CONSTITUTIONAL CULTURE OF THE NEW EAST-CENTRAL EUROPEAN DEMOCRACIES¹

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I. CONSTITUTIONALISM AND CONSTITUTIONAL CULTURE

There is no widely accepted definition of constitutionalism and constitutional culture. The student of comparative constitutional law looking for a more precise meaning of constitutional law observes that the more often some categories of political or sociological jargon are used, the less frequently they are defined. This phenomenon occurs because constitutional scholars often ask what contents are commonly associated with constitutionalism and constitutional culture rather than look for essential qualities or elements of these terms.

Upon closer analysis, we find that constitutionalism is most often linked to rule of law. Such rule of law forms limitations on governmental powers. These limitations protect fundamental rights. In addition, some constitutional experts emphasize the relationship of constitutionalism to political culture: a component of “the moral, intellectual and cultural climate in state.” Quite often, constitutionalism means nothing other than a good constitution. Between the principal demands of constitutionalism, we can find almost all essential precepts of basic democratic law: popular sovereignty and self-determination, the concept of the constitution as supreme law, ideas of democracy and rule of law, limited government, separation of powers, checks and balances, civilian control of military, protection of human rights, and many others.

Constitutional experts who believe that the rule of law is the single most fundamental feature of constitutionalism usually agree that such law may exist and develop within authoritarian or even dictatorial states. In this political environment, constitutionalism describes the mechanisms of political stability without references to self-sustaining democratic institutions. Contrarily,

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2 See Michel Rosenfeld, Constitutionalism, Identity and Legitimacy 4 (1994) (“There appears to be no accepted definition of constitutionalism”); see also Louis Henkin, A New Birth of Constitutionalism: Genetic Influences and Genetic Defects, 14 Cardozo L. Rev. 533, 534 (1993) (“Constitutionalism is no where defined.”).

3 See Michel Rosenfeld, Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction, 14 Cardozo L. Rev. 497, 497 (1993).


5 See Henkin, supra note 2, at 535-36; see also Andrew Arato, Dilemmas Arising from the Power to Create Constitutions in Eastern Europe, 14 Cardozo L. Rev. 661, 663-64 (referring to constitutionalism as “a political form” with “a body of fundamental laws.”). This approach links constitutionalism to written constitutions.

6 See Franklin & Baun, supra note 4, at 2.
democratic constitutionalism assumes that the development of constitutional consciousness requires the imposition of limits on the operation of the government; hence, the process of thinking about a constitution begins when the first efficient restraints are imposed on the arbitrary power of rulers.\(^7\)

The method of searching for contents commonly associated with constitutional culture is often less successful. It is characteristic that one cannot find a satisfactory definition of constitutional culture even in works written directly on the topic.\(^8\) Constitutional culture was so recently introduced into constitutional vocabulary that the process of its absorption by legal scholarship is far from complete. For this reason, any constitutional scholar trying to explain constitutional culture must begin with a clear foreground.

In an effort to clarify my foreground, I will begin discussing constitutionalism by commenting on relationships between constitutionalism and constitutional culture. Because the main aim of this article is to characterize East-Central European constitutional culture, I will successively single out traits most typical of new postsocialist democracies. These traits will next be compared with observations concerning the tendency of a region to converge with or diverge from Western constitutional culture.

My proposition rests on the observation that there are two operating definitions of constitutionalism. The definitions stem from using this term in its narrow sense as well as in a wider, more historic meaning. In the narrow sense, constitutionalism is just a concept; \(i.e.,\) the trend in the theory of state and law that contends that the political organization of a state and society should rest on the order that is regulated by the fundamental norms and rules collected in the act or acts called a constitution. In the wider meaning, the concept of constitutionalism is rooted in historic framework. Here, constitutionalism rests on two precepts; under the first, the actual constitutional order is understood as the form of organization of the state and society prescribed by the constitutional norms and principles, and under the

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second, the system of operating ideas and concepts indicate what should be the functions and structure of the constitution.

Constitutionalism, in the narrow sense, may precede the emergence of the constitutional order in the same way that constitutionalism existing in the European Enlightenment preceded the adoption of the first written constitutions. Constitutionalism of this period evolved as a way of thinking about the organization of a state and society that through the use of constitutional or formal documents would limit the absolutism and arbitrariness of state organs. Furthermore, by analyzing this evolution, historians can note national constitutional qualities—whether those qualities are American, French, German, or other. Understood in this way, constitutionalism would encompass both operating constitutions with constitutional orders as well as concepts of a constitutional regime.

We may observe that constitutionalism, in the narrow sense, becomes sine qua non components. While historic elements are essential to constitutionalism, common modern elements are not essential. Evidently, constitutionalism can exist without a written constitution. Similarly, one may observe that the mere fact of the adoption of a constitution does not predetermine the existence of the constitutional order. The state may adopt a purely decorative constitutional act that may contrast with unconstitutional practices. Furthermore, a state may make constitutional rules and concepts fictions. The lack of constitutional order would not, however, rule out the existence of constitutionalism in the same way as it operated for decades in communist states despite the "declaratory" character of many communist constitutional provisions.

A constitutional culture is a component of a political culture, and as such has the same essential qualities: attitudes, opinions, values, emotion, information, and skills. This author does not limit the scope of constitutional

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9 For example, one may comment on the development of constitutionalism without actual constitutional order in France during the beginning of the eighteenth century. At the same time, in Poland, one may note the inefficient constitutional interaction between elected Polish monarchs and nota bene constitutions. For broader comments, see REtt R. LUDWIKOWSKI & WILLIAM F. FOX, JR., THE BEGINNING OF THE CONSTITUTIONAL ERA: A BICENTENNIAL COMPARATIVE ANALYSIS OF THE FIRST MODERN CONSTITUTIONS 48-74 (1993).

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Culture to purely psychological elements, but rather incorporates a behavioral component into constitutionalism. Responding to some concerns, this approach does not suggest the obliteration of differences between political science and political culture. Rather, political science focuses on studying human behaviors in their complexity as activities oriented on accomplishment of political goals; political culture examines human actions as reflections of human attitudes toward politics and political order. To use an example, it is important for the student of constitutional culture to check whether the politicians or scholars compromise or assault each other during constitutional disputes. While political scientists may wonder whether rude political behaviors are successful in battles for political goals, commentators of cultural phenomena might investigate to what extent such behaviors are expressions of dissatisfaction with constitutional processes.

Hence, similar to the overlap in the studies of political science and political culture, constitutionalism and constitutional culture overlap. Constitutionalism, in a narrow sense, understood as the set of opinions and doctrines about constitutional order is, in fact, one of the components of constitutional culture. Constitutionalism, in a wider sense, grows out of cultural environment, and vice versa. Examination of these intermingled phenomena in East-Central European realities warrants two further introductory observations.

II. SEARCHING FOR A PARADIGM OF EAST-CENTRAL EUROPEAN CONSTITUTIONAL CULTURE: DESCRIPTIVE V. PRESCRIPTIVE APPROACH

1. The first reflection deals with the level of acceptable generalization of observations on regional constitutional cultures. One who searches for cultural

11 In the sixties, Almond and Verba were recognized as main proponents of a "psychological" concept of political culture. Almond wrote "a political culture is a particular distribution of political attitudes, values, feelings, information and skills." COMPARATIVE POLITICS TODAY: A WORLD VIEW 42 (Gabriel A. Almond & G. Bingham Powell, Jr. eds., 2d ed. 1980). For wider discussion of political culture see GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE (1963); see also RETT R. LUDWIKOWSKI, POLSKA KULTURA POLITYCZNA. MITY, TRADYCJE I WSPOLCZESNOSC 3-9 (1980). For the expression of "behavioral" concept of political culture, see W. Pluskiewicz, "Kultura Polityczna—Świado-mosc Polityczna—Wiedza Polityczna" in 2 STUDIA NAUK POLITYCZNYCH (1977); W. KNOBELSDORF, KULTURA POLITYCZNA I JEJ ROLA W SYSTEMIE POLITYCZNYM SPOLECZENSTWA SOSCJALISTYCZNEGO (1974).

12 The problem was widely discussed at the XI Congress of Polish Historians in 1974; for commentary, see LUDWIKOWSKI, POLSKA KULTURA POLITYCZNA, supra note 11, at 4.
characteristics of several countries immediately faces the question of whether there are common cultural features which would distinguish one group of political entities from other groups. Finding some similarities is not enough to justify a thesis concerning the common cultural fabric or core of the group; the compared designates may demonstrate more differences than common traits. This reflection brings us to question whether, in fact, there exists a paradigm of East-Central European constitutional culture.

There exists no single postsocialist constitutional model, and no single constitution or constitutional system served as a prototype for the constitutional drafters from the new democracies. The countries of East-Central Europe share some common recent history, but the roots of their constitutional experience are very different. Some of them have mature constitutional traditions and some began their constitutional experiments in this century. They have intrinsic similarities, which can distinguish them from Western countries, but, on the other hand, they show so many different features that placing them within one single classifying category is problematic, if not virtually impossible.

Searching for common cultural characteristics of the new democracies is an even more difficult task. Because constitutions and constitutional orders are expected to endure, their relative longevity facilitates a comparative analysis. Constitutional culture, however, is a fluid and flexible subject of examination. Culture has stable components such as constitutional tradition, historical models of relevant constitutions, or constitutional mechanisms that have already been qualified as good or bad. Dynamics of other elements of culture are often substantial. With the recent development of means of mass communication, information and skills are acquired quickly; opinions and emotions change overnight; and even attitudes and behaviors can transform relatively easily.

These observations do not dictate that comparisons of constitutional cultures are impossible. These observations, however, do require scholars to discuss geographical constitutional cultural characteristics with a solid dose of caution. When comparing cultural phenomena of more than a dozen countries, one should directly compare tendencies, trends, similarities, and differences rather than models, patterns, and paradigms.

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14 See id. at 133-36.
2. A second reflection regarding constitutional formation addresses the problem of evaluating political culture. In discussing constitutional transformations, many questions naturally arise. Are there parallels between the Western and East-Central European constitutional histories? Does Eastern Europe have any liberal or democratic traditions upon which to draw? Do these countries have “progressive” or “backward” political cultures?

The very attempt to evaluate constitutional culture raises instinctive reservations. Public opinion connotes the terms “progressive” or “backward” in regards to political models as either desirable and good or undesirable and bad. In fact, it is often difficult to estimate “social progressiveness” in such spheres as art, philosophy, literature, or politics. Hence, some components of political culture are subject to evaluation while others can only be described. For example, one can measure either society’s political knowledge or publically available information, but one can hardly evaluate social emotions or attitudes. In the same way, political traditions are a function of a variable that is the sum of its social, economic, and geographical elements. These elements always have certain relative aspects and can seldom be evaluated as either clearly “progressive” or clearly “backward.”

Admittedly, one can examine liberal or democratic elements of Western or Eastern traditions; one can even argue that from the perspective of social well-being, the Western model leads to greater economic prosperity. The West, not the East, made greater contributions toward democracy and placed more emphasis on political pluralism and the fragmentation of power. Still, this does not mean that visible symbols of the West are synonymous with progress. As Montesquieu remarked almost 250 years ago, the value of human arrangements is always relative. In terms of general evaluation, Western and Eastern models are not “backward” or “progressive,” “good” or “bad.” Western models are simply different. The main task of comparative constitutional scholarship is to describe and analyze cultural phenomena—to answer the question “what is the constitutional culture?”—rather than to define what that culture should be. Even if one attempts to analyze the consequences of social attitudes, behaviors, opinions, and emotions, one is still in the area

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16 See generally LUDWIKOWSKI, supra note 15, at 232-36.
17 See generally George Schöpflin, The Political Traditions of Eastern Europe, DAEDALUS, Winter 1990, at 55, 55 (stating that “The Western political tradition always emphasized pluralism and the fragmentation of power. In Eastern Europe, which was politically backward, the state played a much more dominant role as the principal agent of change. This resulted in a politically preeminent bureaucracy and a weak society.”).
of descriptive examination. Evaluations bring us dangerously close to prescriptions that may be interpreted as a panacea for all problems.\textsuperscript{18}

\textbf{III. THE DRAFTERS. "NEW-WAY" APPROACH TO CONSTITUTION MAKING AND ITS CONSEQUENCES}

"What among other factors contributed to Wladimir Maciar’s successes—wrote Slubowski—was repeating that Slovakia is going its own way, different than Russia and different than the countries of the West."\textsuperscript{19} This observation reflects the message repeatedly and successfully sent to the public by the political leaders of many East-Central European democracies. The "new way" approach resulted from the new post-socialist political elites’ feelings of suspension between socialist legacy and Western tradition.

Since the very moment the region entered into an era of extensive constitutional transformation, it became clear that the new democracies would break with their communist past and adopt constitutions that would be marked as "entirely new." On the other hand, the drafters of the new acts could not disregard the post-socialist societies’ sentiments for their communist past. The longing for the illusive communist stability, which is common to all new democracies, is rooted in misinformation or lack of knowledge about life in the West. For decades, communist propaganda tried to ridicule Western moral and social values. Such propaganda presented the new generation of people in socialist countries with pictures of rotten Western societies living in capitalist- and mafia-ruled urban jungles. Widened exposure to Western political, legal, and social culture either reinforced the myth of a rotten and greedy West or contributed to a contrasting, but equally false, image of the West as a paradise.

People in the post-socialist countries or socialist states, exposed to Western political, legal, and social culture, have problems comprehending that being elevated to a higher standard of living does not automatically guarantee happiness for all. Newly introduced market mechanisms reveal step-by-step that those at the bottom of the social structure are still frustrated, even if their conditions of life improve significantly. These individuals might be better off

\textsuperscript{18} See JAN-ERIK LANE, CONSTITUTIONS AND POLITICAL THEORY 4 (1996) (stating that "Modern constitutional theory would encompass both the IS and the OUGHT. It will describe and analyse the constitutions of the world as well as discuss what a good or just constitution amounts to."). I believe that writing on constitutional culture should be more cautious with verdicts as to what constitutional culture ought to be.

\textsuperscript{19} Interview with Jan Carnogurski, Slovakia’s Minister of Justice, Wprost, at 111 (Nov. 15, 1998).
than they were in communist times, but their inequality within a different kind of society creates a longing for the communist "equality in misery." These factors have resulted in major confusion in socialist and post-socialist countries about the West, as well as equally confusing beliefs in the West about an overwhelming yearning of the socialist societies for Western values.\textsuperscript{20}

The social attitudes described above contributed to an ambivalent approach to constitutional drafting in East-Central Europe. The drafters of the new constitutions did not have any doubts that they would borrow from the West. But, the drafters wanted to borrow in their own way. On the one hand, they faced so-called "American and Western European universalistic constitutionalism"\textsuperscript{21} with its appeal for the reception of well-tested liberal values. On the other hand, they listened to the Western scholars' suggestions that remedies for their problems could be found "in local traditions rather than in the history of the United States during the era of the Enlightenment."\textsuperscript{22} As a result, the drafters were intent on rejecting the well-tested Western constitutional models and producing their own constitutions.\textsuperscript{23}

In one of my studies on constitution-drafting in East-Central Europe, I tried to compare this "new approach" to constitutional "gardening" as contrasted with constitutional "engineering" or surgical "transplanting."\textsuperscript{24} An engineer's or surgeon's work requires some level of exactitude. Freedom to experiment is limited. In contrast, constitutional gardeners neither construct their products from well-tested components nor transplant organs into accomplished social organisms. Rather, they pick seedlings from different gardens and implant them, piece by piece, into living and constantly changing vegetation composed of rules, norms and institutions. The new gardens do not resemble traditional

\textsuperscript{20} For more comments on post-communist nostalgia for communism, see Ludwikowski, \textit{supra} note 15, at 190-92.


\textsuperscript{22} B. Ackerman has written, "This said, I want to resist the fashionable relativism that looks upon liberalism as a local prejudice of Anglo-American civilization or maybe even a few English-speaking universities inhabited by rootless cosmopolitans." \textit{Id.} at 277.

\textsuperscript{23} Katz, \textit{supra} note 21.

\textsuperscript{24} Their attitudes are in many ways reminiscent of the reactions of the post-colonial African leaders, who repeatedly claimed that their constitutions should have local flavor because people do not serve the constitutions; rather constitutions are adopted to serve the people. \textit{See} H.W.O. Okoth-Ogendo, \textit{Constitutions Without Constitutionalism: Reflections on an African Political Paradox}, \textit{in} \textsc{Constitutionalism and Democracy: Transitions in the Contemporary World} 65, 67-68 (Douglas Greenberg et al. eds., 1993).

\textsuperscript{25} \textit{See generally} Ludwikowski, \textit{supra} note 10, at 64.
French or British parks; they have a mixed character, blending together features produced by different tastes, cultures and styles.

"Blending and mixing" became a style—a significant feature—of constitutional culture of East-Central European countries. The style stemmed from public attitudes and emotions and from aggressive Western lecturing about the universal values of liberal constitutionalism. This style gave the new constitutions eclectic character that justifies commentators' concern over consistency.

Consistency is one of the basic features of a good constitution. Consistency implies that constitutional provisions gel in such a manner that their rationale is fully explainable and that they mesh with other components of the constitutional system. To be consistent, the drafters of the constitutions would have had to acquire a deep comparative knowledge of the countries from whose constitutions they borrowed. Many drafters, however, did not acquire this knowledge, which resulted in a striking amount of incoherence. For example, the guarantees in the Albanian Constitution for "diversity of ownership [and] free initiative of all economic subjects" neighbor declarations that the economy be regulated by the state and coincide with typical socialist statements that "economic initiative of juridical and physical persons cannot develop contrary to the social interest and should not impair the security, freedom and dignity of man." Surprisingly, the concept of checks and balances is married to the idea of separate functions of the organs of power. In the Kazakh Constitution, the principle of supremacy of parliament is artificially combined with a presidential system of governance. A bicameral legislature is established in the Romanian Constitution without any clear rationale, and a preventive (French) model of judicial review was adopted without any respect to the fact that the particular country lacks a well-developed system of administrative courts. These kinds of inconsistences were avoided by countries such as Bulgaria, Poland and Russia. The constitutional drafters of these countries were able to restrain their tendency to blend different constitutional principles and instead borrowed, to some extent, from recognized constitutional models.

27 Id.
28 See Kaz. Const., art. 64.
29 See comments on the Romanian Constitution in Ludwikowski, supra note 15, at 128.
IV. THE CITIZENRY: CONSTITUTIONAL TRADITIONS, INFORMATION, EMOTIONS

Tradition is one of the most stable components of political culture. Cultural memories are not deleted or replaced overnight. From this perspective, the student of East-Central European constitutional culture must admit that the citizenries of the new democracies are entering an era of post-constitutional transformation with memories lacking constitutional experiments and burdened by socialist legacies.

Poland is the only country in East-Central Europe with constitutional traditions comparable to the West. In 1791, when it adopted the first written constitution in Europe, Poland had significant experience with checks and limitations of the royal power. In fact, with an eighteenth century "democracy of the gentry" system, it was Poland, rather than any Western European country, that became the early symbol of a liberal and constitutional monarchy. The pluralization and fragmentation of power in Poland, however, weakened the state and contributed to the state's loss of independence in 1795 and subsequent partition by Russia, Prussia, and Austria. Until World War I, Poles, along with Hungarians, Czechs, Slovaks, Lithuanians, Latvians, Estonians, Ukrainians, and Belorussians, were incorporated into the absolute empires of Europe. Other countries within the region, such as Bulgaria and Romania, joined the family of sovereign states in the last decades of the

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31 Wiktor Osiatynski, who wrote widely on Poland's constitutional traditions, notes a differing opinion. He claims that the history of the constitutional movement in Poland should be understood as the process of granting privileges by the ruler to the people (the nobles) not as a contract or bargain between people to provide for limited government. See Wiktor Osiatynski, Perspectives on the Current Constitutional Situation in Poland, in Constitutionalism and Democracy: Transitions in the Contemporary World 312, 313 (Douglas Greenberg et al. eds., 1993). For this reason, Osiatynski argues, democracy was better rooted in the constitutional traditions of Poland rather than in the concept of limited government. See id. at 319-20.

This author is of a different opinion. Polish history does not recognize the concept of "a political contract" concluded amongst the people themselves. These types of contracts were based on a philosophical abstraction rather than historical facts. Polish history includes, however, a concept of contracts formally signed by the Polish monarch with the people. So-called "pakta konwenta," negotiated by the electoral monarchs and the nobles since the first election in 1573, were formal contracts confirming the rights and privileges of the nobility and obligations of the king and accepted limitations imposed on his power. See Vicki C. Jackson & Mark V. Tushnet, Comparative Constitutional Law 296-98 (1999). For comments on the history of Polish "pakta konwenta" see Z. Kaczmareczyk & B. Lesnodorski, 2 Historia Panstawa i Prawa Polski 116-17 (1966).
nineteenth century, and the independence of Albania was recognized at the Great Powers' 1912 conference in London.\(^{32}\) Thus, while Western democracies began to flourish, the restraints imposed on the activities of representative bodies in East-Central Europe successfully hampered the development of constitutionalism until the turn of the nineteenth century, and in many cases, until the end of World War I. The successive constitutional experience of the countries of this region was again disrupted by the interwar authoritarian transformations of the East-Central European states.\(^{33}\)

The communist legacy had additional enduring impact on the constitutional culture of the region. One of the fundamental premises of constitutionalism is to promote the reconciliation of individual rights and social interests. Constitutional culture cannot flourish in an atmosphere of cynicism and distrust in common social values. The "decorative" constitutional acts, framed in the Moscow-imposed fashion, commanded no social respect. Socialism undermined and compromised any belief in collective values. The attempt to create a "collective mentality" turned out to be a total failure. Socialism, associated with the Bolshevization of society, resulted in cultural and moral impoverishment and the leveling of all groups to the lowest common denominator. The real aim of the collective was not to bring the people together, but to serve as an instrument for the destruction of the individual approach to life and to promote the complete atomization of society.

The concept of the collective was ridiculed after the fall of communism left its stigma on the mentality of post-socialist generations. This loss of faith in the collective has survived as a loss of confidence in the constitution. The idea of "solidarity," which worked against the common communist enemy, did not serve as a sort of social cement in the subsequent circumstances that promoted competition, struggle for survival, and revenge. The citizenries of the new democracies learned to speak freely and openly; however, they could hardly digest the lesson that freedom of speech requires dialogue and ability to listen to others' arguments. The socialist parliaments were quickly transformed from assemblies composed of compliant "Yes-men" into a fora of deputies, struggling and assaulting political opponents;\(^{34}\) defamation and slander became

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\(^{32}\) For more comments on the constitutional history of East-Central European countries, see LUDWIKOWSKI, supra note 15, at 9-31.

\(^{33}\) The trend followed similar responses of the Western European governments to the crisis of the 1930s.

\(^{34}\) In fact, it has to be admitted that political brawls are not entirely unknown to West European politics. Such brawls are exemplified by the 1998 case of Jean-Marie le Pen, barred in France from holding elective office for political assaults. See Charles Trueheart, French Rightist is Barred from Office for a Year, WASH. POST, Nov. 18, 1998, at A32. For examples
widely used instruments of political battles. The Fall 1999 parliamentary conflicts in Moscow preceded violent street clashes between parliamentary supporters and military units, and finally resulted in Yeltsin both dissolving the Russian Supreme Soviet and arresting Chairman Ruslan Khasbulatov. Yeltsin's actions became vivid symbols of new postsocialist political culture.

Characteristically, high levels of public emotion, occasionally sparked by constitutional dispute, often go hand in hand with everyday public political passivity. These apparently contrary feelings of emotion and passivity are typical combinations within societies of many of the new democracies. Frequent observations regarding constitutions, hastily adopted in periods of social and political transformation, demonstrate tumultuous passive and emotional relationships. However, these relationships often serve as symbols of legitimization of the new political regimes and are hardly elements of everyday life that could animate politically passive societies. Passivity and lack of recognition of the sanctity of a constitution may result in divergence between the constitution and public opinion as well as lack of public identification with the constitution or a high level of disapproval for its provisions. The best litmus-paper test of the level of sufficient “democratization” of the constitution can often be measured by the number of constitutional court decisions that have been contrary to public opinion. Examples of controversial constitutional court decisions include the Hungarian Constitutional Court's decision establishing the unconstitutionality of the death penalty and the anti-abortion decision of the Polish Constitutional Tribunal.

Active involvement of the citizenry in constitutional dialogue requires an organized forum for public disputes. The United States provides an example of public constitutional dialogue. During the 1998-99 impeachment case of President Bill Clinton, congressional debate, in spite of moral sensitivity of the issues discussed, offered the public an enormous load of constitutional information. Media reports, disputes, and everyday explorations of public regarding the former Hungarian minister of foreign affairs, see Hungary Update, E. EUR. CONST. REV., Spring/Summer 1997, at 16, 19.


36 See Okoth-Ogendo, supra note 24, at 68.

reactions contributed to the public's common feeling of participation in the process of constitutional interpretation. As is characteristic of a strong democracy, the sharp public disagreement with the House of Representative's impeachment conclusions neither produced strong criticism of the constitution itself, nor undermined the consciousness that it is the people, not enlightened leaders, that make the constitution. Although the level of generalization of this reflection may vary from one East-Central European country to another, one may observe that citizens of the new democracies lack strong identification with their constitution; this trend, combined with weak constitutional information and the tendency of the leaders to manipulate public emotions, may undermine the stability of the regional constitution-making process.

V. LEGISLATURES: POLITIZATION AND PARLIAMENTIZATION OF THE CONSTITUTIONS

The first constitutions adopted by the new East-Central European democracies were relatively rigid; their drafters seemed to believe that their products would stand unchanged for a relatively long time. Apparently, the drafters were surprised to find that rigidity, meaningless in socialist constitutions, made the new basic laws hardly amendable.

38 In the same way, it is quite interesting to observe how much information about the constitutional process in the United States has been passed to the public during the Senate hearings of two candidates for the posts of associate justices of the Supreme Court: Robert H. Bork and Clarence Thomas. In contrast, the names of judges of the constitutional courts in all new democracies (including even most active tribunals) are relatively unknown. This fact can be explained to some extent by a per curiam character of the courts' judgments and lack of dissenting or concurring opinions; still, the public recognition of the courts' role in the constitution-making process is much less impressive than in the West in general, particularly in the United States. The process of the creation of so-called "televising" or "internet" parliaments is progressing slowly in the new democracies; its effectiveness is still far from being advanced. 39 "Many Romanians still believe that citizens are servants while government officials are masters." Monica Macovei, Legal Culture in Romania, E. EUR. CONST. REV., Winter 1988, at 79, 80. See also Wiktor Osiaynski, The Constitution-Making Process in Poland, 13 LAW & POL'Y 125, 125-27 (1991) (commenting on the impact of the tradition of "leaders'-made" constitutions on the current process of constitution-making in Poland).


41 The fact that the socialist constitutions, regardless of the level of rigidity, were amended at will by the communist-controlled legislatures, solidified the illusion that the built-in constitutional rigidity was of little significance.
For example, the first post-socialist constitution in the region, adopted by Bulgaria on July 12, 1991, reserves the right to initiate amendments to either one-quarter of the national representatives or to the president.\textsuperscript{42} The National Assembly may pass a law on amending and supplementing the constitution by a majority of three-quarters of the national representatives after three rounds of balloting on different days.\textsuperscript{43} If the motion does not get the required majority but is supported by no less than two-thirds of the votes, it may be resubmitted after two months and subsequently passed by a vote of a two-thirds majority.\textsuperscript{44}

In Romania, the revision of the constitution can be initiated in two ways. First, the president, acting in cooperation with at least one-fourth of the deputies or senators, may initiate revision; or by a motion of at least 500,000 citizens coming from at least half of the counties of the country (including Bucharest) in which the motion received the support of at least 20,000 people.\textsuperscript{45} The draft of the amendment must be approved by at least a two-thirds majority of all deputies and senators or, in the case of disagreement between the chambers, by a joint meeting in which the motion must get approval of at least three-fourth of the votes.\textsuperscript{46} The final draft of the amendment must be approved by a nationwide referendum.\textsuperscript{47} Some constitutional provisions are not subject to revision. Examples include governmental form; the national, independent, unitary, and indivisible character of the state; territorial integrity; independence; the justice system; political pluralism; and official.\textsuperscript{48}

In Estonia, the Constitution may be amended by a law either adopted by a referendum or parliament (Riigikogu). The initiative to propose revision is reserved for the president or one-fifth of the deputies.\textsuperscript{49} The draft must be debated during three readings with a two-month long interval between the first

\textsuperscript{42} See BULG. CONST. art. 154.
\textsuperscript{43} See BULG. CONST. art. 155(a).
\textsuperscript{44} See BULG. CONST. art. 155(b). The regular amendments are adopted by the National Assembly. The adoption of the new constitution and some amendments, such as amendments relating to changes in territory or form of state, changes in state administration, and changes in rules of amendments themselves, are reserved for the Grand National Assembly, which is composed of 400 national representatives. See id. at art. 155-158 (text in LUDWIKOWSKI, supra note 15, at 370).
\textsuperscript{45} See ROM. CONST. art. 146(1).
\textsuperscript{46} See ROM. CONST. art. 147(1).
\textsuperscript{47} See ROM. CONST. art. 147(3).
\textsuperscript{48} See ROM. CONST. art. 148(1). In the Czech Constitution the provisions on democratic character of the state and the rule of law are not amendable.
\textsuperscript{49} See EST. CONST. art. 161.
and second reading and one month between the second and third reading.\textsuperscript{50} The amendment must get approval of at least a majority at the first session and three-fifths majority at the deputies at the second session.\textsuperscript{51} The parliament, in matters of urgency, may adopt the draft submitted by a four-fifths majority; the vote requires the approval of three-fourth of the deputies.\textsuperscript{52} The draft may also be submitted and approved by a referendum if the appropriate motion supported by at least three-fifths of the deputies and the referendum was held not later than three months since the vote in parliament.\textsuperscript{53}

The progress of the constitution-making process in East-Central Europe demonstrates several phenomena. First, following the first constitutional explosion of 1991-92,\textsuperscript{54} the drafters of the constitutions opted for the distinction of flexibility of constitutional provisions rather than unamendable fundamental constitutional rules. For example, all of the provisions in the Constitution of the Russian Federation of December 12, 1993, are amendable. However, the Russian Constitution recognizes that some amendments (chapters 3-8) can be adopted by the parliament (three-fourth of the Federation Council and two-thirds of the State Duma) and approved by no less than two-thirds of the federal components of the Russian Federation,\textsuperscript{55} while some provisions (Chapters 1, 2 and 9) can be revised only by a Constitutional Assembly and subsequent popular vote.\textsuperscript{56} The Constitution of Poland of April 2, 1997, provides for an optional procedure of amending Chapters I, II, and XII by referendum. The Polish Constitution states that Polish subjects authorized to initiate amendments (the president and at least one-fifth of the deputies and the Senate) may require, within 45 days of the adoption of the bill by the Senate, the bill’s submission to a referendum which must be held within 60 days.\textsuperscript{57} Other amendments may be adopted by the Sejm with a majority of at least two-thirds of votes of at least half of the statutory number of Deputies and by the absolute majority of at least half of the Senators.\textsuperscript{58}

\begin{footnotes}
\item[50] See EST. CONST. art. 163(2).
\item[51] See EST. CONST. art. 164.
\item[52] See EST. CONST. art. 166.
\item[53] See EST. CONST. art. 164.
\item[54] Besides Bulgaria, Romania and Estonia, in this period several other countries adopted constitutions including Slovakia (September 3, 1992), Poland (interim “Little” Constitution of October 17, 1992), Lithuania (October 25, 1992), and the Czech Republic (December 16, 1992).
\item[55] See RUSS. CONST. art. 136.
\item[56] See RUSS. CONST. art. 135.
\item[57] See POL. CONST. art. 235(6).
\item[58] See POL. CONST. art. 235(4).
\end{footnotes}
Second, the drafters of the new constitutions became more sensitive to the numerous Western constitutional experts’ warnings that each transitory period requires a special degree of flexibility. The drafters realized that 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, endanger rather than strengthen the new constitutions’ stability.

The growing concern that “preferred generations” of constitutional makers are leaving fossilized, but defective, constitutions contributes to the suggestions that “parliamentization” and “politicization” of the constitution should be viewed as a positive, rather than a detrimental, characteristic of constitutional culture during transitory periods. Parliamentization usually means two things. First, constitutional rigidity should be compensated for by leaving parliaments the exclusive power to amend constitutions. Second, the constitutions should have artificially inserted indeterminancy; namely, that details of constitutional norms or principles should be left to regulations of statutory law. Politicization is understood as mixing constitutional politics with ordinary politics. The consequences of both processes warrant careful examination.

In fact, the suggestion that full authority to amend the constitution should be vested entirely in the parliament has not been seriously considered by the drafters of new basic laws. In Bulgaria and Russia, some constitutional amendments require the action of the special Constituent Assembly. In Estonia, Russia, and Lithuania, the amendments require approval by referendum. In Poland, a referendum is optional. On the other hand, the rigidity of the basic laws is implanted not by the cooperation of the citizenry or special conventions in the constitution-making process, but by the provisions requiring qualified majorities to vote in parliamentary action. The pluralization of the legislative bodies, combined with the demands of two-thirds or three-fourths majorities, blocks even the early stages of constitutional revision.

59 András Sajó, Preferred Generations: A Paradox of Restoration Constitutions, 14 CARDOZO L. REV. 847, 850 (1993). Sajó wrote that “the present generation inevitably imposes its scheme or vision upon future generations, and the constitution-making generation (or the political forces that be) have a particularly strong impact on future generations.” Id. at 850.

60 See Holmes & Sunstein, supra note 35, at 287 (“Constitution making in Eastern Europe must be a long, drawn out political act.”).

61 Trying to compare the amendment process in the Soviet Union and Russia one will find out immediately that, between 1937 and 1974, the Stalin Constitution was amended 250 times,
The thesis that built-in flexibility is an important prerequisite of a constitution's longevity has been an argument often used to defend the ambiguous language of many constitutions. Transparency is an important feature of a good constitution, but reasonable commentators may differ as to the meaning of constitutional provisions; commentators should not, however, conclude that a constitution's clauses are indeterminate. The drafters of the law should be able to distinguish between flexibility and uncertainty. The former justifies the very existence of constitutional courts, while the latter encourages these courts to arbitrarily take over the power to legislate.

The artificial indeterminacy of the East-Central European constitutions has resulted in several phenomena. First, vagueness creates a tendency to incorporate awkward statements. Such statements appear to signify the importance of some social problem but, in fact, provide no command or any real substance, such as "citizens of the Republic are obliged to pay taxes and fees in accordance with legislation" or "the religion . . . may be taught in schools." This indeterminancy results in details of the constitutional norms or principles being left to regulations of statutory law. Thus, constitutions are "parliamentarized" by the regular legislative processes.

This approach, used repeatedly by most East-Central European constitutional drafters in the new democracies, makes sense so long as: one, constitutional norms declare principles, rules, or directives explaining a social value or a pattern of socially desirable behavior; and two, norms leave both detailed procedural regulations and value explanation to the implementing

affecting 73 of the original 146 articles. The attempt to amend the Russian Constitution in December 1997 was immediately blocked by President Boris Yeltsin who declared that "as long as I am President, I will not allow any changes to the Constitution." Russia Update, E. EUR. CONST. REV., Winter 1998, at 30, 30. Using another example, the parliamentary attempts to amend the Latvian Constitution to extend the term of the parliament and the tenure of the presidential office have failed six times, as the required majority of two-thirds (66 out of 100 votes) could not be achieved. Finally on December 4, 1988, the Saeima (Parliament) adopted several amendments at a special plenary meeting with 67 votes in favor and 1 vote against. See Latvia Update, E. EUR. CONST. REV., Winter 1998, at 19, 19; KENNETH R. REDDEN, MODERN LEGAL SYSTEMS CYCLOPEDIA 8 (1985). For details on amendments, see S. RUSINOV & V. RIANZHIN, SOVETSKOE KONSTITUTIONNOE PRAVO 81-85 (1975).

As far as the Constitution of the United States is concerned, see William F. Fox, Jr., Amending the Constitution to Accomplish Social Goals, SOCIAL THOUGHT, Summer 1983, at 3, 3.

KYRG. CONST. art. 25 (text available in LUDWIKOWSKI, supra note 15, at 469).

POL. CONST. art. 53 (4). The full provision reads: "The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed."

See Ludwikowski, supra note 10, at 66-67.
laws. For example, the declaration that citizens should pay taxes is commonplace, but the constitutional regulation of the principles of apportionment of expenditures and revenues between administrative or federal components of the state would meet the above-mentioned standard even if the detailed regulations were left to regular parliamentary legislation. The point here is that references to implementing laws should not be used to delay the formulation of basic constitutional principles.

The proper level of generality in constitution-making is always disputable, and some new constitutions and constitutional drafts are frequently criticized for being either too detailed, such as the Ukrainian draft of June 10, 1992, or too concise and lapidary, such as the Russian Constitution of 1993. Commentators on the Polish Constitution of 1997 often claim that the constitution endlessly refers citizens to statutory laws. Many commentators fail to recognize that the number of references matters little; rather, the rationale for "parliamentarization" of the constitution is the important factor. The references to "the other laws" should guarantee that citizens' rights can only be abridged by the statutory laws and that the scope of the governmental authority can be expended only by the law. While statutory laws implement the constitution, they cannot pronounce basic constitutional principles. "Parliamentization" of the constitution, understood from above, makes the concept of the constitution meaningless and produces a body of law that is vague, indeterminate, and overcomplicated.

Some constitutional commentators have gone even further to state that for "constitutional politics [to] collapse into ordinary politics . . . is not only inevitable but, under current circumstances in Eastern Europe, desirable."

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66 See generally GER. CONST. art. 104(a) (giving an example of apportionment of expenditures under the German Basic Law).
67 In fact, most new constitutions are of moderate length (150-170 articles). See LUDWIKOWSKI, supra note 15, at 194.
68 Objections as to the number of references to the statutory laws in the Polish Constitution are not confirmed by comparative analyses. The German Basic Law, comprised of 146 articles, is slightly shorter than the Polish constitution (243 articles), but refers its readers to "further regulations of the law" in 47 instances, amounting to thirty-one percent of constitutional articles. The Polish text does so eighty-seven times, equating to thirty-five percent of its articles. The relatively short Constitution of Kazakhstan (131) refers to laws only twenty-five times, amounting to nineteen percent of the articles. The number of references does not make the Polish Constitution less crisp or clear than the Constitution of Kazakhstan.
69 This requirement stems from the fundamental principle of the rule of law that the citizens can do whatever the law does not prohibit. Governmental authorities should operate on the basis of the law and within the boundaries of the law.
70 Holmes & Sunstein, supra note 35, at 295. "[T]he very creation of a constitutional culture in post-Communist societies depends upon a willingness to mix constitutional politics and
This type of politicization is already visible in East-Central European instances where constitutional culture has resulted in numerous manipulations of constitutional mechanisms for purely temporary political goals.

Consider, as a first admittedly untypical example, the Russian Federation. Ruslan Khasbulatov, before he was deposed by Boris Yeltsin from his position as Speaker of the Russian Supreme Soviet, had several constitutional lawyers on his staff whose job was to tell him when his legislative proposals conflicted with the constitution. When Khasbulatov learned of a possible conflict, he did not abandon his legislative proposal, of course, but with breathtaking nonchalance initiated the procedure whereby the constitution itself could be changed. Put succinctly, constitutional amendments have been used in contemporary Russia (by Yeltsin as well as by Khasbulatov) as just another technique for outmaneuvering one’s political enemies of the moment.71

The power-sharing deal offered to the Russian parliament by Prime Minister Primakov in January 1999 may serve as another clear example of constitutional “politicization.” Yeltsin’s suggested promise not to dissolve the parliament and dismiss the Primakov government if parliament would suspend current impeachment proceedings against Yeltsin is, at first glance, unconstitutional. The political deal would abridge the constitutionally guaranteed prerogatives of both the president and parliament.

Such examples are not unique. In Kyrgyzstan, the consideration of bicameral legislatures was motivated by reference to the concept of checks and balances. Ultimately, however, the upper chamber was perceived as a political puppet and as an artificially created presidential ally, and drafters of the May 5, 1993 Constitution finally decided to establish a single legislative chamber—the Jogorku Kenesh.72 The situation in Belarus took a different turn. The Constitution, adopted by the referendum of November 7, 1996, established a bicameral legislature.73 The drafters reserved for the president ordinary politics.” Id. at 285.

71 Id. at 281. Holmes and Sunstein come to the conclusion that this phenomenon is not only visible in, but probably inevitable and desirable for East-Central European politics.

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

73 See Belarus: Lukashenko-Opposition Conflicts Heats Up, CURRENT DIG. POST-SOVIET
a prerogative to appoint one-third of the senators, a clear revelation of the president's intention to create a "puppet" chamber controlled by him. These examples provide evidence that politicization of the constitution is both a vivid characteristic of East-Central European political culture and a component that goes against the very grain of constitutionalism. Excessive rigidity of the basic laws cannot be remedied by the degradation of the constitution itself. The balance between rigidity and flexibility is a conditio sine qua non of a strong constitution and cannot be substituted by half-measures. The trend toward politicization of the constitution works against the social absorption of the concept of the rule of law and, hence, must be viewed as such.

VI. THE COURTS: JUDICIALIZATION OF THE CONSTITUTION V. POLITICIZATION OF JUDICIAL REVIEW

One of the greatest novelties of postsocialist constitutionalism, judicial review, stands in par to such concepts as the division of powers, political pluralism, and the doctrine of etat de droit (a law-based state). After the fall of communism, constitutional tribunals mushroomed in East-Central Europe and became an active component of developing constitutionalism in the region. Judicial decisions began shaping constitutional culture of the new democracies equally with legislative actions, implementing decisions of administration and opinions of the media. Hence, legal scholarship must answer the following questions: (1) What is the level of appropriate court activity in reviewing the constitutionality of the laws and interpretation of the constitution? (2) To what extent are the constitutional courts ready to challenge political bodies or become themselves involved in politics? (3) What is the role of the courts in "optimization" of the constitution? (4) What means will enable courts to be fully functional and effective?

The discussions of the "counter-majoritarian problem" are an intrinsic component of the Western political culture. Constitutional scholars endlessly agonize over the limits of intervention of non-elected judges into the constitution-making processes. Should the judges restrain themselves and follow "an easy presumption that legislation is constitutional unless the contrary is clearly shown," or should they insert their own preferences into

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75 But see Holmes & Sunstein, supra note 35, at 295.

76 Richard Epstein, Foreword to STEPHEN MECEDO, THE NEW RIGHT V. THE CONSTITUTION,
the constitution? Is judicial activism a way of making the constitution a "living document, flexible enough to be used in modern conditions" or just a limited coup d'etat? 

The discussion of judicial activism, which is an omnipresent component of constitutional culture in North America, has taken a different turn in East-Central Europe. The so-called American decentralized model was rooted in the concept of constitutional supremacy and constitutional checks and balances. This system implies that one power is balancing, controlling, and supplementing the functions of the other, although no single power can completely subrogate the other. The system vests the regular courts with the power to nullify the decisions of the democratically elected organs, without making the judges equally accountable to the people. As Daniel John Maedor writes, "The tension between judicial independence and accountability cannot be altogether resolved," and the American doctrine gives the clear preference to independence. The American system secures all federal judges the right to hold office during good behavior and makes them removable only through impeachment by Congress.

The development of the European doctrine of judicial review took a different swing. In contrast to the American doctrine, the prevailing European model of judicial review concentrates the reviewing authority in a supreme

xi, xi (1986).


78 See Robert H. Bork, Neutral Principles and Some First Amendment Problems, 47 IND. L.J. 1, 6 (1971).

79 "This problem, the counter-majoritarian difficulty of judicial review, has received much more attention from North American scholars in the last decade than from scholars elsewhere in the world." Carlos Santiago Nino, A Philosophical Reconstruction of Judicial Review, 14 CARDOZO L. REV. 799, 800 (1993) (emphasis in original).

80 See LUDWIKOWSKI, supra note 15, at 9 (setting up the distinction between the judicial function and the legislative function).

81 See MAURO CAPPELLETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 58 (1971); see also ALLAN RANDOLPH BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW 125-82 (1989).

court or in a special court.\textsuperscript{83} Blended, as is the case of the German mixed model,\textsuperscript{84} with some elements of concrete and decentralized review, the European model gives individuals direct access to the court, but reserves the right of requesting review of an abstract issue of constitutionality for the highest governmental bodies or parliamentary groups.\textsuperscript{85} The existence of just one constitutional tribunal and limited cooperation of regular courts in the process of review, combined with relatively short tenures of justices, strengthens accountability and restrains the tendency to challenge democratically elected legislative organs.

Although significant discrepancies can be found in the organization of the constitutional courts in the new East-Central European democracies, the countries of the region generally follow West European patterns in opting for centralized review, limited tenure of the constitutional tribunals’ justices and significant contribution of legislative bodies in the process of selection of justices.

Most of the new democracies provide that both the legislative and executive organs should cooperate in selecting the justices, yet the competence of these organs vary. In some countries, the appointing functions are reserved almost exclusively for legislatures, as in the case of Hungary, but in other countries, assignment is relatively proportionally distributed among several organs.\textsuperscript{86} Most of the justices of the constitutional tribunals in East-Central


\textsuperscript{84} For closer comparisons of characteristics of German and French models of judicial review, see Ludwikowski & Fox, \textit{supra} note 9, at 49-50.

\textsuperscript{85} For example, the German system permits the Federal Constitutional Court to hear the constitutional complaints of individuals whose rights have been violated by public authorities [art. 93 (1) 4a of the Law] but reserves the right to request the review of an abstract issue to the federal government, a Land government and one-third of the Bundestag members. \textit{Compare} GER. CONST art. 93 (1) \textit{with} GER. CONST. art. 93(2).

\textsuperscript{86} In Poland, justices are individually selected by the Sejm, and the President and Vice-President of the Tribunal are appointed by the president from a pool of candidates proposed by all justices of the Tribunal. See POL. CONST. art. 194. In Bulgaria, one-third of the justices are elected by Parliament, one-third are appointed by a president and one-third are appointed by the joint meeting of the justices of the Supreme Court of Appeals and the Supreme Administrative Court. See BULG. CONST. art 147; the Constitutional Court itself elects its President. Romania follows the French model and splits the power to appoint justices between the president and the two chambers of Parliament, each having the right to choose one-third of the Court’s members. \textit{See} ROM. CONST., art. 140. In Russia, the president nominates candidates who are appointed by the Federation Council. \textit{See} RUSS. CONST. art. 128. In Belarus, the Constitution reserves for the president the power to appoint half of the justices; the other half is appointed by the Council
Europe are elected for the periods precisely determined by the constitutions. For example, in Bulgaria, Romania, Lithuania, and Hungary justices are elected for nine years,\(^7\) in Albania for two years, in Belarus for eleven years, in the Czech Republic and Ukraine for ten years, and in Slovakia for seven years; in Poland, the tenure of justices was eight years, and was extended by the 1997 Constitution to nine years.\(^8\)

Although the scope of the reviewing activity of the constitutional courts varies, it notable that the awareness of the "counter-majoritarian dilemma" affected the drafters' decision to limit the extent of finality of the constitutional courts' rulings. In some countries (e.g. Poland in 1985-1997 and Romania), only the rulings on the legality of substatutory laws are binding, but the decisions on the constitutionality of statutes can be overruled by a qualified majority of two-thirds of the legislative chamber.\(^9\) In Slovakia, the Constitutional Court has ruled that the challenged acts are "voidable," which means that the organ which issued the act should bring it "into harmony with other laws" within six months after the act ceases to be effective. In Lithuania, the Parliament reserves for itself the final decision in actions on compatibility of international agreements with the constitution, in the violation of election laws and in impeachment proceedings.\(^90\)

The concept of constitutional review in East-Central Europe, which differs from the North American concept, decided that discussion on judicial activity and judicial restraint focused less on the courts' right to challenge the legality of actions of the democratically elected organs and more on the question of whether inexperienced judges will be able to distinguish legal intervention from the inclination to interfere in everyday politics. The problem of "correctly channeled activity" has received more attention of legal scholarship in this region than the issue of "judicial restraint"; "politicization of judicial

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\(^7\) See BELR. CONST art. 116. In Lithuania, the justices are chosen by Parliament from a pool of candidates, one-third of whom are nominated by the president, one-third by the Speaker of the Parliament, and one-third by the President of the Supreme Court. See LITH. CONST. art. 103.

\(^8\) The Hungarian Constitutional Court recently suggested amending the Constitution and extending this term to 12 years. See Hungary Update, E. EUR. CONST. REV., Winter 1998, at 16, 16.


\(^90\) See Statute on Constitutional Tribunal, art. 7/3 (Pol.) (1985); ROM. CONST. art. 145.

**Notes:**

- In other countries (i.e., Bulgaria, Czech Republic, Hungary, Poland under the 1997 Constitution, Russia) the decisions of the constitutional courts on the constitutionality of the law are final.
review,” rather than the “judicialization of the constitution,” became the most vigorously discussed problem.

In fact, the scope of activity of the new constitutional courts surprised even the most far-sighted commentators. The constitutional courts in several countries have been quickly recognized as formidable enemies both by the executive organs and the legislatures. The political conflicts between these courts and the presidents in Belarus, Kazakhstan, and Russia (before Yeltsin’s decision to dissolve parliament in 1993) have been well documented. In Bulgaria (the Socialist Party) and in Slovakia (the Movement for a Democratic Slovakia), political parties charged the constitutional courts for confusing judicial functions with political functions. In Romania in 1995, the practice of sending almost all bills to the constitutional court for review became a matter of constitutional routine. In Albania, the attempts of the constitutional court to assert more power and actively intervene in the legislative policy of the People’s Assembly involved the Association of Judges in an open conflict with President Berisha, which resulted in the removal of progressive Court of Cassation Chairman Zef Brozi.

To what extent did this initially chaotic activity of the East-Central European constitutional courts evolve into a mature process of “optimization” of the constitution? Two results are apparent. One, the courts’ transformation of this function, as subjective fundamental rights change into “objective principles,” serves individuals by protecting their freedoms against the state and other individuals’ intervention. Two, such maxims regulate social

91 See LUDWIJKOWSKA, supra note 88, at 177-82.
93 In fact, the constitutional challenges of almost all legislative acts in Bulgaria in 1995 became almost a routine. In Spring 1995, more than a dozen statutes were submitted for the Parliament’s review. See Bulgaria Update, E. EUR. CONST. REV., Summer 1995, at 5, 6; Bulgaria Update, E. EUR. CONST. REV., Fall 1995, at 5, 8; see LUDWIJKOWSKA, supra note 88. In Slovakia, it became a routine that the President’s vetoes of numerous statutes were overturned by the parliament, resulting in sending the questioned acts to the Constitutional Court. See Slovakia Update, E. EUR. CONST. REV., Spring/Summer 1996, at 23, 23.
95 See Rett R. Ludwikowski, Albania, in WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES 4, 8 (George Thomas Kurian ed., 1998). “Brozi’s removal was apparently the result of his increasingly public positions in favor of judicial independence and against government corruption; it was accompanied by numerous legal and procedural irregularities and resulted in protests from numerous international observers.” The Judiciary in Albania, ABA CENTRAL EAST EUROPEAN LAW INITIATIVE 12 (1996).
relationships and impose positive obligations on the state’s organs. Given the significant discrepancies in the scope of reviewing activity of the courts of this region, the results are not universal. Some observations are, possible, however.

Most of the constitutional courts still focus on review of constitutional coherence of the laws and conformity of international agreements to the constitution. Within this limited scope of jurisdiction, some of the courts are capable of explaining important constitutional principles. The attempts of the Polish Constitutional Tribunal to analyze the concept of the “rechtssstat clause” (state ruled by law), and particularly principles of “nonretroactivity of laws,” “equality,” and “vested rights” were widely commended. In a similar fashion, the Hungarian Constitutional Court explained the principle of “fair trial” and imposed on the Parliament on obligation to amend legislation on misdemeanors. However, the process of extending the constitutional courts’ jurisdiction over the right to hear individual complaints, which gives the courts opportunity for “optimization” of fundamental rights, is still slow. Hearing individual constitutional complaints is recognized as the most democratic feature of judicial review, but its introduction overburdened numerous European constitutional courts, comprising over ninety percent of their agendas.

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96 The involvement of the courts in the process of optimization of the Constitution has been widely commented as an important feature of German constitutional culture. “The consequences of interpreting and treating fundamental rights as rights or as principles become clear when one views the development of decision making by the Bundesverfassungsgericht.” Bernhard Schlink, *German Constitutional Culture in Transition*, 14 CARDOZO L. REV. 711, 717 (1993). As an example, in 1973 the German Federal Constitutional Court recognized that academic freedom is not only a subjective right of German scholars but an objective principle which imposes on the government on obligation to leave the organization of the university completely to the academic institutions and free from legislative intervention. See Judgment of May 29, 1973, 35 BVerfGE 79; id. at 719.

97 See Ludwikowski, *supra* note 10, at 52-58 (including more comments on the scope of the constitutional courts’ activity).


100 The number of complaints submitted to the Hungarian Constitutional Court forced this Court to impose some controls on its own agenda. The Court began checking whether all formal requirements (deadlines, exhaustion of other remedies, direct violation of individual rights the petitioner, binding character of the challenged decision, etc.) were met by the applicants and finally decided that one individual’s constitutional claims cannot be subject to the Court’s review. See Andras Mink, Interview with Lázló Sólyom, President of the Hungarian
Thus, the progress in the process of optimization of the constitution by the constitutional courts is steady in some countries but is neither well-understood nor developed in others. Many of the courts are still highly politicized and the effectiveness of and respect for the constitutional courts in East-Central Europe varies from country to country. The courts’ full impact on constitutional culture has still not been felt.

VII. CONCLUSIONS. WEST AND EAST: CONVERGENCE OR DIVERGENCE OF CONSTITUTIONAL CULTURE?

This article identifies some characteristics of constitutional culture in the new East-Central European democracies. It remains to be seen how far these Eastern European countries will go in their acceptance of a constitutional culture of the West. Will the Western deference for constitutions and the rule of law permeate this post-socialist region?

The response to this question requires more in-depth study. There is definitely the need for reports from all countries of this region on several issues which were mentioned in this work: on the reaction of legal scholarship to judicial decision making; the capability of the legal scholars to anticipate the constitutional courts' decisions;\textsuperscript{101} the level of acceptance of the

\textit{Constitutional Court, E. EUR. CONST. REV., Winter 1997, at 71, 72}. Other countries, which incorporated the review of constitutional complaints into their judicial practice, followed suit and began to carefully verify the meritorious character of all submissions. At the time of this writing, in addition to Hungary, constitutional complaints are permitted by the Constitutions of the Czech Republic, Slovakia and Poland (after 1997). The Constitution of Russia, following the socialist pattern of promising something without enforcement mechanisms, indicates that the decisions of state organs may be appealed in a court of law. The Russian constitution also provides that the Constitutional Court may hear claims about violations of constitutional rights and freedoms of citizens, but it does not explain who can file these complaints and does not list the right to hear individual complaints among competencies of the Court. See \textit{RUS. CONST. art. 46}. The right to appeal the decision of administrative organs which infringe on citizens’ rights is mentioned in Art. 40 of the Kazakhstan Constitution and Art. 82, §8 of the Kyrgyzstan Constitution. The Romanian Constitution provides that any one person suffer damage as a result of the violation of his rights by a public authority, is entitled to have the injury recognized, the act revoked, and to receive compensation for the damage (Art. 48). The Constitution, however, does not explain which court will hear these complaints and provides that the conditions and limitations for the exercise of this right will be determined by statutory law. For more detailed analysis of this problem, see \textit{LUDWIKOWSKA, supra} note 88, at 109.

\footnote{101}{One example is the German Federal Constitutional Court, which develops fundamental tenets of Germany’s constitutional doctrine and scholarship elaborates on them. See Schlink, \textit{supra} note 96, at 730. One may risk the thesis that the involvement of legal scholars in the process of shaping constitutional culture in East-Central Europe is more substantial; national in-depth studies are required to confirm this assumption.}
constitutional courts’ rulings; and the inclination of the media to pressure the courts into addressing constitutional issues.  

The well-balanced evaluation of cultural convergence of the East and West requires the evaluation of the level of cultural uniformity of the new democracies; this objective can be reached only on the basis of national reports.

There are still significant discrepancies in the constitutional cultures of East-Central European countries. The postsocialist societies have different constitutional traditions, unequal experiences with democratic mechanisms, poorly qualified constitutional drafters, and limited staffs of the constitutional courts. In addition, one must admit that ethnic problems of the new democracies impose different burdens on constitutional scholarship and constitution-making. As it has been often observed, one of the rationales of constitutionalism is to absorb ethnic problems into “demotic” problems of entire societies.  

This process is just beginning in East-Central Europe.

A reasonable search must recognize also common cultural features of the new democracies. These traits seem to stem more from the transitory situation of the region than constituting an unsurmountable obstacle in the process of convergence of political culture of the West and East. It can be reasonably observed that the drafters of the new constitutions share doubts as to the universal applicability of Western constitutionalism. Their innovative approach is, however, mitigated by the critical reaction of constitutional scholarship to the inconsistencies of experimental constitutional “gardening.” It appears that regional constitutionalism will attempt to incorporate local flavor and local traditions into the Western constitutional framework rather than reject “imported constitutions.”

Political passivity, combined with occasional fireworks of public emotions, is still a viable feature of regional constitutional culture. The creation of new channels of political information and platforms for public dialogue may contribute to the growing respect for collective values and eventually to social trust in the sanctity of constitutional instruments.

The lack of appropriate flexibility of the new constitutions has resulted in a tendency toward excessive parliamentarization of new basic laws. This trend will be curbed by both the growth of the body of laws implementing

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102 Due to translation problems national reports are a prerequisite to any well-balanced study of these aspects of constitutional culture.

103 “The constituent power of the people will always encompass the ethnic and the demotic elements of the people. But it is the very rationale of the constitution to transform the unfathomable power of the ethnos into responsible authority of the demos.” Ulrich K. Preuss, Constitutional Powermaking for the New Polity: Some Deliberations on the Relations Between Constituent Power and the Constitution, 14 Cardozo L. Rev. 639, 660 (1993).
constitutionally provisions and constitutional court decisions explaining ambiguous language of the constitutions.

Politicization of the constitution along with intrinsic politicization of judicial review is a more troublesome trend which easily may become a trait of regional constitutional culture. If not subject to solid and critical examination, this tendency may divert the development of constitutionalism in the new East-Central European democracies from the rule of law and significantly delay the process of convergence of constitutional culture in Europe.