Constitution Making in the Countries of Former Soviet Dominance: Current Development

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CONSTITUTION MAKING IN THE COUNTRIES OF FORMER SOVIET DOMINANCE: CURRENT DEVELOPMENT

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CONSTITUTION MAKING

INTRODUCTION

The expansion of constitutionalism in the contemporary world is one of the most important evidences of the overwhelming success of the doctrine of "état de droit," which means the legal state or the state established and operating according to law. The concepts of constitutionalism and "état de droit" have mutually enhanced each other. The doctrine of constitutionalism grew out of the idea of limited government protecting individual rights and freedoms. The doctrine of the legal state stemmed from the concept that appropriate judicial mechanisms must be provided to ensure that individuals act within the framework of the law and that hierarchically organized organs of power not only observe law but operate exclusively on the basis of law. The constitution, recognized as the apex of hierarchically structured laws, was to provide a clear background for the assessment of legality of governmental and individual activities.

The acknowledgement of the complementary character of the ideas of "état de droit" and constitutional government accelerated the development of constitutional engineering. The consciousness that every mature state, well-organized according to the rule of law, should clearly determine in one act or a series of basic acts the principles of the political, social and economic organization of the state, the powers and duties of state organs, and certain rights of the people contributed to the recent rapid emission of new constitutions.

Since World War II a large number of countries either adopted new constitutions or revamped their existing constitutional systems. Constitution-making intensified with the emergence of the socialist countries and the new states of the Third World. Since 1945 more than half of the member states of the United Nations have undertaken some kind of fundamental constitutional reform. The post-war constitutional experiences were, however, for

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1 See Allan R. Brewer-Carias, Judicial Review in Comparative Law 7-42 (1989) [hereinafter Judicial Review in Comparative Law].

2 As Albert P. Blaustein pointed out, Of the world’s 162 existing constitutions (approximately 20 of which are presently ‘suspended’) only 15 were promulgated prior to World War II and only 14 more date from before 1960. The pre-war constitutions are United States (1789), Norway (1814), Belgium (1831), Liberia (1847 suspended), Argentina (1853), Luxembourg (1868), Switzerland (1874), Columbia (1886), Australia (1901), Mexico (1917), Finland (1919), Austria (1920), Liechtenstein (1921), Lebanon (1926 inoperative), and
the most part, dissatisfying. Without the extra-parliamentary means of constitutional control, the constitutions of the socialist countries operated more like political-philosophical declarations than legally binding norms. Most of the constitutions of the new third world countries were copied from previous, well-tested constitutional structures without regard to their applicability to the unique geopolitical circumstances in which the new states had emerged. The successes of these new constitutional systems were short-lived. The political structures of the countries that emerged due to the collapse of colonialism during the 1950s and 1960s were subject to frequent and substantial transformation which, contrary to popular expectations, usually resulted in the establishment of a form of military government.3

In the last few years the demand for new constitutions has become even more pronounced. With several East-Central European countries already drafting new constitutions and fifteen former Soviet republics likely to follow, the region has become a major laboratory of constitutional works. Bulgaria, Estonia and Romania adopted entirely new constitutions. Amendments introduced to the Hungarian and Polish Constitutions purged these acts almost entirely of the remnants of their Stalinist legacy. The Albanians and recently the Lithuanians requested Western assistance in their constitution-drafting process. In the early Spring of 1992 Russian legislators visited Washington and were followed by law-makers from Ukraine, Belarus, Armenia, Kirghizistan, Azerbaijan and Kazakhstan.

If several countries of the same region try to conclude constitution drafting one has to be aware of the comparative dimension of this process. Constitutions do not emerge in a political vacuum. Countries borrow from each other and during transitional periods, when new political entities are emerging, borrow heavily. This natural tendency to borrow, however, raises several questions: How to accommodate the well-tested constitutional models in the countries with different political traditions? To what extent the constitutional experiences of certain countries are reproducible in quite different geopolitical circumstances?

Ireland (1937).


Conflict always accompanies change and as the process of constitution-drafting began to unfold many challenges arose. As the new democracies began writing their constitutions numerous Western experts jumped into the fray and headed East. Think-tanks, law firms, law schools, and independent scholars offered services and advice. They confronted East-Central European constitutional drafters unaccustomed to thinking about ideas such as division of powers, judicial review, or the "état de droit" in terms of fundamental constitutional principles. To the surprise of the Western experts, venerated constitutional models advocated by them were neither enthusiastically welcomed in East-Central Europe, nor automatically recognized as superior to the socialist constitutional institutions. A post-socialist lawyer was inclined to believe that the issue of superiority or inferiority is beside the point and he wished rather to focus on the applicability of Western models to the unique situation of post-communist Europe. Failure to take this attitude into account had to result in misunderstanding and problems in communication.

Some initiatives, such as the American Bar Association’s Central and East European Law Initiative (CEELI) workshops, were carefully prepared in cooperation with constitutional drafting commissions from numerous East-Central European countries and proved effective. Ventures advocating blind application of Western models provoked critical comments from numerous European constitutional experts. For example, since the process of constitution writing has been initiated, it became clear that the readiness of the new democracies to borrow from the Western experience has its limits.

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4 The Central and East European Law Initiative (CEELI), a project of the American Bar Association, is a cooperative effort to facilitate the process of legal transformation in East-Central Europe. CEELI is administered within the ABA’s Section of International Law and Practice.

A premise of this project is “making available U.S. legal expertise and assistance to countries that are in the process of modifying or restructuring their laws or legal systems. It is also serving as a research forum and a source of timely information on legal projects and legal developments in Central and Eastern Europe.” Although the main purpose of the project is to offer U.S. legal experience it recognizes that it is just one approach that participating countries may wish to consider. CEELI is designed to operate as a public service project, not a device for developing business opportunities. CEELI offers its services through a variety of legal workshops and conferences, runs a special “Sister Law School” exchange program, publishes newsletters and “Legal Guides to Doing Business”. For more information on CEELI see the American Bar Association’s programmatic brochure “Central and East European Law Initiative. An American Bar Association Initiative for Law Reform and Comparative Law,” Dec. 1, 1990.
and that these countries wish to declare their social orientation and emphasize the need for the state’s protection over the weaker social groups. To a socialist lawyer, both the common and civil law systems were subject to criticism because they protected establishments insensitive to social and economic unfairness.

The failure to recognize that the new democracies had their own legal experiences before they became socialist states also contributed to the clashes between Western and Eastern legal traditions. The constitutional histories of several Eastern European countries date only from the turn of the century while other countries of this region have an impressive constitutional legacy to follow. Constitutional experts must consider to what extent the longevity of the pre-socialist constitutional experience would effect the maturity of the new constitutional drafts.

Constitutional drafters also must decide whether the main purpose of the new constitution is to abolish the socialist legal system or to substitute a new legal order. As constitution-making has profound consequences, the drafters must also address the question of whether the new constitutions are expected to last for decades or are to serve only as an interim device for a transitory period.

Several factors have guided the development of this article. The author was fortunate to be involved in several constitutional workshops and had an opportunity to review and assess numerous draft constitutions prepared both by the former Soviet republics and the new East-European democracies. These works proved that during the recent stage of constitutional development in East-Central Europe remarkable similarities and differences exist in the constitutional works of several countries of this region. Are these similarities, however, strong enough to justify a thesis on a new constitutional model emerging in the area of former Soviet dominance? The examination of this question is the primary aim of this article.

This article was preceded by the study, *Searching for a New Constitutional Model for East-Central Europe*, published in 1991, which analyzed the

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5 For example, the first Polish constitution dates to 1791, right after the American constitution, and four months before the first written French constitution. Bulgarians, for instance, adopted their first constitution in 1879. Praised as one of the most democratic in Europe, it was suspended within five years. However, Bulgaria is now at the forefront of adopting certain constitutional priorities, such as the concepts of division of powers and judicial review.
historical background for constitutional reform in East-Central Europe. The study focused on the constitutional development in the Soviet Union in the glasnost era and in the two Central European countries most advanced in the process of constitutional transformation, Poland and Hungary. This article focuses on current developments in the new European democracies and the several former Soviet republics. The author’s purpose is not to add another article to the numerous elaborate theoretical explanations of the well-known historical events. Instead, the following remarks will be a straight-forward report on political transformation of the post-glasnost era with a clear emphasis on constitutional works.

The article consists of two parts. The first is the update of constitutional transformation in the region experiencing the retreat from communism. The organization of this part requires some explanation. The part breaks down into two separate chapters on constitution-drafting in former Soviet Republics and in the new democracies of East-Central Europe. As the former Soviet republics existed within the same statehood until the end of 1991, it seemed appropriate to assemble comments on political developments in the former U.S.S.R in one subchapter examining the end of Gorbachev’s era and the process of the establishment of the Commonwealth of Independent States. The country-by-country discussion which follows is limited to the examination of the process of constitutional-drafting in several former Soviet Republics. The comments on the constitutional drafts were organized around several more important issues such as the distribution of powers, the inclination to adopt features of presidential or parliamentary systems, constitutional enforcement, and the flexibility of the constitutional provisions.

The subchapter on Constitution Drafting in Former Socialist States of East-Central Europe has a slightly different organization. It focuses exclusively on individual countries of post-socialist Europe with the exception of Yugoslavia where the unstable political situation at the time of this writing does not allow any mature evaluation of a future constitutional system. With all similarities linked to common socialist legacies, the former European Peoples Democracies each had their own statehood and more recently have faced different cultural, religious, economic and ethnic problems. It seemed more appropriate to examine their post-communist traumas separately. Thus, each country-by-country section of this subchapter splits into a short report on political developments and a commentary on the

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process of constitution-drafting.

The reader who is looking for an explanation of the references made in Part I to French, German or other constitutional models will find them presented in Part II on a more detailed basis. Being more theoretical than Part I of the article, Part II reviews the major constitutional controversies of the post-communist world against the background of deeply-rooted Western constitutional ideas. The primary aim of the second part of this article is to analyze the fabric of the new constitutions. This part focuses on the issues which proved to be most controversial during the process of constitution-drafting in East-Central Europe, such as the description of the state in economic, political and cultural terms; the selection of the form of government; the concepts of the division of powers; the review of the constitutionality of laws; and the idea of a constitution being rigid or flexible. Although a long and exhaustive bill of rights can be found in all new constitutions and constitutional drafts, a more detailed analysis has to be based on the examination of the actual record of these countries in human rights protection. This task was left for a separate study. Finally, based on the information collected from the country-by-country reports, Part II also supplies observations on the process of forming a new constitutional model in the region of former communist dominance.

I. POLITICAL AND CONSTITUTION TRANSFORMATION OF THE POST-GLASNOST PERIOD: COUNTRY-BY-COUNTRY REPORT.

A. The End of Gorbachev's Era

Among the problems faced by Gorbachev at the end of his presidency none was more compelling than the future of the Union of Sovereign Soviet Republics. The largest country on earth was disintegrating and both Gorbachev's supporters and his opponents had to consider what might remain of the former Soviet empire. Was the Union descending into chaos? Was there anyone who could and really wanted to save it?

The Union Treaty, proposed by Gorbachev at the end of November 1990, was the last desperate move to preserve both the structure of the centralized state and his own position. However, with the power slipping out of

7 Id. at 145-147.
Gorbachev's hands the future of a centralized union built largely on military and ideological control was doomed. The concept of the Union was soon to be replaced by the idea of a loose, voluntary confederation of independent states. The concept of a commonwealth or confederation, favored by Yeltsin, became a crucial issue in his dialogue with the Kremlin.

In fact, both Gorbachev and Yeltsin did not seem to fully understand either the ethnic and religious animosities or the hardships which were tearing the disintegrating empire into pieces. Gorbachev did not believe that the Soviet people would be ungrateful for his policies of "glasnost" and "perestroika." Despite all its devastating side-effects on the communist regime, Gorbachev's strategy was still projected as a conservative revolution which was intended to restore rather than undermine the framework of communist power. On the one hand, he still was not ready to renounce the communist party and the communist future for the falling empire, and on the other hand, he did not want to admit that the Kremlin lacked the power to control the centralized state.

Yeltsin, on his part, failed to realize that economic interdependencies were too weak to pull the former Soviet republics toward close relations with Moscow. Dimitri K. Simes correctly observed that:

Like most people in the Soviet Union, excepting the Baltic states, Yeltsin operated on the assumption that the links among the republics were too deep to allow the death of the union. Also there was the belief that, as Yeltsin and Russia were in the driver's seat in destroying the old union, they would have a determining influence in shaping and running the new confederation of independent republics.

On July 5, 1991, amidst disputes on control over enterprises, licensing of foreign trade, collection of customs tariffs and taxation, Gorbachev's draft

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9 The assumption that Gorbachev's glasnost and perestroika are "communist nonetheless" was widely disputed by the Sovietologists. For further discussion see Martin Malia, A New Russian Revolution?, N.Y. REV. OF BOOKS, July 18, 1991; Martin Malia, The August Revolution, N.Y. REV. OF BOOKS, Sept. 26, 1991; For polemics with Malia, see Andrzej Walicki, Russia, Before the Coup and After, 5 CRITICAL REVIEW (1991).

Union Treaty was passed by the Russian Supreme Soviet. The negotiations with other republics were, however, far from completion. Step-by-step the concept of an "open union" surfaced as the working formula. According to Gorbachev's position the Union Treaty was to be signed by Russia, Kazakhstan and Uzbekistan and would be "open for signing" by other republics.

However, the signing of the Union Treaty, which had been slated for August of 1991, became less of a priority in light of the intensifying political struggle and the rapidly developing economic crisis. By mid-1991 it was quite clear that Gorbachev's plan to integrate the Soviet Union into the global economy did not have its desired immediate effect due to inter-party difficulties and politics. Several key leaders, including Boris Yeltsin and the mayors of Moscow and Leningrad, followed Eduard Sheverdnadze and resigned from the party. Gorbachev found himself locked in the vigorous power struggles raging between the progressivists and the communist party hardliners. Both attempted to reduce and restrict the power of the soviet president.

To combat the conservatives' more and more open attack upon state policy, Gorbachev decided to separate the higher levels of the government from the Communist Party of Soviet Union (CPSU) apparatus. He also instituted emergency measures to curb international barter and restrain hard-currency bank transfers. However, the limited decrees which Gorbachev issued in regards to the deteriorating conditions in the Union went virtually ignored by all of the Republics, but most notably Russia.

As the time of the signing of the Union Treaty approached, the hardliners became more and more concerned that the Treaty would grant excessive

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12 Id.
13 The program was widely heralded at the time of the July 1991 summit of the leaders of the seven major world economic powers. Gorbachev's attendance was meant to help cement his association with the West and emphasize his commitment to true economic reform. The Soviet Union also was awarded associate membership in the IMF and the World Bank.
concessions to the republics. In the beginning of August they apparently tried once more to coerce Gorbachev into their faction but did not succeed. One day before Russia, Kazakhstan, and Uzbekistan were due to sign the Union Treaty the right-wingers decided to seize power.

From the 19th to the 21st of August, eight members of the Soviet conservative alliance, led by the KGB Chief Vladimir Kryuchkov, Defense Minister Dmitri Yazov, and Vice President Gennadi Yanaev, formed the State Emergency Committee and placed Gorbachev under house arrest. The coup members demanded he declare a state of emergency and transfer power to Yanaev. On August 21, the coup collapsed paving way for a major shake-up within the Soviet leadership. The conservative faction, opting for a centralized union, was destroyed. Gorbachev declared that the Soviet Communist Party was an all-pervasive influence blocking the progressive reforms. On August 25, he resigned as Communist Party General Secretary and ordered the government to seize all party property. In his resignation statement he proclaimed that the Communist Party Central Committee should take the difficult but honorable decision to dissolve itself. The CPSU ceased to exist.

The failure of the coup gave boost to separatists in the republics and wrecked Gorbachev's hopes for the resurrection of the Union. Within weeks of the collapse of the coup, all of the republics but Kazakhstan and Russia had declared independence. The various union republics began to refuse to continue providing budget funds to the central government, which resulted in the dissolution of many central government departments or their takeover by the Russian government. On September 6, the Soviet Congress of

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17 Id.
20 Id.
23 Id.
People's Deputies officially recognized the independence of Lithuania, Latvia and Estonia, terminated the 1922 Union Treaty and handed over power to an interim authority pending signature of a new treaty founding a voluntary Union of Sovereign States.  

As a result of the Russian decisions to take over control of almost all Soviet gold, diamond reserves and oil exports, and the disputes over the control of the Soviet merchant fleet and navy, the process of signing a new union progressed very slowly. In October, some chances for an umbrella agreement on economic ties seemed to emerge but they were stalled when the three Baltic republics, along with Georgia, Moldova, Azerbaijan and Ukraine, decided to stay away from talks. At the end of November the attempts of Gorbachev to bring seven republics around to the Treaty failed entirely. The fate of a centralized union was finally decided by the Ukrainian plebiscite, which by December 1, 1991 predetermined the complete independence of this second-most populated Soviet republic.

On December 8, the Russian President, Boris Yeltsin, Ukrainian President, Leonid Kravchuk, and Belarussian parliamentary chairman, Stanislav Shushkevich, took over the initiative and signed a joint agreement on the establishment of a “Commonwealth of Independent States.” On December 17th, Yeltsin and Gorbachev held talks and decided to terminate the activities of the central organs of the union by the end of the year. On December 21st, the leaders of eleven republics—Russia, Ukraine, Belarus, Kazakhstan, Uzbekistan, Kirghizistan, Tajikistan, Turkmenistan, Armenia, Azerbaijan and Moldavan—held a meeting in Alma-Ata to jointly sign a document on the establishment of the Commonwealth of Independent States. They formally announced that “the Union of Soviet Socialist Republics had ceased to exist” and that the former Soviet seat in the United Nation Security Council would be taken over by Russia.

The status of the new Commonwealth was vague from the very beginning. Four countries which earlier split with the Soviet Union—Georgia, Lithuania, Latvia and Estonia—did not join the Commonwealth. The eleven co-founders declared that the new loose federation is “only a consultation

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24 *Gorbachev’s Bid*, supra note 19.
26 *Recent Political Trends*, supra note 18.
27 Id.
28 *Gorbachev’s Bid*, supra note 19.
29 *China Notes Vigorous Upheavals*, supra note 22.
Gorbachev, who was notified about the abolition of the presidency of the Soviet Union, resigned on December 25, 1991. The USSR's central power rapidly died out and by the end of 1991 the Soviet Union ceased to exist.

B. Constitution Drafting in Several Former Soviet Republics

1. Russia Federation

The disintegration of the Soviet Union brought Russian President Boris Yeltsin face-to-face with the problems for which he used to blame both Gorbachev and the party conservatives. In 1992, the Soviet Union was gone and the communist party was no longer in charge but a radical program of reform remained as unclear as before. As Carroll Bogert wrote, "one year later, Russians have a new system, but the same psyche."31

Despite its preoccupation with a massive government reorganization, programs of economic reform, and rocky relationships with other members of the Commonwealth, Russia tried to advance works on a new federal Constitution. The constitution drafting began in mid-1990 but progressed very slowly. In June 1990, the Russian Congress of People's Deputies entrusted to the newly elected Constitutional Commission the preparation of a new draft constitution of the Russian Federation and its submission for consideration by the next Congress.32 The Commission prepared several drafts which were published in November 1990 and October 1991.

The 1991 draft was presented to the Fifth Congress in the fall of 1991, taken into consideration, and the Congress instructed the Constitutional Commission and the Supreme Soviet "with regard for the observations and proposals of the people's deputies of the RSFSR [Russian Soviet Federated Socialist Republic] to complete the draft constitution of the Russian Federation presented to the Congress and submit it for consideration by the next RSFSR Congress of People's Deputies."33 In effect, this simply meant

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30 Id.
31 Carroll Bogert, They Beat the Coup—So Why the Gloom?, Newsweek, Aug. 31, 1992, at 48.
33 Id.
that the Congress did not see the possibility of the adoption of the draft in the foreseeable future. Dmitry Kazutin commented that the draft of the Constitution will probably "sink without trace in the quagmire of economic ignorance, ideological idiocy, and elementary stupidity."\(^{34}\)

Many provisions of the drafts have already been incorporated into the existing Constitution in the form of amendments, but the task of adopting an entirely new Constitution was still very difficult.\(^{35}\) Two problems proved to be particularly challenging, the first being the federative structure, the second being the distribution of powers. The drafters' concept of a federal state is criticized both by so-called Russian "patriots" and non-Russian "patriot-separatists."\(^{36}\)

The patriots claim that "the draft disrupts the federation's unity, lavishly confers rights right and left and infringes upon interests of the Russian people."\(^{37}\) The patriot-separatists object that the draft favors the rights of the Russian Republic and fails to reckon with the rights of peoples of the autonomous regions. They suggest that Yeltsin should first set up his own Russian Republic and later enter into treaty-stipulated relations with the Tatar, Yakut and other republics. As Viktor Sheinis observed, "The two stands are far removed from each other, with advocates trampling on the draft Constitution mapping out the medium line which alone can become the basis of compromise."\(^{38}\)

Trying to cope with the problem, the Russian Supreme Soviet finally adopted on March 13, 1992, the Federal Treaty on Demarcation of Jurisdiction and Powers between the Federal Organs of State Power of the Russian Federation and the Organs of Powers of the Republics within the Russian Federation.\(^{39}\) The Treaty provides a long list of issues falling within the jurisdiction of the federal organs or over which the federal organs and the organs of state power of the Republics have joint jurisdiction. Similar to the U.S. Constitution, the Republics have exclusive jurisdiction

\(^{34}\) Dmitry Kazutin, What I Have Read, Heard or Seen, MOSCOW NEWS, Oct. 16, 1991.


\(^{36}\) Vadim Bakatin, A Draw—In Whose Favor?, MOSCOW NEWS, Apr. 29, 1992.

\(^{37}\) Sheinis, supra note 35.

\(^{38}\) Id.

over those matters which have not been granted to the federal organs by the Treaty. 40 The main provisions of the Treaty were incorporated into the draft Constitution of the Russian Federation. 41

The second problem is even more controversial. The drafts put the concept of the separation of powers among the “Fundamentals of the Constitutional System of the Russian Federation” along with such principles as state and people’s sovereignty, supremacy of the law, political pluralism, federalism, market economy, social justice, respect for human rights and liberties. 42 In fact, in the opinion of many Russian commentators, the incorporation of the drafters’ concept of the separation of powers would give a constitutional sanction to the transformation of Russia from a parliamentary democracy into a presidential republic. Viktor Sheinis observed that “[t]he immense strengthening of executive authority in Russia and its isolation from parliament is an accomplished fact.” 43 He asks, “Should the powers which presidential forces have assumed de facto be constitutionally formalized, or is there a need to return to the milder variant of the initial draft, which envisaged the government’s subordination to parliament?” 44

The debate on the new draft Constitution illustrates just how far the advocates of parliamentary and presidential systems have drifted apart. Before the text was submitted to the Fifth Congress of People’s Deputies, alternative versions of the draft were drawn up by the Communists of Russia group and researchers at the Saratov Institute of Law. 45 The Communists charged that the commission’s draft constitution made no mention of socialism or communism and that it did not establish a well-balanced relation

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40 Article III(1) of the Russian Federal Treaty provides, “The Republics shall have the plentitude of state power on their territory with the exception of the powers delegated to the jurisdiction of the Federal organs of state power of the Russia Federation under the present Treaty.” See Federal Treaty, supra note 39, art. III(1).


43 See Sheinis, supra note 35.

44 Id.

45 Address to Russia’s Congress of People’s Deputies on the Draft Constitution by the Russian President and Chairman of the Constitutional Commission (Official Kremlin Int’l News Broadcast, Nov. 4, 1991) [hereinafter Address to Russia’s Congress].
between the legislature and the executive. In response, in his Address to the Congress of People's Deputies, Yeltsin tried to defend the draft and explain his concept of constitutional checks and balances.

Following the instructions of the Fifth Congress, the Constitutional Commission decided to organize an extensive discussion of the draft. As a result, several more “alternative drafts” surfaced, most of them advising the conclusion of separate treaties between the Russian Federation and its members; the strengthening of the parliamentary democracy through granting legislative functions only to one house of the Russian parliament (the State Duma) and supervisory functions to the other one (the Senate); and the curbing of the prerogatives of the President through shifting some of his functions to the federal Prime Minister, who would be fully responsible for the government’s administrative activity. In response, Boris Yeltsin's aides, led by Alexander Maslov, drew up a “Presidential draft Constitution of Russia” which clearly absorbed a number of features of the American presidential system such as the presidential prerogative to control the executive, the right to veto any law enacted by the parliament subject to the overruling vote of a two-thirds parliamentary majority, the right to be elected in nationwide elections for a six-year term in tandem with a Vice-President who would automatically become speaker of the parliament's upper chamber.

Amidst the discussion whether Yeltsin will decide to submit his draft Constitution to a public referendum, the Constitutional Commission

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46 Id.
47 Id.
48 See Sergei Alexeyev & Anatoli Sobchak, Constitution and the Destiny of Russia, SOVIET PRESS DIG., Mar. 30, 1992; See also Vladimir Todres, Save Constitution and Take Khazbulatov 'Down a Peg', SOVIET PRESS DIG., Mar. 7, 1992 (Todres' comments on draft proposed by the Communists of Russia faction, assisted by the so-called Smena group of deputies).
49 I. Sichka, Presidential Draft Constitution of Russia Discovered, SOVIET PRESS DIG., Apr. 9, 1992; See also The President's Draft Constitution of Russia is Found (Official Kremlin Int'l News Broadcast, Apr. 9, 1992).
50 Serghei Chugayev, Russia's President Ready to Hold Referendum on Land and New Constitution, SOVIET PRESS DIG., May 13, 1992. Chugayev commented on the main problem facing Yeltsin:

He does not have the power to conduct referendum. So Yeltsin is expected, before the month is out, to ask Parliament to amend the relevant legislation so as to grant him such powers. Should Parliament refuse, he would have to collect one million votes in support of the demand for a
amended its draft and prepared a version which was a sort of compromise between the Commission's original draft and the presidential draft. This draft was published on March 30, 1992 as the "Constitutional Commission's Draft Text." The draft provides that the Russian Federation Supreme Soviet is a bicameral standing parliament and the sole legislative authority. The Supreme Soviet consists of the State Duma and the Federal Assembly, both chambers participating in the legislative process on equal footing.

The president of the Republic is both the head of the state and the head of the executive. He is elected directly by the people for a five-year term, heads the Security Council and is the supreme commander-in-chief of the armed forces. The president issues decrees and ordinances which do not need governmental countersignature. Contrarily, he has the right to revise or revoke ordinances and regulations of the government. The president does not have the right to veto legislation but he may ask for a reconsideration of the law. If, however, upon repeat examination the federal law is passed by a majority of both chambers the President must sign and promulgate the law.

The president, the chairman of the government (the prime minister), and the members of the government may not be deputies. The president runs for the office together with the vice-president. In the event of a compromise, the vice-president does not preside over the Federal Assembly and is only a president's deputy. The chairman and the members of the government are appointed by the president with the consent of the Supreme Soviet. The members of the government may be forced out of office by the Supreme Soviet in the unclear procedure in which the chambers vote by majority to refuse to recognize the president's justification "not to dismiss a minister." The president may also be dismissed from office for deliberate serious violation of the constitution in a proceeding initiated by no less than one-third of the deputies of the State Duma, as a result of a decision of the Constitutional Court and upon the voting by the Federal Assembly by a majority vote of no less than two-thirds of the total number of elected deputies.

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popular vote to enable the President to conduct referendums. This would of course slow the process of adopting a new Constitution, but would make it possible to use such a referendum for settling the land issue.

Id. See 1992 Commission's Draft, supra note 42.

Id. at art. 102, § 4.
The institution of judicial review was modeled on the German system which combines features of abstract and concrete review. The thirteen-member Russian Constitutional Court, created in July 1991 and chaired by Valerii Zorkin, has an extensive jurisdiction to review the constitutionality of federal laws, governmental acts, international agreements, constitutional conflicts between federal and state authorities, constitutionality of political parties and other voluntary organizations. The access to the Court is open to a relatively wide range of petitioners. The review may be initiated by the abstract petition of the highest governmental and judicial officials, by petition of a chamber or a deputy of the Supreme Soviet. The Court also hears individual complaints and protests against "the unconstitutionality of law enforcement practice." The decisions of the Constitutional Court are definitive and are not subject to appeal or protest; the enactments or provisions deemed unconstitutional "become null and void."

Although the judicial review of the constitutionality of the laws in "concrete" adversary proceedings is permitted by the draft, the proceeding is still vague and requires further clarification. The judges of all courts must refuse to apply the law which they recognize as unconstitutional and "make a representation to the Constitutional Court concerning recognition of this law as unconstitutional." It is highly unclear, however, what steps the Constitutional Court may take. Is the Constitutional Court able to enforce its interpretation of constitutionality against the interpretation of the regular courts? Will it work as an appellate court? How is this Court able to secure

53 The Constitutional Court made its reputation by agreeing to hear a petition of 37 people's deputies representing the defunct Communist party who sought to overturn Yeltsin's banning of the Party and the confiscation of its property following the August 1991 coup. A group of anti-Communist deputies responded with a countersuit charging the Communist Party with being an unconstitutional organization. Hearings began on July 7, 1992 and were widely commented upon by the western press when the Court barred Mikhail Gorbachev from traveling abroad so as to compel his testimony at trial. See Richard Pipes, The Past on Trial: Russia, One Year Later, WASH. POST, Aug. 16, 1992 at C1; Michael Dobbs, Court Bars Gorbachev from Travel, WASH. POST, Oct. 3, 1992, at A18; See also Constitution Watch, Russia, E. EUR. CONST. REV. 1,7 (Summer 1992). On October 27, 1992 Yeltsin banned another party, the National Salvation Front, charging it for the attempt to "overthrow the legally constituted authorities." As was the case of Yeltsin’s decree banning the Communist Party, his October ban on the National Salvation Front could be challenged in the Constitutional Court. See Michael Dobbs, Yeltsin, Citing 'Terrible Danger' Bans Nationalist Opposition Front, WASH. POST, Oct. 28, 1992, at A18.

54 See 1992 Commission's Draft, supra note 42, art. 106.

55 Id. at §§6,7.
the stability of the legal system if regular courts might reach different opinions concerning constitutionality of the laws?

Acknowledging the fact that the draft still involves a great deal of controversy and may require some additional work, the Constitutional Commission decided to publish the draft and submit it for consideration by the Sixth Russian Congress of Deputies. President Yeltsin again proposed several Amendments to the draft going against the tendency to curtail his power. The Congress discussed the draft at the evening meeting on April 18, 1992. The resolution which was adopted did not differ from the resolution of the Fifth Congress. The general concept for constitutional reform and the basic provisions of the draft Constitutions were approved but "[t]he Supreme Soviet and the Constitutional Commission were instructed to complete work on the draft, taking into account the proposals and critical comments that have been made, and to submit it to the next Congress of Russian Federation People's Deputies, after first publishing it so the general public can become familiar with it." Despite the general opinion that the Congress and the president are locked in the vicious circle of constitutional debate, Yeltsin optimistically expressed the view that the new Constitution could be adopted in 1993.

2. Lithuania

Due to its preoccupation with internal political struggles, Russia may be quickly outdistanced in constitutional works by smaller republics. First constitutional drafts were produced by Lithuania, Estonia and Ukraine in 1991, with Belarus, Kirghizistan and recently Azerbaijan and Kazakhstan following suit shortly thereafter.

The first draft of the Constitution of the Republic of Lithuania was dated March 7, 1991 and was discussed at the first Lithuanian constitutional workshop, attended by American participants, in Vilnius on January 21-25,
The workshop was followed by the visit of the Lithuanian delegation in Washington D.C., March 1-6, 1992, during which the second draft dated February 26, 1992 was analyzed. This draft was supplemented in May 1992 by Lithuania’s draft Court Law.

The Lithuanian drafts were the result of a solid effort of its drafters to introduce into the Lithuanian system the fundamental principles of Western constitutionalism such as the sovereignty of the people, democratic and representative government, division of powers and judicial review. Assessing the second Lithuanian draft, Professor William Wagner, one of the participants of the workshops, wrote that “in many ways (the draft) reflects a far deeper and more natural grasp of the principles of constitutional democracy than has been the case in some other constitutional drafts emerging in East and Central Europe.”

The 1992 draft establishes a parliamentary system and attempts to create checks and balances among the three branches of the government. The whole concept of the division of powers is, however, designed halfheartedly. On the one hand, the draft provides that “full and absolute power may not be concentrated in any one State institution;” on the other hand, it declares that “the Seimas (the legislative organ) is the supreme and sole organ of state power representing the Lithuanian People.” The legislative and controlling power of the parliament was to be balanced by the dual executive system, with the president, directly elected by the people, sharing the executive power with the government headed by the prime minister. The president has the right to veto the legislature which can be overridden by two-thirds of all the Seimas deputies. The president seems to be stripped of the power to dissolve the Seimas but has the right to form a Provisional Government for a period of six months “if the Seimas does not confirm two-thirds of all Ministers and does not approve the program of Government activities within 30 days of the nomination of the Prime Minister, or if the Seimas expresses non-confidence in the Government within six months of its formation.”

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61 See Update 5, American Bar Association Central & East European Law Initiative (June 1992).
62 See CEELI MARCH 1992 REPORT, supra note 60.
64 Id. at art. 90.
It is quite clear that the drafters tried to adopt some features of the German constitutional institutions known as the “constructive vote of no confidence” and “legislative emergency.” They were set up to secure stability similar to that offered by the German system. Trying to explain their rationale, Alex N. Drahnich and Jorgen Rasmussen wrote:

The underlying idea is to prevent a negative majority, of say, the extreme left and the extreme right, from voting a Government out of office when all they can agree upon is that they do not like what the Government has been doing. Therefore, in Germany a chancellor defeated in the Bundestag, even by an absolute majority, is not required to resign. The only way the Bundestag can force a chancellor from office is to designate a successor by an absolute majority.65

Still one has to observe that the rationale for the adoption of these institutions into the Lithuanian draft is vague. The Lithuanian Seimas lacks the right of the German Bundestag to elect the prime minister by an absolute majority without presidential cooperation. The president and the prime minister also lack the power to dissolve the Seimas which might alleviate a parliamentary impasse. The shortcoming of the Lithuanian arrangement is that upon the expiration of the six-months term of the Provisional Government the president still might not be able to resolve the stalemate.66

The completely restructured judicial system, drawn partially from the experience gained during twenty years of Lithuanian independence and partially from the experience of other legal systems, shows a clear intention of the drafters to insure the independence of the judiciary. The draft provides also for the establishment of the Constitutional Court but its structure and functions demand further clarification. The Lithuanian draft follows a so-called centralized, or concentrated, model of review, which

66 Article 91 of the 1992 Draft provides, “Upon the expiration of the six-months period, the Provisional Government shall either resign or submit a program to the Seimas requesting that the Seimas consider and resolve the question of confidence in this Government. Upon the resignation of the Provisional Government, the formation of a new Government shall be carried out according to the procedure established by the Constitution.” See 1992 Draft Lithuanian Constitution, supra note 63, art. 91.
reserves the right to control the constitutionality of the laws to one special judicial organ. The draft provides that the Lithuanian Constitutional Court will review the statutes adopted by the parliament, presidential decrees, and governmental directives and resolutions. When asked by the parliament, the Court would review violations of the electoral law, constitutionality of the international agreements and the capacity of the President to continue his tenure. The Court will also settle the disputes between local and central governmental agencies and disputes regarding the constitutionality of political parties. Several commentators have pointed out that without further refinement the Court would be an "exceedingly busy" body as it would operate mostly as an advisory organ. All ambiguities and some technical problems notwithstanding, the first Lithuanian drafts received wide praise from Western commentators.

Despite the strong encouragement from the west, the process of adoption of a new constitution in Lithuania advanced slowly. Particularly the establishment of a formal presidency proved to be a major problem for the Lithuanians. A referendum held on this issue on May 23, 1992 failed to support a constitutional amendment to a Provisional Basic Law (March 11, 1990) meant to bind the drafters of a final constitution. In fact, 69.5 percent of those voting were in favor, but only 57.5 percent of eligible voters turned out, thereby denying the referendum the necessary approval of 50 percent of the entire electorate.

The question of presidential powers was put on the ballot in the parliamentary elections in October 26, 1992. The voters approved a new constitution establishing presidential institutions but the independence movement, Sajudis—the representatives of which prepared the draft constitution—was defeated in the election. An upset victory of the communists led by Algirdas Brazauskas, Lithuania's former communist party chief, leaves the details of a new constitution open to further dispute.

3. Estonia

The unsuccessful referendum left Lithuania behind neighboring Estonia in

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terms of completing the constitutional process. Estonia declared its independence in March 1990 and fully separated from Moscow on August 20, 1990, after the coup attempt in Russia. Shortly afterwards a constitutional commission was formed to draft a new constitution. The 60-member commission, called the Constituent Assembly, was composed of 30 members of the Supreme Council (the former Supreme Soviet of Estonia), and 30 members from the Congress of Estonia (an interim independent quasi-parliament).

The Assembly considered four drafts and widely discussed the possibility of using the 1938 Constitution of Estonia as a model for a new basic law. As in the other republics of the former Soviet Union, the attention of the drafters was focused on two major problems: the limits of presidential power and the method of electing the president. After the initial rejection of two drafts which clearly favored the presidential system, the Assembly focused on the proposal of the Estonian National Independence Party ("ENIP") to reactivate the 1938 Constitution, and on two new drafts: one prepared by former Estonian Minister of Justice, Juri Raidla, and the other by the drafting committee of the Assembly led by Jun Adams. The 1938 Constitution generated some attention as it provided for the election of the president by the parliament, the model favored by the Assembly. Under the pressure of the population which favored election of the president directly by the people, the Assembly compromised. It decided that the first president, would be popularly elected but his followers would be elected by the parliament. The debate on the model of the presidential election showed that the Assembly clearly favors a parliamentary system. Finally, all drafts proposing a strong presidential power, including the one based on 1938 constitution were rejected. The Assembly decided to put before the electorate a modified Adam's draft which envisaged Estonia as a parliamentary republic.

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71 Id.
72 Constitution Watch, E. EUR. CONST. REV. 3 (Summer 1992).
73 Id.
The draft vested supreme legislative power in the Riigikogu, a 101-member unicameral parliament. The Riigikogu is a clearly predominant power in Estonia. It adopts laws, elects the president, decides on the conducting of referenda, ratifies and denounces foreign treaties, authorizes the candidate for prime minister to form the government, and makes major governmental appointments.

The president is elected for five years by the Riigikogu and representatives of local governments, who together form the Presidential Electoral Assembly. The Constituent Assembly decided that the term of the first popularly-elected holder of the presidential office would be shortened to four years. The president as head of the state has functions typical for this position in Western European parliamentary republics, such as the role of an arbiter in inter-parties disputes and the representative of the state in international relations. Within some limits he has the right to issue decrees and to request the reconsideration of a bill or ask for the review of its constitutionality by the State Court.

Several features of the procedure of the selection of the government seem to be borrowed from the German Basic Law. The President nominates a candidate for the prime minister, who is expected in 14 days to submit to the parliament an "exposé," a proposal outlining the basics of forming the future government. If two successive candidates of the president fail to form the government or fail to get the parliament's approval for their "exposé," the right to submit the candidate for prime minister reverts to the parliament. If, however, the parliament fails to select a prime minister, the president, may dissolve the parliament and declare a new election. The parliament may also vote the government down in a no-confidence action with a resolution carried by a majority vote of the Riigikogu. In response to a no-confidence vote the president has, at the suggestion of the government, an option of dissolving the parliament and holding a new election. The right to dissolve the parliament in the time of a governmental crisis seems to give the Estonian president a stronger position than that reserved for his Lithuanian counterpart.


76 Constitution Watch, supra note 68, at 4.

77 Estonia Const. (1992 Draft), supra note 75, arts. 78, 107, 109, 110.
The Estonian Constitution also provides for another procedural mechanism, the motion of confidence, which seems borrowed from the French Constitution. This mechanism provides that the government can make passage of a particular bill a matter of confidence, meaning it may stake its life on a particular bill. In France, a motion of confidence fails if it does not receive a majority of the total membership (not just those voting). The rationale for this procedural mechanism is that if the motion of confidence fails then the bill passes even without a vote of a majority of those present.\footnote{Id. at art. 98; See also MAJOR EUROPEAN GOVERNMENTS, supra note 65, at 270.}

The court system is comprised of rural and city courts, district courts, and the State Court which appears to have some power of judicial enforcement of the constitutional provisions. The Constitution provides that all courts, in the course of their proceedings, should refrain from applying laws or legal measures if they are in conflict with the Constitution. The power to invalidate unconstitutional legal acts is vested in the State Court.\footnote{ESTONIA CONST. (1992 Draft), supra note 75, art. 152.} In fact, the Constitution does not provide any further details regarding the establishment of judicial review in Estonia.

A month before the draft Constitution was submitted to the referendum it had been strongly attacked by a group known as Restitution, led by Endel Lippmaa, Johannes Kass, and Juri Estam, who favored the readoption of the 1938 Constitution.\footnote{Constitution Watch, supra note 68, at 3.} For a moment it looked as though the Estonian Constitution may share the fate of the Lithuanian draft. This criticism notwithstanding, the draft Constitution of Estonia was put to national referendum on June 28, 1992, and was adopted. Approximately two-thirds of the eligible voters voted, with more than 91 percent accepting the draft.\footnote{Id. at.art. 98; See also MAJOR EUROPEAN GOVERNMENTS, supra note 65, at 270.}

The adopted Constitution, the first one accepted by a former Soviet republic, took effect on July 4, 1992.\footnote{Id.}

4. Ukraine

"After centuries of colonial anonymity," wrote Adrian Karatnycky, "Ukraine is finally making its mark on world affairs."\footnote{Adrian Karatnycky, The Ukrainian Factor, FOREIGN AFFAIRS 90 (Summer 1992).} Karatnycky further
wrote:

Although relegated to secondary status by the West, Ukraine is rapidly emerging as a forceful and important actor in defining the contours of post-Soviet Europe. Russia and its President Boris Yeltsin may have taken the lead in defeating the August 1991 putsch and the Soviet Communist Party. But it was Ukraine, led by President Leonid Kravchuk, that ultimately provoked the unraveling of the Soviet empire: Ukraine's refusal to sign Mikhail Gorbachev's union treaty precipitated the collapse of the U.S.S.R. and the creation of the new Commonwealth of Independent States (CIS).84

The constitutional works in Ukraine began shortly after the December 1, 1991 referendum, in which 90 percent of the population voted for independence. The working group of the Constitution Commission of the Parliament of Ukraine, headed by Leonid Yuzkov, prepared two first drafts of the Constitution of Ukraine in January and June 1992. The second draft was submitted to the evaluation of a CEELI group of experts and the CEELI Report was forwarded to Kiev on July 14, 1992.85

The draft, which contains 258 articles, exceeds by one-third the length of constitutional texts in other former Soviet republics. It provides specific regulations concerning, for example, the national anthem (Article 253), the state flag (Article 252), professional and amateur arts (Article 93), and legislative organization (Articles 149-153). On the one hand, the drafters intended to give the constitution some rigidity by disallowing amendments directed against independence; territorial integrity; additions restricting forms of property and human rights; and by providing for an all-Ukrainian referendum in the case of amendments proposed by no less than two million electors.86 On the other hand, the detailed character of the draft which provides specific regulations could encourage frequent amendments which,

84 Id.
86 The amendments proposed by one-third of the members of both houses have to be approved by at least two-thirds of each house of the National Assembly. DRAFT CONSTITUTION OF THE UKRAINE, June 10, 1992, at arts. 256-257 [hereinafter UKRAINE CONST. (1992 Draft)].
in turn, may diminish public respect for the constitution. The commentators observed that the draft seems at the same time to prescribe too much and too little, and suggested that minor problems should instead be subject to statutory control.\(^{87}\)

The introductory chapter on General Principles of the Constitutional System portrays Ukraine as "a democratic, social state which adheres (its) activity with the rule of law." \(^{88}\) It provides a solid framework for a representative government, although it also recognizes the importance of the idea of direct democracy. Article 115 of the draft states that "the people exercise state power through nation-wide voting (referenda), elections, and through the system of state bodies." \(^{89}\) The following article explains, \textit{expresis verbis}, that "an all-Ukrainian referendum is the constitutional means of direct approval by the people of Ukraine of laws and other state decisions." \(^{90}\)

It must be observed with satisfaction that the drafters placed the concept of limited government among the essential foundations of democratic government. \(^{91}\) The draft provides that citizens can exercise their rights in the sphere "which is not prohibited by law," but the state bodies operate only within an area which is determined by law, meaning that they must have a clear legal basis for their actions. \(^{92}\)

Departing from the socialist tradition, the draft constitution clearly recognizes the principle of division of powers. Legislative power in Ukraine is vested in the National Assembly. A bicameral structure of the legislature can hardly be explained either in the light of Ukraine being a unitarian state or Ukrainian constitutional tradition. One may observe that bicameralism might undermine the effectiveness of the legislative system.

The executive power is vested in the president, who is both the head of state and the head of the government. The drafters clearly intended to incorporate into the constitution some elements of the American presidential system. Similar to the American model, the president of Ukraine is elected

\(^{87}\) Ukrainian Constitutional Analysis, \textit{supra} note 85, at 1.

\(^{88}\) \textit{UKRAINE CONST.} (1992 Draft), \textit{supra} note 86, art. 1.

\(^{89}\) \textit{Id.} at art. 115.

\(^{90}\) \textit{Id.} at art. 116.

\(^{91}\) \textit{Id.} at arts. 64, 65. Article 64 reads, "The state shall be subordinated to and serves the civil society...." Article 65 states, "The state shall not infringe on the affairs of persons and of society.... State regulation of societal relationships shall be confined within the borders defined by this constitution. Executive and legislative power shall be limited by the law."

\(^{92}\) \textit{Id.} at art. 5.
directly by the people and he "carries out the general leadership of the Cabinet of Ministers of Ukraine and directs its executive activities."\(^9_3\) The President may issue decrees and orders which do not require countersignature of the ministers. He is Commander-in-Chief of the Armed Forces and he has a suspensive (deferring) veto which can be overridden by two-thirds of the total number of members of each house as determined by the constitution. The prime minister is only a deputy to the president and is "subordinated and accountable" to him. In addition, the president may annul the acts of ministers and heads of central or local bodies of executive power. The president submits candidates for the post of prime minister to the National Assembly and proposals for their dismissals.

The executive and the legislature are separate and independent. To terminate the president’s tenure before the expiration of his 5-year term the Assembly must impeach the president. As opposed to the American system, the people may be called to decide directly on the termination of the powers of the president or on the dissolution of the Assembly. The Assembly must decide by at least a two-thirds majority of each of the houses to hold a referendum on the termination of the powers of the President. The President cannot dissolve the National Assembly, except in a case where the Assembly has initiated an all-Ukrainian referendum on the termination of the presidential powers of the head of state and the people expressed their confidence in the president.

The draft still has some ambiguities. The role of the prime minister is not well-defined. This position, being a concession toward the parliamentary system, seems to be halfheartedly crafted. Also, the provisions on the presidential election are vague. The draft seems to provide for a majority vote to elect a president. It does not explain, however, what happens if a majority of the electorate does not vote or the vote is split among several candidates. The commentators suggested that in order to diminish the danger of rule by a person acceptable only to a small minority of the public, Ukraine might wish to consider amending the draft Constitution to provide for run-off elections where a presidential candidate has not received endorsement by a majority of the electorate.\(^9_4\)

The judiciary system consists of the common courts, economic courts, and the Constitutional Court.\(^9_5\) The system still shows some features tradition-

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\(^{9_3}\) Id. at arts. 175, 178, § 11.

\(^{9_4}\) Ukrainian Constitutional Analysis, supra note 85, at 8.

\(^{9_5}\) UKRAINE CONST. (1992 Draft), supra note 86, art. 203.
ally attributed to a socialist model. The existence of special economic courts, which in a socialist state handled disputes between state enterprises, state farms and cooperatives and operated more like courts of arbitration than regular courts, confirms that the drafters still anticipate that the state will administer a vast area of public property. On the other hand, the draft constitution does not provide for special administrative courts. The right to hear cases regarding illegal actions of state administrators and officials is vested in regular courts (courts of general jurisdiction). This system, introduced in most socialist countries in the 1950s, has never worked properly. The judges of regular courts, well-trained to follow the rules provided in the codes hardly can offer a policy-minded analysis of administrative decisions. In some former socialist countries, notably Poland, the judicial review of administrative acts has been taken over by a network of special administrative courts.

The Constitutional Court is fashioned on the German model of the mixed, (abstract and concrete) constitutional review. Articles 243 and 244 grant the Court abstract judicial review, power to review the compatibility of laws, presidential decrees, international agreements, as well as acts and actions of the central and local legislative and executive bodies with the constitution. The Court institutes the review when asked to do so by the highest officials of the state and at least one fifth of the members of the chambers of the parliament. Review by the Constitutional Court may also be initiated in connection with regular judicial proceedings, which resembles the concrete (or incidenter) form of review. Article 217 provides that if "in the course of a judicial proceeding the court determines that it must apply a law or its interpretation that is inconsistent with the Constitution, then the court shall adjourn the proceeding and shall petition the Constitutional Court of Ukraine to declare the law or its interpretation unconstitutional." The

96 For description of the functions of economic courts in a socialist state, see MARY ANN GLENDON, MICHAEL GORDON, & CHRISTOPHER OSAKWE, COMPARATIVE LEGAL TRADITIONS 765-72 (1985).
97 UKRAINE CONST. (1992 Draft), supra note 86, art. 205.
98 For a more detailed explanation of the German model of judicial review see Part II, Chapter E: Constitutional Enforcement.
99 It resembles provisions of Article 93 of the German Basic Laws which granted German Federal Constitutional Court abstract power to review constitutionality of Federal and Land law when petitioned by Federal or Land government or one-third of the members of the Bundestag. GRUNDEGESETZ [CONSTITUTION] [GG] art. 93 (F.R.G.).
100 Id. at art. 100.
Constitutional Court is also an advisory body and may be asked “to give consultations.”

Similar to the German model, the draft grants individuals the right to file a complaint. In light of the fact that complaints comprise some 95 percent of the cases of the German Federal Constitutional Court, the Ukrainian drafters tried to limit the complaints to cases which have already been “considered and decided by general courts” and in which the complaint was supported by the Ombudsman (the Representative of National Assembly of people’s rights). ¹⁰¹

To sum up, the Ukrainian Constitutional Court is the single judicial organ vested with the power to review and to determine the constitutionality of normative acts. Constitutional proceedings can be initiated either through petition (an “abstract” review) or through inquiry by a regular court (“concrete” review.) The CEELI commentators were skeptical that the “idea of interrupting trials to certify an issue to the Constitutional Court and awaiting its decision could seriously undermine the effectiveness of the trial court system.”¹⁰² Instead, it was suggested that the drafters might wish to consider the introduction of a decentralized system¹⁰³ allowing all regular courts to rule on Constitutional issues themselves. This author is of a different opinion and believes that a decentralized or American system of constitutional review is not applicable to countries of this region.¹⁰⁴ In his opinion the concept of judicial review presented by the Ukrainian draft is ambitious but quite coherent and the drafters may be complemented for the attempt to follow recognized European traditions of judicial review.

5. Belarus

Constitutional reform was initiated in Belarus shortly after the country proclaimed Byelorussian laws ascendant over Soviet statutes in July 1991, and declared the Republic’s independence on August 25, 1991. On December 8, 1991, Belarus joined with Russia and Ukraine to declare the

¹⁰² Ukrainian Constitutional Analysis, supra note 85.
¹⁰³ A decentralized American system of judicial review is analyzed in Part II, Chapter E: Constitutional Enforcement.
¹⁰⁴ See comments on the applicability of the main models of judicial review to East-Central European geo-political environment at the end of this study.
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demise of the Soviet Union and the creation of a Commonwealth of Independent States. On April 6, 1992, the Constitutional Committee headed by Valentin A. Borostov, Chief of the Legal Department of the Cabinet of Ministers, prepared the draft of the Constitution of the Republic of Belarus. The draft was submitted for the assessment of the CEELI’s group of attorneys with expertise in the area of constitutional law. A compilation of individual comments was forwarded to the Belarusian Constitutional Committee on August 28, 1992.

The draft begins with a short preamble followed by a section on the basis of the constitutional system. Article 1 describes the Republic as état de droit, (“law-based state” or a state operating according to law). This idea incorporates the most important principles found in most forms of democratic government, such as the separating, checking, and counterbalancing of powers; a hierarchical and graduated legal system with the constitution on the top; priority of universally-acknowledged norms of international law; submission of the state to the law; and operation of the state’s authorities within the limits of the law. The draft recognizes the people as the single source of state sovereignty and puts some emphasis on the forms of direct participation of people in power. Although the representative form of democracy still prevails, the draft leaves a number of important questions of state and social life for the decision of republic-wide and local referenda.

It is clear that the choice of the presidential or parliamentary system was a difficult decision for the drafters. The draft borrows from the French model of government, but borrows inconsistently. Similar to the French system, the draft of the Belarusian Constitution recognizes in the president of the Republic the function of arbitrator or mediator. The president is directly elected by the people, can issue orders and instructions, and dissolve

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108 For more detailed comments on the French model of government, see text accompanying notes 361-368, infra.
the Soim (parliament) in the event of the non-confirmation of the Government of the Republic in the course of six months or in the event of the expression of non-confidence in the government more than twice in the course of a year.

As in France, the president lacks the veto power of the American president, but he can ask the legislature to reconsider a bill that it has passed. The Belarusian president does not need, however, to ask the prime minister to agree for resubmission of the bill or for countersignatures for his orders. On the other hand, in France the government derives its legitimacy from the president. The French president appoints the prime minister and for a long time it was not clear whether the government would be obliged to ask the National Assembly for a vote of confidence. In the Belarusian draft, the president only nominates the Chairman of the Government but the Chairman and the government are elected by the Soim, are responsible to the Soim, and accountable before it. The commentators observed that the draft still "places too much power in the hands of the Soim, the legislative branch, whose power is not adequately checked by the other branches of government."

The establishment of a system of judicial review seems to be another central theme of the constitutional debate in Belarus. The draft provides for a very interesting system of mixed constitutional control which is both centralized and concentrated, concrete and abstract. Article 133 of the draft gives the right to decide on the constitutionality of a given normative act to any court which comes upon a constitutional controversy during consideration of a specific case. The Constitutional Court would institute an abstract control on its own initiative and when called upon by the main officials and highest courts of the Republic. It is unclear whether the Constitutional Court would also work as an appellate constitutional tribunal and how, in the absence of a stare decisis system, the consistency of the constitutional decisions will be protected. The procedure by which the Constitutional Court suspends the acts recognized as unconstitutional and submits its decision for review by the Soim while reserving the right to override the Soim's opinion thereby depriving the act of juridical force, seems to unnecessarily complicate and politicize the process of review and

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110 Foyer, supra note 109, at 19.
111 Belarusian Constitutional Analysis, supra note 106, at 1.
112 For a more detailed analysis of the models of judicial review see text accompanying notes 369-386, infra.
undermine the concept of the separation of powers.

The commentators also observed that the draft does not make clear whether the new government is to be based upon principles of market economy or a socialist model. On the other hand, they praised the fact that the rights secured by the draft are directly applicable law and that the constitutional guarantees of rights are protected from being eradicated by subsequent legislation, executive action, or judicial decision. Generally speaking, although the draft provided a lot of information on the development of the Byelorussian constitutional system following its independence, the completion of the constitution drafting in this republic nonetheless requires a great deal of work and a lengthy nation-wide discussion.

6. Azerbaijan, Kazakhstan, Kirghizistan

The three republics of Central Asia and Transcaucasia share many common features. They are located in the area which is engulfed in a long-running conflict between Armenia and Azerbaijan regarding the status of the region of Nagorno-Karabakh, and plagued by ethnic and civil warfare following the toppling of the Presidents of Georgia, Azerbaijan and Tajikistan. All of them lack any democratic traditions and all received independence as a side-effect of events in which they participated somehow reluctantly. The republics have economies which are still fully intertwined with those of their neighbors and with Moscow. Martha Brill Olcott wrote:

As Soviet central structures withered, so too did subsidies from Moscow that had long helped feed Central Asia's ever increasing population. The region's leaders were left with sole responsibility for keeping their economies afloat. Yet

114 See comments of Virginia Supreme Court Justice Barbara Milano Keenan, id.
115 Georgia's President Zviad Gamasakhurdia was forced to flee Tbilisi in January 1992; Azerbaijan's Ayaz Mutalibov was toppled in May, 1992; and Tajik President, Rakhman Nabijev, was toppled in September 1992. See Tajik President Resigns in Opposition Custody, WASH. POST, Sept. 8, 1992, at A14; Spread of Ethnic Wars Feared in Ex-U.S.S.R., WASH. POST, Sept. 9, 1992, at A25; See also Olcott, Central Asia's Catapult to Independence, FOREIGN AFFAIRS 108-130 (1992).
116 See Olcott, supra note 115, at 108.
technological and diplomatic expertise was sorely lacking in these new states. Each nation has tried to varying degrees to diversify its economy and exploit the interest of regional powers—most often, Iran, and Turkey. But those efforts are hindered by transportation and communication links that still follow old colonial routes through Russia.117

In the summer of 1992, Kirghizistan, Kazakhstan, and Azerbaijan prepared drafts of new constitutions which share many common features that might be examined together. The texts are more concepts of a preliminary and general nature, than well-rounded and detailed drafts. Although the documents seem to benefit from the numerous similar projects available at this moment in other former Soviet republics, they still demand a lot of work and their adoption without further amending process seems to be problematic.118 At first glance it is obvious that the drafts need some structural reorganization which would enhance their coherence, contribute to their clarity, and could help flush out many possible questions of interpretation and reservations concerning overlapping provisions.

The most striking similarity linking all three drafts is a clear intention of the drafters to provide a framework for a presidential system. The Azerbaijan draft describes the state expressis verbis as “a presidential republic” and the two other draft constitutions, although less explicit, leave no doubts as to the similar intention of the drafters. While a tendency to incorporate some elements of the presidential model into the new constitutions could be detected in many East-Central European new constitutions,

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117 Id.
this inclination has usually been manifested half-heartededly; the presidents were presented as “senior statesmen” or “supreme arbitrators” sharing power with parliamentary accountable chiefs of governments. The Kirghiz, Kazakhstani and Azerbaijani drafts break with these half-measures and drift clearly toward an American version of the presidential rule. In the opinion of the drafters, given the special geopolitical circumstances of the region, this model can guarantee the rights and freedoms of the citizens better than a parliamentary government.

The presidents are the heads of the states, highest executive officials, and commanders-in-chief of the armed forces. They are elected directly by the people, have the right of veto which can be overridden by a majority of two-thirds of the legislature,¹¹⁹ and can issue decrees. The cabinets are headed by the presidents, who, with consent of the legislature, can appoint the prime ministers and the ministers. The executive officers are accountable to the presidents.¹²⁰

The limits of the presidential power are still vague. On the one hand, the drafters seem to understand that the balance of powers depends on the cooperation of the President and the Parliament, and try to follow to some extent the American model of checks and balances. On the other hand, they intend to secure a supreme power to the executive. The confusing results are clearly visible and if the ambiguities of the drafts are not removed political abuses may very well ensue.

At this moment, it only seems appropriate to observe that all drafts show a clear tendency to provide for some kind of enforcement mechanisms for constitutional rights and freedoms. The concept of judicial review requires,

¹¹⁹ KIRGHIZISTAN CONST. (1992 Draft), supra note 118, art. 48; KAZAKHSTAN CONST. (1992 Draft), supra note 118, art. 88. The Azerbaijani Draft simply declares that “the President makes use of the right to veto legislation.” AZERBAIJAN CONST. (1992 Draft), supra note 118, section on Organs of Executive Power.

¹²⁰ KAZAKHSTAN CONST. (1992 Draft), supra note 118, arts. 94-95, which makes the Cabinet of Ministers politically accountable to the president and constitutionally accountable to the Parliament. The drafters reserved for the parliament the right to dismiss the minister, with the consent of the president, by two-thirds majority vote of the general number of deputies, in the case of violation of the Constitution or the laws of the Republic. Id.; see also KIRGHIZISTAN CONST. (1992 Draft), supra note 118, art. 48. The Azerbaijani Draft is less explicit. It provides that the President appoints the Cabinet with “subsequent confirmation” of the Parliament and that “the President carries out functions regarding the execution of laws and is in charge of the activities of the Cabinet of Ministers.” AZERBAIJAN CONST. (1992 Draft), supra note 118, at 19-21.
however, further refinement. For example, the Azerbaijani draft goes to the extent of giving the Constitutional Court an unprecedented power to “dissolve parliament if it repeatedly passes laws that violate the Constitution.” With all admiration of the drafters’ intention to establish an effective system of constitutional protection, this provision seems clearly to infringe upon the autonomy of the legislative power and affect the commonly understood principle of division of powers. Two other drafts more clearly provide for a centralized model of constitutional review which in Kazakhstan is vested in a special Constitutional Court and in Kirghizistan in the Constitutional Chamber of the Supreme Court. Both drafts prohibit the regular courts from applying the laws which contradict the Constitution and instruct the courts that a the violation of the Constitution is found, they should suspend the trial and turn to the central constitutional authority for the final examination of the law claimed unconstitutional.

One can also observe that, although the drafts guarantee economic freedom and the inviolability of all forms of property, they do not declare the clear adherence to the concept of market economy. All three drafts seem to repeat the old socialist formula limiting the freedom of the owner by vague needs of society and interests of the people. The drafts also provide that the land and natural resources are within the exclusive ownership of the state, a provision which might clearly be read as discouraging both domestic entrepreneurship and foreign investment.

To sum up, one has to admit that, despite all the turbulent geopolitical circumstances, the constitutional works in the post-Soviet republics are in full bloom and it can soon be expected that the region will produce several brand new constitutions. All the shortcomings of the new drafts notwithstanding, this significant effort of countries having very little, if any, constitutional tradition is admirable. The success of these emerging but still imperfect and fragile democracies is in the clear interest of the West and warrants as much attention and support as possible.

C. Constitution Drafting in Former People's Republics of East-Central Europe

“The cataclysmic dissolution of Communist regimes and the clamorous awakening of the East European peoples in 1989” wrote Laszlo and David Stark, “prompted observers to overestimate the strength of organized democratic forces in these events. The stunning electoral victory of Solidarity in June, the public drama of Imre Nagy’s reburial in Budapest that
same month, the street demonstrations in Leipzig in October, and the massive assemblies in Prague in November were all signs of popular striving for democracy."\textsuperscript{121}

The first "velvet revolutions" in Poland, Hungary, and Czechoslovakia placed these countries in the avant-garde of democratic transformations in East-Central Europe. The speed with which the three countries purged their basic laws of communist rhetoric raised the expectation that they would be the first to adopt brand new constitutions in this region. In 1989, Poland announced that its new constitution might be expected in the bicentennial of the country's first constitution of May 3, 1791. The Preamble of the amended constitution of Hungary referred to the temporary character of the text. Since the beginning of 1990 Czechoslovakia quickly began to adopt a number of constitutional acts which were expected to be soon collected into one basic law in the very beginning of the nineties. None of these expectations proved true, with the first new constitutions actually being adopted in Bulgaria and Romania, the countries which traditionally were recognized as strongholds of Communism. The question as to why those countries which were more advanced in democratic restructuring were outpaced in the process of making constitutions deserves further attention.

1. The First "Communist" Constitutions of Post-Communist Europe

a. Bulgaria

Political and Economic Transformation: In the eighties Bulgaria shared with other Soviet satellite countries most of the crucial symptoms signifying the corroding effects of the economic crisis of the communist system. Incompetence, widespread corruption, and the unaccountability of decision-makers were incompatible with the basic principles of economic efficiency. Lack of information about, coordination of, and proper control over the implementation of production decisions, coupled with a form of decentralization that was more apparent than real, crippled the socialist system of central planning and decisionmaking. The double standard of morality, together with massive economic dislocations, created a black market and corruption which have been irrevocably integrated into the way of life in communist countries. In addition to all of these problems, Bulgaria's rapid industrialization in the sixties and seventies and the respective sweeping economic shifts

\textsuperscript{121}Eastern Europe in Revolution 13 (Ivo Banac ed., 1992).
resulted in the widespread collapse of agriculture and left the country greatly dependent on its Western and Eastern markets. M. Todorova observed,

The disintegration of the traditional East European and Soviet markets, which had been Bulgaria's only export possibility for the produce of its heavy, electronic, chemical, and light industries became a major problem for the effectiveness and, indeed, the very existence of these industries. On the other hand, if one considers the structure of the foreign debt, the extreme dependence of Bulgarian industries on foreign imports is indicated by the fact that over 60 percent of the hard-currency expenditures during the last five years went for the import of raw and other materials. There is practically no industrial branch whose hard-currency return is bigger than its hard-currency expenditures. The continuous devaluations of the dollar were an additional blow. On the whole, the country exports for dollars but imports for deutsche marks, yens, and schillings.\footnote{122 Todorova, Improbable Maverich or Typical Conformist? Seven Thoughts on the New Bulgaria, in Eastern Europe in Revolution, 149-50 (Ivo Banac ed., 1992).}

The pressure for reform that swept through Eastern Europe took effect in Bulgaria starting with Bulgarian President Tudor Zhivkov's unexpected resignation on November 11, 1989.\footnote{123 Battiata, Bulgaria's Zhivkov Quits After 35 Years; Foreign Minister, 53, Replaces East Bloc's Longest-Serving Leader, WASH. POST, Nov. 11, 1989, at A1.} Petar Mladenov, the former Foreign Minister, replaced Zhivkov as the leader of the Bulgarian Communist Party and the new President of the country.\footnote{124 Id.}

The dissident or opposition movement in Bulgaria, until December 1989, had consisted of various separate and small groups with different objectives and strategies. In early December 1989, Bulgaria's nine leading opposition groups, led by Zhelyu Zhelev, joined together to form the Union of Democratic Forces ("UDF").\footnote{125 Union of Democratic Forces Sets Out Its Aims, British Broadcasting Corp., Summary of World Broadcasts, Dec. 9, 1989 available in LEXIS, NEXIS Library, BBCSWB File.} Under the pressure of the opposition, the National Assembly voted on January 15, 1990 to end the Bulgarian Communist Party's monopoly on political power.\footnote{126 Bulgaria Tumbles Communist Monopoly, L.A. TIMES, Jan. 15, 1990, at P2.} The Assembly also
approved provisions which would protect the rights of Bulgaria's ethnic Turk and Moslem minorities. Responding to the UDF's pressure for a speedy transition to a democracy, the Assembly also agreed to discuss with the opposition further constitutional changes.

The Bulgarian opposition faced, however, several difficult problems. First, it was inexperienced and staked its future heavily on a negative campaign against the communists. Second, the UDF lacked charismatic leaders such as Polish Walesa or Czech Havel. Third, it did not have a real remedy for the Bulgarian economy which presented many urgent problems, including a mounting foreign debt, a substantial trade deficit, shortages of basic foods, and poor quality of consumer products. Fourth, the opposition had to win the confidence of the society which feared rapid changes and especially economic shock-therapies. The UDF's effort for accelerating the process of economic reform met with the electorate's reservations and criticism.

All of these factors contributed to the Bulgarian Communists', renamed as the Bulgarian Socialist Party ("BSP"), unexpected victory in the elections held in June 1990. Bulgaria became the first country in Eastern Europe to return the communists to power after holding free multi-party elections. The opposition, however, managed to elevate UDF's candidate to the position of President. After five unsuccessful attempts to elect a president, the parliament agreed to a "compromise candidate," Zhelyu Zhelev, who ran unopposed and gained a vote of 284 out of 389 votes cast.

The elections in Bulgaria resulted in a typical period of diarchy. After its victory the "BSP," led by Prime Minister Andrei Lukanov, formed a "coalition government of experts" with the Agrarian Union and the Movement for the Rights and Freedoms. The UDF refused to join such a coalition saying that it did not want to be held responsible for the

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127 Todorova, supra note 122, at 165.
129 President Mladenov was forced to resign on July 6, 1990, because of a videotape that was made public which showed Mladenov calling for tanks to be used against demonstrators in December 1989. See Bulgaria Chief Quits in "Let Tanks Come" Flap, L.A. TIMES, July 6, 1990, at P1.
131 BULGARIAN SOCIALIST PARTY NOMINATES LUKANOV FOR PRIME MINISTER, REUTERS, June 30, 1990.
economic mistakes that the interim BSP government under Prime Minister Lukanov had made during its period of rule.\footnote{Bulgarians Rally to Support Strike for Democracy, \textit{REUTERS}, June 25, 1991.}

After two weeks of street protests and a four-day general strike led by the new trade union called Podkrepa, and with severe economic crisis plaguing the country, Premier Lukanov was forced to resign on November 29, 1990.\footnote{THE POLITICAL HANDBOOK OF THE WORLD, 90 (Arthur S. Banks ed, 1991).} On December 7, 1990 Dimitar Popov, a politically independent judge, was chosen by parliament to be the new prime minister.\footnote{Judge Chosen as Bulgaria's Prime Minister, \textit{L.A. TIMES}, Dec. 7, 1990, at P3.}

In February 1991, the Bulgarian economy faced drastic reforms that were implemented to facilitate the transition to a market economy. Price controls were dropped and this was followed by price increases of up to ten times on many basic items. Bulgaria also suffered severe shortages of fuel and other necessities. The situation was grim: production had fallen 30% since 1989 and continued to fall, unemployment was at about 7% and rising, and inflation was at about 500%.\footnote{Bulgaria Gets Few Points for Progress, \textit{CHI. TRIB.}, Oct. 25, 1991, at CI.}

In this situation it was obvious that the new elections of 1991 would also be dominated by economic concerns. The results of the elections were a sort of draw. Both major parties received almost identical support of the electorate: Union of Democratic Forces (UDF), 110 seats and 34.36% of the vote; and Bulgarian Socialist Party (BSP), 106 seats and 33.14% of the vote.\footnote{Final Official General Election Results, British Broadcasting Corp., Summary of World Broadcasts, (Radio Broadcast, Oct. 23, 1991).} Although the UDF received a nominally higher percentage of votes than the BSP, the UDF was far short of securing a majority of the seats in the 240-seat parliament. Consequently, the BSP obtained enough seats to slow the pace of reform.\footnote{By a vote of 131-94 the Parliament chose Philip Dimitrov, a lawyer and leader of the UDF, as the new prime minister of Bulgaria. See Dimitrov Elected Bulgarian Prime Minister, \textit{UPI}, Nov. 8, 1991, available in LEXIS, NEXIS Library, UPI File.}

The next show-down between the BSP and the UDF came with the presidential elections held on January 12, 1992. This was the first time in Bulgaria's history that the people were allowed to elect a president. The main issues in the election were the economy, with the monthly inflation rate at 3.5% and the unemployment rate at 10%, and nationalism, directed against the ethnic Turk minority. The incumbent President Zhelev and his Vice-President Blaga Dimitrov faced 21 other candidates and won by a narrow
margin in the run-off against the BSP candidate Velko Valkanov.\textsuperscript{138}

The UDF government faces an electorate exhausted by factional politics and ready to support any party which would offer a coherent program of economic recovery. Many Bulgarians, disillusioned by the economic crisis as well as by the government’s confrontational stance towards unions and the press, have openly turned against the UDF government under Prime Minister Dimitrov, including the powerful anti-communist union Podkrepa, the post-communist Independent Syndicate Confederation, the Confederation of Independent Trade Unions, the Movement for Rights and Freedoms, and President Zhelev.\textsuperscript{139} Many critics assert that the strong anti-communist stance taken by the UDF government has only added to the economic problems of Bulgaria. They claim that there is still a strong pro-communist sentiment in the country and that communist opposition is the fact which has to be faced by the UDF. Opinion polls for Fall 1992 gave the UDF 31%, down from 35% at the beginning of the year, and gave the BSP 26% of the vote.\textsuperscript{140}

\textit{Constitutional Development:} Despite the economic turmoil, Bulgaria’s overall human rights performance continued to improve in 1991. Freedom of press, assembly, religion, speech, association, and travel were generally respected.\textsuperscript{141} One also might observe that, all factional animosities notwithstanding, the Bulgarians were able to avoid drastic pluralization of their legislative body which crippled many of the constitutional reforms in Poland and Czechoslovakia. On the one hand, the Bulgarian National Assembly, which split into two major coalitions, suffered from the excessive polarization of its political forces. On the other hand, the existence of just two major opponents still kept this body operational. Thus, using its significant electoral victory in 1990, the socialist coalition was in the position to push forward the process of constitutional drafting. As a result, the Grand National Assembly, elected in 1990, adopted the first brand new constitution in East-Central Europe in July 1991.

The constitution was carefully purged of rhetoric typical for the Stalinist constitutions. It dropped the terms such as “people’s republic,” “socialist

\textsuperscript{138} Zhelev did win 53 percent of the vote, beating out Valkanov who received 46.6 percent. \textit{Bulgarians endorse reform}, \textit{FIN. TIMES}, Jan. 24, 1992.


\textsuperscript{140} \textit{Id.}

state,” “socialists achievements,” and “central planning.” Instead, the Republic of Bulgaria is characterized as a democratic, law-governed, and social state, based upon the rule of law, principles of people’s sovereignty, political pluralism, division of powers, precedence of ratified, constitutional international treaties over conflicting domestic legislation, and wide protection of fundamental rights of citizens.\textsuperscript{142}

The 1971 Constitution of the People’s Republic of Bulgaria rejected the principle of division of powers, vesting all power in representative organs, the National Assembly, and people’s councils.\textsuperscript{143} The new Constitution clearly provides that “the power of the state is divided between a legislative, an executive, and a judicial branch.”\textsuperscript{144}

The changes in the system of governance are less elaborate. The form of government did not change and Article 1 of the 1991 constitution provides that “Bulgaria is a republic with a parliamentary system of government.”\textsuperscript{145} The drafters shifted the functions of the State Council, the collegiate head of state, to the President. One who would attempt to trace in the new Bulgarian Constitution some elements of the presidential system will discover some borrowings from the French model,\textsuperscript{146} such as direct election of the President or the prohibition of a joint appointment as a minister and a national representative.\textsuperscript{147} Otherwise, the role of the President is envisaged as that of a senior statesman who represents Bulgaria in international relations and consults the parliamentary groups in the process of nominating the candidate for Prime Minister.\textsuperscript{148} The President’s discretion to choose his own candidate for Prime Minister is limited; he either has to nominate the candidate of the largest parliamentary group, or, respectively, the candidates of the second-largest and other major parties if the previous appointees fail to propose the cabinet in seven days. If the National Assembly subsequently is unable to nominate its own candidate, the

\textsuperscript{142} CONSTITUTION OF THE REPUBLIC OF BULGARIA, \textit{available in LEXIS}, Europe Library, EELEG File; U.S. Dept of Commerce, July 13, 1991, Preamble, arts. 1, 4, 5, 8, 11, 24/2 and ch. 2 (Fundamental Rights and Obligations of Citizens) [hereinafter BULGARIAN CONSTITUTION].

\textsuperscript{143} Id. at art 2(2). \textit{See also} WILLIAM B. SIMONS, \textit{THE CONSTITUTIONS OF THE COMMUNIST WORLD}, at 38-67 (1980), for text of the 1917 Constitution.

\textsuperscript{144} BULG. CONST. art. 8.

\textsuperscript{145} Id. at art. 1.

\textsuperscript{146} For the explanation of the French model, \textit{see} Part II, Chapter D: Presidential vs. Parliamentary System.

\textsuperscript{147} BULG. CONST. arts. 93(1), 68(2).

\textsuperscript{148} Id. at arts. 92(1), 99.
President has to appoint a "caretaker cabinet" and dissolve the Assembly. The President does not have the right to veto the legislative acts, to rule by decrees, to hold referenda, or to declare martial law or a state of emergency. Nor is he the chief of the executive. That position is held by the Prime Minister who is fully responsible before the National Assembly.

Justice is administered by the courts and supervised by the Supreme Court of Appeals. The judiciary has independent and coequal status with the legislature and the executive. The 1991 constitution also provides for a system of administrative adjudication exercised by the Supreme Administrative Court. Judges, prosecutors, and investigators are appointed, promoted, demoted, transferred, or dismissed by the High Judicial Council, a self-governing judicial body composed of the Presidents of the Supreme Courts and appointees of the National Assembly and judicial authorities. The Presidents of the Supreme Courts are appointed or dismissed by the President of the Republic upon the proposal of the High Judicial Council.

The Constitution established the Constitutional Court based on Western European models. The Constitutional Court consists of 12 justices, elected in the modified French fashion one-third by the National Assembly, the second third by the President, and the final third by a joint meeting of the justices of the Supreme Court of Appeals and the Supreme Administrative Court. The Court has elaborate advisory and arbitrary functions. The constitution also vested in the Court the right of abstract constitutional review which may be exercised on the initiative of no less than one-fifth of the national representatives, the President, the Council of Ministers, the Supreme Court of Appeals, the Supreme Administrative Court, or the Prosecutor General. The decisions of the Court are final and any act ruled unconstitutional becomes invalid as of the day of the enactment of the ruling.

To sum up, the Bulgarian Constitution of 1991 can be praised for its clarity and coherence, well-balanced concept of a parliamentary system, judicial review of administrative actions, and elaborate system of judicial enforcement.

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149 U.S. DEPT. OF STATE, supra note 141.
150 BULG. CONST. arts. 119 (1), 124, 125.
151 Id. at arts. 129, 130.
152 For more detailed explanation of French model, see Part II, Chapter E: Constitutional Enforcement.
153 BULG. CONST. arts. 149-152.
self-government. The presidential-executive relations are still confusing and one must observe that the Bulgarian Prime Minister lacks the maneuverability of the British Prime Minister or the German Chancellor. The scope of the constitutional review is still fairly limited and the functions of the Constitutional Court, which can be activated either by the ordinary courts or individual petitions, are predominantly advisory. Despite these shortcomings, the 1991 Bulgarian Constitution attracted significant media attention as the first brand new constitution of the post-glasnost period in East-Central Europe.

b. Romania

**Political and Economic Transformation:** The end of communist dictator Nicolae Ceausescu's rule came about in late December 1989. Following the Timisoara demonstrations and a week-long outburst of hostilities in Bucharest between protesters the Securitate (the state secret police), and the troops loyal to Ceausescu, the dictator was ousted and executed on December 25, 1989.

Several days before the execution of Ceausescu, on December 22, 1989, a new provisional government, the Council of the National Salvation Front ("CNSF"), was formed to serve until May 1990, when Romania would hold free parliamentary elections.\(^{154}\) The leaders of the CNSF took over the main governmental positions: Ion Iliescu, a former Communist Party official who was deposed by Ceausescu, became President; Dumitru Mazilu, a diplomat who was placed under house arrest for criticizing the dictator, was named Vice President; and Petre Roman, professor at the Polytechnic Institute, was appointed Prime Minister.\(^{155}\)

The question of how the CNSF was actually formed was the subject of controversy; there was much speculation that the group had been in existence for many months before the December revolution in Romania. The Council officially announced its existence on December 22 on national television; at that time, it had thirty-nine members consisting of dissidents, former Communist Party members, intellectuals, and artists. By early January 1990,


the CNSF had grown to 150 members.\textsuperscript{156}

On February 2, 1990, under pressure from opposition groups, the CNSF relinquished its control over the government, reorganized as a political party, and joined with members of 29 other political parties to form an interim coalition government.\textsuperscript{157} Basically, any group that had met the requirements for forming an official political party was eligible to join the new interim government.\textsuperscript{158} The new government, which was to rule the country until the May 1990 elections, was called the "Provisional Council for National Unity."\textsuperscript{159}

The presidential and parliamentary elections set for May 1990 were the first free elections in Romania in 62 years. The only three parties represented in the presidential elections were: the National Salvation Front ("NSF"), whose candidate was Ion Iliescu; the National Peasant's Party ("NPP"), whose candidate was Ion Ratiu; and the National Liberal Party ("NLP"), whose candidate was Radu Campeanu. Over 80 parties ran candidates in the parliamentary elections for the 397 seats in the lower house, the National Assembly, and the 190 seats in the upper house, the Senate.\textsuperscript{160}

The result of the elections was basically a landslide victory for the left-wing NSF. Iliescu was elected President of Romania, receiving 85.07\% of the vote, and the NSF won a two-thirds majority in both houses of the parliament, receiving 62.31\% of the vote for the lower house and 67.02\% of the vote for the upper house.\textsuperscript{161} Although the victories of both the NSF and Iliescu had been predicted, the difference in votes received between the NSF and other opposition parties was surprisingly large.

\textsuperscript{158} The official political party requirements were that there were to be at least 251 members in the organization, deposit in bank of at least $1,100, an address, a platform, and a set of bylaws. By February 1, 1990, 29 parties had met the requirements. See Celestine Bohlen, \textit{Upheaval in the East: Rumania; Question in Bucharest: Who's in What Party?}, N.Y. TIMES, Feb 3, 1990, at A8.
\textsuperscript{159} Id.
\textsuperscript{160} \textit{Evolution in Europe; Choosing a New Romanian Leader}, N.Y. TIMES, May 20, 1990, at 16.
\textsuperscript{161} \textit{Final Election Results}, The BBC, Summary of World Broadcasts (Radio Broadcast, May 28, 1990).
Upon assuming his position as President, Iliescu began a program of "dismantling centralized planning in favor of freer markets." Moreover, the NSF advocated a "gradual transition to a market economy with the emphasis on social guarantees for the working people" which would not include any shock therapy reforms. In June of 1990, President Iliescu appointed Petre Roman as prime minister; subsequent to that, Roman appointed a 23-member cabinet composed mostly of technocrats, with representation of the opposition lacking. This absence was basically the reason that sparked student demonstrations against the NSF at Bucharest University in mid-June 1990. The students accused the Front of neo-communism and established a "Communist-free zone" in the city center. The demonstration was broken up by thousands of miners who, on Iliescu's call, arrived in Bucharest and beat up the demonstrators in the presence of the police.

The next tide of protests in Bucharest was caused by the reorganization of the Romanian Communist Party. The Party which virtually disappeared after it was ousted in December 1989, re-initiated itself under the name Socialist Party of Labor ("SPL") in November 1990. This new party was created by former members of the Communist Party joining with the left-wing Democratic Party of Labor. The creation of the SPL was met with protests from opposition forces both in the streets of Bucharest and in the parliament. Protesters, who viewed the SPL as merely a secret creation of Iliescu and the NSF, demanded the resignation of the President.

Throughout the end of 1990 and the first half of 1991, the protests against the government continued, resulting in the resignation of Prime Minister Roman on September 26, 1991. The violence began on September 25 when Romanian miners gathered in Bucharest to demand higher wages and better living conditions. The miners were soon joined by city residents protesting

164 Katherine Verdery & Gail Kligman, Romania after Ceausescu: Post-Communist Communism?, in EASTERN EUROPE IN REVOLUTION, at 130, (Ivo Banac ed., 1992) [hereinafter EASTERN EUROPE IN REVOLUTION].
165 Id. at 133-34.
both the government and the economic crisis plaguing the country. This time the demonstrators demanded the resignation of the President and the Prime Minister. Succumbing to the pressure, Roman resigned but remained in office until the new government of Theodor Stolojan was ready to take over.\textsuperscript{168}

Looking ahead to the next general elections which were to be held in September 1992, it appeared that the opposition parties would need to join forces in order to challenge the incumbent NSF. As early as November 1991, the NPL leader Radu Campeanu started to unite the NPL, the NPP, the Democratic Union of Hungarians in Romania ("DUHR"), and other opposition parties in an attempt to form some sort of alliance to run against the NSF.\textsuperscript{169} Such an alliance of opposition forces was finally formed in November 1991 under the name "Democratic Convention." The Convention, which was composed of 18 different groups, said that it was seeking to remove from Romania, "communism, primitive nationalism, extremism, and chauvinism" and in turn institute the rule of law as well as a market economy.\textsuperscript{170}

As the 1992 elections drew nearer, it appeared that President Iliescu, who had relinquished his party membership upon assuming his position as President, would seek to secure his reelection by disassociating himself from the radical economic program of NSF. He successfully presented himself as a senior statesman standing above factional conflicts, presiding over steady, free-market, and democratic reforms but opposing any drastic, "surgical" changes. This position manifested in the pre-election period contributed to the split between Iliescu supporters and the supporters of former Prime Minister Roman. Roman has called Iliescu "a neo-communist who depends on the Romanian Intelligence Service for survival" while calling himself "the only capable reformer in politics today."\textsuperscript{171}

Iliescu's chances for reelection were also enhanced by the split in the opposition camp. In May of 1992, Campeanu removed the NLP from the Democratic Convention, thus removing any hopes of the Convention being the biggest electoral bloc. The main reason behind this split was that the

\textsuperscript{168} \textit{Romanian Miners Hold Out for President's Resignation}, N.Y. TIMES, Sept. 28, 1991, at 3.

\textsuperscript{169} \textit{Romania: Stolojan's Quick-step}, EASTERN EUR. NEWSLETTER, Nov. 18, 1991, at 1, 6-7.

\textsuperscript{170} \textit{Anatomy of Romania's Centrist Opposition Alliance}, REUTERS, Sept. 25, 1992.

NLP could not agree with the Democratic Convention on power sharing. Moreover, this action by the NLP blocked any chance that one party would win more than 20% of the seats in the Parliament.\(^{172}\)

As had been predicted in the presidential race, no candidate won an absolute majority, thus making a second round run-off mandatory. What was surprising was the fact that, despite national opinion polls, Iliescu received a higher percentage of votes than the main opposition candidate Emil Constantinescu. The second round, run-off presidential election was held on October 11, 1992, with Iliescu winning over 61% of the vote to beat out Constantinescu, who won 39% of the vote.\(^{173}\)

In the parliamentary elections, the results were even more surprising as the ex-communists, receiving about 30% of the vote and defying earlier predictions, prevailed over the democrats who only received about 20% of the vote.\(^{174}\) However, since no party won a clear majority, future legislative action depended on the winners' possibility to form a coalition government. The task took almost a month but finally, on November 4, 1992, at a meeting between Iliescu and parliamentary party leaders, Nicolae Vacaroiu was appointed as the new Prime Minister.\(^{175}\) Iliescu appointed the non-partisan Vacaroiu calling him a "man of reform."\(^{176}\) While Vacaroiu wants to work for "the continuation and consolidation of reform," he does not want to introduce quick and abrupt changes that would cause the standard of living to drop dramatically.\(^{177}\)

**Constitutional Development:** The communist dominance in the Romanian National Assembly in 1990-91 had undoubtedly one beneficial aspect. The communists, attempting to establish their reputation as reformers, declared that the primary task of the new Parliament would be to draft a new constitution. The communist-dominated Parliament completed its task of the adoption of a new constitution fifteen months after a Constitutional Commission was formed in June 1990.\(^{178}\) The Commission, consisting of

\(^{175}\) *Nicolae Vacaroiu Named as New Romanian Premier*, The BBC, Summary of World Broadcasts (Radio Broadcast, Nov. 5, 1992), available in LEXIS, NEXIS Library, BBC File.
\(^{176}\) *Tough Times Ahead for New Romanian Premier*, AGENCE FRANCE PRESSE, Nov. 5, 1992, available in LEXIS, NEXIS Library.
\(^{177}\) *Id.*
parliament deputies from Iliescu's National Salvation Front, discussed the
draft constitution with the group of CEELI experts in the Summer and the
Fall of 1991 in Bucharest and Washington, D.C. Preliminary and final drafts
were debated in the full Constituent Assembly (which doubles the regular
parliament) and, after having been submitted to a referendum, the final draft
was passed on November 21, 1991 and was promulgated on December 8,
1991.179

The Constitution should be praised for its clear structure and compact
character. The list of constitutional rights is long and looks impressive at
first glance. The Constitution guarantees equality of rights; individual
freedom and personal security; rights to free movement; privacy of life;
freedom of religion, assembly, speech, and press; confidentiality of
correspondence; inviolability of domicile; major political, social and
economic rights, such as the rights to vote, and to be elected; rights to
education, to information, to health care; the right to strike; the protection of
private property; and many others.

A more careful examination of this list may raise several concerns. For
example, one may observe that minority interests, notoriously Romania's
problem, require more sophisticated safeguards than the regular guarantees
of equality before the law, impartiality of the courts, and respect for
minorities' languages.180 One may also point out that the protection of the
rights of aliens do not measure up to current international standards, which
offer equal protection before the law to "the persons," including foreigners,
rather than only to "the citizens" of the country.181 Among other prob-
lems, it may be noted that, if the freedom of movement of citizens is to be
protected, the restrictions of this right should be laid down by the constitu-
tion, not by ordinary law. The restriction on the exercise of individual rights
and freedoms on the basis of offending a vaguely defined "public morality"
may also raise some concern.182

Generally speaking, the evaluation of constitutional rights is always
difficult without the examination of judicial enforcement of the constitutional
guarantees and here some observations deserve notice. The Romanian
Constitutional Court, established on the basis of a law adopted by the

179 Id.
182 Id. at pt. II, ch. II, arts. 26, 49.
National Assembly on May 16, 1992, follows the French model of political rather than "sensu stricto" judicial review. The Court may not convene on the initiative of other courts, or on its own initiative. The right to initiate constitutional review is reserved to a few political figures who will usually belong to the same majority which passed the challenged statute, such as the presidents of two chambers, at least 50 deputies and 25 senators. The Romanian Court cannot decide on the constitutionality of laws in force or ratified international agreements. The Court's right to hear individual complaints on violations of constitutionally guaranteed rights is very vague. With the exception of the power of review when a legislative enactment has been drafted but not yet promulgated, in addition to some supervisory functions, the powers of the Romanian Constitutional Court are very limited. The decision of the Court concerning the unconstitutionality of laws may be overruled by a two-thirds majority of Parliament. In France, this system works in combination with the network of administrative courts, with the Conseil d'Etat (Council of State) at the top, which reviews the legality of the administrative acts. In absence of this system, one may observe that the judicial enforcement of the constitutional rights in Romania may still be difficult.

The Constitution created a parliamentary form of government with a dual executive and bicameral legislature. The rationale for the existence of the second chamber in the Romanian system is not clear. The chambers are equal and elected in the same way. Both Deputies and Senators represent the entire country and cannot be bound by the instructions of their constituencies. The number of instances in which both chambers meet in joint sittings further confirms an opinion that their functions are basically the same.

The second chambers are usually set up to promote regionalism, as is the case of Belgium, Spain and Italy, are federal components of the legislative bodies, as is the case of the United States, Germany, Switzerland, Russia and Yugoslavia, or simply survived in the countries with strong traditions of bicameralism, such as the United Kingdom. In some new democracies of

183 The court was founded on June 3, 1992. See Constitution Watch: Romania, EAST EUR. CONST. REV., Summer 1992, at 5.
184 For more comments on French model of constitutional review see text accompanying notes 369-386, infra.
185 The Court can also convene at the request of the President of Romania and the Supreme Court of Justice. ROM. CONST. art. 144.
East-Central Europe, Poland for one, the second chambers were set up for political reasons to counterbalance the influence of the communist nomenclature in the first chamber. As none of these reasons characterize the Romanian political environment, the existence of two chambers seems to be of little use.

The prerogatives of the directly elected President are limited. Before promulgation, the President may refer the law to Parliament for reconsideration but has to promulgate it if the Parliament passes the law again by a simple majority.\(^{186}\) The President designates a candidate for the post of Prime Minister and appoints the government on the basis of a vote of confidence from Parliament.\(^{187}\) The President, after consulting the Presidents of both chambers, may dissolve Parliament once a year if Parliament does not approve the formation of the government within 60 days of the first request.\(^{188}\) The President is the commander-in-chief and can institute a popular referendum, after consulting Parliament.\(^{189}\)

In summary, despite several flaws, the Constitution sets up a solid framework for the further development of democratic mechanisms in Romania. Whether this framework will be used to strengthen the communist legacy or to peel off the country’s neo-communist label depends on the Romanians themselves.\(^{190}\) In an interview on September 25, 1992, preceding his electoral victory, President Iliescu said, “It is not up to others, but up to the Romanian people to decide who is the best representative for them.”\(^{191}\) At least until recently, this seemed to be true.

c. Albania

*The End of Political Isolation:* “Enver Hoxha, who ruled from 1945 to his death in 1985,” wrote Kathleen Imbolz, “maintained one of the world’s strictest and most isolated communist police states. He broke ties first with Yugoslavia, Albania’s northern and eastern neighbor, and then, in 1960, with the Soviet Union, in each case claiming that they had diverged unacceptably

\(^{186}\) Id. at art. 77.

\(^{187}\) Id. at art. 85.

\(^{188}\) Id. at art. 89.

\(^{189}\) Id. at arts. 90, 92.


\(^{191}\) Romania’s Ex-Communist President Faces Tough Reelection Bid Today, WASH. POST, Sept. 27, 1992, at A44.
from a Stalinist purity. From then until 1978, Albania maintained a political friendship only with China. After breaking with that nation as well, Albania stood alone for more than 10 years.\footnote{Kathleen Imbolz, \textit{Albania: Forgotten Country, Analysis and Opinion}, E. EUR. REP., Aug. 31, 1992, at 732.}

When Ramiz Alia, Hoxha’s successor as the president and first secretary of the ruling Party of Labor (APL), assumed power, many people hoped that he would become “Albania’s Gorbachev.”\footnote{Verdery & Kligman, \textit{supra} note 164, at 189.} Contrary to these expectations the situation in Albania remained essentially the same, as the personality cult established by Hoxha was still heavily followed.

Late 1990 brought the first outright challenges to the communist regime. Initially, President Alia, acting in the role of “the reformer,” had announced that the upcoming elections in March 1991 would be secret-ballot, multi-choice elections, but refused to allow multi-party elections. Then on December 8, 1990, student protests erupted at Tirana University. The protests evolved into a pro-democracy movement, and on December 11, President Alia agreed to meet with the student leaders. As a result of this meeting and mounting demonstrations, Alia authorized the formation of opposition parties.\footnote{Carol J. Williams, \textit{Albania—A Step to Democracy}, L.A. TIMES, Mar. 26, 1991, at 6.}

As the first opposition party to form, the Democratic Party was comprised of students and intellectuals.\footnote{Paul Holmes, \textit{Albania’s Communists Hold Power, Leaders Humbled—Forecast}, REUTERS, Apr. 1, 1991.} In addition to the Democratic Party, the following parties formed prior to the elections in the spring of 1991: the Republican Party, the Democratic Front, the environmentalist Greens, the pro-communist Agrarian Party, the Albanian Women’s Committee, and the Greek minority Omania organization.\footnote{Id.}

The first multi-party parliamentary elections since the communists took over in 1944 took place in two rounds, on March 31, 1991 and on April 7, 1991. As had been forecasted, the Communists, acting under the pretense of reformers, proved victorious at the ballot box, receiving the vast majority of their support from rural areas.\footnote{Id.} The Democratic Party, on the other hand, received the majority of their support from cities, including the
Albanian capital, Tirana. These elections resulted in a 250-member parliament consisting of both hardliners and moderates, in which the Communist APL held over a two-thirds majority of 168 seats.

A surprising result of the election was the upset of President Alia in his campaign for a seat in Parliament; Alia was defeated by Democratic Party candidate Frank Krrogi. This apparent upset was not, however, the end of Alia's political career. A new draft constitution, introduced by Alia and the ALP right before the March 31 elections, stated, among other things, that Parliament could elect anyone to be president if the person "fulfills all conditions for being elected a deputy." The draft constitution did not explicitly require that person to be a member of Parliament. Since the APL won a majority in Parliament, it had enough strength to push through a temporary Law on Major Constitutional Provisions, despite resistance from the opposition. After passing this law, the Parliament elected Alia as President.

As a result of unsuccessful attempts of several governments to cope with the political turmoil and grave economic problems, the date of the next parliamentary elections was set for March 22, 1992. Although the Democrats won the elections, beating the Socialists as predicted, they inherited a country in serious economic trouble, with hungry and unemployed masses, rising inflation, widespread crime, and a collapsed economy. The Democratic Party obtained control over 62% of the National Assembly seats, giving Albania's Parliament the largest democratic majority in all of Eastern Europe. Democratic Party leader, Sali Berisha, was appointed by Parliament as Albania's first non-communist president. Much to the satisfaction of the Democrats, on April 4, 1992, President Alia, the "last of the communist style dictators in Eastern Europe," resigned before the Parliament could remove him from office.

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199 Id.
200 ALB. CONST. art. 78 (March 1991 draft) [hereinafter ALB. CONST. (1991 Draft)].
Constitution Drafting: The constitution-making process in Albania began in 1990, when a parliamentary commission assisted by an extraparliamentary expert group was formed to write a new constitution. The first draft was completed in December 1990 and the work on a second draft proceeded as the country moved toward the spring 1991 elections. The draft, dated March 1991, was submitted to Western commentators for evaluation. The analysis was forwarded to Albania at the end of September 1991.

The disputes regarding the March 1991 draft focused on several key issues: the separation of powers, the regulation of economic activity, the treatment of human rights protections, the status and functioning of the judiciary, and the constitutional court. The framework describing the basic philosophical concepts of the Albanian Constitution still is not clear. The draft refers to Albania as an "état de droit" based on social justice, the protection of human rights and freedoms, and on political pluralism. One may observe, however, that the concept of "état de droit" in a classical version comprises an idea of division of powers, the most venerated principle of Western constitutionalism. Contrarily, the socialist constitutional jurisprudence usually rejected the doctrine of division of powers as apparently incompatible with the idea of parliamentary supremacy. In fact, the doctrine of division of powers was irreconcilable with the totalitarian leadership of the communist parties and, as such, could not be placed among the major principles of socialist constitutionalism. In contrast to some other constitutional drafts analyzed above, the Albanian draft still did not recognize this principle explicitly. It refers to the People's Assembly as "the supreme organ of state power," whereas the Council of Ministers is not referred to as the "executive power" but, as in typical socialist constitutions, as "the supreme executive organ."

The Albanian draft provides for typical provisions setting up the framework for a parliamentary system in which the two branches of
government, legislative and executive, are more or less fused, with the legislature being able to vote the executive out of office without any need for a national election by the people. The Albanian People's Assembly has an exclusive right to adopt and amend the constitution (the "pouvoir constituant"), to adopt statutes, and to elect the President and the Council of Ministers. Western experts commented:

The vesting of primary government power in the legislature has been a hallmark for socialist regimes in Central and East Europe for many years under the Communist system. During that time, the legislatures acted primarily as a rubber stamp to Communist Party dictates and were not expected to carry out the full exercise of governance and policy making. Under a more democratic system the vesting of almost total power in the legislature is an invitation to authoritarianism and abuse of power. This threat can be prevented only by establishing in the constitutional framework a more evenly balanced distribution of powers between the executive, legislative and judicial branches.211

It was clearly the will of the drafters to leave the concept of ownership close to the socialist model. Although the draft provides that private property can be expropriated only for public needs and that the state does not have a monopoly over ownership, public ownership is still privileged. Land and underground resources are the property of the state, land being given only for "the use" of physical persons. There are still no declarations of the marketization of the economy. In fact, the draft contains numerous references to "central planning" as a "mechanism of harmonization of national and local interests," reminiscent of the traditional rhetoric of the Stalinist constitutions.212 These provisions are still far away from Western standards.

Of special concern to Western commentators were serious problems in the treatment of human rights protections. The catalog of fundamental rights presented by the draft is relatively long and looks impressive at first glance. One may observe that some of the economic and social rights, such as the right to employment, health care, and education, are at this moment

211 CEELI Albanian Analysis, supra note 207, at 3.
unenforceable and may be treated only as programmatic statements. The constitutional declaration that the state promotes policies in favor of the implementation of these rights would be more consistent with the availability of national resources in the poorest country of the Eastern Europe. The human rights provisions of the draft have been criticized for their generally unclear language, for the presence of limitations and exceptions that could seriously curtail the exercise of legitimate freedoms, and for granting government officials substantial discretion in determining how and whether protected rights can be invoked.\textsuperscript{213}

The provisions on organization of the independent judiciary raise serious concern. The commentators observed that many elements in the Draft Constitution would limit or undermine the independent status of judges and the court system.\textsuperscript{214} Among the most important are, for example, the power of the Assembly to dismiss members of the highest courts,\textsuperscript{215} the power of the Ministry of Justice to “direct and control the activity of judicial administration,”\textsuperscript{216} the composition of the Supreme Council of Justice as a self-governing judicial body made up of nominated officials (by the President, the Minister of Justice, the Attorney General) or jurists elected not by the courts but by the legislature, and the very limited term of office (5 years) of the Constitutional Council.\textsuperscript{217}

The Albanian draft follows a limited mixed system of judicial review which provides for one centralized organ, the Constitutional Council, to hear all constitutional cases. The Council can be activated either by the inquiry of the regular courts hearing the disputes involving constitutional controversies, or by special political organs through a direct action. The Albanian draft has some French features and borrows from the model of judicial review initially introduced in Poland in the mid-eighties. The Albanian Constitutional Council, more a political body than a court, is to be comprised of members appointed by the Assembly and by the President. The right to file a petition is to be vested in the highest state officials and one-fifth of the deputies. The ability of the Council to act as an effective independent check on unauthorized action by the Assembly is limited by the fact that in cases dealing with the constitutionality of statutes, the decision of the Council is

\textsuperscript{213} \textit{CEELI Albanian Analysis}, supra note 207, at 3-5.
\textsuperscript{214} \textit{Id.} at 5.
\textsuperscript{215} \textit{ALB. CONST. (1991 Draft)}, supra note 200, at arts. 68, 69.
\textsuperscript{216} \textit{Id.} at art. 111.
\textsuperscript{217} \textit{CEELI Albanian Analysis}, supra note 207, at 5-6.
not final and may be overruled by a vote of two-thirds of the People’s Assembly.\textsuperscript{218}

In sum, the Albanian draft still has general organizational and structural needs, insufficient clarity, and a socialist flavor, shortcomings which most likely will be corrected by the third draft. A new commission headed by Deputy Minister of Justice Kristag Traja recently began preparation for a third draft. The Commission containing members of all five parties represented in Parliament, such as Democratic, Socialist, Social Democratic, Republican and Human Rights, as well as judges and other experts, is expected to complete its work at the end of 1992.\textsuperscript{219}

2. The Avant-Garde Comes Late

a. Poland

\textit{Political Compromise:} One who would like to contrast the Hungarian and Polish retreats from Communism quickly finds that the transition to democracy in Hungary took place in unfettered electoral competition while the transition in Poland was a result of an important political compromise.\textsuperscript{220} At the moment when the Polish Solidarity set to their Round Table negotiations with the communist government officials in April 1989, the idea of free elections in Eastern Europe was inconceivable.\textsuperscript{221} The compromise reached in Spring 1989 provided for the opposition’s participation in the upcoming elections in exchange for 35\% of the seats in the Seym (the lower house) and free elections of the Senate (the second chamber of the parliament). The newly created Presidency was to remain in the hands of the Communists. The Hungarian opposition capitalized on the Polish experience and refused to enter into the elections under the communist umbrella.\textsuperscript{222}

The re-legalization of Solidarity and its electoral success in June 1989 confronted Poland’s first post-war non-communist Prime Minister Tadeusz Mazowiecki with the communist President, Gen. Wojciech Jaruzelski, elected by both chambers in which the seats were still occupied by the representa-

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\footnote{218}{\textit{Id.} at 16.}
\footnote{219}{E. EUR. CONST. REV., \textit{supra} note 205, at 2.}
\footnote{220}{\textit{See} EASTERN EUROPE IN REVOLUTION, \textit{supra} note 164, at 17-19.}
\footnote{221}{\textit{See Jan Gross, Poland: From Civil Society to Political Nation, in EASTERN EUROPE IN REVOLUTION, \textit{supra} note 164, at 60.}}
\footnote{222}{\textit{Id.} at 27-30.}
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tives with disputable legitimacy. In April and December of 1989, the Constitution was redrafted to include provisions guaranteeing a number of civil liberties, establishing free elections, and removing the Communist Party from its leading role in state affairs. Still the adoption of a brand new constitution by the Parliament carrying a post-communist stigma seemed to be unacceptable.

"In Hungary, by contrast," wrote Laszlo Bruszt and David Stark, "the transformation of political structures has been so rapid and comprehensive that its party system seems to whirl like a finely calibrated and well-oiled machine." When the Hungarian Communists began to regain their respectability, Poland was starting its "witch hunt" for the Communists who still occupied important governmental and parliamentary posts. Paradoxically, on the one hand, Poles, like Hungarians, began to look back with some sentiment to the communist policy of full employment and centralized governmental control as opposed to uncertainty and hardships of a market economy. On the other hand, Poles showed more and more impatience that the end of communism had not brought immediate prosperity and began blaming the government for "not settling accounts" with the former Communists living opulently and obstructing the reforms. Professor Andrzej Mania explains,

In result, if someone in the government has had connection with the communist party in the past, no matter how small the connection or how young this person was, he will have a negative aura of untrustworthiness instilled upon him by other members of government. These people claim that a person with a communist background may not in fact know what the proper interests of the country should be. For example, during the formation of the parliament a dilemma arose when it was necessary to find seats for each of the party's representatives. No one wanted to sit next to the communist party representatives out of fear that this would show that their party is not too different from the commu-

\[223\] Id. at 52.
\[224\] Id.
nists since they sit so close.\textsuperscript{225}

Neither the elevation of Lech Walesa to the post of the President in new direct elections at the end of 1990, nor the parliamentary elections in October 1991 solved the Polish constitutional impasse. Being a result of a political compromise, the amended Constitution created checks and balances which ceased to work in a changing political environment. The Round Table Agreements, which were to guarantee some amount of control for the Communists, were a major departure from the parliamentary system toward a presidential model.\textsuperscript{226} The President was granted the right of veto and legislative initiative, the right to dissolve the Parliament, and to impose martial law.

The direct election of Lech Walesa as the first non-communist President deprived the presidential model of its former rationale and strengthened the sentiment to restore a parliamentary system. The opinion, however, that depriving the Solidarity President of the same prerogatives enjoyed by his Communist predecessor would be rather embarrassing, gave some steam to the idea of balancing the President's power by further "democratization" of the Parliament. Using the system of strict proportionality and disregarding the usual 5% threshold which kept weaker parties out of the Parliament, Poles elected representatives of no less than 29 parties. No single party received more than 13% of the vote.\textsuperscript{227}

The excessive system of checking and balancing contributed to the impotence of the Government. President Walesa, abandoned by his former political allies, lost his backing in the Parliament. The communication between both chambers of the legislature and the Government also became very strained. Wiktor Osiatynski noted that

\[\text{when, however, President Walesa tried to use his prerogatives, his power proved to be illusive. The Seym (the main chamber of the Polish Parliament) could not rule itself but}\]

\textsuperscript{225} Interview with Dr. Andrew Mania, Professor and Associate Dean of the Faculty of Law, Jagiellonian University of Cracow, Poland, an expert on Polish Constitutional law (July 13, 1992) [hereinafter Interview with Dr. Mania].


could block the work of the Government through obstructing the legislative procedure. The President, despite the huge power, could not rule himself either but could restrain the Government and the Parliament.\(^{228}\)

The opening ceremonies of Poland’s first democratically elected Parliament were upset by the month-long failure of Parliament and the President to agree on a new prime minister.\(^{229}\) The protracted negotiations between major parties, such as the Democratic Union Party headed by Tadeusz Mazowiecki, the Liberal Democratic Congress of Jan Krzysztof Bielecki (the second non-communist Prime Minister), and the center-right Center Alliance most closely associated with Lech Walesa, were unsuccessful and ended with the rejection of Walesa’s first choice for prime minister, former Solidarity adviser Bronislaw Geremek. Finally, in late December, the coalition government of Jan Olszewski, supported by, among others, the Center Alliance, the Christian National Union, and several peasant parties was confirmed by Parliament.\(^{230}\) According to expectations, this Government, based on a large coalition, was from the very beginning incapacitated by bitter factional struggles and unable to complete the constitution-making process.

*Economic Shock-Therapy*: As in the case of Hungary, economic hardships diverted the attention of the Poles from the constitutional reform. Advised by Western experts, led by Harvard’s Jeffrey Sachs, the Polish government subscribed to the strategy of a one-shot jump toward a market economy. The Polish economic reform has been based on three major kinds of measures: liberalization, stabilization and privatization. Jeffrey Sachs wrote:

> Economic liberalization means introducing market competition and creating a legal framework for private property and privately owned business. Stabilization fosters a climate in which enterprise of any kind can survive. It involves limiting budget deficits, reducing the growth of the money supply and establishing a realistic, uniform currency exchange rate to promote stable prices and foreign trade.

\(^{228}\) Osiatynski, *supra* note 226, at 8.


Privatization, certainly the trickiest area of reform, transfers existing state property, such as factories, to the private sector.\footnote{Jeffrey Sachs, \textit{Building a Market Economy in Poland}, SCI. AM., Mar. 1992, at 36.}

In January 1990, the architect of Poland's unprecedented transformation from a centrally planned economy to a market economy, Deputy Prime Minister and Minister of Finance Leszek Balcerowicz announced that, in order to provide a foundation for future liberalization, stabilization, and privatization, the Polish Government had to pursue a program of significant economic austerity. To keep inflation under control and to make the currency convertible, the Government introduced a tight money policy and removed most price controls. As far as macroeconomic stabilization is concerned, the results were remarkable. The budget shifted from a deficit of 7.4 percent of the GNP in 1989 to a surplus of 3.8 percent in 1990. The reform eliminated persistent shortages and lines at Polish stores. Inflation dropped and thanks to the new convertibility of the Polish currency and the favorable exchange rate after devaluation, Polish exports to the West surged from around $8.5 billion in 1989 to $11.5 billion in 1990.\footnote{Figures according to Jeffrey Sachs, \textit{id.} at 37; U.S. DEPT. OF STATE, supra note 227.}

The surveys clearly indicate a significant growth of Western investment intentions in Poland. It is clear that the size of the population and the size of the perceived market, a decent communication system, relatively good roads, ethnic and religious homogeneity, access to the Baltic Sea, and location on the channel between Germany and Russia makes Poland attractive for Western business.\footnote{Released in April 1992, DRT International's survey on middle-market investment in Central and Eastern Europe shows that while a clear majority of Western companies see growth opportunities in this region, as well as growing customer demand and the possibility to reduce costs and become less dependent on their home economies, most of them would admit that major problems have to be taken into consideration before going into East-Central Europe. Among the difficulties most often encountered is the uncertain political and economic environment which creates high risk for investment. Other difficulties include cultural, social and linguistic problems, administrative formalities, lack of finance for investment, currency restrictions, poorly working banking system, and the general lack of information and reliable contacts.}

The number of Polish-Western joint
ventures grew along with the general growth of small private corporations.\footnote{The Polish Central Statistical Office reports that there were 7,685 joint ventures in the second quarter of 1992, compared with 2,176 for the same period last year. By country of origin, firms from Germany had the largest number of joint ventures (37%), followed by companies from Sweden (8%), France (5.1%) and the United Kingdom (4.8%). Within the last year, capital invested by joint ventures doubled from $182 million at the end of 1990 to $402 million at the end of 1991. Government Reports Sizeable Rise in Ventures with Foreign Investors, [Sept. 14, 1992] E. EUR. REP. (BNA) No. 19, at 739, 748 (Sept. 14, 1992).}

The service sector was booming. Sachs reported, "between December 1989 and June 1991, individuals started 460,000 businesses, operating mostly in services, and the payrolls of all small private firms grew by an estimated 860,000 workers."\footnote{Between December 1989 and June 1991, the number of private industrial corporations grew by about 25,000. Jeffrey Sachs, Building a market Economy in Poland, SCI. AM., Mar. 1992, at 39.}

On the other hand, privatization of large enterprises, the third pillar of the reform, did not move forward rapidly enough, resulting in the significant shrinking of the industrial sector and declining budget revenues in 1991.\footnote{U.S. DEPT. OF STATE, supra note 227.}

The Government had to cut back some social services and cap wages and benefits in the state sector. The state budget also suffered from the cuts in subsidized sales of Soviet petroleum. Unemployment rose to 11%, inflation to 70% and real incomes dropped over 30% during the period from January 1990 to the end of 1991. Inflation again dropped to 41% in 1992, but it was still higher than in Hungary and Czechoslovakia where it was at 27% and 17%, respectively in 1992.\footnote{Data after c:\data\contract\taskliste, Polish G.U.S. and "Advanced Reforming Countries Might Reach End of Recession", THE VIENNA INSTITUTE FOR COMPARATIVE ECONOMIC STUDIES, June 1992, quoting Polska Szansa tej Jesieni [Polish Chance this Fall], GAZETA WYBORZCZA, [ELECTORAL GAZETTE]. Sept. 10, 1992.}

The significant influx of inexpensive western agricultural products into Poland served a major blow to the Polish agricultural sector. These factors generated scattered strikes and public criticism of the government's austerity measures.\footnote{Labor Minister Jacek Kuron stated that as of July 25, 1992 there was a total of 38 brief strikes and 42 protests in three different regions, with more than 50,000 workers taking part in them. Government Promises to Prepare Draft Stabilization Agreement, E. EUR. REP. (BNA), Aug. 3, 1992, at 627.} After months of indecision regarding whether to continue the Polish "shock therapy," President Walesa replaced Prime Minister Olszewski with Hanna Suchocka,
a specialist in constitutional and parliamentary law.\textsuperscript{239}

The Interim Constitution: The works on a new constitutional draft are advanced but still far from completion.\textsuperscript{240} After amending the 1952 Constitution in 1989, separate constitutional committees were formed in two chambers of the Polish parliament to draft versions of a brand new charter.\textsuperscript{241} The conflicts between the two committees, which resulted in breaking off all contacts with one another, stemmed mostly from the discussion of the Polish preferences for a parliamentary or a presidential system.\textsuperscript{242} The issue of the applicability of either model in the Polish geopolitical circumstances generated a lot of emotion.

The Seym Constitutional Committee, chaired by Bronislaw Geremek, prepared a draft whose aim was to reconcile these conflicting preferences.\textsuperscript{243} The draft, released in September 1991, borrowed heavily from the German model of so-called “chancellor’s democracy.” The President’s role was conceived as that of a senior statesman, but the center of power was shifted to the Prime Minister and his cabinet.\textsuperscript{244} The Senate’s Committee, chaired by Alicja Grzeskowiak, put forward two drafts, the first in April 1991, and the second one after the new parliamentary elections in October 1991. Both drafts favored a presidential form of government and vested the

\textsuperscript{239} Id. at 594.

\textsuperscript{240} Some Polish constitutional experts believe that the Polish Seym lost momentum after the completion of the Round Table negotiations. “The biggest mistake the government has committed since the changes began—says Mr. Szczepanek, of the office of Kazimierz Barczyk, Representative to the Seym,—was to neglect putting forth a constitutional draft quickly; trying it out to see if it succeeds and if it does not then discarding it.” Interview with the Representative Kazimierz Barczyk and his associates, Mr. Szczepanek and Mr. Gadowski (June 29, 1992).

\textsuperscript{241} The precise date when the commissions were appointed is not clear. Andrzej Rapaczynski mentions early 1990, while other commentators date the beginning of the constitutional works to December 1989. See Andrei Rapaczynski, Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament, 58 U. Chi. L. Rev. 595, 601 (1991); cf. Constitution Watch: Poland, E. EUR. CONST. REV., Spring 1992, at 2 [hereinafter Poland].

\textsuperscript{242} Poland, supra note 241.

\textsuperscript{243} Id.

\textsuperscript{244} Rapaczynski, supra note 241, at 626-30 (analyzing the draft in detail). See also A.B.A. CEELI, Comments on the Draft Polish Constitution, July 8, 1991.
President with full cabinet appointment power. As new developments have rendered these drafts outdated and reduced their significance to a merely historical one, they do not warrant a more in-depth analysis in this study.

In the spring of 1992, the issue which generated the most heated discussion was the procedure for the adoption of a new constitution. In accordance with the bill passed by the Seym, a new Constitutional Committee was to be composed of 46 members of the Seym and 10 members of the Senate. Constitutional initiative was granted to the Constitutional Committee of the Parliament, to any group of 46 deputies to the Seym, and to the President. The Constitution was to be adopted by a two-thirds majority of the National Assembly, i.e., the Seym and the Senate combined, and subject to ratification by popular referendum. The bill met with opposition from both the President and the Senate. President Walesa wanted to include in the Committee representatives of the Government, the Supreme Court, and the Constitutional Tribunal who had been given only observer status by the bill. The Senate introduced amendments which proposed to increase the ratio of Senators to deputies on the Constitutional Commission and suggested that the constitution be adopted in the National Assembly by a 55% majority rather than two-thirds. The Senate amendments were invalidated by a vote of two-thirds of the Seym which confirmed that the Constitution would be drafted, adopted, and ratified according to the Seym’s bill.

In the meantime, the Extraordinary Commission of the Seym has been working on the project of the constitutional act, “The Constitutional Statute on Appointing and Dismissing the Government and Other Changes


248 Interim Constitution Approved in Poland, E. EUR. CONST. REV., Spring 1992, at 12; records of the constitutional debates taken personally by the author.
Regarding the Highest State Organs,” submitted to the Seym by the President Walesa. In response to the presidential proposal, the Democratic Union, the largest party in the Parliament, prepared and submitted to the Seym, in February 1992, a draft of the interim constitution. The draft, called “The Constitutional Act on Mutual Relations between Legislative and Executive Powers of the Polish Republic,” or “The Small Constitution” for short, focused on checks and balances between the Parliament, the President, and the Government, leaving other issues for the regulation of the new constitution.

In comparison to the recently in force, amended Constitution of 1952, the draft of the Small Constitution proposed several major changes. First, the 1952 Constitution provided that at motion of the President, the Seym shall appoint and recall the Prime Minister. The Small Constitution, however, suggested that the President should designate the Prime Minister and the Cabinet, which would then need the approval of the Parliament. The procedure for designating the Government is elaborate and cunning. The refusal to approve the presidential candidate for Prime Minister by an absolute majority gives the Seym the opportunity to designate a successive candidate by the same majority. If a majority of the Seym then fails to agree on a candidate, the President would once again designate a Prime Minister, who this time would need only the approval of a plurality. If it fails once again, in the next round the Seym may elect its candidate by a plurality of the votes cast. However, should the Parliament’s candidate fail to win the required support, the President can either dissolve the Parliament or appoint a Provisional Government for the six months. Second, the draft of the

249 The full title of the act is “The Constitutional Statute on Appointing and Dismissing the Government and Other Changes Regarding the Highest State Organs.” See the draft of the act submitted to Wieslaw Chrzanowski, Seym’s Marshal by the President Lech Walesa, Mar. 12, 1991.


251 The text of the Small Constitution has been published as Ustawa Konstytucyjna of August 1, 1992 on Mutual Relations Between the Legislative and the Executive Power and on the Local Government in EKONOMIA I PRAWO, [ECONOMICS AND LAW], Aug. 7, 1992, Nr 185, at VIII.

252 See Lech Mazewski, Wzmocnienie Państwa [Reinforcing the State], RZECZYPOSPOLITA [REPUBLIC], Sept. 18, 1992.

253 Konstytucja, supra note 250, at 11.
Small Constitution introduced the so-called "constructive vote of no confidence" which provides that in dismissing the Prime Minister, the Seym must simultaneously designate a successor by an absolute majority.\(^{254}\) Third, the draft significantly increased the power of the Cabinet. The Prime Minister was made directly responsible to the Seym, and the President was stripped of the power to ask the Parliament for the Cabinet's dismissal. On the other hand, the draft gave the President and the Prime Minister the joint power to replace ministers without the consent of the Seym. In contrast to the Constitution in force, the draft allowed the Cabinet to ask the Seym for permission to legislate by decree. Fourth, the amended 1952 Constitution provided that a separate statute would determine which acts of the President need to be countersigned by the Prime Minister. The statute, however, has never been passed. The draft provides a list of actions, such as calling elections of the Parliament, dissolving the Parliament, vetoing the Parliament's legislature, and appointing judges, which do not need to be countersigned by the Prime Minister or one of the other ministers. In other actions, the President must cooperate with the Cabinet. The President has important checks on the Seym with the veto power and on the Government with the veto power over its decrees. In contrast, should the President attempt to bypass the Seym by means of referendum, the cooperation of the Senate is required.\(^{255}\)

The draft of the Small Constitution was widely praised as the result of a clever compromise which could be recognized as a "success of the Polish democracy."\(^{256}\) On the other hand, it also has been attacked by the Center Alliance and the Movement for the Republic, headed by former Prime Minister Jan Olszewski, which claimed the draft gave preference to the presidential system.\(^{257}\) Despite the opposition of these two parties, on August 1, 1992, the Seym adopted the draft by a two-thirds majority.\(^{258}\) The draft was submitted to the Senate which returned a heavily amended

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\(^{255}\) Konstytucja, supra note 250.

\(^{256}\) Osiatynski, supra note 226, at 8. Zbigniew Witkowski, counselor for the Senate Constitutional Commission, is of a different opinion and claims that the draft "is not a great success of Polish democracy. It is rather an evidence that we do not know how to reach democracy." Jaka Bedzie Ta Mala? [What Will be This Small?], GAZETA WYBORCZA [ELECTORAL GAZETTE], Sept. 18, 1992.


\(^{258}\) Mala Konstytucja Uchwalona, [The Small Constitution Adopted], GAZETA KRAKOWSKA, [CRACOW'S GAZETTE], Oct. 17-18, 1992, at 1.
For final adoption, the interim “Small Constitution” again needed the vote of a two-thirds majority of the Seym to override the Senate’s opposition.259

The procedure of the Seym’s voting over the Senate amendments became the matter of a major controversy. The Seym’s procedural rules initially provided that the Seym should vote on the amendments twice, once to reject an amendment and the second time to accept it, if the amendment has not been voted down. In both instances, a majority of two-thirds was required to decide about the future of the amendment. However, this procedure may result in a legislative deadlock. If one-half of the Seym deputies vote against the amendment, it is not rejected because a two-thirds majority is needed for this purpose. If, however, the other half of the deputies supports the amendment, it also will not be accepted due to the lack of the required qualified majority of two-thirds. The amendment is neither rejected nor accepted as is the whole act, a constitution, or a regular statute, which has been subject to the amendment process. The described scenario causes a clear legislative impasse.

The rules of procedure were changed in July 1992 when it was decided that the Seym would vote only once; a two-thirds majority is needed to reject the Senate’s amendments, but when they are not rejected, they are automatically adopted. This procedure greatly increased the role of the Senate because the support of one-third of the Seym’s deputies would be sufficient to adopt the Senate’s amendments. Confronted with the heavily amended version of the Small Constitution, in October of 1992, the Seym decided to change the rules of procedure again. The new procedure distinguishes between regular statutes and constitutional acts. As far as regular statutes are concerned, the Seym votes twice, with a two-thirds majority needed to reject the Senate’s amendments and a plurality required to accept them. The possibility of a deadlock was decreased but not eliminated. In the case of constitutional amendments, it was decided that the Seym should vote only once. A qualified majority of two-thirds of the vote is necessary to adopt the amendment but if the amendment is not adopted it is automatically rejected. The role of the Senate was reduced as the one-third plus one of the Seym deputies voting against the adoption of the Senate’s constitutional amendment would be enough to kill the Senate’s amending action.

The decision to change procedural rules was challenged as unconstitutional in the Constitutional Tribunal which delayed the process of the adoption of the Small Constitution by one month. In mid-November, the Constitutional Tribunal ruled in favor of the Seym's action and on November 17, 1992, President Walesa signed a new interim Polish Constitution which is to become an important component of a brand new constitution, the completion of which is not expected before the end of 1993.

b. The Republic of Czechs and Slovaks

Retreat from Communism: One who is aware of the comparative dimension of the process of the East-Central European countries' retreat from communism easily finds out that the striking similarities in the new democracies' reform programs have been based on several commonly recognized priorities, such as democratization, resocialization, and marketization. Democratization means the radical transformation of the constitutional system through the replacement of totalitarian or quasi-totalitarian mechanisms with a legal framework in which the supreme power would be truly vested in the people and exercised by them directly or indirectly. Resocialization is conceived as the real and dramatic recovery of the society from the ethical crisis caused by the socialist double standard of morality, widespread corruption, forced labor, disrespect for social values, unaccountability of decisionmakers, rewarded incompetence, etc. Marketization means a fundamental structural economic change signified by massive privatization, price liberalization, the introduction of internal exchange convertibility, a certain amount of competition, and the elimination of most governmental subsidies. In some countries, however, these remarkable similarities in projecting major social, economic, and political goals are overshadowed by the very specific local problems among which the importance of the ethnic controversies is second to none. This is the case of Czechoslovakia where the post-glasnost constitutional development unfolds its special features only when analyzed in the context of the particular ethnic problems faced by this country. Katarina Mathernova wrote,

People often view the Czech and Slovak Federative Republic (CSFR), Hungary and Poland jointly as being countries of

\[\text{\cite{Bieron}}\]
the former Eastern bloc most likely to achieve democratic political and market economic reform. The recent constitutional developments of these three countries do possess some similar traits—all three have striven to reinstate the rule of law, create new democratic structures, protect fundamental rights and freedoms, create a system of reliable checks and balances, and introduce a genuine judicial review. It is important to realize, however, that despite these similarities, the current constitutional debate in Czechoslovakia is fundamentally different from the debate in the other countries.

The most fundamental difference is that Czechoslovakia is not ethnically homogeneous, while both Hungary and Poland are more or less ethnically homogeneous societies.\(^{261}\)

The dissolution of communist power in Czechoslovakia began at the end of 1989 with mass pro-reform protests in Prague and other cities, the formation of the opposition group “Civic Forum,” and the speedy resignation of the Communist Party General Secretary, Milos Jakes, and the 13-member Politburo.\(^{262}\) The initial stages of the anti-communist retreat looked so smooth that the western commentators, following Timothy Garton Ash, named the Czech revolution “gentle” or “velvet.”\(^{263}\) Tony Judt wrote that “[i]n contrast with its Polish and Hungarian neighbors, Czechoslovakia in 1989 had undergone no gradual political liberalization, no partial economic reform.”\(^{264}\) But Czechoslovakia also did not incur the massive debts to Western banks that were expected to cripple its neighbors like Hungary and Poland; in contrast, Czechoslovakia was entering the era of democracy with the reputation of a “specialist supplier within the East European common market.”\(^{265}\) Moreover, Czechoslovakia had a communist leadership well-aware of the inevitable collapse of their world and ready to learn from the


\(^{264}\) Id. at 96.

Polish and Hungarian lessons.

After President Husak's resignation, a new "coalition government of national understanding" was sworn in. The main objectives of this interim government, under the direction of Prime Minister Calfa, were first to lead the country to its first free elections since 1948, to be held in June 1990, and second, to revive the stagnant economy.

The first signs of hope for reform in Czechoslovakia came with the election of Alexander Dubcek as chairman of the Federal Assembly on December 28, 1989 and with the election on the following day of Vaclav Havel as President of the country. Dubcek had been out of the political scene since 1968 when his attempt to introduce reform to Czechoslovakia had been crushed by the Soviets. Havel, who had been jailed several times for his subversive views and controversial plays, had never even intended to run for a political office. Havel and the Civic Forum had, however, been gaining respect and support from the Czech people, who were desperately in need of reliable political leadership. As the first non-communist president of Czechoslovakia since 1948, Havel was unanimously elected by all 323, still predominantly communist, Assembly members.

In April 1990, the federal Assembly in Czechoslovakia adopted a new name for the country, the "Czech and Slovak Federal Republic." The heated debate between Czech and Slovak representatives over the initially proposed names "Czechoslovak Republic," "Republic of Czechoslovakia," or "Czechoslovak Republic" was a clear symptom of the deep division of sentiment between the country's two major nationalities.

The first post-war free elections took place in Czechoslovakia in June 1990. They were based on the electoral law which limited the number of parties seeking election to those that were able to show proof of either 10,000 members or 10,000 signatories, further limiting the number of parties represented in the Federal Assembly to those which could secure at least 5% of the popular vote. The turnout at the polls was overwhelming with

266 Id.
268 Judt, supra note 262, at 100.
270 Judt, supra note 262, at 105.
271 Id. at 106.
96% of the 11.2 million eligible voters casting ballots. The two parties that dominated elections were the Czech group, Civic Forum, and the Slovak counterpart, Public Against Violence. Together, these parties received 46.3% of the national vote and secured 170 seats in the new 300-member bicameral parliament. Re-elected as President, Havel asked Marian Calfa to form a new government.

Upon assuming office, President Havel and Prime Minister Calfa faced massive economic and social problems which the people expected them to resolve during their two-year terms. Between February and June 1990, the Czechoslovak Assembly passed some sixty laws which were intended to end monopolies and price controls, and establish the right to free enterprise. After the election, the government managed to follow with several important economic regulations dealing with privatization, restitution, foreign exchange, banking, and foreign investment. These laws were expected to start the transformation from a communist society into a free-market economy. As in other new European democracies, the new laws also led to social tension, unemployment, and strikes. The slowdown in the economy hit the Slovak Republic much harder than the Czech Republic.


273 Klas Bergman, *Civic Forum Faces New Hurdles in Prague*, CHRISTIAN SCI. MONITOR, June 13, 1990, at 6, available in LEXIS, Nexis Library, CSM File. In the lower chamber, the House of People, the Civic Forum and Public Against Violence won 87 of the 150 seats, and in the House of the Nations the two parties won 83 of the total 150 seats. The Communist Party of Czechoslovakia, with 13.6% of the vote, won 47 of the 300 seats in parliament, while the Christian Democratic Union with 11.6% of the vote won 40 seats, the Moravian autonomists won 16 seats, Slovak separatists 16 and the Hungarian minority 13. Surprisingly enough, the communists took second place in the elections; originally the Christian Democratic Union, composed of the People’s Party and the Czech and Slovak Christian Democratic parties had been predicted to take second place.

274 Havel was re-elected as president on July 5. Peter S. Green, *Havel to Ask Former Communist to Form Czechoslovak Government*, UPI, June 13, 1990, available in LEXIS, Nexis Library, UPI File.


276 The de-control of prices was set to happen in two stages: the first on July 1, 1990; the second in January 1991. Judt, *supra* note 262, at 103.

277 Mathernova, *supra* note 261, at 481.

The reports showed that Slovakia suffered from four major disabilities:

First, for strategic reasons 80 percent of Czechoslovakia's arms industry was located in the Slovak Republic. The program of military conversion has, therefore, hit Slovakia far harder than the Czech Republic. Second, most of the civilian industry in Slovakia is based on the processing of raw materials which are utilized by domestic industry. Thus Slovakia has only limited means of exporting directly and is in fact responsible for only 20 percent of the federation's total exports. Third, agriculture accounts for a major portion of the republic's GDP (Gross Domestic Product), and the crisis in Czechoslovak agriculture has thus hit Slovakia much harder than the Czech Republic. Fourth, because of its proximity to the former states of the CMEA (Council for Mutual Economic Assistance), Slovakia was highly dependent on direct and transit trade with those states. The collapse of that trade has also hit Slovakia harder than the Czech Republic which borders on Austria and Germany.  

These problems exacerbated the political tensions between the two members of the federation.

The Break-down of the Constitutional Process: The other major target of the Havel's 1990-92 presidential term was constitutional reform which was widely expected to create a firm legal background for the economic transformation. After the beginning of the Czechoslovak revolution in November 1989, several amendments were passed to purge the Constitution of 1960 of its Stalinist legacy. Similar to those of Poland and Hungary, the new Czechoslovak constitutional amendments eliminated the provisions on the leading role of the Communist Party and modified the role of an

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279 Int'l Risk Guide, supra note 265.
One year later, in November and December 1990, the Parliament succeeded in passing a number of piecemeal amendments to the Constitution, most notably the Bill of Rights and Freedoms, as well as an act on the division of competencies between the two republics. In March 1991, the Assembly adopted a constitutional act on the constitutional court and, in July 1991, another act on the judiciary. Further attempts, however, to advance works on a new constitution brought even more frustration and disappointment than had the economic reform.

The balance of political powers in the Federal Assembly clearly results in a failure of the constitutional process. Although the Czech Civic Forum and Slovak Public Against Violence won the 1990 elections, neither secured the three-fifths support necessary to push through constitutional changes. Czechoslovakia has a bicameral parliament (Federal Assembly), comprised of a 150-member House of the People and a 150-member House of the Nations. Following the 1968 Federation amendment, which introduced "the prohibition of majoritarian rule," the Czech and Slovak representatives in the House of the Nations vote separately. As Katarina Mathernova observes, "[t]hese voting procedures result in a DE FACTO creation of a three chamber Federal Assembly consisting of the Chamber of People and the Czech and the Slovak parts of the Chamber of Nations." A bill is approved only if it is passed by a majority of the total number of the

281 In contrast to Poland, the Czechoslovak President's powers are modest. He is elected by the Federal Assembly, can dissolve the Assembly only if it cannot agree on the budget, and can appoint the Government which can be easily voted out by the Assembly. He cannot call for a referendum, rule by decree, or veto the acts of the Assembly. Id. at 603-05 (Articles 60-65, Constitutional Law on the Czechoslovak Federation).


284 See CONSTITUTIONS OF THE COMMUNIST WORLD, supra note 276, at 597-98 (Constitutional Law on the Czechoslovak Federations, of 27 Oct. 1968, art. 42). K. Mathernova explains "The majoritarian rule (a majority outvoting a minority) is prohibited, i.e., deputies in the two parts of the Chambers of Nations have to vote separately, when voting on bills regulating taxes, price policy, customs, technological investment, labor, wages and social policy, press, media, economic administration, establishment of federal organs of state administration, foreign economic relations, any budgetary questions and issues of citizenship. Interestingly, the prohibition of majoritarian rule does not apply to votes of no confidence to the government (the executive)." Mathernova, supra note 261, at 482 (citations omitted).

285 Id. at 483.
representatives of each republic. Constitutional acts and amendments, the declaration of war, and the election of the President require a three-fifths majority of the deputies of each house. In practice, this means that 38 votes of either the Czech or Slovak part of the Chamber of Nations can block any ordinary law and 31 votes in either part can block constitutional acts and amendments.

After the June 1990 elections, the winning parties in both Republics had suffered from factional wars within, splitting into rival groups. In February 1991, the Civic Forum, which had been the strongest party in the Czech region, split into 3 parties: the center-right Civic Democratic Party, whose leader was Finance Minister Vaclav Klaus; the center-left Civic Movement, led by Foreign Minister Jiri Dienstbier; and the small center-right party Civic Democratic Alliance, supported by Federal Economy Minister Vladimir Dlouhy. Public Against Violence had split into two factions: those who supported the ousted Slovakia Prime Minister Vladimir Meciar and those who did not. Meciar, the former communist and outspoken speaker for greater autonomy for the Slovak republic, was forced out of office in a power struggle in 1991 amid allegations that he had worked for years as a secret police informer. Meciar was replaced by the Christian Democrat leader, Jan Carnogursky, who opted for keeping the federation together but also wanted much larger autonomy for his republic. Being in opposition to Carnogursky, Meciar joined a rival party, the Movement for Democratic Slovakia.

The fractionalization of the political movements doomed the chances for further constitutional development at the federal level. At the beginning of 1992, the Federal Assembly considered the possibility of adopting an interim constitution, fashioned after the Polish “Small Constitution.” The law was intended to comprise three chapters of a federal constitution regulating the relations between the president, federal parliament, and federal government. However, the bill failed to pass, as did President Havel’s proposals for a ratification of the new federal constitution by the Czech and Slovak

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287 Mathernova, supra note 261, at 483.
289 Mary Battiata, Slovaks of Two Minds Over Separation from Big Czech Brother, WASH. POST, Sept. 10, 1992, at A22.
290 Mathernova, supra note 261, at 488.
National Councils, the proposed amendment to the Referendum Law which would allow the president to initiate a referendum with the consent of the federal government instead of the federal parliament, and the amendment which would allow the president to dissolve the parliament when two chambers are unable to agree on a draft bill.291

On the level of the republics, the Slovak National Council submitted its draft Constitution of the Slovak Republic for public discussion.292 The basic text of the draft, which had been worked out from the coordinated proposals and positions of the political parties and the political movements, provided for a unicameral parliament, the Slovak National Council, and for numerous alternative solutions suitable either for an independent republic or an autonomous republic envisaged as a component of "the joint state."

The Velvet Divorce of the Czechs and Slovaks: For the country headed into the 1992 elections, the problem of the dissolution of the 74-year-old federation became an issue of foremost importance. Whereas in the 1990 elections the choices boiled down to "anybody but the communists," in the 1992 elections the voters were deciding on the future existence of the country. The results of the elections in the two republics were the exact opposite of each other.293 In the Czech Republic, for instance, the Civic Democratic Party (CDP) led by Vaclav Klaus won the most votes; Klaus basically advocated a speedy transformation to a free market and the maintenance of a common state.294 The CDP won 33 percent of the vote to the Federal Assembly and 30 percent to the Czech National Council.295 In Slovakia, on the other hand, the Movement for a Democratic Slovakia (MDS), led by Meciar, who advocated slowing down the reform process and independence for Slovakia, won the most votes. The MDS secured 34 percent of the vote to the Federal Assembly and 37 percent of the vote to the Slovak National Council.296

With the election campaign taking on a highly ideological tone the emphasis shifted from the preparation of a constitution to the accelerated

291 *Id.* at 496-97.
295 *Id.* See also New Czech, Slovak Leaders Accelerate Separation, E. EUR. CONST. REV., SPECIAL REPORT, Summer 1992, at 10.
296 *Id.*
process of the disintegration of the Federation. In summer 1992, the Czech and Slovak leaders worked out an agreement in which, on January 1, 1993, the country would split into two separate and independent states with two currencies and constitutions.297 This agreement, which allowed for a peaceful separation of the two republics and a gradually reduced federal role, was the only structure on which the Czechs and Slovaks could agree.298

The future of the country was an issue which determined the tone of the presidential elections. These elections, held in early July 1992, resulted in the parliament, led by Slovak deputies, rejecting the re-election of Havel. Although Havel was the only candidate in the first round of voting, he was barred from the next round which was scheduled for later in July. Havel was entitled to remain in office until October 5, 1992, if parliament could not appoint a successor. He resigned, however, in response to the Slovak parliament's declaration of the sovereignty of Slovakia on July 17, 1992.299

Taking another step closer to separation, the Slovak parliament approved a draft constitution on September 1, 1992, providing for dissolution of the federation with the two republics cooperating only in custom and monetary matters.300 By January 1, 1993, the velvet divorce of the Czechs and Slovaks became an accomplished fact.

c. Hungary

Of all Central European countries Hungary seems to be the least determined to adopt a brand new constitution. The current political structure in Hungary was formulated by the 1949 Constitution which was heavily amended in 1989. The 1989 Amendments contain a broad range of human rights protections and provide for a democratically elected Parliament,301 a parliamentarily elected President,302 and an independent judiciary.303


298 Andrew Nagorski, *It Was Good While It Lasted: Czechs and Slovaks Decide to Go Their Own Ways*, NEWSWEEK, June 29, 1992, at 33.


301 HUNG. CONST. ch. 2, § 20.

302 Id., ch. 3, § 20A.
The 1989 amendments confirmed a temporary character of the constitution but the further constitutional development was slow. At the time of this writing, the chances for a quick adoption of the brand new Hungarian basic laws seem to be slim.

Several factors contribute to the political stalemate which makes further constitutional reform in Hungary very difficult. First is the crumbling support for the ruling parties. Two rounds of Parliamentary elections held in March and April of 1990 determined the distribution of the parliamentary seats between the main political forces. The winning Hungarian Democratic Forum (HDF), with 43 percent of the parliamentary seats, formed the governing coalition with the Independent Smallholders Party (ISP), which gained 11 percent of the seats, and the Christian Democratic People's Party (CDPP), which controlled 5 percent of the seats.\textsuperscript{304} The opposition was comprised of the Alliance of Free Democrats (AFD)(23 percent of the seats), the Hungarian Socialist Party (HSP) (8.5 percent of the seats), and the Federation of Young Democrats (Fidesz) (5.4 percent of the seats).\textsuperscript{305} After the elections, the right-of-center coalition of HDF, ISP, and CDPP held 229 out of 396 parliamentary seats, but the poor showing of the coalition in public opinion polls has contributed to the internal turmoil between the three parties and has eroded the HDF's control of the Hungarian National Assembly. The debates within Parliament have been the subject of much criticism, as members have been accused of debating relentlessly without actually coming to any definable terms. Of the three parties, it is the ISP and the HDF that have been continually at odds, creating an atmosphere of extreme factionalism and excessive politicalization of all legislative work.\textsuperscript{306} This atmosphere provides the opportunity to obstruct any serious attempts at drafting a new constitution.

\textsuperscript{303} Id., ch. 4, § 32A. For a more detailed analysis of the Hungarian constitutional reform, see Ludwikowski, \textit{supra} note 6, at 157-164.

\textsuperscript{304} Bruszt & Stark, \textit{Remaking the Political Field in Hungary: From the Politics of Confrontation to the Politics of Competition, in Eastern Europe in Revolution, supra} note 160, at 51.

\textsuperscript{305} \textit{Country:} Hungary, Kaleidoscope: Current World Data, Aug. 21, 1992, \textit{available in LEXIS, Intnew Library, KCWD File.}

\textsuperscript{306} First of all, there has been a split within the ISP with one section, the Historical Section, supporting the governing coalition and the other section, led by Jozsef Torygan, which does not support the coalition. \textit{Coalition Smallholders Hold Rallies in Support of Government,} (BBC radio broadcast, Apr. 29, 1992), \textit{available in LEXIS, Intnew Library, BBCSWB File. See also} Int'l Risk Guide, \textit{supra} note 265.
Second, the coalition policy also is being attacked from the outside. The possibility of further cooperation between Prime Minister Jozsef Antall, representing the HDF, and President Arpad Goncz, the leader of the opposition party AFD, is heavily tested. Antall agreed to the appointment of Goncz because of a deal struck between the two parties; the HDF members in Parliament supported Goncz in return for the AFD supporting various constitutional changes proposed by the HDF. Although Hungary’s support of a parliamentary system contrasts significantly with the attempts of several East-Central European countries, notably Poland, Ukraine, and Belarus, to introduce elements of a presidential system, President Goncz has sought to increase his prerogatives as president. Although Goncz’s position was largely ceremonial, with no real power or political responsibility, Goncz was widely respected for his significant role as mediator. He has frequently addressed the country on issues involving national policy, has negotiated with the transportation workers during the strike of October 1990, and has used his power to send the compensation bill (providing restitution to former owners of land that had been seized by the Communists) to the Constitutional Court for review. In summer 1992, the disagreement between Antall and Goncz and between the HDF and AFD became more acute. The ongoing dispute has erupted into “open warfare” with Goncz refusing to comply with Antall’s order to fire the directors of the state-run radio and television. Peter Tolgyessy, one of the leaders of the AFD, said recently that Prime Minister Jozsef Antall’s and HDF’s “stability will definitely be questioned in the long-range, and its chances of re-election will decline considerably.”

The third factor which discourages the governing coalition to put forth a new draft constitution is the strength of the Hungarian leftist movement.

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307 The AFD, for instance, supported HDF’s proposal to change the constitutional requirement of a two-thirds majority of parliament to pass some important measures. Arpad Goncz IBC Political Risk Services, May 1, 1992, available in LEXIS, World Library, RPTIBC File.


Recently, commentators observed almost a rebirth of the Socialist party in Hungary. Opinion polls have shown that the socialists are gaining more respect in the public eye. Although it does not seem that the public would ever advocate a return to communism, the public continues to confront the hardships of a market economy, such as unemployment and inflation, with the social protectionism of the communist era. Sensing this growing public support, it is very unlikely that the renamed Communists would easily accept the further purging of their original 1949 Constitution, much less the adoption of a new constitution. The Constitution, amended in 1989 and 1990, still restrains the operations of the Parliament by old procedural rules, called Standing Orders, and provides opportunities for the opposition to obstruct legislation.  

Last but not least, the governing coalition has economic rather than political priorities on its agenda. The economy of Hungary has been declining since the end of Communist rule. In 1991, inflation was up 31 percent at the end of the first quarter. Unemployment was at 10.1 percent at the end of June 1992 with over 547,000 registered unemployed. The main characteristics of the economy at the end of June 1992 were declining production and consumption, and a higher than planned budget deficit. The consensus on the need for foreign investment is overwhelming. The West, along with the IMF and the World Bank, has accommodated Hungary's requests for money. Thirty-four percent of Western companies which were asked to indicate any interest in investing in East-Central Europe gave first choice to Hungary as opposed to 32 percent attracted by Poland, and 29 percent by the Czech and Slovak Republic. Foreign trade between Hungary and the West also has been on the rise. As of 1990, the Soviet Union was the chief trading partner of Hungary, but by 1991 Hungary's trade with the Soviet Union had fallen to almost nothing,

314 Mid-Year Unemployment Figures Published, Daily Report: East Europe, (Foreign Broadcasts Information Service), Aug. 6, 1992, at 23.  
while trade with the West had soared.\textsuperscript{317}

When the coalition came to power, Prime Minister Antall maintained that the key to moving forward was stimulating foreign investment and trade.\textsuperscript{318} Although Antall began his term with the intention of transforming the Hungarian economy into a market economy, concerns over unemployment and inflation slowed the reform process. For the most part, the Hungarian people do not seem satisfied with Antall’s performance. While the leaders of various nations hold Hungary in high esteem as the pioneer of reform in Eastern Europe, the general mood of the Hungarian population is one of dissatisfaction and pessimism.\textsuperscript{319} Taking those factors into consideration, it is understandable that, although the HDF and Antall had on their original agenda the institution of more constitutional reform, there has yet to be any significant changes to the Constitution, with the exception of minor revisions in 1991 and 1992. The overriding concern in Hungary seems to be the mounting inflation and unemployment rates, at the expense of working on the proposed constitutional reforms.

In summary, the partisan pattern of voting in the Hungarian National Assembly, does not leave any room for constitutional restructuring. According to Article 24, section 3 of the Constitution, the amendment or the adoption of new basic laws requires the vote of two-thirds of the National Assembly.\textsuperscript{320} Hence, without support of the opposition parties, the coalition occupies only approximately 60 percent of the 396 seats in the Assembly and falls short of the majority needed to pass a brand-new constitution.\textsuperscript{321}

3. Why the Firsts are the Lasts

The anti-communist revolt of 1989 destroyed the “magic” of Marxist-Leninist cliches such as “justice for all,” “collective mentality,” and “perfect equality.”\textsuperscript{322} The revolt compromised once sacred and apparently all-explaining keystones of Marxism, “the rules of dialectics,” “the concept of

\textsuperscript{317} Market Reports, \textit{supra} note 313, at 40.

\textsuperscript{318} \textit{Id.} at 37.

\textsuperscript{319} \textit{Hungary’s Tough Times Reviving Political Jokes}, CHI. TRIB., May 7, 1992, at 31C.

\textsuperscript{320} HUNG. CONST. ch. 2 § 24 (3).

\textsuperscript{321} Racz, \textit{supra} note 309, at 22.

class war,” “the thesis about withering away of state and law.” Societies proved to be pluralistic rather than dichotomous structures. Social conflicts did not explain themselves through a simplified concept of two-class clashes. The whole thesis of the withering away of state and law found itself in a trap. Stalin proclaimed that the dictatorship of the proletariat abolished classes. Thus, if law and state were nothing but instruments of class domination, they could exist only in societies split into opposite classes. Class law without classes was a self-contradictory concept and no “dialectic decorative rhetoric” could overcome the paradox of its existence in the socialist classless society.

Among all these window-dressing ideas which for decades served as a sort of ideological facade, or social cement rather than real creed of communism, one thought proved to be more time resistant than others. This was a Hegelian idea, that “it is not consciousness that determines life, but life that determines consciousness.” This idea, transformed into the main thesis of Marxist-Leninist historical materialism, proclaimed that conditions of life, economic basis, and means of production determine human consciousness, ideas, and even politics. Ideas, views, and convictions have consequences but they are just factors in the sum total of the determinants of life. Economic basis is the dominant engine of the evolution of human civilization. In Marx’s view, if the social superstructure of moral, legal, religious, and political ideas does not keep up with the development of economic infrastructure, it has to be changed by class war or revolution.

Ironically, communism did not prove to be exempt from this regularity. All moral, ideological, and social deficiencies of communism notwithstanding, the crisis of this system was sealed by its irreversible economic failures. Similarly the fate of the new democracies seems to be linked to the successes of their large-scale economic experiments. As Maria N. Todorova wrote, “for all the euphoria over democratization, intellectuals’ revolution, and the rest, economic problems have dominated the public discourse throughout.”

The new experiments of East-Central European countries with democratic mechanisms illustrate this thesis perfectly. The sentiments of the people in

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325 Todorova, Improbable Maverick or Typical Conformist? Seven Thoughts on the New Bulgaria, in EASTERN EUROPE IN REVOLUTION, supra note 160, n. 2.
East-Central Europe for their communist past seem to be determined by the signs of a quick economic recovery or the symptoms of further economic stagnation. One may observe that the graver the economic hardships in the new democracies, the stronger the popular yearning of the people for return to the illusive state protectionism of the communist era. Thus, the chance of the communist reformers returning to power may be increasing.

Although some nostalgia for communist stability is common to all new democracies, one has to observe that economic, cultural, and ethnic factors impacted the reform process differently in the various countries. More economically advanced countries like Hungary and less socially, ethnically, and religiously fragmented countries like Poland seem to be more immune to promises of “post-Communist communism” than less developed countries with weaker democratic and liberal traditions such as Albania, Bulgaria, and Romania.

Resistance to a communist comeback does not, however, automatically entail economic and political success. Paradoxically, the communist governments which retained power sometimes were more efficient in terms of the speed of a constitutional transformation. Although the constitutional changes were not profound enough and the new constitutions still bear communist stigmas, the constitution-drafting process could be quickly completed by the former communists desperately trying to build a reputation as reformists and by the communist controlled parliaments.

The countries which started their peaceful process of retreat from communism early, such as Poland, Hungary and Czechoslovakia, overestimated the strength of democratic forces and the maturity of their societies’ political culture. The factional struggles of deeply pluralized legislative bodies were counterproductive and delayed the legislative processes. The deputies learned how to speak openly and criticize each other faster than they learned to respect the arguments of the opponents. On the one hand, the more “velvet” the first stage of the transition, the more compromises that were made. This process further protracted the advancement of democratic reform. On the other hand, the process of constitution making cannot be rushed, and it may happen that the countries which “come late” will adopt mature constitutions of a well-tested durability. Still, the last ones might be the first ones.
II. FABRIC OF THE NEW CONSTITUTIONS: OVERVIEW OF A NEW CONSTITUTIONAL MODEL.

The main goal of this study is to report on the constitutional process in the new European democracies from a comparative perspective. This entails an attempt to discover similarities and differences in the processes of the constitutional works with special emphasis on the examination of common fundamental features of the new constitutional drafts.

Clearly, countries subject to examination have shared some distinctive, key elements that characterized the socialist system, such as mono-party rule, socialist ownership of productive resources in the form of state property, income redistribution controlled by the government, and the principle of central planning. They shared also the system of "democratic centralism," which was to combine a centralized decision-making process with dependence on the creative activity and initiative of local managers. Among these features one could easily discover the common core of the socialist constitutions.

The preceding part of this article identified some common economic, social, and political problems shared by the new democracies in their first post-socialist years. The question remains as to what extent these problems reflect on the formation of the common core of the new constitutions. To what extent will this core absorb the basic principles of Western constitutionalism? Is there any new constitutional model which is surfacing in this region? To respond to these questions, several issues, most frequently discussed in the process of the constitutional works, were selected.

Although the final evaluation of a "post-socialist" model must be postponed until more East-European constitutions are formally adopted, the process of constitutional drafting is so advanced that some tendencies can be already identified and some observations deserve notice.

326 See Ludwikowski, supra note 6, at 125-36.
327 Although long and exhaustive bills of rights can be found in all new constitutions and constitutional drafts, their more detailed analysis has to be based on the examination of the actual record of these countries in human rights protection. This task was left for a separate study. For further information, see, PRAWA, WOLNOSCI I OBYWATELDA W NOWEJ POLSKIEJ KONSTYTUCJI [RIGHTS, FREEDOMS, AND DUTIES OF MAN AND CITIZEN IN A NEW POLISH CONSTITUTION], 1990; see also Human Rights: The Development of the Constitutional Framework and the Prospects for the Future, in CONSTITUTIONALISM AND HUMAN RIGHTS; AMERICA, POLAND AND FRANCE, (Thompson and Ludwikowski eds., 1991) at 121-60.
A. The Structure of the New Constitutions

The fabric of most constitutions consists of such essential components as a preamble, general principles of state organization, fundamental rights and freedoms, system of state governance including sections on central and local government, sections on judicial structures and judicial control of the constitutionality of laws, concluding provisions on amending the constitutions, emergency measures, and some miscellaneous or transitional provisions. One who would undertake the task of checking some 20 constitutions from around the world adopted in the last 10 years will find all these components in many of these constitutions and most of them in all of the constitutions. For example, the majority of constitutions reviewed contain preambles and a section on local government and judicial review, but virtually every constitution contains a section on general principles of state organization, fundamental rights, central government, the judiciary, and procedures for amendments.

Viewed from this perspective, the new East-Central European constitutions and constitutional drafts do not reveal any glaring abnormalities. Most of the new constitutions and constitutional drafts are of moderate length of 150-170 articles. While the communist constitutions usually contained very...
lengthy preambles stressing history and goals of socialism and providing many anti-imperialism references\textsuperscript{331}, the preambles of the new East-Central European constitutions are short or omitted altogether.\textsuperscript{332} General principles and a section on fundamental rights and freedoms are in every constitution without exception. The list of rights usually breaks down into sections or chapters dealing with political, social, and economic rights, as well as a part describing the duties of the citizens. Some of the constitutional drafts, such as the Ukrainian, Lithuanian, and Azerbaijani drafts, contain special chapters on civic society, which usually cover the state regulation of societal relationships with a special focus on ownership rights. Several countries, such as Slovakia, Romania, Belarus, Bulgaria and Estonia, have separate sections on economy, finance, and state budget.

The sections on the horizontal and vertical distribution of powers between central and local government and legislative, executive, judicial bodies can be found in all constitutions. Some of the drafts, the Ukrainian act for example, contain a separate chapter on territorial structure of the country and a special section on the electoral system and referendums. Following the old Soviet model, the Lithuanian draft and the new Estonian Constitution retain the chapters on foreign policy, and Ukraine, Lithuania, Hungary and Albania include special chapters on national defense.

Judicial control of the constitutionality of law, traditionally discredited by the Stalinist constitutions, is now also a standard element of the reviewed constitutions. Most of the constitutions and drafts, with the exception of the Slovak and Estonian Constitutions, contain separate chapters on the Constitutional Court or the Constitutional Council, emphasizing that these bodies are vested with the special powers and are separate from the regular judicial organs. All of the constitutions and drafts contain concluding sections which usually cover the amendment provisions,\textsuperscript{333} emergency measures and miscellaneous provisions regarding the coat of arms, the seal, the flag, the anthem, and the capital.


\textsuperscript{332} Eight of the reviewed acts have short preambles, but two of them, the Constitution of Romania of December 1991 and the draft of Lithuanian Constitution of February 1992 do not contain preambles at all.

\textsuperscript{333} In the Hungarian Constitution (as amended by August 24, 1990) the amendment provisions are short and are included in the section on the National Assembly. See Hung. Const. ch. 2, § 24(3).
B. The Description of the State

Wojciech Sokolewicz, Professor of Constitutional Law at the Institute of Law Studies of the Polish Academy of Sciences wrote:

Most generally speaking, the changes now in progress in the political systems of Eastern Europe consist in transition from autocracy to liberal democracy; from arbitrariness of the Communist Party-controlled State to unconditional subordination of State to the rigors of law; and from a loose system of sources of law, their hierarchy obscure in practice, to a coherent and strictly hierarchical one, based on a stable foundation of the national Constitution treated as the basic statute and the supreme law.\textsuperscript{334}

The political transformation of the post-communist world from "autocracy to liberal democracy" is best manifested by the changes in the constitutional descriptions of the new East-Central European states. The socialist rhetoric has been carefully eliminated from the new basic laws which no longer describe their countries as "socialist democracies" or "people's republics." The typical Stalinist phraseology, vesting power in the working classes as represented by their communist parties and emphasizing the working masses struggle with "exploitation of man by man," has been replaced by references to popular sovereignty, political independence and territorial integrity of the countries. Virtually without exception, every new constitution and constitutional draft contains the declaration that people are the source of power, and that in its external aspect, the principle of sovereignty is manifested by the exclusive competence of the state to control its own territory. Besides all these references and the usual explanation of a unitary or federal character of the state, both well-known to contemporary Western constitutionalism, there are several terms or labels, commonly used for the description of the post-communist countries, which warrant some atten-

\textsuperscript{334} Sokolewicz, Democracy, Rule of Law, and Constitutionality in Post-Communist Society of Eastern Europe, DROIT POLONAIS CONTEMPORAIN (POLISH CONTEMPORARY LAW), (1990 n.2) at 5-6.
All new constitutions and constitutional drafts describe the state as "democratic." The majority of them use this term in conjunction with the description of the state as "a state of law" (in Poland and Romania), "a jural state" (in Hungary), "a juridical state" (in Albania), "a state recognizing supremacy of law" (in Azerbaijan), or "a law-based state" (in Belarus, Bulgaria, Kirghizistan, Russia and Slovakia). All these deviations in references to the well-known French concept of "état de droit" or the German "Rechtsstaat" stem from translational subtleties rather than doctrinal differences and with very few exceptions one can note a clear tendency of the drafters to emphasize the importance of this idea and to provide quite elaborate explanations of it.

Without searching for a more extensive definition of democracy, the purposes of the constitutional descriptions of the state as "democratic" are (1) to make the people as a whole a subject of the sovereignty, (2) to state that the people manifest their will in a variety of ways and that the principle of political pluralism is a fundamental element of a well-functioning constitutional government, (3) to express that "the government of the people" means the rule of the people's majority and the respect for the rights of minorities and individuals, (4) to stress that the government "by the people" means both the representative government and some elements of direct democracy, and (5) to emphasize that the government "for the people" means the idea of civic society, which subordinates the state to the societal interests. It is worth noting that the forms of direct participation of the people in the decision-making process are not unanimously defined. Some constitutions provide for direct democracy in the form of referenda, while others leave it to the discretion of the parliaments. The variations in this aspect reflect the different priorities and interpretations of the drafters.

The search for common structure of the new constitutions has been restricted to the newly adopted constitutions and the drafts which provided relatively elaborate concepts of the constitutional provisions. This subchapter and those that follow search for general common features of the new East-European constitutionalism. For this reason, the author used all new constitutional drafts available to him until January 1993. In addition to the texts listed in note 326, other documents analyzed are: Draft of the Constitution of Kazakhstan (dated June 2, 1992), the Constitution of Kirghizistan (of June 16, 1992 and August 1992), the Constitution of Azerbaijan (undated, submitted to CEELI evaluation in July 1992), Draft Constitution of the Russian Republic (of March 30, 1992), the Constitution of the Republic of Hungary (as amended by August 24, 1990), Draft Constitution of Albania (of March 1991), and Draft Constitution of the Polish Senate (dated October 1991).

There is no clear reference to the concept of state as "état de droit" in the Constitution of Estonia or the Draft Constitution of Poland prepared by the Commission of the Senate.

See Sokolewicz, supra note 334, at 6 (referring to Abraham Lincoln's famous formula of "government of the people, by the people, and for the people").
people in power (through referenda or plebiscites) are clearly recognized as important democratic instruments. There are references to these instruments of direct democracy in all new constitutions and constitutional drafts and some of these acts, the draft constitution of Belarus for instance, explain these mechanisms in separate chapters. One of the drafts of Kirghizistan’s constitution goes even further, in that it envisages a model of plebiscitary democracy in which the state is described as “a state of people’s self-government” and in which most of the important decisions, such as adoption of the Constitution, creation of the Parliament, elections of the Senate and the President, dissolution of the Parliament, and removal of the President, are made by means of referendum.  

The concept of the legal state, as provided for in the new constitutions, also contains several essential elements. First, it assumes that the state operates within the clear framework of hierarchically arranged legal acts with the basic laws recognized as the apex of the legal system. To clarify the scope of this framework some of the constitutional acts provide an elaborate list of legal acts which fall within the meaning of the law. One can observe that almost all the new constitutional acts incorporate international treaties into the scope of the law, some of them, such as Romania and Hungary, on the basis of parity between domestic and international law, but many of them (Bulgaria, Poland, Slovakia, and Russia) on the basis of precedence taken by international treaties over municipal laws.

Second, the idea of the state of law means legality or submission of the state to the law. It stems from the hierarchical character of state organs and

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340 ROM. CONST. tit. III, ch. I, § 3, art. 72; POL. CONST. art. 6 (Seym Draft).
341 See ROM. CONST. tit. I, art. 11; HUNG. CONST. ch. I, § 7(1); RUS. FED. CONST. art. 3, § 4 (Draft); POL. CONST. art. 7, § 2 (Seym Draft); SLOV. CONST. art. 9.
the principle that every governmental organ acts within the basis of law. The difference between the state and the citizens is that the state and its organs may only do things that are allowed by law, while the citizens may do everything that is not forbidden by law.\textsuperscript{342}

Third, the state of law provides for constitutional guarantees of the observance of the law. The most important of them is the concept of limited government as embodied by the ideas of the division of powers and checks and balances. The constitutional state of law also provides an extended protection for human rights in the form of judicial review of the legality of administrative actions and of the constitutionality of statutes, international agreements, and executive orders. Almost without exception these principles can be found in all the new constitutional drafts.\textsuperscript{343}

As far as the economic and social policy is concerned, most of the constitutional acts present the new democracies as "market oriented" with the market system described as a "social one." "Social" means a widespread support for a still large role played by the state in the relatively egalitarian distribution of wealth. The constitutions of Bulgaria and Romania and the draft constitutions of the Russian Federation, Belarus, and Ukraine clearly use the term "a social state"; the draft constitutions of Poland and Albania\textsuperscript{344} refer to a state of "social justice," the constitution of Slovakia describes the Slovakian state as "socially just" and the constitution of Hungary speaks about "social market economy."

The attitude toward market mechanisms is more diversified. Only a few countries, such as Hungary, Russia, Romania, and Slovakia, call themselves...
clearly "market econom[ies]."  Most of the new democracies declare more cautiously that they are "market-oriented" in their common intention to support economic pluralism, meaning "diversified forms of property," to guarantee the freedom of entrepreneurship, fair competition, and to carry on an antitrust policy. Some other new democracies either try to avoid clear constitutional declarations of their economic policy or, in fact, they lean toward a policy of central planning, limit the scope of activity of a private enterprise, and restrict the private ownership of land and mineral resources. With all these variations one can capsulize the common tendency to describe a new East-Central European state as a democratic, social, law-based republic, recognizing basic rules of the market as natural economic environment.

C. Distribution of Powers

1. The Origins of the Theory of Division of Power

In The Federalist No. 9 Hamilton wrote:

The regular distribution of power into distinct departments; the introduction of legislative balances and checks; the institution of courts composed of judges holding their offices during good behavior; the representation of the people in the legislature by deputies of their own election: these are wholly new discoveries, or have made their principal

345 See HUNG. CONST. ch. I, §9. RUSS. FED. CONST. art. 9, § 1 (Draft) (referring to "the social market economy"). ROM. CONST. tit. IV, art. 134 (stating "the economy of Romania is a market economy"). SLOV. CONST. art. 59 (calling the state "a socially and ecologically oriented market economy"). Art. 59.

346 KAZAKHSTAN CONST. art. 45 (1992 Draft); UKRAINE CONST. art. 6 (1992 Draft); AZERBAIJAN CONST. §IV (1992 Draft).

347 ALB. CONST. arts. 19, 20 (1991 Draft) ("the State attends to planning the entire economic and social activity and to harmonizing national and local interests, with a view to meeting the material and cultural needs of the society and strengthening the independence and defense of the country. The state exercises control over internal and foreign trade"). ESTONIA CONST. art. 32 ("the law may establish, in the public interest, categories of property in Estonia which are reserved for ownership by Estonian citizens, certain categories of legal entities, local government or the Estonian state"). KAZAKHSTAN CONST. art. 47 (1992 Draft) ("the land, its depths, waters, vegetable and animal worlds, and other natural resources are within the exclusive ownership of the Republic of Kazakhstan").
progress towards perfection in modern times. They are means, and powerful means, by which the excellencies of republican government may be retained and its imperfections lessened or avoided.\textsuperscript{348}

In fact, the ideas that the checks and balances of government are essential to free institutions and that the power must be divided among several governmental branches to avoid an arbitrary government were not new. The advantages of the separation of powers were recognized by Aristotle and elaborated by Polubius in his examination of the well-balanced Roman system of power. John Locke listed three powers in the British Commonwealth: legislative, executive, and federative. Locke, however, suggested that supreme power lay in the legislature and did not recognize the judiciary as a separate power. The judiciary was enumerated among "powers" by Montesquieu, "the oracle . . . always consulted and cited on this subject."\textsuperscript{349} But Montesquieu, as Mauro Cappelletti convincingly argued, despite listing the judiciary among "powers," believed that in fact it is no "power" at all. He wrote that "of the three powers of which we have spoken, the judicial is, in sense, null."\textsuperscript{350}

In fact, the American Constitution adopted a Lockean or Montesquieuian model of government only to some extent and in various countries the idea of distribution of powers was applied differently. It was obvious, for example, that despite Montesquieu's references to the English system, the powers in the English model were neither equal nor well separated. In Montesquieu's France, the separation of powers was to impose efficient restraints on the executive power and protect citizens against the absolutism of monarchs. Separation of powers in America was conceived as a guaranty of liberty, but it also was intended to protect the system established by the Constitution against the domination of any single power. As Cappelletti states,

\textsuperscript{348} The Federalist No. 9, at 72-73 (Alexander Hamilton) (Clinton Rossiter ed., 1961) [hereinafter Hamilton].

\textsuperscript{349} The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961).

To be sure, the strict separation, "French style," of the governmental powers, whether or not actually "Montesquieuian" in inspiration, was miles away from the kind of separation of powers which almost contemporaneously was adopted by the American Constitution. Separation of powers in America is better described as "checks and balances."331

Differing needs dictate that in different systems the principle of division of powers means different things. The common idea that the powers of the government should be limited and its functions diffused is also currently implemented in several basically different ways.

In the so-called French model, the principle of division of powers is associated to a large degree with the idea of separation of powers in the sense of actual separation of organs and their functions. Arthur Taylor von Mehren and James Russell Gordley wrote,

The leaders of the French Revolution saw the principle (of separation of powers) in more abstract and conceptual terms. They began with the concept of sovereignty, portions of which were delegated by the nation to each "power." For the "concrete idea of function," there was thus substituted the "abstract idea of power of a special nature that an authority required in order to accomplish its task. Instead of seeing the separation of powers as a political technique, the men of the Revolution announced a dogma of political theory." The principle of separation thus came to be viewed in rigid and abstract terms. Each power was entirely independent of the others; collaboration between powers was forbidden, and theoretically, unnecessary because each had been delegated the fragment of the national sovereignty necessary to discharge its functions.332

With time traditional French mistrust of the judiciary abated, and the French

331 Cappelletti, supra note 350, at 14.
permitted delegation of some functions from the legislative power to the executive. The functional separation became less clear-cut, but still the French system remained a symbol of a rigid concept of distribution of powers.

The system of checks and balances, traditionally associated with the American model, puts emphasis on the equality of power and not on the separation of power. The power is distributed into three organs. Each organ is run by a different team of people, whose functions are to some extent blended and often overlapping. The president can veto legislative acts, and unless the veto is overridden by a two-thirds vote in both houses of Congress, it kills a bill. The president's ability to influence legislation stems from his responsibility to report on the state of the nation, and his right to call Congress into special session and to adjourn the legislature if the two houses cannot agree on a date. The Senate confirms and rejects presidential nominees. The House controls the budget and sets procedures for the administrative agencies, and the courts interpret legislation and the Constitution. As enumerated by one of the early statesmen of the country, John Adams, the checks and balances are as follows:

First, the States are balanced against the general government. Second, the House of Representatives is balanced against the Senate, and the Senate against the House. Third, the executive authority is in some degree balanced against the legislature. Fourth, the judiciary is balanced against the legislature, the executive and the State governments. Fifth, the Senate is balanced against the president in all appointments to office, and in all treaties. Sixth, the people hold in their own hands the balance against their own representatives by periodical elections. Seventh, the legislatures of the several States are balanced against the Senate by sexennial elections. Eighth, the electors are balanced against the people in the choice of President and Vice President. And this, it is added, is a complication and refinement of balances which is an invention of our own, and peculiar to this country.

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353 Fred R. Harris, America's Democracy 58-59 (1983).
In most parliamentary democracies organs of power are not separated, powers are not equal, and the functions are blended. The chief executive officer is a member of the legislative body and is elected by the legislature to run the executive branch. His cabinet members also sit in the legislature, and they simultaneously carry on executive and legislative functions. In this system, the division of powers basically means only that none of the powers can accumulate all basic functions, that is, legislative, executive, and judicial, and that the independence of the judiciary is constitutionally guaranteed. Wade and Bradley wrote that "[i]n many continental (European) constitutions separation of powers has meant an unhampered Executive; in England it means little more than an independent Judiciary." 255

2. The Distribution of Power in the New Post-Socialist Constitutions

Socialist constitutionalism traditionally rejected the doctrine of division of powers and claimed that the entire power was vested in the supreme representative bodies, the people’s legislatures. The socialist theorists maintained that the power in their system was concentrated but that its functions were allocated to different branches of the government. According to Marx, the doctrine of separation of powers is "... in principle nothing else than a profane industrial division of labor applied to state mechanism for the purpose of rationalization and control." 256

An observer of the development of constitutionalism in East-Central Europe must admit that the reluctance to experiment with the idea of the division of powers is still widespread in several former socialist countries. There is no unambiguous reference to this idea in the Constitutions of Hungary or Slovakia or in the Seym draft to the Constitution of Poland. 257 The Constitution of Romania and the draft Constitution of Albania clearly follow the old-fashioned Soviet model and refer to the parliament as "the highest representative body of the Romanian people" or "supreme organ of state power" and to the government only as an organ of state administration which "ensures the implementation of the domestic and foreign policy." The

257 In contrast to the Seym Draft, the draft Constitution of the Polish Senate clearly states that "the State's power is executed by the separated and balanced legislative, executive and judicial organs." POL. CONST. art. 4 (Senate Draft).
court is not described as a "power" but is referred to as "judicial authority" or an "organ of justice."\textsuperscript{358}

The other countries of the former Soviet dominance which have already advanced their constitutional reforms clearly invoke the principle of the division of powers. The Constitution of Bulgaria, for example, does not leave any doubts as to the drafters dedication to this most venerated idea of Western constitutionalism; it declares that "[t]he power of the state is divided between a legislative, an executive, and a judicial branch."

One can observe that in the group of states which have dropped the traditional socialist idea of parliamentary superiority, the American model of checks and balances enjoys popularity. The concept is followed quite extensively in the constitutional drafts of most of the republics of the former Soviet Union, such as Russia, Ukraine, Estonia, Kirghizistan, and Azerbaijan. Furthermore, these constitutional drafts frequently emphasize that balance and equilibrium among the executive and legislative authorities are highly-valued attributes of a good government.

With regard to the vertical distribution of powers between central and local government, the socialist legacy is still perceptible. Each new "team" in all socialist countries has repeated that the decentralization of decision-making could trigger the recovery of the communist system, but each new reform of the local government has been more illusory than real. On the one hand, it was obvious that, given the lack of proper information at the top, local managers were better equipped to deal with economic, social, and political reality. On the other hand, short of returning to a system of market stimulants, the system of central control could be replaced only by the supervision of local workers' committees—a solution that could endanger party dominance. Economic power, once shifted to the working class, would lead to the growth of political power for the masses.

In contrast to all declarations about decentralization of power, the traditional socialist system of so-called "dual subordination" of the local public administration reserved full control over the decisionmaking process to the central governmental bodies. The local representative organs (councils or soviets) were subject to the control of higher representative bodies which could abrogate their acts. They could be dissolved upon decision of the Parliament. Similarly, the decisions of the local executive organs were controlled by the higher executive agencies with the ministers at the top. This system was left intact by the draft Constitution of Albania and has not

been subject to any profound reform in Romania, Bulgaria, or some former Soviet republics such as Kirghizistan or Kazakhstan, where the chief local administrative officers (prefects) are appointed by the government and are the representatives of the central government.359

All other new democracies, such as Poland, Hungary, Russia, Lithuania, Belarus, and Slovakia, show a tendency to give more self-government to territorial administrative units. The local government is guaranteed some budgetary independence and juridical personality, while the central government reserves the right to oversee the legality of the local government’s actions. The inhabitants of the territorial units directly elect the representative bodies which have municipal duties and functions of public administration. In most cases, the local councils or soviets elect the local executive officers, but in at least one state (Slovakia) the Constitution provides that the inhabitants of the municipality directly elect the municipal mayor.360 It can be expected that forthcoming constitutional acts will favor a truly decentralized model of local administration and will shift some portion of power, which until recently attentively guarded by the central government, to the territorial units organized on the basis of wide autonomy.

D. Presidential v. Parliamentary System

1. Major Political Systems

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.361 Although with time the dichotomy

359 ALB. CONST. ch. IV (1991 Draft); ROM. CONST. ch. V, § 1, art. 122. In Bulgaria “the oblast governors” are appointed by the Council of Ministers. BULG. CONST. art. 143, § 1. However, the mayors of the townships are “elected by the inhabitants or the township councils.” BULG. CONST. art. 139. In Kirghizistan “akims,” chief officers of local state administration “act as the direct representatives of the President of the Kirghiz Republic.” KIRGHIZISTAN CONST. art. 82 (1992 Draft); See also KAZAKHSTAN CONST. art. 103 (1992 Draft).


of the political systems dissipated into a variety of mixed models, it is still successfully used in comparative analysis.

Without examining in detail the actual variations of these two major political systems, one may distinguish them by several fundamental features.\(^3\) The presidential system, usually associated with the American political experience, is characterized by a concentrated model of the executive. The president is sole executive and is elected directly by the electorate as the head of state and the head of the 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. They can be called upon by the legislature to account for their actions but they cannot be simply voted down by the legislature's expression of lack of confidence. On the other hand, the president may call a special session of the legislative assembly or adjourn its meetings, but he cannot dissolve the legislature and hold new elections.\(^3\)

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.\(^3\) 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 to call for an election before the end of the parliamentary term. Being the fusion of the executive and the legislature, the parliament is a supreme power over its constituent parts. Douglas V. Verney wrote that "[t]he notion of the supremacy of

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\(^3\) See id. at 175-191 (listing of the basic features of the presidential and parliamentary systems).

\(^3\) See id. at 186-88; see also Harris, supra note 351 at 58.

\(^3\) Verney, supra note 359, at 178-79.
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 forgotten, that neither of the constituent elements of Parliament may completely dominate the other.\textsuperscript{365}

Of the mixed models, the French presidential-parliamentary system seems to attract significant attention of the drafters of the new constitutions.\textsuperscript{366} 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 is directly elected by the people; also, the power of the executive has been strengthened and made less dependent on the parliament. 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. 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 parliament, dissolve the legislature and call new elections. The president cannot veto the acts of the parliament but he may ask for the reconsideration of bills which he opposes. As the ministers 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 which legislates in these areas by decrees.

2. Basic Features of the Presidential and Parliamentary Systems in the Post-Socialist Constitutions

Analyzed against this background, the new constitutional acts break down into several groups. In the constitutional systems of the East-Central European countries, such as Albania, Bulgaria, the Republic of Czechs and Slovaks, Estonia, Hungary, Lithuania, and Romania, a parliamentary model of government still seems to be prevalent. The preamble of the Constitution of Hungary clearly provides that the state is "a parliamentary democracy." Similarly, the Constitution of Bulgaria states that "Bulgaria is a republic with a parliamentary system of government."

\textsuperscript{365} \textit{Id.} at 181.

\textsuperscript{366} ALEX N. DRAHNICH \& JORGEN RASMUSSEN, MAJOR EUROPEAN GOVERNMENTS 274 (1982).
The constitutional acts of the other East-Central European republics do not make straightforward declarations regarding the political system, although the major features typical of European parliamentarism may be found in most of these acts. Still, one may note cautiously the tendency to increase the prerogatives of the presidents in these countries. The constitutions of Estonia, Hungary, and Slovakia and the draft Constitution of Albania provide for election of the president by the parliament or electoral college, whereas the constitutional acts in Bulgaria, Lithuania, and Romania establish a direct system of presidential elections. The attempt of the Hungarian President to strengthen his position has already been commented upon in previous chapters of this article. The Lithuanians, although still clearly supporting the parliamentary form of government, vest executive power both in the Government and the President. In several countries, such as Albania, Estonia, Lithuania, and Romania, the President may refuse to sign bills and may submit them for reconsideration to the Parliament. Following the German and Italian practice, the Estonian Electoral Body is comprised of the members of the Riigikogu and representatives of the local government, or Volikogus.

The attempt of the Polish president to strengthen his prerogatives, slightly mitigated by Poland's Small Constitution, already has been widely commented upon in this study. One also can note a clear tendency of some former Soviet republics, namely Russia, Ukraine, Azerbaijan, Kazakhstan, and Kirghizistan, to introduce into their constitutions some elements of the American system of government. In all these states the attempts to establish a framework for a presidential system met with strong criticism of the parliamentary factions. These factions link the presidential system to the traditions of socialist autocracy and portray it as a potential threat to the process of democratic changes in this region. In all these republics the attempts to repress the excessive powers of the executive resulted in the production of alternative versions of constitutional drafts promoting the ideas of parliamentary democracy. In short, although at this moment it is clear that the role of presidents in the new democracies keeps growing, it is still

367 The President may be elected either by the parliament (Riigikogu) or by the "electoral body." ESTONIA CONST. art. 79.
368 The right of the president to dissolve the parliament is not clearly guaranteed in all the new constitutions. It is provided for by the constitutions of Romania and Bulgaria, but is not clearly vested in the president of the other new democracies discussed above. ROM CONST. tit. III, ch. II, art. 89; BULG. CONST. art 99, § 5.
too early to decide which of the two major systems of government will finally prevail in the republics of the former socialist bloc.

E. Judicial Enforcement of the Constitutions

1. Origins and Major Models of Judicial Review

Most of the studies on the origin of judicial review indicate that this institution surfaced in the United States in the beginning of the nineteenth century and was incorporated into the constitutional practice by the courts, which had already displayed significant judicial activism. This statement, although correct in general, requires some supplementary explanation. The idea that the courts have the right to review the constitutionality of laws, which found its judicial pronunciation in the famous opinion of Chief Justice John Marshall in Marbury v. Madison, has, in fact, its antecedents in the doctrine of natural law. This doctrine implied that the law has a hierarchical structure and that the people have the right to disobey and nullify the lower law if it does not correspond with the higher one. To transform, however, this vague idea into the institution of judicial review several conditions had to be met.

First, to avoid arbitrariness, the reviewing institution's powers of checking the consistency of the hierarchic system of law had to be separated from the powers to make law. The organ which was making law could not review the correctness of the law. The fairness of the system required the adoption of the concept of the division of powers.

Second, the reviewing institution needed a well-refined supreme law which could serve as a precise background for the evaluation of inferior law. The vague concept of natural law was poorly suited to play this role. The supreme law could not be, as in the English system, a body of principles or maxims drawn from legislation, judicial precedence, custom, conventional rules or the opinions of writers of authority. To shield the judges against any assumption of arbitrary power, the development of judicial review required an authoritative document, a written constitution.

Third, as Alexander Hamilton wrote in The Federalist, "no legislative acts, contrary to the Constitution, can be valid. To deny this would be to affirm that the deputy is greater than his principal; that the servant is above his

369 See MAURO CAPPELLETTI & WILLIAM COHEN, COMPARATIVE CONSTITUTIONAL LAW, CASES AND MATERIAL 6-8 (1979).
master; that the representatives of the people are superior to the people themselves." Thus, the principle of the supremacy of the constitution became a condition *sine qua non* of the development of judicial review.

Fourth, the constitution had to guarantee its own rigidity. The amendment process had to be more difficult and formal than the regular legislative process. The excessive flexibility of the supreme law, which could be amended freely by the legislature, would make the judicial review useless or ineffective.

Fifth, the establishment of the system of constitutional review implied the existence of a judicial system in which the judges would be prepared to go beyond concrete adversary litigations and exercise judgments affecting general legal policy of the state. These conditions were met for the first time in the United States, and it was quite natural that this country pioneered in subjecting its legislation to judicial scrutiny. In accordance with American theory and practice all acts of Congress, state constitutions and state legislative, governmental and administrative acts, and international agreements are subject to judicial review.

The American model is often described as a decentralized or diffused system of concrete review. Such a system allows all courts the right to review the constitutionality of the laws. Furthermore, it is recognized as concrete or incidental because the constitutional issue can only arise as incidental to another litigious issue. This model has been adopted by some South American countries such as Argentina and Mexico, by former British colonies such as Australia or India, by some Scandinavian states such as Finland, Sweden, Norway, and also by Japan, Denmark, and Greece.

Nineteenth-century Europe was reluctant to experiment with judicial review. The first attempts to incorporate this institution into constitutions were initiated after World War I in Austria. The Austrian model, which was introduced by the Austrian Constitution of 1920, is often described as a centralized or concentrated and abstract model. In contrast to the

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371 It should be noted that Alan R. Brewer-Carias lists only three of the conditions mentioned above, specifically conditions two, three and four. *Judicial Review in Comparative Law, supra* note 1.
372 *Id.* at 125-55; Cappelletti, *Judicial Review in the Contemporary World* 46-52 (1971) [hereinafter *Judicial Review*].
American model, the power of review in the concentrated system is vested either in a supreme court of a country or in a special court. This review can be initiated through an independent action raising an abstract issue of constitutionality. Such a model was introduced into the practice of many countries with civil law traditions. In Spain, the Tribunal of Constitutional Guarantees was created under the Constitution of 1931, and the Italian Constitutional Court was established by the Constitution of 1948. Recently some countries with legal systems which have emerged from common law roots, such as New Guinea or Uganda, began to experiment with the concentrated system of judicial review.

Besides these two well known models, a variety of other types of constitutional review have political rather than judicial character. Political control of the constitutionality of law may be "internal" if exercised by an organ of the central legislative body. Such was the case of the Soviet Union, where the right of review was exercised by the Presidium of Supreme Soviet. Political control may be "external" as is the case in France, where the right to review legislation is vested in a special quasi-judicial body, Conseil Constitutionnel (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. The Constitutional Council must review organic laws before their promulgation. 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 chambers or by any sixty members of the National Assembly or Senate. Political control may be "mixed" if exercised by the special organs composed of deputies and extra-parliamentary experts on constitutional law. Cappelletti explained this model through the example of the Constitution of Romanian People's Republic. He wrote:

The recent Romanian Constitution of 1965, although not admitting to judicial control such as that adopted in 1963 Yugoslavia... had instituted within the Parliament itself a Constitutional Committee, elected by Parliament. Up to maximum of a third of the total number of its members, the Committee may be composed of specialists who are not

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374 JUDICIAL REVIEW IN COMPARATIVE LAW, supra note 1 at 225.
375 Id. at 186.
members of Parliament. The Committee under Article 53 of the Constitution has the task of putting before the "Great National Assembly" reports and opinions on the constitutionality of the bills as indicated by the rules of Parliamentary procedure.\footnote{376 JUDICIAL REVIEW, supra note 372, at 10.}

**Judicial Review in the New East-Central European Constitutions:** As previously noted, the socialist doctrine traditionally did not recognize the need for judicial review. In the early 1960s the attitude toward judicial control began to change and, in 1963, Yugoslavia for the first time began setting up constitutional courts. Poland had the tradition of administrative adjudication, which dated back to the interwar period when the Polish Constitution of 17 March 1921 announced the establishment of the Supreme Administrative Tribunal and the local administrative courts.\footnote{377 See, Rett R. Ludwikowski, Judicial Review in the Socialist Legal System; Current Developments, 37 INT'L & COMP. L.Q. 89-108 (1988) (analyzing the traditions of judicial review in East Central Europe).} In 1986 Poland adopted the statute on the Constitutional Tribunal, establishing a precedent which had been followed by virtually all new European democracies until recently. Constitutional review became the greatest novelty of the post-socialist world, and the selection of a model of judicial review which would be applicable to the legal traditions of the post-socialist countries became one of the most controversial issues in the constitutional debate across East-Central Europe.

To the disappointment of many American constitutional experts, one may observe that the American decentralized model did not significantly inspire the constitutional drafters in the former socialist countries. Several factors contributed to the general preference to adopt one of the well-tested European models.

First, it must be emphasized again that the American decentralized model is rooted in the concept of constitutional supremacy. The idea that the constitution should be drafted not by regular legislative bodies but by special conventions to whom the people delegated a constituent power is an idea that originated in America. The American Constitution also introduced a relatively rigid process of constitutional amendment. The rigid character of the constitution combined with the principle of its supremacy implied the right of the courts to disqualify any repugnant laws. The same conclusion
cannot be drawn *per se* from the fundamentals of the systems which fail to place the constitution above the parliament.

Second, the diffused system has grown out of the concept of constitutional checks and balances. In this system it is natural that one power is balancing, controlling, and supplementing the functions of the other, although none can take over all of the powers of the other. The concept of a diffused system of judicial review of the legislation corresponds well with this model. It certainly does not fit the system which implies a strict separation of powers, such as provided by the French model. Also, the countries which emphasize the superiority of the legislative assemblies hardly can agree with the logic of the system which provides for control of the "superior" power by the "inferior" courts.

Third, the decentralized and concrete system vests in the regular courts only the power to nullify the law "inter parties" and extends the validity of the courts' decisions on other cases through the principle of "stare decisis." As Mauro Cappelletti wrote,

Since the principle of stare decisis is foreign to civil law judges, a system which allowed each judge to decide on the constitutionality of statutes could result in a law being disregarded as unconstitutional by some judges, while being held constitutional and applied by others. Furthermore, the same judicial organ, which had one day disregarded a given law, might uphold it the next day, having changed its mind about the law's constitutional legitimacy. Differences could arise between judicial bodies of different type or degree, for example between ordinary courts and administrative tribunals, or between the younger, more radical judges of the inferior courts and the older, more tradition conscious judges of the higher courts. This is notoriously what happened in Italy from 1948 to 1956 and what continues to happen on a large scale in Japan. The extremely dangerous result could be a serious conflict between the judicial organs and grave uncertainty as to the law.\(^{378}\)

The American Supreme Court hears appeals from the most important constitutional decisions and under the principle of stare decisis its rulings are

\(^{378}\) *Judicial Review*, *supra* note 372, at 58.
binding upon all other courts. To reach the same effect in the civil law system, the Supreme Court or the highest court would have to be given the right of ruling "erga omnes." The effect which is possible in the American pyramidal structure of the court system might, however, be very difficult to obtain in the system where the coexistence of several high courts for different areas of law prevails.

Last, but not least, the diffused system requires judiciary qualifications which most civil law judges usually lack. The system of legal education in most of the civil law countries is offered at the undergraduate level and is less oriented toward professional training than in the common law system. Civil law "career judges" are well trained to follow the rules provided in the codes and to analyze the logical consistence of the system. Prepared to focus on the unchangeable core of the legal system rather than on its mutable elements, the civil law lawyers are not prepared to offer the policy-minded analysis required by a constitutional review process. Even if one were to agree that the role of the common law judges as lawmakers has recently been reduced, the degree of judicial activism, particularly in the United States, nonetheless far exceeds the scope of the discretion traditionally reserved for European judges.

One can observe, at this moment, that some countries which traditionally fall within the sphere of the French legal influences, such as Romania or Albania, might prefer a sort of political, rather than strictly judicial, review. The other East-Central European states and some of the former Soviet republics seem to be attracted to the German model, which is viewed as an example of a centralized "mixed" system, combining some elements of both concrete and abstract review.

The German Federal Constitutional Court has gained a reputation as one of the most energetic constitutional courts in the world. The scope of the constitutional review of the German Court is impressive. The Court can be reached through five major channels. First, it has the power of constitutional review of the rights and duties of federal organs. Second, it has a right of abstract review of the formal and material compatibility of federal

law or Land law (the law of the states which are federal components of Germany) with the Basic Law and the compatibility of Land law with federal law. The Court acts on the request of the federal government, a Land government, or of one-third of the Bundestag members.  

Third, the Court has right of concrete review. If any court considers unconstitutional a law the validity of which is relevant to concrete adversary action, the proceeding before that court should be stayed and a decision should be obtained from the Federal Constitutional Court.

Fourth, the Federal Constitutional Court rules on the compatibility of political parties with fundamental democratic principles recognized by the Basic Law.

Fifth, the Court hears the constitutional complaints of individuals whose rights have been violated by public authority.

It is widely believed that the "mixed" character of the German system and relatively wide direct access to the Court granted to the individuals enhance the democratic character of a traditional centralized model. While some countries, Poland for example, still substantially curb the scope of judicial review, other countries, such as Russia or Ukraine, extend the scope of judicial review almost as willingly as the German Court.

The major issues which still generate a lot of controversy are the right of the constitutional courts to hear individual complaints and the right of the parliament to overrule the constitutional courts' decisions. On the one hand, easy access to the constitutional court is an important factor of public legal and social education. On the other hand, vesting the right to petition the

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382 Id.
383 Id. at art. 100 § 1.
384 Id. at arts. 21 and 18 (dealing with the Court's right to curb the rights of those individuals whose behavior threatens the "free democratic basic order").
385 Id. at art. 93(4)(a).
386 Poland adopted a centralized and a limited "mixed" system of judicial review. The right to review the constitutionality of a law was vested in the Constitutional Tribunal only and the right to file a petition was originally vested in the main organs and officials of the state who could initiate review directly, submitting abstract questions without any pending litigation. It resembled the classic Austrian abstract model. However, review by the Tribunal could also be initiated by regular courts addressing inquiries in connection with judicial proceedings. This resembled concrete review. Access to the court was still indirect because the inquiry could be submitted by presidents of the supreme courts or central administrative organs. The Tribunal could not invalidate sub-statutory acts, and its decisions concerning statutory acts were subject to the Seym's (parliament) approval. The Seym could overrule the Tribunal's decisions by a qualified two-thirds majority. For comments on the Russian and Ukrainian models see chapters on the constitutional reform in those countries, supra.
court in all individuals whose constitutional rights have been violated, would either immensely increase the workload and burden the budget of the court or force the court to be very selective.

In addition, the right of the court to invalidate the legal acts passed by the legislative body is not compatible with the superior status of the legislature. This status still is recognized by several East-Central European countries; consequently, the right of the constitutional court to rule decisively on the constitutionality of all the laws, including statutes, requires either the elimination of the principle of legislative superiority or the elevation of the court's status to a special constitutional organ. This status would elevate the constitutional courts above all other judicial structures. At this moment one may conclude only that the development of the East-Central European system of the constitutional enforcement is in process and that the German model of judicial review seems to attract a lot of attention. Still, the extent to which the new democracies will duplicate this system is hardly predictable.

F. Flexibility of the New Constitutions

1. Rigid v. Flexible Constitutions

At the end of the nineteenth century the traditional distinction between written and unwritten constitutions was subject to criticism. It has been pointed out that both "written" and "unwritten" constitutions have their written and unwritten parts. Single framework documents, called "written constitutions," become operational through the body of implementing laws, interpretations, decisions of courts, and constitutional practices. Countries with "unwritten constitutions" also have some authoritative documents which determine the form and functions of the government. In 1880, Thomas M. Cooley wrote,

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 in England. The weakness of an unwritten constitution consists in this, that it is subject to perpetual change at the will of the law-making power; and there can be no security against such change except in the conservatism of the law-making authority, and its political
responsibility to the people, or, if no such responsibility exists, then in the fear of resistance by force. 387

In 1884 James Bryce proposed a new classification of constitutions as “flexible” and “rigid.” The former were to be “promulgated and repealed in the same way as ordinary laws;” the latter were to “stand above the laws of the country which they regulate.” 388 Constitutional writers quickly adopted Bryce’s classification of constitutions although his criteria for the distinction between “flexible” and “rigid” constitutions have been widely challenged. First of all, in Bryce’s description both types of constitutions share some common features, most notably the attribute of stability. 389 Second, Bryce had a distinctive tendency to mix up flexible and unwritten constitutions. He admitted that almost all currently adopted constitutions are rigid. Kenneth C. Wheare observed 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.” 390 Third, his observation that a flexible type of the constitution was particularly appealing to an aristocracy and was most suitable for a state interested in territorial expansion lacks serious support. 391

Several scholars proposed different criteria of distinction between flexible and rigid constitutions. Kenneth Wheare, reinforcing some comments of Bryce, suggested using the terms “rigid” and “flexible” “not according to whether or not they 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.” 392 Leslie Wolf-Phillips made another attempt to refine the classification. 393 He claimed 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.” 394 This refinement seems to fit the purpose of this article. Indeed, it makes it possible to distinguish the question asked by Wheare of

387 COOLEY, supra note 354 at 21-22.
388 JAMES BRYCE, CONSTITUTIONS 8 (1884).
389 Id. at 21, 66.
391 BRYCE, supra note 388, at 31-36, 43-46.
392 WHEARE, supra note 390, at 17.
393 LESLIE WOLF-PHILLIPS, CONSTITUTIONS OF MODERN STATES XII (1968).
394 Id.
whether it is actually hard to amend a constitution—a question of political nature—from the question of whether the constitution, in the intention of the drafters, was made easily amendable. At the recent stage of the constitutional works in East-Central Europe, the question, whether the new constitutions will be subject to frequent change, cannot be answered satisfactorily. The special procedures or requirements for constitutional amendment, however, lend themselves well to comparative analysis.

In fact, someone who would like to claim that the ease or frequency with which a constitution is amended depends less on the legal provisions which proscribe the method of change and more on a variety of actual political circumstances which accompany the change, would find a perfect example in socialist constitutions. These constitutions gained the reputation of flexibility regardless of their relatively rigid provisions on constitutional amendment and change. The Constitution of the Soviet Union and most of the constitutions of the satellite people’s republics required a two-thirds or three-fifths majority of the parliament to amend. The fact is, however, that they were amended at will, as the socialist representative bodies were totally controlled by the national communist parties.

2. Amending the Post-Socialist Constitutions

The post-communist constitutional reform changed the situation radically. The outside commentator could note that the political leadership of the new republics experienced a sort of shock, in that the procedures for amending the constitutions which had previously been without meaning suddenly began to give the constitutional texts their intended rigidity. The requirements of a qualified majority needed for constitutional revision brought the process of constitutional reform in Hungary, Poland, and the Republic of Czechs and Slovaks almost to a standstill. Given the fractionalization of the immature electorate, unexperienced in coping with the mechanisms of political pluralism, a similar result may occur in the other new democratic republics.

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395 Greg Asciolla, Adopting and Amending Constitutions in Eastern Europe 12 (1992) (unpublished paper prepared under the supervision of the author of this article). The author would like to recognize the contribution of Mr. Asciolla to the research for this subchapter.

So far, one may observe the general tendency to incorporate into the new constitutions a solid portion of rigidity. Notwithstanding warnings that each transitory period requires a certain degree of flexibility, the constitutional drafters in virtually all new democracies seem to believe that their constitutions will stand unchanged for relatively a long period of time. The following examples of recently adopted constitutions clearly show that the framers wanted the amending process to be difficult.

In Bulgaria, the right to initiate constitutional amendments may be asserted by one-quarter of the national representatives and by the President. Any motion to this effect must be considered by the National Assembly no earlier than one month and no later than three months after it has been filed. The National Assembly may pass a law on amending the Constitution by a majority of three-quarters of the national representatives, after three rounds of balloting on different days.397 A new constitution may be adopted only by a special constituent body, the Grand National Assembly, which consists of two-thirds more representatives than the regular National Assembly.398

In Romania, the revision of the Constitution can be initiated by the President of Romania upon recommendation of the government, by at least one-fourth of the deputies or senators, or by at least a half-million citizens. Citizens who initiate the revision of the Constitution must come from at least half the counties of the country and in each of these counties and in Bucharest municipality, at least 20,000 signatures supporting this initiative must be obtained. The draft of the revision must be approved by a two-thirds majority of the members of each chamber. This revision is subject to public approval by way of referendum. The provisions of the present Constitution concerning the national, independent, unitary, and indivisible character of the state, the republican form of government, territorial integrity, the independence of the system of justice, political pluralism, and official language cannot be the subject of revision.399

397 The following provision even further complicates the process. "If a motion is approved by less than three-quarters but no less than two-thirds of the votes of the national representatives, the motion is resubmitted for consideration after two months have elapsed, but before the passage of five months. In any new debate, a motion may be approved if at least two-thirds of the national representatives have voted for it." BULG. CONST. art. 154, §2, art. 155 §§1-2. One must observe that the process of amending is elaborate although the difference between a two-thirds (or eight-twelfths) and a three-fourths (or nine-twelfths) majority is not significant.

398 BULG. CONST. art. 158.

399 ROM. CONST. arts. 146-148.
The Constitution of Estonia vests the right to initiate amendments in one-fifth of the deputies of the parliament and in the President. The amendment may be adopted by referendum called upon the decision of a three-fifths majority of the parliament or by the vote of three-fifths of the parliament, repeated in two successive sessions and after three readings whereby the interval between the first and second reading is to be at least three months, and the interval between the second and third readings is to be at least one month.400

Without going into details of other constitutional drafts, the commentator may observe that the wisdom of the amendment process requires that the constitution should be amendable, otherwise a whole new document would have to be adopted. The recent pluralization of the political spectrum in the new East-Central European democracies, combined with the built-in rigidity of the new constitutions, may freeze the natural process of constitutional development and, despite the intentions of the drafters, may endanger rather than strengthen the stability of the new constitutions.

CONCLUSION: ONE OR MANY MODELS?

For the constitutional lawyer the search for a constitutional model is, perhaps, the most difficult element in a meaningful comparative analysis. Modeling may mean searching for structural design which could serve as a pattern for prospective constitution-making. The conviction that there are some commonly recognized features of "a good constitution" may inspire the task of projecting for a single constitutional paradigm, which could be recommended to the drafters as a fashion archetype or prototype for all constitutions.

Searching for a constitutional model may also mean something different, namely a descriptive analysis of common characteristics which can actually be found in several constitutions. It may mean the examination of the common roots of some commonly used constitutional institutions and rationales for their application. This task, although modest, was always more appealing to this author. He was convinced that the drafters of the new

400 The Estonian Constitution also provides for an emergency proceeding for the amending the Constitution. Specifically, "a proposal to consider a proposed amendment to the Constitution as a matter of urgency shall be adopted by the Riigikogu (parliament) by a four-fifths majority. In such a case the law to amend the Constitution shall be adopted by a two-thirds majority of the complement of the Riigikogu." ESTONIA CONST. art. 166 (1992 Draft).
constitutions need information about the progress of other constitutional works more than they need lessons or examples for emulation and imitation. Looking at the material collected in this study from this perspective, several observations can be made.

With all similar circumstances in which the new constitutions are drafted, one cannot expect the duplication of the Stalinist process of constitutional "modeling." The prototype of a socialist constitution was framed in Moscow and forced on the satellite Soviet countries. As far as the new, post-socialist democracies are concerned, the drafters borrow one from another and sometimes borrow more heavily than they ought to do, but they have the freedom of choice limited only by the will of their people. Thus, one should discuss the actual frequency with which several constitutional features are repeatedly used rather than an actual common core of the new constitutions.

In order to describe a model or a special type of constitution, the comparative expert has to find features which help to place several constitutions into one category while leaving the others outside of this group. The comparative analysis of the new constitutions hardly satisfies this requirement. True, the new constitutions have similar structures and most of them reveal some intention of the drafters to base the stability of the new constitutional system on a significant degree of rigidity, but it was pointed out that the new post-socialist constitutions share these features with other recently adopted constitutions in other parts of the world.

The description of the state as "a democratic, law-based republic, recognizing basic rules of the market" is typical for many Western constitutions. The reference to the state as an instrument of "the social justice" sounds like a relic of socialist philosophy. However, the special concern for the principles of social justice is not unknown to Western constitutions. For example, the Constitution of Ireland reflects traditional Catholic teaching about property and social justice. Specifically, it states that the exercise of the property rights "ought, in civil society, to be regulated by the principles of social justice."401 The Basic Law of the Federal Republic of Germany describes the state as "a democratic and social state" and recognizes the right "to own and inherit property," provided that use of property "shall serve the public wealth."402 The Constitution of Japan declares that "all people shall have the right to maintain the minimum standards of wholesome and cultural

401 IR. CONST. art. 43, §2; see also MURPHY & TANNENHAUS, supra note 380.
The analysis of the new constitutions in the context of the political system shows as many similarities as differences. On the one hand, the new democracies share with Western countries a general tendency to limit the power of the government and to distribute its prerogatives among several governmental branches. On the other hand, some countries still prefer a parliamentary system while the others experiment with one of the forms of presidential or parliamentary-presidential systems. At this moment, there are no clear indications that any one of these systems will prevail in the countries of former Soviet dominance.

As far as a system of constitutional enforcement is concerned, one may note a general tendency to absorb some mechanisms of judicial review, the greatest novelty in this region. Still, with some preferences worthy of note, there is no one single model which would attract the attention of the drafters of the new constitutions.

To sum up, there is no single constitutional model which would be surfacing in East-Central Europe. There are, however, similar problems faced by the countries of this region and similar constitutional remedies which might be tested for their solution. The similarities should be identified by the constitutional commentators and brought to the attention of the drafters. It seems, however, to be worthy of some emphasis that two basically different skills are necessary to advance the process of constitutional drafting. Looking for advice and assistance, the East must distinguish between two kinds of constitutional experts: horizontal and vertical comparativists. The first specialize in comparisons of recently drafted constitutional models and in the process of constitutional drafting, whereas the second focus on historical studies of constitutional traditions and legacies. Western constitutional experts may successfully fulfill the first role and highlight the horizontal comparative dimension of the constitution-drafting process. If, however, the West does not want to duplicate the dissatisfying constitutional experiments of the third world countries, it should leave the assessment of the adaptability of the analyzed models to the constitutional experts from the new European democracies.

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403 JAPAN CONST. ch. III, art. 25.