DEMOCRATIC CONSOLIDATION IN EASTERN EUROPE: INSTITUTIONAL ENGINEERING
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Klaus von Beyme

INSTITUTIONAL ENGINEERING AND TRANSITION TO DEMOCRACY

The enlightened neo-institutionalism in the 1980s brought back the institutions into political science. Previously they had been neglected. 'Grandpa's political science' was out since it was institutionalist. The competing paradigms of the 1960s and 1970s were behavioralism (in macrotheory combined with a functionalist system's perspective) and neo-marxism. Both were bitter enemies but they agreed on one point: institutions are only a framework to study the behavior of actors.

For the neo-institutionalists the institutions were still conceived in a rather instrumental way. Institutions served as channels for the actors of policy networks which worked within and without the constitutionally entitled political institutions. In an analogy to the arts neo-institutionalists recommended to abandon the 'central perspective' - in politics the perspective of a national legislator (Mayntz/Scharpf 1995: 44). New forms of decentralized steering of actors were discovered. The state served only as a kind of supervisor.

Rather the palaeo-institutionalists reintroduced holistic considerations of institutional engineering. Grandpa's political science with weary discussions on the virtues of parliamentary or presidential government had a renaissance. Some of these palaeo-institutionalists belonged to the conservative resistance against the 'behavioral revolt', such as Giovanni Sartori. They had for a long time fought against the sociologisation of political science and stood up 'in defense of politics' (Bernhard Crick). Only in France was it unnecessary to fight 'in defense of politics' because the institutionalist bias of political science in this country was never abandoned.

The neglection of institutions under the auspices of behavioralism had negative consequence for the discipline as can be shown in the case of Germany. The electoral commission in the 60s, when Germany pondered over the introduction of the British plurality electoral law, still contained three social scientists. In the Enquete-commission for the constitutional reform in the 1970s only one political scientist was represented at all. Political science had left constitutional engineering to the lawyers.

Constitutional engineering involves the rationalistic bias that good constitutions can be made - though its torchbearers by no means thought of the constitutions as a 'machine', as did some thinkers of the classical enlightenment era. Leftist rational choice neo-

institutionalists held, such as Jon Elster (1988: 319ff), that the consequences of constitutional change can hardly be predicted. That is why he was rather interested in solutions to promote justice instead of speculating about an efficient solution of problems. Non-normatively oriented analysts, on the other hand, nourished deep suspicions against the idea of justice in constitutional engineering. Good institutions rather than good men and citizens - agreeing on justice - were required for them. Theoreticians of radical and participatory democracy - since Rousseau - on the other hand distrusted 'good institutions' and were rather interested in educating good citizens motivated by a 'civil religion' and educated for civil society. They neglected, however, that this required also institutions and even 'good institutions' because of the possible abuses of state-run educational efforts.

The established democracies have institutions which are used by their citizens in a routinized way without asking for their legitimation (Jepperson 1991: 149). Nevertheless some institutions have to be protected by state measures and appeals to the people, for instance the electoral system when participation approaches the 50% threshold and thus puts the democratic majority principle into question.

Institutional engineering was not a concept invented by the new wave of transitions from dictatorship to democracy. It was rather a concept for transition from democracy to democracy in a time when a consolidated democracy entered into a crisis. Italy was the classical case. Some scholars began asking whether Italy ever met the criteria for consolidation until 1994 because the old system was shaken without major resistance from the part of the established political forces. In the 19th century a British citizen who wanted to buy the French constitution got the answer from the bookshop owner: "Sorry, we don't sell periodical literature". The stability of consolidated democracy after World War II has obscured the fact that stability is rather the exception in constitutional history.

Institutional engineering in Western Europe is used all the time because of the European Union. In Germany one fifth of all the laws are caused by an impulse from Brussels. Quite frequently this involves also the constitution. There is not yet a European constitution which makes the national constitutional engineering obsolete and reduced constitutional adaptation to judicial review from Luxemburg. Quite a few experts (cf. Grimm 1994: 50f) warn us to attempt the institutional risk of European constitution without a democratic infrastructure. The longer a European constitution will be postponed the more complicated it will be to agree on a system. After the war, the European democracies were

fairly similar variations of the parliamentary system, even France until 1957. France introduced a semi-presidential system in 1958 and systems in crisis, turning to constitutional engineering, such as Italy, recently consider also the introduction of a semi-presidential system. The East European system of the northern tier to which negotiations for access to the EU were promised by 1998 have also partly adopted a semi-presidential system, such as Poland. Some new members in crisis are thinking about constitutional engineering and strengthening the popular elected president, such as Austria and Finland. In most European countries the democratic crisis is spreading: the decline of party identification and voting participation, fractionalisation of party system, alienation of citizens from what they call the 'political class'. Constitutional engineering seems to be the way out. The beliefs in government project has shown alarming figures. In Italy the confidence in institutions is at its lowest state (32%) (Listhaug/Wilberg 1995: 305).

In such a model, institutional engineering in Eastern Europe was no longer able to import foreign istitutions. The concept of constitutional engineering is neutral to the question whether constitutional provisions develop via diffusion and import from other countries or spring up as functional equivalents because the constitutional engineers have to solve similar questions in different countries. Chasbulatov, as president of parliament in opposition to president Yeltsin, tried to give almost a lecture to the deputies on the three possible systems, the presidential, the semi-presidential and the parliamentary system. The result of the constitution-making process was nevertheless a rather original combination of all three, with a center of gravitation in the semi-presidential system (cf. von Beyme 1996: 101ff). In the transition process to democracy in Eastern Europe no completely new form of governmental system was created. Most of them were, however, not whole-sale imports but rather indigeneous combinations of historical models. The American system as a model in European history of 'constitutional engineering' played mostly a minor role and remained within the boundaries of semi-presidentialism (cf. von Beyme 1987: 33ff).

Institutional engineering in Western Europe concerns four democratic institutions:

- the constitution as a whole,
- the discovery of the semi-presidential system,
- the search for a new electoral law which renders efficient majorities,
- the use of plebiscitarian instruments to overcome the crisis of the representative system.

1) Constitutional engineering

Constitutional engineering in the transition from democracy to democracy was rare. It happened most frequently:

- in the case of a new federalization of constitutions (Canada, Belgium),
- in the case of an adaptation of the monarchy to a modern parliamentary system (Sweden 1971, 1974).
- There is only one notable case of transition from one regime (parliamentary) to another (semi-presidential) (France 1958).

In most other cases institutional engineering remained below the level of replacing the whole constitutional system. In the transition from dictatorship to democracy there was more institutional continuity than in processes of transition from fascist or right-wing dictatorships to democracy.

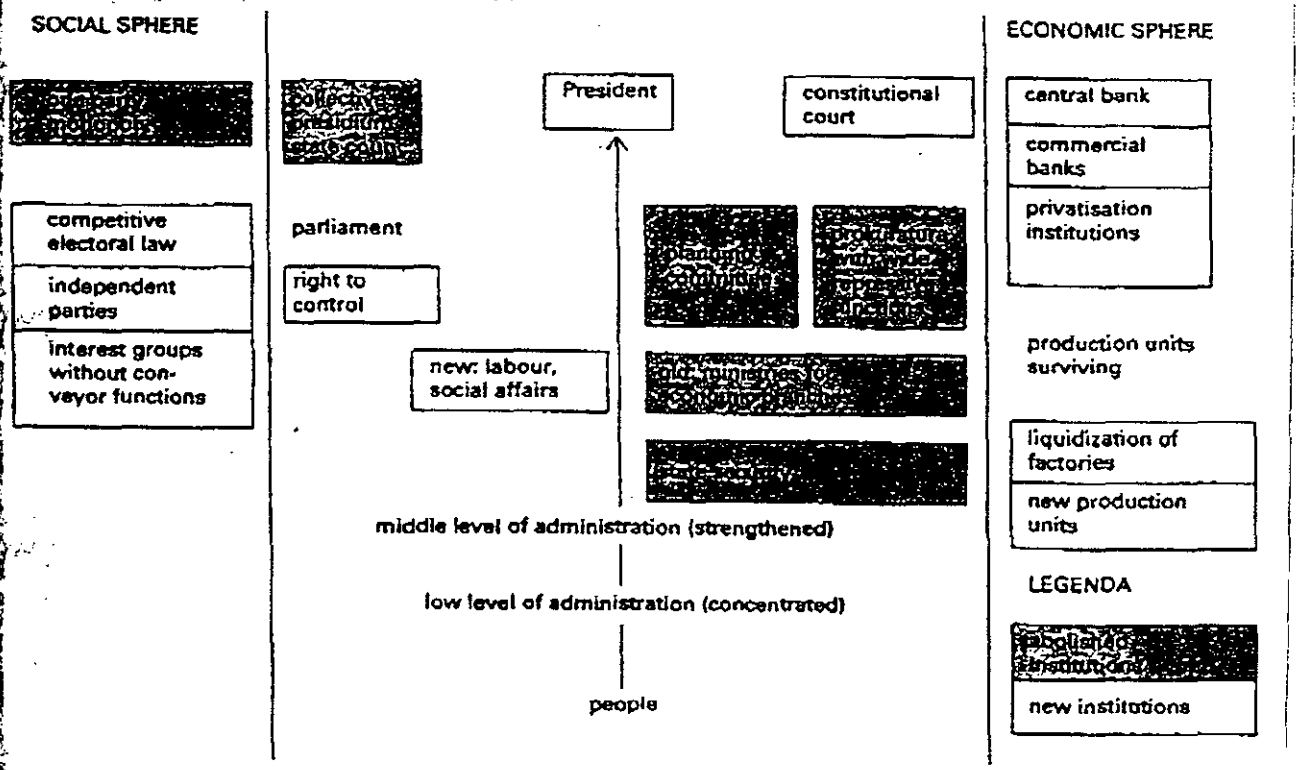
Constitutions contain the meta-rules of a system which are to be accepted by all groups supporting the new regime. The fourth wave of democratization in Europe, after 1989, led to a paradox situation: the meta-rules had to be fixed, though they were not yet consolidated and agreed upon by many relevant political forces of the transitional regimes. The written constitution, more so than in former transitions, remained a promise for the future. What Schmitter (1992: 161) called partial regimes of the constitutional systems were hardly developed: the party system took shape, but the system of interest groups remained underdeveloped.

Whereas fascist regimes after 1945 disappeared, communist institutions after 1989 survived in many countries of Eastern Europe, especially those where transition was bargained for in a corporatist way (Poland , Hungary). In countries where a peaceful transition occured, some institutions were already revitalized and democratized in the late 1980s. Then in a second constitutional modernization the institutions of a market economy were added to the constitutional system.

Constitution-making is a power-struggle, as can be seen in Western Europe after 1945 and in the 1970s as well as in Eastern Europe in the early 1980s. Some of the old concepts such as the perception of parliamentary government as government by assembly became an instrument for the old communists to extend their power bases. Sometimes the new presidential office antagonized floating parliamentary majorities, which occurred in Poland and Russia.

Another paradox was evident: the more democratic the majority of citizens was who had pushed the system into early concessions to the oppositions, the less radical was the constitutional innovation in the first phase of transition. Countries with a clear ruptura were in the position to impose constitutional ideas, either by the new democratic forum (Czechoslovakia, Lithuania) or through the reform communists, who in the first period of transition had stayed in power (Romania, Bulgaria, Albania, Serbia). A new constitution in the latter cases did not necessarily mean a new constitutional system. Where new states were created because of the disintegration of multi-ethnic regimes, such as in the Baltic states or in the successor states of Yugoslavia, the incentives to create a new constitution were great. Only Estonia and Latvia revived their pre-communist constitutions in order to emphasize the continuity of their statehood which had perished through Soviet annexation.

Figure: Superposition of new insitutions in the process of constitutional engineering



Four models of constituitonal consolidation were developed in Eastern Europe:

1. According to the Austrian example of 1945, the pre-authoritarian constitution could be reintroduced, as in Estonia and Latvia. This road indicated continuity and denounced the Soviet period as violent intermezzo.
2. Corporatist revolutions tended to amend the constitution if it contained enough provisions to please the bourgeois elements in the country, as was the case in the constitutions of the 1950s in Eastern Europe. In Hungary the constitution of 1949 in Article 2.1 emphasized the values of bourgeois democracy as well as democratic socialism. In Albania a substantially amended constitution of 1976 was accepted as a draft because the debate on the new constitution of 1991 was long and agreement was difficult. Many CIS states have also chosen to keep amended constitutions of the Soviet period, eliminating the most ideosyncratic parts of Communist provisions.
3. A third group went the normal route to work on a new constitution. This happened mostly when one group had a hegemonial position - the Forum in Czechoslovakia or the Communists in Romania and Bulgaria (until 1991).
4. In some cases no agreement was reached, as in Poland in 1992. A 'Small Constitution' as a provisional constitution regulating the cooperation of the three powers was the result. This situation was a reminder of the Third French Republic which in 1875 created three different constitutional laws but no integrated constitution. Article 77 of the Small Constitution in Poland indicated which parts of the old socialist constitution were still valid.

The final compromise weakened some of the president's powers and reserved, in the possibilities for forming cabinets, certain rights of codetermination for the Parliament by the possibility of a constructive vote of no confidence (Article 66.4). The president was not ready to accept this compromise and contributed to the destabilization of government in order to impose himself as an arbiter. When Hanna Suchocka was toppled, the president, even before the formal vote of censure, had negotiated with the Solidarity group and other foes of the prime minister. 'Solidarity' consequently threatened strikes. This did not go as far as the mobilization of the miners in Romania, who tried to put the prime minister Roman under pressure. The prime minister made it cclear, though, that these extra-parliamentary means actually undermine parliamentary democracy in Poland.

Most new constitutions combined Western democratic principles with indigenous national traditions. Russia called herself a 'democratic federative constitutional state with a Republican form of government'. The 'Social State', added in previous versions, was graded down to the catalogue of 'declarations of state goals' (Article 7). The principle of federalism, on the other hand, was upgraded in the debates on the constitutions which were protracted over several years. Originally, three 'Subjects of the Russian Federation' (Daghestan, Mordvinia and the Northossetic Republic) have used the characterization of a 'socialist Republic'. In the final version of December 1993, all socialist remainders had disappeared. On the other hand, in the codification of the new economic system many concessions were made to the old nomenclatura. The parliamentary draft of the Russian Constitution contained an Article (9) on 'social market economy'. It disappeared and was downgraded to a more neutral mentioning among different forms of property (Article 8.2). The draft of 1992 (Article 9.3) wanted to emphasize 'social partnership', but it was sacrificed in search of a compromise between the reformers and the die-hards of the old regime. In some respects there was no harm done and new well-sounding formulas without concrete obligations for the state were omitted. Sometimes the new formula sounded like an adaptation of old contents. 'Social partnership' in its streamlining capacity of the draft reminded one of the old notion 'socialist community of men' which had not improved the liberty of Soviet citizens.

In Hungary the bargained constitution proclaimed a 'peaceful political transition to a legal state which realizes a multiparty system' (preamble). 'Social market economy' was a compromise after so many failed experiments with a 'socialist market society' was accepted in many East European countries. In Germany it had remained a propaganda slogan since Erhard and lasted uhtil it was finally introduced into the 'State treaty' with the GDR, which led to the unification of the two German states (Article 1.3, 11). Even the principles of the magic quadrangle of economic goals of the state (full employment, anti-inflation policy, balanced state budget and balanced foreign trade) earned constitutional importance. The formula 'social and democratic legal state' in the German Basic Law spread already in the third wave of democratization after World War II (Spain 1978, Article 1). New were the abundant confessions for an ecological market society in Eastern Europe.

The self-image of the transitional regimes which showed itself in the new constitutions was sometimes very vague: it included 'political pluralism' (Romania, Article 1) or the 'parliamentary system of government' (Bulgaria, Article 1.1) and sometimes even

the catchword of a 'civil society' was introduced (Lithuania 1992, preamble; Slovenia, preamble). Most states were so insecure of their continuity that lengthy references to history were often made. Lithuania hinted at its statehood which was founded 'many centuries ago'. Slovakia, hardly ever an independent state, invoked the 'cultural heritage of Kyrillos and Methodius' and the 'historical bequest of the Grand Moravian Empire'. Croatia even inserted a historical list of all the sovereign decisions made by the Croation estates (which operated within other Empires).

The separation of state and church was emphasized in many costitutions. According to the predominant interpretation this was no longer an attack for the free exercise of religion, as it was interpreted sometimes in the early days of laicist movements. The privileged mentioning of a 'traditional religion of the Republic' in the Bulgarian constitution (Article 13.3) was hardly compatible with the state's religious neutrality. Russia underlined the 'worldly state' more than others (Article 14). No religion was allowed to be imposed by the state. Religion in this respect was treated in equal terms with ideologies (Article 13.2). The invocation of the almighty God in the Polish draft of a constitution was not deviant from the customs of other Catholic states (most outspoken in Ireland 1937/72, preamble). The culture of preambles even in modern laicist cultures has a threefold function: to sketch in a ceremonial language the basic principles of the system, to integrate the citizens and to mention the hopes for the future. In Eastern Europe this kind of verbal integration flowered, as was necessary since the integration of the citizens in many states was shaky and the prospects for the future were dim.

The best intentions were devoted to the prevention of systems falling back into totalitarianism. Most abuses of the communist system were forbidden, such as forced labour, censorship (Russia, article 28.3; Slovenia 1992, article 1) and the death penalty (Slovakia, article 15.3). 'The right to live' (Bulgaria, Article 28; Russia, article 20) logically entails the outlawing of death penalties. Russia, however, was not in a hurry to implement this consequence. The 'right to live' was limited by the addition that the death penalty is possible 'until its abolition by a federal law'.

The counter-reaction against totalitarian dangers led to a frequent entrance of truisms into the constitution, such as outlawing regulations which limit immigration and emigration of the citizens (Estonia, Article 36; Russia, Article 27), forbidding deportation (Russia, Article 36.2), torture (Russia, Article 21), medical experiments with men (Estonia, Article

18.1, 18.2) or collecting data on the citizens' private life (Russia, Aug. 1993, Article 45.1). It did not strengthen confidence in the new legal state, that this provision disappeared in the last moment. In some countries the deprivation of citizenship was outlawed (Article 6.3). Only in Poland did the provision that the president could deprive a citizen of Polish citizenship exist (Article 41).

Truisms of best intentions entered the constitutional texts, such as the sentence: 'unpublished laws are not applied' (Russia, Article 15.3). One can imagine that this was meant to be a barrier against the Russian practice to govern by unknown ukazy, but in a legal state this provision is superfluous. Contradictions and limitations of granted rights also hindered the trust in the legal state. In Russia (Article 55.2) it was ruled that human and citizens' rights should not be diminished by state activities. But the catalogue of exceptions invited some misgivings. Not only did 'moral reasons, health and the rights and interests of other persons' authorize limitations of the basic rights, but even 'the defense of the country and the security of the state' (Article 55.3). 'State security' was surely the most abused notion under Communist rule.

Following the German example, the constitutionality of the parties entered some of the budding democratic constitutions (Bulgaria, Article 149.5; Estonia, Article 48.3; Poland, Article 5). In Russia's constitution (Article 13.5) the social organizations were also included. In most countries a Constitutional Court was developed, but in only a few cases was the Court directly entrusted with the decision of whether the constitutionality of parties should be given or not. In many countries the democratic status of interest groups was regulated. Mandatory membership in mass organizations was outlawed in Russia. Originally this provision was limited to the trade unions (draft 1992, Article 29). Yeltsin's constitution of December 1993 has postulated a right to leave mass-organizations for all interest groups (Article 30.2).

In most consitutions the protection of private property was new. In some countries state ownership was strongly protected for the mining resources (Yugsolavia, Article 73). Also for agricultural soil, certain rights were reserved in some constitutions of the succession states of Yugoslavia.

Governmental stability was a concern in many constitutions - as it was in the new democracies after 1945 which first 'rationalized' the parliamentary system. In Bulgaria (Article 99) and Hungary (Article 33,3) the president was subject to certain rules of

consultation. The Swedish constitutional reform of 1971 first introduced this kind of provision because the Riksdag majority distrusted the heir of the throne who later became king of Sweden. The distrust was not so much due to the concern of his democratic intentions, but rather his intellectual abilities to handle difficult procedures of coalition-buildung. Although many constitutions preserved plebiscitarian elements of the former socialist constitutions, excesses of communist manipulated democracy such as the recall (Poland, Article 6) of the imperative mandate for deputies (Bulgaria, Article 67) were forbidden.

The most important test for the democratic convictions of the founding fathers of the new regimes was the treatment of ethnic minorities. There were declarations of the 'multinational people'(Russia, preamble) or invocations of the 'democratic tradition of nation-building'(Yugoslavia, Article 4) which were similar to the rhetorics of the old regime. All these provisions were impacted only by specification. It caused doubt when Russia (Article 1.2) differentiated between the notions of 'Russian' (russkij, ethnic meaning) and rossiiskij (legal meaning), but in the end declared the two terms as synonyms. The treatment of different languages was the most important part of ethnic relations. Sometimes a state language was fixed (Bulgaria, Article 3; Lithuania, Article 14). In Russia (Article 26.2) the right to speak one's language was granted for all ethnic groups. But a language of the state (Article 68.1), the territorial languages of the Republics aside, was written into the constitution. The most curious provision was found in the remainder of Yugoslavia. After 40 years of propaganda for an integrated Serbo-Croatian language the Constitution under Serbian dominance restricted the notion 'Serbian' to two dialects written with Cyrillic characters.

State languages can also be found in Western constitutions. Spain's constitution (Article 3.3) mentions the right and duty to know and to use the state language. In Bulgaria (Article 36.2, 36.3) this was formulated in a much more mandatory way, because there was a 'duty to learn' Bulgarian. This was much in the tradition of the Bulgarization of Turkish names in the 1980s which did not stop at the cemeteries of the Muslims in Bulgaria. More trustworthy was the Slovakian formulation (Article 32) which did not impose a duty, but only mentioned the right of the ethnic minorities to learn the state language. Apparently those countries which were fairly homogeneous in ethnic respect could afford to be most liberal - as Hungary for instance. Nobody will conclude from the constitutional text to the social reality of ethnic politics. But it is noteworthy to point out that the degree of liberalism

and pluralism in most cases is already visible in the constitutions. Most important was, however, the regulation of ethnic relations in laws which supported affirmative action. The Czech Republic and Hungary were most generous in this respect in granting the ethnic minorities financial and organizational help.

In many cases, remainders of the old system were to be found in the description of social rights and citizens' duties in the constitutions. Poland (1952/92, Article 69) declared a right to recreation and leisure and promised (Article 77) to support the creative intelligentsia. Hardly any constitution went so far as the constitution of the Land Sachsen-Anhalt in 1946 which ruled a 'right of the youth to pleasure'- a fairly ridiculous variation of the old principle of 'pursuit of happiness'..

In the GDR until March 1990 there was a constitution-making process for an independent East German state. But the 'round table' discussion on a democratic constitution were already more realistic than other former ex-Communist countries in stating the social rights are basically meaningless in the areas where the democratic state is unable to control the creation of such goods as housing or workplaces. As in the West, environmental protection was the door where unrealistic formulations entered the constitution. 'Everybody has a right to sound environment'(Slovakia, Article 44) raises many expectations which cannot be satisfied. German leftist analysts (Guggenberger et al., 1991: 35), therefore, renounced writing into the constitution everything under the sun which is good and desirable. This did not prevent constitution-makers from promising a 'humane demographic policy'(Russia, draft 1992, Article 8), though.

The duties of the citizens remained in many constitutions. The duty to pay taxes was emphasized much more than in Communist regimes (Romania, Article 53; Russia, Article 57). Military service (Russia, Article 59.3) is mentioned as a duty, in combination with a right to opt out and to choose a civilian service instead of serving in the army. Some declarations, however, came close to older communists formulas. In other cases, the state handed over part of its responsibilities to its citizens when it imposed on the citizens the duty to preserve the monuments of history and culture (Article 43). The constitutional sections dealing with the duties of citizens are certainly the most papatronizing aspects of the new regimes.

Western analysts should be fair; constitutions are hardly ever without contradictions, because they have been worked out by compromises. Universal declarations are to be found

next to state interventions on behalf of very specialized interests such as 'agriculture in the mountains'(Switzerland, Article 23 bis). The more protracted the constitution-making process, as in Russia or Poland, the greater are the contradictions in the constitutional system.

Constitutions are decisions about the distribution of power. Institutional engineering is just a too technocratic expression for influencing the power process by constitution-making. The semi-presidential system as well as the electoral law have been used by constitutional engineers in East and West to reshuffle the balance of power between various political forces.

2) The semi-presidential system

The search for good institutions has led - in West and East - to a positive reevaluation of hybrids, such as the semi-presidential system or electoral laws which offer a bonus to majorities without being majoritarian. In both fields a loose talk on 'mixed systems' is widespread. But neither is the German electoral system a 'mixed type' nor is the French system of semi-presidentialism. The former is but a variation of proportional electoral law, the latter is basically a subtype of parliamentary systems. Some authors try to create an independent type (Bahro/Veser 1995), but more rigorous examination teaches that the French system is closer to parliamentary regimes than to an authentic presidential system (Steffani 1995: 639). There is a huge range of variation in the power of presidents in semi-presidential systems. In some countries, such as France, the president is much stronger than provided by the constitution; in others, such as Finland or Iceland, it is de facto weaker than according to the constitution. This relative power position may even vary over time. It even happened to the true presidential system in the United States, otherwise some authors would not have been able to talk about 'congressional government' (Wilson) and others (Schlesinger) about an 'imperial presidency', both being fairly close to the truth in their respective time though no constitutional engineering had changed the legal powers of the office (cf. von Beyme 1987: 57).

Constitutional engineering in Italy has led to a debate in which Sartori's (1994: 136f) dictum mixed types are better than pure types is widely accepted. The Italian case discredited institutional engineering, however, because leading figures, such as Berlusconi changed their opinion several times and called on experts for every turn. Most absurd was the discussion

on popularly elected prime minister. Israel has elected one for the first time and did hardly contribute to show the virtues of such as system in the light of the peace-making process in the Middle East. So far no West European system introduced a semi-presidential system in a recent crisis. But it is noteworthy that public opinion polls show in most countries - Germany with the weakest president imaginable not excluded - that the majority of the people favours popular election of presidents, thus advocating a semi-presidential system without knowing it.

This plebiscitarian mood - reinforced in some cases by demagogic leaders who hoped to have easier access to power by popular vote - has created many semi-presidential systems in Eastern Europe. Some authors (Merkel 1996: 84) try to subdivide presidential-parliamentarian and parliamentary-presidential systems. This is, however, hardly convincing. Croatia or Serbia, according to their constitutions would belong to those semi-presidential system with a preponderance of parliament, but even a superficial observer will not confound the legal regulation with de facto powers of Tudjman or Milosevic.

More important is the question whether there exists a correlation between the path of transition and the type of regime. It is hard to discover (table 1).

Table 1: Modes of transition and governmental systems

Erosion		Collapse		Continuity of elites (sometimes combined with the foundation of an independent state)	
semi-presi-dential	parliamentary	semi-pres.	parliamentary	semi-pres.	parliamentary
Poland	Hungary	Lithuania	Czech Re-public Slovakia	Russia Belarus Ukraine Romania Croatia Serbia	Bulgaria Latvia Slovenia

Both regimes occur in all the three types of transition to democracy. Only the type 'continuity of elites' shows a pre-ponderance of semi-presidential systems. Whereas the new

or old elites used constitutional engineering in order to manipulate the electoral law in their favour, this was not possible so far concerning the type of regime. There was no transition from parliamentary system to semi-presidentialism and the other way around so far. Even the two former communist systems which declined by erosion and negotiated revolution and kept open parts of the constitutional question. Poland and Hungary are not likely to change the system once they agree on a final constitutional settlement.

3) Electoral laws

Transitions to democracy were frequently combined with a new electoral law. Since the first wave of democratization in this century, after 1918, the transition was accompanied by a transition to or a restauration of proportional electoral systems. Electoral systems are even more directly related to the distribution of powers in a system and were therefore highly controversial. Most institutional engineering after consolidation in Western democracies concerned variations of the proportional system. In the 1990s only two exceptions from this rule can be found:

- New Zealand changed from the British plurality voting system to a personalized proportional system similar to the German model. The new sensibility for political correctness towards minorities - especially the Maori - contributed to this reform (Ingh 1995).
- Italy changed from the proportional system to a variation of a majoritarian system. This case is important because it was not a question of fairness, as in New Zealand, but because of deep crises of the parliamentary system. The electoral reform as of August 1993 was oriented towards the referendum of April 1993. The reform seemed to be highly legitimized. 82,7% of the voters endorsed electoral reform. In both chambers three quarters of the seats were distributed according to plurality vote in single-member districts and one quarter as a proportional compensation. This saved the life of some minor groups. The high expectations of a new system which was to usher into an age in which the corrupt old political class disappeared were not fulfilled. No bipolar system but rather a tripolar system developed. The electoral alliances which were admitted prevented the system from realizing the idea of a direct investiture of the executive by the voters. Regional fragmentation of the party system increased, especially in the North where the Lega Nord dominated. The center was

reduced but it survived (Freund 1995: 61).

For a long time the experts had resisted to a fundamental electoral reform. Norberto Bobbio (1984) once argued that it was unfair to force two venerable old parties which participated already in the Risorgimento, such as the Liberals and the Republicans, to disappear by electoral engineering. The little reform of 1993 forced several small groups to disappear. It brought even the formerly leading party, the Christian Democrats, to the brink of ruin. But they survived, renewed as Popolari with 11.1% (1994). The 'éternel marais du centrisme' which was denounced by Duverger in the Third and Fourth Republic, however, has not completely been dried out.

The reform as a first example of institutional engineering proved to be half-hearted. 'Maggioritario ma non troppo' (Bartolini/D'Alimonte 1995), two Italian political scientists have dubbed it. The PDS, the Lega Nord and the Christian Democrats (PPI) demanded the absolute majority voting system with two turns according to the French model in the Fifth Republic. Conservative analysts, on the other hand, opposed the majoritarian tendencies in the country and called the half-way reform already an 'act of violence', alien to Italian political culture (Panebianco 1994: 1). The limits of institutional engineering were visible: the reforms were to be transported by popular will. The majority of the voters was, however, overburdened with judging complicated electoral formulas. Experts of electoral engineering, on the other hand, wanted a radical reform which was logically consistent but difficult to explain to the voters. Democratic legitimation of a reform threatened to fail because the matter was too complicated for simple yes-no answers of voters.

The logically consistent formula was not visible because electoral engineering was used to calculate advantages for various political groups and parties. Sartori 1995: 44) - il grande vecchio of political science - had, as many other professors of political science, a chance to participate in a daily scientific debate in the newspapers. He cautiously advocated the French system with two turns. But his caveat was that the French system is acceptable only when it succeeds in structuring the party system. In many statements in this debate there was a criticism of the old partitocrazia, combined with the fear that Italian parties under a French electoral formula might be reduced to their French prototype. Electoral engineering was hardly able to predict the consequences of an electoral reform, especially when it was linked with the introduction of a semi-presidential system.

West European experiences with electoral engineering showed that the effects of changes of the electoral formula are hard to calculate. For decades the Germans were told that Hitler could have been avoided with a British electoral law, until retrospective scenarios made it more likely that the Nazis would have seized power even earlier than 1933 under plurality vote (Falter 1991). The French socialists had denounced for two decades the French majoritatian system as detrimental to the left, until Mitterand discovered in 1981 that the Gaullist formula benefited his PS once it overstepped the threshold of a certain strength. In power, Mitterand again miscalculated the impact of electoral law. He had hoped to defend the PS position by a proportional electoral law - a calculation which was doomed and France returned to her former formula. The French manipulation of electoral law was no warning for Italy, so it had to make her own experiences. Italian experiences with the former legge truffa should have made the country sceptical. But from time to time the pseudo-rational arguments of constitutional engineers are used as a panacea to overcome the crisis of a system.

In Eastern Europe the engineers of the new constitutions and electoral laws were on a still unsafer ground for their predictions. Most of the East European countries have introduced a variation of proportional electoral systems combined with majority building capacities. Three variations of proportional and combined electoral laws were introduced by the constitutional engineers:

- A personalized proportional law of the German type in which the result in single member constituencies has little impact on the distribution of the seats,
- The parallel system (the Germans first debated the abstract type under the misleading name of 'Grabensystem') which was first introduced in Mexico and later became popular because of Japanese experiments. It is characterized by a parallel distribution of one part of parliamentary seats by majoritarian and the other one by proportional provisions. In Eastern Europe the constitutional engineers of Croatia, Lithuania and Russia used it.
- Compensatory electoral systems which also involve a combination of majoritarian and proportional provisions. But in contrast to the parallel system the mandates which were conquered by the majority principle are not counted (Kasapovic/Nohlen 1995; Nohlen/Kasapovic 1996: 30ff).

'Institutional engineering' is a correct expression when we analyze the power considerations involved in the creation of electoral laws. The type of transition was only partially influential on the choice of electoral laws (cf. table 2). Where the old elites remained strong, they tried to stick to the majoritarian electoral system which predominated in the Communist countries (Nohlen/Kasapovic 1996: 45).

Table 2: Modes of transition and electoral system

erosion	collapse	continuity of elites including foundation of independent states
Poland (3) Hungary (4)	Czechia (3) Slovakia (3) GDR Lithuania (2)	Russia (2) Ukraine (1) Romania (3) Croatia (2) Serbia (3) Bulgaria (3) Slovenia (3) Latvia (3) Belarus (1) Albania (4)

(1) absolute majority voting
(2) parallel system
(3) proportional system in multimember constituencies
(4) compensatory

Institutional engineers, exploiting the absolute majority system to strengthen their power position, frequently failed. The system fulfilled its purpose to guarantee representativeness and participation, but failed to create a concentrated party system. The reasons were declining trust in communist parties or desintegration of the forum type parties when the new forces chose to stabilize their recently conquered power position by an old electoral formula. The result were new compromises between the camps, most frequently hybrids of systems, combining majoritarian and proportional elements. In many cases the elements of the electoral law were not fully compatible. They were less the result of logical system but the accident of momentaneous power relation among the parties.

Institutional engineering in Eastern Europe took place on a large scale. Among 19

countries 9 voted on the basis of a majoritarian system during the first elections. Eight of those have changed the system for the second election: four created a combined system, two a proportional system. Among the combined and proportional systems also five attempts of institutional engineering have been carried through (Nohlen/Kasapovic 1996: 205f). The reform pessimism in an institutional freezing hypothesis of some authors - institutional engineers in the first elections miss their chance and later only minor reforms are possible which do not change anything (Solari in Nohlen/Solari 1988: 22) - proved to be unjustified. Sartori (1994: 29) advocated another explanation for the reform pessimism: political scientists are incapable of giving an adequate policy advice. Many of the criticisms that the new electoral systems are poorly designed - leaving the question open whether politicians or political scientists are to blame - judge from the basis of conventional wisdom with quite simple assumptions on causality. Most of the hypotheses on the impact of an independent variable (the electoral law) on a dependent variable (the party system) were mistaken in the case of Eastern Europe. Institutional engineers refer to intervening variables such as 'political culture' and 'cleavage structure in society' to explain the failures of prediction.

Another intervening variable was the choice of the governmental system. Since Lijphart it has been discussed whether in tranisitons to democracy the combination of semi-presidential systems with proportional electoral law or with combined systems - deviating from the majoritarian formula - do not create the worst of all the worlds. This assumption was plausible under Walesa's presidency in Poland, but after some corrections of the proportional system it became less obvious. It seems to be less true in those countries where the continuity of old elites (Romania until 1996) was unshaken and presidents had enough manipulative powef in order to overcome the considerations of the institutional engineers.

Skepticism against institutional engineering spread among some experts. They withdrew to the position of circular causality relations among the variables and to less rigorous demands of simultaneous maximation of all the three functions of electoral systems. Venerable truisms of insight were revitalized: electoral formulas create the desired function of stabilizing party systems only when the developmental differences in the country are not too alarming (Nohlen 1990: 127). In spite of an equalizing 'social imperialism' of the Communist federations the collapse of the systems of planned economy left the budding democracies with enormous regional imbalances. Sometimes this was the case because of the equalizing capacities of Communist regimes: they located factories in little developed areas

without fiscal considerations of the comparative costs of such an investment policy. When these factories collapsed because of their natural disadvantages in an open and internationalized economy, the functional prerequisite of regional equality was no longer given. This had some impact on the stabilizing measures of institutional engineers.

4) Plebiscitarian decision-making

When democracies enter a stage of crisis the electors are rediscovered by the political elites. The call for plebiscitarian participation is popular. Even in highly anti-plebiscitarian systems, such as Germany, two thirds of the electors favor plebiscitarian co-determination in the legislative process. The elites in Germany, on the other hand, are most stubbornly opposed to any concession in that direction because they partly believe in the old myth that the Weimar Republic declined because of abuses of plebiscitarian instruments (Jung 1990).

Institutional engineers are not always so convinced that plebiscitarian instruments will improve democracy because:

- parties and parliaments are further weakened,
- votes in a referendum are interpreted as a vote of no-confidence against the government consulting the voters. The opposite can happen as well as in Norway: twice the victors in a referendum were defeated in the subsequent elections (Caciagli/Uleri 1994: 175),
- frequent referenda strengthen powerful interest groups which mobilize their interests,
- referenda simplify the complexity of political decisions by simple yes and no-questions.

Again, Italy is the best test case for institutional engineering by the introduction of referenda in 1970. 26 decisions in 8 referenda were taken by the people, among them important questions, such as divorce (1974), abortion (1981) and questions of minor importance, such as limitations of hunting (1990) or the abolition of a ministry of tourism (1993). The Italian electors falsified the Weimar traumatic experiences and decided moderately. Only in the case of public party finance (1993) did a great majority vote against the status quo (90.3%) though most parties recommended something else. New social movements use the referendum against the established parties which are less and less able to carry through their policy, as Italy experienced in the case of turning down abortion, proposed by the Christian

Democrats (1981). Sometimes single persons, organizing comittees won broad support (Segni, Giannini or Pannella). The referendum on the electoral system in 1993 ushered into the end of the old republic and showed the danger that strengthening one institution by institutional engineering may weaken another one, such as the parties. Even leftist thinkers, such as Bobbio (1984: 41) did not evaluate referenda as an instrument of democratization - except in situations of crisis and deadlock - and rather recommended more participation from the subsystems. Plebiscitarian instruments as a way out of deadlocks in democracies are dangerous (Sartori 1994: 165). They are however, preferable to a coup d'état and are tantamount to a legitimized coup. They are the more dangerous as popular decisions in recent times were sometimes taken by tiny margins, such as the popular election of the Polish president - which invited hundreds of attempts to invalidate the elections via the constitutional courts. Quebec decided with a tiny majority to stay within Canada and the Danes and French accepted with not impressing majorities the treaties of Maastricht. The call for participation instead of representation proved not always to be a way out of the crisis.

In the crisis of the 1990s there were two ways out of the crisis: Italy has chosen the plebiscitarian road without very convincing results. Germany, on the other hand, has followed its purely representative concept and did not even accept a referendum for endorsing the constitution after reunification. The elites in West Germany rather tried to win over acceptance for the system via financial transfers. They 'bought' legitimation instead of mobilizing it via broader participation.

The institutional engineers in Eastern Europe had no problem in keeping a 'socialist achievement' in the constitutions which was done with very few exceptions in most of the post-communist regimes. Fortunately, it was rarely used and when it was, such as in Russia 1993 or in Belarus 1996, it had a highly manipulative character. Moreover have conflicts between parliamentary majorities and presidents in both cases undermined the legitimacy of the referenda by petty power struggles on behalf of the conditions of the referendum.

Conclusion

Institutional and constitutional engineering is a concept which grew out of the revival of an enlightened institutionalism. Palaeo-institutionalists - which had always fought against a sociologization of political science and its reduction to limited considerations on the causality between independent and dependent variables - and neo-institutionalists working with rational

choice models joined their efforts to reconsider institutional factors.

Institutional engineering is an instument of comparative politics to evaluate the consequences of institutional change via comparisons. it was developed in the study about transitions from democracy to democracy. It showed that changes usually were made within narrow limits. Rarely did systems change from one type of rule to the other (such as 1958 in France) or change majoritarian electoral law for strict proportionalism. The moves usually were done in the middle field of combined majoritarian and proportional systems and arrangements which remained within the proportional system but seemed to guarantee a strengthening of the relative majority parties.

Institutional engineering in the crisis of Western democracies was completed by the largest wave of transition to democracy in history: two dozens of countries overnight tried to democratize. A particular constellation between old and new elites led to a particularly tough process of compromising between old and new forces, old and new institutions. Institutional engineering was blocked in some cases in the deadlock of no agreement which left countries such as Poland or Hungary without a final constitutional solution. This must not be a burden in the future. The Third French Republic survived 65 years (1875-1940) with a similar situation.

In the third wave of democratization old rules of thumb that institutional change had to be completed in the initial stage have been falsified. A greater volatility of voters and a loser party system than in former transitional regimes have contributed to more room for manouvering in instituitonal engineering. This was at least quite obvious in the realm of electoral laws.

Institutional engineering showed, however, in Eastern Europe that the progressive intention to make democracy work - combined with the concept of plebiscitarian decision - is always in danger of being abused for changes away from democracy, even under the disguise of democratic institutions, such as the application of referenda. Belarus is a latent danger everywhere!

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(2)

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Constitutions: Do they matter? Why do they matter? How do they matter?

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Constitutions: Do they matter? Why do they matter? How do they matter?

Do constitutions matter?

For Wheare, the word 'constitution' is used in two different senses (1966, p. 1). First, it is used to refer to "a selection of the legal rules which govern the government of [a] country and which have been embodied in a document" (ibid., p. 2). So, countries with a codified constitution, such as France and the US, have a constitution in this first sense of the word. Second, it is also used to refer "to describe the whole system of government of a country, the collection of rules which establish and regulate or govern the government" (ibid., p. 1). So, countries without a constitution in the first sense of the word, such as Israel and the UK, still have a constitution in this second sense of the word. In addition, though, even those countries with a constitution in the first sense of the word also have a constitution in the second sense of the word as well. That is to say, in countries such as France and the US only "a selection of the legal rules which govern the government" has been embodied in a document and yet the government of these countries is affected not simply by the rules which are set out in the codified constitutional document but also by other formal and informal rules, procedures and practices as well. Therefore, some countries will have a constitution in both the first and second senses of the term, whereas other countries will only have a constitution in the second sense of the term.

On the basis of this observation it may be argued that constitutions in the first sense of the word are not necessary for good government, whereas constitutions in the second sense of the word are. That is to say, constitutions matter but only in the second sense of the word. As Preuss notes, the opposite of a 'constituted' system (in the second sense of the word) "is the condition of a society which can deal only very imperfectly with its destructive tendencies, its power structure, its social inequalities ..." (1995, p. 110). In other words, the absence of a body of legal and extra-legal rules to shape the relationship

both between the set of political institutions in a country and between the citizens and those institutions will result in confused responsibilities which may in turn encourage the exercise of arbitrary power. Needless to say, this body of rules must meet certain requirements if it is to be considered democratic (in the liberal sense of the term). Nevertheless, it remains that the absence of a constitution in the second sense of the word is potentially dangerous. By contrast, the absence of a constitution in the first sense of the word is not necessarily dangerous at all. For example, both Israel and the UK may have far from perfectly democratic governmental systems (according to certain interpretations of the term 'democratic'), but they do not have systems which permit arbitrary power. Clearly, there are times when it may be necessary to establish a codified constitution. Newly democratised or independent countries may wish to mark unambiguously the break with the past. Nevertheless, evidence suggests that a codified constitution is an option rather than a requirement for good government. Indeed, Pogany accurately observes that "constitution making, the formal act of drafting or revising a constitution, does not lead automatically to constitutional transformation" (1996, p. 589). In other words, the establishment of a constitution in the first sense of the word does not necessarily bring about a fundamental change in the overall way in which a society is governed. Instead, what is more important is the whole body of rules that govern the government of a country, namely the constitution in the second sense of the word.

Why do constitutions matter?

The term 'constitution', as defined in Wheare's second sense, is the equivalent of the term 'institution', as defined by Peter Hall. For Hall, the term 'institution' refers to "the formal rules, compliance procedures, and standard operating practices that structure the relationship between individuals in various units of the polity and the economy" (1986, p. 19). In recent years, there has been a resurgence of interest in the role played by institutions in the political process (see, for example, Steinmo, Thelen and Longstreth, 1992). The essence of the institutional approach is that institutions can help to explain political

outcomes. They do so because they affect both the degree of pressure that political actors can bring to bear upon the political process and the likely direction of that pressure (Hall, 1986, p. 19). That is to say, institutions influence the power relations between the various participants in the political process, empowering and/or disempowering political actors in the pursuit of their objectives, while at the same time they also influence the choice of objectives which these actors decide to pursue. In short, institutions help to establish both the rules of the game and the aim of the game itself.

Constitutions only matter because the rules, the institutions, that comprise them are not inconsequential. The corollary of this point is that by establishing certain constitutional rules, or a certain institutional structure, it is possible to shape the fundamental pattern of decision making in a particular country. Needless to say, at any one time many rules will be operational. This means that the decision-making process is unlikely to be shaped by merely a single institution (such as the prime ministership), or by a single set of institutions (such as the executive) but will be shaped by a combination of interlocking institutions and sets of institutions (Hall, 1986, p. 260). The relationship between these institutions is complex and their effects are almost always countervailing. Nevertheless, despite the complexity of institutional arrangements and their countervailing effects, constitutions (in the second sense of the word) matter because the sum of the institutional relationships that they contain and their effects produces a particular pattern of decision making in any given country.

How do constitutions matter?

If constitutions, understood as a general body of institutional relationships, matter and they matter because these relationships shape the outcome of the decision-making process, then there is a natural temptation to try and specify which relationships comprise the optimal form of constitutional design. This is the motivation behind, for example, the debate about the relative merits of different forms of government. For example, Linz argues that the virtues of parliamentarism stand in contrast to the perils of presidentialism

(1990a and 1990b), whereas Shugart and Carey postulate that properly crafted presidential or premier-presidential regimes may overcome some of the most oft-cited disadvantages of presidentialism (1992, 273-287). So, there is a debate as to which institutional relationships are better than others. The problem with this debate, though, lies in the classification of the various constitutional, or institutional, forms that are posited. The classification problem can be seen in two particular ways.

Firstly, there is no common agreement concerning either the optimum number of salient constitutional forms or their most appropriate nomenclature. For example, Riggs prefers to adopt the basic distinction between two major types, parliamentary and presidential (Riggs, 1988, 252). By contrast, Duverger favours a classification which introduces a third type, a semi-presidential regime (Duverger, 1980). Less parsimoniously, Shugart and Carey have distinguished between six separate types, parliamentary, presidential, premier-presidential, president-parliamentary, assembly independent (Shugart and Carey, 1992, 26) and parliamentary with president (Shugart, 1993).

Secondly, there is also no common agreement concerning which countries should be treated as examples of which particular constitutional forms. Different writers place the same country in different categories. Most notably, there are certain problems with 'mixed', 'hybrid' or 'frontier' countries which are endowed with both a popularly elected fixed-term president and a prime minister who is responsible to the legislature. For example, Sri Lanka has been classified as a presidential regime (Horowitz, 1990, 77) and as a president-parliamentary regime (Shugart and Carey, 1992, 160). Iceland has been classified as a semi-presidential regime (Bartolini, 1984), as a parliamentary regime (Mainwaring, 1993, 205) and as a premier-presidential regime (Shugart and Carey, 1992, 160). Finland has been classified as a presidential regime (Lijphart, 1984, 70), as a parliamentary regime (Lijphart, 1989, 373), as a semi-presidential regime (Sartori, 1994, 134), as a premier-presidential regime (Shugart and Carey, 1992, 160), as a dualist executive regime with a presidential corrective (Nogueira, 1986, 136) and as a mixed regime which belongs to none of these categories (Stepan and Skach, 1993, 5). Finally, one writer cites 29

different classifications of the French Fifth Republic (Cohendet, 1993, 69).

It may well be that parliamentarism is indeed virtuous and that presidentialism is in fact perilous. Furthermore, when constitution-makers are faced with the practical task of drawing up a constitution then real choices have to be made as to which form of government, as to which set of institutional relationships, should be adopted at the expense of all others. Nevertheless, it is still worth sounding a slightly sceptical note concerning the arguments which are proposed in favour of particular types of constitutional arrangements. For example, the case in favour of parliamentarism may be strengthened if Finland is classed as a presidential regime. By contrast, the case in favour of presidentialism may be strengthened if Finland is classed as a parliamentary regime. Because there is neither a commonly accepted schema of constitutional forms nor common agreement as to which countries are examples of which forms in whatever schema, then it is important to recognise that arguments which suggest that certain constitutional forms are better than others are highly contestable.

This suggests that there is still a considerable research agenda for those studying constitutions to undertake. Firstly, it is necessary to explore more fully the complexity of institutional arrangements and their countervailing effects so as to be in a position better to identify which institutional relationships produce which decision-making patterns. Second, it is necessary to analyse in more depth the characteristics of particular constitutional forms so as to arrive at a common schema with which to classify democratic regimes. Thirdly, it is necessary to classify countries as unambiguous examples of particular regimes so as to allow more objective comparisons of their institutional properties. If such a research agenda is undertaken, then constitution-makers may be in a better position to craft democracies in the future.

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(3)

The Institutionalisation of Democratic Politics

(Draft)

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Introduction: The collapse of communism and the conditions for democracy

The successful establishment of democratic political systems is a complex phenomenon, embracing multiple dimensions, of which the creation of an appropriate set of political institutions is not one, albeit a vitally important one. In the collapse of the communist regimes of the former Soviet Union, 'Eastern Europe' and elsewhere, several institutional factors came to play a significant role and to acquire great salience as events unfolded. In my view, elements of democratisation in combination created opportunities that could be used in order to bring about the demise of a system that had failed to satisfy the economic, political and psychological needs of the peoples concerned. The abandonment of the communist party's political monopoly – written into the constitutions of most of the countries in the region – permitted the establishment of other organisations to challenge the communists politically. The relaxation of censorship – under the slogan of glasnost' in the Soviet Union – made it possible to raise matters that had hitherto been taboo, including issues of policy and the quality of representatives. Electoral reform gave meaning to those two factors, by allowing candidates other than those endorsed by the communist authorities to run for office. Institutional reform added substance to the earlier reforms, by creating representative organs with powers other than that of acclaiming the communist party's policy and giving it legal standing. There was now some point in taking political activity seriously at all stages of the process. These were various elements in the processes of pressure and negotiation that led to the abandonment of the communist political framework in favour of 'democratisation'.

These factors *in combination* both undermined the abolity of the communist system to continue and created the basis for political evolution towards democracy. All are vital for democracy to flourish: freedom of speech and information; freedom to compete for office; freedom to form parties or comparable institutions to assist in effective campaigning and governing; and the existence of political institutions with the capacity to take authoritative decisions according to certain established procedures in response to public demand. These are not only necessary conditions for democracy: they also render the survival of a totalitarian regime impossible (and make the maintenance of an authoritarian one unlikely).

Identifying 'democracy'

While such conditions may be necessary for the establishment of democracy – and they may even be regarded as sufficient if a minimalist view is taken of what constitutes 'democracy' ('facing the electorate' once every four or five years), more sophisticated perspectives on democracy suggest that otehr factgors are also important: cultural supports for the institutions and procedures of decision making; an independent legal system to which citizens have unfettered access for the redress of grievances (including complaints against the state itself and its agencies); an array of autonomous auxiliary bodies such as progressional associations, representative bodies such as employers' groups and workers' unions, plus the right to form new ones without sanction from the political authorities. In this context, the concept of 'civil society' has been used to depict the kind of socio-political set-up conducive to democracy.

Given a relatively rich vision of what constitutes democracy, Ralf Dahrendorf's statement to the effect that democracy is relatively easy to establish in comparison with setting up a market economy seems wide of the mark.[1] It was a judgement that reflected a widely-held view about the overthrow of communist systems in the name of 'democracy', expressed in its most celebrated form by Francis Fukuyama.[2] Subsequent experience in the countries concerned has demonstrated that the collapse of communist rule does not automatically lead to even a simple version of democracy, and certainly that the establishment of a political system that *both* meets certain theoretical criteria for identifying the presence of democracy *and* gives the citizens a sense that they are served by a 'government of the people, by the people, for the people' is not such a simple task. The peoples of the former Soviet Union and Central and Eastern Europe who have been engaged in the process of 'transition to democracy' have discovered for themselves some of the complexities that are entailed.

The essential point to bear in mind is that there is no single 'model' of democracy, unlike the system from which these countries are in transition. Broadly speaking, there was a model of a communist system to which all countries more or less adhered, although with differences of greater or lesser significance in the details of its application, or with variations in the extent to which the original Stalinist system was modified. Thus, some countries permitted the presence of minor parties; agriculture was not universally collectivised; and the role of churches and other organisations was more significant in some countries than in others. Over the half-century or more or communist rule, different countries modified their systems to varying extents – supplementing planning with a market mechanism, relaxing censorship, or reducing the severity of the political police. Nevertheless, the essence of the system remained intact: the 'leading' role of the Marxist-Leninist party and the various mechanisms – democratic centralism as a universal organising principle, *nomenklatura* as a method of controlling recruitment – by which it

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1 Ralf Dahrendorf, *to follow*.

2 Francis Fukuyama, *The End of History and the Last Man* (London: Penguin, 1992); the phrase 'the end of history' was the title of Fukuyama's controversial article, published in 1989: see Francis Fukuyama, 'The End of History?', *The National Interest*, 16 (Summer 1989), pp. 3–18. It is, of course, a crude over-simplification to present Fukuyama's complex and sophisticated argument as stating simply that communist rule had been replaced by liberal democracy; nevertheless, in publishing his article when he did, in the publication in which it appeared, Fukuyama was indeed giving succour to those who saw as the very antithesis of 'totalitarian communism' a very simple view of 'democracy', and the two major ideological trends in the twentieth century engaged in a titanic struggle in which 'democracy' had by then manifestly been victorious.

performed that role. This means that the various nations, on overthrowing the communist system and regaining their sovereigh independence, found themselves in rather similar circumstances, with a common legacy of institutional and behavioural characteristics to overcome. In the absence of a single 'model' that could be readily applied, however, each nation was faced with an opportunity (and a need) to devise its own constellation of institutions and practices, taking account of whatever it regarded as of greatest significance for national political self-expression, in the light of political, social, economic, international and other circumstances that constrained the choices. The experience of the past seven years or so – as is well demonstrated in the country studies prepared for this conference – shows that different nations have indeed chosen different institutional arrangements, have responded differently to common dilemmas, and have reached quite different forms of consensus about the way forward.

There are many issues that impose choices: some appear purely technical, yet they can have a profound impact on the effectiveness of the democratic transition. The first relates to the establishment of a constitutional framework for democracy: the creation of a set of underlying principles and basic rules by which the nation's affairs shall be regulated. A fundamental goal is stability, which will permit a society and its citizens to pursue its life in an orderly fashion. In the economic circumstances in which the former communist states have iniversally found themselves, the pressures on the political system are enormous. Given the significance of steady economic decline and failure in inducing the failure of the old system, and the perception that a combination of a market economy and political democracy brought about both individual freedom and economic well-being, the fledgeling democracy was placed under great pressure to bring about such changes as would satisfy public demand for liberty and wealth. Moreover, this pressure may be such that the task of institution-building may be rushed, leading to political and legal errors that may be difficult if not impossible to overcome. It may be no exaggeration to suggest that democracy is on trial, and that authoritarian rule may be a real alternative in some countries (as it has been in, for example, some of the former Soviet republics of Central Asia: perhaps Belarus at the present time is also heading in that direction).

Issues in constitution-building

Is a new constitution necessary?

Perhaps the most basic feature of democracy is the rule of law: the idea that the political behaviour of a nation, including that of its state instituions, should be governed by rules adopted according to certain established procedures. A constitution, as the fundamental law, sets out those procedures. All communist regimes possessed constitutions which purported to perform precisely that function in the political system, and they were taken sufficiently seriously by the ruling parties to amend and modify them periodically, and to replace them in toto when this was deemed appropriate. They provided for a set of institutions which engaged in the formal tasks of law-making and law-application: a parliamentary institution, to which deputies were elected by the populace; an administrative structure of ministries, state committees and the like to implement the laws; and a system of courts and police to enforce compliance. Typically, these documents also identified the rights and obligations of citizens, while also setting political limits on the

exercise of the rights ('in support of the socialist system'). An immediate question that confronted the various post-socialist countries, therefore, was whether a new constitution was required, or whether the existing constitution could be so modified as to permit the institutions to function in a democratic fashion, that is, without the Marxist-Leninist party's leading role. If so, which elements needed to be abolished or modified? If not, how should a new constitution be drawn up and by what mechanism should it be adopted (by members of the existing legislature, by a specially elected constituent assembly, or by referendum, for example)? Was it even possible simply to make the existing constitution function in different circumstances?

The issue did not present itself in an identical manner in the various new states, nor was it perceived in the same way. In some (such as Poland and Hungary), the state had enjoyed a continuous existence from before the advent of the communist regime until after its demise: there was therefore, in principle, a continuity that might facilitate the adoption of a new document (in Poland, in particular, however, it failed to do so). In the case of the three Baltic states, their independent identity had been interrupted by incorporation into the Soviet Union: popular sentiment therefore encouraged the framers of the democratic constitution to reject the existing constitution as illegitimate – with the consequence that the legislature had no authority to adopt a new constitution. Yet the constitutions that had existed before the Second World War had been drawn up in very different circumstances from those of the 1990s, and might need severe modification before they could be applied: some of the political debates in those nations concerned the practicality of returning to constitutional arrangements drawn up before the Second World War. Still other states – Slovakia and Moldova, for example – were approaching an independent existence for the first time in their history, and were confronted by the task of nation-building alongside that of state-building.

Definitions of citizenship

Constitutions typically set out a definition of citizenship, which frequently reflects a consensus or a majority view about the identity of the 'nation'. For these countries, and for other ex-Soviet states and the states of former Yugoslavia, where state boundaries had been drawn with no economic, social or cultural rationale, and inter-regional migration had been encouraged by the former regime, definitions of citizenship presented the first significant constitutional issue that preceded even the establishment of an electoral system or a legislature. Similar issues arose in other states that had been created several decades earlier, before some of the modern principles of civic rights and obligations had been established: the rights of the Turkish-speaking minority in Bulgaria, or the Hungarian minorities in Romania, Serbia, Slovakia and Slovenia are a case in point. In a number of cases, therefore, the collapse of communist rule presented opportunities to sort out fundamental issues that had been 'on ice' for decades. In the case of Russia, the collapse of the communist system also represented the collapse of the Russian Empire, and it has reawakened an age-old quest for identity, in which the Russian nation debates whether or not the very principles of Western-style liberal democracy are appropriate. The solution of this particular issue has not been uniform, nor has the issue been obviously resolved to everyone's satisfaction: rules on citizenship that appear restrictive have tended to alienate the Russian minorities – principally comprising immigrants – in the Baltic states, most

notably Estonia; the position of the Hungarian minorities in Slovakia and Romania have been a cause of concern; and the treatment of members of non-titular ethnic groups in the various republics of former Yugoslavia (over language issues, alphabet use, property rights and the like) have been issues that served as pretexts for military action in the bloodiest collapse of communist rule. There is a danger that democracy will become a tyranny of the majority, in which members of ethnic minorities – some of whom attained that status through the territorial settlements imposed by the Great Powers at the end of the First World War – are treated as second-class citizens and become scapegoats for social and economic difficulties faced by the society as a whole. The treatment of minorities within the system is therefore an important question in establishing democracy, which some states appear to have handled with greater sensitivity than others. Slovenia deliberately opted for 'popular sovereignty' rather than 'national sovereignty', while declaring that the Slovene *nation* alone has the right of self-determination in Slovenia; and as the example of Estonia shows, hardened positions can be modified over time, for the benefit of minorities. At issue is whether or not non-citizens have a political voice (a vote in national elections, in local elections, in referendums), a right to organise politically, possibly a representative assembly or special representation in the parliament; what cultural rights (to use of language in courts and in schools, to religious observance) they possess; whether or not they may serve in the state service, or serve as jurors in courts, and so forth; and the conditions on which non-nationals may acquire citizenship. Inevitably, different groups will have a different sense of what is 'just' in these circumstances, which can lead to clashes.

New challenges to new states

When new states emerge from old ones – as in the case of the Baltic states or Slovenia – the tasks that confront the designers of the new system are significantly greater than in those cases where the state continues a previous existence, for they have to take upon themselves the creation of agencies to perform functions that previously were carried out, if at all, by the central government. Policy-making mechanisms, independent police authorities, a new court system, customs, taxation and currency regimes, management of foreign relations – these are areas for which the previous sytem provided at best partial institutions and procedures.

Type of democratic system

After fundamental questions of citizenship and statehood have been agreed (and experience shows that this can be a very contentious question, in which the outside world may take a keey interest), the basic type of democratic system needs to be selected. The fundamental choice is between a parliamentary system and a presidential system, with variations; in some countries with a tradition of monarchy (Romania, Bulgaria, Russia), some groups have called for a restoration of that form of rule (presumably as a constitutional monarchy), although with little impact. Fundamentally, the question concerns the division of powers between the various sets of state institutions: the legislature, the presidency, the legal system, the administration, all of which will exist in a modern state. There are no 'correct' solutions, but it is reckoned that presidential systems

allow for more effective decision making – an advantage that may be vital in circumstances of economic or political crisis – while posing problems of accountability, whereas parliamentary procedures may turn the institution into a 'talking-shop', thereby making effective government difficult to achieve, although parliamentary deputies are more directly accountable to their electors. In striking a balance in the authority of the two institutions, the question of a presidential veto arises: in a parliamentary system, what powers does a president possess to cancel, revoke, delay or challenge legislation which he or she considers inappropriate? And by what mechanism can such a veto be overridden by parliament? In a presidential system, what constraints exist on the president's powers to rule by decree?

In either case, issues of the structure of the legislature arises: is the parliament to have one, two or more chambers? A two-chamber legislature tends to delay the processing of bills, but may result in improved quality of legislatoin. But that depends in part on the resolution of a further question: how will the functions of the different chambers be differentiated? Will the representatives be selected by the same method or according to the same principles? What will be the term of office of the parliament? Will terms be fixed or can they be foreshortened by a loss of confidence in the government?

And what of the president's term of office: should it coincide with that of parliament? Should it be of a different duration? Should it overlap? How should the president be selected: by popular election or by the parliament? Should special arrangements be made for the initial term? In what circumstances and by what mechanism should it be possible to remove a president from office?

These issues arose universally within the region, and both broad types of system have been adopted in different countries: Hungary, Poland and Albania, for example, have parliamentary systems, with restricted powers accorded to the president; Slovakia and Russia have presidential systems. In all cases, however, the precise significance of constitutional provisions has been subject to political definition, as president and parliament have used their respective powers to challenge the authority of the other: typically presidents seek extended powers, parliaments seek to restrict executive authority. In Albania this issue was presented to the people in a referendum, and the president's proposal was rejected; more recently, in Belarus, the president's proposal to extent his powers was endorsed by the same mechanism. In Hungary, president and parliament clashed over the appointment of the director of the state broadcasting system. Clearly, the words of a constitution are nor normally sufficient to delimit the powers and prerogatives of political institutions: over time, conventions and traditions develop which themselves acquire constitutional status by governing what kinds of behaviour are acceptable.

The electoral system

Of crucial importance in a modern democracy is the electoral system by which representatives of the people are chosen. Again, there are numerous variants in election procedures, all of which are governed by certain operational principles such as open candidature, universal adult suffrage, freedom to campaign and canvass votes, free acces to the poll, secrecy of the ballot, scrupulous counting and recording of the vote. A fundamental distinction lies between simple plurality ('first past the post') systems of the Britain or US type, and proportional representation, of which several variants exist. A

form of proportional representation has been selected in the majority of the countries under study, with the acknowledged risk that it produces fragmented legislatures. Indeed, the experience of several countries has been a multiplicity of parties represented in parliament, creating potentially unstable coalitions as the only way of forming aand sustaining government – and supporting arguments for a strengthened presidency. In an attempt to reduce if not eliminate the significance of this danger, a dual form of mandate has been devised (on the model of Germany), with some seats allocated by direct election and others to parties that obtain votes above a threshold (which varies from 3 per cent to 5 per cent, with higher levels required for electoral coalitions of parties). These measures have, over time, led to relative stability in the constitution of the deputy corpus in most countries, although the proliferation of political parties remains a feature of these new democracies.

Party systems

In modern democracies, political parties play a central role as institutions that seek to win control of the law-making institutions of the state in order to implement policies endorsed by the legislature in elections. For many, indeed, electoral competition among parties is at the very heart of 'democracy', and the political monopoly of the communist party was seen as a principal reason for the rejection of the former regime. The right to create a political party, to devise a programme of government, to recruit members, promote candidates for election and canvass for votes is seen as a fundamental democratic right. As soon as communist regimes began to fall – indeed, before – new parties began to be formed. Indeed, so enthusiastically has this right been acted upon that dozens of parties have contested elections in almost all the countries concerned. Slovakia – one of the last states to gain independent existence – still possesses 54 parties, while Romania has 250 and Poland some 260 at the present time! While it is true that, in all cases, only a relatively small number of parties have had real political impact, the bewildering rate at which they have formed, disbanded, re-formed, amalgamated, split and re-named themselves has rendered problematic the formation of a *party system* (implying relatively stable relations among parties, which are identifiable to the voters according to social, regional or ideological criteria). A further effect may have been to alienate a public already disenchanted by the very notion of 'party' following the experience of decades under which a self-styled 'party' dominated the system.

Nevertheless, parties are vital in modern democracies, and they require legal protection and guarantees that they will be able to function. Issues over their right to own property have arisen – a matter that particularly affects the reconstructed former communist parties, which acquired real estate and massive funds which place them in a position of great advantage compared with newcomers. Also of great significance for the functioning of the same ex-communist parties is the banning of parties from places of work, at least in the state sector: that was a basic organisational characteristic of the ruling parties, whose network of basic or primary organisations penetrated the bulk of enterprises in the state-owned economy. If maintained, that arrangement would give those parties an enormous organisational and therefore political advantage.

The legal system

The independence of the legal system is a further fundamental requirement of democracy – a contrast to the communist system where 'revolutionary justice' and 'socialist legality' enabled fundamentally unjust legal principles such as 'guilt by association' or 'guilt by analogy' to become part of the political armoury, and 'telephone justice', whereby judges received sentencing instructions from the party committee, an everyday phenomenon in many countries, if not all. Questions that relate to the independence of the judiciary and the courts include those of who appoints or elects judges, whether they are lifetime or fixed-term appointments, whether they are prohibited from holding other state office or being members of parties.

Other institutions and organisations

In additional to the state and party institutions discussed above, modern democracy identifies the existence of autonomous public and social organisations as a qualifying characteristic. The former communist-ruled societies certainly posssessed many such organisations, from trade unions to famers' organisations, professional associations, sports clubs, theatrical societies, youth organisations and many others. The critical issue, however, was that they were virtually all sponsored by the regime or its agencies, and controlled by the party, which nominated their officers through the principle of *nomenklatura*. While it may be the case that the party made use of such organisations in order to sound out public and professional opinion in given areas, there can be no doubt that the ultimate effect was to control public activity.

The process of democratisation therefore requires that organisations of this type should arise and function independently of the state and political authority. Clearly, there is a need for broad-ranging fundamental legislation governing such organisations: they need certain rights, such as the right to exist, to own property, to run bank accounts, to sue and be sued, to employ officers and other workers, to devise rules of membership, to determine their internal arrangements, to deal with other organisations, and to wind themselves up; their members need means of legal redress for damages at the hands of the organisation or its officers (financial maladministration, for example). But these provisions can be adequately satisfied by means of general legislation, within which each individual organisation can function as its members see fit.

While such legal provisions may not be difficult to introduce, creating the broad range of such ancillary organisations is quite a different matter, since, by definition, their autonomy is paramount. Even more difficult is the next step: that of devising formal and informal mechanisms for these many organisations to perform the political role of feeding their members' needs, wants, demands and interests into the political system for incorporation into the legislative agenda. In a modern democracy, many of the functons that were carried out by state administration in the communist system are carried out by autonomous boides of this kind: sports associations regulate and license the activites of their members; Bar Councils control the functioning of lawyers, Medical Councils of doctors; employers' and workers' organistions negotiate contracts and terms of employment. Governments consult such professional and special-interest groups when framing policy, and in turn the groups make use of the press and other channels to

articulate their views on behalf of their members. They serve as gate-keepers, without which the state apparatus could become overloaded; and they help to inform the process of policy-making and legislation, thereby making the devising of successful policy more likely.

The signs are that this condition is far from being achieved in the former communist countries. A notable exception of a single influential institution is the Roman Catholic Church in Poland; in other countries even the Church has not regained the influence that it possessed before the advent of communist rule – and such is the climate of the times that it is not likely to do so.

Problems of institutional engineering

Lack of expertise and experience

A widespread problem that confronts these countries after several decades of rule by a system based on quite different philosophical and legal principles is the lack of appropriate expertise and experience on the part of specialists, politicians and the public at large. None but a tiny handful have any first-hand experience of living in liberal democracies, and even the specialists – lawyers, social scientists – were given a very limited and critical training in the features of liberal democracy. The absence of a single 'model' and instead the availability of many variants, each with its advantages and drawbacks, which function differently in different institutional and cultural contexts, renders the choice of an appropriate institutional framework extremely difficult.

Furthermore, even after the formal institutional setting has been agreed and implemented, the behavioural dimension is not appreciated by the role-players in the institutions. Parliamentarians waste time in playing 'political games', scoring points off one another or seeking personal or party advantage. Their lack of familiarity with procedures, with legal principles, and with the technical issues associated with managing an increasingly complex modern society based on principles that have been anathema to their society for most if not all of their lifetime may lead to a strong sense of incompetence. This in turn pushes towards enhanced executive authority in the form of a strong presidency, with the added risk that an equally inexpert president may wittingly or unwittingly subvert the purposes of democratic consolidation.

While to a certain extent such expertise may be brought in from outside the system (as economic expertise has been), that too carries the danger that this will be interpreted as outside interference, and will be resented as such. Moreover, tying progress on 'democratisation' to economic asistance or other favours may also be seen as a form of political and economic blackmail, opening the way for demagogic exploitation of fears and resentments.

The pressure of unreal expectations

The circumstances that have everywhere followed the collapse of communist rule place enormous strains on the fragile institutions of democracy. Economic collapse, leading to hyperinflation and high unemployment and the deterioration of health and educational services; universal shortages; environmental degradation; swift and extreme economic and

social differentiation, as some have prospered in the new circumstances while the vast bulk of the population have not; rising crime and social pathologies such as prostitution and drug abuse: these and similar features of a society in crisis place public confidence in 'authority' under strain. The expectation at the beginning of the decade was that 'democracy' and 'the market' would create freedom and plenty in place of servitude and shortage: the failure to deliver causes most citizens to conentrate on survival and to withdraw support from the institutions and individuals responsible for that failure. While the number of parties seems not to fall, turnout in elections has declined after the excitement of the early years, indicating a lack of conviction that the political institutions will succeed in changing the nation's fortunes. This sense of despair is further boosted when politicians act undemocratically or unscrupulously or waste time in political point-scoring.

Public and politicians, perhaps, failed to appreciate the scale of the task that confronted them: even the economic reform cannot be achieved by simply letting market forces arise and operate. The scale of the legislative programme that is required to dismantle the communist system and replace it by a new set of institutions and rules is colossal: major items of legislation, inexpertly and hastily drafted and rushed through by incompetent and inexperienced parliamentarians, are given inadequate scrutiny and create new problems while perhaps failing to solve old ones. The role of the Constitutional Court in a number of countries has been extremely significant in making sure that constitutional principles are upheld – but the too-frequent referral of legislation to the Constitutional Court may itself set a constitutional principle that might be regarded as undesirable: items of legislaton may become a political football between president and parliament, with the Constitutional Court being asked to perform as referee; the backlog of such cases can delay the resolution of contentious issues to the extent that the legislative process becomes blocked.

Lack of appropriate political culture

In short, what is required is the development of the appropriate political culture, and that is something that can come only over time, with experience and education. Many of the nations in the region are attempting to build a democratic political system and society for the first time in their history, and one should not forget that the processes of developing democratic institutions and conventions in Britain, for example, took most of the nineteenth century. The political system of liberal democracy is based on different principles from the Leninist one of *kto kogo* (literally 'who – whom'), which sees politics as a struggle to the death and compromise is a sell-out rather than an achievement. The principle that one's political opponent deserves respect, that one defeat is not the end of a political life, that one can fight another day – and even that there may be a life after politics: all of this has to be learnt by peoples to whom such ideas have not been part of their education or their everyday thinking about politics, and who are impatient to see results. A particularly worrying feature of the present circumstances across the region is the scale of criminal activity, which further undermines confidence in democratic procedures and institutions.

Conclusion

Democratisation has travelled a long way in countries that, less than a decade ago, were still ruled by monopoly communist parties inspired by different principles from those of liberal democracy. The task of creating working democratic institutions is of a scale that was appreciated by very few when the process was embarked upon. While many problems remain – presidents and parliaments still struggle for influence, and a major country such as Poland still has no permanent constitution – it is a sign of the success of the democratic transition so far that former communists, having been elected into office by democratic choice and then having lost a subsequent election, have accepted the will of the electorate and retired into opposition, most recently in Lithuania.

'PROCESS' NOT 'PRODUCT' ENGINEERING IN THE CONSOLIDATION OF DEMOCRACY

(4)

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In all the speculation about how to "engineer" appropriate institutions that will consolidate regime change in fragile neo-democracies (FNDs), the emphasis has been almost exclusively on the **product** not the **process**. We have been told that certain formats for organizing executive power and certain ways of conducting elections tend to provide specific advantages, mainly greater flexibility and lesser fragmentation. Those that choose parliamentarism over presidentialism, and high threshhold proportional representation over first-past-the-post majoritarian electoral systems supposedly will have an easier time of it -- although no one is foolish enough to claim that this alone will guarantee success.

I suspect (i.e. I cannot prove) that no executive or electoral arrangement has such an "across-the-board" generic effect -- whether benevolent or malevolent -- on the consolidation of democracy (CoD). These **products** of institutional engineering do not have identical effects -- whether in magnitude or in direction -- in all polities, irregardless of social cleavages, level of economic development, mode of insertion in the international economy, previous form of autocracy, etc. It is, therefore, a mistake for "consolidologists" to peddle such general advice about

institutional engineering of unsuspecting natives without taking into account the economic, social and cultural contexts into which these products are being inserted.

What may be more generic -- and, hence, "stretchable" across time and space -- is the **process** whereby institutions are engineered, i.e. how and when they are chosen, ratified and implemented. That is the simple theme that I intend to develop in this short paper.

The Constitutional Moment

The most obvious occasion for choosing the "core procedures and rights" of a new regime and, hence, a distinctive type of democracy is in the making of a constitution. Not only do such documents lay out an explicit matrix of institutions and a formal distribution of their competencies, but they presumably do so by means of comprehensive and consistent norms that govern behaviour (and establish legitimacy) for an even wide range of political transactions. In virtually all contemporary cases, these "founding" documents are openly debated and formally drafted although, as we shall see, there are many different contexts and ways of ratifying and implementing them.

But it is first important to remember that **modern democracy should be conceptualized, not as "a single regime", but as a composite of "partial regimes". As CoD progresses, each of these partial regimes becomes institutionalized in a particular sequence, according to distinctive principles, and around different sites -- all, however, having to do with the**

representation of social groups and the resolution of their ensuing conflicts. Parties, associations, movements, localities and various clientele compete and coalesce around these different sites in efforts to capture office and influence policy. Their structured activity has the effect of channelling conflicts toward the public arena, thereby, diminishing recourse to such private means as settling disputes by violence or by imposing one's will by authoritarian fiat. Authorities with different functions and at different levels of aggregation would interact with these representatives, base their legitimacy upon their accountability to different citizen interests (and passions), and reproduce that special form of authority that stems from exercising an effective monopoly over the use of violence.

Constitutions are efforts to establish a single, overarching set of "meta-rules" that would render these partial regimes coherent, assign specific tasks to each and enforce some hierarchical relation among them. But it is very important to recall that such formal and unique documents are rarely successful in delineating and controlling all these relations. As we shall see, the process of convoking a constituent assembly, producing an acceptable draft and ratifying it by vote and/or plebiscite undoubtedly represents a significant moment in CoD, but some partial regimes may already by in place de facto before this process gets under way and, even after it is over, many partial regimes have been left undefined de jure.

For it is precisely in the interstices between different

types of representatives that constitutional norms are most vague and least prescriptive.[2] Imagine trying to deduce from even the most detailed of constitutions (and they are becoming more detailed) how parties, associations and movements will interact to influence policies. Or trying to discern how capital and labour will bargain over income shares under the new meta-rules.

[PLACE FIGURE ONE HERE]

According to the liberal ideal of the 19th Century, constitutions are supposed to be neutral with regard to the interests of any specific group in the population. Contemporary analysts would probably admit that this is an illusory quest. All possible institutional configurations will benefit some more than others and, therefore, are likely to be contested at their inception. Hopefully, popular support will be sufficient to get them initially implemented and, eventually, they may come to be accepted out of habit.

Two other general features of "constitutionalism" are particularly relevant for CoD. First, it may seek to define the future **substance** as well as the **form** of politics by placing certain social and economic rights (and privileges) beyond the reach of "normal" democratic uncertainty. Present-day constitutions tend to condition absolute guarantees of the sanctity of private property with clauses referring to "social utility" or the "public good", but the use of such documents (plus affiliated codes and statutes) to reassure powerful minorities that their vital interests will not be violated by the

change in regime is still a commonplace. Second, to make such reassurances more credible, the new constitutions must effectively bind not just their **present** drafters but also **future** generations. They must resound with eternal ("self-evident") principles, be difficult to amend, and empower specific institutions (i.e., a Supreme Court or a Council of State) with an independent capacity to ensure that they are interpreted and applied.

The "Panacea" of Constitutionalism

If "electoralism" was the panacea of the transition stage,[3] "constitutionalism" is likely to be the one for consolidation. In both cases, the basic idea is the same: giving a particular form to the resolution of political conflicts will *per se* modify the substance of political demands and alter the strategies of political actors. While such formalisms are not without their independent significance, it would be very hazardous -- not to say foolish -- to centre attention exclusively on the definition of a comprehensive legal framework delimiting the powers of institutions and the rights of citizens as **the** hallmark of consolidation.

For one thing, not all countries undergoing regime change even engage in constitutionalism. A few very well-established democracies operate without such a formal document (e.g. Great Britain and Israel). Some, virtually without deliberation, simply reach back into their (usually recent) democratic past, resuscitate or revise slightly a previous document (e.g.

Argentina, Bolivia, Greece and Uruguay). In Eastern Europe, one common pattern has been to keep the "phoney" constitution from the ancien régime soviétique with some minor revisions (e.g. Poland) or virtually none at all (e.g. the former USSR and some of its former republics).[4]

Most neo-democracies, however, do elect representatives for the explicit purpose of deliberating publicly about these matters and some will eventually produce a brand new constitution. These constituent assemblies are especially compelling under the following circumstances:

(1) if the country has little or no tradition of constitutional governance;

(2) If the country has altered its physical boundaries or definition of its identity;

(3) if the previous constitution was made at a time when the role of public authorities was dramatically different;

(4) if significant ethnic minority groups have emerged and asserted their demand for new collective rights and greater political autonomy;

(5) if major segments of the population have been enfranchised since the previous constitution and define

their rights and obligations in novel fashions.

Since the above "bill of specifications" fits a large number of FNDs, it is hard to avoid the conclusion that -- from the perspective of **process** -- this is by far the most desirable and enduring way of going about choosing a country's institutions.

Merely convoking such an event is not, however, enough. Not only must it produce an agreed-upon document without too much manifest discord or too lengthy deliberation, but it should do so by respecting a set of generic norms.

Experience suggests that "the constituent power" is more likely to contribute to CoD if:

(1) an assembly is convoked for the explicit purpose of drafting a constitutional document;

(2) the members of this assembly are elected, not selected, but not automatically empowered to convert themselves into a regular parliament;[5]

(3) the decisions of this body are taken by the largest possible margin and not by some "minimal winning majority" according to the short-term, ahistorical logic of individualistic rational choice.

(4) its product is widely publicized and ratified by the

citizenry as a whole, usually in a referendum;

(5) once it has been popularly ratified, the constitution is ceremonially promulgated, placed on public display and subject to periodic interpretation by a specialized juridical process.

These norms of prudence seem obvious (to me) although they have rarely all been practiced by FNDs. They are designed to associate the constitution with the "founding" of a new regime in ways that distinguish it both from whatever remains of the legality of the ancien régime and from the immediate perpetuators of the transition itself. The object is to give this document a distinctive status which is associated not just with its substance but also with its form.

The Matter of Timing and Sequence

As I have suggested in Figure Two, the timing and sequence of such an occurrence can also be a crucial variable. **"The sooner the better"** should be the motto. The longer actors hesitate in this effort, the more they will be capable of evaluating how specific institutional arrangements can affect them and the greater the difficulty they will have in coming up with "fair" rules that all can agree to. If they wait until after various "partial regimes" are up and running -- say, under a new electoral law and set of party statutes -- those who have benefitted by these provisional measures will be increasingly

inclined to attempt to institutionalize their recently acquired advantages.

[PLACE FIGURE TWO HERE]

It is, therefore, possible that when a constitution is drafted and approved may be at least as important as what it contains.

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* ENDNOTES *

1. With thanks to Bruce Ackerman, The Future of Liberal Revolution (New Haven: Yale University Press, 1992).

2. For a fascinating argument that it is often the "silences" and "abeyances" of constitutions -- their unwritten components -- that are most significant, see Michael Foley, The Silence of Constitutions. Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government (London: Routledge, 1989).

3. Terry Karl, "Imposing Consent? Electoralism Versus Democratization in El Salvador," in Paul Drake and Eduardo Silva, Elections and Democratization in Latin America 1980-1985, (San Diego: Center for Iberian and Latin American Studies, Center for U.S.-Mexican Studies, University of California, San Diego, 1986).

4. For six types of "constitution-making environments," see Juan J. Linz and Alfred Stepan, Problems of Democratic Transition and Consolidation (Baltimore & London: Johns Hopkins University Press, 1996), pp. 81-3.

5. The intent of this stricture is to ensure that the drafters of this document will not be its immediate beneficiaries, i.e. that the members of the constituent assembly will not be distributing powers and establishing privileges that they themselves know that they will subsequently enjoy as members of the legislative assembly. For example, it has been suggested that the recent constitutions and constitutional revisions in Eastern Europe have produced an institutional format which is excessive in its attribution of powers to the legislature because they were all drafted by representative who knew that they would be occupying roles in that legislature. Jan Zielonka, "New Institutions in the Old East Bloc", Journal of Democracy, Vol. 5, No. 2 (April 1994), pp. 87-104.

The danger, however, of enforcing too great a separation between the two assemblies is that the constituents may be tempted to come up with rules that they themselves would not be willing to live by as parliamentarians. Normally, the problem is resolved by the rapid emergence of a subset of professional politicians who expect, one way or another, to follow a career defined by the rules of the new constitution.

SKETCH OF THE PROPERTY-SPACE INVOLVED IN THE CONSOLIDATION OF WHOLE AND PARTIAL REGIMES IN MODERN DEMOCRACIES

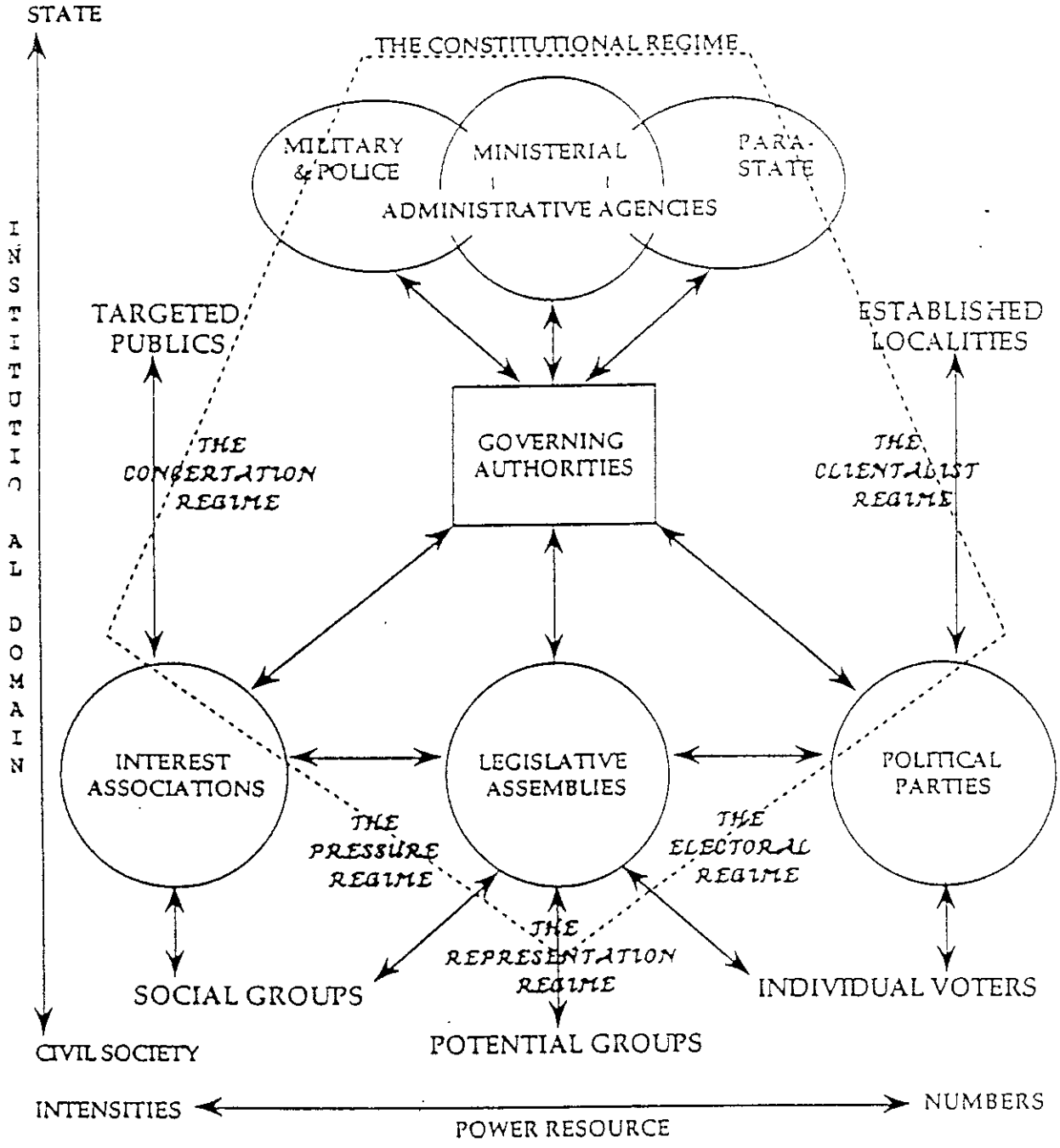
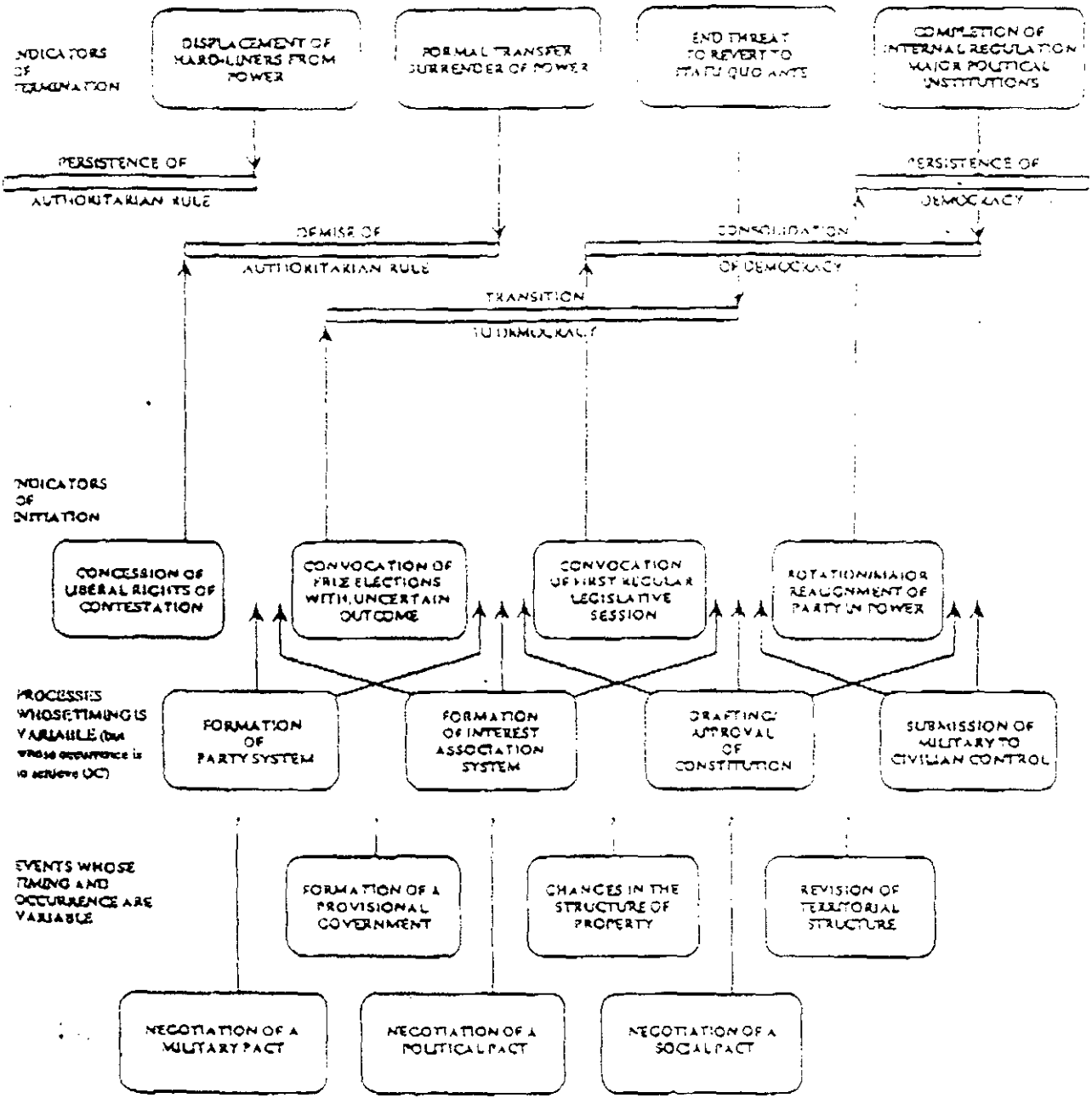


FIGURE [illegible]

A VISUAL REPRESENTATION OF REGIME CHANGE FROM AUTHORITARIAN RULE TO DEMOCRACY



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The Tension between the Division of Power and Constitutional Rights (with Special Emphasis on Socioeconomic Rights)

(Draft)

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The Tension between the Division of Power and Constitutional Rights (with Special Emphasis on Socio-Economic Rights)

by Wojciech Sadurski

1. Introduction

Constitutional rights, it is correctly thought, strengthen the position of the individual vis-a-vis the legislative, executive and judiciary branches of government. In a sense, constitutionalization of rights affects a "division of powers" between an individual and the state: The status of the individual is robustly protected against governmental decisions which affect his or her interests, and which might be otherwise justified, in the absence of constitutional rights. Those rights exclude, therefore, certain routinely accepted reasons for actions, or demand that these reasons be of particular urgency.

Whether constitutional rights also affect the relationship of particular branches of government toward each other is a different matter. It has become a commonplace belief that the constitutionalization of rights implies the introduction of strongly counter-majoritarian devices into the political system. Conventional wisdom in the current constitutional discourse in the post-communist countries of Eastern and Central Europe has it that constitutional rights, in order to be meaningful, require a system of constitutional review of political branches performed by non-elected branches of the government, and in particular, by the judiciary. The rise of constitutional tribunals in almost all the countries of the region[1] -- though in some countries they achieve higher prominence, independence, and power than in others -- is a testimony to the force of this conventional wisdom.

This trend has major significance for the shifts in the division of power. Any decision of one branch of government which declares invalid a decision of another branch affects separation of powers. When the judicial branch invalidates a decision of the legislature or of the executive, the decision affects the allocation of institutional responsibility. Such a jurisdictional effect is a serious matter because "whenever a political decision is declared invalid, the judgment of the judicial branch has been substituted for that of other branches of government."[2] But the significance of this "substitution" varies, depending upon the type of constitutional ground which serves as a basis for the review. When the constitutionality of an act is evaluated from the point of view of the principles of separation of powers itself, the court merely assesses whether a given body had a right to issue the decision, and whether it was issued in the right procedure. But when the court assesses the act from the point of view of its consistency with such open-textured formulas as "social justice," "Rechtsstaat" or "social state," then, in effect, it is substituting its own value judgments or policy

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[1] But there are exceptions. For example, in Latvia the Constitution provides for a complex system of presidential refusal to promulgate the law, coupled with a possibility of a referendum on a challenged law (art. 72 of the Constitution) -- but no Constitutional Court. The Law on Constitutional Court was passed only in June 1996 and, as Adolf Sprudz reports in his conference paper, by late October 1996 it has not yet been activated (see pp. 28-29).

[2] Komesar 1984, p. 366.

choices for those taken by an elected body. The tension between constitutional review and the principles of democratic legitimacy is then evident.

While the borderline between the former type of constitutional review ("separation-of-powers"-based review) and the latter type ("substantive" review) may be unclear,[3] it is obvious that evaluation of legislation and governmental acts from the point of view of consistency with constitutional rights belongs to the second category of review. Since constitutional rights, by their very nature, cannot be given a precise and canonical interpretation in the text of the Constitution itself, and lend themselves to interpretations about which reasonable people may disagree, a challenge to an act on the basis of its inconsistency with rights can be seen as a clash of competing values, and not necessarily as a clash of a "right" with something else. This is all the more evident when the rights which serve as a basis to displace a policy of an elected government regulate social, economic, or cultural interests of individuals. Constitutionalization of this sphere, coupled with the power of judicial review, produces a dramatic change in the classical system of division of powers.

The momentous character of this shift has not gone unnoticed in the East and Central European post-communist countries, though there has been no consensus about whether it is good or bad. Perhaps the most eloquent criticism of this transfer of powers from the legislative and the executive to the judiciary has been raised recently by Andras Sajo in his article about the impact of the Hungarian Constitutional Court's decisions upon the governmental attempts to restructure the welfare system.[4] Characteristically, Sajo's article has been provided with a subtitle: "Welfare rights + constitutional court = state socialism redivivus." Also in Poland, the prospect of review exercised by the Constitutional Tribunal under a new proposed constitution, which will contain -- in all probability -- a broad array of "programmatic" socioeconomic rights, led some commentators to express fears that the Tribunal will get embroiled in policy-making. As leading Polish constitutionalist Jerzy Ciemniewski warned, if the Constitutional Tribunal wields the power of review under certain socioeconomic constitutional norms, "we will embark upon a very dangerous path by combining the roles and functions of different categories of branches of state and by confusing the scope and nature of the responsibilities carried by these bodies."[5]

Whether it has happened, whether it will happen, and whether it should happen in post-communist countries, is the central theme of this section of the conference discussion for which this paper will serve as an introduction. I will reflect here upon the shifts of powers, affected by constitutionalization of socioeconomic rights, from a general institutional perspective. This institutional perspective allows us, among other things, to cut through ideological beliefs, self-serving rationalizations, and self-congratulatory theories. This is done by asking direct questions

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[3] See Neuborne 1982, who claims that much of the "substantive" judicial review in the United States and France may be plausibly interpreted as a process-based, separation-of-powers review, which is compatible with classic democratic theory.

[4] Sajo 1996, p. 31. It is not my purpose here to assess the merits of Sajo's argument. For a critique of his article, see the paper presented to this conference by Istvan Szikinger, p. 21.

[5] Ciemniewski 1996, p. 41.

about the relative levels of competence of different participants in the complex decision-making process, controlled by constitutional rules.

For purposes of this paper, I will take it that the reasons for supporting specific countermajoritarian devices of rights-protection (such as the power of the courts to strike down legislation enacted by elected bodies) must appeal to such context-dependent factors as the differing capacities of different institutions, the level of political culture of society, and the age of the constitution (which may or may not necessitate adjusting an old text to changed circumstances). This assumption, while likely to meet with the approval of many political scientists, is not widely accepted among constitutional lawyers whose influence on the constitutional discourse in post-Communist countries is dominant. As a matter of fact, this assumption goes against the current widespread enthusiasm for the argument that constitutional rights, in order to be meaningful, must necessarily, and as a matter of principle, be supported by a strong, substantive power of judicial review.[6]

The central problem identified in the theme of this paper -- the impact of constitutionalization of socioeconomic rights upon the shift in the division of power -- arises out of the combination of two independent factors: constitutional entrenchment of socioeconomic rights on one hand, and acceptance of institutional authority of constitutional courts to review legislation on the other. Neither of these two factors, taken alone, needs to transform the pattern of division of powers, but the combination of the two virtually assures a shift. This recognition informs the structure of this paper. I will first consider the role of socioeconomic rights in post-communist constitutions (part 2 of the paper). Next, I will turn to the second ingredient of the combination mentioned at the beginning of this paragraph, namely the question of judicial review of constitutionality. In part 3, I will reflect upon the connection, in general, between constitutional rights and judicial review. In the subsequent three sections I will discuss various institutional modalities of judicial review, and how they affect the changes in division of power: the choice of abstract *versus* concrete judicial review (part 4), of an *a priori* as opposed to *a posteriori* review (part 5), and of the degree of "finality" of various systems of judicial review (part 6). I will then consider (in part 7) the viability of non-judicial methods of constitutional control of legislation. Finally, in part 8, I will bring the various threads of my analysis together, suggesting both the promises and the threats stemming from the discussed shifts in the division of powers, as seen from the standpoint of the main rationales for having separation of powers in the first place. Whether as a result of the constitutionalization of socioeconomic rights there have also been significant shifts between the two non-judicial branches themselves -- namely, as some suggested, from the legislative to the executive[7] -- will remain beyond my analysis in this paper.

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[6] For example, see Halmai 1993; Paczolay 1993.

[7] See Preuss 1993b, pp. 78-79.

2. The problem of socioeconomic rights

As is well known, socioeconomic rights have given rise to one of the main controversies in post-communist constitutionalism.[8] The question has received wide treatment in the literature,[9] and it is not my intention to describe it here. However, a few general remarks are in order, to establish a link with the subject-matter of this paper.

First, while socioeconomic rights are usually treated as "positive" rights, and as identifying "programmatic" goals for the government, that characterization is not accurate. The distinction between policy guidelines and rights *sensu stricto* does not correspond to a distinction between socioeconomic rights and civil-political rights (because rights which apply to a socioeconomic sphere may have a determinate content which imposes clear limits upon state action). Nor does it correspond to a distinction between "positive" and "negative" rights ("positive" rights may impose determinate limits upon state action, with the result that the failure to act may be unconstitutional). The positive/negative distinction, in turn, does not correspond to a distinction between socioeconomic and civil-political rights (some civil rights may require a positive state action, some socioeconomic rights may demand state non-interference with individual action). It is therefore important to keep these three distinctions (determinate rights v. policy guidelines, socioeconomic v. civil-political rights, and positive v. negative rights) separate.

Second, a decision about the constitutionalization of socioeconomic rights has major significance for division of powers, although not necessarily for the actual position of citizens with respect to social and economic matters. The latter may well be protected under a statutory regime of socioeconomic rights which is immune from judicial control, and which is fully subject to policy decisions by the legislature and government. In other words, failure to constitutionalize socioeconomic rights does not mean that the state renounces any responsibility for the socioeconomic interests of its citizens. Powerful arguments have been made in constitutional discourse in post-communist countries both for and against the constitutionalization of rights, and in assessing these arguments it is important to remember that the proper focus of discussion is not on whether to observe these rights in a legal system, but whether to grant them constitutional status.

Those who answer in the negative, point to the fact that, if socioeconomic rights are to be meaningful *qua* constitutional rights, they will imply an important transfer of budgetary decisions from the legislature to the judiciary, which will have to decide about budgetary spending in the process of enforcing citizens' rights.[10] This will radically subvert the current pattern of separation

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[8] For an excellent survey of various arguments on both sides of this controversy, see Osiatynski 1996, pp. 252-57. But note that in some countries the role of the controversy was lower than in others. As Vello Pettai reports in his conference paper, in Estonia "social issues . . . [did] not appear to have emerged as a major issue at any point during the constitutional debates", p. 14.

[9] See, e.g., Osiatynski 1994, pp. 138-45.

[10] Osiatynski 1996, p. 262.

of powers,[11] create a permanent tension between the parliament and the Constitutional Tribunal,[12] and freeze socioeconomic policy at a level which may be totally inadequate in tomorrow's conditions.[13] They also argue that socioeconomic rights, if written into the constitution, might help maintain and petrify certain negative societal attitudes and predispositions, such as dependency upon state services.[14] As Cass Sunstein argues, if constitutions are seen as "precommitment strategies, in which nations use a founding document to protect against the most common problems in their usual political processes," then removing socioeconomic rights beyond constitutional entrenchment may be beneficial in those states which wish to undo "the culture of dependency."[15]

On the affirmative side of the answer to the question about the constitutionalization of socioeconomic rights, one should note a point made by Tadeusz Zielinski that, unless socioeconomic rights are elevated to the constitutional level, the authorities will have full discretion to disregard, or even to further reduce, citizens' social entitlements.[16] Referring to his own experience as Poland's second ombudsman, Professor Zielinski argues that unless socioeconomic rights are constitutionalized, even legislative and executive acts contrary to the European Social Charter and international human rights covenants will be immune to challenge.[17] In addition, Herman Schwartz argues that many socioeconomic rights are, or may be, judicially enforceable;[18] that even if they are not, they nevertheless are "a way of imposing political and moral obligations on those who operate the state's governmental apparatus" to take appropriate steps,[19] and that at least some of the critics of constitutionalization of these rights are in fact opposed to the very implementation of these rights, constitutionally or otherwise.[20]

Third, aspecific catalogue of socioeconomic rights varies from constitution to constitution. Among post-communist countries, one may distinguish between constitutions which keep the list

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[11] Ciemniewski 1996, pp. 41-42.

[12] Osiatynski 1996, p. 262.

[13] Gintowt-Jankowicz 1996, p. 186, Osiatynski 1996, p. 262.

[14] In her conference paper, Renate Weber raises the question whether constitutional socio-economic rights "are capable to turn Romania into a welfare state or if they are the result of a still prevailing mentality, according to which the state is omnipotent and omnipresent . . .(p. 19).

[15] Sunstein 1993, pp. 36-37, emphasis in the original.

[16] Zielinski 1995, pp. 211-212.

[17] Id., pp. 212-213.

[18] Schwartz 1992, pp. 26-27.

[19] Id., p. 27

[20] Id., p. 28.

of socioeconomic rights to a basic minimum (e.g., Estonia,[21] Lithuania[22]), those which have a moderate number of socioeconomic rights (e.g., Slovenia[23]) and those which go very far in proclaiming such rights (e.g., Hungary). In the Western world, there are some constitutions which do not contain any socioeconomic rights at all (e.g., the United States, Austria, Sweden, Germany, Denmark[24]); there are those which contain a relatively narrow list (e.g., Finland[25] or Greece[26]), and there are those which contain a very generous list of rights (e.g., Italy, Portugal). It is important to keep in mind that, as Wiktor Osiatynski has observed, there is not necessarily a correlation between the "generosity" of a constitutional catalogue of rights and the level of socioeconomic policy of the state.[27] Indeed, a comparison of the United States and Sweden, two countries which are equally silent in the area of constitutional proclamation of socioeconomic rights, and yet have quite divergent approaches to socioeconomic duties of government vis-a-vis its citizens (even though, arguably, today the contrast is less obvious than in the heyday of the Swedish welfare state), is very telling in this respect. One can go even further and note an inverse relationship between socioeconomic rights being in a constitution and the existence of a welfare safety net, by comparing generous welfare

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[21] In the Constitution of Estonia, the only rights in this category are enumerated in a single article entitled "Welfare Rights" (art. 28), in a "General Integrity" Rights section, and include only health care and the right to general social assistance.

[22] Chapter 2 of the Constitution, entitled "The Individual and the State," which contains a list of rights, does not include any socioeconomic rights at all. There are some formulations of socio-economic rights in Chapter 3 ("Society and the State"), such as an "equal opportunity to attain higher education according to one's abilities" (art. 41(3)), and in Chapter 4 ("Natural Economy and Labor"), such as a right to rest and leisure, and to annual paid holidays (art 49).

[23] As Miro Cerar reports in his conference paper, the drafters of the Constitution deliberately refused to entrench "the right to work and the right to adequate housing" (at p. 17).

[24] In Denmark's 1992 Constitution, the only exception is a right to work, formulated not in the terms of an individual right, but rather as a guideline that "efforts should be made to afford work to any able-bodied citizen," s. 75 (1), and a right to public assistance to people unable to support themselves, s. 75 (2).

[25] The only socio-economic right in the 1995 Constitution is a right to employment, framed in terms of a state's duty (s. 6).

[26] The only socio-economic rights in the 1986 Constitution are a right to free education ((art. 16(4)), to work (art. 22 (1)) and to social security (art. 22 (4)).

[27] Osiatynski 1996, p. 233. See also Preuss 1993a, pp. 12.

states with no socioeconomic rights in their constitutions (Denmark, Austria,[28] Australia,[29] New Zealand[30]) with countries that have an appalling welfare situation but impressive catalogues of constitutional socioeconomic rights.[31] It is also worth adding that the absence of socioeconomic rights in the constitution does not necessarily mean the absence of any constitutional anchor for social welfare programmes: terms such as "social justice" (e.g., in Polish Little Constitution, art. 1, or in Estonia's Constitution, art. 10), "welfare and quality of life" (Portugal, art. 9) or "social state" (Germany art. 20, Slovenia art. 2) may be the basis for constitutional review of government social programs.

Fourth, socioeconomic rights -- regardless of the catalogue -- may be granted the same or a different status as all other rights. In some constitutions, there are no discernible distinctions made between socioeconomic and other rights, in terms of their status. This is the case, *inter alia*, of the Russian, Macedonian,[32] Bulgarian[33] and Hungarian constitutions, where there are no textual differences in the position of socioeconomic and other rights. In Hungary it was the interpretation by the Constitutional Court which drew a distinction, and not the Constitution itself.[34] In some other constitutions, socioeconomic rights are distinguished from other rights -- either by delegations to

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[28] There is no bill of rights in the Austrian constitution.

[29] The Constitution of Australia does not contain a bill of rights at all, the only exception being in s. 116 (freedom of religion).

[30] The 1990 Bill of Rights (which is not entrenched, and has statutory weight only) does not contain any socio-economic rights.

[31] In his conference paper, Piotr Winczorek contrasts the impressive list of constitutional promises with the sorry actual state of affairs in the areas of employment, education and health care in Poland, p. 12.

[32] "Economic, Social and Cultural Freedoms" are listed in Chapter II, Part 2 ("Basic Freedoms and rights of the Individual and Citizen"); Part 3, entitled "Guarantees of Basic Rights and Freedoms" applies to civil and political rights (part 1) and socio-economic rights (part 2) equally.

[33] Various rights to "welfare" are listed as Chapter 2, Part 3 of the Constitution, entitled "Fundamental Rights and Obligations of Citizens," and there characterization as "fundamental" is not qualified by any other provisions.

[34] In Decision 31/1990, the Hungarian Constitutional Court established that the right to social security (art. 70E of the Constitution) "does not entitle anyone to social security and safety, and legal claims on such a general level cannot be defined," quoted in Osiatynski 1996, p. 267 n. 78. As Paczolay suggests, "the interpretation of Chief Justice Solyom clearly states that social and economic rights are not raised to the rank of subjective rights that can be enforced by the judiciary against the state," Paczolay 1996, p. 121.

statutory regulations of the specific contents and limits of socioeconomic rights (e.g., Slovenia),[35] or by a separate clause which provides that they cannot be enforceable in a way applicable to all other rights (Portugal,[36] the Czechoslovak Charter of Rights and Freedoms of 1991).[37] It is clear that if a constitutional right is accompanied by a proviso that the extent of the protection will be determined by statute (as is the case in Slovenia, Estonia,[38] etc.), the effect of insulating the right from a routine political process is largely reduced. The shift of power from the legislature to the judiciary is unlikely to occur because the constitutional right, *per se*, is insufficient to evaluate the constitutionality of a law or policy. Finally, socioeconomic "rights" may be explicitly described as "tasks" for the government in the socioeconomic sphere, thus clearly suggesting that they are not seen as rights *sensu stricto* by the drafters (Spain).[39] This was a construction used in the (now aborted) 1992 "Presidential" draft of the constitutional Charter of Rights and Freedoms in Poland. It clearly distinguished "Social and Economic Rights and Freedoms " (these included a right to education, freedom of work, right to labor safety, a right to medical protection and a right to social welfare) from "Economic, Social and Cultural Tasks of Public Authorities" (which included, among other things, the improvement of working conditions, full employment, aid to families, medical care beyond the basic level, etc). This was accompanied by an explicit statement that the latter "tasks" are fulfilled by the authorities "in conformity with current economic possibilities." In this way, the idea that socioeconomic tasks apply to governmental actions and aspirations, rather than to determinate results, was constitutionally endorsed -- but no pretense was made that these tasks and aspirations described a range of constitutional "rights."

Fifth, the issue of enforceability of socioeconomic rights should be distinguished from the issue of socioeconomic rights as a ground for judicial review. As to the former issue, the defenders

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[35] As examples of constitutional rights accompanied by a delegation to statutes, see art. 50 (social security), art. 51 (health care), art. 52 (rights of the disabled), etc. Note that some other constitutional rights in the Constitution of Slovenia (that is, other than socio-economic) are also accompanied by a delegation to statutes.

[36] In the Portuguese Constitution, "Personal, political and civil rights, freedoms and safeguards" are listed in Section II, while "Economic, social and cultural rights and duties" are in Section III of Part I of the Constitution, entitled "Fundamental Rights and Duties". Article 17 (in section I) explains that "The general system of rights, freedoms and safeguards covers those set forth in Section II and fundamental rights of a similar type" (emphases added).

[37] The Czechoslovak Charter which, after the dissolution of Czechoslovakia, was made a part of the constitutional order of the Czech Republic and -- with some changes -- of the Slovak Republic, provides in Art. 41 that certain enumerated socio-economic rights "can be claimed only within the limits of the law as set out in these provisions".

[38] See the conference report on Estonia by Vello Pettai, p. 21.

[39] "Guiding Principles of Economic and Social Policy" (chapter III of the Constitution) are distinguished from "Rights and Freedoms" (chapter II).

of "socioeconomic" rights often say that these rights have merely a "programmatic" character, as opposed to "claim rights." This is meant to suggest that constitutionalization of the right to work, housing, health care etc. does not authorize citizens to press any specific claims against the government in court, but merely imposes a duty upon the government to conduct an effective policy aimed at fulfillment of these programmatic goals. In this sense, these rights are not directly enforceable, or self-executing. A leading Polish proponent of the view that the constitutional prescription of tasks for the state in the area of housing, work, etc. does not contradict the essence of rights, Tadeusz Zielinski distinguishes between "claim rights" and "programmatic rights," the latter "defin[ing] the tasks of public authorities in the area of welfare rights of citizens." In addition, "[a] right to work means only that a citizen has a right to assistance in finding a job by the public authorities. A right to lodging means only that a citizen is provided the opportunity to make use of policies leading to satisfying citizens' needs for lodging."[40] But if all there is to a right is an opportunity to benefit from whatever state policy is in operation, then it is redundant to call it a "right": it is, rather, another way of urging the government to have a policy in this field. Be that as it may, from the point of view of our topic, i.e., the question of separation of powers, the crucial issue is not whether a right is judicially enforceable or not, but instead whether a right can serve as a basis for overturning a law, a budget, or a policy by the Constitutional Court. It is at this point that the most striking shift of policy-making power from the legislative and executive to the judiciary takes place.

Sixth, even within the same list of rights, either a "minimum" or a "strong" use can be made of these rights, both in the process of enforcement and judicial review. A minimum use would consist of viewing an entrenchment as a guarantee against arbitrary and discriminatory limits on access to a given socioeconomic program, whatever it may be. In other words, it does not order a state to run any particular program, say of education, housing or health care, but once a program is in place, constitutionalization amounts merely to a guarantee of equal access.[41] Such a use of socioeconomic rights has been suggested, for example, by Herman Schwartz.[42] As Judge Gadgijev Gadis reports in his conference paper, a number of judgments by the Constitutional Court of Russia concerning the interpretation of social rights focused on the application of the principle of equality before the law, and resulted in "the expansion of the circle of people, having the right [to] social payments."[43] In turn, a strong use of socioeconomic rights goes much further than prohibiting arbitrary or discriminatory exclusions, and calls for adoption of efficient means by the government to attain programmatic goals as defined by the constitution-maker. While choosing the "minimal"

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[40] Zielinski 1996.

[41] This understanding is not equivalent to the notion of a "programmatic" right because the latter requires the state to have a program. A "minimum" use of the right requires merely that, if there is a program, it must not be arbitrarily denied to some beneficiaries.

[42] See Schwartz 1992, p. 27. It is important to note that this was not the only function of socio-economic rights prescribed by Professor Schwartz in his article.

[43] The conference paper by Gadgijev Gadis, p. 10.

interpretation would probably weaken much of the criticism against "socioeconomic rights," that interpretation is rather implausible because of its redundancy: discriminatory policy is already proscribed by constitutional rules against discrimination.

It is perhaps worth noting that one frequent argument against constitutionalization of socio-economic rights, made in particular in the context of post-communist constitutionalism, has been that, as a result of conflating rights with state policies, the effectiveness of other rights, including those that do have determinate meaning as limits on state action, will be reduced.[44] Herman Schwartz disagrees: "This notion that if some rights turn out not to be effective, others will be in some way degraded in value, is utterly complete nonsense."[45] For my part, I believe that Schwartz's point may be well taken in regard to systems where the values of constitutionalism, rule of law, and the protection of rights are well established, and where disagreements about rights pertain to the margins, rather than to the core meaning of rights. However, in a system where a nihilist tradition of treating a constitution as a purely decorative instrument is strongly embedded, and where the fundamental notions of constitutionalism and rule of law have a weak purchase upon the collective consciousness, everything that undermines a strict construction of constitutional limits upon discretional governmental action is to be regarded with concern.

3. Constitutional Rights and Judicial Review

Determining the wisdom, or the lack thereof, of granting a judicial body the power to invalidate legislative and executive decisions, on the basis of constitutional rights, is a complex matter which cannot be determined by a simple reference to the idea of rights protection versus majority rule. Contrary to a conventional wisdom in constitutional discourse, the issue is a matter of pragmatic judgment about relative institutional competence rather than a matter of principle. This is for three main reasons: (a) a rights-based distrust of majoritarian institutions -- which is usually cited as the reason for countermajoritarian review -- cannot be absolute because, if it were, we would lack the bases for the constitution-making process in the first place; (b) the opposition of rights *versus* consequentialist policy-considerations is not equivalent to the opposition of rights determination *versus* majority rule; (c) even if we have good reasons to distrust the legislature in its task of properly protecting rights, it is a *non sequitur* to claim that judicial review necessarily follows; it is conceivable that, in particular contexts, even if the legislature is not very good at protecting constitutional rights, the judiciary may be worse.

Let me briefly explicate these three points.

(A) If we thought that the majority was inherently unable to respect and honor the legitimate interests of minorities and individuals, and that is why we need a countermajoritarian body to ensure the legislative respect for constitutional rights, then we would be incapable of understanding how constitution-making (including the adoption of a bill of rights) is possible at all. After all, it is the majority which ultimately decides about the constitution -- a qualified majority, and a majority

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[44] See, e.g., Elster 1993a, p. 198.

[45] Schwartz 1995, p. 221.

acting in special way, but a majority nonetheless.[46] And if we never trusted the majority to be able to consider, in good faith, the legitimate interests of the minority, then we could never have a genuine bill of rights in the first place.

But if there are some circumstances in which we can trust the majority in rights determination (partly because we have no other choice), then it opens the way to trusting the majority in other circumstances as well -- as long as these circumstances resemble significantly the circumstances which supported the trust in the first place (i.e., the circumstances of constitution-making). Now there are important differences between constitution-making and ordinary lawmaking (this is the whole point of the dualist theory), but the differences are of degree. To draw a sharp contrast between the majority deliberating on the constitution and the majority deliberating on the statutes (including those which would restrict the constitutional rules) would be in essence to rely on the fiction that the same group can act, in different circumstances, on the basis of totally different motives. While it may sometimes apply to an individual agent, it is much less plausible with regard to the community.

(B) It is not the case (either as a matter of description, or as a normative theory) that members of the majority in a democracy are always guided by their own (or their constituency's) interests. Rather, the motives for supporting or rejecting a particular proposal (whether a legal bill or a policy proposal) derive from a number of considerations, which occupy a broad continuum, between narrow self-interest on one end, and ideals about the common good on the other.

The relative importance of these two types of considerations varies from case to case (compare voting on a budget with voting on an abortion law), but it would be deeply unrealistic to believe that people are never moved in their political decisions (either as voters or as legislative representatives) by their views regarding "the common good" -- the ideals which do not collapse into these people's sectarian interests. Obviously people strongly disagree about what constitutes a "common good" -- but this is another matter. What matters is that very often people are moved by considerations other than the expected utility of a given law to them, or to their group. If this is the case (again, both as a matter of realistic description, and of a normative theory), then the identification of the majority rule with the application of utility in lawmaking and policy-decisions, and the consequent demand for a rights-based judicial review, is not justified.[47]

(C) The decision about allocating authority is always based on a comparison of the relative virtues and vices of different institutions, rather than on looking at various institutions one at a time. Even if we are skeptical about the competence of the legislative process in the rights context, this is not enough to support a shift to the judiciary. We first must be satisfied that the judiciary will provide a superior alternative to the legislature.[48]

Such a judgment will hinge on a great number of variables, and on their relevance to an institutional ability to discern the meaning of rights. These variables include, among other things,

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[46] See Elster 1993b, pp.179-80, 192-93.

[47] See, in particular, Waldron 1993, pp. 407-16.

[48] See Komesar 1984, p. 376.

such matters as the procedures of selection and recruitment of members for a given body, the conditions of job security of the decision makers, the flexibility in determining one's agenda, the access to information and empirical studies on matters affected by a decision, requirements for giving reasons for one's decisions and defending them against the critics, patterns of responsibility for unpopular decisions, etc.

Take, for example, the requirement of giving reasons for, and the responsibility for defending, one's decisions. These are two separate requirements, which need not coincide. Courts (including constitutional courts) are usually expected to articulate their principled grounds for decisions ("a forum of principle").[49] This function is enhanced when constitutional courts may publish dissenting opinions as well; in those systems where constitutional courts are prohibited from making dissenting views known (such as in France, or in pre-1970's Germany), the function of giving the reasons is not as well performed. On the other hand, courts are usually silent once the decision has been made. This affects the nature of their reasoning, and reduces their impact upon public discourse. Significantly, Professor Sajo once described the Hungarian Constitutional Court's argument as "sterile, self-oriented, and not responsive to external challenge."[50]

Any of these variables may be considered relevant to the relative institutional competence in the area of rights protection. But these considerations cannot be substituted by easy and simple pronouncements that judicial review automatically follows from constitutionalism's restricting role vis-a-vis majority rule. It may be that parliaments, in specific countries and at a certain time, are defective instruments for respecting the rights enshrined in constitutions -- but there is nothing self evident about it. It is question-begging to declare *a priori* that the judiciary is better qualified to determine the best interpretation of general, textually indeterminate provisions of constitutional bills of rights. When the court and the parliament disagree about the proper meaning of a constitutional right, and the court strikes down legislation enacted by the parliament, then it simply would be wrong to infer from the fact of disagreement that only one body could be truly alert to the issue of rights.

One rather plausible ground for judicial rather than political intervention seems to be the case of legislatively inflicted damage to the political process, as a result of which the functioning of majority rule itself is distorted. The strength of the legitimacy of judicial intervention is that it appeals to the values of democracy itself and is ostensibly addressed to the process of majoritarian decision-making.

But this theory (made famous in the United States by John Hart Ely)[51] is not without its problems. First, the values of process are often indistinguishable from the values of substance. For example, freedom of speech is a procedural device necessary for the functioning of democracy, but it is also a substantive interest of individuals protected by the Constitution. When the legislature

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[49] See Dworkin 1985, chap. 2.

[50] Sajo 1995, p. 266.

[51] Ely 1980.

compels broadcasting stations to respect Christian values,[52] is it imposing constraints upon the channels of political communication or, rather, upon the individuals' rights to express themselves publicly as they wish? A natural answer would be "Both," but the process-oriented theory of judicial review would have us disregard the latter effect and focus on the former. The danger of the former interpretation is, however, that virtually any speech may be seen as related -- directly or indirectly -- to political mechanisms of democracy. If this is the case, then the process-based argument collapses into a substance-based argument, and one is indistinguishable from the other.

Second, we need an explanation of why legislators are typically less concerned about the process of democracy than the courts are. After all, a clash of interpretations -- when the court is about to invalidate a legislative decision -- concerns contested values, when it is not obvious which interpretation of a constitutional right is clearly more "correct." One such explanation may appeal to the idea that legislators are more prone to be motivated by wrongful prejudices and stereotypes. But is the judiciary inherently more immune to such motivations? An American legal scholar observed, for example, that in the United States "[r]emedies for gender discrimination have come as often from the political process as from the judiciary. . . . Similarly, both after the Civil War and during the past two decades, Congress intervened to curtail discrimination against blacks that affected state political processes."[53] England provides another example where the absence of judicial review of the constitutionality of procedural rules (or any other legislative norms for that matter) has not brought about any drastic malfunctioning of the political system which leads to a distortion of the democratic process. Consider various anti-discrimination laws[54] which are examples of legislative rather than judicial activism oriented toward accommodation of minorities within the system.

4. Judicial Review: Abstract or Concrete?

The main distinction has to be drawn between those systems in which the courts exercise judicial review of an act in the process of deciding a particular case to which this legal act applies (a concrete review), and those in which courts review an act *in abstracto*, regardless of any particular litigation (abstract review). Of course, there are constitutional courts which possess both these powers, but for a general discussion it is useful to make a distinction between the pure systems.

This dichotomy has to be distinguished from a classification of systems of judicial review into centralized and decentralized (or diffuse); the former exists when there is a single body endowed with the power of constitutional review (as in continental European constitutional tribunals); the latter, when every court has the power to decide about the constitutionality of an act applicable to

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[52] See, e.g., Articles 18.2 and 21.2.6 of the Broadcast Law in Poland of December 29, 1992, upheld as constitutional by the Constitutional Tribunal on June 7, 1994.

[53] Komesar 1984, p. 404, footnotes omitted.

[54] Race Relations Act 1965, amended in 1968 and 1976; Equal Pay Act 1970; Sex Discrimination Act 1975.

a case before it (as, e.g., in the United States, Canada, Australia, Sweden, Japan and India). Decentralized review is always concrete, but centralized systems can be abstract or concrete (or mixed). An interesting case of a hybrid of a centralized and decentralized system is provided by Estonia where, apart from the National Court's normal functions of abstract constitutional review, any regular court can petition the National Court with regard to the constitutionality of a law applicable to a case before it. In itself there is nothing surprising about it, as most European constitutional tribunals can be activated in this way. What is peculiar is that if a regular court, in the trial of a case, concludes that the applicable law contradicts the Constitution, the court not only petitions the National Court to determine constitutionality, but also "shall declare it to be in contradiction with the Constitution."[55] It follows that every Estonian court has the power to declare any law unconstitutional (a decentralized and concrete review), and only subsequently will such a declaration trigger proceedings before the National Court.

But let us consider here a distinction between "abstract" and "concrete" review in their pure forms. What are the implications of this distinction for the division of powers? As a general hypothesis, one may argue that the concrete review affects the shifting of power from the legislative to the judiciary to a lesser extent than in an abstract system. This is because of a different rationale, and the related availability of precautions against excessive judicial activism.

Consider the original rationale for the system of judicial review as established in the United States in 1803, under Marbury v. Madison. Contrary to the popular opinion, Chief Justice John Marshall did not base the Supreme Court's power to invalidate the acts of Congress on his understanding of the Court's role as a watchdog of the constitutionality of legislative acts. The conventional argument that the existence of constitutional constraints necessitates the power of the Court to declare when Congress has overstepped these constrains, does not figure in Marshall's reasoning -- not explicitly, anyway. If one reads Marshall's opinion in Marbury v. Madison carefully, one realizes that the whole construction of an implicit power of the Court is based on one, rather simple argument: the court (any court, not just the Supreme Court) has to apply the law in order to decide a specific case; if there is a conflict of two laws which control the case at hand, the Court has to decide which law should be given precedence; if the Constitution and a lower act clash on the same issue, the Constitution must prevail.

The declaration that an act of Congress is invalid is merely a practical necessity of having to decide a particular case: "Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each," explains Justice Marshall. And since the Constitution is addressed to the legislatures as well as to the courts, the latter have no choice but to declare invalid an act inconsistent with the Constitution.

This, on its face, is an argument which is qualitatively different from an argument that the Court has to be a watchdog of the Constitution, and to oversee congressional behavior under the Constitution. There is hardly any place for the idea of judicial supremacy in Marshall's view: the Court has no choice but to discard the act in order to apply the Constitution, but Congress or the government may insist on its own interpretation of the Constitution, different from that of the

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[55] Art. 5 of the Law on Constitutional Review Court Procedure of 5 May 1993.

Court's.

This rationale for judicial review informs the institutional precautions against judicial activism. If the argument about judicial review is made along Marshall's lines, and it makes sense only with respect to concrete judicial review, then it also makes good sense to erect precautions against judicial transgressions beyond the role justified by the rationale for a concrete judicial review. In the United States Supreme Court's jurisprudence, it has meant that the federal courts have jurisdiction only if a number of conditions are met: they cannot decide lawsuits that are "moot," or "unripe," or where parties cannot establish their "standing," or when the subject-matter is essentially "political," etc. These conditions all follow from the constitutional description, in Article III, of the role of federal courts in deciding "cases" and "controversies," and the power of judicial review of legislative and executive acts is subject to constraints stemming directly from this role.

In contrast, "abstract" judicial review need not be subjected to any such constraints; the rationale for abstract judicial review relies more directly upon the watchdog role of the constitutional court, and the constraints mentioned in the preceding paragraph do not apply here. Of course, in practice, a constitutional tribunal which exercises an abstract review may manifest a great deal of restraint, while a supreme court which strikes down an act in the process of concrete adjudication may be very activist and non-deferential in its treatment of the legislative branch. However, all things being equal, the concrete review lends itself better, in my view, to a restrained review, and, therefore, has a lesser impact upon a shift in the allocation of powers to articulate constitutional norms.

5. Judicial Review: *A Priori* or *A Posteriori*?

A great majority of contemporary constitutional courts have only an *a posteriori* power of review of acts, that is, they cannot consider them before the acts enter into force. There are only a very few exceptions: notably *Conseil Constitutionnel* in France which can only consider (and, if it so decides, invalidate) the *lois* before their promulgation. In the post-communist world, the Romanian Constitutional Court has the power to adjudicate the constitutionality of laws before their promulgation (alongside the *ex post* power, but the latter can be triggered only by the courts).[56] The Spanish constitutional court, from 1980 until 1985, possessed both the *a priori* and *a posteriori* powers, but after 1985, the *a priori* power was rescinded, as an illegitimate affront to the principle of parliamentary sovereignty. There are also examples of bodies which can review in a nonbinding fashion the constitutionality of proposed legislation, such as the Law Council in Sweden, where the convention developed that the government would shelve criminal or civil legislation ruled unconstitutional by this body.

What is the significance (if any) of this distinction for the purposes of the constitutional division of power? It is useful to consider the illustrious example of the a *priori* model -- namely the French Council. The first thing to note is that the Council was not intended to be a protector of constitutional rights; indeed, the 1958 French Constitution does not even contain a bill of rights, and the Council was meant to operate merely as a guarantor of a separation of powers. The extension of

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[56] Art. 144 (a) of the 1991 Constitution.

its role, including the protection of constitutional rights (under the preambles to the 1946 and 1958 Constitutions, the 1789 Declaration of Rights, as well as "fundamental principles recognized by the laws of the Republic") was due to its own judicial activism, beginning with the landmark decision of 16 July 1971 when, for the first time, a *loi* was struck down for breach of fundamental rights.[57] Further, and following from the limitation of its power to that of an *a priori* review only, the Constitutional Council stands out, in comparison with other European courts, in that it does not possess a power of "concrete" review; that is, it cannot review the question of constitutionality arising out of an application of a challenged law to a specific legal case.

In these two respects, the *Conseil* is much closer to being a system of lawmaking than of judicial power. Indeed, a classical study of the *Conseil* by Alec Stone makes a convincing case for considering the *Conseil* as a "third chamber" of the legislature, rather than as a judicial or even a quasi-judicial body. The *Conseil* can invalidate a decision of the parliament in abstract terms rather than in the process of litigation; it can suggest positive solutions which would remove the defect from the law, and therefore is not merely "negative";[58] it decides on matters in which disagreement boils down to different policy choices and where constitutional norms are highly indeterminate;[59] it defines policy objectives and goals for the Parliament to pursue,[60] its deliberations are activated by a political action -- usually by a group of opposition senators or deputies unhappy about the law,[61] etc. All of these are characteristics of a legislative body, and Stone is very effective in showing that a number of characteristics which may seem to deny the "third chamber" characterization, in fact are shared by a number of bodies whose "legislative" nature is undeniable.

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[57] Decision No. 71-44 DC.

[58] See Stone 1992, pp. 209-10.

[59] For example, in 1982, the Council struck down the Socialist government's nationalizations bill on the grounds that its provisions for compensation violated property rights; it went on to state how the government could save the bill by employing different formulas for the valuation of the companies concerned; the government then wrote the formulas into the law, and eventually the revised bill survived a second referral. The revision raised the cost of nationalizations by 25 percent, see Stone 1992, p. 241.

[60] In one of its most famous decisions, in 1986 the Council invalidated a proposed Press Law on the basis that it provided insufficient guarantees for pluralism in media (a concept not mentioned in any constitutional text) and thwarted the Chirac government's attempt to repeal the limits on press ownership; Decision no. 86-210 DC of 29 July 1986, see Bell 1992, pp. 327-30.

[61] Laws may be referred to the Council by the President, the Prime Minister, the Presidents of the chambers of the Parliament and sixty members of either chamber of the Parliament. But in practice it is almost solely the instrument of parliamentarians. From 1974 (when the constitutional amendment expanded the right of referral to any sixty deputies or senators) until 1987, out of 202 referrals, 196 were made by parliamentarians, and only 6 by other authorized persons, see Stone 1992, p. 58.

But how different, from this point of view, are the cases of these Constitutional Courts which possess the *a posteriori* power of review only? Contrary to the expectation, the difference seems to be formal rather than substantive. The German Constitutional Court, or Hungarian Constitutional Court, can do all the things that the French *Conseil* can do -- plus possess all the powers related to the concrete review. The only difference between an *a priori* and an *a posteriori* review is the absence of promulgation by the President in the case of the *a priori* review. But if this promulgation is compulsory, as it is in the case of laws certified as constitutional by the *Conseil*, then the difference is technical: in both cases a body may displace a decision which enjoys majority support in an elected branch of the government.

The difference is perhaps that the *a priori* system brings about more stability to the system: while the law has been promulgated, no future challenge can be effective. The *a posteriori* system introduces more uncertainty and instability to the law. Although this, in itself, does not affect the separation of powers, certainty is an important matter. In turn, an *a priori* system seems to create an incentive for frivolous or obstructive uses of constitutional review by the opposition. It is instructive to note that this was the main reason why Spain decided to abandon the *a priori* review. The bills referred to the Court before they became effective caused delays in the introduction of reforms devised by the Spanish government in 1983-85. As Stone says, "these referrals delayed the reforms for ludicrous periods of time."[62] But this is a matter which can be remedied by, for example, strict time limits imposed upon the constitutional court (as in France, where the *Conseil* is required to rule within one month).

A more interesting question is, perhaps, whether there would be a major impact upon separation of powers if the constitutional courts were permitted, or required, to express their views regarding the constitutionality of proposed bills, before the vote in the legislative chamber(s) was taken. This would engage them, as advisory bodies, in the early stages of the legislative process. Some constitutional rules expressly prohibit such an involvement (e.g., in Slovakia[63] and in Estonia[64]), and some courts, despite the absence of an express prohibition, declined such invitations (Hungary[65]). The reasons given usually cited the principle of separation of powers. But one wonders

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[62] Stone 1992, p. 244.

[63] Art 128 (2) of the Constitution.

[64] See art. 4(2) of the 1993 Law on Constitutional Review Court Procedure.

[65] See Sajo 1995 at 256. Sajo reports that the Court has repeatedly refused to accept requests made by opposition members of parliament to investigate draft laws before the final vote. But note that the Constitution also provides for an *a priori* review analogous to the French system (besides an *a posteriori* review): the President may send the law enacted by the Parliament to the Constitutional Court before signing it within the fifteen days that he normally has for promulgation. If the Constitutional Court certifies the law as constitutional, the President is obliged to sign and promulgate it; if the law is declared unconstitutional, the President returns it to Parliament, see Art. 26 (4) and (5). Note also that Istvan Szikinger, in his conference paper, reports with approval a proposal of "introducing a preliminary control" over legislation but by

whether it would make such a great difference, once the constitutional courts have been given (or have usurped) a strong power to displace legislative judgment after the act has been enacted? Perhaps a system of "early warning" might help avoid a subsequent invalidation? Perhaps an advisory role of the court would de-dramatize the process of distorting the policy designed by the representative branch? It is likely (as Stone suggests in his comparative analysis of Wester European constitutional tribunals) that even an *ex post* review strongly affects the lawmakers' choices (by encouraging them to anticipate, and avoid, grounds for future invalidation of their acts). If that is the case, then an open and explicit opinion expressed by the court at an early stage would have the effect of bringing more transparency to the process. It would also help save resources consumed in legislative decision-making (considering that the costs of decision-making by the constitutional court are lower than the costs of parliamentary decision-making) and provide vital information to lawmakers. And, contrary to some concerns, it is hard to see why the power to give advisory opinions *ex ante* would compromise the independence of the court and turn it into "an organ loyal to the Parliament."[66] The power to give expert advice is not contrary to, but, indeed, presupposes, a degree of independence. As a matter of fact, some (non-constitutional) Supreme Courts (e.g., in Poland) have the express power to issue advisory opinions about proposed laws -- and it has not been seen as compromising separation of powers, or judicial independence, in any way.

It is worth adding that in a system of decentralized and "concrete" judicial review, not all courts resist the idea of advisory opinions to legislators. Such resistance might seem unsurprising, as the very nature of a concrete review system presupposes that a court may decide concrete cases only. The legislative proposals are even more removed from concrete cases and controversies than abstract, valid laws; they may or may not develop into real cases in the future. But while the Supreme Court of the United States has, from the very beginning, rejected such a possibility on separation-of-powers grounds,[67] some state constitutions in the United States permit their highest courts to issue advisory opinions.[68] In any event, it seems that the principle of separation of powers argues with greater force against the availability of advisory opinions in a system of concrete judicial

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another body than Constitutional Court (p. 6).

[66] This concern was expressed by Tamara Morshchakova, Vice-President of the Constitutional Court of the Russian Federation, see Morshchakova 1995, p. 137. Similarly, Istvan Szikinger claims that "involvement [of the Constitutional Court] in pre-enactment procedures necessarily weakens control over law in force" (p. 6 of his conference paper).

[67] The rule was established in 1793 when the Court refused to provide an opinion, sought by President George Washington, concerning the obligations of the 1778 Franco-American Treaty. See Pushaw 1996, pp. 442-44.

[68] The technical ground for this distinction is that state courts (including state Supreme Courts) are not controlled by Article III of the Constitution of the United States, which describes the jurisdiction of federal courts in terms of cases and controversies. Landes and Posner provide an economic explanation for the rejection of advisory opinions at the federal level, but not necessarily at the state level, see Landes and Posner 1994, p. 712.

review than in an abstract system. This is because one might argue that "the ideal of an independent, apolitical judiciary would be undercut if judges expressed an opinion about a law that might later come before them in a lawsuit."[69] But no such concern applies to a system where judges are called upon to review the law *in abstracto*.

6. Finality of Judicial Review

The degree to which power is transferred from the legislature to the judiciary is a function of, among other things, the degree of finality by constitutional decisions of courts and tribunals. In the post-communist world, only two tribunals have a less-than-final power of review, in the sense that their decisions about unconstitutionality can be overridden by a parliamentary supermajority (in Poland[70] and in Romania[71]). This is considered a sign of their institutional disadvantage, compared to other constitutional tribunals, and has been the source of complaints by the Tribunals themselves[72] and their supporters.[73] But for those who deplore the anti-democratic consequences of judicial power, the non-finality offers a way of reconciling democratic decision-making with constitutional review. The power of constitutional tribunals to review acts, but only tentatively, means that legislators -- and the general public -- are asked to have a second look at proposed legislation, and consider the constitutional aspects which perhaps had not been considered sufficiently in the first approach. It is the power that slows, but does not derail, the operation of majority rule.

From the perspective of the institutional allocation of authority, the power of constitutional review should not be seen as a matter of a dichotomy -- either the constitutional tribunal's decisions are final, or they are only tentative -- but rather as part of a continuum. At one end of the spectrum, the tribunal's decision adds only an insignificant cost to the legislative process and the will of the legislators is subverted only to a minimal degree; at the other end of the spectrum, the cost of

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[69] Pushaw 1996, p. 443.

[70] A Constitutional Tribunal's decision may be overridden by a two-thirds vote of the Sejm in the presence of at least half of its deputies, Art. 7 (4) of the 1985 Constitutional Tribunal Act. This is exactly the same requirement as for any constitutional amendment, see art. 106 of the Constitution. In May 1996 a new bill on the Constitutional Tribunal and a proposal for constitutional amendment was submitted by the President to terminate the availability of parliamentary override.

[71] A majority of two-third of the members of each chamber overrides the decision of the Constitutional Tribunal, art 145 (1). The override possibility applies only to the pre-promulgation decisions of the Tribunal.

[72] For example, the President of the Polish Constitutional Tribunal flatly stated that the "override" provision is incompatible with separation of powers and "reflects a view, typical for a totalitarian state, about the unitary character of state authority," see Zoll 1996, p. 113.

[73] See, e.g., Teitel 1994, pp. 178-79.

overriding the non-majoritarian body is very high. But the court's decision is never "final" in the literal sense: in lawmaking, there is no such thing as having "the last word." For one thing, it always can be overridden by constitutional amendment. This may be costly and burdensome, but not necessarily much more costly than the supermajority needed to override (through a non-constitutional procedure) a tribunal's decision in, for example, Poland and Romania. As a matter of fact, in Poland the requirements for a constitutional amendment are exactly the same as those for a decision overriding the Constitutional Tribunal's decision, and this fact served as the basis for one commentator's remark that "the override is tantamount to [a constitutional] amendment."[74] In Romania, the difference is that, while both the override and the constitutional amendment require the same parliamentary majority, the amendment also requires a referendum (Article 147). As Renate Weber states in her conference paper, this suggests "a conflict between Article 145 [parliamentary override of the Court's invalidating decision] and Article 147 [constitutional amendment] which is not constitutionally solved"[75] -- but the conflict appears to be based on the assumption that parliamentary override is indeed equivalent to a constitutional amendment. And this is question-begging, especially if we believe that both the parliament and the Court are engaged in a *bona fide* interpretation of open-textured constitutional norms, and, therefore, a finding of unconstitutionality by the Court does not necessarily establish that the law is indeed unconstitutional, and that the only way to bring the law in line with the constitution is to repeal the former or amend the latter.

Even short of a constitutional amendment, the "finality" of the Court's invalidating decision can be qualified by various institutional strategies. These may be written into a constitution, and therefore openly acknowledged as a way of injecting a degree of democratic deliberation into the essentially non-democratic process of judicial review. One example of such a strategy is the so-called "notwithstanding" provision of the Canadian Charter of Rights and Freedoms. This provision, in s. 33 of the Charter, states that "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature . . . that the Act or the provision thereof shall operate notwithstanding a provision included in" the Charter's catalogue of freedoms and rights. These declarations can be in effect for up to five years, which is the longest period of time for which a government stays in power without going to the polls, but they can be renewed indefinitely. Section 33, admittedly inserted into the 1982 Charter as a matter of political compromise and used sparingly, may be seen, as an American enthusiast of the provision described it, as "an effort to have the best of two worlds: an opportunity for a deliberative judicial consideration of a difficult and perhaps divisive constitutional issue *and* [as] an opportunity for electorally accountable officials to respond, in the course of ordinary politics, in an effective way."[76] The benefits of this approach seem significant: it allows the court to register its constitutional protest, puts the burden upon the legislature to face the constitutional issue explicitly, symbolically identifies the problem in a matter highly visible to the electorate, but does not distort the legislative will as a requirement of having

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[74] Schwartz 1993, p. 176.

[75] A conference paper by Renate Weber, p. 13.

[76] Perry 1993, p. 158.

supermajority in order to override the court's decision necessarily does. It seems like a good compromise between ordinary politics and constitutional concerns, which enhances popular deliberation over constitutional norms without distorting the democratic will. If we believe that the articulation of constitutional norms is a matter of concern not only for the constitutional courts but also for the legislatures, executive branches, and the general public, then the s. 33 compromise may be seen as an attempt "to make ordinary politics and constitutional law penetrate each other"[77] in a way that benefits society overall.

The United States Constitution provides for a mechanism of majoritarian constraint on judicial review, in the form of the Article III power of Congress to regulate the jurisdiction of the federal courts. Theoretically at least, the Congress might use this power to foreclose judicial consideration of constitutional challenges to legislation but in fact, although some constitutional lawyers have no doubts about the constitutionality of such a power of foreclosure[78], this has never served as a significant limit upon judicial review. There are various reasons, both political and legal, why the Article III power never served an analogous role to the Canadian Charter's section 33 in insulating controversial legislation from judicial review.[79]

But the very fact that such power exists suggests that, even in a system which is seen as the model for strong judicial review, "finality" of the Court's decisions, which invalidate legislative acts, is qualified. Some writers believe that the Supreme Court's decisions are never really the "last word" on the matter. Rather, they serve to initiate a complex dialogue between the courts and the elected branches of government, in which the latter may attempt to counter the effects of the decision. In a recent study of such interaction between the Supreme Court, the legislative and the executive, Neal Devins has shown that the legislative and executive branches have successfully restricted the impact of the Supreme Court's landmark decision on abortion,[80] and in consequence, have made the Court reexamine and qualify its own, earlier decision. As Devins concludes, "once a Supreme Court has decided a case, a constitutional dialogue takes place between the Court and elected government, often resulting in a later decision more to the liking of political actors."[81]

Devins is correct in saying that, on issues where constitutional interpretation is at stake, "the last word is never spoken,"[82] and that the articulation of a true meaning of constitutional norms is as much a task of the legislature, the executive, and the general public, as it is of the Supreme Court. It is also the case that the legislative and the executive branch have numerous methods of prevailing

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[77] Tushnet 1995, p. 299.

[78] Redish 1982, p. 907.

[79] See Tushnet 1995, p. 287.

[80] Devins 1996.

[81] Devins 1996, p. 7.

[82] Devins 1996, p. 55.

over the Court in its interpretation of constitutional rights,[83] although sometimes it may take a lot of time, as for example, the protracted resolution of the child labor issue in the United States indicates.[84]

Then, too, there is always the last resort option of amending the Constitution. But this is often politically unrealistic, or prohibitively costly, as seen in the example of the United States where, in its long constitutional history, only four attempts at constitutional amendment were successfully made to override Supreme Court decisions disfavored by the legislature.[85] Still, in those legal systems where the process of legislative amendment is less cumbersome, this avenue of restricting the "finality" of a constitutional court's decisions is a more readily available and practical option.

Finally, one should add that the finality of tribunals' decisions may be seen by the legislators sometimes as an advantage rather than as a countervailing, antagonistic power. The fact that legislators work in the shadow of judicial review may give them a good excuse for not making the decisions which the electorate demands -- by anticipating the tribunal's objections or by shifting the responsibility for an unpopular decision to the tribunal. It may provide a convenient excuse: "We wanted to adopt this law, or this policy, but the tribunal would not let us do it." Or, conversely, the tribunal's strong authority may free the parliament to behave irresponsibly. Individual members of a parliament can signal their "right" attitudes (valued by the majority of their constituency) by voting for proposals which they know will not actually become law because the tribunal will strike them down as unconstitutional.[86] Ironically, the tribunal's power to prevail over the legislature may serve the legislature's interests quite well, although perhaps not for the right reasons.

7. Non-Judicial Review

It is important to remember that judicial review (by which I mean the power of review which includes invalidating statutes due to unconstitutionality) is not the only possible institutional device of separation of powers and for eliminating legislative production which threatens the respect for rights. Rather, it is one of a range of possible institutional devices which may or may not, when part of a larger system of institutions and political culture, have a tendency to exert pressure upon the legislature to respect rights. A decision about the use of any of these devices must consider not only its ability to exert such pressure (that is, its benefits, from the point of view of a system of protection of rights), but also its costs. The costs of judicial review mainly include the consequences of

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[83] See generally, Ratner 1981, pp. 930-32.

[84] In 1916 and 1919, Congress attempted to strike at child labor indirectly, using the interstate commerce and taxing powers, and the Supreme Court invalidated both of these attempts, in Hammer v. Dagenhart, 247 U.S. 251 (1918), and in Child Labor Tax Case, 259 U.S. 20 (1922), respectively; in 1938 Congress returned to the original 1916 bill struck down in Hammer, and a unanimous Court approved child labor legislation in 1941.

[85] 11th, 14th, 16th and 26th Amendments.

[86] For an example of such behavior in the American context, see Macey 1993, p. 235.

injecting countermajoritarianism into lawmaking and policymaking. For one thing, decisions are made which would not have been made but for the system of judicial review; for another thing, public discourse about the proposed law or policy is thwarted by "juridification" of the policymaking and lawmaking, as a consequence of withdrawing the matter from the realm of ordinary politics.

The loss of the benefits of judicial review (such as the heightened concern for individual rights and for unpopular minorities) may be offset by other institutional devices. They may include bicameralism (especially if the two chambers are composed according to different principles and their coexistence is seen as a guarantee of a high quality of legislative production),[87] executive veto and a possibility of refusal to promulgate the law by the president,[88] special legislative procedures for laws implicating constitutional rights,[89] independence and robustness of the press, subjecting a legal domestic system to supranational scrutiny (exercised, for example, under the European system of protection of rights), and an effective pressure by non-governmental organizations concerned with individual and minority rights. Non-institutional devices such as the quality of political culture, the sense of *noblesse oblige* by the members of legislatures, public opprobrium for expressions of prejudice and bigotry, rules of party discipline by the members of parliament (especially in a proportional system of representation) which make members dependent upon the decision of their party leaders rather than on specific pressure by their local constituencies -- all these factors may affect the character of legislation, from the point of view of respect for individual and minority interests.

Great Britain is an interesting case in point. While in some respects the system of protection of rights seems to be inferior compared to the American system based on judicial review, it would be hard to say that British citizens (including those belonging to disadvantaged, unpopular, and powerless minorities) are evidently less free than the beneficiaries of rights-protection in the United States or in the continental European models of judicial review. With respect to a special case of socioeconomic rights, there is certainly no correlation between a strong protection of the welfare interests of individuals and the availability of judicial review under a constitutional bill of rights. This observation suggests that judicial review is not a variable which makes all the difference between protection and non-protection of constitutional rights. In countries such as Great Britain,

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[87] In her conference paper, Renate Weber states that in Romania one of the advantages of bicameralism has been that "in several cases bad draft-laws adopted by one Chamber have been corrected by the other chamber" (p. 10). This seems to be the dominant argument of the proponents of bicameralism in those countries where it is not grounded on a federal structure of the state. See also the conference paper by Istvan Szikinger who reports, at p. 6, that in the constitutional debates in Hungary "low quality of legislation" has been cited as a reason for a proposed second chamber.

[88] See Elster 1993b, pp. 196-204.

[89] See, e.g., Articles 58 (3), 59 (2), 60(4), 61(4), 62(2), 53(3), 65(3), 68(5), 69(4) and 70c(3) of the Constitution of Hungary, which require a special two-thirds majority for passing the laws regarding certain specified constitutional rights.

Finland, the Netherlands or Greece, protection of rights generally, and of socioeconomic rights in particular, has been a product of legislative action, and not of judicial constraints imposed upon legislation.[90]

8. Conclusions: Constitutional Rights and the Division of Power

One can, it seems to me, identify three main rationales for a system of division of powers, and for specific arguments about allocating certain powers to one rather than to another branch of government. These are, first, a libertarian rationale (preventing the tyranny and despotism which result from a concentration of powers in one body),[91] an efficiency rationale (tasks should be assigned to the body which is best qualified to perform them), and a legitimacy rationale (tasks should be performed by the body which has a mandate to do so, under whatever theory of legitimation we accept).

There may be other rationales, not reducible to any of the three mentioned above. For my purposes, it is important to note that the three above rationales are distinct, though in particular cases they may overlap. Examples of such an overlap include those situations in which legitimacy may be based on qualifications alone, in which case the third rationale collapses into the second one (such as when one argues that the army should have the authority to decide about launching military actions because it knows best the facts about an external threat). But we may sometimes hold legitimacy to be separate, and superior, to qualifications (such as when an impartial umpire in an arbitration dispute has derived legitimacy from the mutual consent of the parties, even though another body might have greater expertise in the matter in controversy), and these two rationales can still be separate from a libertarian argument. It is commonplace that liberty-based arguments for checks and balances may be counterproductive from the point of view of efficiency. As one of the greatest judges in American history, Louis Brandeis noted: "The doctrine of separation of powers was adopted by the convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but . . . to save the people from autocracy."[92] A modern writer characterizes this view as "the eighteenth-century hope that freedom could be secured by calculated inefficiency in government."[93]

It is useful to undertake a scrutiny of constitutional review (based on socioeconomic rights) from the point of view of these three rationales of separation of powers. The results of the scrutiny will be, largely, context dependent. They will depend on a number of factors such as the relative

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[90] But compare a categorical judgment by Cappelletti that "all systems past and present of political, non-judicial control [of constitutionality] . . . have proved to be utterly inefficient," Cappelletti 1989, p. 195.

[91] This was, of course, the dominant rationale of the classical proponents of the idea of separation of powers, namely Montesquieu, Locke and Madison; see Holmes 1995, p. 164.

[92] Myers v. United States, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting).

[93] Mendelson 1992, p. 779.

power of parliaments and executive bodies in a given country, the prestige and authority of constitutional judges, their backgrounds and patterns of accountability, the persistence of authoritarian tendencies among the executive, the dominance of charismatic political figures, the popularity of non-liberal and populist policies, etc.

However, putting these context-dependent variables aside, one may suggest the following working hypotheses, as a starting point for a discussion of circumstances in particular countries:

First, from the point of view of a libertarian rationale, the shift of decision-making authority from the legislative and executive to the constitutional-judicial bodies seems to be a neutral matter. In principle, it neither prevents nor favors various potentially autocratic tendencies within the system of government. To be sure, one may argue that by denying the executive the power of final say on socioeconomic policy, the shift prevents these branches from using socioeconomic policy as an instrument of rent-seeking behavior, clientelism, and the buying off of various interest groups with privileges in exchange for their support. But, on the other hand, constitutional review of socioeconomic policy may prevent a government from running economic reforms and modernization programs, force it to adopt more populist policies, and, as a result, undermine the bases for the robust protection of individual liberties. This is the case when a court is under the ideological influence of populist ideas and, in particular, when it undertakes scrutiny of legislative acts using such yardsticks as "social justice" or "vested rights." The incentive structure which shapes the court's activity is such that it is more likely to be receptive to claims based on traditional structures of dependency: it has very little to lose (because it does not decide on the budget) and a lot to gain (in terms of social popularity, self-satisfaction and an overall sense of moral self-righteousness) by erring on the side of "generosity" in mandating governmental welfare expenses.

Second, from the point of view of an efficiency rationale, the qualifications of the constitutional courts to decide about the matters of socioeconomic policy seem to be inferior to those possessed by two other branches of the government. Constitutional judges usually do not have the knowledge, information, background, and skills necessary to analyze complex issues of socioeconomic policy. The question is, to what extent such complex issues indeed arise in the process of judicial review under socioeconomic constitutional rights. No doubt, in some cases these issues boil down to fairly simple and obvious value choices. The question of "qualifications," then, is really more a matter of legitimacy (because the "capacity" to properly discern fundamental values is a matter of institutional authority) -- our third rationale. But to the extent to which the access to information and the possession of skills in the field of economics and social policy is indeed required for an evaluation of a governmental policy, the constitutional courts seem to be ill suited to fulfill this role.

Third, from the point of view of the legitimacy rationale, the response to the phenomenal rise of the constitutional courts must be ambiguous. If we view these courts as judicial bodies, then their legitimacy in this area is in serious doubt. Courts derive their legitimacy from the ideal of an impartial umpire adjudicating between competing claims.[94] But constitutional courts in Europe do

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[94] For a classic discussion of courts' legitimacy derived from a model of "triads" (two persons in conflict with each other, and an umpire asked to assist in achieving a resolution), see Shapiro 1980. See also Cappelletti 1989, pp. 31-45.

not decide specific cases and controversies, where this form of legitimacy applies. In abstract policy-making or policy-evaluation, legitimacy is most typically based on political accountability and not on the impartial umpire model. And constitutional courts are tainted by an important accountability deficit. As Burt Neuborne says (though not in a context confined to socioeconomic rights): "When substantive-review judges identify values and totally insulate them from majority will, the troublesome question of why judges are better than other officials in identifying and weighing fundamental values cannot be avoided."[95]

On the other hand, if we view constitutional courts as "third chambers," and abandon altogether a judicial paradigm, then their accountability may be less of a problem. For one thing, constitutional courts are accountable in a way that ordinary judges are not: the process of appointing constitutional judges is much more political (with constitutional guarantees which usually ensure that the courts' membership reflects all major political groupings),[96] political sympathies of the judges are sometimes reasonably well known, and the system of tenure may make them potentially more sensitive to the political trends of the day. For another thing, their location in the model of legislative powers, as a third chamber, may render us less inclined to insist upon the accountability requirement. This is because they can be seen as a "chamber of reflection": a forum of dispassionate evaluation of a given policy, removed from day-to-day political pressures.

In a recent article, an American critical constitutional scholar identified two main negative consequences of a "more than minimal" judicial review: "policy distortion" and "democratic debilitation." The former consists of the fact that, in a system of judicial review, "legislators choose policies that are less effective but more easily defensible than other constitutionally acceptable alternatives."[97] The latter means that "the public and their democratically elected representatives cease to formulate and discuss constitutional norms, instead relying on the courts to address constitutional problems."[98] These are very serious consequences. "Policy distortion" may, in the extreme, mean that the government will be disabled from pursuing the policy which is endorsed by the legislature and which has the political support of the electorate; it may lead to the undermining of reforms in the crucial period of transition. "Democratic debilitation" may lead to depoliticization, apathy and withdrawal of the public from a public discourse about policy proposals and law

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[95] Neuborne 1982, p. 368.

[96] For example, the Constitutional Court in Hungary is elected by Parliament, on recommendation of a commission which includes one person from each of the representative groups of parliamentary parties; in the Czech Republic, the Constitutional Court is appointed by the President with the approval of the Senate; in Bulgaria, one-third of the judges of the Constitutional Court are elected by the National Assembly, one-third by the President, and one-third by a joint meeting of the Supreme Court of Appeals and the Supreme Administrative Court, etc. See also Cappelletti 1989, p. 138.

[97] Tushnet 1995, p. 250.

[98] Id., p. 275.

reform.[99] This would be one of the sins for which the tradition of "negative constitutionalism" [100]can be blamed.

Of course, both of these effects can still be recognized by a proponent of strong judicial review, and yet assessed in opposite terms. "Policy distortion" may be seen as a modification of policy by considering those important values which have been given a constitutional status more seriously than the legislature and government usually do. "Democratic debilitation" may be seen as a much needed way to insulate the protection of those fundamental interests from the realm of everyday politics, dominated as it often is, by populism, demagogy and intolerance for the most vulnerable.

The upshot of this paper may be that the reality is more complex than either a radical-democratic or a liberal countermajoritarian answers suggest. Whatever decision about the structure of constitutional articulation of norms is taken -- whether there should be constitutional socioeconomic rights or not, whether a judicial or quasi-judicial body should have the power of reviewing legislative and executive acts or not, whether this review should be abstract or specific, *a priori* or *a posteriori*, final or tentative, etc. -- it will affect the allocation of authority among the institutions which all have their individual strengths and weaknesses. These strengths and weaknesses vary from country to country and from one period to another. An institutional approach may help view the problem as ultimately a matter of pragmatism rather than of principle.

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[99] In the United States and Canada, there has been a growing trend toward criticizing the strong judicial review (as exercised by the US Supreme Court) from the perspective of democratic, participatory values; this is nicely epitomized by the title of a recent book by Daniel Lazare: *The Frozen Republic: How the Constitution is Paralyzing Democracy*; see also Tushnet 1995; Mandel 1989; West 1993, p. 251-67, Perry 1993, p. 160.

[100] See Holmes 1993, p. 24.

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Albania - K. Loloçi (October 1996)

Chapter I: Do Constitutions Matter?

For almost forty-five years, Albania was governed by a dictatorial Communist regime that isolated the country from virtually all contacts abroad. This, and a pronounced economic backwardness, are the principal characteristics that distinguish Albania from the other countries of East and Central Europe, which were governed by more liberal Communist regimes.

The changes in the air that blew through the other countries of East and Central Europe were also felt in Albania, beginning in 1990 but in a more pronounced manner in 1991 and thereafter. The need to draw up a new Constitution that would lay the foundation for future changes became evident in 1990. The Communist Constitution of 1976 was a significant obstacle on the political plane as well as on the juridical one. Politically, the Constitution of 1976 impeded the establishment of party pluralism. Juridically, it blocked the creation and evolution of a market economy. And although it contained a host of individual rights, they were not guaranteed by any branch of the government.

For this purpose, in October 1990 a group of jurists was given the charge of preparing a new Constitution, which would be presented for approval to the new Parliament that was to be elected. Despite the influence of old ideas and the "old mentality" that will be discussed below, the draft that resulted contained some

significant achievements, removing a series of legal obstacles to the creation and consolidation of democratic institutions. Nonetheless, the draft also contained flaws and defects that were an expression of the time in which it was prepared as well as the legal culture of the jurists who prepared it.

After being discussed by a commission created especially for this purpose, the draft was presented for review to the first pluralist Parliament, which came out of the elections of March 31, 1991.

Although that Parliament was nominally controlled by the Party of Labor, and by a significant two-thirds majority (sufficient to enact Constitutional laws), under strong pressure from the opposition Democratic Party, Parliament refused to review or approve that draft Constitution. Instead, it approved the creation of a group of deputies to draw up a temporary Constitutional law, which would be in force until the preparation of a full draft drawn up in accordance with the standards of the time. And thus, the Constitutional law "On the major Constitutional provisions," which, with amendments and additions that were made later, is in force even today, was adopted by Parliament on April 29, 1991.

Without any doubt, the approval of this Constitutional law was an important event in the political life of the country. And the benefits that accrued to Albanian society from its approval have been important and considerable.

The important Constitutional principle of the separation of powers found reflection in this Constitutional law. Parliament was structured and organized as an active legislative institution. The government was limited in its power to issue acts

that have the force of law. This can only be done after receiving authorization by law or by proposing draft decrees to the President of the Republic. The institution of the head of state was given the ordinary form that we find today in all the western democratic countries. From a collective state chairmanship with vast powers, it was changed into the President of the Republic, an individual with limited powers (although as will be discussed later, those powers are still fairly extensive).

On the economic plane, the obstacles for creating the conditions necessary to establish and develop a market economy were removed.

While these changes and others created significant benefits for establishing democracy in Albania, and notwithstanding the later amendments that improved the Constitutional framework even more, the Constitutional laws now in force in Albania contain many defects and deficiencies. The powers of the different branches of government are not set out clearly, and it has happened more than once that there has been an interference by the powers beyond the bounds set out between them, which has had as a cause, among other things, these ambiguous Constitutional sanctions. In particular, the judicial power appears as the weakest branch from the viewpoint both of Constitutional sanctions and of Constitutional guarantees, and, as such, finds itself constantly under threat from the executive power. The cases of interference by the executive in judicial activities have been numerous. In some cases, this interference would appear to have a Constitutional "justification."

The need for the approval of a new, full Constitution, which would eliminate the defects and contradictions of the existing Constitutional laws, has been constantly present in the life of Albania since 1991. After the elections of March 22, 1992, the

Democratic Party came to power. One of the principal duties that it was charged with was the creation of a Constitutional commission to prepare a Constitutional text that would comply with international standards and respond to the new conditions facing the country.

The commission began work in 1992, particularly in the last quarter, meeting several times a month to discuss the articles and chapters prepared by a working group. The work of the commission was considered concluded with the preparation of a draft Constitution that was sent to popular referendum for approval in November 1994. In a rather surprising development, however, the draft was not approved by the popular vote in the referendum.

In the first instance, it should be stressed that the Constitutional process has been conducted under the influence of a harsh political climate. On the one hand, the Democratic Party, under the direct leadership of the President of the Republic, has been seeking to increase the already strong powers and role of the executive (principally of the President himself), while on the other hand, the opposition has constantly tried to neutralize the power of the executive, especially that of the President, while emphasizing the parliamentary character of the Republic.

The President of the Republic is and has been the principal protagonist in all the political life and state activity of the country. And this has a natural explanation.

The Communist regime planted the seeds of the idea of a state and political mechanism at the head of which stood a powerful "leader" who would direct virtually all state and economic activity. It then consolidated the idea in practice. This

mechanism, this practice had a direct psychological influence on the entire social life of the country for a relatively long period, almost fifty years. In this way it created a negative mentality with a whole series of rules. Thus, now, it would be very difficult for anyone who grew up in this period to take power in Albania without falling prey to this mechanism, this practice, this mentality.

It should be kept in mind that there are two main parts to this mechanism: a "number one" of the state and political life of the country and a group of individuals, incorporated into a party, constantly doing the political will of "number one." A bizarre mutual interaction becomes established between these two parts. It is not only the person who holds the position of "number one" who seeks the constant strengthening of that role. What is more interesting is that the interests of the persons who surround him also require it. Servility is the principal characteristic of the moral behavior of those involved in this mechanism. This group of persons, who also hold key positions in the party, make every effort to maintain the role and power of "number one" unbroken. Only in this way do they see it possible to satisfy their personal interests, both economically and on the political plane. The mechanism permits no groups of opponents or fractions in the party (or, of course, outside it).

This mechanism had extended its influence into every pore of Albanian society and could not be eliminated overnight. And so it happened that when the first critics of the policies of the Democratic Party, and those of the President of the Republic, appeared in 1992 within the Democratic Party, the President himself as well as the group of his supporters attacked the critics mercilessly, and they were expelled from the party.

Or let us take a significant recent example from the life of the Albanian opposition. The Socialist Party, the largest Albanian opposition party, had decided to withdraw from the Parliamentary elections of May 26, 1996, because, according to its leaders, it was not in a position to confront the massive manipulations of the party in power. In order to analyze this new situation, and also to fulfill a need that had been articulated both outside and inside the country -- the renovation of the party -- the Socialist Party decided to hold a congress. The situation before the congress was characterized by a fierce struggle between the existing leadership and the group that wanted the renovation of the party. The latter were victorious in the congress. The losers resigned, distancing themselves from all the leading organs of the Socialist Party. They could have stayed within the Socialist Party as a "fraction," but "mentality did not permit it." This mentality is summed up very well with the slogan "either for us or against us."

To return to the Constitutional process in Albania, although that process extended over a relatively long period, the previous Parliament was not in a position to ratify a new Constitution. In the first instance, approval of a new Constitution would constitute an important political victory: a democratic step forward in the relations of those in power with the opposition. The struggle between them has, however, been characterized by the absence of transparency and the necessary spirit to find a joint language of compromise, something which has also been seen in the aspect of the Constitutional process. The worsening of democratic consolidation because of the absence of a new Constitution, in other words, should not be seen so much from the viewpoint of what could be realized as a consequence of the approval and existence of a new Constitution as much as the absence of a spirit of cooperation and transparency between the parties in their savage struggle for power.

Of course, the enactment of a new Constitution, besides having positive results of a political character, would also exercise a powerful influence on the activity of all the institutions that this Constitution would establish and consolidate. The most important thing is that a way be found for constructive dialogue about devising and approving the new Constitution. This would create a more favorable situation for all the branches of power to function more independently. So long as dialogue and a constructive spirit do not exist, that is, while we are still under the influence of the old mentality and the old mechanisms, the chances that the articles of a Constitution, however good they may be, will be implemented are very small. Thus, for example, although the Constitutional Court was created in 1992, and according to European models, it has been and continues to be, according to many critics, a blind tool in the hands of "number one." While it is certainly a good thing to have a well drafted Constitution, putting it into life -- taking measures and creating all the conditions of the implementation of its articles -- is something else, and more important. Even if the Constitutional laws in force are not perfect, this does not justify in any way the failure to act in accordance with their provisions in particular cases, as has happened in the past few years in Albania.

It bears repeating that the principal factor that has influenced the progress of the Constitutional process in Albania has been and continues to be the spirit of dictation that characterizes the party that has power, and that this is the expression of the inheritance of the past. The old regime constantly sought to effect its purposes without yielding in any way to opposition forces. Only the carrying out of several elections, transferring power from the hands of one party to another and back again,

could serve as a major lesson to influence the consolidation of democracy in the country in a significant way.

The authoritarian, dictatorial regime of the past led the young politicians of 1991 to think and to select a parliamentary system as the most suitable form of government for the country at that time. It seemed that this solution would be the best countervailing influence to the past regime, in the midst of which stood the "number one" of the state and the executive branch of government. By establishing a parliamentary form of government, it was thought that it would best serve the purpose of uprooting the habit of obeying the dictate of a sole person, as well as establishing and consolidating political pluralism and putting the executive under control.

But in the final analysis, this solution in fact had no influence on the consolidation of democracy. What we tried to analyze above -- the practices, the mechanism, the mentality of the old regime -- reappeared, although in a different and less severe form, in Albanian political life. While the president in the parliamentary form of government is generally a symbolic figure, out of political life for the most part, in Albania, de facto, the President of the Republic took a central, quite important role in the political life of the country, and it often required his consent to find solutions to specific problems. Thus, not by chance did the initiative belong to him for the determination of particular important stands. While some of this found Constitutional expression, in other cases what the Constitutional Laws said was beside the point.

Let us recall the 1993 Constitutional Law "On the fundamental human rights and freedoms," the draft of which was prepared under the guidance of the President and presented to Parliament on his initiative as well. Although it is, on balance, an excellent document, it was rushed through Parliament with no meaningful debate. Had that debate taken place, or had the members of Parliament had more of a hand in its preparation, presentation and enactment, it might have been better understood and used more often than has been the case to date.

Similarly, the preparation of a complete Constitution in 1994, and the referendum on it that followed, by-passing Parliament, were solely presidential acts. The rejection of the Constitution that resulted was at least in part a popular reaction against this.

Under such circumstances, I do not think that whether the presidential form of government is chosen, or a parliamentary one, there would be a visible difference in the consolidation of democracy. The role of the Albanian president has been quite as significant as if Albania's Constitutional laws made it a presidential republic.

Compared with the initial chaos into which the country was plunged at the beginning after the downfall of the Communist regime, the situation is more stabilized today, and we may even affirm that in a number of respects significant steps forward have been made. The legal basis for the existence and functioning of the principal state institutions has now been approved. Despite the powerful influence that politics still has on the activity of these institutions, the signs can be seen of attempts by the latter to implement a more independent activity. Nonetheless, we are still far from bringing to life the principle of the separation of powers at the

standards of Western countries. It is sufficient here to look once more at the decisions of the Constitutional Court. Decisions that are contrary to the policies of the party in power or its government are rare, and in recent times such decisions are lacking completely.

But the existence of a legal basis for the creation and regulation of institutional activity does not mean that the chaos has disappeared. As can be easily understood, the creation of the legal basis is only one step towards establishing a law-governed state, a Rechtstaat. As is known, in the countries of Eastern Europe, especially backward ones like Albania, there is a wide and deep gap between the approval and existence of a law and implementing it and bringing it to life. This gap requires time to be gotten over. The chaos is still present, and appears in various forms.

What is first apparent is that a majority of the people who have been employed in the various institutions are not yet familiar with the new rules of government. Part of them do not have adequate educational abilities to perform the work with which they have been charged. Add the serious economic conditions and the corruption (which to a considerable extent is the result of these conditions) and you can imagine how difficult it is to consider everyday problems, to establish necessary measures for the treatment and solution of these problems, or to solve them without taking account of long-term priorities, the disquieting slowness of the administration, and the absence of concentration on and responsibility for fulfilling one's duty, that is, solving these problems.

Let us take an example. Issuing new laws has probably been the main priority of the Albanian government in this phase of the country's development. Here we speak not of the implementation of these laws, but rather of the process of drafting them and drawing them up. It has often been observed that drawing up these laws has been entrusted to some persons who have had no experience and do not have the necessary knowledge to do this work. (It should be noted that there are in fact people in Albania who have such experience and knowledge). Or great urgency, driven by the need for regulation in various fields of social life, has resulted in the pursuance of a totally incorrect procedure for creating a given draft. For example, the Labor Code, basically just a translation or transplant of the labor code of some Western country, was prepared by a few individuals and was not subjected to any discussion of the sort necessary to adjust it to Albanian conditions and reality. The Code was also rushed through Parliament on an urgent basis, without any discussion there, and approved in 1995. Today, various economic and public entities that have to deal with it are faced with juridical difficulties that are close to insurmountable. [Name one or two if you have time]. These problems have resulted in a movement for some important amendments to the Labor Code to be drawn up and approved. But the Ministry of Justice, whose job it is among other things to take steps to keep weak drafts from passing to the government and then to Parliament, has been passive and inept.

Albania is among those countries that adopted an interim Constitution immediately after the fall of the prior regime. Looking at the Albanian experience, immediately approving a provisional Constitution is not a perfect solution. As we showed above, the Albanian Constitutional Law is a temporary political solution brought about by various political forces. This Law, including other constitutional amendments made later, contains a number of defects and contradictions, which put

it lower on the scale rated by contemporary Western standards. While it was approved as a provisional constitutional law, to serve for the political situation of a temporary period, as time went on, the period for which it served was no longer provisional. This fact in itself is another negative point. Probably the sole reason that caused the Albanian Parliament to approve a Constitutional Law in 1991 was the need to abrogate the Communist Constitution of 1976. Even today, it is difficult to say whether this need could have been realized just as well through the modification and amendment of the 1976 Constitution, following in this manner the Hungarian example, an example which, in my opinion, is a better solution.

If we keep in mind that the political period immediately after the downfall of a regime will bear the epithet "provisional" for some time, and that it is such in fact, I do not think that legal acts (all the more, fundamental acts, such as a Constitution), may be formulated in a perfect fashion in these periods. Such being the case, it would have been better for Albania to have modified and amended the Constitution of 1976, even if the changes had to be very great. If it had happened that way, its repeal and the enactment of a new, modern Constitution would, among other things, constitute a necessary imperative for the pleiade of politicians of today and tomorrow.

In many cases, the Albanian experience has shown and continues to show that the old mechanisms, the old practices and the old mentality of the past become considerable hindrances to the implementation both of clear institutional rules and the principal of the separation of powers. However, the existence of precise rules is still necessary, because it eliminates to a considerable extent the invasion of one power by another.

Chapter 2

The law "On the major constitutional provisions" that was approved on April 29, 1991 by the Albanian Parliament did not regulate fundamental human rights and freedoms, except that one article of its first chapter, "General Provisions," referred the regulation of human rights and freedoms to the provisions of international covenants on human rights.

The Constitutional Commission established in 1992 to draw up a new draft Constitution debated for a long time in connection with the chapter of the draft that dealt with these fundamental human rights. One of the points most debated in the Commission was whether social and economic rights should be included in the draft Constitution or not.[1] While the debate from time to time became extremely heated, the Commission eventually decided that several rights of a social and economic nature would find a place in the draft.

The chapter on human rights prepared by this Commission was presented to Parliament in March 1993. (The reason it was submitted separately from the rest of the Constitution is an interesting one, related to political forces, but not relevant here). The Constitutional Law "On fundamental human rights and freedoms" was adopted by Parliament on March 31, 1993.

The Constitutional Law of March 31, 1993 provides that the fundamental rights are obligatory and to be brought to life by the coercive force of the court. In

[1] See report (photocopied pages attached).

Albania, not every court may apply constitutional provisions directly. Consequently, even fundamental human rights are protected only by applying to the Constitutional Court. When the ordinary courts find themselves faced with questions in which fundamental rights are affected, they refer the question to the competency of the Constitutional Court. The decision of that court is final and binding on all state and public institutions, individuals and others. However, up to now, judicial practice in defense of the fundamental human rights and freedoms has been sparse.

Several complaints have been presented to the Constitutional Court in which the protection of social and economic rights has been sought. These complaints have been aimed at having various legal provisions annulled because they directly violate the social and economic rights guaranteed by Constitutional Law. The Constitutional Court has rejected the complaints as groundless.

Chapter 3

As we have mentioned several times, in 1992 Parliament elected a Constitutional Commission to draw up a draft Constitution. The Commission was made up of deputies, party officials, experts, and even a union representative. The Commission set up a working group, which it charged to meet regularly and prepare the chapters of the draft in the first instance. Basic questions such as the form of government, the creation of a second chamber in the nature of a "senate," the electoral system, the right of ordinary judges to apply Constitutional provisions directly and consequently whether a Constitutional Court would need to be set up, etc., were to be decided first in the Commission, or even by party discussions, and

then the working group would continue its work preparing the draft. Jurists were also included in the composition of the working group.

According to the law "On the major Constitutional provisions," the approval of the Constitution and amendments to it in Albania is done by Parliament, by a qualified majority of two-thirds of all members of Parliament. So far as the parliamentary procedure for approval of constitutional acts is concerned, the 1991 law "On the major Constitutional provisions" did not change the Constitution of 1976.

So far as concerns the referendum procedure, it is not contemplated as the method for approval of the Constitution or any other important legal act. Only in the fall of 1994, after legal changes had been made, did the use of referenda for the approval of legal acts and the Constitution become possible. A referendum on the draft Constitution took place in November of the year 1994, but it was not approved by the people. (The law on referenda had not been approved by a two-thirds majority of Parliament, and several opposition parties immediately complained to the Constitutional Court about it. The Court did not issue a decision before the referendum, however. Several months later it issued one of its many political decisions, upholding the constitutionality of the referendum procedure in this case).

The opinion was expressed above that drawing up a Constitution immediately after a radical social change, as happened in Albania and as has happened in other countries, is not advantageous. One of the reasons for this is the low conceptual level, or knowledge level, on the part of the authorities or their representatives in the commissions or other organs created specifically to draft and approve constitutional

laws. Regardless of their political position, whether members of the party in power or of the opposition, the leadership is generally not distinguished by any understanding, conception or better knowledge of questions of a constitutional nature, such as, for example, political institutions, the way they function, the parts of government (powers) and the manner of regulating relationships between them, and so on. Generally, the members of the Constitutional Commission expressed old ideas and concepts, this being a reflection of their background. Thus, for example, it was difficult to convince members of Parliament in 1991 that judges did not have to be named for fixed periods of time and that, on the contrary, they are often in their position for life.

In addition to the influence of the past, through the persistence of the mentality that it imposed, the additional perceived need to consolidate power by any possible means led to the desire to control the public organs and entities more and more, even including the Commission and the working group. Initially in the post-Communist political life of Albania, when the Democratic Party (DP), now the party in power, was in opposition (1991-1992), emphasis was placed on strengthening the role of Parliament, seen as needed on the one hand to consolidate collectivism and, on the other hand, to combat the mechanism of the past when all power was concentrated and exercised by a sole person. But immediately after the DP came to power and its chairman was elected President of the Republic, the same mechanisms and mentality that had ruled in Albania for 45 straight years, which we spoke about above, began to unfold and operate.

Chapter IV

A defect that characterized the constitutional process in Albania was that all the work of the working group, as well as that of the Commission, was not accompanied by a public debate in which various individuals and organizations took part. The only debate on constitutional problems, which was held more in the press than by means of radio or television, happened in the short period -- less than six weeks -- between the time the draft Constitution was approved by the Commission and the date it was to be put to popular referendum in November 1994.

Because of the complex political situation in the country at that time, the debate was much politicized and the question presented was merely: according to the Socialist Party (the largest opposition party), the draft responded only to the whims and passions of the President of the Republic, because it gave him a very large number of powers, and therefore the people should vote against it. The Socialist Party also supported its stand against the draft on the alleged ground, mentioned above, that the referendum procedure conflicted with what the Constitutional Laws in force required for the approval of a new Constitution. On the other hand, the DP supported the draft, calling it a very great achievement of Albanian political and juridical opinion in close cooperation with international experts.

Even the brief debate that went on in the press demonstrated a confusion and lack of clarity in the concept of the separation of powers, including the separation of powers between the central power and the local organs of power. Although a series of laws had been adopted through which the activity of the local organs of power was regulated, nonetheless the acts of the executive (the central government) once again

occupied an important place in many respects of the activity of these organs. This could be seen, for example, in the rights that were left to the local management bodies in connection with taxes. Their rights in this connection are very limited, and their possibilities of bringing their powers to life are very small. It is quite clear that the experience of the past, when the organs of local power were considered only a step in the administrative pyramid, still wields a powerful influence on state employees in the central government and at the "base" of the pyramid.

The Communist regime in Albania struck a powerful blow against religion, religious institutions and religious belief, so much so that one might say that religious life virtually disappeared. Among the first measures taken in 1990, when liberalization began, was the re-legalization of religion and religious practices, through the opening of religious institutions. But in fact, this was not accompanied by effective, active measures by the state. A relatively long time was required until religious institutions could be established and function again in Albania. And this happened principally with the great financial help of international religious organizations. Nonetheless, it is still too early to speak about a revival of these institutions in the condition they were in many years before. Similarly, we also have to accept the fact that the role of the church or mosque is small in the spiritual life of Albanian society.

Professional organizations and other organizations in Albania were, during the Communist regime, entirely under the control of the state. They were in no condition to carry out independent policies defending the interests of the workers or individuals that they represented. They were even considered means, "levers in the hands of the sole party," the elite of which controlled all the political and social life in the

country. These organizations, especially the professional ones, began to play a bigger role right after the downfall of the Communist regime. It can even be stated that they played a considerable role in removing the Socialist Party from power (that party being considered a continuation of the Party of Labor, the ruling party during the Communist regime), hastening the elections of March 22, 1992, which brought the Democratic Party to power.

At this time, however, their role has paled. There are several reasons for this. Albania has only small enterprises, very small ones. It is difficult for separate individuals, in widely scattered work places and with differing income levels, to meet and to organize or to find a common language. Emigration, and the revenues that come from it, still constitute an important source of income for a considerable number of families. You may add to this also the great pressure that is put on them not to oppose the current government policies.

The same thing can be said for farmers too. Their politics are personal. The spirit of cooperation to join lands or equipment to make possible an increase in production or productivity is still not visible. Competition does not yet exist in agriculture, which would promote its development. The majority of agricultural products continue to be imported from Greece or other countries, at a time when all the possibilities exist for them to produced by Albanian farmers. This is a strong indicator of the lack of interest of the rural population to work in agriculture. Here too, emigration, having an important influence on the life of farm families, has led to a rather large amount of passivity among farmers. A final factor of some importance is the difficulties caused by the failure to solve land ownership questions.

Those organizations that have seen a significant increase are political parties. Unlike the manner of formation of other organizations, political parties, according to the law "On political parties," still continue to be created by order of the Ministry of Justice. If the Minister of Justice refuses the request of a group of individuals to create a political party, then the latter have the right to appeal to the Court of Cassation, whose decision is final. By participating in elections, political parties may participate in Parliamentary life or in that of the government of local areas. Participation in the elections, and the winning of a sizable number of seats, is a premise that is connected with the very financial resources of political parties. Therefore, all parties do whatever is possible to assure that they will enter Parliament (or win other elections); otherwise, their political life is finished.

Without participation in Parliament, the ability of parties to say their piece on the important problems of social and political life is practically nil, as is their ability to obtain the funds necessary to conduct social or political activity. The laws "On political parties" and "On the elections to the People's Assembly" (which is still the official name for what is now commonly called Parliament) contain a series of prohibitions for Albanian political parties to obtain funds from other financial sources than those recognized by law.

Although outside the scope of this discussion, it is this fact of political life that has led to the political crisis in Albania after the May 1996 Parliamentary elections, when the DP took over 90% of the seats in Parliament.

On the other hand, beginning in 1991 a strong political contrast has existed in Albania, which has permitted only the existence of two groupings (or more exactly,

two parties, around each of which other small parties are gathered). The color gray cannot yet seen on the Albanian political horizon. Participation in Parliament is done through an election law of a marked majoritarian character (first past the post). Of 140 seats in the Albanian Parliament, only 25 are filled through the proportional system, while the other 115 are elected from the single-member zones into which the country is divided.

Evaluation

The most difficult institutional question for Albania has been the active and defining role of the President of the Republic in the life of the country, notwithstanding that in Parliamentary republics, such as Albania is today, the role of the head of state is normally a lesser or a symbolic one.

Another question that has begun to occupy a major place on the Albanian juridical and political stage is the relation between the Court of Cassation and the Constitutional Court. Either on its own initiative or at the request of interested parties, the Constitutional Court has recently rendered several decisions in which decisions of the Court of Cassation have been overruled, which casts doubt on the role of the Constitutional Court. The consequence of these decisions has been a rather large degree of confusion, especially so far as the ability of the so-called "permbarimi," or bailiff's office or office in charge of executing decisions, to carry out decisions of the Court of Cassation is concerned.

The drawn-out period for resolving issues of property in land has also created problems and difficulties, in particular with respect to foreign investments. These

issues, in my opinion, are decisive for the rapid development (or lack of same) of the Albanian economy.

No less troubling is the problem of the effectiveness of Albanian administration. There are many reasons that have brought about its glacial slowness and the lack of ability of many administrators. But what is worth mentioning here is that a state administration like this becomes more and more of an obstacle to the rapid development of the market economy and, as a consequence, for the solution of the severe economic and social problems of the country.

K.L.

BULGARIA

Venelin I.Ganev

CHAPTER I

The new Bulgarian Constitution was adopted on July 12, 1991 by a Great National Assembly elected an year earlier with an explicit mandate to create the country's fundamental law. The Constitution established a regime which may be tentatively described as "semi-presidential". Art.1 of the Constitution proclaims that Bulgaria is a "republic with a parliamentary from of government"; at the same time, however, parliament has to share the distinction of "representing the people" with a popularly elected president. The president cannot be dismissed by Parliament (although s/he may be impeached by the Constitutional Court pursuant to a motion filed with the Court by no less than 2/3 of all deputies, Art.103), and parliament can be dismissed by the president only if it fails in three successive attempts to install a government (Art.99). "Policy-making" falls squarely within the domain of parliament and the government: the president does not have the power to appoint ministers, cannot introduce draft legislation, and has a very weak veto (the veto may be overridden by an absolute majority vote in parliament). At the same time, the president does possess some power potential: the authority to make strategic appointments (ambassadors; four of the 12 Constitutional Court Justices; several members of the Board of Directors of the National Bank; high-ranking military officers etc.), guaranteed access to the national electronic media and regular contacts with foreign dignitaries and opinion-makers. How exactly this potential will be realized hinges upon the

behavior of the incumbent president and the strategies employed by political actors manning the other major political institutions. What is undisputable, however, is that fears of possible ascendancy of "an imperial presidency", i.e. uncontrollable expansion of unchecked presidential power, are ungrounded.

Bulgaria also has a Constitutional Court which consists of 12 members (with the president, the National Assembly and the assembly of all judges sitting in the Supreme Court of Cassation and the Supreme Administrative Court each appointing 1/3 of the Justices, Art.147), and has the power to invalidate laws which contradict the Constitution (Art.151 in conjunction with Art.149).

After a brief experiment with a mixed electoral system (deployed during the 1990 elections for a Great National Assembly), Bulgarian political elites have clearly opted for a system of proportional representation, with a 4% threshold and a distribution of seats calculated by a version of "the D'Hondt method".

The relative advantages and pitfalls of a "quick fix solution" to the problem of constitution-making were never really subject to public debates. In the aftermath of the Roundtable Talks (held in early 1990) the idea that a popularly elected Great National Assembly should draft and adopt the country's new Constitution was almost universally accepted. As work on the constitutional text progressed, however, two specific criticisms were raised:

- mutual charges of incompetence. One of the leitmotives in the communist-controlled press was that oppositional parliamentarians are a reactionary bunch seeking to resurrect antiquated pre-war political structures. Conversely, non-communist politicians expressed

the view that a parliament dominated by the ex-communists (the Bulgarian Socialist Party, the heir to the communists, controlled 211 votes in the 400-member Great National Assembly) can only produce a "communist Constitution" (a hotly debated point of contention was the designation of the Bulgarian state as "social" in the proposed Preamble of the new Constitution). In this context the issue was not how fast the Constitution should be adopted, but by whom it is drafted and adopted.

- displacement of preferences That the existing communist constitution is inadequate was unanimously recognized, but the scope and nature of the proffered changes differed. Some commentators argued that the work on the Constitution detracts elites from much more pressing tasks, such as the economic reform. In this context, the argument against the "quick fix" is that it can never be "quick" enough and will necessarily entail extensive deployment of scarce intellectual and organizational resources which may be put to use in other, more promising pursuits.

In my opinion, both objections are irrelevant: for better or worse, Bulgaria does not possess the kind of "smart, educated and democracy-loving" elites envisaged wistfully by both ex-communists and oppositionists, and to lament their absence is a moot point. On the other hand, ample evidence suggests that there is no correlation between parliament's workload and what may be broadly called "the process of reform". The "either/or" frame in which the issues of constitution-making and economic reform are sometimes juxtaposed is misconceived: that Bulgaria has a Constitution but is lagging behind with the restructuring of the economy is due not to the fact that party leaders were "busy" working on the constitutional text, but to numerous other factors, foremost among which is the

behavior of strategically located elites for whom subverting the objectives of "the reform" is the preferable form of self-interested behavior.

On several occasions over the last 5 years campaigns were initiated with a view to amending the Constitution. In 1994, for example, when Prime Minister Berov resigned, none of the three parliamentary factions controlled enough votes to elect a new government, and the danger that the deputies will fail to elect a successor loomed large. President Zhelev promptly announced that if that happens he will follow the Constitution, which mandated the dismissal of parliament, and authorized the president to schedule new elections and appoint a caretaker government. At that point party leaders realized that the Constitution does not contain any provisions regarding parliamentary control during the interim period. In addition to the obvious risks stemming from unbridled executive actions, some deputies were worried by the prospect that for several weeks they will be deprived of their parliamentary immunity and hence exposed to possible investigation in corruption cases. Hasty arrangements were made during the last days of the out-going parliament and a proposed amendment establishing some forms of parliamentary control and declaring that all deputies will retain their immunity was passed on a first reading (constitutional amendments are passed by a 3/4 majority of all deputies on three readings held on three different days, Art.155). Subsequently, however, the project began to unravel, and no further steps were taken prior to the dissolution of parliament.

At various times leaders of the ex-communist party voiced their displeasure with current constitutional arrangements regarding judicial independence and private property. More specifically, they allege that the courts "do not follow the will of the people" and that

constitutional guarantees of private property inhibit salutary governmental action. These complaints were never transformed into concrete initiatives and placed on parliament's agenda.

Finally, during the second half of his presidency President Zhelev repeatedly expressed the view that Bulgaria should become a "presidential republic", i.e. that the constitutionally delineated domain of presidential prerogatives should be expanded. This rhetoric, however, was never "narrowed down" to concrete proposals, and to this very day the concept of "presidential republic", while still floating in the air, remains murky and ambiguous.

As these examples suggest, no alternative constitutional blueprint has emerged in Bulgaria after 5 years of constitutional practice. Complaints are regularly voiced, but on an "ad hoc" basis, i.e. when particular actors fail to realize a concrete project. Overall, it may be asserted that what political elites and the public in general are confronting is the gradual realization that the Constitution contains provisions which lend themselves to conflicting interpretations, ambiguities which need clarification and lacunae which must be "bridged" by conventions forged in the course of institutionalized elite interaction. The idea that "the Constitution" is "not working" does not seem to enjoy much support, and it is close to impossible to rally popular support behind a political platform which accords high priority to the radical re-making of the country's fundamental law.

It is notoriously difficult to gauge with a satisfactory degree of exactness what the causal impact of a Constitution. Those who believe that the Constitution is the reason why a polity developed the way it did are prone to disregard the confluence of other factors.

Those who deny its importance have no easy resort to counterfactual illustrations ("even without the Constitution things would be the same") to sustain their claims (emblematic in this respect is the exchange between Dahl and Vile regarding the historical significance of American constitutionalism).

Therefore the evaluation of the import of the Constitution is a matter of speculation as much as anything else. I think that the best way to approach this issue is to provide succinct answers to several interrelated questions:

I. Did the Constitution ensure the participation of all social and ethnic groups in the political process? The answer to this question in the case of Bulgaria is "yes". Of course, this answer compels me to comment upon the most publicized provision of the new Bulgarian Constitution, namely the Art.11.4, which prohibits the formation of political parties "on ethnic basis". This is clearly a discriminatory measure intended to hurt the Turkish minority living in the country. Immediately upon the adoption of the new Constitution a group of nationalist MPs affiliated with the ex-communist party asked the Constitutional Court to declare the party of ethnic Turks ("Movement for Rights and Freedoms", MRF) unconstitutional. In a hallmark decision, the Court affirmed the constitutionality of MRF. Those who hastily argued that the reasoning of the Court is "tenuous and fragile" were proven wrong: at present at least three Turkish parties as well as a dozen Roma and Macedonian parties are duly registered and allowed to participate in the political process[1].

[1] There seems to be some confusion about the constitutional status of a "the party of the Roma" which allegedly has been denied registration, as reported by the RFE in 1990. This is an

Presidential, parliamentary and local elections are scheduled regularly and held in an orderly fashion; transfer of power is peaceful; conflicts over allegations of electoral fraud are successfully resolved by the courts, and losing parties always abide by the final decision in such cases.

[A good illustration of this argument is the controversy surrounding the 1995 mayoral elections in Kurdzhali, the administrative center of a region populated primarily by ethnic Turks. After the BSP-backed candidate lost to his MRF opponent, he filed a suit alleging electoral fraud, and the district court ruled in his favor. MRF appealed to the Supreme Court, the ruling of the lower court was overturned, the original election results were confirmed. Several days thereafter the ethnic Turk who was elected mayor assumed his office without further complications.]

In short, the Constitution ensured the uninterrupted continuity of the electoral process and the formation of an incipient mechanism for political representation.

II. Did the Constitution establish "the ground rules of the game"? The answer to that question is also "yes", and it has three specific aspects:

a/ limits were imposed on majority tyranny. One of the major objectives of the Constitution is to contain autocratic majorities. In addition to the Turkish case, this is splendidly illustrated by the aborted effort to launch a "lustration" campaign in Bulgaria. After the non-communist opposition won the 1991 parliamentary elections, it passed three

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error: after a consultation with the leading human rights organization - the Helsinki Committee - I was able to determine that no such thing has ever taken place. I wish to thank Ionko Grozev for clarifying this point.

consecutive laws which imposed various restrictions on the rights of former high-ranking communist officials. The first legislative act - the amendments to the "Banks and Credits Law" established a 5-year ban on appointments of a restricted number of former party functionaires (members of the Central Committee of the Bulgarian Communist Party and secret service agents) on the Boards of Directors of Bulgarian banks. The second law, an amendment to the "Pensions Law", declared that the time which high-level officials spent on the payroll of the communist party and its satellite organizations will not count as "employment" for the purposes of the pension law (and hence their pensions, which are calculated on the basis of "years of employment" ought to be substantially reduced). The third law rendered certain members of the communist nomenklatura ineligible for elective positions in the autonomous bodies for self-government of Bulgarian universities and other academic institutions (it should be emphasized that all of them kept their tenure and were allowed to continue their teaching). Immediately upon their passage these laws were protested before the Constitutional Court, and it invalidated the first two (the third was repealed soon thereafter). No legislative efforts to launch policies that smack of de jure discrimination have been undertaken after that.

b/ maintenance of judicial independence. Arguably the greatest success of post-1989 Bulgarian democracy is the construction and maintenance of an independent judicial system, and this would have been inconceivable without the new Constitution and the guarantees it provides.

There have been several efforts to subdue the judiciary. For example, in 1993-4,

when BSP re-gained its dominant position in parliament, it made it clear the "cleansing" the judicial branch stood at the top of its priorities. The "Law on Judicial Power", passed in 1994, marked the climax of this effort and brought to fruition the ex-communists' endeavor to settle accounts with their perceived opponents on the bench. The major objective of the law was to introduce retroactively new eligibility requirements for the country's top judges (needless to say, these requirements were crafted in such a way as to eliminate all judges appointed after 1989) and to dismiss immediately all those who do not qualify. The Constitutional Court declared all provisions establishing the retroactive force of the new law unconstitutional, and struck down a text allowing parliament to dismiss judges "if their behavior undermines the prestige of judicial power". Thus the campaign of the ex-communists came to a naught and the integrity of the judicial system was maintained.

c/ avoiding institutional chaos. Although the expression "war between the institutions" is currently in vogue in Bulgaria and figures prominently in the parlance of politicians who try to rationalize their failures, it is misleading. What we in fact witness is representatives of various institutions arguing about what is to be done and criticizing their respective policies; disputes over jurisdiction, incompatible "expansionist" institutional strategies or ambiguous "usurpations" of authority are actually very rare.

Those who wish to benefit from institutional chaos may avail themselves of various strategies - setting "precedents" which are violative of explicit legal rules; enacting rules which encroach upon prerogatives of other branches of power, etc. - but so far the

independent judiciary has been able to forestall the most egregious attempts to "tip the institutional balance". For example, the Court voided a new provision in parliament's Standing Orders which declared that all prospective ambassadors must be subject to a "parliamentary hearing"; the Court ruled that the Constitution grants to the president full authority over this matter and parliament cannot "force" him to "share" this authority.

III. Did the Constitution create a framework within which issues are articulated and resolved?

Generally speaking, yes. It seems that with the adoption of the Constitution the group goals of elite fractions were re-ordered: the maintenance of the constitutional system is apparently valued more than the short-term benefits that may be reaped when the path of destructive non-compliance is adamantly pursued. In addition, perceptions of the saliency of judicial arguments have shifted in the post-1991 period. Somewhat surprisingly, all contentious issues were framed - and ultimately resolved - as legal-constitutional problems to be settled by the Court. Arguments derived from "the Constitution" gradually suffused the rhetoric if not the thinking of opinion makers. The catchwords of the pre-constitutional era - "the will of the people", "true justice", "national integrity", "giving to the oppressors what they deserve" - rather rapidly fell into disuse.

Apparently, the adoption of the Constitution was one of the factors which triggered a process of political learning, i.e. shifts of behavioral patterns as a result of encounter with crisis situations. At present, elites are increasingly reluctant to refer to the Constitution as

an "obstacle" which impedes their efforts; rather, they reproach each other for their failure to find the right solution to nagging social problems within the context of the existing Constitution. Thus the Constitution created a new political discourse which structures the expectations of the public and molds elite behavior.

IV. Is there a functioning, respected constitutionally established procedure for problem solving? The answer to that question must be obvious by now: yes - this procedure is judicial review. Somewhat surprisingly, over the last years the Constitutional Court has asserted itself as a major player on the political scene, and constitutional adjudication is accepted as the solely legitimate problem-solving mechanism. Respected or despised, as the case might be, the Court has assumed the role of final arbiter on all issues pertaining to the Constitution.

The most recent case of judicial intervention in Bulgarian politics is arguably the most striking one. When Georgi Pirinski was nominated as a presidential candidate of the most powerful party in Bulgaria, BSP (the party which controls parliament, the Council of Ministers and almost all municipal councils), the opposition asked the Constitutional Court whether he meets one of the constitutional eligibility requirements, which provides that the president must of Bulgarian citizen "by birth". Pirinski was born in 1948 in New York, and hence became an American citizen; in 1952 his parents came back to Bulgaria, and he was granted Bulgarian citizenship. Declining to address the Pirinski case directly, the Court ruled that whether or not a person has acquired citizenship "by birth" or "by naturalization" is to be determined in accordance with the law in effect at the time when

that individual was born. According to the 1948 Bulgarian citizenship law, children of Bulgarian parents born abroad did not obtain Bulgarian citizenship it they became automatically citizens of the country where they were born (of course, the 1948 law was framed by the communists so as to deprive the offspring of Bulgarian political emigres from Bulgarian citizenship). On the basis of this interpretation of the Constitution and the 1948 law, the Supreme Court determined that Pirinski acquired his citizenship "by naturalization" and refused to register him, whereupon Pirinski withdrew from the race.

V. Does the Constitution serve as a fundament upon which the edifice of efficient government is to be built? The answer is a resounding "no". In fact, Bulgaria was recently dubbed by The New York Times "the worse managed state in Europe". Herein lies the most interesting paradox of the Bulgarian "transition": constitutionalism is functioning, and yet the state is disintegrating society is afflicted by an excruciating crisis. Of course, this paradox may be easily obfuscated, either by denying the saliency of Bulgarian constitutionalism - for example, by labeling it "sham", "backward" or "immature" - or by gainsaying the disastrous proportions of the crisis ("things cannot be that bad if the Constitution is really working"). And yet the truth is that in Bulgaria both the rise of constitutionalism and a protracted socio-economic crisis developed simultaneously. This problem must be interpreted as an invitation to probe deeper into the meaning of all questions signposted above: under what conditions will a fair and democratic electoral process result in good policy-making? When will a political "game" which is "played by the rules" yield positive-sum results? Does containment of conflict necessarily stimulate

effective and legitimate governing? The answer to all these questions is no, not necessarily.

The evidence, then, suggests that the Constitution has had a beneficial impact upon the fledgling Bulgarian democracy; but it also forces us to insist that the major question is not what are the limits of this constitution, but rather what are the limits of constitutionalism as a project. Moreover, by "limits" I do not mean "limits in general", but "limits" in the specific socio-economic and political conditions which transpired after 1989 in eastern Europe. The full picture of post-communist constitutionalism will only begin to emerge if we confront squarely questions such as: What kind of pressure would induce elites to seek cooperation? What interests must be mobilized in order to stem successfully the sweeping tide of corruption? What mechanisms must function alongside the Constitution if incentives for effective policy-making are to emerge? In other words, while it is undeniably true that the Constitution provides an incentive structure, it also appears that this incentive structure is superimposed on a web of other incentives shaping elite behavior. Foremost among these is the opportunity of strategically located elites to loot state property with virtual impunity.

CHAPTER 2

The framers of the Bulgarian Constitution were very generous when devising the "rights" chapter; as a result, Bulgarian citizens are "blessed" with an array of rights which

most other nations may only dream about. In addition to all "classical" political rights Bulgarian citizens are entitled to: state assistance in the upbringing of their children (Art.47.1), the right to work (Art.48.1), healthy and non-hazardous working conditions, guaranteed minimal pay, rest and leave of absence (Art.48.5), right to strike (Art.50), social security and welfare aid (Art.51.1), unemployment benefits (Art.51.2), free medical care (Art.52), education (Art.53), the right to avail themselves to national and universal cultural values and develop their own culture in accordance with their ethnic self-identification (Art.54), right to a healthy and favorable environment (Art.55).

There were no "debates" in the sense of offering conflicting views on complex issues: at times the drafting of the chapter resembled a race in which all parliamentary groups were vying to come up with an ever more "complete" list of rights and to convince the electorate that they are genuinely animated by a thoroughgoing concern with the welfare of society. The only contentious word was the term "social" in the Preamble of the Constitution (where Bulgaria is defined as "a democratic, law-governed and social state"). Those who favored the term argued that "the social component" is indispensable if Bulgaria is to style itself as a modern "democracy"; those who opposed it maintained that it would only serve as a pretext for continuing interference on the part of an intrusive state in the workings of an autonomous civil society. Ultimately, the text was included in the Constitution, but its impact is hard to gauge. It was invoked in the process of constitutional adjudication (more on this below), but on the whole it is hard to find any evidence that it has actually shaped social and economic policies.

There is absolutely no evidence that "rights" and their attendant costs were actually

taken into account in the budgetary process. In fact, when the 1996 budget was updated, the average increase of government spending was 1.42, but spending in the "social sphere" went up by only 1.19, i.e. less than other expenses and less than the projected annual rate of inflation.

Social rights were invoked on several occasions in the process of constitutional adjudication:

A. During the lustration campaign. The Court annulled two lustration laws, arguing that they violate rights guaranteed by the Constitution. When a law was passed barring former communist officials from occupying key positions in the banking system, the Court struck it down, declaring that such measures violate the principle of equality and constitutionally established "freedom to choose one's occupation and place of work" (Art.48.3). The new pensions law, which sought to reduce the pensions of former apparatchicks shared a similar fate: it was invalidated as a "discriminatory measure" encroaching upon "the right to social security and welfare aid" (Art.51.1).

It bears emphasizing that the third lustration law - which rendered members of the academic nomeklatura ineligible for positions in the administrative bodies of self-government in Bulgarian universities - was not declared unconstitutional, arguably because the plaintiffs could not refer to a constitutional "right" to occupy administrative positions within academia. Another important point to grasp is that the Court discussed these rights along with other basic constitutional principles - equality, prohibition on discrimination, retroactivity - and declared the law unconstitutional referring to an accumulation of several violations.

B. During debates on one of the Restitution Laws. When the ex-communists re-gained their majority in parliament in 1993, they added a new text to the Agricultural Land Law, which provided that agricultural land will not be subject to restitution to the former owners if a "superficies" has been granted by the local municipality to third parties, even if construction work has not yet begun. (the strategic intent behind this amendment is quite simple: the "superficies" rights were bestowed by communist-controlled local councils upon various ex-communists functionaries, who were planning to build their "dachas" on the land). The Court invalidated this provision, arguing that it imposes severe restrictions in the right to property (Art.17). In their dissent, two of the Justices pointed out that the law should be upheld if the restrictions are analyzed against the backdrop of a comprehensive understanding of the essence of "the social state". In other words, the legislator, when confronted by a situation in which the two interests clash (the right of the former owner vs the right of the person entitled to build and own the house), may legitimately choose in favor of those who are deemed to be "socially weaker". Hence the significance of "social rights" emerges not so much in the sphere of state policy where benefits are disbursed, but if and when the state "takes sides" in a situation where the rights of private individuals are in conflict.

C. In a case involving the amendments to the Environmental Law. The new text provided that in "exceptional cases" the government may proceed with public construction works in the absence of an "expert evaluation of the environmental impact" which is usually

requisite in such cases. Plaintiffs argued that this provision, granting discretion to executive officials, imperils their right to healthy environment (Art.55).

The Court correctly pointed out that what is at stake in this case is the presumption about the constitutionality of the Government's actions. If the presumption is that the Government will abuse its prerogatives thereby endangering constitutional rights, then granting "exemptions" from legislative constraints on executive action will be unacceptable. If, conversely, the presupposition is that the Government will only act to avert greater dangers, then carving out room for "exceptions" is warranted. The Court upheld the latter view and let the law stand.

These developments illuminate three types of problems with constitutional social rights in Bulgaria:

1. institutional. Even though Art.5.2 declares that "the provisions of the Constitution shall apply directly", Bulgarian citizens are not allowed to initiate the procedure of judicial review (this prerogative belongs to 1/5 of the deputies, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court and the Chief Prosecutor, Art.150). This means that the Court is prevented from developing a body of jurisprudence addressing specifically the problem of "socio-economic rights". Theoretically this process may be sustained by the Chief Prosecutor, who may assume the functions of an Ombudsman, but at present he is under no pressure to do so.

2.jurisprudential. The practice of the Bulgarian Court has shown that the specific domain of socio-economic rights is hard to delineate and remains elusive for a very particular reason: often the actions/inactions which violate specific rights also contravene general

constitutional principles, and as a rule judges prefer to invoke precisely these principles when deciding constitutional cases. For example, denial of the right to work may also constitute a breach of the principle of equality; tampering with pension rights may amount to trespassing the ban on retroactive imposition of duties etc. This raises the question whether all these rights have a "content" which is not reducible and/or completely overlapping with the essence of the basic constitutional principles. So far, this "content" has remained underdefined jurisprudentially.

Part of the problem is that the plaintiffs in such cases are politicians who are more prone to resort to sweeping claims when framing their petitions. An allegation that "the majority in parliament" undermines "equality" carries more weight than the claim that "the right to work" has been neglected. This strategy dovetails nicely with the Justices' desire to stay "on stable ground" when declaring legislation unconstitutional: their instincts tell them to search for "universally accepted principles" and not subtle nuances. Therefore this dimension of constitutional adjudication remains stunted, and what is particularly murky is how potential conflicts between rights of private individuals will be handled.

3. political. The Environmental Law case illuminates an interesting problem: what criteria should the Court rely upon when evaluating legislation purporting to "specify" general constitutional norms? Are parliamentary majorities which "concretize" the content of rights carrying out a legitimate political mandate or encroaching upon rights which already have a specifiable content? Notwithstanding the fact that these rights are constitutional in form, they have to be filled with political substance. And it seems hard indeed to draw the line

between majority preferences legitimately articulated through political institutions and unlawful trespassing of constitutional limits.

At present, political elites in Bulgaria do not use the language of "socio-economic rights". Devastated by a triple-digit inflation, dramatic deterioration of the standard of living, collapse of the banking system, crime, skyrocketing prices of heat, bread and electricity, Bulgarians have long since turned their eyes away from Chapter 2 of their Constitution. Arguably, only if certain conditions are at hand may a "socio-economic rights" discourse begin to take shape. First, at least some measure of economic prosperity is indispensable: if the population spends more than 80% of its income on food and utilities, the issue of what is "granted" by the Constitution and what "rights" are violated will recede in public consciousness. Public perceptions that "rights claims" can be meaningfully pursued will vanish rapidly. And second, state institutions must maintain some measure of viability. From whom would citizens "demand" their rights if the state has reached a terminable stage of decay? Rampant cynicism about the way in which rapacious elites "administer" public affairs is not conducive to the ascendancy of rights-focused political language.

In sum, at this point in Bulgaria socio-economic rights seem to be doubly irrelevant. They do not impose a burden on politicians, who easily disregard them when designing and financing policies. And they are not a potent source of "special frustration" pulsating independently of the overall disillusionment with the stark neo-socialist reality. Hardly anyone asserts that the crisis is "constitutional"; it is universally recognized that society has fallen pray to "normal politics" gone awfully wrong.

CHAPTER 3

As already mentioned above, Bulgaria's new basic law was adopted on July 12, 1991 by a Great National Assembly, a special representative body vested with the power to create and adopt a Constitution. Consensus on the necessity of summoning such an Assembly was reached at the Round Table Talks, where virtually no objections against this idea were raised. The Bulgarian Socialist Party, heir to the communist party, won an absolute majority of the seats in the Assembly (211 out of 400); the rest of the mandates were distributed among the Union of the Democratic Forces (UDF), the Bulgarian Agrarian National Union (BANU), the party of ethnic Turks in Bulgaria, the Movement for Rights and Freedoms (MRF) and several independents.

At the time of the elections BSP was still pretty much in the grip of the former apparatchicks, but they were gradually being pushed aside by a new generation of party leaders. By the end of 1991 only two of the members of "the old guard" remained at the helm of the party - A.Lukanov, the Prime Minister, and A.Lilov, Chairman of the party. The opposition, in turn, resembled a rather unruly coalition which found it increasingly difficult to engage in coherent policy-making and to design strategic plans for counteracting BSP's maneuvering. Revered politicians who were active in the 1940s figured prominently in opposition politics, but they had to compete with newly emerging "leaders" for the coveted mandate to represent the non-communist opposition. For obvious and understandable reasons MRF behaved as a one-issue party, whereas BANU simply failed to establish a distinctive political presence.

The most important functional feature of the Great National Assembly was that it was empowered to pass ordinary legislation while hammering out the final text of the Constitution. As time progressed and the country began to slide into the depths of economic and social depression, this affected the legitimacy of the constitution-making process: the public proved to be susceptible to the view that if a group of politicians are incapable of solving the problems of "normal politics",there is no reason to expect that they will fare better when confronted with the conundrums of "constitutional politics". In the short run this functional duality - constitution-making paralleled by ordinary legislative activities - turned out to be as big a threat to the legitimacy of the new constitution as for example the fact that it was adopted by an assembly dominated by ex-communists.

Moreover, this situation engendered an incentive to procrastinate among those who found themselves "in control". The sluggish work of the Constitutional Committee provoked a group of 39 MPs from the opposition to boycott parliament and launch a hunger strike, demanding that an explicit deadline for the adoption of the constitution be set. This rebellious act, in turn, exacerbated tensions within the UDF, which soon thereafter split in three separate factions. The most radical faction remained implacably hostile to the new Constitution and refused to sign it, whereas the two moderate factions continued their work along with the ex-communists and successfully brought it in fruition in July 1991.

The Constitution was not endorsed by a popular vote, although interesting stories unfolded regarding its ratification. First a referendum was scheduled in order to forestall the allegations of monarchists that any constitution which does not heed popular opinion on the issue of monarchy will be illegitimate. Then, for reasons which remain obscure to

this day, the referendum was called off. When the Constitution was finally adopted with he requisite 2/3 majority, the President refused to sign it. It was promulgated and subsequently published in State Gazette with the signature of the Chairman of the Great National Assembly (in 1993 Zhelev signed the Constitution "retroactively").

It is to be noted that it was precisely the radical faction of the UDF that won the plurality of the votes in the next elections, a result which may be interpreted as a popular vote against the new Constitution. An alternative explanation would be that the ex-communists and their partners were voted out of power because of the way the governed the country, and not as a punishment for adopting an unpopular Constitution. Abrogating the Constitution did not figure in the electoral platform of the UDF, and the fact remains that the entire campaign against the basic law abated rather quickly.

With the benefit of hindsight we may assert that in the long run the incompetence of framers tends to recede in public memory, to be supplanted by a mixture of indifference and tacit acceptance of existing constitutional arrangements.

The new Constitution departs dramatically from the 1971 communist constitution. The State Council, a collective executive body which was headed by long-surviving dictator Todor Zhivkov and governed the country by means of decrees ("ukazi"), was abolished and substituted by a relatively weak presidency. The president does not have a say in the national policy-making process - s/he cannot issue decrees and cannot introduce draft legislation.

The new Constitution also sought to re-affirm the independent status of the judiciary as a separate branch. For the first time in Bulgarian history a Constitutional Court wielding

the power of judicial review was established, and constitutional texts promoting judicial independence were adopted (irremovability of judges, Art.129.1; self-government of the judiciary on questions pertaining to appointments, promotions and dismissals, Art.129.2; financial autonomy of the judiciary, Art.117.3). Subsequent developments showed that all these measures are assiduously enforced by the highest courts in the country (for example, in 1994-1995 the Constitutional Court thwarted the efforts of parliament to dismiss "unruly" non-communist judges and the attempt of the government to slash the budget of the judiciary). The rise of independent judicial power is by far the most interesting aspect of contemporary Bulgarian constitutionalism; it also bears testimony to the beneficial impact of the new constitution.

The office of the vice-president seems to be the only one which somehow survived the constitution-making process because its existence constrained the choices of the framers. This office was established in April 1990, i.e. when the old constitution was amended by the last all-communist parliament in the aftermath of the Round Table Talks agreements. Its strategic potential became visible in July 1990, when BSP-backed president Petar Mladenov resigned, the leader of the opposition, Zhelyu Zhelev, was elected president and in a gesture of good will (or in accordance with the terms of an undisclosed deal) he picked up as his vice-president Atanas Semerdzhiev, a respected general, member of the moderate faction in the BSP. In 1992 Zhelev run - and was re-elected - on the same ticket with the famous Bulgarian dissident poet Blaga Dimitrova. A year later Dimitrova resigned from her office over disagreements with Zhelev's political quarrels with his erstwhile partners in the UDF, and the vice-presidency remained vacant

for the rest of Zhelev's mandate. At present Bulgaria is the only east-European country with a vice-president, and it is plausible to assume that this institution was not abolished by the new Constitution simply because it was already "there".

The single most pervasive theme which transpired in parliamentary debates on the meaning of past experiences was the abuse of political power. Discussions on the question of emergency powers provide a splendid illustration of the apprehensions and concerns of Bulgarian framers. Since the very beginning a consensus emerged that the President should not be authorized to declare a state of emergency at his/her discretion. One deputy eloquently argued that although the president should be recognized as a "commander-in-chief", his powers to use the armed forces should be restrained and parliament should maintain at least some measure of control over issues pertaining to national security "in order to assuage the concerns of the public that dictatorial ambitions might take over". In a similar vein, another deputy stated that "we hardly need to convince each other that abuses of power are more likely to be perpetrated by an individual vested with exorbitant power than by a collective body, such as Parliament". The proposal that the prerogative to declare a state of emergency should be vested in parliament, however, drew similar criticisms. Even though such suggestions were voiced and apparently propelled a discussion within parliamentary factions, they failed to garner enough support and were shelved with the following argument: "There are two ways of ensuring stability [under complex and critical conditions]. One is to grant even greater power to one state organ or another. The other is to work towards reaching a political consensus". Therefore the deputies adopted on a second reading a text providing that a state of emergency will be

declared by parliament pursuant to a request filed by the president (i.e. none of the principal actors was allowed to act at their own discretion). During the final third reading a new player was added to the scheme - the Council of Ministers was also authorized to file with parliament requests demanding a declaration of a state of emergency - but the game remained the same: neither the highest-ranking executive officials nor parliamentary majorities may declare a state of emergency without consulting each other. Hence the frightening memories of the past, which perhaps blended with trepidations about opponents' moves in the future, motivated the "fathers" of Bulgarian constitutionalism to endorse the principle of collegiality with a view to preventing the rise of arbitrary power.

It would be presumptuous to assert that Bulgarian society was split into factions which displayed clearly defined ideological characteristics. Emphasizing the communist - anti-communist division remains, I think, the most adequate if analytically impoverished way to describe ideological tensions in Bulgaria during that period. Rather than descending from basic ideological propositions to concrete problems, political actors encountered contentious issues which forced them to develop ideological arguments in order to confront their opponents. A good example would be the ethnic problem ("pluralists" vs "nationalists"), education and private property ("etatists" vs "liberals"), foreign policy ("pro-Russians" vs "Westerners"). As a result, the fabric of the Constitution reflects the strategic compromise of pragmatic, and arguably myopic, party leaders, and not the ideological commitments of passionate factions.

CHAPTER 4

The Bulgarian multi-party system came into existence in 1989-1990, when a number of "old" parties were restored (The Bulgarian Social-Democratic Party, the Radical-Democratic Party, the Democratic Party, the Bulgarian Agrarian National Union "Nikola Petkov" etc.) and great many new parties were born (the Green Party, Ecoglasnost Ecological Movement etc.). Foremost among these new players are the Bulgarian Socialist Party (an ideological and institutional heir to the communist party), the Union of the Democratic Forces (a coalition which is composed of almost 20 non-communist parties) and the Movement for Rights and Freedoms, the political party of Bulgarian Muslims. At present, the Bulgarian Business Block and a coalition consisting of the Democratic Party and the Bulgarian Agrarian National Union also hold seats in Parliament. Parliamentary elections in Bulgaria are held under a proportional system with a 4% threshold, and the number of "lost" votes varies from 10 to 25%. As a rule smaller parties which fail to pass the muster seek to form a coalition with one of the stringer parties, which inevitably entails the obliteration of their political physiognomy. Those who are adamant in maintaining their autonomy usually hibernate between electoral campaigns, supported exclusively by the charismatic energy of their leaders (typical example would be the Bulgarian Social-Democratic Party, which is very weak, but is led by a respected and popular man, Petar Dertliev, and therefore still figures in the electoral calculations of the larger parties).

Overall, the impact of non-parliamentary opposition on national political agenda is null: these parties rarely come up with comprehensive proposals and are unable to generate captivating ideas; in addition, their access to the media and the press is limited. It seems though, that this situation is not a source of special disappointment among the public: although the "loss" of votes cast for parties which did not qualify is lamented, the dominant "mode" of complaining is not "why are some worthy politicians excluded from parliament", but "why are those who are in parliament so corrupt and ineffective". The dismal failures of a succession of Bulgarian governments is attributed to the behavior of political elites and not to the electoral system, and the idea that only if "good" elites are brought in everything will be fixed, does not seem to breed excitement among the Bulgarian public.

I would like to sound a cautionary note: if we want to find credible answers to questions such as who are the important actors on the Bulgarian political scene and what is it that they are doing, it would be unwarranted to narrow down our research exclusively to the study of political parties. The principal factor in Bulgarian politics are various networks which are composed by party leaders and representatives of the financial, industrial and arms-export nomenklatura; their purpose is not to design policies, but to loot state property. Therefore each political decision and every policy outcome must be analyzed in the light of an elusive and yet ubiquitous "mafia coefficient": policies reflect demands of mafias as much as they embody party preferences, ideology and values. The relative ease with which state property may be stolen or otherwise syphoned into private pockets is the single most important fact to be heeded in the study of Bulgarian politics.

The fate of various communist organizations in the post-communist period is interesting and contradictory; it cannot be encapsulated into a neat, one-dimensional formula. The dynamic of their transformation was shaped primarily by the clash of two conflicting tendencies - the strategic effort of the communist party to preserve its dominant role, and the sustained effort of the non-communist opposition to "undo" the symbiosis between party and state.

The first important concession which the opposition obtained after prolonged negotiations at the Round Table Talks (which took place in early 1990) was the disbandment of all party cells in state-run businesses and state institutions. This political retreat, however, did not imperil the party's prospects: it renamed itself (from Bulgarian Communist Party to Bulgarian Socialist Party, or BSP) and remained by far the largest and wealthiest political organization in the country.

In a radical effort to sap the party's financial strength the opposition passed in 1992 a law confiscating party property along with the assets of its satellite organizations (the law was protested before and upheld by the Constitutional Court). Predictably, this law did not have the desired effect: today BSP's financial resources easily dwarf the financial potential of all other parties combined. There have not been serious efforts to outlaw the former communist party.

The party's satellite organizations followed three different paths:

- some of them survived intact. For example, the Bulgarian Writers' Union and the Bulgarian Anti-Fascist Union remain harbingers of neo-Stalinist radicalism and remain loyal purveyors of the party line.

- some of them disappeared or left the party's orbit. For example, the communist trade-unions were transformed into "independent" confederation of unions, and even though they tend to lean more towards BSP than any of the other parties, their leadership displays a degree of autonomy. Recently these unions spearheaded the strike movement against the socialist government of Prime Minister Zhan Videnov. Gone are also the mass organizations in which all students from primary, secondary and high schools used to be recruited.

- the third group consists of organizations which continue to be at the service of the party but under a new guise. Foremost among these are the new "agrarian cooperations". In 1992 the old cooperatives were disbanded by law; after the ex-communists regained their parliamentary majority in 1993, however, they launched a series of amendments to the law, as a result of which "new" cooperatives proliferated; as a rule, they are headed by the directors of the "old" cooperatives or other trustworthy members of the local nomenklatura. It is impossible to gauge to what extent the mushrooming of these organizations is spurred by the genuine desire of villagers to work in cooperatives, and to what extent they are blackmailed and victimized by powerful local party potentates. But it is clear that these new "institutions" are not viable economically: they are simply incapable of producing any marketable goods and are primarily used as a facade behind which various financial dealings involving state subsidies and bank loans are "struck" at an alarming pace.

Religious institutions in Bulgaria remain weak and bereft of influence, and that contention applies with equal force to the dominant Christian church (the East-Orthodox

Church) and Muslim and Jewish organizations. Some surveys have depicted an increased interest of the citizenry in religious matters, but so far that tendency has not been matched by an aggressive politicking on the part of church officials. Religions institutions in Bulgaria have traditionally been and are likely to remain in "splendid" political isolation.

During the constitutional debates in Bulgaria scarce attention was paid to the problems of local government, so much so that it would be presumptuous to talk about "clashing arguments" derived from competing visions. The Constitution provides that the country will be divided into municipalities and regions (Art.135). In municipalities mayors and local councilors shall be elected by the citizens (Art.136); the governors of the regions shall be appointed by the Council of Ministers (Art.143). The financial system in the state remains highly centralized: although local officials are authorized to collect all taxes, they are obliged to pass on the entire revenue to the central government, and then apply for subsidies. In Bulgaria taxes may be imposed only by law, which makes it illegal for municipalities to resort to this form of raising revenue. However, local authorities still have at least one important source of income: they are empowered to privatize municipal property. Despite the inevitable tensions with the central government over the intractable question who really owns what, privatization has allowed local councils to boost their budgets.

Four aspects of "local politics" after 1989 seem to be of some importance:

1. it remains unclear how the principle of local self-government will be squared with the concept that "the governors" must implement the policies of the central government.

This tension was brought into sharp relief when the ex-communists declared Sofia "a region" and appointed a "governor" whose sole function was to sabotage the policies of the popularly elected non-communist mayor of the city. When the Constitutional Court ruled on the legality of this measure, it determined that the new arrangement should stand because the government has a legitimate interest "to ensure the harmony of national and local interests" (Art.142 of the Constitution). Obviously, political conventions regulating this inherently volatile sphere are yet to be hammered out in Bulgarian political practices.

2. Governments are likely to unleash "budgetary vengeance" on districts perceived as "alien territory". Sofians, for example, are exposed to constant harassment from government officials who refuse to procure the resources to which the city is entitled (at one point Prime Minister Videnov called the capital city "blue ghetto", referring to the party color of the UDF, the major opposition party), but provincial cities are sometimes afflicted by similar blows (Pazardzhik, Sliven). Whether or not such "punishments" are conducive to maximization of political benefits for the ruling party remains to be seen; but it can scarcely be denied that on financial matters "the locals" depend on "the center" and not vice versa.

3. Regional governors are transformed into purveyors of partisan politics. Almost all governors appointed by the first non-communist government in 1992 were dismissed in 1993. Middle-level bureaucracy, to the extent that it functions, operates under the supervision of politicians whose loyalty to the dominant party clique is their only political asset.

4. There are some signs that "local interest" is becoming a basis on which

politicians belonging to rival parties are willing to seek cooperation in the pursuit of favors from the government. For example, when the government announced in 1996 that it will slash subsidies for all cities, local BSP MPs - along with all other MPs from the respective region - signed petitions protesting the measures of their own government and started "lobbying" within the party on behalf of their constituents (Burgas). How such practices will evolve in the future remains to be seen; at present a local MP is much more likely to invest in his/her relations with the party leaders than in creating a "local basis".

Even before 1989 the "civil society idea" dominated the growing dissident literature; after 1989 the concept of civil society as a sphere which goes "beyond" the institutions of the state became one of the rhetorical monuments around which the political discourse of the fledgling democracy began to gel. Various aspects of this concept were debated in lengthy articles ("the role of intellectuals", "the function of independent organizations", "the significance of private property", "separating the private from the public", "creating a new political culture") and filtered through the rhetoric of political actors. Gradually, however, this beautiful dream began to fade, its exotic charm soon drowned beneath the waves of desperation. Bulgaria's experience shows that "civil society" may manifest itself in rather perverse forms: "freedom of contract killing", "private mafias", "autonomous crime networks", "independent schemes for ripping off gullible citizens", "grass-root extortion gangs". In addition, the country was devastated by two acute economic crises - both developed as a result of the incompetent and corrupt policies of two socialist governments, A.Lukanov's in 1990 and Zh.Videnov's in 1996 - which wrought havoc on the

organizational infrastructure of society and extinguished almost completely the willingness of citizens "to get involved".

A glimmer of hope still remains, and several loci of "benevolent" societal self-organization persevere: a couple of civil-rights organizations continue to monitor the activities of state officials in prisons and places of preliminary detention, business organizations managed to stop several unconstitutional acts of the government, the persistent effort of the ex-communists to "cleanse" the national electronic media precipitated the emergence of professional organizations of journalists who alerted the public to the censorial attitude of reckless politicians. However, these encouraging developments cannot hide the fact that the only realistic "forms of political existence" available to the great majority of Bulgarian citizens are atomistic withdrawal into the small, hopelessness-stricken world of the immediate family and friends, and engagement in the national political process, primarily through voting in national, local and presidential elections. At present, anything that lies "beyond" that remains shrouded in impenetrable mists.

It would be erroneous to attribute this development to the proverbial "Balkan backwardness" of Bulgarian "culture". Rather, the problem is quite new: Bulgaria presents us with the lamentable spectacle of a fairly well developed modern welfare state which has collapsed. Hegel's remarkable intuition proved to be remarkably precise: without a state "civil society", both as a normative ideal and social practice, is simply impossible. What Bulgarians have to put up with today are not the syndromes of "Balkanism" - they have to endure the symptoms of a radically weakened modern state.

Estonia

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Estonia's adoption of a new constitution in June 1992 was one of the fastest institutional transformations to take place in post-communist Eastern Europe.[1] However, the transition itself did not come easy. It began almost fortuitously with a "miracle compromise" in August 1991 to convene a Constitutional Assembly. It was delayed thereafter for several months as debate roared over such things as direct presidential elections and limiting political rights for former communist officials. And it ended with one group of Estonian politicians still adamantly calling instead for the resurrection of a semi-presidential and fairly authoritarian constitution from 1938.

Indeed, Estonia's final consolidation as a parliamentary democracy by early 1997 owed much to what Jon Elster has called "institutional interest" among members of Estonia's Constitutional Assembly.[2] The Assembly, when it was agreed upon, represented a equal mixture of members from the Estonian Supreme Council and its quasi-rival the Congress of Estonia. This meant that the predominant trend in the Assembly was parliamentary. At the same time, however, there was clearly an element of what Elster terms "passion", since Estonian nationalist sentiment also precipitated the adoption of exclusionary citizenship laws, which would shut out most of the country's Russian-speaking population from participation in national politics for the foreseeable future. This

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[1] For a comparative list of countries and the time it took for each to adopt new institutional arrangements, see Joel Hellman, "Constitutions and Economic Reform in the Post-Communist Transitions", *East European Constitutional Review*, vol. 5, no. 1 (Winter 1996), p. 56.

[2] Jon Elster, "The Role of Institutional Interest in East European Constitution-Making", *East European Constitutional Review*, vol. 5, no. 1 (Winter 1996), pp. 63-65.

factor would also affect constitution-making. Finally, a degree of "reason" also presided, in that conscious checks on parliamentary power were built into the system along with a sound array of civil liberties and duties. Thus, on the one hand, the new parliamentary constitutional system soon proved itself to be remarkably functional and (it would appear) consolidated; on the other hand, the marginalization of some 350,000 mostly-Russian non-citizens in the country will continue to pose a challenge to national integration and broader democratic participation for some time to come.

This chapter will begin by outlining Estonia's 10-month road to a new constitution and political system in 1991-1992. It will then offer an assessment of the new institutions at work since 1992. It will argue most importantly that although the entire constitutional process seemed shaky at times, it is clear in hindsight how beneficial the endeavor has been for democratic consolidation.

Independence and Creation of the Constitutional Assembly

On the eve of the August 19, 1991 attempted coup d'état in Moscow, Estonia was severely divided politically, and seemingly nowhere near ready to undertake the kind of solemn and consensus-obliging task that would be constitution-making. Ever since Estonia had begun actively pushing for independence in 1989, two fundamentally different conceptions of that independence had been competing against each other, splitting the country's political society down the middle. The Estonian Popular Front, which since 1988 had been Estonia's leading political organization, favored a more flexible approach to independence, one that would work within existing institutions and would be oriented toward making a fresh start politically once independence was achieved. To this end, the Front actively took part in elections for the Soviet Congress of People's Deputies in March 1989 as well as in local elections in Estonia later that year. Next, the Front set its sights on capturing the republic's parliament, or Supreme Council, where it won a plurality of seats in March 1990. This victory set the stage for the March 30 adoption of the country's

moderately-toned declaration of a transition period toward independence. The statement, which differed from Lithuania's all-out proclamation of statehood, was characteristic of the Front's philosophy of gradualism and openness.

Opposed to this broad strategy, meanwhile, was a movement called the Citizens Committees, launched in February 1989. Its approach, on the one hand, was a more radical and uncompromising one. However, the Committees were also much more than a mere nationalist out-bidder of the Popular Front. They had a tangible vision of independence of their own. The Committees claimed that because Estonia had been illegally occupied and annexed by the Soviet Union in 1940, none of the political institutions created by Moscow could be accepted or legitimized in any way. Dealing with them, the Committees said, would be tantamount to dealing with an illegal occupier. Instead, the Committees maintained that power had to go back to those people, from whom it had originally been taken, namely the citizens of the pre-war Republic and their descendants. As a result, the Committees began registering such citizens and their descendants in 1989, and in February 1990 (after they had registered over 600,000 citizens) they organized free elections for a special Congress of Estonia, which convened in March to debate ways of "restoring" the occupied Republic of Estonia. The Congress generated much initial enthusiasm because its message was very straightforward. The Soviet occupation was illegal, they said, and Estonia had only to demand the unconditional restoration of its independence by Moscow. This claim was further given credence by the fact that for 50 years the West had refused to recognized the Baltic states' incorporation into the Soviet Union. Thus it seemed that international law also expressly called for Estonia's freedom. And if the country already existed legally, there was no need to get caught up in the morass of "secession" from the Soviet Union, as the Kremlin had demanded and the Popular Front had initially been willing to accept. Such a move, according to Congress leaders, would have been dangerous for re-establishing true independence and could have resulted in satellite status for the country. Throughout 1990 and 1991, the Congress of

Estonia continued to meet several times, and although its clout began to diminish steadily as the independence struggle dragged on, it remained a kind of "shadow parliament" to the Supreme Council and a bulwark against any attempts to move toward a "second" or "third" republic in disregard to the first.

Thus, on August 19, 1991, as the Soviet coup began in Moscow, Estonia's politicians were still locked in this dilemma. Although the Supreme Council held the *de facto* reigns of power, it could not completely ignore the political pressure of the Congress or seek to act unilaterally even in this tense situation. On the first day of the coup, therefore, the Supreme Council adopted only three simple statements: one denouncing the putsch and calling on the world not to recognize it; a second authorizing a special Extraordinary Defense Council to run the republic if the Supreme Council were prevented from meeting; and a third calling on the people of Estonia to remain calm and to resist Soviet forces peacefully if it became necessary. The Council remained firm on the goal of independence, but it was not until the second day of the coup that the politicians seriously began to work on an independence declaration.

Recently published reflections by participants on all sides of those "two decisive days on Toompea Hill" in Tallinn show how precarious the decision-making over independence was at that time.[3] On the morning of August 20, leaders in the Supreme Council decided to invite members of the Congress for a meeting to discuss ideas about what such a declaration should say. On the one hand, some members of the Supreme Council had already argued that the parliament should automatically declare itself a constitution-making body (or Taastav *Kogu*) and proceed from there in drafting a new constitution. During their meeting with Congress members, they even put forward a draft resolution to this effect. For the Congress leaders, however, this option was anathema, since they saw it as another attempt by the Council to usurp all power. The Congress leaders maintained instead that such a constitutional body could only be created through

[3]20. augusti klubi ja Riigikogu Kantselei, *Kaks otsustavat päeva Toompeal (19.-20. august 1991)*, Tallinn: Eesti Entsüklopeediakirjastus, 1996.

new elections to be held after Estonia had restored its *de facto* independence. Finally, during another tense, closed-door meeting that evening, the deputy speaker of the Council and a moderate leader of the Popular Front, Marju Lauristin, came up with the final compromise: instead of creating a *Taastav Kogu* unilaterally through the Council or postponing its establishment until new elections could be held, Lauristin proposed that the two organizations themselves form a joint Constitutional Assembly, which would be authorized to draft a "bipartisan" basic law for later submission to a popular referendum. The Assembly would contain an equal amount of members from both sides, and as a result would hopefully bring much-needed unity to the upcoming task of state consolidation.

The proposal was accepted by leaders of both the Congress and the Council, although some dissenting voices remained on both sides.[4] Later that evening, the two sides further agreed that Estonia would not request new diplomatic recognition from the international community after its independence was achieved, but rather that it would insist on the "restoration" of diplomatic ties broken after 1940 and the Soviet occupation.[5] This was a victory for the Congress of Estonia. Finally, it is interesting to note that according to several observers another reason for the compromise's success was the fact that the chief proponent of a "new republic" (as well as the chief opponent of the Congress), Prime Minister Edgar Savisaar, had not participated in the negotiations.[6] Savisaar, who had been in Sweden during the first day of the coup, had made it back to Estonia (via Finland) by the night of August 19. But on August 20 he was apparently more involved in securing Estonia's defenses and organizing a Popular Front rally against the coup than in following the negotiations between the Congress and the Council. From the looks of it, his only influence on the talks was to have his Justice Minister Jüri Raidla put forth the failed draft declaring the Supreme Council unilaterally to be the new *Taastav Kogu*. Thereafter, it is

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[4]Cf. Ülo Uluolts's comments in *Kaks otsustavat päeva Toompeal (19.-20. august 1991)*, pp. 125-128.
[5]On this point, cf. Mart Laar's comments in *Kaks otsustavat päeva Toompeal (19.-20. august 1991)*, pp. 106-107.
[6]Lauri Vahtre, *Vabanemine*, Tallinn: IM Meedia, 1996, p. 101. Also Vardo Rumessen's comments in *Kaks otsustavat päeva Toompeal (19.-20. august 1991)*, pp. 120.

not clear why Savisaar did not intervene more in the talks in favor of a more Council-dominated declaration, since any revival of the Congress's influence in politics through its inclusion in a Constitutional Assembly was clearly against Savisaar's interests. Yet, in any case, the final draft was completed without him; and from the prime minister's loge in the parliamentary chamber, Savisaar reportedly showed only little elation when the declaration was passed, although he did vote for it.[7]

Thus the Supreme Council's historic "Resolution on the National Independence of Estonia", adopted at 11:02 PM on August 20 by a margin of 69 to 0, read as follows:

> *Proceeding from the continuity of the Republic of Estonia as a subject of international law,*
>
> *Relying upon the strength of the Estonian population's clear expression of will in the March 3, 1991 referendum to restore the national independence of the Republic of Estonia,*
>
> *Taking into account the March 30, 1990 Resolution of the Supreme Soviet of the Estonian SSR "On the State Status of Estonia" and the Declaration of the Supreme Soviet of the Estonian SSR "On the Cooperation Between the Supreme Soviet of the Estonian SSR and the Congress of Estonia",*
>
> *Taking into account that the coup d'état in the USSR seriously imperils the democratic processes in Estonia and that it has made it impossible to restore the national independence of the Republic of Estonia through bilateral negotiations with the USSR,*
>
> *The Supreme Council of the Republic of Estonia resolves:*
>
> *1) To affirm the national independence of the Republic of Estonia and to seek the restoration of the diplomatic relations of the Republic of Estonia.*
>
> *2) To form a Constitutional Assembly, whose composition shall be delegated by the highest legislative organ of state power, the Supreme Council of the Republic of Estonia, and by the representative body of the citizens of the Republic of Estonia, the Congress of Estonia, for the purpose of drafting the Constitution of the Republic of Estonia and presenting it to the people for a referendum.*
>
> *3) To hold Republic of Estonia parliamentary elections during 1992, on the basis of the new Constitution of the Republic of Estonia.*[8]

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[7]Ibid. Vahtre, p. 103; and Rumessen, p. 121. Savisaar also declined to include his reflections from August 19 and 20 in the book *Kaks otsustavat päeva Toompeal.*

[8]For complete text, see Advig Kiris, ed., *Restoration of the Independence of the Republic of Estonia: Selection of Legal Acts (1988-1991)*, Tallinn: Ministry of Foreign Affairs of the Republic of Estonia and Estonian Institute for Information, 1991.

Within two days, Iceland became the first country to restore its relations with Estonia, while the Russian Federation recognized Estonia's independence on August 24. Soon afterwards, Estonia's renewed statehood was universally acknowledged by the world, and the country became a member of the United Nations and other international organizations.

The Constitutional Assembly Begins Work

The August 20 declaration had broken a major impasse in Estonian domestic politics, while also greatly advancing the task of state-building. But the Council and the Congress remained wary of each other, and throughout the seven-month term of the Assembly relentless jockeying persisted.[9] The first question to be decided was the size of the new Assembly. The Congress, with a total of 499 members, favored a larger Assembly of 80 representatives, 40 from the Congress and 40 from the Council. The Supreme Council, meanwhile, supported a smaller body of only 40 members. On September 3, the Supreme Council adopted a decision splitting the difference and mandating a Constitutional Assembly of 60 members, 30 from each representative body.[10] In an additional move, however, the Council sought to reassert some of its authority vis-à-vis the Congress by laying down itself some of the ground-rules for the Assembly. In a decision on the "tasks and procedures of the Constitutional Assembly", the Council decided that the Assembly's first session would be opened not jointly by the leaders of the Council and the Congress, but only by the chairman of the Supreme Council, meaning Arnold Rüütel.[11] (He would lead the Assembly until it chose a permanent speaker.) The Council further set a rigorous deadline of November 15, by which the Assembly (meeting only on

[9]For an excellent, participant's account of the stage-by-stage work of the Assembly, see Rein Taagepera, "Estonia's Constitutional Assembly, 1991-1992", *Journal of Baltic Studies*, vol. 25, no. 3 (Fall 1994), pp. 211-232.

[10]"Eesti Vabariigi Ülemnõukogu Otsus Põhiseadusliku Assamblee valimistest", ["Decision of the Supreme Council of the Republic of Estonia on Elections to the Constitutional Assembly"], 3. september 1991. *Riigi Teataja*, 1991, 30/356.

[11]"Eesti Vabariigi Ülemnõukogu Otsus Eesti Vabariigi Põhiseadusliku Assamblee tööülesannetest ja töökorraldusest", [Decision of the Supreme Council of the Republic of Estonia on the Tasks and Procedures of the Constitutional Assembly of the Republic of Estonia"], 3. september 1991. *Riigi Teataja*, 1991, 30/357.

Fridays and Saturdays) was obliged to submit a draft constitution only to the Supreme Council. Again the Congress was shunted. Thirdly, the Council reserved for itself the right to decide whether to put the draft to a national referendum.

As Taagepera notes, this was the most serious question to remain throughout the constitution-making process: how much would the Council go back on the "bipartisan" and seemingly binding status of the Assembly, in order to change the draft constitution to its own liking before it was put to a referendum.[12] As it turned out, this was not an unfounded fear. Very early in the Assembly's term a widespread impression emerged that Congress members had begun to dominate the discussions. This was partly because many members elected from the Supreme Council were often busy with their other legislative duties.[13] Thus, many in the Supreme Council looked forward to the opportunity to correct their disadvantage, when the draft constitution came back to them for approval. However, ultimately the most serious *ex post* meddling was thwarted.

Supporters of the Congress, meanwhile, were able to include in the Council's September 3 decision a point reiterating the fact that the Assembly did not have any legislative powers. This clarification was meant to prevent any attempts to declare the jointly-created Assembly a new parliament for the whole country.[14] The decision also guaranteed that financial support for the Assembly would be provided by the Supreme Council's chancellery. This would keep the Assembly from being possibly forestalled bureaucratically. Lastly, the Assembly was empowered to make decisions based on a simple majority of those voting. This would greatly speed the Assembly's work and not make it hostage to the one-third (!) or so members of the Assembly who often did not show up to the meetings.[15]

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[12]Op. cit., Taagepera, pp. 218, 225, 226.

[13]These people served Monday through Thursday in the Supreme Council and then Friday and Saturday in the Assembly, while the Congress-based delegates served only in the Assembly.

[14]Op. cit., Taagepera, p. 217-218.

[15]Average attendance according to Taagepera was 62%. One of the persistent no-shows was Lennart Meri, the Foreign Minister at the time, but also later the first President under the new Constitution. 6 out of the 7 Russian members of the Assembly (elected via the Supreme Council), were also frequent absentees. For additional commentary (including number of oral interventions per participant), see Rein Taagepera,

Citizenship debates

The revival of the Congress of Estonia's political fortunes after the failed Soviet coup extended far beyond gaining an equal voice in the Constitutional Assembly. Citizenship issues also began tilting its way, that is toward the exclusion of most Russians from automatic citizenship in the restored Republic. For the Congress's legal restorationist logic claimed that only those who had been citizens of the pre-war state and their descendants should have the right to automatic citizenship once statehood was renewed. All other residents, since they arrived during an illegal occupation, could (should and would) in the Congress's opinion be made subject to special naturalization procedures based on specific language and residency requirements. This had been the Congress's dictum since it started registering citizens for its movement in 1989.[16] Through 1990 most Estonian politicians seemed to agree with it, although few outside the Congress were vocal about it. During early 1991, however, the Congress's influence on citizenship weakened, as the prolonged independence struggle with Moscow prompted many Estonians to begin believing that some decisive compromise with local Russians would be needed. In March, Estonia held its plebiscite on independence with all residents (citizens and non-citizens) participating. This seemed to legitimate the rights of all residents to subsequent citizenship. In early August, the Popular Front even approved a citizenship policy very close to the so-called "zero-option" plan of blanket citizenship for all. Yet, when the Soviet coup failed with such farcical speed and Estonia had regained its independence within the space of a few days, the political tide shifted back to more uncompromising positions and the zero-option dropped completely from view.

"Constitution-Making in Estonia", Paper prepared for the Conference on the Design of Constitutions, University of California, Irvine, 10-12 June 1993.

[16]The movement also registered "citizenship applicants" during its campaign (some 30,000 in all) among those who supported Estonian independence, but were not techincally citizens. These people were later allowed to elect non-voting representatives to the Congress.

The final decision on citizenship by Supreme Council did not come until November 6. In the meantime, there were widespread debates over the equity of denying automatic citizenship to Soviet-era immigrants. Most salient, of course, was the large-scale coincidence of Russian-speakers with these Soviet-era immigrants. Estonia had been over 95% Estonian after 1945 due to wartime losses and population shifts. The vast majority of Soviet-era arrivals to Estonia thereafter were Slavs, and by 1989 the Estonian share of the population had fallen to 61.5%, Russians constituted 29%. Thus, although technically not based on ethnic criteria, the restrictive citizenship law would nonetheless have serious ethnopolitical consequences in disenfranchising most of the Russian-speaking population of the republic. This result was obviously not displeasing to many Estonian nationalists, and in some debates the citizenship policy was often as forcibly argued in ethnic terms as it was in legal ones. However, the denial principle also had a basis in international law given the illegality of the Soviet occupation; and this was something that Estonian politicians would cling to as well as cite repeatedly when accusations were later made (either from Moscow or more obliquely from the West) that the law would be exclusionary.[17]

From the point of view of constitution-making, therefore, the early "resolution" of the citizenship issue meant that the Assembly would now be crafting a political system that at least for probably the next decade or so would be dominated and run by Estonians. This consequence did not, of course, blind the framers to the need to take into account the anomalies that would be present with such the large population of minority non-citizens. Many articles in the future Constitution would indeed explicitly address these issues. (See below.) However, the situation also certainly kept the Assembly from having to think about designing institutions in, say, a consociational way to facilitate power-sharing with

[17]The November 6 Supreme Council resolution merely laid down the principle of automatic citizenship as exclusively for pre-war citizens and their descendants. A later law passed on February 26, 1992 defined the future naturalization requirements as a 2-year period of residency, a language test, and a one-year waiting period. In true restorationist style, these requirements were even drawn from an earlier Estonian statute from 1938.

Russians. The process was in fact more akin to writing a constitution for a homogeneous nation-state.[18]

Parliamentarism vs. Presidentialism

Because the Constitutional Assembly had been issued from two parliamentary bodies, its orientation in constitution-making was naturally likely to be parliamentary. Had popular elections been held for the Assembly, for example, many more supporters of a presidential or semi-presidential system might have been included. For in Estonia's political history there were two elements, which favored some kind of presidentialism. The first was very recent: since 1988 and the beginning of Estonia's political mobilization, Arnold Rüütel as the chairman of the Estonian Supreme Soviet (and later Supreme Council) had very much played a presidential figure during Estonia's fight for independence. He had been the one to go alone before Mikhail Gorbachev and the USSR Supreme Soviet Presidium in November 1988 to defend Estonia's declaration of sovereignty; he had served as the republic's *de facto* head-of-state when meeting with other republican and world leaders in 1990 and 1991. He was also very popular among average Estonians, who had grown to like having one person personify the country's political leadership. Thus, as in all of the republics of the Soviet Union, where the constitutional structure was universally made up of a Supreme Soviet and its chairman, in Estonia too the institutional pre-conditions, pressures, and "interests" for presidentialism were all present.

Secondly, Estonia had finished its interwar period of independence with a presidential regime (from 1938 to 1940); and although that system had clear authoritarian origins, it still retained a kind of unwitting legitimacy as the seemingly cumulative and thus infallible reflection of the country's true political culture. For in 1920, Estonia had

[18]This circumstance also probably discouraged many of the 7 Russians elected to the Assembly from the Supreme Council from actively participating in the constitution process; after all, many of them had in the meantime been declared non-citizens, although they were not stripped of their mandates because of that. Another reason for their lax participation was language; the Assembly proceedings were conducted exclusively in Estonian, which most of the Russians did not speak.

adopted a super-parliamentary constitution, which went on to curse the country with frequent changes of government and chronically weak leadership throughout the 1920s. By the early 1930s something needed to be done. In 1932-33, two referenda were held to change the constitution. The first one, calling for a strengthening of the parliamentary system, failed to garner a majority. The second one, however, envisioning an entirely new presidential system and supported by authoritarian right-wing groups, passed by a wide margin. Still, before that constitution could be enacted, Konstantin Päts, the prime minister and interim president at the time, seized power in a coup d'état, claiming that the extreme right could not be allowed to come to power under their new constitution. Thus, Päts went on to cancel the upcoming presidential elections, abolish parliament and outlaw opposition political parties. For the next three years he ruled alone, until 1936 when he called for the election of a new Constitutional Assembly as part of an initial liberalization process. A year later, this Assembly drew up and passed a new constitution, which Päts claimed had avoided the excesses of the 1933 version. In fact, however, according to one analyst, the 1938 constitution was even more presidential in its provisions than the failed right-wing constitution, but few people took notice of this.[19] Instead, it was the image of a president (Päts) bringing stability to a Depression-ridden and internationally increasingly besieged country that satisfied most Estonians in the late 1930s, and which did not look half-bad to many other Estonians in the early 1990s.

Thus, the Constitutional Assembly of 1991 had to face these legacies, and when it began accepting initial drafts to work with in late September, three out of the five proposals presented were presidential in nature. First off the gun was a draft prepared up by a team of prominent lawyers led by the Justice Minister Jüri Raidla. Its essence was largely presidential, although it claimed to be a mixture of presidentialism and parliamentarism.[20] Next, a strongly presidential draft was presented by Ando Leps, another lawyer and independent member of the Supreme Council. Leps's version drew a lot on the 1938

[19]Op. cit., Taagepera, p. 212.
[20]Op. cit., Taagepera, p. 222; Vahtre, p. 111-112.

Constitution, which eventually itself became a third proposal submitted by a small group of Congress of Estonia members. Fourth on the list was a parliamentary draft submitted by a minor politician, Kalle Kulbok. And lastly a parliamentary draft was submitted by Jüri Adams, a member of the Congress of Estonia and leader of the Estonian National Independence Party.[21] Adams in his proposal took the approach of mending the 1920 super-parliamentary constitution with some more balanced provisions.[22] When four out of the five proposals were voted upon in succession on October 11 (Kulbok withdrew his at the last minute), it was Adams's parliamentary draft that came out on top and which would now be used by the Assembly as the basis for its further deliberations.[23] As Taagepera has noted, "The choice of [this] starting draft set the scene for an essentially parliamentary outcome."[24]

The Assembly's First Draft

During the next two months of deliberations, the Adams draft underwent extensive revisions. In particular, the draft had been very vague on the exact duties and powers of the legislature, government, and president. (It spent more time detailing how these office-holders were to be elected.) The Assembly thus went to work in committee looking at individual sections of the Adams draft. Each of the seven committees was allowed to hold with as many as three foreign experts, invited via the Council of Europe as well as individually from the United States to review the draft. (These advisors were almost all specialists in constitutional law; only a few were political scientists.) By mid-November and the arrival of the original deadline set by the Supreme Council, the Assembly was still not nearly done with its work.[25] A redaction committee was set up on November 8 to

[21]What was surprising about Adams was that he had a forester's education and no formal training in law, but he went on to serve as a respected member of the Riigikogu and its committe on legal affairs.
[22]"Eesti Vabariigi Põhiseadus, Eelnõu", Esitatud Põhiseaduslikule Assambleele 1. oktoobril 1991, Võetud edasise töö aluseks viie esitatud eelnõu seast PA otsusega 11. oktoobril 1991, Autor Jüri Adams, ERSP.
[23]"Hääletamine Põhiseaduslikus Assamblees", *Nädalaleht*, 26. oktoober 1991.
[24]Op. cit., Taagepera, pp. 223-224.
[25]Taagepera notes that this was one moment where some Assembly members feared that the Council might try to pull the plug on it, using the Assembly's failure to make the deadline as a pretext. This however did

begin unifying the various chapters of the draft now emerging from committee. It would still take the Assembly, however, over a month to proceed through the final reading of the draft and release it to the public on December 21.[26]

In this all-important first draft, each of the three institutions of legislature, government and president was spelled out in greater detail, often listing as many as 18 precise prerogatives and duties (as in the case of the president). These sections would greatly help to flesh out the new structure of powers. At the same time, where the Adams draft had been specific, the new version left many procedures open for subsequent laws to regulate. These issues included, very importantly, the electoral system for the Riigikogu as well as procedural rules for decision-making in the parliament. The official draft also lowered the majority necessary for a parliamentary override of a presidential veto. This went from a two-thirds majority of parliamentary members to a simple majority of votes cast.

Social issues, interestingly enough, do not appear to have emerged as a major issue at any point during the constitutional debates. In part, this was because of the legacy of Soviet socialism, which many liberal-minded Estonians did not remember fondly. At the same time, there was a small group of social democrats in the Assembly, who often found common cause with many Estonian nationalists, since the latter favored state support for Estonian families and Estonian culture.[27] The Adams draft (largely influenced by Estonian nationalists from the ENIP) was thus a mixture of social conservatism and nationalist welfare. Article 27 of the draft proclaimed, "Care for the needy shall rest first and foremost with the members of [one's] family," while the next paragraph stated "The state shall be obliged to organize assistance in cases of old age, physical disability, or loss or absence of a wage-earner."[28] Article 25 stated "Every person shall have the right and obligation to

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not happen. Op. cit., Taagepera, pp. 225. Rein Taagepera, "Mida ÜN peaks PA-ga peale hakkama", *Rahva Hääl* , 16. november 1991.

[26]"Eesti Vabariigi Põhiseadus, Eelnõu", *Rahva Hääl*, 21. detsember 1991.

[27]Personal communication by Rein Ruutsoo, member of the Constitutional Assembly, October 30, 1996.

[28]Op. cit., Adams, pp. 4-5.

find him- or herself employment," but again the next phrase read, "The state shall assist in the finding of employment." Finally, Article 21 placed the primary responsibility for children's education and up-bringing on parents, but state schools were also guaranteed. Many of these contradictions were pared away in committee, but the December 21 draft still contained many broad promises and guarantees.

A consistent element in all of the subsequent drafts of the Constitution (beginning with Adams's version) was the degree of concessions made to the country's large Russian-speaking and non-citizen populations. Some 30% of Estonia's Russian-speakers were concentrated in the northeast, in the cities of Narva, Kohtla-Järve and Sillamäe, where they made up as much as 95% of the population. Thus, special language and participation arrangements had to be made for these areas. In the Assembly's first draft, Article 29 stipulated that in areas where minorities represented over half of the population, the language of that minority could also be used in local administration alongside Estonian. Article 28 guaranteed everyone's right to preserve their nationality (or ethnicity) as well as promised the right of cultural autonomy for minority ethnic groups. For non-citizens, the Adams draft allowed them to vote in local elections, a practice known in few other countries around the world. Although this provision was stated more vaguely in the December 21 draft, the principle was ultimately clearly enshrined in the final version (Art. 158).

Public Discussion of the First Draft

For much of the public, it was high time by mid-December that something concrete be released. During the three months the Assembly had been operating, relatively little was reported about its deliberations or progress. This vacuum allowed many proponents of a presidential system as well as opponents of the Assembly in general to engage in public pot-shots at the body. The public discussion that ensued after the release of the Assembly's draft raised two main issues. The first was a call to re-name the head-of-state

in Estonian as *president* instead of *riigivanem* (or state elder) as the Assembly had drafted it. This change eventually went through. The second and more controversial issue, however, was the Assembly's stipulation that the president be elected by the Riigikogu. This decision was, of course, in step with normal practice in parliamentary systems; but for most average Estonians, who wanted to feel like they had direct input in electing their leaders, a popular election was favored. Indeed, a poll taken in late January-early February 1992 showed that nearly 75% of those surveyed supported direct election of the president.[29] Many opponents of the Assembly also again insisted that a popularly-elected president would be a "balancing" factor in the division of powers as well as add an element of "personal responsibility" to government. In an effort to counter such sentiments, some Assembly members, such as Marju Lauristin, sought to explain why a popularly-elected president would be dangerous for Estonia.[30] Lauristin noted that the only reason direct election of the president functioned well in countries such as France or the United States was because political parties there were disciplined and served to filter out uncertain candidates before they reached the ballot. In Estonia's case, direct presidential elections without such parties would only serve to divide society. Moreover, echoing classic political science arguments against presidentialism, Lauristin recalled that in a parliamentary system the executive (or prime minister) can always be removed quickly through a no-confidence vote, while an unpopular, but directly elected president would be able to sit on his popular mandate until the end of his term. A dangerous situation of competing sovereignties with the parliament would arise.

In mid-January, the Assembly formed a new committee to sort through the proposed changes. Taagepera reports that at this moment another brief attempt was made to disband the Assembly, but that this was neutralized when the Assembly agreed to cooperate more fully with the pro-presidential "expert group" headed by the Justice

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[29]EKE Ariko, "Rahvas ei taha loobuda õigusest valida presidenti", *Postimees*, 12. veebruar 1992.
[30]Marju Lauristin, "Riigivõimu küsimus", *Postimees*, 3. jaanuar 1992. Vello Saatpalu, "Riigipea valimine", *Rahva Hääl*, 29. veebruar 1992.

Minister Jüri Raidla.[31] On February 14, the Assembly passed its final version of the draft constitution by a margin of 32 to 3 (with 6 abstentions), and the document was officially submitted to the Supreme Council (and Congress of Estonia) for consideration.

Meanwhile, also in January another special Assembly committee was formed to work on an "implementation law" for the constitution, which would regulate transitional issues, but which would not thereafter remain permanently a part of the text. For example, the law stated that the first term of the new parliament would last a maximum of three years (as opposed to the future term of four years), while the first president would be allowed to sit only four years (instead of five). Second, for the next three years the law would allow changes to be made in the Constitution under relaxed majorities in the Riigikogu or through popular initiative. (Neither of these, however, was ever used.) Overall, these and other provisions proved to be a good way for making compromises on some of the more controversial issues. In particular, this concerned the mode of election for the president. Succumbing to public pressure, the Assembly agreed in late February to allow a one-time direct election for president in 1992, but it also stipulated that the winner had garner at least 50% + 1 votes in order to be elected. If no candidate gained such a majority, then the final choice from among the top two vote-getters would go to the newly-elected Riigikogu.

Finally, Estonia's constitutional debate could not go by without the issue of post-communist lustration also coming up. On the one hand, the Assembly had already agreed to an "oath of conscience" which would be required of all persons seeking elective and appointed office in Estonia (whether national or local) through December 31, 2000 (Articles 6 and 7 in the implementation law). This oath would specify that the candidate has never been a member of any foreign security service nor participated in the active persecution of fellow citizens. Yet in mid-February as the implementation law was being completed, a group of 7 members of the Assembly submitted an emergency appeal calling for the inclusion of a more specific lustration clause in the law. The proposed "paragraph 8"

[31] Op. cit., Taagepera, pp. 225-226.

would have explicitly prevented top Communist officials from running for local or national office as well as from serving in local or national government posts, again until December 31, 2000. The ban would have specifically affected those people who actively served the Communist Party, i.e. all functionaries of the CPSU, all members of the Estonian Communist Party's Bureau, all city and regional secretaries of the Party, and all national, regional, and city secretaries of the Estonian Komsomol. After heated debate, the Assembly decided that the issue was too political for it as a constitution-making body to decide, and instead it recommended to the Supreme Council that the paragraph be included as a separate question on the final constitutional referendum. The implementation law was thus passed by the Assembly on February 28 by a margin of 28-3.

When the draft constitution came before the Supreme Council in mid-March, opponents of the Assembly had another opportunity to challenge its work. Although the Council decided graciously to treat the draft as an integrated text and to only vote on it up-or-down, it first took the pleasure of sending the draft back to the Assembly, claiming that the draft "lacked consensus among the Estonian people".[32] In the month that followed, many minor changes in wording were made to the Assembly's draft, but by and large little was changed. The president was given the right to appeal to the Constitutional Review Chamber of the National Court if his veto was overridden by parliament, however the presidential election process was left undisturbed. At the same time, several press articles appeared again attacking the Assembly's draft and claiming that the people had been left powerless and deprived of their right to elect their leaders.[33] Other opponents called for a new round of "public discussion" over the draft. The Assembly, however, reaffirmed its support for the document and concluded its final session on April 10 (albeit with only 24 members present).

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[32]Cited in Taagepera, op. cit., p. 226.

[33]Andrus Ristkok, "Võimuolijatele võimutäius", *Rahva Hääl*, 7. aprill 1992. Also a group of lawyers allied with Supreme Council chairman Arnold Rüütel voiced their "expert" opinion. "Eksperdid põhiseaduse eelnõust", *Rahva Hääl*, 22. aprill 1992.

The Supreme Council thus relented on April 20 and voted to forward the draft constitution to a referendum. However, the implementation law would be delayed for another three weeks. During this period, the lustration "Paragraph 8" was conveniently dropped, although it is not exactly clear how.[34] Instead, a new (although completely unrelated) referendum question appeared asking voters if those non-citizens who had applied for citizenship by June 5, 1992 could be allowed to vote on an exceptional basis in the upcoming presidential and parliamentary elections. In the Supreme Council, many Popular Front deputies had wanted to include this concession to non-citizens directly in the implementation law. However, nationalist deputies were able to force it onto the referendum ballot. Meanwhile, the Council also agreed to mandate new Riigikogu elections by September 27, 1992 at the latest, which eased fears that some in the Council would seek to prolong their mandate as long as possible. Lastly, the Council set the referendum to be held on June 28, 1992, while the complete draft of the constitution was published again in both Estonian- and Russian-language newspapers.

The conclusion of Estonia's ten-month constitution-making enterprise came as the draft was approved by an overwhelming 91.2% of the votes cast. Still, in the run-up to the referendum last-minute opposition was heard from one vociferous group of Estonian politicians who insisted that only a return to the 1938 Constitution could be considered legal and just. Calling themselves "Restitution", the mavericks (including the respected physicist Endel Lippmaa) attempted a last-ditch campaign for a "no" vote in the referendum; but as the result showed few people took them to heart. The outcome of the second referendum question on special voting rights for citizenship applicants was much closer, however this initiative failed 53% to 47%. Right-wing parties and member of the Congress of Estonia campaigned against it, while many moderate Estonian politicians avoided taking a public stand.

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[34]Neither Taagepera nor Vahtre provide any clue. Nor does Jüri Adams in a lengthy newspaper published in May. Jüri Adams "Põhiseaduse eelnõu saatus Ülemnõukogus", *Postimees*, 20. mai 1992.

New Institutions at Work

Fundamental Rights and Duties

Estonia now had 15 chapters, 168 articles and some 6,669 words of constitution to live by.[35] In its final form, in fact, the structure of the document differed remarkably little from the original draft proposed by Jüri Adams; yet its content had been significantly beefed up along the way. Chapter Two, for example, on Fundamental Rights, Liberties and Duties was now greatly expanded. It proclaimed the equality of all persons before the law as well as the right of all persons to protection under the law. Article 14 stated that the enforcement of all rights and liberties shall be the duty of the legislative, executive and judicial powers, as well as of local government. Article 15, in turn, guaranteed that "every one has the right to appeal to a court of law if his or her rights or liberties have been violated." The text went on to read:

> "Everyone whose case is being tested by a court of law shall be entitled to demand any pertinent law, other legal act or procedure to be declared unconstitutional.
>
> The courts shall observe the Constitution and shall declare as unconstitutional any law, other legal act or procedure which violates the rights and liberties laid down in the Constitution or which is otherwise in conflict with the Constitution."

Contesting the constitutionality of laws indeed became a proven practice in Estonia soon after the Constitutional Review Chamber of the National Court was set up in early 1993.[36] According to the Constitution, cases may be referred to it on appeal either by the lower courts, by the President, or by the Legal Chancellor.[37] By mid-1994 each of these three institutions had in fact used this prerogative. The most celebrated case involving rights occurred in April 1995 when the Court ruled that property nationalized by the Estonian government in 1993 from certain Soviet-era social and economic organizations had to be

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[35]For an authoritative English-language translation of the 1992 Constitution, see *Estonian Legislation in Translation/Legal Acts of Estonia*, no. 1 (January 1996). A similar translation is available via the Estonian Foreign Ministry's World Wide Web page at www.vm.ee

[36]The Chamber is a 5-member sub-division of the 15-member National Court.

[37]In the lower courts' case, any time they first declare that a law is unconstitutional, the decision is automatically appealed to the Constitutional Review Chamber. In the President's case, he can appeal only after his veto has been overriden by the Riigikogu. Lastly, the Legal Chancellor can appeal a case only after he has issued a warning to the executive or legislative body that passed the unconstitutional act, and that body has refused to comply.

returned or be compensated in full as a violation of property rights. The case had been brought by an agricultural cooperative in defense of some apartment buildings taken over by the government for housing privatization. A Tallinn court found that the law on renationalization of such property was unconstitutional, and this precipitated the Chamber's review. At the same time, however, the specific law that was overturned also affected organizations such as the Estonian Communist Party. As a result, the Party (now in the form of its successor, the Estonian Democratic Labor Party) was given back the rights to a multi-story office building in downtown Tallinn. The Chamber's decision later prompted legislators in the Riigikogu to try and re-adopt the housing provisions of the failed law, but a strong precedent had been set.

Social Welfare Rights

Social welfare rights in the new Constitution were fairly restricted or left vague. Article 27 (one of only two articles to deal with the issue) declared that, "The family being fundamental for the preservation and growth of the nation, and as the basis for society, shall be protected by the state." However, the only explicit right to welfare benefits was given to families with many children and the disabled. The elderly, individuals without providers, those unable to work, and the needy were all listed as entitled to state assistance, but the extent of that assistance would be "determined by law." This provision obviously gave legislators and the government a fair amount of leeway in drawing up the state budget each year, especially during the two years of economic shock therapy that would immediately follow adoption of the Constitution. Most Estonians seemed to withstand the belt-tightening, although it is clear that even those opposed to the hardship could find little recourse in the Constitution.

The President

As for the main branches of government, the Constitution ended up pitting the Riigikogu against a relatively weak, but by no means powerless President. And in Lennart Meri, the first head-of-state, the Riigikogu got a fairly brazen new office-holder, who was eager to set precedents and determine the full scope of his powers and prerogatives. On September 20, 1992 the special one-time popular election for president, which had been acceded to by the Constitutional Assembly, took place alongside the Riigikogu elections. The favorite in the race, Supreme Council chairman Arnold Rüütel, was thwarted by three other candidates from reaching the 50% + 1 majority he was hoping to gain for direct election. (He garnered only 41.5% of the vote.) When he and the second place finisher, Lennart Meri, were referred to the Riigikogu, however, the right-of-center majority in the new parliament opted for Meri, even though Meri had won only 29.5% of the popular vote. Thus Meri was elected President.

During his first term, Meri vetoed over two dozen laws. On six occasions he was overridden by parliament, and Meri appealed to the Constitutional Review Chamber. The President won in 5 out of those six cases.[38] In addition, in January 1994 Meri had a brief standoff with Prime Minister Mart Laar, when he delayed the appointment of several government ministers nominated by Laar in a cabinet reshuffle. The Constitution (Art. 78, Para. 10) states that the President shall "appoint and recall members of the Government" as proposed by the Prime Minister. There is no explanation, however, as to what happens if the President decides to reject the candidates or slow their appointment. In the event, Meri merely demurred and finally approved the changes. In international affairs, Meri, having previously been foreign minister, was also avid in playing out his role as head-of-state. When meeting with foreign leaders he often conducted what seemed to be his own foreign policy, leading to frequent confusion with the Ministry of Foreign Affairs. In 1995-96 Meri also haggled with the Ministry over the appointment of several ambassadors.

[38]Not surprisingly, one of the laws Meri contested was the President of the Republic Act passed by the Riigikogu in May 1994.

Thus the parliament-president axis in the new constitution appeared to be working out as intended with some occasional, but entirely healthy friction. Observers noted that during his first term President Meri may well have been careful not to alienate too much the Riigikogu, which would eventually decide his re-election in August 1996. Indeed when the time came, Meri was unable to muster the two-thirds majority he needed in the parliament for an immediate second term. It was Meri's rival from 1992, Arnold Rüütel, who this time thwarted Meri by maintaining through three rounds of voting a support group of some 32 mostly-rural deputies in the Riigikogu. This forced the election into an expanded electoral college, where in accordance with the Constitution 273 representatives from all of Estonia's local governments were added. Two rounds of voting in this body finally secured re-election for Meri and the start of a full five-year term.[39] Indeed, this was one of the most interesting questions for the future: to what extent would Meri, now in a terminal second term, seek to push his powers even further to the limit? Meri promised in his victory speech to cooperate more with parliament, but this remained to be seen.

The Parliament

The Riigikogu, meanwhile, underwent changes of its own, as it experienced its first re-election in March 1995. In contrast to Jüri Adams's initial draft of the Constitution, electoral rules for the parliament were deliberately left out of the final version. Instead, the Supreme Council adopted a separate Riigikogu Electoral Law in April 1992, which set up a three-tier electoral system based on proportional representation to fill the parliament's 101 seats. On the multi-member district level, candidates would be elected if they surpassed the necessary vote quota (based on the Hare formula). At the next level, additional mandates were allocated within the district based the pooling of total party votes. All remaining seats would be divided based on each party's national vote total using a modified d'Hondt

[39]For a complete account of the presidential election, see "Estonia" under the Constitutional Watch section of the *East European Constitutional Review*, vol. 5, no. 4 (Fall 1996).

formula.[40] Although some distortions occurred, the parliament that emerged using this system was representative, with a total of nine parties or electoral blocs elected.[41] The right-of-center coalition of Prime Minister Mart Laar that took office survived for two years until it was driven out by a vote of no-confidence. A caretaker government was then installed since scheduled parliamentary elections were just around the corner in March 1995. For these elections, the electoral system was not significantly changed. The results thus saw the continued presence of some 10 parties and coalitions. A center-left government took power under the leadership of Tiit Vähi from the Coalition Party. This government, however, did not last for much more than six months, when Estonia faced one of its most serious government crises to date. In October, the Interior Minister and leader of the Center party in the coalition, Edgar Savisaar, was implicated in a taping scandal, which he however denied and refused to acknowledge. The standoff finally led to President Meri dismissing Savisaar (at Vähi's request) based on the President's constitutional powers. (Art. 78, Para. 10) The move also forced Savisaar's party out of the government. Prime Minister Vähi then turned to the liberal Reform Party with whom he formed a new government in November. Thus in four years the new parliament had weathered three changes of government and cabinet successfully.

Local Government

Local governments also sought to get on their feet during the first four years of the new Constitution. Local elections were held in October 1993, which empowered new city and town councils to act. In the very first article of an entire chapter on local authority, the Constitution designated local governments as the main organizers of local life and services. (Art. 154) It gave them the explicit right to levy and collect local taxes, which would help

[40]For further specifications, see Christian Lucky, "Table of Twelve Electoral Laws", *East European Constitutional Review*, vol. 3, no. 2 (Spring 1994).

[41]In terms of the distortions, for example, one émigré Estonian, Jüri Toomepuu, who polled nearly 17,000 votes ended up bringing into parliament other candidates who won as little as 51 votes. For an account of the 1992 elections, see Vello Pettai, "Estonia: Old Maps and New Roads", *Journal of Democracy*, vol. 4, no. 1 (January 1993).

fund independent local budgets. (Art. 157) Property taxes, for instance, became one such source. In addition, many of the country's national tax laws (such as the personal income tax) were written so as to automatically allocate part of the proceeds to local governments. By 1996, most towns seemed to be making do, although many small rural communities were considering merging in the future to increase their tax base. In October 1996, Estonia held its second series of local elections, which this time saw gains by the Reform Party.

Non-citizens and Minorities

As a result Estonia's citizenship policy from 1991-2, an extensive ethnic cleavage was *de facto* created in the country's politics. By early 1997 this situation was only slowly beginning to stabilize through new laws and provisions of the Constitution. As a first step, in May 1993 the Riigikogu adopted final language criteria for naturalization, through which the formal process could now begin. The requirements were set at moderate levels, although even these proved difficult for many Russians who had never learned Estonian or lived in heavily-Russian areas.[42] In the summer of 1993, Estonia underwent a major crisis as the parliament attempted to pass an Aliens Act to regulate the legal status of non-citizens. The Act evoked widespread protest among non-citizens in northeast Estonia, who feared that under the new rules they would be deprived of their permanent residency status. These concerns were quelled after the Riigikogu amended the law, however much public trust among non-citizens was lost. The 1993 local elections helped to recoup some of that confidence, when non-citizens participated actively in the elections, based on the special provisions included in the Constitution. In Tallinn, for example, Russian parties won nearly 40% of the seats on the city council. In the March 1995 Riigikogu elections, Russian parties made further gains, breaking into the previously 100% Estonian parliament with 6 seats. In 1995-1996, the process of issuing new residency permits for non-citizens was completed, however the naturalization rate was still sluggish. Only some 83,500

[42]The language requirement assumed an Estonian vocabulary of around 1500 words, which was tested in both oral and written form.

people had been naturalized by October 1996, and of these only about half had actually taken the full language and culture exam.[43] Moreover, a new citizenship law passed in January 1995 raised the naturalization requirement to include a civics exam in Estonian. This change appeared to slow down the process somewhat further.

Thus for the foreseeable future some 340,000 people in Estonia were likely to remain in the country as permanent residents, with some 120,000 of these people registered as Russian Federation citizens and the rest continuing on as stateless persons.[44] In terms of constitutional rights, the final version of the Constitution ended up making specific reference to this citizen/non-citizen split as regards the rights and duties of all persons. Article 9, Paragraph 1 read as follows:

> The rights, liberties and duties of everyone and all persons, as listed in the Constitution, shall be equal for Estonian citizens as well as for citizens of foreign states and stateless persons who are present in Estonia.

This article would offer blanket coverage for all non-citizens. However, some rights in the Constitution were qualified with the phrase "unless otherwise determined by law". This stipulation was included on the right to receive state welfare benefits (Art. 28), the right to pursue a profession or job of one's choice (Art. 29), the right to engage freely in entrepreneurship (Art. 31) , the right to own all types of property (Art. 32), and the right to receive government information about oneself (Art. 44). In addition, Article 48 restricted membership in political parties to citizens only. Article 30, meanwhile, also limited employment in the civil service to citizens only, although it said exceptions by law could be made in this provision. In January 1995, the Riigikogu passed the Civil Service Act, which re-iterated the citizenship requirement for national and local government employees. The Act did allow some non-citizens, who were employed either in law enforcement, the

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[43]Many applicants received citizenship under simplified terms if they were ethnic Estonian or had registered as "citizenship applicants" with the Congress of Estonia back in 1989-1990. The total number of naturalized citizens is taken from "Estonia Today, Citizenship Statistics: an update as of 1 October, 1996", information sheet released by the Estonian Ministry of Foreign Affairs, October 20, 1996. The number of applicants who actually took language exams is based on personal communications with the National Language Board and the Citizenship and Migration Board.

[44]In 1996, Estonia began issuing aliens passports to these stateless persons, so that they could freely travel abroad.

state revenue service, or in rescue services, the right to continue working for 3-5 years; however, other non-citizen employees would be terminated by February 1996. In late 1995, the Riigikogu extended this deadline to February 1997, since as one government minister noted, the earlier date would have affected at least 2,400 people in northeast Estonia alone.[45] Still, at some point, the moment was bound to arise when the citizenship requirement for government jobs would lead to a certain number of dismissals. Finally, the judicial rights of non-citizens were given a boost in October 1996, when a Tallinn district court overturned the expulsion of a Russian Federation citizen, Pyotr Rozhok, who had been accused by the Estonian government of political subversion. Rozhok, a member of Vladimir Zhirinovsky's Liberal Democratic Party, was thrown out of Estonia in March 1995 by the Citizenship and Immigration Board. However, following an appeal by Rozhok, the court ruled that the Board had not followed due procedure and ordered Rozhok be allowed to return to Estonia.

Conclusion

In a September 1996 report before parliament, Estonia's Legal Chancellor, Eerik-Juhan Truuväli, noted that the initial phase of constitutional consolidation had now more or less been completed.[46] Most of the essential supplementary laws enumerated or alluded to in the Constitution had been passed. The next phase of fine-tuning would still require important decisions to be made, but many basic structures were solidly in place. To begin that fine-tuning process, the Estonian government formed a commission in mid-1996 to begin reviewing various suggestions for changes in the Constitution. The chairman of the commission, Justice Minister Paul Varul, stated, however, that no radical alterations were expected. The commission was scheduled to submit its report to the Riigikogu by the end of 1997.

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[45]"Riigikogu muutis avaliku teenistuse seadust", *Päevaleht*, 21.12.1995.
[46]Enno Tammer, "Õiguskantsler pahandas seadusandjaga", *Postimees*, 26 September 1996.

Thus, five years after Estonia's politicians had scrambled desparately to restore their unity in the face of a conservative Soviet coup, the results of their leap into a Constitutional Assembly seemed to be fairly gratifying. The architect of that "miracle compromise", Marju Lauristin, would later reflect,

> I am convinced, that that support that was expressed during that memorable late-night vote in favor of the so-called "third way", which would become the Constitutional Assembly, was in fact a wholly successful compromise between two hitherto seemingly irreconcilable trajectories, which in turn guaranteed both the continuity of legal authority and its legitimacy, while also allowing for the radical renovation of the [Estonian] state's constitutional foundation in line with the democratic principles of the late 20th century.[47]

The full test of that "renovation" would, of course, only be complete sometime in the 21st century. But for the time being, the new Constitution had performed more or less as planned and desired.

[47]Op. cit., 20. augusti klubi ja Riigikogu Kantselei, *Kaks otsustavat päeva Toompeal* , p. 81.

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RE-BUILDING DEMOCRACY IN LATVIA

By Adolf Sprudzs

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RE-BUILDING DEMOCRACY IN LATVIA

Latvia proclaimed her independence on November 18, 1918, in the aftermath of the First World War.[1] After a war of liberation, to free the country from German and Russian domination, reconstruction of the war-ravaged land could begin in 1920. A Peace Treaty between Latvia and Soviet Russia was finally concluded on August 11, 1920, in which Russia recognized the independence and sovereignty of the Latvian State and "forever" renounced all her sovereign rights over the Latvian people and territory.[2]

Recognized de jure by the Allies and other members of the family of nations and admitted to the League of Nations in 1921, Latvia could now begin building her democratic state institutions. General, secret and proportional elections were held in April, 1920, to elect the Satversmes Sapulce (Constituent Assembly). 24 participating political parties and groups presented 57 lists of candidates,[3] representing citizens of Latvia as defined by the earlier Law on Citizenship of August 23, 1919, [4] from which 150 members of the Satversmes Sapulce were chosen. The Social Democrats and the Farmers' Union became the major forces in the newly elected assembly, along with a good

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[1] For a concise, modern, and well-written history of Latvia and the Latvians, see Andrejs Plakans, The Latvians: A Short History. Stanford: Hoover Institution Press, 1995, xx, 257 p. (Studies of Nationalities); for quarterly updates on constitutional politics in Eastern Europe, including Latvia, see the section "Constitution Watch" in the East European Constitutional Review, published by the University of Chicago Law School and the Central European University since 1992.

[2] League of Nations Treaty Series (LNTS), vol. 2 (1920-1921):212-231

[3] Latvju Enciklopédija (LE), red. A. Svábe. Stokholma: Tris Zvaigznes, 1953-1955, 3 vols., at Satversmes sapulce [Constituent Assembly], 3:2252

[4] Ibid. at Pavalstnieciba [citizenship], 2:1883-1884

representation from the eastern province of Latvia - Latgale, as well as representatives of all the major minority groups.[5] The Satversmes Sapulce convened for its first session on May 1, 1920, performed the duties of the highest state organ (parliament) for more than two years and drafted the final text of Satversme, the Constitution of Latvia, which was passed on February 15, 1922, and became the Basic Law of the democratic Republic of Latvia on November 7, 1922.[6] The Latvian Constitution of 1922 proclaimed that "Latvia shall be an independent democratic Republic" and declared that "The sovereign power of the Latvian State shall belong to the People of Latvia".[7] The Constitution dealt mainly with the organization of the State and the formation, rights and duties of its constitutional organs - the unicameral Saeima (parliament), the President of the State, the Cabinet of Ministers, Courts of Justice and State Control. A second proposed part of the constitution dealing with the rights and duties of citizens was discussed and debated by the various political factions in the Satversmes Sapulce but no agreement was achieved and these matters were not included in the final text.[8] They were addressed later by general legislation.

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[5] Ibid. 3:2252

[6] The full text of the 1922 Satversme [Constitution of Latvia] in English is available in 44 Jahrbuch des oeffentlichen Rechts der Gegenwart 417-423 (1966), and other sources, e.g., International Human Rights Norms in the Nordic and Baltic Countries, ed. by Martin Scheinin. The Hague: Martinus Nijhoff, 1966: 97-104; The Rebirth of Democracy. 12 constitutions of central and eastern Europe, edited by The International Institute for Democracy [Strasbourg] Council of Europe Press, 1995. 625 p. Latvia at 259-274.

[7] Constitution of the Republic of Latvia, 1922, Art. 1 & 2

[8] L.E. at Valsts iekārta [state organization], 3:2583

A very liberal Latvian election law, permitting small groups of citizens to form political parties and present candidates for elections, as well as the system of proportional representation resulted in a multiplicity of political players in the new Republic of Latvia. Intense bargaining and haggling between the potential government coalition builders was a regular feature of the process of forming governments, as the few major parties never had a clear majority. Governments which were formed did not last very long. During the period from 1922 to 1934 four Saeimas were elected, with a total number of 40 political parties and groups represented in them, while thirteen different cabinets of ministers were formed and dissolved during the same period.[9] There was some growing discontent with the lack of efficient political processes, aggravated by the difficulties of the world-wide economic crisis. An authoritarian regime was established on May 15, 1934 by Prime Minister Karlis Ulmanis, leader of the Farmers' Union, who dismissed the Saeima, suspended parts of the Constitution, established a "Government of National Unity", and promised constitutional reform. World events, however, moved faster than Ulmanis' plans for a constitutionally better organized Republic of Latvia.

The two giants, whose collapse in 1918 had provided the opportunity for Latvia and other nations in Europe to establish their independence and sovereignty, had recovered and were again making their plans for world domination. The Nazi-Soviet Pact on Non-Aggression of August 23, 1939, with its secret protocols sealed the fate of Poland and the Baltic States and unleashed the Second World War.

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[9] Plakans, op. cit., 127

Estonia, Latvia, and Lithuania were coerced to sign Pacts of Mutual Assistance with the USSR in early October 1939, permitting the establishment of Soviet military bases on their territories, being assured in Art. V of the Pact (for Latvia) that "The carrying into effect of the present pact must in no way affect the sovereign rights of the contracting parties, in particular their political structure, their economic and social system, and their military measures".[10] Eight months later, in June 1940, the Baltic States were occupied by the Red Army, and in early August, 1940 forcibly incorporated into the USSR.[11]

Fifty years later when the Baltic "singing revolutions" helped bring about the collapse of the Soviet empire,[12] Latvia still did have the necessary elements for becoming

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[10] Latvian-Russian Relations: Documents. Compiled by Dr. Alfred Bilmanis. Washington, D.C.: The Latvian Legation, 1944: 198-199 at 199

[11] See William J. H. Hough, III, "The Annexation of the Baltic States and Its Effects of the Development of Law Prohibiting Forcible Seizure of Territory", in 6 New York Law School Journal of International and Comparative Law 301-533 (1985); for relevant documents see "Forcible Occupation of the Baltic States and Their Incorporation Into the Soviet Union" in Foreign Relations of the United States. Diplomatic Papers, 1940, Washington: GPO, 1959, pp. 357-444; important investigation and collection of documents and testimony on the Baltic case was performed in 1953 and 1954 by a U.S. House Select Committee to Investigate Communist Aggression and the Forced Incorporation of the Baltic States Into the U.S.S.R., under the chairmanship of Charles J. Kersten, which also published a very thorough and comprehensive report, including a following conclusion: "The evidence is overwhelming and conclusive that Estonia, Latvia, and Lithuania were forcibly occupied and illegally annexed by the U.S.S.R. Any claims by the U.S.S.R. that the elections conducted by them in July 1940 were free and voluntary or that the resolutions adopted by the resulting parliaments petitioning for recognition as a Soviet Republic were legal are false and without foundation in fact" - see Third Interim Report of the Select Committee on Communist Aggression. 83rd Congress, 2d Session. Washington: GPO. 1954. 537 p.at p.8; reprinted as Baltic States: a Study of Their Origin and National Development, Their Seizure and Incorporation Into the USSR. Buffalo: William S. Hein & Co., 1972.

[12] See Nils R. Muiznieks, "The Influence of the Baltic Popular Movements on the Process of Soviet Disintegration", 47 Europe-Asia Studies 3-25 (1995)

an independent state again - territory, population and state power - but the situation, however, was quite different from that of 1940.[13]

While the territory of Latvia, as based on the Peace Treaty of 1920 with Russia and on post-World War I border settlements with Latvia's other neighbors, was intact, one district was missing. The district of Abrene in the province of Latgale, comprising about 3 per cent of the pre-1940 Latvia, had been annexed in 1944 to the territory of the Russian Soviet Federative Socialist Republic (RSFSR)[14]. Apart from this still unresolved dispute, in which Russia strangely claims that the 1920 Peace Treaty "lost its force in 1940 when Latvia became part of the USSR",[15] and some border control problems, Latvia has resumed exercising sovereignty powers over her territory. Russian troups which had "controlled about 850 military facilities including large areas of land and many buildings throughout Latvia",[16] were pulled out of Latvia before August 31, 1994, in accordance with the Treaty on Russian Troop Withdrawal signed in Moscow on April 30, 1994.[17] The remaining active Russian military presence at the Skrunda early-warning radar station will continue until September 1, 1998, with the agreed dismantling of this station scheduled before February 29, 2000.[18]

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[13] See Juris Dreifelds, Latvia in Transition. New York: Cambridge University Press, 1996. ix, 214 p. and Rasma Karklins, Ethnopolitics and Transition to Democracy: The Collapse of the USSR and Latvia. Baltimore: Johns Hopkins University Press, 1994. xxiii, 206 p.

[14] See Dietrich A. Loeber, "The Russian-Latvian Territorial Dispute Over Abrene: A Legacy from the Times of Soviet Rule", 2 The Parker School Journal of East European Law 537-559 (1995)

[15] Loeber, op.cit, p. 537, 549-553

[16] Dreifelds, op.cit. p. 172

[17] See the Latvian text of this treaty and related agreements in 1995 Latvijas Republikas Saeimas un Ministru Kabineta Zinotājs issue 2 no. 25, pp. 166-197

[18] LRSMK Zinotājs, 1995/2 p. 187

Population losses in Latvia from 1940 to mid-1945 were tremendous. From an estimated total population of 2 million in 1939, war casualties, executions, deportations, and emigration had reduced the population to about 1.4 million in 1945.[19] While the Latvians had lost about 300,000 of their own total number by mid-1945, percentage-wise they still constituted around 80 per cent of the country's total population.[20] Post-World War II Soviet reprisals, guerrilla warfare, forced collectivization of agriculture with mass deportations of Latvian farmers in 1949, and the influx of Russian administrators and workers changed the situation dramatically. In 1959, the percentage of Latvians had dropped to 62%, by 1979 to 53.7%, and by 1989 had reached its all-time low of 52%.[21] The Russian share of the population in 1989 was 34%, Belorussian - 4.5%, Ukrainians - 3.5%, Poles - 2.3%, and Lithuanians - 1.3%.[22] During the decades of Soviet rule, large scale immigration into Latvia of Russians, Belorussians, Ukrainians and others was promoted by Moscow to build and operate new Soviet industrial plants whose location in Latvia did not make any economic sense, Latvia not having any appropriate raw materials, nor the required energy resources. This large scale migration was systematically implemented, however, as part of the general Russification policy which not only encouraged these Soviet "internationalists" by preferential treatment for housing and social services in Latvia and Estonia but also "discriminated against local cultures and

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[19] Plakans, op.cit., p. 152

[20] Ibid. p.153

[21] The Baltic States: A Reference Book. Tallin/Riga/Vilnius: Estonian Encyclopedia Publishers/Latvian Encyclopedia Publishers/Lithuanian Encyclopedia Publishers, 1991, at p.92

[22] Idem

languages and favored the Russian language and the Russian-speaking population".[23] Denationalization of the Latvian nation was clearly the aim of these Soviet colonizing policies. Many of the hundreds of thousands of these Russian-speaking immigrants who soon formed majorities in seven largest Latvian cities, including the capital, Riga, considered themselves important elements in this process. They also were considered to be much more loyal to the regime than the Latvians and were expected to watch out for instances of Latvian "deviations" from prescribed politically correct behavior. It was, therefore, no wonder that "Those Latvians harboring any ambitions to advance in their jobs were consciously and subconsciously "leaning backwards" to prove that they were enthusiastic "internationalists", that is individuals devoted to the welfare and dominance of everything Russian and Soviet".[24] Over the decades of Soviet rule, fear had become a daily fact of life and the necessity to lead a "double life" had now become unavoidable. In the mid-1980's, the Latvian nation had reached a point of danger and "was moving inexorably toward that point where national dissolution and extinction could become irreversible".[25] An opportunity to reverse this course of doom and dispair came with Gorbachev's Glasnost and Perestroika. While nobody knew the limits of newly-found freedom of expression, nor the tolerated boundaries of political activity, after the first daringly courageous "calendar demonstrations" in 1987, the population of Latvia lost its

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[23] See Steven Woehrel, "Russians in the Baltic States", 4 Current Politics and Economics of Russia 127-141 at 128 (1996)

[24] Dreifelds, op.cit. p.48

[25] Ibid., p. 50

long-standing fear of the repressive system and joined forces with its Baltic neighbors to begin the struggle for independence and sovereignty lost fifty years ago.[26]

National awakening in Latvia began with dissidents, folklore ensembles and the activities of the small but courageous Helsinki '86 group, supported by the rapidly growing Latvian Environmental Protection Club and the newly formed Latvian National Independence Movement. An umbrella organization, uniting these early activists and others with influential Latvian writers, artists and intellectuals as well as progressive Party reformists was formally established in June 1988 as the People's Front and very quickly became the massive national leading force in the struggle for Latvian freedom. In the elections for the Latvian Supreme Soviet in March/April 1990, the People's Front supported candidates gained a comfortable two-thirds majority. On May 4, 1990, at its first session, the new Latvian Supreme Council adopted the declaration "On the Renewal of the Independence of the Republic of Latvia".[27] The relatively freely elected representatives of the population of Latvia, elected under the Soviet system, had spoken and the final act in the Latvian independence drama had begun. The validity of the Latvian Constitution of 1922 was restored but suspended with the exception of Art. 1, 2, 3 and 6, "until the adoption of new wording of the Constitution".[28] The arduous and complicated

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[26] For a collection of expert discussions in English, French and German of political and legal developments in the Baltic States, see The Baltic Path to Independence. An International Reader of Selected Articles. Ed. by Adolf Sprudzs. Buffalo: William S. Hein & Co., 1994. xvi, 392 p. For a participant's story on the events in Latvia, see Olgerts Eglitis, Nonviolent Action in the Liberation of Latvia. [Cambridge, MA] The Albert Einstein Institution [1993] vii, 72 p. (Monograph Series, No. 5)

[27] For the text of this declaration as read by Deputy Apsitis of the Editorial Commission on BBC May 7 broadcast, see Adolf Sprudzs, "The Rule of Law and the Baltic States" in Bibliothek und Recht - international. Libraries and Law-International. Festschrift Ralph Lansky. Hamburg/Augsburg, 1991. vii, 326 p., at 231-241

process of forming the new State organs started in a situation which was in one respect, not substantially different from that in 1918 - the actual power in Latvia did not yet belong to the Latvians themselves but was in the hands of the USSR representatives. More than a year of dangerous tensions, confrontations, and collisions with some loss of life followed until the fateful coup d'état in Moscow, during which the Latvian Supreme Council resolved on August 21, 1991, "To declare Latvia as an independent, democratic republic, in which the sovereign power of the Latvian State belongs to the people of Latvia and its sovereign state status is determined by the Republic of Latvia's Constitution of February 15, 1922". At the same time, the Supreme Council also declared that "Until the time when the occupation and annexation of Latvia is liquidated and the Saeima of the Republic of Latvia is convened, supreme power is to be executed exclusively by the Supreme Council of the Republic of Latvia. Only the laws and institutions of the supreme power are legally in effect in the territory of the Republic of Latvia".[29] During the following week the independence of Latvia (and Estonia and Lithuania)was recognized by the Russian Federation, Ukraine, Belarus, Georgia and the European Community nations, followed by the United States on September 2, and the USSR on September 4. On September 17, 1991, Latvia took her seat at the United Nations.[30]

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[28] Ibid. p. 237-241 at 239 : Article 1 Latvia is an independent democratic republic. Article 2. The sovereign power of the State of Latvia belongs to the people of Latvia. Article 3. The territory of the State of Latvia, within the boundaries determined by international treaties, consists of Vidzeme, Latgale, Kurzeme and Zemgale. Article 6. The Saeima is elected by universal, equal, direct, secret and proportional ballot.

[29] 44 Jahrbuch des oeffentlichen Rechts der Gegenwart 395 (1996)

[30] Plakans, op.cit. p. 183

Latvia now was an independent state de facto and de jure, fully recognized as such by the international community of nations. The Latvian Supreme Council, while being the highest political authority of the land was, however, an institution of the Soviet period, elected under Soviet rules. Therefore its declaration of August 21, 1991, clearly indicated that the Supreme Council and its appointed Council of Ministers consider themselves to be transitory caretakers until the time when the new parliament, Saeima is elected and convened. This election, however, required the identification of those "people of Latvia" who would have the right to choose this new Saeima under the rules of the 1922 Constitution. After much debate the Supreme Council on October 15, 1991 adopted its "Resolution on the Renewal of the Republic of Latvia's Citizens' Rights and Fundamental Principles of Naturalization" which restored Latvian citizenship to those persons who were citizens of Latvia on June 17, 1940 (the day of Soviet occupation), and their descendants, and established fundamental principles for granting Latvian citizenship through naturalization.[31] In dealing with one of these principles, i.e. - "whether political integration into Latvia had to be a precondition for Latvian citizenship" the Supreme Council "decided that political integration was a necessary precondition, that only people who identified with the independent state of Latvia and its democratic form of government could be offered citizenship. Thus the requirements for naturalized citizenship reflected this logic by encouraging potential citizens to become integrated into Latvia through residence, acquiring basic Latvian language proficiency, acquiring basic knowledge of

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[31] See Inese Birzniece, "Latvia's Citizenship Law: The Politics of Choosing an Identity", American Foreign Policy Interests, December 1995, 10-20 at 11-2

Latvia's constitution, renouncing competing citizenship, and taking a loyalty oath".[32] The Supreme Council did not, however, enact any measures for citizenship through naturalization because of the prevailing opinion that as a transitional body, elected by an electorate which included non-citizens of Latvia, it did not have the required legal authority under the 1922 Constitution.[33] A Law on Residents' Registry was enacted by the Supreme Council on December 17, 1991, requiring all residents of the Republic of Latvia to register and receive a personal identification number, also enabling those who could prove their Latvian citizenship by appropriate documentation to restore their status as such. The combined results of this Residents' Registry showed that on October 6, 1994, 38% of ethnic Russians residing in Latvia (285,314) registered as Latvian citizens; the total number of Latvian citizens (1.75 million of 2.48 million residents) constituting 71%, with 724,000 or 29% of Latvia's residents being noncitizens. The three largest ethnic groups of noncitizens, according to these 1994 data were 466,000 or 64% Russians, 86,000 or 11% Belorussians, and 63,000 or 8.7% Ukrainians. Almost half of the noncitizens (356,000) of Latvia lived in Riga, the capital of Latvia.[34]

On December 10, 1991, the Supreme Council enacted the Constitutional Law on "The Rights and Responsibilities of Citizens and People", thus supplementing the 1922

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[32] Birzniece, op.cit. p. 15

[33] Idem.

[34] Birzniece, op. cit, p. 16

Constitution, in which these matters were not covered.[35] This Constitutional Law is an elaborate formulation and listing of rights and duties of citizens, as well as noncitizens and, while not having the same status as the Constitution, is regarded as an essential part of basic law of Latvia. As for the question of whether and how these rights and duties can be enforced in court, the law does not prescribe a specific judicial avenue for such enforcement.[36] If, however, "review of normative enactments in administrative cases becomes an established competence of the Constitutional Court, it will mark a step forward in setting up a local procedure enabling individuals to base complaints on the Constitutional Act on the Rights and Obligations of Citizens and Persons or a prospective second part of the Constitution. At the present stage, it is worthwhile to point out that the Constitutional Act is a rather precise copy of the European Convention on Human Rights".[37] No actual court cases dealing with these matters are known to this writer to have been adjudicated, and while the Law on the Constitutional Court has recently been passed, the Court itself, at the time of writing has not yet been constituted.

The question of Latvian citizenship was a subject of heated debate in the Supreme Council and in the press in view of the critical demographic position the Latvian nation found itself in 1991, as a victim of Soviet aggression and decades of severe Russification policies. Proposals ranged from granting automatic citizenship to all current permanent

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[35] LRAPV Zinotājs 1991/Nr.415, p. 26 ff.; English text in 44 Jahrubuch des oeffentlichen Rechts der Gegenwart 395-398 (1996), and in International Human Rights Norms in the Nordic and Baltic Countries, ed. by Martin Scheinin, p. 105-110

[36] See Inta Ziemele, "Incorporation and Implementation of Human Rights in Latvia" in International Human Rights Norms in the Nordic and Baltic Countries, ed. by Martin Scheinin, pp.73-110 at 78

[37] Inta Ziemele, op.cit., p.89

residents of Latvia, the so-called "zero-option", to much more restrictive policies of limiting Latvian citizenship only to those persons who had it before the Soviet occupation on June 17, 1940, and their descendents, and extending naturalization to selected others who could be politically integrated over a period of time, so that the majority status of the Latvian nation would not be endangered by massive absorption of non-Latvians. The "zero-option" was supported by political activists in the Russian-speaking immigrant groups and by those who feared an ethnic polarization, while it was opposed by those who thought the independent Republic of Latvia was the only instrument that could save and preserve the Latvian nation, its language, and ancient culture now and in the future. The Supreme Council majority was not in favor of the "zero-option", but considering themselves not legally authorized under the 1922 Constitution to decide on this very crucial problem, remained indecisive, finally leaving it for the next Saeima, to be elected in 1993 as the legitimate highest State power of the independent and sovereign Republic of Latvia, to assume responsibility for this decision. The debate, however, continued with great intensity and involved not only national but also international participants and critics. Russian Federation repeatedly charged Latvia with violations of human rights and discrimination against Russian-speaking inhabitants of Latvia. Visiting groups of human rights experts from the United Nations, Council of Europe, U.S. Department of State, and others repeatedly reported their findings that no such violations or discrimination had been practiced.[38] In the meantime, registration of residents of Latvia continued, establishing at the same time the community of the "people of Latvia", who, as the authentic citizens of

[38] Plakans, op.cit. 190-191; see also sections on Latvia in U.S. Dept. of State's Country Reports on Human Rights Practices for 1992 et seq.

Latvia at the time of the election, would have the right to elect the 5th Saeima, thus being connected legally and symbolically to the pre-war democratic Republic of Latvia. The Supreme Council amended the Latvian Electoral Law of June 9, 1922, by extending the voting rights to persons of 18 years and older, the rights to be elected to Saeima to 21 year olds and set a 4 per cent minimum of votes for parties to reach in order to gain seats in Parliament.[39] 874 candidates representing 23 political parties, groups, and organizations competed for the 100 seats in the Saeima on June 5-6, 1993.[40] The largest number of seats - 36 was won by a group called Latvia's Way, which was a coalition of major popular leaders in Latvian politics with prominent representatives from Latvian exile organizations and communities; followed by seven other parties. The transition period had now ended. A coalition minority government was formed by Valdis Birkavs (Latvia's Way; formerly deputy Chairman of the Supreme Council) with the help of Farmers' Union (12 deputies), and the President of Latvia - Guntis Ulmanis (Farmers' Union; an economist and a grand nephew of Karlis Ulmanis, the last President of pre-war Latvia) was elected by the Saeima, with the generally popular former Communist leader, Anatolijs Gorbunovs (Chairman of the Supreme Council and now one of the prominent leaders of Latvia's Way), elected the President of Saeima.[41] At its first session the 5th Saeima declared that the amended 1922 Convention of Latvia was now fully in force and operational.[42] Among the many pressing tasks the new Saeima and Birkavs' Cabinet of

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[39] LRAPV Zinotājs 1992/Nr.46-49 pos. 590, pp.2389-2397 at 2389

[40] Plakans, op.cit., p. 194 and Dzintra Bungs, "Latvia's Transition to Independence Completed", 3 RFE/RL Research Report 96-98 at 96 (Jan.-1994)

[41] Plakans, op.cit. 196

Ministers had to deal with, two were most urgent and critical: negotiations with the Russian Federation as the successor of the USSR for the withdrawal of Soviet/Russian troops from the territory of Latvia, and the enactment of a citizenship law. Negotiations with Russia had been going on for some time, with the Russian side trying to link the withdrawal of troops to the status question in Latvia of retired Soviet forces personnel, raising charges of mistreatment of Russian-speaking residents of Latvia, and insisting on a continued Russian military presence at the Skrunda early warning radar station. With some considerable pressure from the United States, CSCE, and other interested states and international organizations, both parties were induced to agree on some compromises and the treaty, as reported earlier, was concluded on April 30, 1994. Except for Skrunda, Russian troops left the territory of Latvia before August 31, 1994.

Five different drafts of a citizenship bill (summarized by Birzniece, op.cit.) were considered by the Saeima. Three of them were referred to Saeima committees for analysis and recommendations on September 23, 1993. On November 23, 1993, a plenary debate took place, and in a secret ballot the Saeima voted to adopt (with 53 votes in favor, 28 votes against, and 6 abstentions) the Legal Committee's recommended draft law which had been proposed by the government coalition of Latvia's Way and Farmers' Union.[43] After the first reading, the draft law on citizenship was sent by the Saeima to the Council of Europe and the CSCE for review and comments by their legal experts. As a result of subsequent comments from these and other sources some changes were made, and the

[42] LRSMK Zinotājs 1993/Nr.30 p. 1993

[43] Birzniece, op.cit. 16-18

revised text was adopted after the third reading by the Saeima on June 21, 1994, and sent to the President for his enactment signature. President Guntis Ulmanis returned on June 28, 1994, the Law on Citizenship to the Saeima for reconsideration of several points, including proposed percentage quotas (opposed by international experts) which were reviewed and eliminated by the Saeima on July 22, 1994, and the President then finally signed the Law on Citizenship on August 11, 1994.[44] Some amendments were made on March 16, 1995, exempting certain categories of people from the naturalization process, thus significantly reducing the number of naturalization applications received.[45]

After settling the citizenship dilemma, which, of course, did not satisfy all parties but provided a modus vivendi in the present situation, the Saeima could finally turn to the problem of the status of aliens in Latvia. The long-awaited law on the Status of Former USSR Citizens Who Do Not Have Citizenship of Latvia or Any Other State was enacted on April 12, 1995, giving "legal status (equivalent to permanent resident status) to most noncitizens (former Soviet citizens) residing in Latvia (as of July 1, 1992) but who were born in or entered Latvia after June 17, 1940, if they do not have Russian citizenship or that on any other State. Such persons will be entitled to receive a Republic of Latvia passport, which will be a valid travel document giving the holder the right to reenter Latvia without a visa. The law also includes demobilized Soviet/Russian armed forces personnel and their family members if they were demobilized before January 28, 1992 (the same date as that cited in the Latvia-Russia troop withdrawal agreements signed on April

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[44] Ibid. p. 18-19; Latvian text in LRSMK Zinotājs 1994/Nr.17 pp.1499-1509

[45] Birzniece, op.cit 18-19

30, 1994)".[46] With this determination of the status of noncitizens and of retired Soviet army personnel, one of the last major contentious and unregulated population problem did receive a legal solution. The citizens and noncitizens of Latvia could now focus their attention not so much on their past and still existing ethnic differences and potential conflicts, as on the necessity to work together for their common interests as a territorial community, honestly striving to become a united political community as well in a sovereign and democratic Republic of Latvia.

There are some tentative indications that the situation is slowly but steadily changing from an obvious confrontation of the two groups in late 1980's and early 1990's to that of a tolerant coexistence. While the reality of no drastic political changes in the near future is gradually sinking in for activists of all shapes and convictions, cooler heads are beginning to present arguments emphasizing the necessity and benefits of cooperation for the common good. Academic research projects have shown that in the last 4-5 years the views of Latvians and Russians have become more identical on a number of issues. Thus, for example, in a substantial report on large in-depth surveys conducted during the period 1988-1994, some dealing with "Civic Consciousness in Post-Communist Latvia" [and related issues], Brigita Zepa, a leading Latvian sociologist, has found that "Considerable changes have occurred in four years time in the citizenship orientation of the non-Latvians. If in 1990 only 40 per cent of non-Latvians wished to obtain the Latvian citizenship, then in 1994 approximately three fourths of Russians and two-thirds of the other non-Latvians have obtained or are planning to obtain Latvian citizenship, but

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[46] Idem.

only some 10 per cent do not want to obtain citizenship or are yet undecided. The results of the survey show that, in many cases, the sense of citizenship of the non-Latvians has approached that of the Latvians. This process is enhanced by the opinion of non-Latvians that Latvia will develop both economically and politically more successfully than Russia. Also, the number of non-Latvians (now there are more than half of them) who strictly support Latvia's independence (both currently and in the future) has increased considerably. The idea of motherland has also developed: more than half of the non-Latvians consider Latvia to be their motherland".[47] Academic discussions have been held in late 1995 and early 1996 on the subject of developing a political nation in Latvia, the national processes in Latvia, and the political nation and ethnological strategy in Latvia, involving prominent scholars from the Latvian Academy of Sciences, the University of Latvia, as well as political figures and journalists.[48] Comparisons were drawn with the experience of developing a political nation in the USA, the need for the psychological readiness to integrate within such community on the basis of tolerance and respect of democratic principles and practice, as well as direct references to the situation in Latvia between 1918 and 1940.[49] One of the concluding thoughts was that "The issue of the emergence of a political nation is linked to the consolidation of a new national identity and

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[47] Brigita Zepa, "Valsts statusa maina un pilsoniská apzina" [translated by the author as "Civic Consciousness in Post-Communist Latvia After Regained Independent Statehood, 1991-1994"], in Latvijas Zinátnu Akadémijas Véstis - A, {Humanities/Sociology] 1995, Nr. 7/8:31-44 at 44

[48] See "Politiskás nácijas veidosanás Latvijá" in Latvijas Zinátnu Akadémijas Véstis {Texts of seven lectures] 1995, Nr. 11/12: : 38-48; and The Newsletter of the Latvian Center for Human Rights and Ethnic Studies, Nr. 7 (March 1996):10-12

[49] Discussed by historian Dr. Leo Dribins in the 1995 seminar, see reference in footnote 48, pp. 42-22

Latvia's progress towards a modern European society".[50] It was also agreed that a political nation could be multicultural and multiethnic (as in Latvia) but needed consensus on independence of the state and basic democratic values. Latvian and non-Latvian views have grown closer during the last few years in these matters. The existing differences of views and convictions will continue for a long time but mutual tolerance seems to be improving, dictated by the realization that no dramatic changes or miracles (such as the willingness of the more developed nations in the West to help Latvia by accepting as immigrants a portion of those Soviet-era settlers who would like to leave Latvia) are not going to happen. Many of those Russians and their descendants who are Latvian citizens have ties to Latvia which in some cases go back several centuries. Many others are related to Latvians through mixed marriages[51] and long-standing friendships. Others have been born in Latvia and consider Latvia their motherland. These and similar factors explain the fact that despite the recognized cultural and other differences , Latvians and the Russian-speaking non-Latvians (majority of whom are Russians) have managed to ignore various attempted provocations by extremists on both sides and are gradually moving towards a democratic and civil territorial community in which the rule of law and mutual respect is not the exception but the accepted norm.

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[50] Ibid. p. 48

[51] See Iveta Pavlina, "Ethniski jauktas laulības Latvijá", in Latvijas Zinátnu Akadémijas Véstis - A [Humanities/Letonica:Ethnography] 1995, Nr.11/12:55-60. The author establishes, among other things, that in the former USSR Latvia was in the first place with her number of mixed marriages; that every fourth marriage in Latvia is a mixed marriage, that every third Russian and every fifth Latvian is marrying a partner of a different ethnic group - see pp. 55 & 56, etc.

Latvia has been striving to become an integral part of Europe and a member of its intergovernmental organizations. These efforts have been largely successful and in many ways have directly influenced legislation and decisions made by the Cabinet of Ministers. Developments in Latvia since the early '90's have been carefully watched and monitored by a number of intergovernmental, international and non-governmental organizations, which have also offered their financial support, expert advice, as well as criticism. In late 1992, the United Nations Development Programme established a country office for Latvia in Riga, whose mission "is to help Latvia develop its capacity to achieve sustainable human development, giving top priority to supporting Latvia's transition to a democratic civil society based on the rule of law. It has also emphasized the need to address the human and social aspects of transition, as well as public administration reform".[52] The UNDP Latvia has also "assisted in developing the National Programme for the Protection and Promotion of Human Rights, the National Programme for Latvian Language Teaching, and a carefully designed strategy for implementing what is perhaps the most comprehensive social welfare reform programme in Central and Eastern Europe".[53] In addition, the UNDP Latvia is involved in some thirty other projects, among them the preparation and publication of the substantial and very informative annual Latvia. Human Development Report in English and Latvian.[54] As a result of an international mission to

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[52] See UNDP Riga office one-page information flyer [1996]

[53] Idem

[54] The 1995 (first) and 1996 reports, prepared by a large team of Latvian experts, specialists in different fields, with Dr. Nils Muiznieks as the Editor-in-Chief, deal with the major problems Latvia is facing in the transition from a traumatized former Soviet colony to an emerging civil society, trying to build an

address the human rights situation in Latvia in mid-1994, which was led by the UNDP and included representatives of the Conference on Security and Cooperation in Europe - CSCE (now the Organization for Security and Cooperation in Europe - OSCE) and the Council of Europe, a proposal was made for the establishment of an independent body to facilitate and promote knowledge of human rights in Latvia, to provide advice and support for vulnerable groups and to investigate complaints. In consultations with the Government of Latvia the National Programme for the Protection and Promotion of Human Rights in Latvia was initiated in early 1995[55] and later followed by the establishment of the Latvian Human Rights Office by the Cabinet of Ministers "through a special procedure under Art. 81 of the Constitution".[56] The Latvian Human Rights Office has been operating since late 1995 under the special regulations of the Cabinet of Ministers, is financially supported jointly by the Government of Latvia, the UNDP and the governments of Finland, the Netherlands and Sweden[57] and is gradually and noticeably increasing its scope of activities and impact.[58]

The Organization for Security and Cooperation in Europe, as a regional arrangement under Chapter VII of the Charter of the United Nations (apart from its other

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independent, democratic state. These UNDP reports are available from the UNDP Latvia office - Skolas ielá 24, Riga LV-1167, Latvia, as well as from the Internet.

[55] See UNDP Project Brief "Capacity Development of the Latvian Human Rights Office", LAT/94/010, p.1; the Latvian text of the program ' "Latvijas Valsts cilvéktiesību aizstávības un veicinásanas programma" was conceptionally confirmed by the Cabinet of Ministers on January 24, 1994

[56] See UNDP Project Brief, p.1

[57] Ibid., p. 3

[58] See the Latvian Human Rights Office reports for the first and second quarters of 1996 (available in Latvian and English), as well as its various opinions rendered on specific subjects and cases. The Latvian Human Rights Office can be contacted by e-mail: vcba com.latnet.lv or fax: 371-7244074.

functions) "has been established as a primary instrument in the OSCE region for early warning, conflict prevention and crisis management in Europe" and does have an OSCE Mission in Latvia[59] performing vital and delicate tasks. It works closely with the Government of Latvia but only general information on OSCE activities is made public.

Apart from the UNDP and the OSCE, other intergovernmental organizations also are active in Latvia; there are the international and national non-governmental organizations, the NGO's. According to the UNDP 1996 report on Latvia, the growth of NGO's has intensified in recent years but exact information of their number, size and structure is not available. Estimates range from 1200 to 1500 NGO's, with a total membership that can only be guessed. A survey being conducted by the Latvian Ministry of Welfare and the UNDP suggests that "most NGO's focus on issues related to children, poor families, pensioners and the disabled, and that their most significant functions are education, information, consultation and the distribution of humanitarian aid".[60]

One independent, non-profit organization, established in December 1993, and initially funded by the Soros Foundation's Higher Education Support Program, is the Latvian Center for Human Rights and Ethnic Studies, headed by a young "repatriated" Latvian political scientist from California, Dr. Nils Muiznieks. Its activities are centered on the compilation and distribution of information and education with the aim of

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[59] See the OSCE Fact Sheet, p.2

[60] See UNDP Latvia. Human Development Report. Riga, 1996, p.95

"promoting the observance of human rights and harmony between the various ethnic communities in Latvia".[61]

Foreign financial sources have also been a significant factor in the birth of a new academic journal on human rights in Latvian - Cilvēktiesibuu zurnáls, published by the Institute on Human Rights of the University of Latvia Faculty of Law.[62] This new human rights quarterly, various conferences and public lectures, as well as numerous courses involving human rights, offered by the University of Latvia, Riga Technical University and other institutions of higher learning indicate the perception of the importance of human rights in a democratic Latvia. The totalitarian past which was saturated by lofty slogans on human rights without any practical content of reality has left a legacy of cynicism and mistrust that will be difficult to overcome. As the examples mentioned show, a beginning, however, has been made.

Returning now to the government structure in Latvia, space allows only brief remarks on local self-government. Under the Soviet regime "Latvian local government had operated much as it did throughout the communist world, functioning essentially as an appendage of the central government and subject to the dictates of the communist

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[61] See The Newsletter of the Latvian Center for Human Rights and Ethnic Studies, Nr.2, June/July 1994:1. The Newsletter is available in Latvian, English and Russian.

[62] The recently published second issue (1996) of the Cilvēktiesību zurnals [Human Rights Quarterly] is devoted to the Initial Human Rights Report of Latvia submitted to U.N. Human Rights Commission on the implementation by Latvia of the International Covenant on Civil and Political Rights, as well as comments and additional material. This 1994 report is now made available to the public for the first time; it is also the first such document submitted by Latvia on the implementation of any multilateral convention in force and binding for Latvia.

party."[63] It was a completely centralized system which had to be changed as quickly as possible, to keep pace with the massive movement toward independence. This process of change has been going on since the local elections of 1989 and 1994 as part of the constitutional reform and is continuing at the time of writing.[64] According to the present arrangements, there are in Latvia 600 territorial units which have local self-government: 26 districts and 7 major cities, with the districts subdivided into 492 rural communes and 69 district town territories. Capital city Riga has its own territorial arrangement with six administrative subdivisions.[65] 406 of these 600 territorial self-government units have less than two thousand inhabitants, including 157 local government territories which have even less than one thousand people.[66] Under the centralized totalitarian system when everything was decided, directed and financed "by the Center", this was workable and "efficient". Now there is a sort of "tug-of-war" going on between the various representatives of the local self-governments and the central administration in Riga. Various government conceptions and other reform proposals are being debated, all trying

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[63] See "Local Democracy Building in Latvia", by John Greenwood, Richard Haslam, and Charlie Balsom, 42 Administration 211-224 at 214 (Summer 1994)

[64] See Edvins Vanags, "Development of Local Self-Government in Latvia", 1994 (1/2) Humanities and Social Sciences, Latvia issue "On the Way Toward Democracy", pp.38-48; for reforms and legislation in the period 1989-1993 see "Local Democracy Building in Latvia" just mentioned in footnote nr.63; for an analysis of the 1994 local election results, see Dzintra Bungs, "Local Elections in Latvia: The Opposition Wins", RFL/RL Research Report, vol. 3, no. 28:1-5 (15 July 1994); see also a general discussion of local self-government in Latvia and its possible reforms in Pasvaldības Latvijā, [Riga, Izdevējs Izglītiba, 1994] 35 p. (Politikas burtnicas, Nr. 1); and a discussion of constitutional reform proposals to strengthen the rights of local self-government by Māris Pūkis, "Satversmes grozījumu priekslikumi pasvaldību tiesību nostiprināsanai" in Satversmes reforma Latvijā: par un pret [Constitutional Reform in Latvia: For and Against], Ekspertu seminārs, Riga, 1995 g. 15. jūnijs. [Riga] Sociāli economisko pētījumu institūts "Latvija" [1995] 95 p. at 75-86

[65] See Pasvaldības Latvijā p.12

[66] Idem

to find a better distribution of rights, responsibilities and financial sources. The 1922 Constitution of Latvia mentions local self-government only once - in art. 25 which establishes the right of the Saeima to demand data and explanations from ministers and local self-government units. The prevailing view is that the local self-governments are subordinated to the Cabinet of Ministers in the same way as all the administrative agencies of central government.[67] This situation seems to be in direct contradiction with the principles of the 1985 European Charter on Local Government. Reform is still debated but is coming.[68]

Legal reforms aiming in some measure toward a state that would be based on the rule of law were initiated already in 1988. They gradually became more assertive, even in the framework of the USSR, and culminated in the Declaration of the Independence of Latvia on March 4, 1990.[69] The pace of reform legislation quickened, of course, after the collapse of the USSR in 1991. The Latvian legal community played a very important role in these developments. The judicial system as such was, however, as unprepared to assume an appropriate role in a democracy as were the other two branches of government, if not more so. A new Law on the Power of the Courts was adopted on December 15,

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[67] See Māris Pūkis, op.cit., p. 78

[68] The Cabinet of Ministers agreed in May 1996 on the local self-government reform conception which aims at decentralization and projects more efficient arrangement of territorial self-government units and their financial support. There is opposition to government plans among representatives of local government and members of Saeima.

[69] For a description and analysis of these early years of the struggle for the independence of Latvia by an important participant, see Tālavs Jundzis, "Tiesību reformas un to loma Latvijas neatkarības atjaunosanā, 1988. gads - 1990. gada 4. maijs", Latvijas Vēstures Institūta Zurnāls, 1995 Nr. 1 (pp. 121-142) and Nr.2 (pp. 132-152), with a summary in English "The Reforms of Law and Their Role in the Resumption of Independence of Latvia" (1988 - May 4, 1990). Dr. Jundzis was a Minister for Defense of Latvia, 1991-1993.

1992 by the Supreme Council of the Republic of Latvia,[70] establishing the principle and guarantee of independent courts of law, the inviolability of judges, etc.[71] The judicial system of Latvia was subsequently reorganized into three levels of courts: the district courts or municipal courts, the regional courts and the Supreme Court.[72] This reorganization affected the regular flow of court proceedings, dictated considerable changes in the positions and the number of judges and support personnel, and presented multiple difficulties. Shortage of fully qualified judges who would fulfill all the demands of the new democratic order, would be committed to independent Latvia and its Constitution, has been difficult to overcome. A Government report, covering August, 1994 to August, 1995, indicates that in the 39 district (or/and municipal) courts there were positions for 219 judges, of which 15 positions were still vacant and for additional 11 places candidates were being considered; the five regional courts had 49 positions for judges, for which only 33 judges had been appointed and confirmed, with the worst situation in the eastern region of Latgale which still needed seven judges for its regional court.[73] To help improve the professional education quality of judges, a Judicial Training Center was established in April 1995, in cooperation with and support of the Latvian Judges Association, Central and East European Law Initiative of the American Bar

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[70] LRAPV Zinotājs Nr. 1/2 January 14, 1993, pos. 15, pp.74-104

[71] For a brief analysis of this law see Gvido Zemribo, "The Judicial Power of the Courts in Latvia" in 1994 (1/2) Humanities and Social Sciences, Latvia issue "On the Way Toward Democracy" pp.29-37; now Ambassador of Latvia to Denmark, Justice Zemribo was Chief Justice of the Latvian Supreme Court at the time and also chaired the commission that prepared the law

[72] Ibid. p. 34-35

[73] Valdības darba gada pārskats - No 1994. gada augusta līdz 1995. gada augustam {Riga, 1995} at 158-159

Association, Soros Foundation, and the United Nations Development Programme.[74] The Judicial Training Center offers twelve-week long professional courses for new judges, has presented a workshop on "Judicial Independence and Separation of Powers" for government officials, and is offering assistance for a project to computerize Latvian courts. Judges appointed to the recently established regional courts[75] often have little, if any, experience necessary and appropriate for their new functions which include the handling of appeals. The Judicial Training Center has also offered training to such judges "in areas such as appeals procedure, arbitral principles, civil procedure, and privatization,"[76] and is helping to slowly raise the level of judiciary competence in Latvia. The higher courts have access to computers and the general availability of legal information is improving. Court housing facilities and adequate financial support for the courts in many cases are still problems waiting for solutions. Transition from the "simplicity" of courts in the totalitarian past to a system that would be compatible with the principles and practices of a democratic state, has proven to be (as elsewhere) very difficult, time-consuming, and complicated. Nevertheless, Latvian Government has chosen the difficult road to Europe, and, since the Declaration of Independence on May 4, 1990, has stated its adherence to 51 international conventions in the field of human rights, assuming various legal obligations implied in them.[77] Comparison and harmonization of

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[74] Idem.; see also ABA Central and East European Law Initiative, 1995 Annual Report, p.21

[75] According to the quoted Latvian Government report, the five regional courts began their work on March 31, 1995

[76] See ABA CEELI Update, vol. 6 no.2, p.10 (Summer 1996)

[77] See Egils Levits, "Cilvéktiesības un pamattiesību normas un to juridiskais rangs Latvijas pasreizéjá tiesību sistémá [Human Rights and Basic Rights and Their Legal Rank in the Present Legal System of

the existing national legislation with these international obligations is now an urgent task, especially since 1995 when Latvia joined the Council of Europe and became an associated member of the European Communities, which, of course, involves additional legal duties. Of special significance is the European Convention on Human Rights which Latvia has signed but not yet ratified. It is clear that judges of the Latvian court system must become familiar with this and other international agreements which impose specific legal obligations on Latvia, especially in the field of human rights, so that correct interpretations as well as methodology in court decisions are made.

After protracted discussions, projects and deliberations, which began already in the late 1980's, the 6th Saeima, elected in late 1995, finally established the Constitutional Court of Latvia. On June 5, 1996 the Law on the Constitutional Court was passed, and on June 12, 1996 the new text of Art. 85 was adopted as an amendment of the 1922 Constitution.[78] The Constitutional Court of Latvia will consist of seven judges, appointed for ten-year terms by the Saeima, will examine the constitutionality of laws, international agreements, regulations and decisions of Saeima and the Cabinet of Ministers, and handle other matters designated for its competence by the law. The text of the Law states that cases can be brought to the Constitutional Court by the President of Latvia, the Saeima (one third of deputies), the Cabinet of Ministers, the Supreme Court, the general

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Latvia], manuscript for an article, forthcoming in Juristu zurnáls; Hon. Egils Levits, now a judge from Latvia on the European Court of Human Rights, played an important role as a Western legal consultant during the struggle for the independence of Latvia, was the first Latvian Ambassador to Germany, a Minister of Justice, and then again Latvia's Ambassador to Austria, Switzerland and Hungary

[78] LRSMK Zinotájs, Nr. 14, pos. 407:1650-1663, 1996. gada 25. júlijá

procurator, and the council of a local government.[79] Individuals do not have this right directly. Of the seven judges to be confirmed by the Saeima, three come from candidates nominated by the Saeima, two - from the Cabinet of Ministers, and two from candidates nominated by the Supreme Court. At the time of writing, in late October 1996, candidates for the Constitutional Court have been nominated but no action by the Saeima has been reported on this important new constitutional development.

Summarizing the major constitutional developments in Latvia since May 4, 1990, it can be stated that the process of transition from totalitarian Soviet regime to a fledgling parliamentary democracy seems to have worked peacefully and reasonably well in Latvia. There have been some ethnic tensions and individual cases of administrative discrimination, but repeated international investigations of alleged regular human rights violations have found no evidence of such regular violations. Establishment of an independent Latvian Human Rights Office, the growing activities of international and national non-governmental organizations, and the forthcoming role of the newly established Constitutional Court of Latvia are significant factors for guaranteeing future positive developments in this area. The period of pre-war Latvian independence from 1918-1940, the fact that the Soviet annexation of Latvia had not been recognized de jure by the Western powers, and the still living generation of multiethnic citizens of Latvia who remember those years with affection and personal attachment, - these were very important elements influencing the decision to restore an independent Republic of Latvia (and not to establish a new "second Republic", with all its residing inhabitants automatically becoming

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[79] Ibid., Art. 17

citizens). The full re-instatement of the 1922 Satversme (Constitution of Latvia) was after that a logical legal consequence. This 1922 constitutional document, while lacking a section on individual rights and duties, has been generally recognized as a stabilizing factor internally, preventing potential conflicts between different branches of state power, and has also been a positive element for Latvia's image abroad. The Latvian Satversme does have the aura of the idealism and democratic convictions of the members of the Constituent Assembly of 1920 who were elected by the whole nation and were truly representative of the population, including all minorities of Latvia at that time. It has now served well as the undisputed guide for a functioning parliamentary democracy of Latvia. A major shortcoming of Satversme is the missing second part on civil and political rights of individuals, on which the Constituent Assembly failed to agree in 1922. The need for this amendment to the Constitution is widely recognized in present-day Latvia, and is being debated by the public, the experts, and the Saeima committees. The 1991 Constitutional Law on the Rights and Responsibilities of Citizens and People, intended and largely considered as an effective supplement to the Constitution, actually is only an ordinary law, without any special status, and may have already been superseded in some matters by later legislation. Latvia's new international obligations on her road to Europe, as well as the multiethnic mix of her population require constitutional clarity. The complexities of this and possibly other changes of the Satversme must be faced and solved by the political forces in the Saeima as important and urgent priorities.

The Latvian "singing revolution" with its hundreds of thousands of enthusiastic participants opened the gates to the road for the restoration of a parliamentary democracy

in Latvia. In five years of independence the political structure and processes for a democratic Republic of Latvia have been engineered and built, following the principles prescribed by the 1922 Constitution of Latvia. During these five years, Latvia has faced tremendous political, economic, and social difficulties, including the "to be or not to be" crucial negotiations on Russian troop withdrawal, the practical collapse of the empire-orientated mass production industries, some very severe banking crises, and the most complicated problem of Latvian citizenship and the status of the multitude of Soviet-era settlers.

The first phase of "institutional engineering" in Latvia appears to have worked reasonably well. The formal democratic structure and processes have been put in place. Numerous political parties have emerged, although only a few of them can really be considered similar to the traditional political parties as they are known in the West. The parliamentary elections have been free and democratic, but resulting in a divided parliament in which only coalition governments can be formed. The process of political self-definition is still continuing, and is affecting the chances for stable long-term economic and political planning. Participation of the population in the processes of government, while very active in the early years of independence and the 1993 parliamentary elections, has diminished considerably in the following years. Ordinary citizens have doubts as to the quality and trustworthiness of their political representatives. Mistrust and cynicism about the political processes is widespread. To quote Professor J. Penikis, a political scientist from Indiana, University who recently returned from a Fulbright teaching assignment at the University of Latvia:

> "The bad news, in essence, comes down to attitudes - to the way the current leaders think of their own role in Baltic politics and to the perceptions that the rest of the citizens have of their leaders. The role model for far too many Baltic politicians still is the Communist Party apparatchik - with one important qualification. The latter is that the current politicians do realize they first have to get themselves elected to become apparatchiks. But once elected, they tend to revert to the type. Big, black cars, personal body guards; secretive little cliques, insider trading of favours - all these are only surface marks. The more serious malady is the apparent immunity political leaders enjoy against social pressures that originate outside their own closed circuit. The Baltic press publishes disclosures of official misconduct and malfeasance that would end the political career of a minister, if not the entire cabinet, in a Western democracy - and nothing much happens. The offending apparatchik accuses journalists of smearing his or her name, the protective clique moves in, and the press moves on to another sensation of the day. ... Much of the public trust and respect that the leaders of the independence movements enjoyed has been replaced by cynicism and a sense of helplessness.[80]

This "cynicism and a sense of helplessness" is, to a large degree, a legacy of the totalitarian past, when the "learned helplessness"[81] was created and fostered by the political, economic, and social realities of the Soviet regime. This feeling of a gradually imposed, almost total mental dependence on the state, which itself was corrupt at all levels, is today an inheritance that only time and special efforts can heal. As a noted Canadian-Latvian psychiatrist, who has studied the mentality distortions of the post-empire "homo sovieticus", has said: "Realistically, the process of recovery will be slow because people's personalities and psyches cannot be rebuilt like brick buildings".[82]

The gap between the ruling elite and the population, if compared to the critical years of the struggle for independence, has widened significantly, despite the loudly professed declarations of equality and democracy. Rhetoric seems to dominate over the efforts to improve reality. While prosperity for a few has arrived with miraculous speed and abundance, the standard of living for a large majority of the population has declined dramatically. When the problem for many is simple survival, there is little inclination or time for acquiring knowledge about lofty principles of human rights, for the learning of

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[80] Janis Penikis, "Five years of independence"The Baltic Times, October< October 10-16, 1996, p. 23

[81] Discussed in the chapter on "The Emergence of Civil Society" in the 1995 UNDP Latvia. Human Development Report, as well as in the 1996 report

[82] See Voldemars Gulens, "Distortions In Personality Development In Individuals Emerging From a Long-Term Totalitarian Regime", 26 Journal of Baltic Studies 267-284 at 284 (1995)

democratic skills, or for participation in the building of civil society. Transition from a totalitarian to a democratic society takes time, requires a lot of determination and effort, and is costly for most participants.

The re-building of democracy in Latvia has begun. The necessary structures and processes, enabling the formal functioning of a democratic order, have been established. More time and substantial effort is needed to fill this new democratic structure with genuine democratic content. "International engineering" will not be fully successful until a concurrent and really effective "human engineering" produces this essential content.

(10)

Consolidation of Democracy in Lithuania

Nida Gelazis

Constitutional Design

I. Lithuania's "Legal Path"

The adoption of the 1992 Constitution represented the penultimate step in what Vytautas Landsbergis has often called Lithuania's 'legal path to independence.' The 'legal path' was chosen not only because of its peaceful, democratic qualities that were believed to be necessary to gain Western sympathy and support. It might be argued that this method was not chosen at all, but was in fact the only hope for independence. Current MP and former Constitutional Court justice, Stasys Staciokas, recalled that the 'legal path' was borne out of the realization that Moscow was more inclined to give into requests supported by legal reasoning. Therefore, by persuading Soviet legal experts and communist bureaucrats to enter its ranks, the Sajudis Popular Front was able to effectively force its independence goals using the routine procedures and tactics to extract services from the central government in Moscow. With this in mind, the sequence of events leading to the adoption of the Basic Law in 1990 can be seen as deliberate and tactical.

After Mikhail Gorbachev's introduction of the glosnost program the Sajudis Popular Front was created. By deleting Art. 6 (which granted the Lithuanian Communist Party primacy) from the LSSR Constitution, the Supreme Soviet opened the door for Sajudis members to run for office in what became the first multi-party elections of December 1989. When Gorbachev visited Vilnius in January 1990 and met with the new Sajudis majority in the Supreme Council, he also adopted legal tactics when attempting

to slow down the independence process. Gorbachev promised to consider amendments to the USSR Constitution that would allow the eventual secession of Soviet republics from the USSR. But Sajudis leaders found another way. By arguing that Lithuania's inclusion into the USSR Constitution was the result of a secret pact between Hitler and Stalin (which had been long declared illegal by the international community) Sajudis leaders asserted that the Soviet Constitution does not apply to Lithuania, and any amendments made to the Soviet Constitution would be irrelevant. This led the way for the Sajudis majority in the Supreme Council to pass the declaration of independence on March 11, 1990. In order to formally bridge the 50-year gap between the internationally recognized constitutional democracy that existed during the inter-war period, Sajudis leaders immediately reinstated the 1938 Constitution (the last of three constitutions adopted during the 22-year inter-war independence period). There were two reasons why the symbolic re-adoption of the pre-WWII Constitution was important. First, after its declaration of independence, no influential Western democracy acknowledged the Republic of Lithuania. Therefore, Lithuanian leaders continued to work as they had, making sure that no legal loophole remained which Moscow might find to draw Lithuania back into its net. Secondly, by cooperating with the Sajudis movement, the Lithuanian Communist Party had not lost its public credibility or democratic viability and therefore might have insisted on retaining the Soviet Constitution as the basis for an independent "Lithuanian Soviet Republic." Sajudis needed to assure the West that it was determined to create a liberal democracy in Lithuania. Less than one hour after the reinstallation of the 1938 Constitution, the Supreme Soviet adopted the Provisional Basic Law, which served as an interim constitution for nearly two years. In an effort to avoid

calling new elections and to maintain the stability of the current government, the Basic Law resembled the Lithuanian Soviet Constitution in its provisions concerning institutions and power structures.

II. Drafting the Constitution

As early as November 7, 1990 the presidium of the Supreme Council formed a special constitutional committee to come up with a "constitutional concept" which was to serve as the basis for future constitutional drafts and debates. Besides inviting Supreme Council deputies, the presidium also brought in legal specialists from outside the legislature and soviet judiciary to participate in the committee. Attendance lists include deputies, representatives of the Procuracy, the Cabinet of Ministers, Intellectuals from universities and research organizations, and other members of the judiciary. Although a December 31, 1990 deadline was given by the presidium, the document produced by the working group, called the "concept sketch," was finally presented to the Supreme Council on April 25, 1991.

The sketch served not only as the blueprint for future constitutional drafts, but also predicted which constitutional issues would be the most contentious. The committee members attempted to produce a single constitutional concept from the three constitutions adopted during the inter-war period. This was a formidable task considering that the 1922 constitution created a super-parliamentary system and the 1938 constitution super-presidential regime. Obviously, behind the mechanical changes that were written into each constitution of inter-war Lithuania lie conflicting ideological influences. The 1922 constitution in many ways resembled the French parliamentary

system, while the 1938 constitution was a Lithuanian version of fascism. The evils of re-adopting either alternative were obvious to everyone, but the necessary compromise seemed to elude everyone.

A. The Legacy of Inter-war Lithuanian Democracy

The 1922 constitution granted the Seimas extensive powers. Besides being the sole law-making body in the government, the parliament was required to ratify nearly all international treaties, as well as declare war or peace. The Seimas was given the right to elect the president and control the Cabinet of Ministers (p.40-41), as well as the opportunity to dismiss either by a vote of two-thirds. In contrast to other parliamentary systems, the president could dissolve the Parliament but was required to resign as soon as a new assembly was elected. Although the president was given decree power, all presidential acts required the counter signature of the prime minister. The Seimas's monopoly of power was absolute, and since no provision had been made of how to arbitrate disagreements between the branches of power, the inherently suicidal regime toppled quickly.

The next inter-war constitution was adopted in 1928. To a great extent, the 1928 constitution resembled its predecessor, but with a few minor changes. The president was given legislative power in between Seimas sessions, without the condition that the parliament ratify those laws once its session reconvenes. This constitution also creates a vehicle for arbitrating disagreements between the branches in the form of holding referenda. Unlike the 1922 constitution, the 1928 basic law required public ratification within ten years of its adoption. The combination of giving the president legislative powers in the absence of the Seimas and the ten-year trial period for the constitution

resulted in an extraordinary regime: for the next eight years, the president ruled, in line with the constitution, by not only fulfilling the duties given to the president but, since he never called parliamentary elections, he performed the duties of the parliament as well. When the Seimas was finally elected, the constitution was thrown out.

In what was probably an effort to constitutionalise the inevitable, the 1938 constitution formally instituted a presidential system. Like the 1928 constitution, the new constitution extended the terms of both the Seimas and the president from three years to five. The directly-elected president had the right to dissolve the parliament, but the Seimas could dismiss neither the president nor the cabinet. The Seimas and the president were given legislative powers, but all Seimas laws needed to be promulgated or vetoed by the president. Referenda were employed once again to arbitrate disagreements between the branches as well as ratify constitution amendments. In order to institute a certain amount of longevity to this basic law, more complicated amendment procedures were adopted.

B. The Constitutional Concept Sketch

The tenacity displayed during Lithuania's fight for independence was once again displayed by the committee in attempting to fulfill Sajudis's promise of reinstating inter-war democracy. Despite the unfeasible task of meshing the three constitutions of Lithuania's "glorious past" the constitutional committee was committed to produce the missing link of the country's constitutional evolution. With all the options it had to choose from, the committee decided to create an essentially parliamentary system, but stressed the importance of checking the Seimas's power. In those instances where no consensus was reached in the committee, the sketch included alternative projects next to

the contested articles. The Seimas was deemed the sole legislative power, responsible for adopting the tax code, state budget, and creating local administrative territory units. It would hold a vote of confidence in the president's choice for prime minister and cabinet, as well as other president-appointed offices. The Seimas could be comprised of 99 or 141 deputies, for a term of either four or five years. No provisions to dissolve the Seimas were included. A Seimas-elected president was offered as an alternative project to a directly elected head of state, although the sketch did include a provision to allow the Seimas to impeach the president. The president was given the power to appoint the prime minister, promulgate or veto Seimas adopted laws, call Seimas sessions, deal with foreign policy issues with the help of the foreign minister, declare states of emergency (with Seimas approval), and decree power with approval from the prime minister. The cabinet of ministers was put under the control of the Seimas. Like the 1938 Constitution, the committee's sketch included complicated constitutional amendment procedures, requiring that a referendum be held in order to changes certain articles.

The committee's most drastic departure from the inter-war constitutions was in its chapter on the judiciary. Throughout the inter-war period, the courts were seen as secondary to the task of governing. The thought that the courts could arbitrate during conflicts between the other branches had never before been considered. The sketch created the institution of a constitutional court, consisting of nine judges, for the sole purpose of guaranteeing that the constitution would be correctly implemented by the president, cabinet, parliament, and other courts.

When the committee presented its concept sketch to the Supreme Council in April, 1991, many articles were vague and incomplete. However, it is impossible to

dismiss the document entirely. Firstly, it is important to note that a parliamentarist system was favored by a committee that was not purely comprised of Council deputies. Secondly, the Constitutional Court as well as the new importance given to the judiciary in general may have never been discussed. Finally, no matter how superficial the link to the past was, a conceptual sketch which included references to the inter-war constitutions was as important to the new Lithuanian nation as those articles which would make the new constitution viable 50 years later. Without those links to the past, the constitution may not have been accepted during the referendum vote.

C. Two Constitutional Drafts

Eight months passed after the conceptual sketch was delivered to the Supreme Council and the Constitutional Commission was formed. Although the Supreme Council successfully led the country through the Soviet economic blockade and Soviet tank attacks, it never learned to function effectively as a parliament. The newness of democracy, the inexperience of the deputies, and the splintering of Sajudis completely stalled the work of the Supreme Council. Nearly all of time during Council sessions was allotted to discussing and amending the standing orders. Questions of accountability for economic reform measures would end in the resignation of the prime minister—subsequently the office changed hands three times in less than two years. After two years of institutional chaos, the Supreme Council finally addressed the need to adopt a new constitution. On February 11, 1992 the Supreme Council adopted the law "On Constitution Drafting" which instituted a strict schedule for the adoption of a constitution. It formed the Constitutional Commission which would draft a constitution

according to the conceptual sketch. The Commission's draft was to be presented to the Council by the end of March 11, then debated, amended and adopted by October.

While the Constitutional Commission worked to meet its deadline, newly-formed non-parliamentary parties (most prominently the Liberal Party) and the Sajudis Popular Front, which had lost most of its support in the Council, coordinated their efforts to participate in the constitution drafting process. At first, Sajudis hoped to influence the process by organizing a referendum on its draft amendment to the Provisional Basic Law. The amendment would have created the office of the president. The proposed law envisioned a directly-elected president who would serve a five-year term. Presidential candidates were required to be between 40 and 65 years of age, Lithuanian by blood, and have lived in Lithuania for at least the last 10 years (the last requirement was aimed at WWII Lithuanian émigrés). The amendment also would have given the president broad powers to dissolve the government and the Supreme Council, as well as stop any government decree he or she deemed unconstitutional. The purpose of this referendum was two-fold. First, Sajudis hoped to automatically increase its leader's, Vytautas Landsbergis, powers over the renegade Supreme Council deputies. Second, with a majority of citizens voting in favor of a strong presidency, Sajudis would have gained leverage in adopting a more presidential constitution that either the conceptual sketch or the Commission's constitutional draft envisioned. The referendum failed due to low voter turnout, but since those who did vote clearly favored the proposal, Sajudis felt that enough voters had voiced their opinion to require the Commission's draft to be changed. After the failure of the referendum, Sajudis urged support for the Liberal Party's draft Constitution, which it quickly renamed the Sajudis draft. In a final assault on the

Council, Sajudis collected signatures calling for the dissolution of the Supreme Court. Although two years remained in its term, the Supreme Council voted to call pre-term elections, which were held simultaneously with the constitutional referendum.

Remarkably, the Commission's draft was substantially altered during the summer of 1992 in an effort to comply with some of the Sajudis draft's articles. With only 12 days remaining before the October 25 elections, Council members voted to adopt the constitutional draft. During the final debates, which were held during an extraordinary session, almost every deputy voiced bitter resentment at the way in which the draft was debated and written. Despite these reservations and unresolved disputes, deputies representing various opposing factions conceded that this was the best chance of adopting a constitution in the near future and, since the Council of Europe requires it of their members, Lithuania needed to adopt a constitution as soon as possible. The draft was adopted by the Council, but no time remained for public debate. Voters were familiarized with the draft only when it was printed in the daily newspapers. Finally on October 25, 1992, the Constitution was approved by 56.7 percent of the electorate. Had the Council waited for the new Seimas to convene before adopting the Constitution, the strong showing of the Lithuanian Labor Democratic Party (LDLP) could have easily rewritten the draft and adopted a far different constitution, or could have delayed adoption indefinitely.

The 1992 Constitution

The Lithuanian Constitution could be categorized as a quick-fix constitution, not only because the decision to adopt it seemed rather spontaneous, but also because it

represents a compromise between two major rival forces in the first democratically elected Supreme Soviet. The indecision of this period coupled with the demand that a constitution be quickly adopted resulted in a constitution that is neither parliamentary nor presidential, an electoral system that is neither proportional or single-candidate majoritarian. Lithuanian constitution drafters dutifully incorporated internationally prescribed norms into the draft, but failed to decisively engineer a new institutional structure that would match the needs of the country—or for that matter even argue convincingly what the needs of the country are. Perhaps what has been created is the ultimate stop-gap constitution: one in which nearly all alternatives are present, and for which, after a few years of testing, the advantages of one form of government over the other would become clear. Presumably at that time, a constitutional amendment could be adopted to favor one or another institutional system. But in order to promote stability (another element the inter-war constitutions lacked) the drafters developed challenging amendment procedures, making the Lithuanian Constitution rather difficult to change.

I. The Seimas

Although the Supreme Council caved to Sajudis demands that the president's powers be expanded, the Seimas of the 1992 Constitution does not have decreased powers in comparison with the Seimas of the Commission's draft. The president was simply given limited power to check the Seimas. For example, the first article in the Seimas chapter of the Commission's draft referred to the Seimas as the "highest representative and sole legislative branch of power, which is accountable only to the nation." No such article exists in the present Constitution and therefore more closely resembles traditional

European parliamentary system, where the president and parliament are made to cooperate by instituting checks on each branch's power. Such a system of "mutual dependence" presumably helps create a more stable system. For the past four years, the Seimas has been quite cooperative with the President, but the reasons for that have more to do with the majority party in Parliament than with institutional engineering.

The President

In 1993, after voting in an LDLP majority in the Seimas, voters chose Algirdas Brazauskas as president. In line with Art. 83, Brazauskas formally suspended his activities in the LDLP by resigning as the party's head. Despite his break with the party, Brazauskas very rarely conflicted with the Seimas majority, and the presidency maintained a low profile during contentious parliamentary debates. The one time when Brazauskas stepped in to try to stabilize the government was during the bank crisis in the winter of 1995. When it was exposed that Prime Minister Adolfas Slezevicius retrieved his deposit from a bank a day before the bank was closed, several ministers resigned in protest of the PM's behavior. When Brazauskas advised Slezevicius to resign, the Prime Minister did not obey, but waited for support from his party in Parliament. Only when the LDLP could not salvage the situation did Slezevicius finally quit his position.

Having lost party support in the newly elected Seimas, Brazauskas's influence has become increasingly imperceptible. Now that the HU-CL controls the Parliament, their previous commitment to a strong presidency has disappeared. Once again, Brazauskas's compliance with the Seimas has nothing to do with the constitutionally powers given to the presidency and is more a result of political extortion. In 1995 Brazauskas met

privately with Latvian President Guntis Ulmanis and signed the Maisiogaila treaty which renounced Lithuania's claim to an area in the Baltic sea presumed to contain oil. By signing a treaty pertaining to the Lithuanian border, Brazauskas overstepped his presidential jurisdiction. Article 138 of the Constitution explicitly requires that the Seimas ratify treaties concerning the realignment of state borders. According to the Constitution (Art. 74), the Seimas can impeach the president for gross violations of the Constitution. Although no impeachment initiatives have been launched, the threat has been enough to keep Brazauskas in check. Consequently, HU-CL's candidate for prime minister was dutifully accepted without conflict by the president as was the cabinet of ministers. Only after the next presidential elections in 1998 will there be an opportunity to see whether or not the office of the president will become as powerful an institution as prescribed in the Constitution.

Elections, Parties, and NGOs

A. Electoral Laws

The question of what type of electoral formula to adopt in 1992 was just as contentious as choosing a parliamentarist or presidentialist system. Since the 1922 Seimas was elected through a purely proportional system and the 1938 assembly through first-past-the-post multi-district scheme, the 1992 Council chose to compromise again. Consequently 70 Seimas deputies are elected by a single-district proportional system, while the remaining 71 are directly elected in separate electoral districts. If after the first round of elections no single candidate garners support from at least 50%+1 of the electorate, a second round is held between the top two candidates. For the proportional

half of elections, parties must submit lists of their candidates, and seats are distributed to those parties who receive at least 4% of the vote. For parties representing ethnic minorities, this threshold was reduced to 2%.

In preparation for the 1996 Seimas elections, several amendments were made to the 1992 electoral law. The changes reflect an intention by the Seimas to reduce the number of political parties in the future. First, the threshold was increased to 5% for all parties (including ethnic minority parties) and 7% for two-party coalitions. State campaign funding, previously offered to all registered political parties is now issued only to parties that hold seats in Parliament. Campaign financing limits were also increased from 140,000 lits to 700,000.

Despite these efforts, the number of parties represented in the 1996 Seimas did not decrease. Although smaller parties did not win as many seats as they had in the past, one or sometimes two representatives were able to enter parliament through the multi-district direct elections. The only ethnic minority representative was voted in by his mostly-Polish district outside of Vilnius that way. Although it probably will not be a priority until the next campaign season (three years away) members of the current majority party, the Homeland Union-Lithuanian Conservatives, have expressed their desire to impose a strictly PR system in the next elections.

B. Political Parties, NGOs, Religious groups

Most of the strong political parties active today have gained their popularity by their links to parties of the past. The most obvious example is the Lithuanian Democratic Labor Party, which has clear ties to the Lithuanian Communist Party. Before he was voted into the presidency, Algirdas Brazauskas was the head of the LDLP. Before

Lithuanian independence, Brazauskas had been the first secretary of the LCP. Like many communist leaders, Brazauskas actively participated in the Sajudis movement. As the head of the LCP, Brazauskas took credit for being the first local communist party in the USSR to break off from the Moscow party center—a move which was subsequently copied by communist party branches throughout the USSR. By actively participating in the independence movement, the communists were able to maintain their legitimacy as a political party. Support for the LDLP in the 1992 Seimas elections came from diverse social sectors. Using the old LCP networks, the LDLP was able to garner support from already organized groups, like unions, in what was a chaotic civil society. With the Sajudis movement continuing to splinter into new political parties and an inexperienced parliament floundering on policy decisions, the LDLP was seen by many as a better alternative. The sweeping LDLP electoral victory in 1992 was a surprise even to the ex-communists.

But the tireless opposition has spent the last four years destroying the party's credibility by accusing party members of corruption and incompetence. Insinuations were easy to make since many communist leaders seemed to make enormous profits from the transition to liberal democracy. In a country where conflicts of interests is the predominant strategy for a successful in business as well as politics, government officials and business tycoons working together harmoniously, cashing in on privatization while promising government aid to unemployed and destitute. When Prime Minister Adolfas Slezevicius was found to have withdrawn his investment in a bank days before it was closed by the central bank, the single act effectively proved all previous insinuations of

LDLP corruption to be true. LDLP made a pitiful showing in the 1996 elections, winning only 12 of its previous 70+ seats in the Seimas.

The big winners in the last elections were parties with clear ties to the Sajudis movement. Among those parties, the Homeland Union-Lithuanian Conservatives is the party which most closely resembles Sajudis and its celebrated leader, Vytautas Landsbergis. Its rhetoric borders on nationalist populism—HU-CL prides itself in its struggle to maintain a moral, catholic society while adopting traditionally social-democratic economic principles. Its hope of softening the blow of painful economic reform by fostering sentiments of national unity and sacrifice for Lithuania is doomed to failure.

Three other Sajudis off-shoots are the Christian Democrats, Social Democrats and the Center Union. The first two are reincarnated parties from the inter-war period. The Christian Democrats have formed a coalition with the HU-CL and will probably be the most influential of the minority parties, even though its politics do not differ strongly from the other two. Parties prey on public confusion and the result is a party system committed to promoting individual candidates instead of clearly-stated ideological convictions. Parties with clearly-stated political ideologies and economic policies, like the Liberal Party, have never been able to win enough seats in Parliament to make a difference.

Other vehicles for social mobilization have also had disappointing results. The Catholic Church, though it was the only institution to keep the hope of independence alive throughout the soviet regime, was unable to maintain its position as an institution committed to the protection of human rights and democracy. In contrast to other

Catholic nations in East Europe, Lithuania adopted a policy of strict separation between church and state. Today the church generally supports the Christian Democrats and the HU-CL, but mobilizing public support from the pulpit has been fruitless since few Catholics actively practice their religion.

Several non-governmental organizations have been organized in Lithuania. All of them receive money from abroad, either from international foundations or directly from the governments of established Western democracies. More than any other institution, NGOs have worked to educate the public about what it means to participate in a democracy. The most prominent NGOs have established clear ties with the government, and as a result most research and writing projects are conducted by scholars who work in the government, which somewhat counteracts the purpose of an NGO. But, it is argued, Lithuania is a small country with a limited number of qualified experts. NGOs in Lithuania are also less likely to commit their work to helping national minorities. The argument there is that money is sent to Lithuania to help *Lithuanians*. Thus projects for helping national minorities are predictably watered-down and ineffective.

Basic Rights

Social and economic rights occupy a prominent space in the Lithuanian Constitution. Just as they had in the inter-war constitutions, basic rights and freedoms are listed before all the government institutions. Beginning with Art. 6 ("The Constitution shall be an integral and directly applicable statue, every person may defend his or her rights on the basis of the Constitution.") the Constitution dedicates three chapters to citizens rights and

the state's obligation to help citizens realize them. Besides listing all the UN Convention's basic rights and freedoms, the Constitution also demands that certain socio-economic concerns be provided by the state. For example: Art. 39: "The state shall take care of families bringing up children, render them support"; Art 41: "secondary, vocational, and higher schools shall be free of charge in public schools"; Art. 42: "support for culture and science, Lithuanian history, art, and other cultural monuments and objects"; Art. 45: "the state shall support ethnic communities"; Art. 52 "the state guarantees the right of citizens to old age and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law"; Art. 53: "the state shall take care of people's health and shall guarantee medical aid and services in the event of sickness. The procedure for providing medical aid to citizens free of charge at state medical facilities shall be established by law"; and Art. 54 "the state shall protect the environment." Each of the articles listed put demands on the state budget to realize citizen's rights to a prescribed standard of living.

Debates on how these requirements would be met in an economically devastated country, or even why they should be included in the Constitution were not apparent before its adoption. Perhaps the inclusion of these articles was thought necessary by drafters in order to convince the public that the state would not abandon its commitment to citizen's basic needs under a democratic regime. After all, the Constitution's first test was its adoption by referendum. But in the absence of public debates prior to the referendum and the remarkably few cases brought to trial for violations of these 'rights'

leads to the conclusion that most citizens are not aware that these rights exist or how to go about defending their rights in court.

Twice, these constitutional rights were publicly challenged. The first instance occurred in June 1995, when Health Minister Antanas Vinkus came to Parliament complaining that only a pitiful part of the budget-allocated funds had actually been delivered to the Ministry of Health. Basing his argument on Art. 53, he complained that the Constitution had been violated because the ministry of health did not have enough money to ensure that proper health care is offered to Lithuanian citizens or to pay medical staff their meager wages. Because it did not receive all of the money allocated to the Ministry in the state budget, medical equipment and drugs were purchased from firms on credit. This sent the Ministry deeper into debt, since interest accrued on credit is high and was never taken into account when the state budget was adopted. He predicted that the situation would undoubtedly raise the prices of hospital stays and services. At the time patients were required to pay 4-5 lits per day, while the actual cost swallowed by the hospitals came up to an average of 700 lits per day on each patient. Vinkus reported that citizens were required not only to pay for hospital stays (albeit at extremely low rates) but that citizens were also required to buy their own pharmaceuticals without any aid by the government.

In response to Vinkus's complaint, the Seimas adopted a law which organized a national health insurance scheme, to which employed citizens were required to contribute each month. The system comes into effect on January 1, 1997. Although it is unlikely that this law will be contested in courts, the Constitutional Court seems comfortable with the law, even though it clearly contradicts the Constitution.

In another highly publicized case, Vilnius University sued the Finance Ministry in 1996 for not issuing money to the university promised in the budget. Although the university operates independently from the state, thus far the budget has allocated money to it every year. VU based its arguments on Art. 41 of the Constitution, which guarantees that education will be provided free of charge. Without forwarding the question to the Constitutional Court (Art. 106 allows courts to forward cases involving constitutional question to the Constitutional Court for deliberation before the lower court makes its final decision) the Vilnius district court decided in favor of Vilnius University and required the Finance Ministry to turn over the outstanding payment. It is important to note that Vilnius University did not bring up the argument that the funding was insufficient to provide higher education free of charge. Although all public schools and universities suffer from insufficient funding, no such case has ever been brought to court.

No case involving socio-economic rights has ever been brought to the Constitutional Court. Perhaps this is because Constitutional Court justices would never demand that these rights be enforced. Constitutional Court justices have expressed their beliefs that the strict enforcement of socio-economic rights is unrealizable, and therefore, unenforceable. If Court justices do not believe that these rights are viable, it does not seem to make a difference whether or not these rights are included in the constitution. In fact, some justices and legal experts have indicated that they should never have been included. But a constitutional amendment to erase these provisions would be political suicide for the Parliament which adopted it, and the chances that a referendum could successfully pass such an amendment are equally minute. Perhaps the state believes that ignoring those constitutional articles will make them go away.

Amending the Constitution

Probably any important document which is born out of compromise will leave all participants in the decision-making process dissatisfied. The Lithuanian Constitution is no exception. During parliamentary debates on the adoption of the constitutional, the only point on which all the factions were able to agree was that the Constitutional draft was imperfect. Time and again supporters of the constitution begged skeptics to look beyond the draft's shortcomings and vote for the draft just so that Lithuania would not loose its place in line for EU membership.

Constitutional amendment proposals generally fall into three categories: 1) government institution proposed amendments which are intended to either fix perceived constitutional mistakes or supplement unclear or incomplete institutional arrangements, 2) politically motivated amendments to pass alternative provisions which failed to be adopted in 1992, and 3) constitutional amendment demanded by international organizations, primarily by the EU association agreement and its protocols.

The first category of amendment proposals stems from government institutions that believe the constitutional provisions concerning their particular branch of power to be either completely inadequate or contradictory. According to Arturas Paulauskas (General Prosecutor until 1992 and deputy prosecutor 1993-1996) Art. 118 are poorly formulated because the framers of the constitution (Parliament) could not clearly conceptualize the function of the Procuracy. (Lietuvos Respublikos Konstitucija:

Tiesioginis Taikymas ir Nuosavybes Teisiu Apsauga, p.13.) Article 118 states that the 'procedure for the appointment of public prosecutors and judges and their status shall be established by law.' Because no decisions were made initially about the status of the Procuracy, the prosecutors' terms in office, and comprehensive list of duties, Paulauskas argues that the office of the prosecutor is unstable and overburdened with work. In practice, the effects of an inadequately drafted constitutional blueprint for the institution is clear—the staggering backlog of cases has made it impossible for prosecutors to bring suspected criminals to trial quickly. Many cases are tabled for years, which, when coupled with the only recently repealed law on pre-trial detention, means that many people are imprisoned for years before their cases can be tried in court. Moreover one of its functions, investigating civil servants activities for infractions of human rights or corruption has been also given to the Seimas Ombudsman (Art. 73). Therefore the two institutions have been left to figure out for themselves where their powers and responsibilities lie. Citizens with gripes about civil servants like police are more likely to bring their complaints to local prosecutors, and not to the Seimas ombudsman.

Former Supreme Court chairman, Mindaugas Losys, argues that Art. 61 of the Constitution (which gives MPs the right to submit inquiries to the prime minister, ministers and other state institutions elected by the Seimas) could allow Parliament to question a decision of a judge in a specific case. Therefore because the Supreme Court and the Court of Appeals justices are formed by the Seimas, Art. 61 could be used to justify Seimas interference in the activities of the court, which is prohibited by Art. 114. Already, judges have been brought before Seimas committees to be reviewed for allegations of bribe taking and corruption. But interference in specific cases before the

court has also been undertaken by certain MPs. Intimidation by Seimas members was particularly evident during the Vytas Lingys murder trial in 1992. Within six months, Boris Dekanidze, one of the leaders of the notorious organized crime gang 'Vilnius Brigade,' was arrested, charged, tried, and executed for ordering the murder of journalist Lingys. The case against Dekanidze consisted almost solely on the testimony of the hit man, who escaped the death penalty through plea bargaining. Most legal experts in the country agree that the chances that an innocent man was convicted are quite high. However little public sympathy exists for the known mafia leader, and the public outcry against the Lingys murder was seen by judges and MPs as a great opportunity to publicly demonstrate their commitment to fighting organized crime.

These two problems, along with the right to 'free' healthcare and education, are occasionally debated, but no steps have yet been taken to initiate constitutional amendments. An important reason is that little support can be gathered for more freedom of the judiciary. Apathy does not only stem from years of mistrust in the courts in the USSR. Despite arguments put forth in favor of maintaining some influence on courts in order to fight corruption, citizens and parliamentary deputies alike believe that there are more important things to worry about than the freedom of the court. Thus, judges' complaints go unheeded in the Seimas, which is the only government branch that may initiate constitutional amendments (Article 147).

Since the adoption of the Constitution, several issues which had been contentious in the Constitutional Commission were revisited by certain political groups. Half way through its term, the LDLP majority in the Seimas proposed amending Art. 55 and shrinking the size of Parliament from 141 to 79 deputies. This had been one of the

alternative projects in the Constitutional Committee's conceptual sketch. LDLP argued that cutting the size of Parliament would save money for the state. After the proposal failed to gain the support of the opposition in Parliament, the issue was brought up again in an independent referendum campaign organized by a small group of popular television personalities and politicians. The referendum attempt failed to gather enough voters' signatures and was also dropped. While an argument of saving money for the republic at its own expense might be remarkable by any parliament, the LDLP's motives could have been questionable. The state is already "saving money" by allowing MPs to serve as cabinet ministers simultaneously. To shrink the Seimas may also shrink the pool of influential political actors, not to mention the representativeness of the government. This issue does not appear to be a priority for the new HU-CL and Christian Democrat Seimas.

Thus far, of all the complaints about the Constitution, the Seimas has responded only to the plight of municipal officials. Although proposals to extend municipal council terms came up during constitution drafting, at the time arguments for strict centralized control seemed to be more salient. Even before the communist regime, Lithuania had always been a centralized state—as authoritative voice had always come from the capital, in the form of parliamentary legislation and budget decisions, governors appointed by the president, or directives to implement the latest Communist Party scheme. In line with tradition, local governments under the 1992 Constitution are not strong. Although the centralized state structure was deemed necessary due to Lithuania's small size, at least one other reason exists for keeping the provinces weak. During the independence movement, regions populated by ethnic Poles began using Sajudis arguments to promote

their re-annexation to Poland. Unfortunately the right to self-determination was reserved for ethnic Lithuanians and their demands were promptly denied. The current chapter on local government not only limits the influence local government can have on the center, but also prohibits citizens from creating an effective representative bodies. In 1995, the LDLP proposed extending the two-year terms of local councils to three or four years. Although the LDLP was unable to garner enough support to amend Art. 119 before the summer 1995 elections, after the Homeland Union-Lithuanian Conservatives (HU-CL) won the majority of local council seats, they helped pass the constitutional amendment to extend the term to three years in summer and fall, 1996.

By far the most successful argument for amending the Constitution has been a direct request by the EU. The very first amendment proposal was to allow foreigners to purchase land in Lithuania. LDLP hoped to take advantage of the easier amendment procedures allowed for changes to Art. 47. According to Art. 153, during the first year of the Constitution amendments to certain articles, including Art. 47, required only one reading and only three-fifths support in Parliament. LDLP tried to pass its amendment just as the special regulations were about to expire on October 19, 1993. The attempt ultimately failed, but debates continued for another three years. Lithuania's small size and aggressive neighbors allowed nationalists to repeatedly win debates in favor of closing the doors to foreign investment. However, once the land issue became the primary constitutional barrier to association membership in the EU, the opposition agreed to cooperate with the LDLP majority in drafting an agreeable amendment. The revamped Art. 47, which was finally adopted on June 20, 1996, shamelessly allowed the sale of non-agricultural land to foreign citizens from the EU and G-24 member countries

only. The law seems good enough to fulfill Lithuania's obligations to the Association Agreement, but ethnic minority representatives in Lithuania, particularly the Poles, strongly oppose the recent amendment.

The next constitutional amendment that will be passed is easy to predict. To date the only UN Human Rights Convention Protocol to which Lithuanian law does not comply is the one eliminating capital punishment. Although the Constitution allows capital punishment to be used in sentencing particularly egregious crimes and has been carried out in several cases, President Algirdas Brazauskas recently called a moratorium on the death penalty. This is seen by many to be the first step in conforming to EU standards.

Conforming to West European and American standards of liberal democracy has been, more than anything, the driving force for consolidating Lithuania's democracy. This has been a mixed blessing. Lithuania's Association Agreement with the EU prescribes countless legislative, financial, and trade-related panaceas for what ails the young democracy. Many Soviet laws are still in force with minor provisions, for example the civil code, and legislators are eager to benefit from Western expertise on what kind of new law to adopt. But taking practical advice from stable democracies is not the only reason behind Lithuania's willingness to conform. Fear of Russia continues to loom in the country and NATO membership is seen as the only solution for quelling that fear. For this, Lithuania is willing to accept EU tariffs which threaten to destroy the agriculture sector. But the country's leaders always knew that they would have to conform to certain rules of conduct demanded by open democracies. Lithuania was the first of the Baltic states to adopt liberal citizenship laws and be hospitable to Polish and

Russian residents. Recently, however, legislators have become less accommodating. The new electoral law stripped ethnic minority parties of lower threshold requirements. The adoption of an amendment to Art. 47 of the Constitution asserts that all foreign investors are not equal. The newly elected Conservative-Christian Democrat coalition has cut off state funding for Polish and Russian schools. Although these policies foster democratic consolidation and open society, they were not measures widely practiced in the West or not specifically demanded by the EU, and therefore deemed unnecessary. The rhetoric for yielding to the West will help Lithuanian stability in the long run has won many policy debates. But the question of how long that argument will hold true and what will happen in Lithuania when the cost of yielding to the West becomes too high has never been addressed. Stability in Lithuania, therefore, depends less on institutional structures and more on establishing a broad and unwavering support among the constituency for the democratic principles embodied in the Constitution. Steps must be taken not only to educate the public of these principles but also to convince them that those principles are worth preserving and defending. To that end, Lithuanian democracy still has a long way to go.

Piotr Winczorek

Democratic Consolidation in Eastern Europe. The Case of Poland.

1.1. As this paper is being written (October 1996), work is under way on a new Constitution of the Republic of Poland. Drafting the new constitution is expected to be completed some time at the turn of the current year, 1996. However, whether the planned date is met is largely dependent on the political will of the parties represented in the Polish Parliament [1] since 1993.[2]

1.2. Work on a new, democratic constitution began at the end of 1989, when the two chambers of the Polish Parliament, the Sejm and the Senate, which had been elected in the general election of June 1989, set up their respective Constitutional Committees. The establishment of two separate committees had its rationale in the fact that the Sejm had not been elected in a fully free ballot: its composition had, to a large extent, been shaped by the "Round Table" agreements concluded in April 1989 between those who held power at the time and the opposition, dominated by the "Solidarity" movement headed by Lech Wałęsa. [3]

1.3. The limited representativeness of the Sejm caused senators to show no interest in collaborating with Sejm deputies on the new constitution for the country. One and a half year of work resulted in the two committees producing two separate, and widely divergent, drafts of the constitution. Neither of the drafts was ever submitted for a vote in the Parliament, and thus neither was ever passed as a bill.

1.4. As the term of the Sejm was coming to an end, there was an increasing number of doubts, also among deputies, as to whether the Sejm had enough legitimacy to adopt a new democratic constitution of the country. The course of events in the years 1990-1991 in Poland and abroad meant that the provisions of the "Round Table" agreements of April 1989 could no longer retain their validity. Consequently, the term of office of General Wojciech Jaruzelski, elected President of Poland by the National Assembly in July 1989, was cut short and a new general presidential election was called in late autumn of 1990, with Lech Wałęsa emerging as the winner. The term of the two chambers of Parliament was also cut short, ending in 1991.

1.5. Doubts as to the legitimacy of the Sejm also led to the emergence of a proposal that the new constitution, after being adopted by the Parliament, should be submitted to a national referendum for acceptance. While this proposal was rejected at the time, it reemerged in 1992 and was included in the Constitutional Act on the procedure for drafting and adoption of the Constitution of the Republic of Poland.

1.6. Although in its 1989-1991 term the Parliament failed to adopt a new constitution, it did make a number of far-reaching amendments to the constitution of 1952. The most important of these amendments was made in December 1989. The amendment consisted in redefining the constitutional system of the State.[4] Poland ceased to be a "socialist state" - with all the attributes of the system - and became a "democratic state ruled by law and implementing the principles of social justice". This amendment to the 1952 constitution was adopted almost unanimously. It was also accepted unopposed by deputies of the Polish United Workers' Party (PZPR [=the communists]) .[5]

1.7. At the time, however, the Parliament was too hesitant to go one step further, by repealing the constitution altogether and replacing it with a new act. Doubts in this regard were expressed mainly by deputies and senators of "Solidarity", who believed that real political, economic and social reform in Poland had not taken sufficient root for it to be enshrined in the constitution.

1.8. A few years later it turned out - and this is now admitted by some of the "Solidarity" activists of that period - that an excellent opportunity had been wasted to adopt a new constitution in spite of the many doubts expressed in the Parliament. The "constitutional momentum" that had then been lost meant that each successive year after 1989/1990 was much more difficult for the drafting of a new constitution. The readiness to accept a new democratic constitution was quite universal in 1989/1990, also in circles of the "ancien regime". In the years that followed this was not necessarily the case any longer. Thus Poland, despite being the country where the process of constitutional reform in Eastern Europe began, is one of the last countries of the region not to have a full, new State constitution.

2.1. Work on drafting a new Polish constitution followed two paths in the years 1991-1993. On the one hand, an attempt was made to adopt a provisional and partial constitutional act (or rather two such acts)[6], and on the other, work began on a full and lasting constitution of the State. As for the partial and provisional constitutional acts, these were to include a Constitutional Act on the mutual relations between the legislative and the executive powers,[7] regulating the political system of the State, and a Charter of Rights and Liberties, dealing with human and civil rights and liberties.

2.2. The first of the two acts was eventually adopted in October 1992, and the scope of the areas it regulated was extended to local government as well (the act is commonly known as the "Little Constitution"). Adopting the "Little Constitution" also involved repealing the constitution of 1952, but many provisions of the latter act were kept in force. The provisions that were continued in force deal with such matters as the foundations of the constitutional system of the State, the judiciary, the Constitutional Tribunal and the the rights and duties of citizens. Together with the already mentioned Constitutional Act on drafting and adopting the constitution, the three constitutional acts make up a provisional constitution of the Republic of Poland.

2.3. The draft of the Charter of Rights and Liberties was submitted for discussion in the Sejm by President Lech Wałęsa. The Charter was to replace the anachronic provisions of the 1952 constitution which dealt with the rights and duties of citizens. The Charter, however, was not adopted by the Sejm; neither was a constitutional Charter of Social Rights, submitted by deputies of the Democratic Left Alliance (SLD). The Charter of Rights and Liberties was criticized on the grounds that it was too liberal-oriented, whereas the Charter of Social Rights was considered too socialist in nature.

2.4. The constitutional system of the State which emerges from "Little Constitution" and the provisions of the 1952 constitution that have been continued in force can be described as a rationalized parliamentary-cabinet system. Both chambers of parliament are elected in a general and direct ballot for a four-year term. The President of the Republic of Poland is also chosen in a general election, for a five-year term of office. The Government (Council of Ministers) can be appointed by a variety of procedures, but it is the Sejm that has a decisive

part to play in the process.[8] The Sejm can also make the government resign by a constructive or "ordinary" vote of no confidence.[9] In the latter case, the President may accept the resignation of the government, or may decide to dissolve the parliament before the expiry of its term.[10]

The President is also responsible for ensuring the observance of the constitutional order of the State, and for upholding the internal and external security of the State. The President is the supreme commander of the armed forces. The President is also significantly involved in making appointments to a number of positions in the executive[11] and the judiciary. The President cannot be recalled by the Parliament before the expiry of his term of office, but he is constitutionally accountable to the Tribunal of State for any violation of the Constitution or a statute. It is also only the Tribunal of State that has judicial powers with regard to the President's criminal liability.[12] As for the legal acts issued by the President, some of them need to be countersigned by the Prime Minister or a respective minister, while others remain the sole prerogative of the President.

The President may, with the Senate's consent, call a national referendum[13]. The President may also dissolve the Parliament before the end of its term, under circumstances provided by the "Little Constitution". The President has the right of legislative initiative, and the right to veto acts passed by the Sejm and Senate. The Sejm can reject a presidential veto by a majority of two-thirds.[14] Finally, the President may, before signing a law or after it has come into force, refer it to the Constitutional Tribunal for a judgement on its constitutionality.

2.5. Widely divergent or even contradictory proposals regarding the shape of the constitutional order of the State emerged already during debates on successive drafts of the "Little Constitution" and reappeared on many later occasions, both in the Paliament and outside it. Left-wing, agrarian (Polish Peasants' Party) and some liberal parties[15] called for a parliamentary-cabinet system, although there were some differences as to the extent such a system was to be rationalized[16]. Most right-wing groups favoured constitutional solutions based on the provisions of the Constitution of the French 5th Republic. President Wałęsa also supported such solutions. Thus, the system emerging from the 1992 "Little Constitution" is the result of a compromise between those opposing standpoints. The compromise was reached in a

very fragmented parliament[17] , which had been elected in 1991. The fact that such a compromise was possible at all was an unquestionable success of the Sejm; however the need to seek compromise, as well as the relative inexperience of deputies with regard to law-making, have resulted in the "Little Constitution" being at times editorially faulty, allowing for gaps and obscurities of meaning. Indeed, whenever the choice was between breaching a formerly reached understanding or adopting an ambiguous provision that lent itself to contradictory interpretations, the decision was made invariably in favour of the latter. As a result the text of the "Little Constitution" is full of formulations that have been subject to a great number of controversies regarding interpretation. Thus, for example, the fact that the "Little Constitution" has acquired an interpretation leading to the extension of the President's powers is largely due to the efforts on the part of lawyers and politicians who collaborated with Lech Wałęsa.

2.6. A major role in the shaping of the State's constitutional order in the years 1989-1995 - and this perhaps is not unique to Poland - was played by the way in which presidential authority was exercised by those who held it. President Wojciech Jaruzelski tended to act with much restraint in spite of the wide scope of powers he was vested with by the 1952 constitution, both before and after the amendments of 1989/1990.[18] However, Jaruzelski's personal and political position had been very weak from the very start of his presidency[19] and it was becoming ever weaker as time went on. His resignation from office did not involve any upheavals.

Lech Wałęsa, on the other hand, once elected President, felt very constrained by the provisions of the Constitution. He believed that the fact he had been elected in a general election should lead to more wide-ranging powers than the ones provided for in the constitution of 1952, and later in the "Little Constitution". He maintained that the magnitude of the tasks imposed by those acts on the President was incommensurate with the scope of his powers.

Lech Wałęsa, a dynamic personality, with a sense of historic mission and great political ambitions, [20] also claimed that - faced with the immense task of a fundamental political and

constitutional reform of the country - public authorities, and especially the President of the Republic, should have powers that would be adequate for the task.

All this led Lech Wałesa to seek ways of making the new constitutional system of Poland acquire features that would allow the system to be described as presidential. Attempts aimed directly against such moves were made by Wałęsa's political opponents, mainly on the left, but as his term of office went on, also on the right.[21] Their goal was to weaken Wałęsa's personal position, and this meant that they had to argue against strong presidential power.

It would of course be inappropriate to reduce the motives behind the actions of the two camps to personal considerations alone. Political and ideological convictions also featured significantly in what was going on. Nonetheless, the personal factor has repeatedly played a role in discussions on constitutional matters in Poland.[22]

3.1. After the adoption of the "Little Constitution", work has continued on a new constitution of the Republic of Poland. Since 1992 there have been two successive Constitutional Committees of the National Assembly. The first of them was appointed by the Assembly formed by the Sejm and Senate elected in 1991, while the second - by the Sejm and Senate elected in 1993. Both committees have consisted of 46 deputies and 10 senators, but they have differed radically in their political make-up. This is due to the different political composition of the Sejm and Senate in their successive terms.

3.2. According to regulations now in force[23] drafts of the constitution may be submitted to the National Assembly by the Constitutional Committee, the President, groups of National Assembly members numbering at least fifty six persons, as well as by groups of citizens eligible to vote in Sejm elections numbering at least 500,000 persons who have signed their name under the draft.[24] This right was exercised seven times in the year 1992/1993, and those submitting a draft included the parliamentary parties represented in the Parliament, as well as the President. In 1994, after over one and a half million signatures had been collected, such a draft was submitted by "Solidarity" in collaboration with a number of centre-right parties. Lech Wałęsa, who had commisioned a draft of the constitution to be prepared by a group of lawyers, withdrew it from the National Assembly after barely more than a year (in 1995), having found

the Assembly unrepresentative and describing the draft itself as "socialist". The decision was only one element among many in the political struggle that Lech Wałęsa fought with the parliament, which was dominated by parties opposed to him.

3.3. The constitutional drafts submitted to the National Assembly in 1992/1993 were "transferred" to the Assembly elected in 1993. [25] The task of the Constitutional Committee is now to prepare a unified draft based on all the drafts it has received, except for any drafts rejected by the National Assembly in the first reading.[26] After such a draft is adopted by a majority of two-thirds of the Committee members, it will be submitted to the National Assembly. The Assembly will then hold a debate on the draft, and may either reject it, refer it again to the Committee, or adopt it. Proposals on amending the draft may also be made by the President. The Constitution bill is considered to be passed, if at least two thirds of the National Assembly members cast their vote in favour of it. The adoption of the Constitution by the Assembly opens the way to a national referendum. The nation accepts the adopted constitution by a simple majority of votes, irrespective of the turn-out.[27]

3.4. The constitutional drafts submitted to the National Assembly have differed widely from one another. It would be hard to describe them here in detail, especially as the draft prepared by the Constitutional Committee is to a large extent an original proposal, which does not constitute a "sum" or "synthesis" of the ideas contained in the other drafts.

3.5. Roughly speaking, the drafts can be said to differ in the axiological assumptions[28] underlying some of the major issues. This concerns in particular the axiological foundations of the law. Drafts prepared by right-wing parties or groups make reference (at least in their verbal layer) to natural law axiology, to the social teaching of the Roman Catholic Church, and to the national traditions of Poland. Some of them show clear influence of syndicalist and corporatist conceptions. This is especially true of the draft prepared by "Solidarity". Drafts prepared by parties of the political left, e.g. those of the Union of Labour (UP)[29] and of the Democratic Left Alliance (SLD), or the political centre, as the draft of the Freedom Union (UW), have their axiological basis in a complex of social democratic or liberal values. This is manifest above all in their approach to the issue of social, cultural and economic rights, the issue of the

admissible extent of state interference in the economy, the issue of relationships between the State and the churches as well as other religious unions, etc.

All these drafts (with one sole exception[30]) are based on the principle of the separation of powers and envisage a fairly strong position of the parliament (be it uni- or bicameral). They differ, however, with respect to the type of the State's constitutional order , ranging from a parliamentary-cabinet model to some variety of moderate presidentialism.

3.6. The draft of the constitution now being prepared by the Constitutional Committtee is a voluminous document, containing 220 articles organized in 13 chapters.[31] The draft, I believe, though internally diversified with respect to its axiological basis, is quite a felicitous synthesis of approaches inspired by social-democratic, liberal, Christian-democratic, and nationalist-patriotic ideals. This synthesis has been achieved in the course of two years of detailed and sometimes quite heated debate in the Constitutional Committee,[32] with the participants including not only deputies and senators but also numerous experts in various fields of knowledge, as well as representatives of churches and religious unions, and non-governmental organizations.[33]

3.7. As for the constitutional order of the State, the draft has retained the solutions contained in the amendments to the 1952 constitution made in the years 1982-1986, [34] 1989-1990 and in the "Little Constitution" of 1992. It is worth noting, however, that in the new draft:

- the position of the President has been somewhat weakened;

- the position of the government has been strengthened (by, among other things, the adoption of a constructive vote of "no confidence" as the only way of removing the government from power by the Sejm);

- the constitutional position of the Constitutional Tribunal has been significantly strengthened, especially in that its decisions are to have final binding force;

- institutional guarantees for the independence of the judiciary have been strengthened;

- the system of normative acts has been rationalized, and international law has been declared to take precedence over statutory law;

- the catalogue of liberties and human and civil rights has been modernized and extended (in line with European standards), and new institutions and instruments have been provided for to safeguard such liberties and rights (such as the constitutional complaint);

- the system of public finance has been regulated;

- the constitutional position of local government (on principles of subsidiarity) has been strengthened, and its institutions extended (with local government at all levels of the country's administrative division[35]); and

- the question of states of emergency has been regulated.

3.8. The debates in the Constitutional Committee and outside it, despite being concerned with a great number of detailed constitutional issses, have focused above all on the questions of:

(a) the moral legitimacy of the current National Assembly to adopt the constitution of a democratic state;

(b) the axiological assumptions underlying the constitution;

(c) the nature of the constitutional system of the State, with the options including some form of a presidential system on the one hand, and a rationalized parliamentary-cabinet system on the other;

(d) the preservation of the parliament's bicamerality, with the options calling for the upper chamber to be preserved in its present shape, transformed into a self-government chamber, or abolished altogether, the parliament thus returning to unicamerality;

(e) the scope of civil rights, especially the social welfare rights of the citizens.

In what follows I shall concentrate on the problems mentioned in points "b", "d" and "e".

3.9. The debate over the axiological assumptions underlying the constitution is to a large extent connected with the special position that the Roman Catholic Church has long enjoyed in the public life of Poland. For years, it used to be the main bulwark of resistance to attempts at imposing a totalitarian system upon society. However, after 1989 the Church has experienced some difficulties in adapting to democracy, free market and, especially, political and religious pluralism. Some members of the clergy and some lay believers do not accept a situation in which the Church is no longer the sole, universally acknowledged authority on philosophical

and moral issues; they do not accept a situation where the Church's exclusive right to guide Poles on matters of conscience is questioned. At the same time, some bishops and priests have engaged in direct political activity, giving support in succesive elections to right-wing and nationalist parties, as well as to personalities connected with those groups. This has brought about a situation in which the Church is perceived by a large section of society as an independent political force, and its influence is regarded as excessive.

The Episcopate of Poland, and circles close to it, have on several occasions voiced their opinion on the matter of the constitution, insisting that:

- the constitutional preamble should contain a reference to God (*invocatio Dei*), which would underline the many centuries of the Polish nation's attachment to the Catholic faith;

- the constitution should recognize the primacy of natural law over law made by public authority;

- the constitutional formula of the separation of the Church from the State should be abandoned and replaced by the principle of "mutual autonomy and independence of the Church and the State - each in its [respective] domain"[36];

- the relations between the Polish State and the Catholic Church should be based on an agreement with the Holy See;

- the constitution should abandon the principle stating that the State is a secular institution or an institution "neutral with regard to philosophical or world-view matters";

- the constitution should contain a provision on the protection of life "from the moment of conception until natural death [death from natural causes]";

- the constitution should guarantee the parents' right to the religious and moral education of their children, and should state the principle that religion is a subject of education at school;

- the constitution should safeguard the rights of the family and the rights of marriage, understood as a union of two persons of opposite gender.

Parties and political groups of a secular orientation, as well as some Catholic milieus, have argued against some of those proposals, indicating that if they were to be put into life, this might open the way towards a religious state in Poland (this is something the Church denies). Moreover, it has been pointed out that such provisions would be quite exceptional in the

context of contemporary European constitutional legislation. They could not be reconciled, according to the critics, either with the principle of the equality of all religions, or with the pluralist structure of the Polish society. The draft constitution does largely (although not fully) meet the proposals made by the Church. However, some of the proposals that have been included in the draft (such as the one dealing with relations between the State and the Church, or the education of children) have not been found satisfactory by the Episcopate and political groups close to it. They, are moreover criticizing the draft constitution as "nihilistic", incompatible with the demands of morality and Christian values.

The attitude of the Catholic Church towards the draft constitution may turn out to be a decisive factor in its adoption. The Church may appeal to political parties in the National Assembly that are close to it (such as the agrarians) for a rejection of the draft, and if that fails, it may appeal to society for a "no" vote in the referendum.

3.10. Some political groups which have presented their constitutional proposals have called for the abolition of the Senate and the restoration of unicamerality (the parliament was unicameral in the years 1919-1921 and 1945-1989). The existence of the Senate is seen in such proposals as a remnant of the "Round Table" agreements. Now that the Sejm is elected in a free ballot, the continued existence of the Senate, according to this view, can no longer be justified, especially as it represents the same type of interests as those represented in the Sejm. These are the interests of politcal parties and their electoral clientele. The maintenance of the Senate is costly, and its contribution to improving the quality of law-making - rather small. If the upper chamber was to be kept, this might be - as proposed by the Polish Peasants' Party (PSL) and the Union of Labour (UP) - in the form of a body representing the interests of self-governments of various kinds, and in particular, the interests of local governments; it would thus be a Self-Government Chamber. The procedure for appointing the chamber, its composition and powers would, as a result, have to adapted to its constitutional nature.

The concept of a Self-Government Chamber relates to corporatist ideas, and, as far as Polish tradition is concerned, to the idea of "Self-Governemental Republic" promoted in the 1980s by anti-communist milieus connected with "Solidarity"; the backbone of the self-governmental republic was to be formed by workers' self-managements in the so-called

socialized (or state-owned) enterprises. Whether its proponents were aware of it or not, the idea had close affinities with the doctrine of "self-governmental socialism" espoused at the time by groups of the anti-communist and syndicalist left (for example in France).

The idea of workers' self-management was abandoned after 1989, along with the triumph of liberal and pro-capitalist approaches to the economy, and ideas of parliamentarism and pluralism with regard to political life. It now seems that a Self-Governmental Chamber stands little chance of being established in Poland .

3.11. As has been mentioned before, the provisions of the 1952 constitution that have been kept in force are exceptionally anachronistic as far as the social, economic and cultural rights of the citizens are concerned. The provisions reflect a characteristically communist approach to civil rights; at the same time they are rather imprecise, often lack clear legal content, and are couched in the language of the propaganda of the 1950s. They do, nevertheless, promise: free education at all levels of learning, free health care, a general social security scheme, the right to work, the right to education, and the right of access to cultural goods. These are rights that are quite widely accepted in Polish society. On the other hand, it must be borne in mind that the provisions in question are really a dead letter now as, in spite of the constitution, they are not, and cannot be, implemented, for lack of the necessary resources in the budget. This, for exampe, is the case with the right to work (unemployment stands at 13-15% in Poland), the right to free education (about 40% of all tertiary level students have to pay for their studies, also in public institutions of higher education) or the right to free health care (a considerable proportion of medical services in public health care centres are payable).

That Poland should be a welfare state is one of the things that the public frequently includes in its expectations with regard to the new constitution. According to surveys made by the Centre for Public Opinion Research (CBOS) in 1994, 87% of all Poles expected the new constitution to guarantee the right to work, 41% expected it to determine the lowest pension, while 39% expected it to determine the minimum pay. [37]

In debates on the constitution, it is frequently stressed that Poland (just as other, wealthier nations of Europe) cannot afford to extend, or even to maintain, the current level of state-financed social welfare spending. Introducing promises of social welfare into the

constitution, in the form of individual civil rights is described as a bad case of a lack of realism, a pledge without the necessary means to fulfil it, and a symptom of populism.

On the other hand, there are also voices that the nation cannot be deprived of its social welfare gains, that such action would be immoral and incompatible with the sense of social justice. Moves to abolish the social welfare provisions would also be politcially harmful, as they might produce resentment towards the new constitution, once it is passed by the National Assembly and subject to acceptance in the referendum.

The lines of division between the supporters and opponents of the two views do not run along the lines dividing the ruling centre-left coalition, which has been in power since 1993, from the right-wing opposition, but across those lines. Among the proponents of the social-welfare provisions are the ruling parties: the Democratic Left Allliance (SLD) and the Polish Peasants' Party (PSL), as well as opposition groups, icluding the left-wing Union of Labour (UP), "Solidarity", and some of the right-wing parties (such as the nationalist-Catholic parties); the opponents come mainly from parties and groups of a liberal orientation, such as the Freedom Union (UW).

The outcome of the clash between those differing standpoints is that provisions on social welfare, economic, and cultural issues have been included in the draft of the constitution. However, despite being contained in a chapter on civil liberties and rights, they are formulated rather as the tasks of the State than as individual rights of the citizens. Citizens will not be able to vindicate them by way of a general constitutional complaint and they will be implemented only within limits defined by statute.

This solution, conceived as a compromise, is now under attack from both of the opposing sides - as excessively liberal and as dangerously socialist.

4.1. The fact that work on the constitution of the Republic of Poland has already taken seven years is something I can only describe as a failure of Poland's political elites. Although it is sometimes argued that as time goes by, new constitutional experience is being amassed, and that the slow pace of work makes it possible to draft the text of the constitution in a very careful way, I do not believe that the lack of a new constitution is beneficial for the country.

The current constitutional provisions are, as I have stressed before, of rather low legal quality. This has been one reason, naturally among many others, for the political conflicts experienced by Poland in recent years. These emerge from disputes over the interpretation of constitutional provisions. I therefore believe that adopting a new constitution is matter of utmost urgency.

4.2. Will it be possible for the new constitution to be adopted before the term of the current parliament expires in 1997? At the moment of writing this paper, the answer is still yes. However, soon there is not going to be enough time for the legislative procedure, as defined by the current regulations, to be completed before the end of the parliament's term. If the parties represented in parliament are not able to reach a political understanding with regard to the constitution in the nearest future, the adoption of the constitution may be delayed interminably.

The main points of such an understanding should relate to: (a) the shape of the preamble, including a possible *invocatio Dei*, (b) the issue of the religious/secular nature of the State, (3) the scope and kind of social rights, and the constitutional regulation of local government[38], (4) the constitutional protection of family-owned farms,[39] (5) the structure of the parliament, and (6) the scope of the government's and president's powers. A lack of agreement on these issues may lead to a situation where the constitution is going to be opposed by most parliamentary parties - each of them opposing it for a different reason. The emergence of a "negative coalition" opposed to the constitutional draft would lead to a rejection of the constitution. Such a coalition, however, might turn out to be ineffective once it moved from action against the draft to action directed at adopting a constitution differing in content from the present draft.

Many opposition parties outside the parliament are hoping, not without good reason, to win a significant number of seats in the next parliamentary election. If this turned out true, the composition of the Sejm and Senate would be much more varied than that of the current parliament. Considering the political differences between the parties that may be represented in the future National Assembly, it seems that they would find it even more difficult to reach an agreement on the constitution than it is the case today.

5.1. Just as in other countries, the structure and functioning of the constitutional and political system of the State is largely determined by the shape of the country's party system.

This in turn is the corollary of a wide range of factors - factors of a historical nature, psychological-personal factors, factors concerned with the evolution of the social structure, or factors of a legal-institutional nature. It would be hard to give an account of how the party system has been evolving in Poland, even if one tried to cover only the period after 1989; it would be no less difficult to analyze the influence of the above-mentioned factors on the party system. I am therefore going to concentrate on only one factor - the legal-institutional factor, which I take to include, above all, regulations contained in (a) the act on political parties, and (b) the electoral laws.

5.2. A turning point in the evolution of the party system in Poland was marked (irrespective of all kinds of other political circumstances) by the rejection in 1989 of the constitutional clause stating that the Polish United Workers' Party (PZPR) was "the society's leading force in the construction of socialism", and that the two other legally functioning parties - the United Peasants' Pary (ZSL) and the Democratic Party (SD) - were in a lasting alliance with the PZPR. This clause of the 1952 constitution was replaced by the provision (article 4, paragraph 1, still in force) stating that "political parties [are free to] form voluntarily and on the basis of the equality of all citizens of the Republic of Poland, with the purpose of influencing by democratic means the shape of the policy of the State." This provision thus abolished the monopoly of the communist party, and proclaimed - on the legal plane - the principle of political pluralism.

5.3. The legal status of political parties had not been regulated by a separate act until July 1990, when the act on political parties was passed. This is an act which is general in nature, and very liberal in spirit. It reaffirms the principle of the freedom of the formation and of the functioning of political parties. Parties are divided into two categories: those that do register with a court and those that do not. For a party to register with a court, it must have a founding group of at least 15 persons and it must supply the court with information on the name of the party, the seat of its headquarters, and the way in which its authorities are appointed. A registered party gains legal personality and enjoys the protection of its rights. Unregistered parties are legal, but have no legal personality.

Article 4, paragraph 2, of the 1952 constitution states that any "inconsistency with the constitution of the aims and activities of a political party shall be adjudicated upon by the Constitutional Tribunal". Respective provisions of the 1990 act further state that when adjudicating on a party's constitutionality, the Tribunal may impose a ban on the activities of the party. There are, however, no provisions defining the procedure involved in such cases. Hence the Constitutional Tribunal has no legal means enabling it to make use of the powers conferred upon it by article 4, paragraph 2, of the 1952 constitution. It should be added at this point that so far in Poland there has been no serious attempt to delegalize a political party.

The facility with which a political party can be registered and the benefits it derives therefrom (such as the gaining of legal personality) have caused the number of registered political parties to reach about 260 at the present time. The total number of parties (including those that have not been registered) is not known. By far not all of the parties are engaged in public activity; a great majority of them are ephemeral organizations. Indeed, there are no more than several dozen parties active on the political scene, of which only more than a dozen are of any significance. Out of these only a few have a really important part to play in country.

5.4. The 1990 act on political parties also touches upon their financing. Parties are to be financed openly, mainly from private funds, as well as from economic activities, which the parties are allowed to engage in, by holding shares in cooperatives and companies. The financing of parties from foreign resources has been banned.

The passing of a law on the takeover of the assets of the former PZPR by the State was of special importance for resolving the issue of the financing of political parties. Almost 90% of the PZPR's assets were taken over as a result of the act. In spite of that, the party's successor - the Socialdemocracy of the Republic of Poland (SdRP) - is still in possession of considerable material resources (the value of which is the subject of some political controversy). Considerable resources have also remained at the disposal of the agrarian party (PSL). Meanwhile other parties, formed after 1989, are frequently in a rather unfavourable, or downright disastrous, material situation, which hinders their public activities and puts them in a much worse position compared to parties of the "ancien regime". These circumstances are

quite conducive to the rekindling of political disputes between the "old" and the "new" political parties.

The regulations on the financing of political parties, including provisions concerning the openness of such financing, are not very effective. There is little trustworthy data on the real material condition of the parties, on the sources and extent of their financing, or on their spending. This is a situation that gives rise to the disquiet of the public and of some sections of the political elite.

5.5. After 1993, the parties of the currently governing coalition began putting forward proposals of major amendments to the act on political parties. The proposals stipulate more stringent requirements with regard to the registration of political parties (involving a dramatic increase in the size of membership requirement) and the financing of parties. The proposals for amending the 1990 act have been criticized by opposition groups, which point out that the proposed amendment would favour the "old" parties - especially those that make up the SLD-PSL coalition - and would hinder the formation of new ones.

5.6. The shaping of the party system in Poland has been significantly affected by regulations contained in the electoral laws for Sejm, Senate and local council elections. The elections for the Sejm and Senate in 1989, 1991 and 1993, and for local councils in 1990 and 1994, were held according to different electoral laws. I have already presented the 1989 electoral law[40]; I will now focus on the electoral laws of the years 1990-1993.

5.7. The first fully free election to be held in Poland was the election for local councils in 1990. The election was connected with the introduction of local government at the level of communes and towns. There was little controversy with regard to the election being based on the principles of universal suffrage, equality, direct representation, and secret ballot. What did give rise to differences of opinion was whether the election should be based on the principle of proportional representation or a majority vote.

At the end of 1989 and the beginning of 1990, the "Solidarity" movement was still a fairly uniform political force. It enjoyed huge popular support. Many of "Solidarity's" leaders maintained that political parties were an anachronism and should not be reconstructed. Hence their view was that the "Solidarity" movement should participate in the local elections as a

unified whole, without being divided into political currents and parties. Corresponding with that view was the opinion that the electoral law should be based on a majority vote principle. and provide for one-seat constituencies, and one round of voting. Such a solution would have assured "Solidarity" (which was participating in the election as Citizens' Committees) of an overhwelming electoral victory.

The majority vote principle was opposed by parties of the "'ancien regime" and by some "Solidarity" activists (e.g. those from nationalist-Catholic and Christian-democratic circles), who started organizing their own political groups[41]. Their view was that the electoral rules for local council elections should be based on a system of proportional representation and constituencies of many seats.

As a result, the election rules for local councils (which are still in force despite an attempt to change them, made by SLD in 1994) provide for elections in one-seat constituencies and based on a majority vote principle in rural communes and towns with up to 40,000 inhabitants. Candidates for local councils can be put up by the inhabitants of a given commune after collecting at least 15 signatures of those eligible to vote. In towns and cities of over 40,000 inhabitants, elections are held in constituencies of many seats, they are proportional, and lists of candidates can be put up by citizens (electoral committees) after having collected at least 150 signatures. The lists and names of candidates may be accompanied by information on their party (or organizational) affiliation.

The returns of the 1990 election gave most seats in town and cities to the "Solidarity" (Citizens' Committees) movement, with the runner up being SLD; in rural areas the winners were mainly people with no party affiliation, followed by members of PSL. The 1990 election was in fact a "prolongation" of the 1989 election.

The 1994 election produced a different result. The election was considerably influenced by party politics - especially in the big cities, where it was a common case for political parties and coalitions of both the right and the left to stand against each other in the election. In some towns and cities, left-wing groups, and mainly SLD, won enough eats to dominate the councils and head the local authorities. In rural areas, non-party councillors still predominate, but PSL has strengthened its influence as well.

Thus predictions that a system of proportional representation would favour the crystallization of a party system in urban areas have turned out to be true.

5.8. Elections for the Sejm were held in 1991 and 1993, according to different electoral laws. In both elections, a system of proportional representation was adopted. However, in the 1991 election, the electoral rules gave more opportunities to small and weak political groups, whereas in 1993 they favoured large and strong organizations. This contributed to - but, it must be stressed, was not the only reason for - the very different results of the two elections.

The year 1991 saw the flaring up of a dispute between President Wałesa and the Sejm majority on the issue of the electoral law. The president called for a majority vote system, while the Sejm was in favour of proportional representation. What could be observed at that time within the Sejm, as well as outside it, was the rapid emergence of political parties of most diverse political orientations. These parties had a natural interest in seeing a system based on proportional representation being adopted.

President Lech Wałęsa, on the other hand, reckoned that "Solidarity's" success of 1989 could be repeated once again, and that a majority vote electoral system would enable groups which supported him (such as the Centre Alliance, PC) to gain a majority in the Sejm.

The Sejm came out victorious in that dispute, adopting a proportional electoral law and rejecting the President's veto of the law on two occasions. According to the law, elections were to be held in large constituencies of many seats, with the number of seats won being counted by the Hare-Niemeyer method. The election produced a Sejm that was exceptionally fragmented from the political point of view.

As for the Senate, the principle of voting in two rounds was abandoned and a simple majority vote principle was adopted. However, the processes of political party formation were also discernible here. The Senate, although not as disunited as the Sejm, also turned out to be politically quite fragmented. Since 1991, the election rules for the Senate have not undergone any significant change.

The "Little Constitution" of 1992 introduced the principle of proportional representation for Sejm elections. Whether and to what extent the electoral rules of the 1993 election really satisfy that principle is a moot point. The electoral law adopted before the election (held in

September 1993), contained a number of provisions making it difficult for small and weak parties to get their deputies into the Sejm. Such provisions included in particular: a 5% national threshold, which must be crossed in order for a party to participate in the division of seats (for coalitions the threshold was set at 8%); an increase in the number of constituences (and consequently a decrease in the average number of seats in each constituency); and the adoption of d'Hondt's method of determining the election results. These solutions, along with - it must be stressed - the quarrelling and bickering that had prevented right-wing parties from forming electoral alliances, resulted in a dramatic drop in the number of political groups represented in the Sejm.[42]

5.9. The electoral law for the 1993 Sejm election, as well as the associated electoral law for the Senate election, introduced new regulations on the financing of election campaigns. These regulations may play an important part in the shaping of the party system in Poland.

Political groups which managed to get their candidates into the parliament now benefit from a State subsidy (to cover the costs of the election campaign) which is in direct proportion to the number of seats won by a given party. Parties which did not win any seats receive no subsidy. Considering the costs of the election campaign and the generally poor material condition of Poland's political parties, this may lead and, in some cases, has already led parties to a financial catastrophe; it may also prevent parties from active participation in the forthcoming parliamentary elections.

6.1. The formation of the institutional framework of a democratic constitutional system in Poland is still an ongoing process. This concerns both institutions regulated by the constitution, as well as those which are of a non-legal character, or which are regulated by law only in a fragmentary way (as for example parties and the party system). The social and cultural mechanisms of democracy have not fully developed either, which makes reaching an agreement on constitutional matters more difficult. The story of drafting the new constitution is a good illustration of that. On the other hand, Poland - unlike may other countries of Eastern Europe - is, politically speaking, a relatively stable country, where conflicts have been resolved by peaceful and parliamentary means. Poland also provides a good example of successful

market-oriented economic reforms. The success of those reforms is reflected in one of highest economic growth rates in Europe, a drop in inflation and unemployment, and considerable investment (including foreign investment). These circumstances may in the longer perspective strengthen the foundation of the now forming democratic order, both in its institutional and cultural dimension.

NOTES:

1. The Sejm and Senate election held in September 1993 gave an overwheleming majority in both chambers to left and centre parties, and above all to the Democratic Left Alliance (SLD), which has evolved out of the Polish communist party - the Polish United Workers' Party (PZPR), and to the Polish Peasants' Party (PSL), which is the successor of the United Peasants' Party (ZSL), which functioned in the years 1949-1990. The Democratic Left Alliance won 167, while the Polish Peasants' Party won 131 seats in the Sejm. These two parties have formed the governing coalition since 1993. Opposition parties - mainly of the right wing - are in a minority in the parliament (they have a total of 150 deputies in the Sejm), or, as a result of their election defeat in 1993, have remained without a parliamentary representation. The term of the two chambers of parliament lasts four years, and the next election must be held in the autumn of 1997.

2. The Polish parliament consists of the Sejm, with 460 deputies, and the Senate, with 100 senators. When sitting together, the two chambers form the National Assmbly.

3. According to the agreements, 65% of the seats in the Sejm election were to be reserved for the Polish United Workers' Party (PZPR) and its allies, including the United Peasants' Party (ZSL), while the remaining 35% were to be contested by non-party candidates. All the seats in the latter group were won by candidates put up by "Solidarity". Elections for the Senate, which had been restored after 50 years (it functioned in the years 1922-1939), were to be fully free - as a result of the election, "Solidarity" candidates won 99% of the seats

in the Senate. The Sejm and Senate election was held on a majority vote basis, in two rounds of voting.

4. The official name of the country, and the national emblem were changed as well. Instead of the designation "Polska Rzeczpospolita Ludowa [Polish People's Republic]" the traditional name "Rzeczpospolita Polska [Republic of Poland]" was restored. The national emblem, a white eagle upon a red field, was supplemented by adding a golden crown on the eagle's head (also in line with tradition). These were symbolic changes, but their aim was to underline the return of the country to its historical roots.

5. The Polish United Workers' Party (PZPR) disbanded itself in 1990. A large number of its members then established the Socialdemocracy of the Republic of Poland (SdRP), which forms the mainstay of the the Democratic Left Alliance (SLD).

6. In Poland there is a tradition regarding this type of acts, which are colloquially known as the "Little Constitution". Such acts were in force in the years 1919-1921 and 1947-1952.

7. Drafts of such a law (under various names, but relating to the matters discussed) were submitted on several occasions to the parliament by different agents: the President, the government and the deputies.

8. The "Little Constitution" introduces five "steps" (methods) of appointing the government. If the government is not appointed by means of one of those methods, the next method is applied, until all the methods have been exhausted. If a government cannot be appointed by any of the methods, the President dissolves the parliament. The successive "steps" (methods) consist in the initiative being alternately in the hands of the President and the Sejm, and in the procedural requirements (the kind of majority necessary for the investiture of the government) being successively lower. The Senate is not involved in either appointing or recalling the government.

9. An "ordinary" vote of no confidence consists in the Sejm recalling the govenment by an absolute majority of votes, without simultaneously appointing a new Prime Minister .

10. In May 1993 ", as a result of the combined stand of the parliamentary left- and right-wing oppositon, the Sejm passed an ordinary vote of "no confidence" against the pro-"Solidarity" government of Hanna Suchocka. President Lech Wałęsa made use of the powers he had under the "Little Constitution" and dissolved the parliament before the end of its term.

11. The President has special powers with regard to appointing the minister of foreign affairs, the minister of the interior, and the minister of defence. According to the "Little Constitution" the Prime Minister is obliged to consult the President on appointments to those posts, before presenting a motion on the composition of the government to the President. President Lech Wałęsa transformed the consultation into the practice of presidential decision-making on these three appointments. This is how the institution of "presidential ministers" came into being - ministers that are de facto appointed by the President, in disregard of the Prime Minister. A situation where the President practically appointed the three ministers was especially evident in the years 1993-1995, when right-wing politicians close to President Wałęsa were members of the centre-left coalition governments. On a number of occasion, this led to conflicts between the President, on one side, and the government and the parliament, on the other.

12. The Tribunal of State used to be in existence in the years 1921-1939 and was restored in 1982. This is a Court appointed by the Sejm for the duration of its term, from among persons (chiefly lawyers) who are neither deputies nor senators.The Tribunal of State is appointed to adjudicate on the constitutional liability of supreme officers of the State. It acts upon a motion of the Sejm, and in the case of the President - upon a motion of the National Assembly.

13. Such a referendum, on matters of ownership transformation (the privatisation of public property and enterprises), was held in February 1996. However, the results of the

referendum were not binding, as turn-out failed to reach the required 50% of those eligible to vote.

14. President Lech Wałęsa made use of the veto on many occasions, especially in the years 1993-1995. The veto was not always effective.

15. The party in question is the Democratic Union (UD) - a party that stemmed from the "Solidarity" movement. The party's leadership included two Prime Ministers: Tadeusz Mazowiecki (Prime Minister from 1989 till 1990) and Hanna Suchcocka (Prime Minister from 1992 till 1993). In 1994 the Democratic Union fused with the Liberal Democratic Congress (KLD), headed by former Prime Minister Jan Krzysztof Bielecki (1991-1992), to form the opposition Freedom Union (UW), which now has about 70 seats in the Sejm.

16. In the years 1921-1926 the Republic of Poland had a parliamentary-cabinet system based on the French Third Republic. After the coup d'etat staged by Marshal Józef Piłsudski in 1926, the system was changed, and the President's power was strengthened. In 1935, a new constitution was adopted which instituted a system of presidential autocracy. However, the real power in the years 1926-1935 was in the hands of Marshal Piłsudski, who never held the post of President. The President of Poland in the years 1926-1939 was Ignacy Mościcki.

17. In the Sejm of the years 1991-1993, there were 29 political factions, none of which had more than 13% of the seats. The largest parliamentary parties in the Sejm were the Democratic Union (UD) and the Democratic Left Alliance (SLD).

18. The office of the President of the Republic of Poland was restored following the "Round Table" agreements in April 1989. The President was to safeguard the inviolability of the constitutional order (which was still socialist) and the alliances of which Poland was a member (the Warsaw Pact).

19. General Wojciech Jaruzelski was elected President in July 1989 by the National Assembly by a majority of only one vote. This was because some "Solidarity" activists, afraid

of the fate of the "Round Table" agreements, did not vote against Jaruzelski, as did all the remaining representatives of "Solidarity". On the other hand, some deputies of parties that had up to then been in coalition with the communist party did vote against him.

20. Lech Wałęsa's political role-model is Marshal Józef Piłsudski.

21. A good examples is the Centre Alliance (PC), a right-wing, Christian democratic party, headed by the brothers Lech and Jarosław Kaczynski, at one time close associates of Lech Wałęsa. The Alliance first called for a presidential system modelled on the Fifth Republic in France. When the party came into conflict with the President, it abandoned its ideas and began to opt for a parliamentary-cabinet system.

22. This is not the first time such a thing has happened. The constitution of 1921, which gave the President a purely representational role, had been drafted "against" Józef Piłsudski, who was then the Chief of State. It had been expected that Piłsudski would run for the presidency. However, Pilsudski refused to do so, because he did not desire to be a figure-head president. On the other hand, the 1935 constitution was written "for" Piłsudski, but he never managed to take the presidency (he died in May 1935).

23. This involves the 1992 Constitutional Act on the procedure for drafting and adoption of the Constitution of the Republic of Poland.

24. The right of citizens to submit drafts of the constitution was instituted in 1994, under pressure from President Lech Wałęsa and "Solidarity" who were anxious about the emergence of an actual monopoly of political parties with regard to activities aimed at adopting the State constitution. Moreover, another important motive behind the pressure exerted by the President, and especially by "Solidarity" and other political (mainly right-wing) groups, was that following the 1993 election "Solidarity" and the other groups remained without a parliamentary representation. They claim that the current parliament lacks the "moral legitimacy" do adopt a constitution, since there is not a sufficient representation of opposition groups within it.

25. This meant the Assembly had not followed the principle of discontinuation, whereby drafts of legislation that have not been dealt with during the term of the parliament expire at the end of the term. In this case the objective was to shorten the procedure, save time, and accelarate work on the new constitution.

26. In 1994, the National Assembly transferred to the Constitutional Committee all the drafts that had been submitted, without rejecting any of the drafts in the first reading.

27. It is worth stressing in the case of an "ordinary" referendum, i.e. a referendum that does not concern constitutional affairs, there is a requirement of a minimum turn-out (50%). The lack of such a requirement for the constitutional referendum appears to be a paradox, but the paradox is deliberate. The point is to prevent the rejection of the constitution due to a boycott of the constitutional referendum.

28. It might be added that the dispute with regard to which values the constitution should protect and promote has been one of the pivotal issues of the constitutional debate in Poland in recent years. I shall return to that matter below.

29. The Union of Labour (UP) is a left-wing group that stems from the "Solidarity" movement; it has accepted into its ranks a number of activists who belonged to the reformist wing of the communist party before 1990.

30. This is the draft of the Confederation of Independent Poland (KPN), an undeniably anticommunist party with a left-leaning socio-economic programme and state-oriented constitutional ideas, which draws on Poland's independence tradition and has as its role-model the person of Józef Piłsudski. KPN's draft is modelled on the Constitution of the Republic of Poland of 1935. The party even proposed that the repealing of the 1952 constitution should be accompanied by the restoration of the legal status quo in Poland as it was in 1939. It ought to be added at this point, that the legality of the adoption of the 1935 constitution has been and continues to be a matter of controversy among Polish lawyers, politicians and historians.

31. These are the following chapters: (1) The Republic (covering the ground principles); (2) The Freedoms, Rights, and Duties of Man and Citizen; (3) The Sources of Law: (4) The Sejm and Senate; (5) The President of the Republic of Poland; (6) The Council of Ministers [=the government] and Government Administration; (7) Local Government; (8) Courts and Tribunals; (9) Organs for State Supervision and the Protection of Law; (10) Public Finance; (11) States of Emergency; (12) Amending the Constitution; (13) Final Provisions.

32. The Constitutional Committee has been headed in succession by: senator Walerian Piotrowski (1992-1993), from one of the nationalist-Catholic parties; and since 1993 by Aleksander Kwaśniewski (the current President of Poland), Włodzimierz Cimoszewicz (the current Prime Minister) and Professor Marek Mazurkiewicz - all of three of them deputies of the Democratic Left Alliance (SLD).

33. The non-governmental organizations include ecological, consumer, feminist, war veterans', scientific, or ethnic-minority associations, as well as trade unions and employers' organizations. Some of the Committee's sessions have also been attended by representatives of local governments, professional societies, orders and chambers, and chambers of industry and commerce. Representatives of the Churches (including the Roman Catholic Church) and other religious unions are participating in the Committee's work on a permanent basis.

34. Apart from the Tribunal of State, the year 1982 also saw the establishment of the Constitutional Tribunal (which began its activities in 1986). In 1987, the office of the Commissioner for Citizens' Rights (ombudsman) was instituted. With the exception of the Constitutional Tribunal, of which a counterpart there was in Yugolsavia, all these institutions were then a novelty in countries of Eastern Europe. As far as Poland is concerned, their introduction was a breakthrough in terms of the constitutional order of the State, and paved the way for further measures of a democratic-pluralist nature.

35. At present, there is local government only at the level of communes and towns. Poland is divided into 49 provinces (*voivodeships*) and a total of 2483 comune-level units (including 315 towns).

36. The principle of separation is contained in the provisions of the 1952 constitution continued in force. The separation of the Church and State is presented by the Episcopate as a communist concept. The principle of "mutual autonomy and independence" is included in the Concordat signed by the Holy See with the Polish Government in 1993. The Concordat has not yet been ratified by the Sejm and there is an on-going dispute on its ratification betwen left-wing parties on the one hand, and right-wing parties and the Roman Catholic Church, on the other.

37. Survey of the Centre for Public Opinion Research (CBOS) - BS 31/27/94.

38. The constitutional draft provides for the following principles in this area: subsidiarity (with regard to the relationships between the State and local government), multi-tiered character of local government, judicial protection of local government rights, and economic-financial autonomy of local government. There is a dispute on the multi-tiered character of local government which may be very dangerous for the fate of the draft constitution. The Polish Peasants' Party (PSL) is opposed to the proposal of restoring districts (abolished in 1976) as a third level of the country's administrative division, intermediate between communes and provinces (*voivodeships*) . Other parties are supporting the proposal. Taking into account the number of PSL's deputies and senators, their vote against the constitution may be decisive.

39. PSL is calling for the constitution to safeguard family farms. There are over two million such farms in Poland (their average size being 7.6 hectares); the population of rural areas makes up 38% of the total population of the country, and the number of people engaged in agriculture is 25% of all those employed. The rural and farming population is PSL's natural electorate. The protection of family farms could mean preserving the current agricultural structure of the country, which is assessed by many liberal economists as unfavourable. Calls

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Thus predictions that a system of proportional representation would favour the crystallization of a party system in urban areas have turned out to be true.

5.8. Elections for the Sejm were held in 1991 and 1993, according to different electoral laws. In both elections, a system of proportional representation was adopted. However, in the 1991 election, the electoral rules gave more opportunities to small and weak political groups, whereas in 1993 they favoured large and strong organizations. This contributed to - but, it must be stressed, was not the only reason for - the very different results of the two elections.

The year 1991 saw the flaring up of a dispute between President Walesa and the Sejm majority on the issue of the electoral law. The president called for a majority vote system, while the Sejm was in favour of proportional representation. What could be observed at that time within the Sejm, as well as outside it, was the rapid emergence of political parties of most diverse political orientations. These parties had a natural interest in seeing a system based on proportional representation being adopted.

President Lech Wałęsa, on the other hand, reckoned that "Solidarity's" success of 1989 could be repeated once again, and that a majority vote electoral system would enable groups which supported him (such as the Centre Alliance, PC) to gain a majority in the Sejm.

The Sejm came out victorious in that dispute, adopting a proportional electoral law and rejecting the President's veto of the law on two occasions. According to the law, elections were to be held in large constituencies of many seats, with the number of seats won being counted by the Hare-Niemeyer method. The election produced a Sejm that was exceptionally fragmented from the political point of view.

As for the Senate, the principle of voting in two rounds was abandoned and a simple majority vote principle was adopted. However, the processes of political party formation were also discernible here. The Senate, although not as disunited as the Sejm, also turned out to be politically quite fragmented. Since 1991, the election rules for the Senate have not undergone any significant change.

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CONSTITUTIONALISM AS A VEHICLE FOR DEMOCRATIC CONSOLIDATION IN ROMANIA

1. The political and legal background

In Romania, more than in other countries in Central-Eastern Europe, the last years of the communist regime were very tough both economically and politically. No economic reform was undertaken, the state being practically the only owner of the industry, the main land owner and the only legal entity entitled to conduct international trade activities. During the 80's, the economic and social situation of the population has continuously degraded. Politically speaking, Romania was governed by a communist dictatorship, characterized by an overwhelming control of the communist party. Even though formally speaking state and party structures were separate, the decisions of the Romanian state were actually made by the communist leadership. Obviously, the separation of powers did not exist. After 1989 several political and legal analysts as well as journalists have expressed the idea that the 1965 Constitution was not so bad, listing several rights and freedoms, the main problem of this legal document being its lack of implementation[1]. I do not share this view. The Romanian communist constitution had a very clear aim: to protect the communist state by protecting the communist party and its ideology. The entire fundamental law was designed and structured to fulfil this goal. Therefore, although one can find references to "citizens' rights" or the "independence of the judges" these were merely syntagma without any legal guarantee. Furthermore, according to the Constitution, all state authorities, including the judiciary and the justice system, were obliged to act for the defense and the advancement of the communist ideology.

Unlike the neighbouring countries in Romania the overthrowing of the communism was violent, over 1,000 persons being killed in December 1989. At that time the demonstrators were very clear in expressing their wish: no more communism.

These factors created the impression that the changes in Romania would be more radical than in other former communist countries. Among the first pledges of the leadership which took the power in December 1989 (the National Salvation Front), two regarded its *ad interim* character as the only power of the country until free elections took place in April 1990 and a rapid adoption of a new constitution based on the principle of separation of powers. Contradicting these promises and all expectations, within less than one month the Front turned into a political party and announced it would run for elections. For this reason, to which others have been added, the new leadership was perceived as a sort of continuation if not of the previous regime at least of a part of the communist leadership[2].

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[1] See Adrian Vasiliu "Curtea Constituţională, locul şi rolul ei în statul de drept" (The Constitutional Court - its Role and Place within the Rule of Law) in *Revista Română de Drepturile Omului* (Romanian Review for Human Rights) no. 2/1993, p. 23.

[2] From the very beginning and until now many journalist have expressed such a view. Some national newspapers - such as *România liberă*, *Cotidianul*, *Ziua*

2. The new institutions

In the evening of December 22, 1989, the Council of the National Salvation Front issued its first "**Statement to the Country**" mentioning that "*In this crucial moment we have decided to organize ourselves in the National Salvation Front which relies on the Romanian army and which gathers all the healthy forces of the country, regardless of their nationality, and the groupings which bravely stood up for the defense of freedom and dignity during the totalitarian dictatorship*". The communique also announced the dissolution of all Ceauşescu's power structures, the dismissal of the Government and the termination of the activity of the State Council (the usual legislative body). This gave raise to an institutional and legal vacuum.

To avoid a potential chaos the Statement proclaimed: "*The whole state power is taken over by the Council of the National Salvation Front... All the ministries and central institutions, within their current frame, shall continue their normal activity being subordinated to the National Salvation Front in order to ensure the normal economic and social life. Within the country local, municipal and county councils of the National Salvation Front shall be organized as organs of the local power*". The Statement also contained a 10-point programme for the democratic development of the country and an opened list of persons chosen to be members of this new power structure, the Council. No one can really say on which bases the persons appointed to the Council were chosen, but to the first 30 names announced on December 22, 1989, a few tens were added in the following days, the final number of members thus amounting to 145. In a book on parliamentary law two of the current judges at the Constitutional Court (they were also members of the Drafting Committee) consider that the only criterium for the creation of the National Salvation Front was "*the direct participation to the victory of the December 1989 Revolution*"[3]. They also state that "*[f]rom the beginning the Front was conceived as a mass movement precursory of the multiparty system, unifying various political and spiritual tendencies*"[4]. In their opinion

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- have constantly considered the new leadership of the country as being "cripto-communist" or "neo-communist". Some political scientist and historians have shared such a view. In a very recent interview, published by the review *"22"* in its issue No. 45 from November 1996, Şerban Papacostea, an associate member to the Romanian Academy and the director of the "Nicolae Iorga" History Institute declared: "*The period opened in December 1989 by Ceauşescu's overthrow and which will cease with the current president's retirement from his head of state position, will be known by history as the final stage of the soviet-communist regime in Romania, initiated in March 1945 by the Petru Groza government. Two prevailing and interdependent characteristics relate to this final stage and to the person who represents it: at the international level an absolute devotion toward the Soviet Union and its hegemonic system in Central-Eastern Europe; at the domestic level an effort to safeguard the essence of the communist regime, to reduce to minimum - imposed by the new historical trends - the concessions for political and economical freedoms, to maintain control over the power procedures in all the domains of the social-political life.*"

[3] Mihai Constantinescu, Ioan Muraru, *Drept parlamentar* (Parliamentary law), Gramar, Bucharest, 1994, p. 10.

[4] *Ibidem.*

"[a]ccordingly the Front created its state structure, also as a precursory of the future state, by means of establishing the Council of the National Salvation Front which had united representatives of all patriotic forces of the country, belonging to all social levels, all nationalities, thus having the role of the supreme organ of state power"[5]. It sounds more like a justification than an exegesis.

Following the "**Statement**" several legal acts including constitutional norms were adopted. All of them had a provisional character being enforced until the adoption of the new Constitution: the Decree-Law no. 2 of 27 December 1989 on the establishment, the structure and the functions of the Council of the National Salvation Front and its local councils. The governing program of the Council was very clear on several options: a multi-party system; a democratic and pluralistic system of government; separation of powers; free elections; equality of rights regardless of one's ethnicity; the right to be elected for only one or maximum two mandates; freedom of press; freedom of religion.

According to these new regulations the Council of the Front was the only legislative authority, entitled to issue "decree-laws". By February 9, 1990 over 80 decree-laws have been issued on all the domains of the economic, social and political life. The president of the Council was allowed to issue "decrees" on fields related to competencies which normally belong to a president of a country and to a prime-minister, although the Romanian prime-minister was appointed in December 27, 1989.

The structure and the functions of the Council of the National Salvation Front were regarded as a proof of the transitional character of this body, its role being to govern the country until fair and free elections were held. This is why the National Salvation Front's decision to become a political entity and to run for elections was considered to jeopardy the democratic development of the country by having once again "a state-party". On January 23d, 1990, The Council of the Front decided that the Front should run for election. It is at least surprising that no constitutional law book issued since has commented, from a constitutional perspective, the possibility of a power state body (the Council) to decide upon the creation of a political entity (the transformation of the Front).

Following the decision of the Front to run for elections a big demonstration took place on January 28, 1990 in Bucharest and it resulted in a change of the power - at least of the legislative authority. At the beginning of February 1990 a new institution was created, the Provisional Council for National Unity, where representatives of many other political parties were added to the Front. The total number of member was 253. The Decree-Law no 81 of 9 February 1990 on the Provisional Council for National Unity also had some constitutional provisions.

The main goal of this legislative body was the adoption of a law on parliamentary and presidential elections. But it also regulated on several domains. There are authors who consider that one of the most important aspects related to this new entity, was the decrease of the role played by its Standing Committee (Executive Bureau) which instead of acting like a decision body between the two plenary sessions became more and more a committee preparing the activities of the PCNU[6]. I do not share this view. On the contrary, I think that an important characteristic of the Provisional Council was its incapacity to exercise control over its own activity and the activity of its Standing Committee. The most significant

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[5] *Ibidem.*

[6] *Idem*, p. 16.

example concerns the Romanian Intelligence Service[7]. During its meeting of 21 March 1990 the Standing Committee discussed a draft on the establishment of the Romanian Intelligence Service. By the end of the meeting a communique was issued, mentioning that the draft will be forwarded to the plenary of the Provisional Council for National Unity. This never happened. The Provisional Council never discussed nor adopted such an act. Yet the Intelligence Service was created and it functioned illegally for more than two years, the law regulating it being adopted in July 1992.

But the Provisional Council fulfilled its task and issued the Decree-Law no 92 of 14 March 1990 on parliamentary and presidential elections. This act also had a constitutional character as it defined the new institutions of the state and their powers: the bi-cameral Parliament and the President of the country. It also stated that the new Parliament would act both as a legislative body and as a Constitutional Assembly having as a mandate the adoption of a new Constitution over the following two years.

3. The framers of the new Constitution

The elections took place on May 20, 1990 and brought to the National Salvation Front an absolute victory: almost 70% of the Parliament which also meant almost 70% of the Constitutional Assembly, the necessary percentage for the adoption of a Constitution (two third of the Assembly). Any political party having such a proportion within a Parliament would take advantage and impose its own interest over a constitution. The Front was not an exception. Paradoxically, because the new power was perceived - not only in Romania but also abroad - as a continuation of the former communist leadership, it has showed a certain openness toward several democratic principles and ideas as the foundation of the new Constitution.

The adoption procedure was conceived as having three stages[8]: the adoption of the theses regarding the future Constitution (a sort of pre-draft); the adoption of the draft-constitution; the approval of the Constitution by means of a referendum.

The Constitutional Assembly appointed a Drafting Committee to issue the theses for the new Constitution. Three different pre-drafts were issued. They were published in the media and opened to public debate. But the debate was rather weak. A few articles were published in newspapers - regarding mainly the form of government (republic or monarchy), the powers of the president, the issue of constitutional control (establishment of a Constitutional Court or granting this power to the courts). In analyzing the public reaction at that time, one has to keep in mind the lack of knowledge and understanding of constitutionalism not only of the public but also of most people from the legal profession. Those who were more acquainted with the issue were involved either in the drafting or in the discussions in the Assembly. This explains why only a few legal experts were involved

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[7] See Renate Weber "Siguranţa naţională şi drepturile omului în România" (National security and human rights in Romania), in *Revista Română de Drepturile Omului*, No. 6-7/1994.

[8] See Ion Deleanu *Drept constituţional şi instituţii politice* (Constitutional Law and Political Institutions), Europa Nova, Bucharest, 1996, pp. 93-96.

in the public debate[9].

Significantly, no Bar association in the country was ever involved in commenting the drafts and, at that time, no non-governmental association was in a position to posses such an expertise as to analyze the draft-Constitution. The journalists emphasised and criticised only some political aspects of the choices. Several articles published in *România liberă* emphasised the possibility of reinforcing the Romanian 1923 Constitution, which at the time of its adoption was considered to be among the most democratic in Europe. But the main reason behind this idea was the lack of trust in the capacity of the Constitutional Assembly, due to its composition[10], to issue a democratic fundamental law. The danger consisting in having a Constitution which would enable a continuity of power for the existing ruling party and the President of Romania[11]. At the same time, the configuration of the Assembly enabled a very strong pressure on behalf of some institutions which wanted and have succeeded to preserve their privileges: the police, the prosecutors, the military courts, etc.

No one seriously considered the possibility to amend and implement the Constitution of 1965.

Special mention must be made in relation with the nationalist trends which have influenced some provisions of the Constitution. A Hungarian party (the Democratic Alliance of Hungarians in Romania) and a nationalist-extremist party (the Party of Romanian National Unity) were represented in the Constitutional Assembly. At the same time another extremist party was created in the country (the Great Romania Party). A nationalistic discourse was more and more often used. The Constitution gave satisfaction to these trends, several articles being thus adopted. Article 1 proclaims Romania as a national state; Article 3 (4) says: "*No foreign populations may be displaced or colonized in the territory of the Romanian State*" (provision taken *tale quale* from the 1923 Constitution!); Article 41 (2) says: "*Aliens and stateless persons may not acquire the right of property on land*". This last provision was one of the main obstacles against foreign investment in Romania. But at the time when the draft Constitution was under discussion, the Assembly did not pay attention to economic implications. The debates[12] focused on preventing the possibility to have Transylvania bought - piece by piece - by Hungarians from all over the world!

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[9] See Lucian Mihai "De ce nu voi vota pentru această Constituţie" (Why I shall not vote for this Constitution), in *România liberă*, No. 14572 (538) - 14577 (543) November-December 1991. See also Dan Ciobanu "Aplicarea normelor de drept internaţional de către instanţele judecătoreşti române, în lumina anteproiectului de Constituţie" (The enforcement of the international law norms by Romanian courts as reflected in the pre-draft-constitution), in *Dreptul* (Law), No. 7-8/1991.

[10] After the 1990 elections the National Peasant Party -Christian Democratic and the National Liberal Party, the two main forces of the opposition at that time, shared less than 10%.

[11] For a broad picture on the third running of President Iliescu for another presidential mandate - considered to be the third one, but decided by the Constitutional Court to be the second "constitutional" one, see *Revista Română de Drepturile Omului* No. 13/1996.

[12] The debates of the Constitutional Assembly were published in the *Official Gazette*, part III in 1990 and 1991.

The three drafts were extensively discussed by the Drafting Committee and other representatives of the Parliament with legal and constitutional experts from the Council of Europe, USA and many European countries. In fact several good provisions of the Constitution were accepted as a result of these discussions.

Many articles of the Constitution reflect the heterogeneity of the ruling party by the time of its adoption. This made some good approaches possible. But politically and legally speaking, the Constitution reflects the long standing Romanian traditions.

- Politically, the ideological climate was not favourable to individualism and liberalism. During its history Romania has had a paternalist approach. The head of state has always been considered as the most important person in solving all the problems, despite his legal capabilities. This medieval view has been applied even after Romania became a constitutional monarchy with clear rules. The communist regime - especially the Romanian one - was favourable to such an approach. The father of the country was no more the king, but the leader of the communist party. Ceauşescu's regime lead this tendency to a peak.

At the same time, the state was considered the most important vehicle for the development of the country. The Romanian civil society had never been very strong. But before the communist regime it existed and played its role. During the communism civil society was non-existent, as all associative structures, women, youth, children organisations, trade unions, etc. were not based on the freedom of association of its members, but created and controlled by the communist party[13].

- Legally speaking, during the communist regime Romania had a very dangerous method of regulating: laws, decrees, acts, statutes, decisions were worded in a very imprecise way; thus offering the possibility of interpreting them up to changing them through other laws, decrees, decisions, etc. Unfortunately the Constitution has taken over this "tradition" and many of its provisions are vague, without guarantees but making references to future laws.

Finally, the Constitution was adopted by the Constitutional Assembly on November 21-st, 1991 and has entered into force after being confirmed by a national referendum held on December 8-th, 1991.

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[13] What happened after December 1989 was that an old law, No. 21/1924, which had never been abolished, was reinforced and has become the legal frame for the newly emerging civil society. A few thousands of non-governmental (non-profit) organizations have been created. For several years they were considered as anti-governmental structures, "paid by foreign forces" thus being perceived as a threat to national security. Yet, due to all those meetings with foreign experts and under the influence of the European Convention on Human Rights, Article 37 of the Constitution makes it quite clear that "*Citizens may freely associate into political parties, trade unions and other forms of association*", the prohibition concerning only "secret associations". But the framers of the Constitution had no intention at all to enhance the NGO sector and no privileges were granted to associations, foundations, etc. It was the Law no. 137/1995 on environment protection which, for the first time (and unique until now)stipulates the right of a NGO to stand in justice in its own name but in the interest of another: "*NOGs have the right to take court action with a view to preserving the environment, irrespective of who suffered the prejudice*" (Art. 86).

3. A few constitutional choices

The question of a quick adoption of the Constitution was not a problem in itself. On the contrary, since December 1989 everyone had expected a new fundamental law as a step toward normality and stability. Reluctance was met only due to the composition of the Assembly which allowed some constitutional choices considered to jeopardize the democratic evolution of the country.

a) Separation of powers

The question of separation of powers was very much debated. As previously mentioned several legal acts adopted after the overthrow of the communist regime expressly mentioned the separation of powers as the foundation of the country's democratic evolution. However the Constitution does not contain any specific provision on this principle, "*although during the debates within the Constitutional Assembly and outside it this principle was regarded as a possible remedy against the historical breaking made by the communist political regime as well as a preventive manner against potential neo-communist attempts*"[14]. Moreover, the Constitution does not refer to "powers" but to "authorities" and does not refer at all to "separation". Can we assert that the principle still applies? Various answers have been given.

Many constitutional experts consider that the answer is positive. They were members of the Drafting Committee who played an important role in choosing the implicit assertion of this principle. Their main idea is that separation of powers should not be regarded as a dogma, precisely because of the cooperative character of the activity of powers[15]. The most important thing is to have the principle at work. In this light "*one could understand the position of our Constitutional Assembly who did not mention the principle of separation of powers in the fundamental law, but it has organized the authorities according to its requirements*"[16].

Of course, there are other scholars who criticise this solution. Among the arguments it was invoked even the moment when the communist regime was defeated. It is considered that the Riot in December 1989 was at the foundation of the Constitutional Assembly. Which implies that the Constitutional Assembly did not have absolute power when adopting the Constitution. On the contrary, its limits were drown by the "**Statement to the Country**" of December 22d, 1989. And the Statement expressly mentioned separation of power[17]. The

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[14] Ion Deleanu, *Op. cit.* p. 92.

[15] Ion Deleanu, *op. cit.*, pp. 92-100. See also Ioan Muraru, *Drept constituţional şi instituţii politice* (Constitutional law and political institutions), Editura ACTAMI, Bucharest, 1995, pp. 14-26.

[16] Genoveva Vrabie, *Organizarea politico-etatică a României*, Editura Virginia, 1995, p. 27.

[17] Lucian Mihai, "Separarea puterilor în stat: propuneri de modificare a Constituţiei" (Separation of state powers: proposals to modify the Constitution), in *Revista Română de*

author admits that "*it is possible that from a scientific point of view the principle of separation of powers is wrong and the theory of 'state authorities' to be correct. But the* ***Statement*** *of December 22, 1989 did not express a scientific opinion, but the aspiration of the insurgents, that is, of the revolted people. The adoption of a Constitution is not a scientific endeavour but a political decision framing the desire of the governed people*"[18].

The question is to which extent the absence of this principle was harmful for the country's democratic development. And it seems that there are several issues were it has been detrimental. Such was the case of the independence of the judiciary, because it made possible to include the prosecutors into the judiciary, although they are part of the Public Ministry, which belongs to the Executive branch. The absence of this principle allowed for the creation of the Superior Council of the Magistracy, consisting of magistrates (both judges and prosecutors) which, among other things, will play the role of a disciplinary council for judges, Which means that prosecutors, part of the executive power, are entitled to make decisions regarding judges. Hard to imagine how the independence of judiciary could work in such conditions.

Another issue related to this cooperation between the branches of the power concerns the delegation of legislative competence from the Parliament to the Government and the latter's abuses.

b) Presidentialism vs. parliamentarism

Any state coming out from a dictatorship as Romania had experienced for several decades should be very careful when designing its new structure. The normal tendency is to opt for a collective form of government, a parliamentary system.

This has not been the choice of the Constitutional Assembly which has decided in favour of a semi-presidential form of government. According to Article 58 (1) "*The Parliament is the supreme representative body of the Romanian people and the sole legislative authority of the State*". The Parliament is elected by direct universal vote. So is the President. According to Article 81 "*The President of Romania shall be elected by universal, equal, direct, secret and free suffrage*".

Some scholars consider that the Romanian Constitution has opted for a "dualist executive": the President and the Government[19]. Others are reluctant in defining the president's role as a part of the Executive. They rather prefer to emphasise the presidential competencies "*in the light of the principle of separation of and cooperation between powers*"[20]. And others prefer to stress the president's functions[21].

- Legislative powers: according to Article 77 the President promulgates the laws. He has the possibility to return a law to the Parliament for reconsideration (only once) and also

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Drepturile Omului, No. 2/1993.

[18] *Ibidem*.

[19] Ion Deleanu, *Op. cit.* p. 331.

[20] Genoveva Vrabie, *loc. cit.*, p. 232.

[21] Ioan Muraru, *loc. cit.*, pp. 210-215.

the possibility to send the law to the Constitutional Court to have its constitutionality confirmed;

- The function of organizing public institutions: Article 80 (2) states that "*The President of Romania shall guard the observance of the Constitution and the proper functioning of the public authorities. To this effect he shall act as a mediator between the Powers in the State, as well as between the State and the society*". Accordingly he may address messages to the Parliament (Art. 88); he may consult the Government on urgent extremely important matters (Art. 86); he may participate and preside over Government meetings (Art. 87); he is entitled to organize referendums on matters of national interest (Art. 90);

- The function of selecting, appointing, revoking public authorities: he may dissolve the Parliament (Art. 89); he designates a candidate to the office of Prime-Minister and may dismiss and appoint some members of the Government (Art. 85);
he appoints the judges (Art. 124); he appoints three judges to the Constitutional Court (Art. 140 - the others are appointed by the Senate - 3 and by the Chamber of Deputies - 3);

- Duties related to national defense and protection of public order: the President is not only the Commander-in-Chief of the Armed Forces but he also presides over the Supreme Council of National Defence (Art. 92);

- Functions relating to foreign policy: he concludes international treaties; he accredits and recall diplomatic envoys of Romania and approve the setting up, closing down or change in rank of diplomatic missions (Art. 91);

- The President is also entitled to confer decorations, to make promotions to the rank of marshal, general and admiral; to grant individual pardon (Art. 94).

According to Article 94 (c) the President has the power "*to make appointments to public offices under the terms provided by law*". This is to say that presidential powers are not limited to the constitutional framework, but may be extended by means of a law which has a totally different procedure of adoption than the Constitution. This provision can be regarded as dangerous as it opens the path for legal abuses which can enormously increase the controlling powers of the President without being unconstitutional.

c) Bi-cameralism

The current Romanian Constitution states in Article 58 (2) "*Parliament consists of the Chamber of Deputies and the Senate*".
The option for a bi-cameral Parliament has been generally justified by the "Romanian traditions"[22]. Indeed, the 1923 Constitution had established a bi-cameral Parliament, but, at that time, there were quite important differences between the two Chambers.

The present situation is different. The two Chambers are elected in the same way and have the same competence. Their differences are more circumstantial: the number of the members (the Senate has approximately one third of the number of the Chamber of Deputies) and the size of the constituency they represent (a senator's represents more than the double of a deputy's); the age allowing someone to become a MP (35 for the Senate as compare to 23 for the Chamber of Deputies). At the same time, "*In case of vacancy in the office of the*

[22] Mihai Constantinescu, Ion Deleanu, Antonie Iorgovan, Ioan Muraru, Florin Vasilescu, Ioan Vida, *Constituţia României - comentată şi adnotată (The Constitution of Romania)*, Regia autonomă "Monitorul Oficial", Bucharest 1992, p. 136.

President, or if the President be suspended from the office or be temporarily incapable to exercise this power, the interim shall devolve, in this order, on the President of the Senate or the President of the Chamber of Deputies" (Article 97). The Senate has the competence to appoint the Advocate of the People. Minorities can be represented *ex officio* only in the Chamber of Deputies.

Although having the same legislative competence the experience of the last six years has proven two things:

- firstly, that debating and adopting a law by each Chamber has lowered considerably the rhythm of legislation as such;
- secondly, that in several cases bad draft-laws adopted by one Chamber have been corrected by the other Chamber.

Evaluating the positive and the negative aspects I think that the bi-cameral option was correct and the check and balance procedure should prevail.

d) Republic vs monarchy

Article 1 (2) of the Romanian Constitution states: "*The form of government of the Romanian State is a Republic*". It is interesting to note that back in 1990 and 1991 the main question related to a quick adoption of the Constitution concerned the form of government. The pro-monarchists asked for a special referendum on this particular issue before the adoption of the Constitution, while some supporters of the republicanism pretended that such referendum would take place implicitly together with the referendum on the Constitution. There is no question that such an approach was merely a trick. But, at the same time, it was obvious that the vast majority of the Romanian population was against the monarchy, its supporters representing around 2%. The country's evolution since 1991 proved that the monarchy is not a model of government accepted by Romanians for themselves. Although meanwhile some very strong affectionately evidence of affection were displayed during King Michael's visit in 1992, they were merely emotional, proving respect and consideration for what he represents for the Romanian history and not a constitutional option.

Yet, the Constitutional Assembly considered it had a historical obligation to defend this form of government - the republic -, by regulating the limits of constitutional revision and banning the revision of the form of government (Art. 148). Of course the Assembly did not come up with a solution for the revision of Article 148 itself.

Even today some authors feel the necessity to defend this constitutional choice considering that "*in the general context of asserting multi-party system and human rights, the republican approach finds again its european traditional origins according to which the republic - in the sense of that form of government which constitutes "res public" - is, in its essence, an assembly of institutions which aim to guarantee everyone's freedom and the defense against oppression*"[23].

e) The electoral system

The electoral system is regulated by the Constitution and several laws such as the Law on local elections, Law No. 68/1992 on parliamentary elections and Law No. 69/1992 on presidential elections.

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[23] Mihai Constantinescu, Ioan Muraru, *Op. cit.*, p. 11.

The Constitution lays down clearly the right to vote and to be elected. It also states, in Article 66 that "*(1) In the exercise of their mandate, Deputies and Senators shall be in the service of the people; (2) Any imperative mandate shall be null*"[24]. This means that the parties have no possibility to revoke their MPs, only the people (voters) having the possibility to sanction an MP by not electing him or her anymore. This is more true in theory than in practice as the Romanian electoral system has opted for the party list of candidates without the possibility of a preferential vote, which means that the party will exercise control over its MP members when it decides the new lists.

For parliamentary elections the option has been in favour of a proportionate representativity (one list and one round of elections). For presidential elections the Constitution has opted for a universal, equal, direct, secret and free vote expressed in two rounds of elections.

One of the biggest problems related to elections is the absence of an independent and permanent electoral body. Since 1990 Romania has already held parliamentary and presidential elections three times and local elections twice. Each time an *ad-hoc* Central Electoral Bureau and local county-bureaus were created. Allegations on their political bias have always been made. Their way of regulating was very unclear, sometime they even changed the laws, all in all every election in Romania was like "an organized chaos", not to say that after each election these bodies were dismissed and the election which took place in between 1992 and 1996 scrutinies (as is the case of local authorities) were held quite illegally.

f) The delegation of powers from the Parliament to the Government

Article 114 regulates the legislative delegation: "*(1) Parliament may pass a special law enabling the Government to issue orders in fields outside the scope of organic laws. (2) The enabling law shall compulsorily establish the field and the date up to which orders can be issued. (3) If the enabling law so requests, orders shall be submitted to Parliament for approval, according to the legislative procedure, until expiration of the enabling term. Non-compliance with the term entails discontinuation of effectiveness of the order. (4) In exceptional cases, the Government may adopt emergency orders, which shall come into force only after their submission to Parliament for approval. If Parliament does not sit in a session, it shall obligatorily be convened. (5) Orders shall be approved or rejected by a law which must also contain the orders that ceased to be effective in accordance with para (3)*".

The last 6 years' experience made very clear the difference between enjoying a right and its abuse or misuse. More than one third of the total regulations have been decided by the Government through this procedure. More recently, this year, the Government issued "emergency orders" in the field of organic laws (such was the case of the law on political parties and the law on some tax exemptions).

The constitutionality of these orders is not checked before their adoption. A possible solution would be to check the laws on the basis of which they are adopted, but practice showed that this process takes place months after the statutory orders actually come into

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[24] For the constitutional debate on this issue see Renate Weber, "Curtea Constituţională versus Parlamentul României" (The constitutional Court vs. the Romanian Parliament), in *Revista Română de Drepturile Omului* No. 5/1994 and the Decision No. 44/1993 of the Constitutional Court.

force and start having legal effects.

It is my opinion that the Constitution should be amended at least so as to require control of constitutionality of all these orders as a minimum control over the Government (the executive power). But learning from the past experience I think that it would be even better to amend the Constitution and to forbid (or reduce to a minimum) this legislative delegation.

g) The Court system

The judiciary should not be only the third power in the state but also the only one without any political preferences. In order to achieve this goal, a country's legislation has to be very clear in asserting and guaranteeing the independence of the judiciary.

As previously mentioned, in the Romanian system the prosecutors are assimilated to magistrates and moreover they are part of the Superior Council of the Magistracy which decides upon "*promotion. transfer and sanctions against judges*" (Art. 124). Let me mention that the Council has not the same powers over the prosecutors who are subordinated only to their superiors organized in the Public Ministry. Thus, the Romanian Constitution has succeeded to have the judiciary controlled by the executive but not the opposite[25].

This was stressed even more by means of Law No. 92/1992 on the judiciary which gives the Minister of Justice the possibility to control (through his inspectors) the professional activity of the judges[26].

Generally speaking, several guarantees are necessary to ensure the independence of the judges, for example by declaring them irremovable. According to the Romanian Constitution "*Judges appointed by the President of Romania shall be irremovable, according to the law*" (Art. 124). But the Law No. 92/1992 unequivocally decided that all judges should be appointed by July 1994. It is worthwhile mentioning that the Romanian President fulfilled his duty only in July 1996 after several strikes organized by judges.

Another means of ensuring the independence of the judges is a decent salary. With the exception of judges from the Supreme Court of Justice, the other judges have the same medium salary as any other bureaucrat. The Romanian system did not accept the idea of granting judges salaries representing three medium salaries as it happens in other countries. On the contrary, when the 1996 Budget was under discussion the Minister of Justice declared in front of the Parliament that his budget was too ample as the Romanian judges do not work for money but for the benefit of the country!

Another issue related to the Court system regards the military courts. When the Constitution was under discussion the already existing military courts and prosecutors' offices put a lot of pressure upon the Constitutional Assembly to maintain them. On the other hand, several voices were heard asking for the removal of these institutions and the draft had a clear provision forbidding military courts. But the result was quite different, in the end the

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[25] See Lucian Mihai "Separarea puterilor în stat: propuneri de modificare a Constituţiei", in *Revista Română de Drepturile Omului* No. 2/1993.

[26] These provisions have been criticised by the Council of Europe Rapporteurs. For more details see Renate Weber "Memorandumul MAE - Raportul Konig-Jansson" (The Memorandum of the Ministry of Foreign Affairs - The Konig-Jansson Report), in *Revista Română de Drepturile Omului* No. 5/1994.

Constitution being vague: "*Justice shall be administered by the Supreme Court of Justice and other courts established by law*" (Art. 125/1). When Law No 92/1992 on the judiciary mentioned once again the military courts, this provision was not declared unconstitutional. There are scholars who considered that the existence of military magistrates runs counter to the Constitution due to the fact that they belong both to the Magistracy and to the Military which is part of the executive power[27]. The most serious problem with this institution regards its competencies. Military prosecutors and courts are the only entitled to investigate and decide on penal cases were the perpetrators are not only members of the Army but also policemen and gendarmes.

h) The constitutional control

No one has ever questioned the necessity of a constitutional control. But the debate was quite vivid on who should be entitled to exercise this control. The Romanian tradition before the communist regime was to have such a constitutional control exercised by the Supreme Court. In fact, Romania had a very advanced experience at time when in Europe it was not usual to have constitutional control.

However, the 1991 Constitution made a different choice[28]. It has opted for the establishment of a political and legal body[29], the Constitutional Court which has been granted the right "*to adjudicate on the constitutionality of laws before promulgation*" (Art. 144/a) as well as the right "*to decide on the exceptions brought to the Courts of law as to the unconstitutionality of laws and orders*" (Art. 144/c).

If a law is declared unconstitutional before promulgation it is returned to the Parliament for reconsideration (Art. 145). If the law is passed again by the two Chambers with a majority of two thirds of each Chamber, the law is considered adopted and should be promulgated. The Constitution does not say why this is possible but the only reasonable explanation resides in the fact that a two third majority is required to amend the Constitution. But because Article 147, on the revision of the Constitution, requires a referendum, one could see a conflict between Article 145 and Article 147 which is not constitutionally solved.

The Law No. 47/1992 states in its Article 1 that the Constitutional Court is the only authority having a constitutional jurisdiction. This is true when the control regards laws before their promulgation or afterward by means of exception. It is also true regarding the Government orders by means of exception. But it is not true when it refers to governmental decision or other acts adopted by ministers or other public authorities. As for their control only a court of justice is called to ascertain the inconsistency between a decision and The Constitution. The Constitutional Court does not have the competence to analyze the constitutionality of such acts, not even by way of exception.

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[27] Liviu Popescu, "Existenţa magistraţilor militari în raport cu dispoziţiile constituţionale" (The existence of military magistrates in relation to the constitutional provisions), in *Revista Română de Drepturile Omului* No. 3/1993.

[28] For a critical opinion see Adrian Vasiliu, "Curtea Constituţională, locul şi rolul ei în statul de drept", in *Revista Română de Drepturile Omului* No. 2/1993.

[29] According to the Constitution, the Constitutional Court is not part of the judiciary, but a distinct authority.

Several aspects must be emphasised when discussing the Constitutional Court:

- The appointment of the judges: 3 of them are appointed by the President; 3 by the Senate and 3 by the Chamber of Deputies. Although the law is clear in asserting their independence several allegations have been made on the political bias of the Court[30]; - The bodies entitled to notify the Court before the promulgation of the law are: the President, the Speaker of either Chamber of the Parliament, the Government, the Supreme Court of Justice, 50 deputies, 25 senators. Sometimes it is very difficult to convince these bodies or these persons on the unconstitutionality of a law and several laws conflicting with the Constitution have been passed. I think that the procedure should be more accessible to the public;

- It is beneficial that individuals have the chance to invoke the unconstitutionality of a specific provision of a law or an order, but in order to do so one has to stay in a court trial and the decision to send the case to the Constitutional Court belongs to the judges;

- The competencies of the Constitutional Court should be expanded as to make compulsory the control over all governmental orders before their enter into force;

- It is less important if the Court has a dual character. What is really important is to see the Constitutional Court at work. From this point of view I have to emphasise that several decisions of the Court were at least odd: in one case the Court decided to launch a sort of extraordinary appeal against its own decisions, which is not mentioned by the law but by the Court regulation[31]; more recently the Court has held that it may not rule on any procedural inconsistencies of its own decisions, although the Civil procedure code allows for such a method, thus creating the impression that the Court is above the law[32].

i) The relationship between central and local power

The Romanian Constitution states in Article 119 that "*Public Administration in territorial-administrative units is based on the principle of local autonomy and decentralization of public services*". Since the adoption of the Constitution this provision has constantly been infringed which supports the idea that the option for decentralization resides more in the influence from intergovernmental institutions, such as the Council of Europe and in the consultations with foreign experts than in the domestic willingness.

Law no. 69 of 28 November 1991 on local administration, although adopted few days before the Constitution, contradicted several principles laid down in the fundamental law. An international pressure was necessary to determine the Romanian Parliament to amend this law, which happened in May 1996, exactly before the local elections.

But six years after the adoption of this law and of the Constitution Romania still does not have a law on local budget, nor principles on how the taxes and other sources of income for local government should be regulated.

As I said before, for several reasons, the Romanian State has functioned as a

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[30] These allegations have been made in relation to some decisions, i.e. on the law regulating the restitution of nationalized houses; on President Iliescu's possibility to run for a third presidential mandate.

[31] See Renate Weber, "O stranie decizie a Curţii Constituţionale" (An odd decision of the Constitutional Court), in *Revista Română de Drepturile Omului*, No 2/1993.

[32] See *Revista Română de Drepturile Omului* No. 13/1996.

centralized one. On the one hand it was a question of mentality, the centralization being in accordance with the communist tradition. On the other hand a centralized state is less democratic but much easier to control. The composition of the Constitutional Assembly explains this kind of understanding.

In its Recommendation 12 (1995) on local democracy in Romania, the Congress of Local and Regional Authorities of Europe (of the Council of Europe) was extremely critical on Romanian local administration and its relations with the central administration.
The Congress noted all the legal "*weaknesses, gaps and imprecisions*" together with "*a number of abuses - particularly on the part of certain prefects - in the application of Law No. 69 on local self-government, in connection with the suspension and dismissal of mayors, the provisions of the said Law leaving too much discretion to the administrative authorities*".

These aspects have been changed, but the financial aspects related to the competencies of local administration are still waiting to be regulated.

j) The relationship between international and domestic law

The Constitution of Romania regulates this relationship in the following articles: Art. 11 "*(1) The Romanian State pledges to fulfil as such and in good faith its obligations as deriving from the treaties it is a party to. (2) Treaties ratified by the Parliament, according to the law, are part of national law*"; Art. 20:"*(1) Constitutional provisions concerning the citizens' rights and liberties shall be interpreted and enforced in conformity with the Universal Declaration of Human Rights, with the covenants and other treaties Romania is a party to. (2) Where any inconsistencies exist between the covenants and treaties on fundamental human rights Romania is a party to, and internal laws, the international regulations shall take precedence*". The principle of the supremacy of the Constitution set forth in Article 51 should also be taken into consideration in this context.

Therefore, according to the provisions under Article 11 (2) the treaties ratified by the state become part of the domestic legislation. "Treaty" is used to designate any instrument used in the international practice to materialize the common will of states, be it a covenant, convention, protocol, agreement, statute, final act, final document, etc. It is obvious that the fundamental law in Romania adopted the monist principle according to which the international legislation should be included into the domestic legislation.

A first remark to be made in connection with this text refers to the specificity of treaties whose precedence over the domestic legislation is recognized. These are exclusively human rights treaties. More recently, in connection with Romania's desire to join the European Union, views have been expressed on the necessity to amend the Constitution and to decide upon the prevalence of all international traties over the domestic legislation.

A second remark concerns Article 20. Paragraph 1 of this article stipulates that constitutional norms relating to the rights and liberties of individuals are to be compulsorily interpreted in accordance with the Universal Declaration of Human Rights, with the covenants and all the other treaties Romania is a party to. Some scholars held that the article was worded so as to express Romania's attachment to the Universal Declaration of Human Rights, a fundamental political document in the human rights field[33]. According to a second opinion, the reference to the Universal declaration has no consequences, because the

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[33] Gheorghe Iancu, *Drept constituţional şi instituţii politice* (Constitutional law and political institutions), Universitatea Ecologică, 1993, pp. 66-67.

Declaration is merely a political document and not a treaty in the form provided by the international law[34]. Finally, the third opinion, which I share, holds that by incorporating the Universal Declaration into the Constitution of Romania as compulsory and in interpreting constitutional provisions relating to human rights, the former has acquired legal power in the Romanian domestic law[35].

The most controversial as well as the most important matter from a practical point of view regards precedence of international human rights regulations over the domestic ones. The Constitution sets forth the pre-eminence of international law but leaves unsolved the issue of the relationship between international and constitutional legal norms. Could one hold that international regulations should take precedence even when they run counter to the Constitution? An opinion says that the Romanian authorities competent to negotiate and conclude treaties should examine the consistence of such treaties with the Constitution and that they should be ratified either with reservations and declarations or after the revision of the fundamental law[36]. According to another opinion[37], the constitutional text in Article 20 is liable to criticism due to its vague wording. Moreover, the provision relating to the precedence of international regulations is regarded as difficult to enforce, because the Constitutional Court must pronounce only on the constitutionality of laws, not on the consistency between laws and international treaties[38].

For practical reasons, it is very important to establish what the Constituent Assembly intended when Article 11 and 20 were adopted, in order to understand the competencies of courts in connection with international treaties. Opinions are split in this field too. Some authors and practitioners hold that constitutional provisions moved away from the "*traditional solution of enforcing international conventions at the internal level by means of the laws adopted on their basis*" and established the "*'self-executing' principle, according to which these conventions may be enforced directly, with no need for the screening of the law*"[39].

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[34] Dan Ciobanu and Victor Duculescu, *Drept Constituţional român* (Romanian Constitutional law), Editura Hyperion XXI, Bucureşti, 1993, pp. 87-88.

[35] Ioan Muraru and Mihai Constantinescu, *Op. cit.*, p. 203. See also Genoveva Vrabie, *Op. cit.*, p. 442.

[36] Ioan Muraru, in *Constituţia României comentată şi adnotată*, Regia autonomă "Monitorul oficial", Bucureşti, 1992, pp. 47-50.

[37] See Nicolae Ecobescu and Victor Duculescu, *Drept internaţional public* (Public international law), Editura Hyperion XXI, Bucureşti, 1993, p. 59.

[38] See also Dan Ciobanu and Victor Duculescu, *Op. cit.* For critical opinions on this stand see Renate Weber, "Receptarea dreptului internaţional al drepturilor omului de către sistemul juridic român" (Human rights international law in the Romanian legal system), in the *Revista Română de Drepturile Omului*, no. 12/1996.

[39] See Ioan Muraru, Mihai Constantinescu, *Op. cit.*, p. 203.

This is the most widely shared opinion[40]. Other authors hold, however, that in the Romanian legal system the judge does not enforce international treaties directly, as it happens in the United States, for instance, because he is only entitled to enforce the internal laws of the state[41].

Several practitioners stood up against such interpretation[42]. So far there is no established practice of Romanian courts other than the Constitutional Court in this field[43].

k) Romania as national state

Article 1 (1) of the Constitution states: "*Romania is a sovereign, independent, unitary and indivisible National State*". The "national" character of the state has been one of the most controversial choices. As I said before, it is beyond question that during the adoption of the Constitution in Romania the nationalistic approach was quite strong. Several minorities (the Hungarian one being the most vocal) have expressed their concern with this article which they consider to set up the basis for their assimilation by the Romanian majority, mainly when combining it with Article 4 (1) which declares: "*The State foundation is laid on the unity of the Romanian people*".

Is this the case? Personally, while being convinced that the assertion of the "national" character is the expression of a very clear nationalistic approach, I do not think that the idea behind this provision was to assimilate the minorities. Several constitutional provisions support this view.

- Article 6 (1) of the Constitution declares: "*The State recognizes and guarantees the*

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[40] See also Doru Cosma "Rolul instanţelor de judecată în aplicarea Convenţiei europene a drepturilor omului" (The role of national courts in implementing the European Convention on Human Rights), in *Revista Română de Drepturile Omului*, no. 6-7/1994.

[41] Nicolae Ecobescu and Victor Duculescu, *Op. cit.*, p. 59. See also Dan Ciobanu and Victor Duculescu, *Op. cit.*, p. 88.

[42] See Renate Weber "România şi dreptul internaţional al drepturilor omului" (Romania and international human rights law) in Thomas Buergenthal's Dreptul internaţional al drepturilor omului (International Human Rights), All, Bucharest, 1996, pp. 221-228.

[43] 1995 was the first time when a Romanian court pronounced a decision based on the provisions of the European Convention on Human Rights. In its Decision 59/1995 the Military Appellate Court held that:"*In the light of these constitutional provisions, the understanding of the European Convention on Human Rights and of its Additional Protocols ... as well as of other international treaties, conventions and covenants is governed by the principles of the direct consequence (Article 11 para (2) of the Constitution) and of precedence (Article 20 para (2) of the Constitution), to which may be added - exclusively in the field of human rights and fundamental liberties - the principle of precedence of the optimum legal treatment, set forth in Article 60 of the Convention [...]*

In the light of the above elements, the Court considers that the fundamental rights sanctioned by Article 6 and 13 of the above mentioned Convention...are part of the positive domestic law and shall be observed and complied with as such".

right of persons belonging to national minorities, to the preservation, development and expression of their ethnic, cultural, linguistic and religious identity";

- Article 16 (1) declares: "*All citizens enjoy the rights and freedoms granted to them by the Constitution and other laws and have the duties laid down thereby*";

- Article 59 (2) affirms: "*Organizations of citizens belonging to national minorities, which fail to obtain the number of votes for representation in Parliament, have the right to one Deputy seat each, under the terms of the electoral law*".

That means that not only the Romanian Constitution does recognize the national minorities but it also accepts special measures to strengthen the affirmation of their identity.

Yet, until now, no official institution - such as the Parliament or the Constitutional Court - has expressed a view according to which the Romanian people (as in Art. 4) or nation (as in Art. 1) would encompass all the citizens of the country, regardless of their nationality. On the contrary, in a book on the Romanian Constitution issued by six experts who were members of the Drafting Committee (five of them were or still are judges at the Constitutional Court - which is considered to be a reference in the field) Article 1 has an explanation which I consider to be very dangerous. The authors consider that "*The State is not merely the expression of an organized human community, 'anyone', always heterogeneous and fluctuant. This community is everlasting and distinct from other communities precisely through the specific and indestructible ties between its component members as well as through its own countenance, meaning its power to constitute a nation. Therefore the nation is not an exclusive ethnic or biological phenomenon. It is a complex reality and the result of a long historical process having as its foundation the common ethnic origin, language, culture, religion, psychological characteristics, life, traditions, desires and above all the history and the aspiration to last on its territory*"[44]. Even more, in a footnote on the same subject, the authors assert that "*[t]he concept of 'human community' is the only compatible with the concept of 'nation' because the syntagma "human community' - totally different from the notion 'society' - expresses precisely the history of those composing the nation, the genetical ties between the successive generations and their members' willingness to live together*"[45].

l) Romania as social state

The Constitution sets forth in Article 1 (3) "*Romania is a democratic and social State...*" but nobody really explained how the social character is to be observed. In their book on the Romanian Constitution, the six experts who were also members of the Drafting Committee consider that "*The 'social' attribute may be considered as a correction to the classic liberal democracy, essentially political. The essence of liberal democracy is the 'freedom' but in the case of undeveloped countries 'freedom' tends to become a metaphor if it is not financially supported. On the other hand, for these countries, issuing a global development strategy and its implementation are indispensable. For these countries - and not*

[44] Mihai Constantinescu, Ion Deleanu, Antonie Iorgovan, Ioan Muraru, Florin Vasilescu, Ioan Vida, *Constituţia României - comentată şi adnotată (The Constitution of Romania)*, Regia autonomă "Monitorul oficial", Bucharest 1992, pp. 6-7.

[45] *Ibidem.*

only for them - the 'general interest' is above the individual interests, specific to liberalism"[46].

What are the implications of such an approach? Does it mean that political parties based on a liberal ideology - including the classical one which stresses the individualist approach - are to be banned? Does it mean that the Constitution itself determines which ideology and political approach must the country adopt? Unfortunately I cannot recall any reaction on behalf of political parties on this issue. Nor I can offer legal experts' or political scientists' views. It seems that a consensus has been reached to consider this provision merely a rhetorical one, so to say to disregard it.

But due to its quality of "social state", the Romanian state has, through its Constitution, a wide range of prerogatives, even obligations, in order to ensure the welfare of its citizens. Thus, according to Article 43 (1) *"The State shall be bound to take measures of economic development and social protection, of a nature to ensure a decent living standard for its citizens"*. Among the rights the Romanian citizens enjoy ranges *"the right to pensions, paid maternity leave, medical care in public health establishments, unemployment benefits and other forms of social care, as provided by law"* (Article 43 para. 2) At the same time, Article 33 (1) mentions: *"The right to protection of health is guaranteed"*, while para. (2) specifies that *"The State shall be bound to take measures to ensure public hygiene and health"*.

In what concerns "work", the fundamental law no longer mentions a "*right to work*", but the fact that *"The right to work cannot be restricted. Everyone has the free choice of profession and workplace"* (Article 38 para. 1) The fact that all employees are entitled to *"the right to social protection and labour. The protecting measures concern safety and hygiene of work, working conditions for women and the young, the setting up of a minimum wage per economy, weekends, paid annual leave, work carried out under hard conditions, as well as other specific situations"* is also recognized (Article 38 para. 2).

In addition to this, the fundamental law also contains several articles related to the right of women to receive, for equal work, equal wages with men, to the protection of the handicapped, of children and the young, general compulsory and free education at all levels, the right to associate - trade unions included -, the right to strike, the collective labour contract, banning of forced labour, etc. The most important question to be raised is whether all these provisions - and especially their development through ordinary legislation and through practice - are capable to turn Romania into a welfare state or if they are the result of a still prevailing mentality, according to which the state is omnipotent and omnipresent, the total of its obligations being regarded as its right to exercise permanent control over the whole society.

m) Rights and freedoms

The entire Title II of the Constitution is dedicated to "**Fundamental rights, freedoms and duties**" (Art. 15-54). The Drafting Committee as well as the Constitutional Assembly were very proud of this chapter, stressing all the time how modern the Constitution is.

While recognizing the importance of regulating rights and freedoms by the Constitution, one has to understand that "*the absence of constitutional guarantees represents*

[46] *Idem*, p. 14.

the most significant common characteristic" of these provisions[47].

The Constitution lays down civil and political rights as well as economic and social rights. But it has no provision regarding their direct enforcement. It was the Constitutional Court which issued a decision mentioning the direct enforcement (character) of constitutional rights, but the Romanian courts are rather reluctant in applying the Constitution as such. This is more a matter of mentality and of practice.

We have to add to these constitutional provisions those of Article 11 and 20, because all the rights listed by the Universal Declaration, the two International Covenants[48], the European Convention[49] are part and parcel of our domestic legislation. Their existence was beneficial for the Romanian society. On several occasions they were invoked in the Parliament as well as by some Courts. Back in 1992, the Supreme Court of Justice based its decision on the restitution of a nationalized house on the Universal Declaration. Later on, the Constitutional Court issued several decisions invoking provisions of the International Covenant on Economic, Social and Cultural Rights[50], or those of the International Covenant

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[47] Lucian Mihai, "Consideraţii privind reglementarea drepturilor omului în Constituţia României din 1991", in *Revista Română de Drepturile Omului* No. 1/1993, pp. 8-16.

[48] They were ratified in 1974.

[49] The European Convention was ratified in 1994.

[50] By Decision No. 30/1994 the Court decided on the unconstitutionality of the law by which the deadline of renting contracts for living quarters had been extended. It had been stated that these provisions violated the right to own property, as the extension of contracts was decided without the owners' agreement. Even though the Constitution does not stipulate as such the right to housing, the Court regarded it as part of the broader right to decent living conditions stipulated in Article 43. The Court invoked the provisions of Article 25 of the Universal Declaration of Human Rights and of Article 11 in the International Covenant on Economic, Social and Cultural Rights that mention the right to housing in the broader context of satisfactory living standards. The Court rejected the exception of unconstitutionality on grounds that extension of renting deadline was a legal policy measure compatible with the aggregate constitutional provisions.

Another decision containing reference to the provisions of an international treaty was Decision no. 114/1994 by which Article 32 of Law no. 88/1993 was declared unconstitutional. According to its provisions, professors were not allowed to teach in a higher education institution above the limit of one teaching norm. The Court based its decision on the provisions of Article 6 pt. 1 of the International Covenant on Economic, Social and Cultural rights, according to which the right to work includes the persons' right to earn their living by means of a job they choose or accept freely. Thus, the Constitutional Court ruled that "*People's right to work cannot make the object of any limitation or restriction, each person being free to work as much as his/her physical or mental abilities - that that person alone can assess - allow him/her to*". At the same time, the Constitutional Court interpreted "reasonable limitation of working hours" set forth in Article 7 litt. d of the Covenant in the sense that it may by no means be the ground for restrictions to the right to work, but underlines the right of not imposing on one to work beyond one's physical and mental abilities.

on Civil and Political Rights (or both)[51] or those of the European Convention[52].

When we discuss constitutional rights I think that we have to make a distinction between civil and political rights and economic and social rights. It is always less complicated to implement civil and political rights. In the Romanian case the ratification of the European Convention on Human Rights and its incorporation into the domestic legislation makes things easier. I do not say that civil and political rights are respected, that the constitutional rights are enforced nor do I say that the European Convention and its case-law are known and implemented, but at least they can be invoked in the Parliament (and they have been) and defended by the Courts.

When the economic and social rights were discussed in the Constitutional Assembly the debates were dominated by rhetoric. In fact there are no constitutional guarantees for the economic and social rights. And not all of them can be defended in Courts. I can imagine a law suit on equal wages for men and women for equal work, but not on "*a decent living standard*". I did not see any closing or at least fining of a company for not respecting "*the protecting measures concern safety and hygiene of work*".

The Constitution proclaims protecting measures such as "*a minimum wage per economy, weekends, paid annual leave, work carried out under hard conditions*" or "*the right to pensions, paid maternity leave, medical care in public health establishments, unemployment benefits*" but their implementation relates very much to the political, economic and social program of the Government - meaning of the ruling party (or coalition). Every

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[51] By means of Decision No. 6/1993, the Constitutional Court ruled out as unconstitutional the provisions of Law no. 58/1992 that stipulated different taxes for three categories of persons (taxes were increased by 30% for incomes resulting from multiple sources). The Court invoked the provisions of Article 26 of the International Covenant on Civil and Political Rights referring to non-discrimination, Article 2 para 2 of the International Covenant on Economic, Social and Cultural Rights and Article 14 of the European Convention on Human Rights.

[52] The Court declared the provisions of Article 75 para 1 of the Labour Code unconstitutional by Decision no. 59/1994. According to these provisions, complaints filed against decisions to annul labour contracts as well as labour litigations relating to reintegration of managers in their former jobs were to be solved by the administrative body ranking higher in the hierarchy or by a collective leadership body. The Court referred to the violation of Article 16 of the Constitution on non-discrimination and of Article 21 on free access to justice and based its decisions on the provisions of Article 6 pt. 1 of the European Convention, on grounds that the administrative bodies that annulled the labour contract cannot represent an independent impartial tribunal, as the Convention requires.

The Constitutional Court decided on the unconstitutionality of Article 200 para 1 that used to punish by prison same sex relations between consenting adults (Decision no. 81/1994). The Court invoked the provisions of Article 8 of the European Convention, making reference to the case-law of the Strasbourg European Court, more precisely to the Dudgeon, Norris and Modinas cases.

year a Budget on state social security is adopted but more and more the burden has been transferred from the state to the companies. The result has been that approx 40% of the total labour force in Romania works "on the black market". A law was issued to protect the employees (Law no. 83/1995) according to which employers are compelled to hire their employees by contract and to pay rather high social assistance funds, failure to do so being punished by important fines. But punishing does not mean encouraging the creation of new jobs, hence, the law will not be able to improve social protection much.

n) The Ombudsman (the Advocate of the people)

The institution of the Advocate of the people is regulated in the Constitution within its second title "Fundamental rights, freedoms and duties". It is thus regarded as a guarantee for the citizens to enjoy their rights and freedoms.

But the Constitution is rather vague when describing the institution and its competencies. Article 56 (1) reads: "*The Advocate of the People shall exercise his power ex officio or upon request by persons aggrieved in their rights and freedoms, within limits established by law*". Article 55 (1) also states that "*[t]he organization and functioning of the Advocate of the People institution shall be regulated by an organic law*".

As some authors have remarked these constitutional provisions are too indefinite to allow us to realize how effective this institution will be[53]. It is worth mentioning that the Constitution does not recommend any deadline for such a law, and now, 6 years after the adoption of the Constitution, the law on the Advocate of the people still does not exist[54].

Another remark concerns the functioning of the institution: according to Article 55 (1) "*The Advocate of the People shall be appointed by the Senate, for a term of office of four years...*". Several aspects must be emphasised:

- Firstly, the Constitution does not say anything on the procedure of appointment: two thirds or fifty percent plus one? The problem is not a merely theoretical one. The current draft-law was adopted in a different version by the Chamber of Deputies, which has decided a majority of two thirds of the members and the Senate, which has decided that a majority of fifty percent plus one of the members would be sufficient;
- Secondly, the term of four years theoretically can coincide with a new parliament and thus opens the path for a dangerous situation when any new parliamentary majority can appoint its own Ombudsman. The Constitution does not say if this term is renewable or not;
- Thirdly there is not rational explanation for allowing only the Senate to appoint the Ombudsman. On the contrary, according to Article 57 "*[t]he Advocate of the People shall report before the two Parliament Chambers annually or on request thereof. The reports may contain recommendations on legislation or measures of any nature for the defence of the citizens' rights and freedoms*". How efficient will be this report procedure? The Constitution does not say anything on the adoption of the reports. Some scholars consider that the

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[53] Lucian Mihai, "Consideraţii privind reglementarea drepturilor omului în Constituţia României din 1991" (Observations on human rights regulations under the 1991 Romanian Constitution), in *Revista Română de Drepturile Omului* No. 1/1993.

[54] By the end of the 1992-1996 legislature the draft law had been passed by the two Chambers but with significant differences and, due to the elections, a mediation commission did not have anymore the time to meet.

Chamber of Deputies will have only the possibility to debate these reports, but not vote on them[55].

In his book on Constitutional law and political institutions, Ion Deleanu, a member of the Drafting Committee and currently a judge at the Constitutional Court, mentions that several ombudsmen from various countries have criticised the Romanian constitutional provisions for their ambiguity: the independence of the Advocate of the People is neither explicit nor stressed enough; the competencies and their means of implementation are not defined, etc. But the author is confident that the law will make the necessary corrections[56].

A last remark on the two Chambers' different views on the role of non-governmental organizations: the Chamber of Deputies decided that the NGOs should play a role in the activity of this institution by allowing them to launch complaints - on behalf of individuals - to the Advocate of the People. The Senate's view, on the contrary, was that the Advocate should work directly only with the citizens. It is hard to say which view would prevail.

o) The Supreme Council for the Defense of the Country

Law No. 39 of 13 december 1990 on the Supreme Council of National Defence was adopted a year before the Constitution. It contains provisions which allow the Council to decide upon its own functions and competencies. It also stipulates the composition of the Council: the President, the Prime-Minister, the minister on Industry, the Defence minister, the minister of Interior, the minister of Foreign Affairs, the presidential counsellor on political analysis, the director of the Romanian Intelligence Service, the director of the Service on Foreign Intelligence, the Chief of the Army. All other laws on national security and intelligence services refer to this law and allow the Supreme Council of National Defence to decide upon their functions. Yet, this body is above any control, as the law does not require parliamentary control, but merely recommends reports upon request. In six years no report was ever presented[57].

The Constitution did not solve this problem at all. It only states in Article 118 that "*[t]he Supreme Council of National Defence shall organize and co-ordinate in unitary command the activities concerning the country's defence and national security*". The vagueness of this provision has made possible the continuation of the Council's activity without any control.

4. Institutional design at work

What is most important for a society is to have the democratic institutions working. Their legal frame is necessary, because they need a legal foundation. But recent experience has shown that it is possible to have pretty good laws and no democratic behaviour.

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[55] Lucian Mihai, *loc. cit.*, p. 14.

[56] Ion Deleanu, *Drept constituţional şi instituţii politice*, Editura Europa Nova, 1996, p. 185.

[57] See Renate Weber, "Siguranţa naţională şi drepturile omului în România" (National security and human rights in Romania), in *Revista Română de Drepturile Omului* No. 6-7/1994.

a) Non-governmental organizations

I think that the political elite of a country has the obligation to assume responsibility even for unpopular decisions which can have, on a long run, a beneficial influence on the democratic evolution. Of course, by political elite I understand the Parliament and the Government. In an ideal world these decisions would be endorsed by the civil society as a result of a dialogue, thus the endeavour having better chances to be understood and supported by the public at large.

Unfortunately, the Romanian political elite failed to do so in several circumstances. What was the reaction of the civil society? The Romanian Constitution has no provision on NGOs' participation in decision-making process; it merely allows their existence through freedom of association. Moreover, back in 1990 and 1991 the idea was that political parties are acceptable for their involvement in the political competition, while the institutions of the civil society - which claimed their non-political involvement - were perceived as undermining the Romanian democracy.

Fortunately, this perception has changed in time and although at the level of democratic and civic education there is still much to be done to enlighten the public, at the level of political elite and of the mass media the civil society is now seen as playing a very important role.

But a question remains: which civil society? The Romanian paradox was that together with dissemination of labels on NGOs, with the purpose to threaten the public, parallel associations and groups have been created by the newly installed leadership - the so-called governmentally created non-governmental organizations, with the purpose to generate confusion and to undermine the credibility of genuine NGOs. This was the case for several years[58].

In spite of this unfavourable climate the civil society has grown up and has played a significant role. Civic groups, human rights groups, environmental associations, social organizations, humanitarian groups enjoy more and more the public support.

b) The Church

The church has had quite a different situation in this picture.

Article 29 of the Romanian Constitutions declares: "*(1) Freedom of thought, opinion, and religious beliefs shall not be restricted in any form whatsoever. No one shall be compelled to embrace an opinion or religion contrary to his own convictions. (2) Freedom of conscience is guaranteed; it must be manifested in a spirit of tolerance and mutual respect. (3) All religions shall be free and organized in accordance with their own statutes, under the terms laid down by law, (4) Any forms, means, acts or actions of religious enmity shall be prohibited in the terms laid down by law, (5) Religious cults shall be autonomous from the State and shall enjoy support from it, including the facilitation of religious assistance in the army, in hospitals, prisons, homes and orphanages.*"

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[58] The most recent example relates to the 1996 parliamentary and presidential elections when three so-called NGOs - created in 1990 and which have never been active since - asked and were granted permission to monitor the elections. Their over 5,000 monitors (the vast majority fictional ones) succeeded in removing the monitors of other genuine NGOs which has had a long and efficient tradition in monitoring the elections.

During the communist regime only the Orthodox Church, the Catholic Church and a few protestant and neo protestant churches were allowed. After December 1989 another Romanian traditional church has come back to life: the Greek-Catholic Church. But until now its properties, which have been confiscated by the communists and given to the Orthodox Church, have not yet been returned. If one expected to see religious tolerance at work no doubt he was disappointed.

Due to very serious criticism of the Orthodox Church performance during the communist regime, for the first years after 1989 this Church was quite silent. Since 1995 it has become more and more vocal, trying to impose its on views on the legislative process, although the Romanian state is secular. Students' associations having as their foundation the orthodox religion have become rather fundamentalist, as it was the case in 1996 when, in relation to a World Congress of Jehovah's Witnesses, leaflets were disseminated reading "Orthodoxism or death". But they were very much encouraged in this campaign by the Romanian Patriarch himself who had issued a statement on non-acceptance of minorities, proving religious intolerance.

The fact that the Law on education made the study of religion compulsory in primary school will not change the situation as the religion tolerance cannot be learned by religious compulsoriness.

c) The political parties

After being banned for almost 50 years, many political parties have emerged after December 1989. The first act regulating their existence was the Decree-law No. 8 of December 31st 1989, according to which a political party could be created with 251 members. Some 250 parties have been created. Their functioning was based both on the Decree-law No 8/1990 as well as on the old Law regulating legal persons of private law No. 21/1924 (the law on NGOs). As it was normal, the number of the parties has decreased in time. In order to get access to the Parliament they had to pass a 3% threshold and only a few of them succeeded. But the normal process of country democratization was considered not to be enough for cleaning the political arena.

On several occasions some politicians expressed their view denying any relation between a political party and the civil society pretending that they are more than this and asking for a statute of institution of public law, thus getting an authority statute. This view was successful when a new law was adopted in the spring of 1996.

The Law on political parties requires 10,000 members for a political party with a widespread geographical dissemination.

Parties have become legal persons of public law and they get financial support from the State budget. The parliamentary parties are in a much better position when calculating the amount of such a grant. At the same time, the law regulates some internal aspects of party life which, in my view, should fall under the exclusive competence of that party. The law decides the voting procedure - namely when it could be open and when it must be secret. It also obliges the parties to discuss all their members' opinions. etc., etc. During discussions in the Parliament voices were heard congratulating the MPs for "imposing democracy in the internal life of political parties".

As a follow-up, less than 50 parties registered themselves until now, but during the recent election many of them got less than 10,000 votes (which is the minimum number of members required) which seriously questions the registration process.

For the 1996 parliamentary elections the threshold was still 3% but this time only nine

parties were elected, six of them being grouped in two coalitions.

It is too soon to say what will happen this time with the outsiders. And it is also too soon and hard to predict if and how political parliamentary parties will perform to improve the country's evolution and turn Romania into a real democratic state. abiding by rule of law.

5. Conclusions

Six years of constitutional implementation is a reasonable period of time to have an opinion on its efficiency. Several facts allow us to give a positive answer, while others lead to a different one. Paradoxically, since its adoption the Constitution has been invoked all the time and observed by those who voted against it and has been violated mainly by those who voted in its favour in 1991. Which means that we have to distinguish between legality and legal rhetoric. One of the main characteristic of the Romanian society during the last six years was the undermining of the Constitution and of its guarantees.

If the law is the expression of a political will then so is the observance of the law. And until now Romania has lacked this political will.

But the existence of an early Constitution, as imperfect as it is, has been, maybe, the most important accomplishment of the Romanian society. Certainly two years after some fundamental changes as those we had in 1989 is not a reasonable period of time for fundamental changes in framers' mentality. But looking back and analyzing the stages Romania has passed through it is more and more obvious that the 1991 Constitution was the most we could get. Such a Constitution could not be adopted in 1994 or 1995 when nationalist-extremist parties were not only in Parliament but also in Government and when the ruling party acted more and more in an authoritarian way. Provisions as those of Articles 11 and 20 would not have been allowed.

Of course, a conflict between observance and violation of Constitution is not the most fortunate way for the development of a country. However, what the society has learned was the necessity to fight for the safeguard of our Constitution and our democratic institutions. In terms of legal and political education this represents very much. For example when the President of the country criticized the Romanian courts for the way they have decided on the issue of nationalized houses, saying that their role as judges is not to rule but to wait the regulation of the Parliament, the public opinion's view was that he interfered with a domain which is not his, thus violating the Constitution. When, according to his wish, the General Prosecutor launched extraordinary appeals against those court decision and the Supreme Court admitted them, the reaction was not the lack of trust in the justice system, but the understanding of how important is to respect the institutions and their independence. The fact that all these political gestures were unconstitutional was more and more clearly understood. Which has meant that we have had something to protect: the Constitution and its observance.

At the same time, the Constitution has imposed some limits on governmental behaviour, through the check and balance system. Such were the cases of many decisions of the Government or of various ministers which have been declared unconstitutional in Courts.

Similar were the cases of many draft-laws discussed in the Parliament and presented by the media, where constitutional provisions were more and more often invoked. In analyzing the efficiency of the constitutionalism one has to take into consideration not only the achievements as such but also to which extent the harm was prevented, which in Romanian case has been very important.

I think that a few things should be changed in the Constitution. Among them:

- Several changes must be done in the Judiciary system so as to ensure its

independence;

- A special provision must be adopted to declare all constitutional rights directly enforceable: some of these rights and freedoms are for the time being merely declarations so they need constitutional guarantees;

- All international treaties should be considered as taking precedence over the domestic legislation;

- The Supreme Council of National Defence should be completely changed in its structure and its functions;

- The Government should be stopped from regulating in the way it has so far, so the delegation of powers should be reduced to a minimum and the orders must be subject to constitutional control before entering into force;

- The competencies and the functions of the Constitutional Court must be amended.

And we still need a legislative effort to adopt rules in compliance with the Constitution.

As for the question of what is more important for the success of democratic consolidation: adoption of clear rules of the institutional game or respect of the division of power principle I do not think that they can be separated. I do not necessarily need to see the separation of power principle in a written form as long as its existence is not questioned. And for this we need clear rules for institutions and their functioning. And we need to observe them. It is the same with the letter and the spirit of the law: if the Romanian Constitution were be observed not only in its letter but also in its spirit, which must be understood in its democratic dimension, the democratic evolution of the country will be secured.

Institutional Reforms in Russia

Analysing in their works the experience of transition to democracy in different countries, the Russian politologists point out several typical models of this process(1). The linear or classical model of democratization presupposes, first of all, expansion of citizens' rights with personal (civil) rights being secured at the first stage, political rights — at a later stage and social rights — at a much later period. The power of parliament controlling the government is gradually broadened.

The cyclic model of democratization differs from the linear one, It assumes alternation of democratic and authoritarian forms of rule. This model is widely spread in the Latin America, Africa, Asia. Such a transition to democracy can be prolonged and hard.

The third model is considered to be the dialectic model of democratization. It is, like the cyclic pattern, characterised by the instability of the transitional political regimes. However, the distinctive feature of this model is the following: the transition to democracy within the frames of this model is carried out under the influence of already matured for its establishment inner premises, such as industrialization, numerous middle class, rather high educational level of citizens. Continuous growth of these and other factors leads to a quick collapse of the authoritarian regimes. This is the way the things go in Russia.

Democratization in Russia is achieved by means of the agreement between the elites, i.e. transfomations start at the top. The process of democratization itself began in Russia with the gradual liberalization of political concsiousness of the ruling elite and, first of all, of the number of the top functionaries from the Central Committee of the Communist Party. It took place in conditions of a very strong ideological and political

confrontation with the West. The policy of centralism and common sense was not popular; for this reason the active process of radicalisation of the elites and of polarization of their political orientation was under way. Orienting points have become quite clear: either the western models of the liberal democracy or the traditional principles of socialism.

Since 1992 the Chinese model of modernization, that had a lot of supporters in Russia, has become considerably popular.

Still the western model of political and economic democratization has been given preference to in Russia. In Russia it's considered to be equal to the methods of the shock therapy.

Due to a number of factors, however, this model has been realized less successfully in Russia than in the Check Republic or in Poland. Russia failed to support those traditions of the market economy that had been kept up in the named countries. The size of Russia certainly can't be compared with that of other East-European countries. The economy of Russia greatly depended on the military-industrial complex, therefore the process of liberalization was followed by the intense downturn in the sphere of production, unemployment, poverty of population. Too great a part of population in Russia lives in economically hopeless regions and works at enterprises, having no economic prospects.

At the beginning of liberalization, while passing to the market, Russia failed to take due account of all the hardships and evaluate potential difficulties. Within a very short period of time Russia had to deal with political renewal, establish democratic institutions, find a way out of the crisis of the state indebtedness, carry out a complex structural reform of the economy, settle complicated inter-ethnic problems.

Lack of investments is the gravest issue up till now. Market of corporative securities is still in embryo, hence financing of investments at the expence of this source is scanty. The state doesn't give up its harmful habit of

redistributing through budget a considerable part of the financial resourses. Money flow from the bank sector and from the stock market to the government securities — government obligations. These resources, given by the commercial banks, are used to defray the state budget deficit. Profitability of the government obligations reaches 240%. It's clear that commercial banks don't think it profitable to invest into enterprises at lower interest. But economic growth is impossible if money resources are so expensive.

The process of modernization in Russia provoked the necessity to lay open the criteria of the democratic structure of society, must be secured by the Constitution. Most of the scientists, politicians agreed that human rights in their liberal, not socialist, interpretation must be acknowledged as these criteria.

By the beginning of the 90-s views ignoring the positivist approach to the rights have become leading in the juridical and philosophical literature. Such famous Russian theorists of law as V.S.Nersjesjantz, R.Z.Livshitz, S.S.Aleksejev, V.D.Zorkin, V.A.Tumanov denied that state has been the source of law and that human rights have no supremacy with respect to laws.

It became evident that interrelation of economy and right is not as simple as it was desribed in the works of the classics of Marxism. Scantiness of economic determinism and impossibility to dose human rights proceeding from the arbitrarily interpreted class interest are described by professors L.I.Spiridonov and V.Babajev in their new text-books on the theory of law.

It is characteristic that the same scientists played an active role in the institutional reforms. Professor V.D.Zorkin headed the working group of the Constitutional Commission responsible for the new Draft Constitution. Professor Strashun — the author of the book summarising the experience of the constitutional changes in the countries of Eastern Europe — worked in the same group. Aleksejev S.S., Livshitz R.Z. became advisers of the President of Russia, Tumanov V.A. — the second, after V.D.Zorkin,

Chairman of the Constitutional Court of Russia. The intellectual elite of Russia, the opinion of which was also shared by the political elite, was exclusively important for the formation of the democratic institutions and for the export of the institutional models.

The new Constitution should be adopted as soon as possible — has become the general opinion since the first Congress of People's Deputies in 1990. As a matter of fact, it took three years to work out and adopt the new Constitution. In 1992 this process was slowed down when the new Draft infringed on the interests of the leadership of the Supreme Soviet of Russia and when fight for power started between the Supreme Soviet and the President. The Draft Constitution submitted in 1993 by the President of Russia to the specially summoned organ — the Constitutional Conference — was very much similar to the Draft worked out by the Constitutional Commission headed by President Eltzin. In general, the process of adoption of the new Constitution of Russia can be characterised as relatively quick. New Constitutions should be quickly adopted in the process of democratization without infringing on its idea. A constitution should not be short. Nothing remains but to feel sorry that a chapter on the civil society has been excluded from the Draft Constitution submitted to the referendum, that there is certain lack of norms regulating tax relations and that there are no norms of tax and budget federalism in the Constitution of Russia.

The former Constitution of 1978 seriously prevented the society from being modernized. Introducing alterations and amendments into its text would have made it still more contradictory which didn't contribute to the strengthening of the constitutionalism.

Adoption of the new Constitution has been speeded up by the political and economic factors; namely the political factor was the most significant one at that. There existed a great danger to return to the previous communist system and the strong presidential power was considered as a garantee

against this. The necessity to carry out deep economic reforms was evident but at the same time it was evident that only strong executive power was able to do it. As a result in 1993 political struggle between the supporters and opponents of the new Constitution became very agile and the process of its adoption quickened.

Acknowledging the concept of human rights, many Russian politologists yet in Gorbachev's times wrote that full recognition of personal, political and social rights of man will at once and simultaneously lead to the destructive consequences. These scientists considered that recognition of all human rights in conditions of the economic downturn, unempoyment, ethnic conflicts would result in the destabilisation of society, in its chaotic development, hinder from consentration on realising more acute institutional changes, promote leadership of the most united and influential groups which would come to power in the course of democratic elections and which, as a result, would become the main threat to democratic institutions. Taking into consideration this disputed situation, they state that the strong authoritarian presidential power should be the most reasonable form of government in Russia. Andronik Migranjan who became a member of the Presidential Counsil wrote about usefulness for Russia of the civil authoritarian power. Such reasoning was accepted by many. The differences of the Presidential Draft Constitution from the Draft prepared by the Consitutional commission mainly came to the weakening of the powers of parliament and to the strengthening of the powers of the President. At that, mechanisms of "checks and balances" have slackened as it has become evident lately. Actual lack of the parliamentary control over the activity of the organs of the executive power can hardly be justified. The team working out the Presidential Draft Constitution have not taken into consideration that the enormous outlined amount of the Presidential powers has also a back side — his enormous

responsibility which can be endured by only very rare politicians even having good health.

The Constitution of Russia does not envisage the presidential republic so long as the government headed by the Chairman and accountable to parliament is an element of the parliamentary republic. In the rough papers of the Draft Constitution a merely presidential republic after the USA model was offered but the model resembling the one of the President, secured in the French Constitution, has been accepted in the end.

Introduction of the position of the Chairman of the Government was aimed at getting a "whipping boy", i.e. a person who could be made responsible for the economic downturn.

In 1993, after the Constitution was adopted, such institutional prerequisites of democracy as free elections, press, parliament, local self-government were established rather quickly. However, one can't but admit that in a number of cases these new democratic institutions are democratic only in form but not in essence. This reproach is spread first of all on the institutions established in the national republics of Russia where the level of political culture, traditions do not let consider them democratic in their contents. The same reproach may be as well addressed to a number of federal institutions. The latest presidential elections in Russia can serve an example. Fear of communists who could win the elections and get the power by the democratic way led to serious breaches. I mean inadmissable in a democratic society participation of the apparatus of the state power in elections in the team of the acting President.

Representatives of the criminal world come to power in the course of democratic elections in a number of regions.

Desire to solve all the problems facing the country at once and simultaneously is one of the main reasons why one of the democratic reforms neutralizes the other one. This idea can be commented in the following way.

The economists put the aim to fully privatize the state property during the period of 2-3 years, though it's generally known that this process entails rising crime. The police was spear-headed at immediate eliminating of all the criminal groups even if its actions were not always accompanied by respect to human rights. The aim of people protecting law is to secure all the human rights. But could these three processes be realized painlessly?

On that account it must be ascertained that Russia has failed to overcome the initial chaos.

Adoption of an interim Constitution won't lead to solving most of the problems facing the Russian society. The Russian scientists have come to the firm conclusion that the permanent Constitution, even with explicit drawbacks, is better than a provisional one. Besides, there is no tradition in Russia, in contrast to Poland, to pass provisional constitutions or transitional laws on power.

Excluding political forces of communist orientation, all the other forces proceed from the belief that the Russian Constitution is not quite perfect juridically, but this doesn't mean that another constitution should be adopted. It's preferable to pass federal constitutional laws, supplementing the Constitution. There exist two different approaches to the question in what conditions such laws can be passed. Part I of Article 108 of the Constitution of Russia states that the federal constitutional laws are adopted on the problems, innumerated in the Constitution. Adoption of the constitutional laws is forseen on the following issues: of the order of imposing a state of emergency (Art. 56), of the formation of a new subject of the federation (Art. 65), of the change of status of a member of the federation (Art. 66), of the description and order of usage of the flag, the coat of arms, the anthem (Art. 70), of referendum (Art. 84), of government (Art.114), of court system (Art. 118), of the Constitutional Court (Art. 128).

The direct meaning of Part 1 of Article 108 of the Constitution signifies that it's inadmissible to adopt federal constitutional laws on other questions.

There exists another approach in accordance with which the Constitution may be supplemented in the course of adopting constitutional laws also on other issues.

The Russian Constitution doesn't seem to contain evidently needless raising to the rank of the constitutional of some other legal norms.

At the very beginning of the work over the concept of the new Constitution of Russia the Constitutional Commission determined that the Constitution must be social and liberal. It's true that not everybody clearly understands what this stands for. Considerable and not quite justified list of social rights in the Constitution of Russia is accounted for by its succession to the previous socialist Constitution. Being submitted to the referendum, the text of the Constitution had to contain such rights as the right for housing, labour, health protection, otherwise its adoption might have been delayed.

Such an approach to social rights complicated the possibility of defending them in court. Article 42 of the Constitution of Russia states the right for the favourable environment and for the compensation for the damaged health or property caused by the ecologic breach of law.

In March, 1996, the Constitutional Court of Russia dealt with the case checking the constitutionality of the Law on social protection of citizens who had suffered from the radiation in 1957 when the accident happened at the production concern "Majak".

The plaintiff — a citizen Kornilov, lived in the village of Brodokalmak. In 1957 after the accident at concern "Majak", that caused the radiaoactive pollution of the locality, he, among other citizens, was evacuated to another newly built street in the same village. In 1993 the desputed Law was adopted that spread the Law on social protection of citizens, who had been infringed with radiation in consequence of the holocaust in the Chernobyl atomic

The plaitiff considered that those children of the repressed parents who were in exile with their parents should be legally recognised as the repressed but not suffered from the political repressions.

While working out the budget for the next year the Ministry of Finance took into consideration the judgement of the Constitutional Court of Russia that had applied the principle of equality and spread social payments of compensation in full volume on the children of the repressed.

In the post-socialist states it's reasonable to secure economic and social rights in Constitutions. But it's the responsibility of the Constitutional Courts to define the essence of these rights in conformity with the possibilities of the state budget.

Answering further on the questions put before the author, it should be mentioned that at first, in 1992-1993, the Constitutional Commission of Parliament was working out the Constitution, but in the summer of 1993 in accordance with the President's Decree the Constitutional Conference was summoned as a special organ to work out the text of the Constitution to be submitted to the referendum and to quicken the adoption of the new Constitution. The former Constitution in fact has not been used in the process of working out a new one, excepting the chapter on the human rights. As it has already been said above, there is a certain succession between the provisions of the old and new Constitutions, as far as people's rights are concerned.

Certain struggle of the former socialist ideas against the ideas of liberalism took place while disputing the Draft Constitution. Important disputes were devoted to the justified participation of state in regulating economic and social processes because traditionally state in Russia played a considerable role.

Opposition East — West greatly predetermined disputes on the concept of the Russian Constitution. Some were sure that Russia had a bent for the

East, therefore it was necessary to fix in the Constitution that decision are taken collectively. Others declared that Russia must take a bent for the West with its traditions of individualism.

Russia is a Euro-Asian state and its political tradition represents rather a particular phenomenon. Attempts to simplify these political traditions, reduce everything to the struggle of the European influence against the oriental despotism prevent from sizing up the truth. The scientific consciousness of the West holds too many prejudices and stamp notions such as, that presumably the Russians can arrange the life of the society only in conditions of community and that the Russian political thinking has presumably always been attracted by the authoritarian government and dictatorship.

The Parliament and the President have been elected in the democratic way in Russia. It's principally important that the supreme organs of power have emerged in the reformist but not in the revolutionary way. Legal organs of power in Russia have appeared from the depths of the former socialist society in the course of modernization of the political institutions within the frames of those institutions. Success of actions of the legal power depends on its flexibility and inclination for changes that in their turn depend on the intention of the politicians to keep up the democratic leadership or to return to the authoritarian government. This possibility can't be excluded — the idea of strong power is very popular in province. But the prospect of Russia's development is connected with progressive reformation and modernisation of life.

The group working out provisions of the Coonstitution on the parliament and the President were certainly pressed by the thought of what political forces are presented in the parliament now and what forces could prevail there in prospect.

Provisions of the Constitution on division of powers between federation and its members were worked out proceeding from the necessity to solve the

issues of optimization of the government, reasonable balance of centralism and decentralism. Regional elites, which claimed for their own part of power, have considerably affected the process of working out these provisions. The more so because power in Russia means more than a political power, it is also money, i.e. the economic power.

The church revives. But its influnce can't be assessed as noteworthy. At the same time one of the religions — the christian — tends to gain elements of the state religion, which contradicts the provisions of the Constitution.

The role of such institutes as trade unions, youth organisations, co-operative societies, which used to be adjuncts to the communist party and didn't have any independent role in the political system, is being changed at the present time. Trade unions become more politically neutral, limit their activities by the functions that must be characteristic of the trade unions just to protect the rights and interests of citizens who united on the professional basis. The former collective farms have been juridically reformed into joint-stock companies or co-operative societies, but it must be acknowledged that the change of the juridical form doesn't entail the change of essence.

Answering the question about the role of the non-governmental organisations in the process of passing the state decisions, it should be mentioned that not all the non-governmental bodies are very influential but only those which unite people possessing economic power.

The role of parties in relations between population and state is still not notable. Main groups of interests in the society have not formed yet, accordingly, the process of crystallisation of parties has not yet been over. The process of formation of political parties is slowed down also for the reason that membership of a party is identified in Russia with inherited from the communist party toughness of ideological demands and organisational dependence. These recollections are so vivid that people are not eager to join any party. It's good form to be out of party. There is no law on political

parties in Russia up till now. As a result, the party which loses elections nearly at once (in fact) stops its existence.

More popular are wide people's movements, built on the inter-class basis and putting quite concrete and close aims. The decrease of the prestige of the political parties has also been confirmed by the fact that mostly politicians acting as independent candidates have won the elections in the majoritary constituencies.

The process of transformation in Russia is not simply complicated, it is dramatic. Social expenses are excessive. Hardships of trasformations are caused by the extreme desolation, first and foremost, in the economy. Inter-ethnic conflicts, struggle between the branches of power, disagrrement between the federal centre and the regions are likely to proceed from all this.

Lack of democratic consciousness, political culture and socialist prejudices greatly interfere with the process of transformation.

Gadgijev Gadis,

Judge of the Russian Constitutional Court

(1) В.П.Пугачев, А.И.Соловьев. Введение в политологию. М., 1996, с.185

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SLOVAKIA: THE CASE OF UNCONSOLIDATED DEMOCRACY?

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This paper explores the institutional performance of political system in Slovakia since the fall of the communist regime in 1989. It is argued that two main modes of institutional performance of parliamentary system were dominant in the post-communist development in Slovakia. First, the Slovak Constitution set up rules providing for the emergence of 'assembly government', which was combined with weak coherence of political parties and party discipline at the first stages of post-communist transition, led to the dominance of such type of government in Slovakia. Second, growing coherence of political parties and increasing party discipline modified that form of parliamentarism, and led to the rise parliamentary 'partycracy', especially since March 1994. However, Slovakia's political system based on proportional representation and emerging multi-party system has made government dependend on the stability of ruling coalition of parties. In such way, the dominance of informal rules over formal rules has become part and parcel of Slovakia's 'institutional engineering'. The development of parliamentarism in Slovakia has confirmed that the crucial problem of government is party discipline and coherence. Furthermore, the institutional development was marked by constant efforts to change the constitution and other important political rules made by political movement which originally drafted and passed them. In the postcommunist transition the creation and separation of different branches of political power and the definition of clear rules of political game is necessary condition for successful democratic consolidation. Jan Zielonka suggests even more important role of setting the new rules of political bargaining, according to him, it is "the essence of democratic consolidation" (Zielonka, 1994, p. 87). Thus, the lack of institutionalization of political rules in Slovakia implies a hypothesis about the unconsolidated democracy.

History

The historical tradition of independent statehood and previous constitutional culture tend to affect the establishment and functioning of new political institutions. There are several factors which influenced the process of the constitution drafting in history of Slovakia. First, Slovakia had no history of national autonomy prior to the formation of Czechoslovakia in the aftermath of World War I. Slovakia's only prior history of independent statehood came during World War II, when a fascist puppet regime was established with the permission and assistance of the Nazis Germany. Second, the fact that the first Slovak constitution was promulgated during the period when the question of the existence of the Czecho-Slovak federation was not solved yet may have impact on the its legitimity and stability. Finally, under the above mentioned conditions the very act of passing the Constitution was meant more than the symbolic act emphasizing the issue of independent statehood more that the constitutionalism itself.

The adoption of the Slovak Constitution was one of the institutional outcomes of long and unsuccessful discussions on the set-up of the common state. Jozef Prusak, one of the leading legal experts in Slovakia, emphasized that Slovakia on the one hand, inherited main political institutions and on the other they were formed too fast, before the break-up of the federation. Consequently, the institutions are not socialized widely by political elite as results of historical and political experience. He illustrated this pattern on the process of drafting Slovak constitution which was more pushed by symbolic reasons and was not an

outcome of social and political struggles between the state and citizens, thus, the constitution does not represent a 'peace treaty', which justifies the limited government. He suggested that 'the struggle' for the constitution and constitutionalism will just take place in Slovakia (Prusak, 1995).

The speed of the fall of communist rule and the extent of the political changes in Czechoslovakia was unexpected. In November 1989, two broad anti-Communist movements, Civic Forum (OF) in the Czech Republic and Public Against Violence (VPN) in Slovakia, emerged headed by prominent former dissidents. Very soon, the transition to democracy and a market economy became complicated by national aspirations of the Czechs, Slovaks, and other national groups. While there was a broad consensus on the reform of the main political institutions, a problem concerning the rearrangement of the federal relationship between the Slovak and Czech Republics incited deep political conflicts, delaying implementation of a new federal constitution. After the first elections in June 1990, politics was structured along national concerns and other sensitive symbolic issues.

Especially important in this early period was the debate on the new name for the former Czechoslovak Socialist Republic. Arguments about what to call the post-communist federation were very heated. The so-called "hyphen war" erupted when Slovak leaders demanded to use the spelling "Czecho-Slovakia" (with a hyphen and capital S) instead of "Czechoslovakia" (no hyphen, small s). The alternative spelling that included the hyphen and capitalization of "Slovakia" was opposed by many Czech politicians. The conflict was resolved by the acceptance of two different names: the hyphen was used in the Slovak language, while Czech used the name "Czech and Slovak Federative Republic."

The Czecho-Slovak federation was dissolved after two years of negotiations between Czech and Slovak political leaders who were not able to find any kind of a common state relationship which would be accepted by both sides. Two political parties, the Movement for a Democratic Slovakia (HZDS) and the Civic Democratic Party (ODS) played the key roles in the process leading to the split. These two parties won the most votes in the 1992 elections and were the strongest in their respective republics--ODS in the Czech Lands and HZDS in Slovakia. Both parties originally were parts of the broad anti-Communist movements Civic Forum and Public Against Violence. In Slovakia, HZDS had promised to organize a referendum on the form of Slovak statehood as part of its 1992 election program, but after the elections this promise was not fulfilled. The Czecho-Slovak Federative Republic (CSFR) was finally dissolved by a constitutional law requiring a three-fifths majority vote in both chambers of the Federal Assembly.

The drafting of the constitution of the Slovak Republic started soon after the collapse of the communist regime in November 1989. This decision was legitimized and legalized by the provisions of the old constitutional Law on the Czecho-Slovak federation (No. 143/1968, clause 142) which was passed during the short-lived Prague Spring in 1968. The Law stipulated that after passing new federal constitution both republics would adopt own constitutions on the republic's level. For many Slovak legal experts, who drafted the above mentioned constitutional law on the federation this move was natural historical development

which would completed their original work and fulfilled their expectations about the equal position of the Slovak Republic in the Czecho-Slovak federation. In March 1990 a group of experts led by Juraj Plank prepared the first draft of the constitution. In the same time another group of lawyers prepared the draft of the federal constitution, aiming at democratic institutional reform. However, as Ernest Valko emphasizes, at that time there was no consideration given to the Czech constitution (Valko, 1994).

After the first democratic elections in June 1990, in the federal parliament a special constitutional commission was established. It was composed of the deputies of all three parliaments. Alexander Dubcek, Speaker of the Federal Assembly was nominated as its Chairman, and Dagmar Buresova and Frantisek Miklosko, Speakers of the Czech and Slovak National Councils were appointed as vice-chairwoman and vice-chairman. This parliamentary commission should have political responsibility for constitution-making. In the same time another commission was founded. This commission consisted of legal experts which should prepare drafts and proposals for negotiations of deputies' commission. The federal commissions put together not only deputies from all three parliaments in the former Czecho-Slovakia, but also legal experts from both republics to coordinate constitution-making on federal and republics' levels. According to President Havel the main role of newly elected parliaments was the elaboration of new constitution (Havel, 1990). After difficult, controversial and long debates, it seems that to assign to the new parliaments double role, i.e. constitution-making and regular legislative functions proved to be unsuccessful attempt. Meetings of the parliamentary commission became to be dominated by political conflicts which complicated the process of the constitution drafting. Moreover, according to the evaluation of Czech legal experts, the federal commission for constitution-making was not active and did not play the integrative role towards the commissions of the national parliaments (Jicinsky & Skaloud, 1996).

Moreover, in Slovakia, some political parties and movements established own commissions working on own drafts of the Slovak constitution. Public Against Violence (VPN) supported the draft of the parliamentary and governmental commission, known as Plank's proposal. Gradually, several other Slovak parties proposed drafts of the constitution during 1991. The Christian Democratic Movement (KDH) submitted its proposal in February. This draft already propounded an independent state for Slovakia (Tatar, 1994). Later, the Slovak National Party (SNS) proposed own version of the constitution which also preferred an independent Slovakia. After the split of the VPN, pro-federal faction, renamed as the Civic Democratic Union (ODU) continued to back Plank's draft of the constitution which favored the federation. Another faction of the former VPN, the Movement for Democratic Slovakia suggested the draft of the Slovak constitution, in which Slovakia would became "a voluntary part of an unclearly defined...confederation" (Tatar, 1994, p. 318). The Party of Democratic Left and the Hungarian coalition did not present own drafts. All drafts focused mainly on the position of the Slovak Republic in the federation, with respect to other institutional issues they stemmed from the constitutional traditions of the Czechoslovak Republic. In June 1991 the Slovak parliament decided to form the special parliamentary commission which should work on an approximation of all submitted proposals. The commission was composed of representatives of all parliamentary parties.

Because the main political forces in Slovakia were occupied by drafting institutions for the common state which would protect the position of Slovakia, there was almost no time to consider other institutional alternatives. The Slovak Constitution set up provisions which are outcomes of the institutional inertia that combines the double institutional continuity. First, there are provisions inherited from the inter-war Czechoslovak Republic, and second, there are stipulations taken over from the communist regime. This institutional culture resulted mainly in the central position of the legislature in the political system. Any legislative majority in Slovakia can have sovereign authority over both cabinet composition and lawmaking. It stems from the search for new centers of power after the end of the political monopoly of the Communist Party of Czechoslovakia (KSČ). The revolution destroyed the party monopoly, but it left alone most of the political institutions which the party had established and once occupied. Now open, these became the center of political competition because of their constitutionally established powers. The Slovak parliament--formally called the Slovak National Council--inherited from the Communist-era federalization of Czecho-Slovakia was unicameral legislature with responsibility for making laws on a wide variety of cultural and social policies within the Slovak republic and acquired an even wider prerogative in moves toward decentralization taken by the federal-level government in late 1990 (see Sivakova, 1994b; Wolchik, 1991).

The Constitution

The constitution was passed on September 1, 1992, just a few weeks after the Slovak National Council adopted the declaration of national sovereignty on July 17, 1992. Both legal acts demonstrated the commitment of the majority of deputies, elected in June 1992 to build new national state. The constitution established the government in accordance with the common tradition of the former Czecho-Slovakia as a parliamentary republic. It consists of eight parts and has 156 articles. Part 1, consisting of ten articles, declares mainly symbolic statements. Article 1 says that Slovakia is "a sovereign, democratic state governed by the rule of law", and thus provides for the separation of powers. Establishing a clear separation of powers in any post-communist country meant first of all to cancel various legal prerogatives of the communist party. This, however, took place before the adoption of the Slovak Constitution. There were some parts left from the former communist constitution, among them the third chapter on the economy of the Slovak Republic was interpreted as not obvious constitutional provision.

Parliament

The passage of a new constitution for Slovakia and the republic's independence in 1993 significantly widened the influence of Slovakia's parliament. The Slovak Parliament changed its name after the approval of the constitution into the National Council of the Slovak Republic. The single chamber consists of 150 members elected by universal suffrage (over the age of 21) through proportional representation for a four-year term. According to the Article 73, clause 2 of the Slovak Constitution the members "shall be the representatives of the citizens, and shall be elected to exercise their mandates individually and according to their best conscience and conviction. They are bound by no directives." According to Frank Bealey, the definition of deputy's mandate is reminiscent of the Burkean concept of

'trustee' (Bealey, 1995). This notion of representation emphasized the independence of deputies' mandate, arguing that the representative is not really representing if he or she merely acts as a mechanical transmitter of decisions others have made. This idea stresses the representative's role in a national legislature and obligation to the public good, i.e. a deputy has a freedom to make decisions according to his/her own opinion. However, the election system based on proportional representation and party lists complicates the actual behavior of members of parliament in accordance to this principle. A representative who becomes a minister or President must give up his/her seats though still retaining the right to participate in parliamentary proceedings. This provision attempts to set up clear separation of executive and legislative branches of power.

The parliament has considerable powers over the Cabinet; including a vote of no-confidence, electing and recalling the President of the Republic (Article 101, clause 2). The parliament also enjoys important powers over the judiciary related to elections of the presidents and vice-presidents of the Supreme Court and the Constitutional Court, further it chooses judges of regular courts (Article 86, letter j) and twenty candidates for members of the Constitutional Courts (Article 134, clause 2). The National Council elects and recalls the Chairman and Vice-Chairman of the Supreme Auditing Office of the Slovak Republic (Article 61, clause 1). Moreover, ministers, the Chairman of the Constitutional Court and the General Prosecutor are obliged to participate in the session if the National Council requires it by passing a resolution.

Article 82 of the Constitution says it is "continually in session" which means that it can only be adjourned by its own decision, and it cannot adjourn for more than four months. After the opening session, sessions are convened by the Speaker of the National Council who can call an emergency session on the request of 30 members. The Speaker of the National Council is elected by an absolute majority (76) of members. He convenes it and chairs its proceedings with the help of Vice-Speakers who are similarly elected. Together with the President of the Republic and the prime minister, the Speaker of the National Council signs all laws it has passed.

The constitution grants considerable powers to individual members. It stipulates the right to interpellate, i.e. to raise some questions that have to be answered. Article 80 of the 1992 Slovak Constitution gives each parliamentary deputy the right to address any relevant question, in the form of a formal interpellation, "the Government of the Slovak Republic, a member of the Government of the Slovak Republic, or the head of another central body of state administration concerning matters within their jurisdiction" and to receive a formal answer within 30 days. Since Article 80 also states that this answer "shall become the subject of a debate in the National Council of the Slovak Republic that may be linked with a vote of confidence," each deputy thus possesses a powerful symbolic--and potentially more than symbolic--tool for demanding government responsiveness and for influencing government action (Malova, 1994b). This potential instrument to attack the government is increased by the provision that only 30 members are needed to move a no-confidence vote. Consistent with the power of individual representatives is the fact that the National Council is in charge of its own agenda. The agenda of sessions is set up at the

beginning of the session. Any deputy can propose a change or amendment of the agenda. The agenda should be passed by a majority of the present members. The first speech is that of the sponsor of a bill, then a rapporteur or several rapporteurs, if members of different committees did not appoint a common one. To shorten debate, a 10 minute limit on individual statements can be approved by members.

Although the Slovak parliament possesses extensive formal powers, first years after the collapse of the communist regime its members proved the lack of professional skills, which influenced its performance. New parliament was were poorly prepared in--terms of organization, resources and procedure. First of all, democratically elected MPs were largely inexperienced in parliamentary affairs. The floor discussion has been still confirmed paradoxical behavior of deputies suggesting the low level of their professional skills. While some important economic and social bills did not raise long and controversial debates, and they have been adopted quite fast, other bills related mainly to symbols of the new national state and ethnic issue have constantly raised strong disagreement, quarrels and mutual insults.

Important powers of the National Council which require consent of three-fifths of the members (90) are those of electing and recalling the President; adopting constitutional statutes; amending the Constitution; and declaring war (Article 84). This last provision may balance the position of the President as commander-in-Chief of the armed forces. Other powers listed in Article 86 include proposing referendums; establishing Government departments and other government bodies; debating "basic issues"; approving the budget; and giving consent to contingents of troops to be sent outside Slovakia.

Bills may be proposed by the deputies, the committees, and the Cabinet of the Slovak Republic. However, in the original draft of the new Slovak Constitution the same power was given also to the President, but in the final preparatory consideration it was rejected on the grounds that such power complicated the legislation in the Czecho-Slovak Federal Assembly. The President has a suspensive right of veto, but the parliament can overturn his veto just by passing the bill again. No special majority is required. The review of powers given to the National Council raises the general impression of a legislature of more than average political weight.

The Executive: Government and President

The powers of the executive stipulated by the Slovak Constitution defines the relatively weak position of the government. The government is constitutionally made responsible to a legislature, and thus its "life" depends on other than constitutional provisions such as party system and, especially, party discipline. The prime minister is appointed and removed by the President according to the Article 110, clause 1. There are no provisions regulating process of the selection of prime minister. After the elections or the vote of no-confidence the President usually designates the leader of the strongest party in the parliament or he respects the proposal of several political parties that agreed to form a coalition cabinet. After the 1994 early elections when no clear coalition emerged, the President attempted to serve as a facilitator among political parties. However, this attempt was interpreted as the

undesirable intervention exceeding president's constitutional powers by the winning Movement for Democratic Slovakia.

Article 111 of the constitution defines the process of appointment of individual ministers. The President shall "on the advice of the prime minister" appoint and recall other members of the government. The government faces a semi-formal investiture in the parliament which is determined by the Article 113. The government after thirty days of its formation has to present its program to the National Council and "thus initiate a vote of confidence". The formation of the government in the actual political process in Slovakia already performed all weaknesses of parliamentary democracy stemming from unstable party system and lacking party discipline. Furthermore, the absence of a clear definition of President's rights in the case of the prime minister's request to appoint or recall a minister had raised conflicts between the President and the Prime Minister in the spring 1993.
The rather unclear provision in the Article 116 (clause 4) on of ministerial dismissals by the prime minister finally led to the appeal to the Constitutional Court. The Court interpreted this clause as a right of free decision for the President independently of prime minister's decision (see Collection of Findings and Rulings of the Constitutional Court, No.5/1993).

This ruling of the Constitutional Court even more weakened the position of the Prime Minister over the composition of the government. The Article 116 (clauses 1 and 3) of the Constitution determines the individual accountability of ministers to the parliament and also the possibility to initiate a vote of no-confidence in an individual member of the government. At the time of drafting and passing the Slovak Constitution there was a debate over the prime minister's powers. This debate was probably fostered by Meciar forceful style and it expected that the executive branch of power would prove to be powerful and would dominate the parliament (Tatar, 1992). Some constitutional powers given to the prime minister such as the right to recall a member of the cabinet, the right to return laws to the parliament, the right to join voting on a bill with a vote of confidence of the cabinet, and the establishment of a position of state secretary nominated and recalled only by the cabinet were interpreted as authoritarian provisions aiming at strengthening Prime Minister's power and supremacy of the executive branch of government. The strong executive would be quite obvious post-authoritarian provision based on the experiences from the breakdowns of democracies after the World War I, when the idea of parliamentary sovereignty dominated in politics and deeply divided political forces raised permanent governmental crises. However, this model was not accepted in Slovakia, because the constitution provides for the strong parliament and government can be strong only if political parties are strong, coherent and disciplined.

The Constitution's unusual formal statement of the inner decision-making processes of the Government (Articles 118 and 119) is also a part of the institutional legacies of the former regime. This provision is bound to presage a situation in which any sort of collective and corporate feeling, such as is normally associated with Cabinet government, cannot develop. It is likely to emphasize divisions in the coalition. Further provision illustrating the power of

the parliament over the executive is defined in the Article 86 (letter f) which says that the parliament sets up governmental departments and other governmental bodies.

The Slovak Constitution's provisions that define powers of the President of the republic in the unclear manner set up another potential conflict among political institutions. Drafting of the presidency as the new institution has been also influenced by historical legacies. However, these traditions are contradictory. On the one hand, the formal position and powers of the president in the first Czechoslovak republic was rather strong including the right to veto--in a suspensive way--legislation, to dissolve parliament, to nominate prime minister and ministers, to participate and chair government's meetings. On the other hand, the institution of president was also formed by informal political traditions that was established by the first Czechoslovak President Masaryk. He did not used all powers and he respected decisions of leaders of political parties, consequently the presidency was weaker, limited to the extent of neutral head of the state. However, the role of the president during the World War II was modeled according different pattern providing for strong autocratic leader of the state. The constitutional authority of the Slovak President was crafted according to these controversial institutional and cultural traditions.

The first common objection to the formalization of the presidential powers originates in the explicit structure of the constitution which in the Chapter Six defines the position of the President as the part of the executive (Kresak, 1996). Even if the constitution does not declare political responsibility of the president to the parliament, broadly conceptualized provisions stipulating the right of the parliament to recall president (Article 86, letter b and Article 106) may open a road to such interpretation and its application. The rights of the President defined in the Article 102 reflect the contradictory and unbalanced traditions and further foster potential discords. One of the shortcomings is connected with the limited right of the President to dissolve the parliament. The Article 102 (d) says that President may dissolve the parliament if and only if the parliament subsequently three times within six months after the elections does not vote confidence in the government. In any other situation of an inability of the parliament to form a government only three fifths majority of deputies can dissolve the parliament. Further controversial aspects of the presidential powers--besides above mentioned conflicts over nomination of members of the government--are rights of to participate in parliamentary sessions and to deliver a report on "the state of the Slovak Republic", and to attend government's meetings, to preside over them and require reports from the Cabinet and its members (Article 102, letters o, p and r). The original draft of the Constitution stipulated that President would have a right to propose bills, which was set up by the communist constitution and can be traced in the post-war development, when the president had right to rule by decrees. The power to propose legislation was valid till the dissolution of the federation and broadly used by President Havel (see Malova, 1995a). However, in the final debate over the Slovak constitution this presidential power was deleted.

The actual political development in Slovakia did not avoid perils of potential institutional controversies set up by the constitution. After the uneasy process of political bargaining to find an appropriate candidate who would be supported by the required three fifths majority,

President Michal Kovac has gradually gained more political weight. First, the Constitutional Court set up President's independence with respect to nomination and dismissal of ministers and other officials, and second, the President established informal Round Tables for national minorities and regular meetings with political parties.

The Executive-Legislative Relations

The nature of the relations between government and parliament cannot be divined merely by studying the constitution. The configuration of the political parties in parliament and their relations with each other is in Slovakia, as elsewhere, clearly significant. Yet it does seem as though the constitutional position of the National Council provides considerable scope for governmental instability. A contributory factor may be the executive powers possessed by the President. Considerable powers of the Slovak parliament can be explained by political culture common for the Czechs and the Slovaks in the first Czechoslovak Republic, where the parliament was dominant political institution.

This was strengthen by the impact of the communist regime, which postulated parliament as the supreme representative body of the "people's democracy" with main function to reflect social composition of society. It seems that the writers of the new constitution had not sufficient experience with functioning of different branches of power in parliamentary democracy, where a majority in the parliament is necessary precondition for stable government.

Thus, the National Council, according to the Slovak Constitution is relatively independent from the government with respect to setting own agenda, legislative powers and control of the government. Moreover, the parliament possesses important rights related to functioning of the administrative structure. The parliament can establish governmental departments and other governmental bodies. Furthermore, any member of the parliament may submit an oral or written request to a member of the government and any head of state administration office (including senior civil servants) asking for an explanation of any administrative decision. The government and the prime minister are in weak positions according to the constitution. The one-chambered Slovak Parliament has so many constitutional powers of control over the government that even in two-party system, it would be difficult to discipline individual members. Slovakia has been developing a multi-party system without a strong party discipline in the first years after the collapse of communist rule. The prime minister does not have sole control over his ministers because any of them can be brought down, against his/her wishes, by a vote of the National Council. Combined with the above mentioned Court's ruling the prime minister's only constitutional power in this area is that of not appointing anyone he does not want and he may be under political pressure even to do this from a coalition partner if his/her own party does not have an absolute majority in the parliament. Thus it can be concluded that the performance of the government in terms of stability will depend mainly on unconstitutional factors, i.e. on the political landscape. These circumstances include the composition of the parliament, the level of fragmentation of the party system and on the party discipline. These factors determined the functioning of the executive-legislative relations. Till the early elections in 1994 the government in terms of its composition and performance proved to be highly unstable. Under such conditions one of the likely outcome is the "gouvernement par assemble" of the French

Third Republic (Bealey, 1995; Malova, 1995b). This possibility led some Slovak legal experts to the conclusion that Slovakia's Constitution fully provides for that form of political rule, i.e. 'the government of parliament' and that there is no parliamentary democracy in Slovakia (Kresak, 1996). Our further analysis of political process in Slovakia led us at this point to preliminary and tentative conclusion that the Slovak Constitution set up to the certain level unclear division of rights among different branches of power, and thus it stipulate some constitutional preconditions of unstable government. However, the real political development proved that the mode of government is determined mainly by certain unconstitutional factors including party coherence and discipline.

Position of the Constitutional Court

The common Czech and Slovak political traditions do not provide strong tendency toward the idea of constitutionalism. Although the Constitutional Court was established in the First Czechoslovak Republic, it did not play an important role in the political system. Moreover, in 1993 the Court just stopped to functioned at all. The character of politics was much more influenced by idea of majority rule, based on strong parties and coalition governments than on the idea of constitutional and limited government. During the Prague Spring in 1968, some lawyers, like for example Milan Cic, the current Chairman of the Slovak Constitutional Court began to campaign for an establishment of the independent judiciary and the Constitutional Court. The constitutional amendment of the communist constitution on the federation (No. 143/1968) provided for the establishment of constitutional courts of the federation and both republics, but these provisions were never realized before the break-down of the communist regime. The first Constitutional Court in Czecho-Slovakia was established in 1991 by special constitutional amendment (No. 91/1991) and its functioning was regulated by the law which was passed later (No. 491/1991). On these grounds the Slovak National Council passed the constitutional amendment on the Constitutional Court of the Slovak Republic (No. 7/1991). However, the Constitutional Court in the Slovak Republic was never formed before the split of the federation.

The Slovak Constitution accepted the bulk of the previous provisions on the judiciary and constitutional court from these documents. The Court has the power of abstract review, meaning that a party can challenge an Act of Parliament in the Court on the grounds that it is unconstitutional, without the existence of an actual lawsuit. The Court can be petitioned by one-fifth (30) of deputies, by the President, the Government, any court, and by the Attorney-General. In the case of fundamental human rights, any citizen may bring a case before the Court for such a review (Article 130). According to the Article 125 the Constitutional Court has jurisdiction over constitutional conflicts between laws and the Constitution or constitutional statutes; regulations passed by the Ministries or other authorities of the central government and the Constitution, constitutional statutes, or other laws or other binding rules. The Court has right to decide disputes over powers of 'central government authorities' (Article 126). The Court was established and justices were elected early in 1993. Ten members of the Court were elected for seven years only, based on the argument that it is a new institution, without having tradition, so it is risky to elect constitutional judges for live term. The President has a right to remove a judge of the Constitutional Court only a few cases, such as a conviction by a court of law for a

malicious offense, or upon a disciplinary decision of the Court for misconduct or in a case of judge's inability to participate in the work of the Court.

The Constitution and Human Rights and Freedoms

The second part of the Slovak Constitution deals with fundamental rights and freedoms. The constitution incorporated slightly changed Bill of Rights which was passed by the Federal Assembly early in 1991. The dominant emphasis of the institutional development in the former Czecho-Slovakia and, than, in the independent Slovakia on human rights and freedoms, i.e. on so-called negative constitutionalism, was determined by two factors. First, it was the nature of the former regime, which emphasized social rights, but in the same time constantly violated fundamental civil rights and freedoms. Consequently, the regime's political opposition focused on the protection of human rights and as soon as the former dissidents got in power, they attempted to adopt laws guaranteeing and protecting human rights. Second, it was the role of international organizations such as the Council of Europe, the Conference on the Security and Cooperation in Europe and the European Union which conditioned the former communist countries' membership by accepting human rights protection mechanisms. The fact that a quarter of the constitution deals with the stipulation of citizen rights and freedoms demonstrates how important they were perceived to be.

The constitution divides rights into several sections, the first one is concerned with fundamental rights and freedoms in Articles 14-34 and 46-50. The second section (Articles 35-43) sets out 'economic, social and cultural rights' and is influenced by the former regime conceptualization of social rights. This part includes the rights to choice of profession; appropriate training; work, with a state guaranty for support in unemployment; trade union membership and collective bargaining. The right to strike is also guaranteed. Social rights contain the rights to free health care through medical insurance; security for the old, disabled or single parent's families; free education. Cultural rights include those to freedom of scientific research and artistic expression. These rights were set up as an attempt to satisfy demands to save some principles of social security provided by the previous regime. The further part of the constitution is concerned also with the right to a favorable environment. Article 44 reflects specific communist legacies, because it affirms not only rights but also 'duties'. Everyone has a duty "to protect and improve the environment and to foster cultural heritage" (Article 44, clause 2). Articles 33 and 34 relate to the rights of national minorities and ethnic groups and stipulate the protection of discrimination of persons belonging to ethnic minorities and the use of minority language.

The rights stipulated by the constitution are directly enforceable in courts, or in other state authorities if that is provided by law (Article 46). Everyone has the right to recover damages for "a loss caused by an unlawful decision of a court". However, according to Article 51 all the social and economic rights, except those relating to freedom of association, "may be claimed only within the limits of the law. Consequently, all those rights relating to social security and welfare, the right to strike are not only limited, but also their exercise may be changed by legislation. Furthermore, certain basic freedoms can be restricted. Article 13, clause 3 mentions "restrictions of constitutional rights and freedoms" and declares "shall be applied equally and consistently in all similar cases.

Moreover, Article 16 says the right to integrity and privacy "may be limited only in cases specifically provided by law". Freedom of movement is guaranteed in Article 23, clauses 1 and 2, but clause 3 states this freedom "shall be limited by law only if such limits are necessary in order to protect national security, public order, the health, rights and freedom of other people, or in order to protect the environment in designated areas". There are also other clauses which provide for restrictions of fundamental rights and freedoms. Article 26 guaranteeing freedom of expression and right to information declares they may be "lawfully limited only where, in a democratic society, it is necessary to protect rights and freedoms of others, state security, law and order, health and morality". Article 28, ensuring the right of peaceful assembly, lists exactly the same reasons for limitation of the right and adds also property.

The Slovak Constitution declares a lot of rights and freedoms, but further detailed study reveals that none of them are absolute. Some of the rights are left to later determination by law and others can be limited for such reasons as threats to national security and public order. Such crucial rights for the establishment and functioning of democracy as the rights of free expression and peaceful assembly may be restrained when morality is to be protected.

Electoral System

Since November 1989, Slovakia has had three national elections which were a central part of the democratization process. The first post-communist election law introduced a proportional representation system that existed in the first Czechoslovak Republic between two wars, thus abolishing the majority system of the Communist regime. Before the 1990 elections there was a short public discussion about the most appropriate type of elections system. Within the anti-Communist block there were two contradictory tendencies. On the one hand, there was a strong distaste against any communist institution, combined with the support for the renewal of the pre-war democratic institution. This tendency supported the proportional representation. On the other hand, there was a strong anti-party bias that stemmed from the previous monopoly of the communist party and also form the negative impact of party-cracy dominant in the first Czechoslovak Republic. These opinions led to the preference of the majority system which would favor 'well-known personalities' (Havel, 1990). Relevant political forces tried to reach a compromise within these attitudes, and consequently, the proportional representation based on party list with preferential votes was established. The adopted election law has also aimed at avoiding of fragmentation of parliaments that was typical for the pre-war Czechoslovakia. The new election law put forward a provision establishing a threshold for a party's entrance into parliament. A party had to receive at least 5 per cent of the vote in order to gain seats in the federal parliament. Moreover, according to the law on political parties, only parties which had reached at least 2 per cent of the vote, could receive federal financial support after the elections. The party fragmentation that followed in all three parliaments in the former Czechoslovakia was not foreseen and also not prevented by party discipline.

The threshold for the Slovak National Council in 1990 was only 3 per cent and, consequently 7 political parties out of 36 gained seats in the parliament. In the Slovak Republic before the election of 1992 the threshold for a single party was increased to 5 per cent, and a new provision on election coalitions of parties was passed in an effort to prevent fragmentation. The threshold of 7 per cent for a coalition of 2-3 parties or movements, and 10 per cent limit for a coalition of more than 4 parties or movements was established. Under these conditions only 5 out of 23 political parties that submitted party lists for the election to the Slovak National Council succeed in entering the parliament. For the early elections in 1994 aforementioned 5, 7 and 10 per cent thresholds have been maintained. These provisions led to the formation of election coalitions which resulted even in more fragmented composition of the parliament. Only 18 parties and electoral coalitions were registered for the elections but, in fact, they represented 31 different parties. Due to the electoral coalitions and common party lists, the parliament is composed of members of 16 parties, organized in eight parliamentary party clubs. Only minor changes to the 1992 electoral law have been introduced before 1994 elections. First, only parties receiving at least three percent (previously 2 percent) of the vote can be financed by the state. Second, the subsidy has been increased from 15 to 60 Slovak koruna per vote. Third, a limit on election spending was introduced.

The electoral system in Slovakia has had a definite impact on the formation of political parties and on party structures in general. The electoral system was designed in theory, to limit the number of political parties in Slovakia. However, due to the state financial contribution there are still 54 political parties and movements organized in Slovakia. Even, in the case that some merges are likely to occur before the next elections scheduled for 1998, the leaders of the HZDS, the biggest party in Slovakia, have been attempting to change the electoral system since 1993. First steps aiming in the new territorial and administrative division of the country were already made. From the point of view of stable support for the HZDS the creation of new districts will likely favor this party (Krivy, 1996). The change of electoral law was already declared in the Government Program, but which formula will be taken was not determined yet. However, the Movement for Democratic Slovakia has to gain the support of its coalition partners, because it does not alone have required majority, i.e. 76 votes.

However, the new Slovak constitution of 1992 resulted not only from the institutional inertia and traditions, but also from the efforts of a single strong party which, working within certain limits of tradition and public opinion, established a parliament where party strength would play an important role (Lijphart, 1994; Kitschelt, 1994). Likewise the system of proportional representation reflects a choice by early institutional architects to establish parliamentary representation on a party basis. At that time, the anti-party bias dominated public life, but, the attempts of key political leaders focused on establishing of a new model of political organization, i.e. broad citizens' movements which should be more effective and flexible alternatives to political parties (Malova, 1994a). Whether or not those architects were fully aware of the consequences of their decisions in 1990, the decision in 1992 to increase the demands on party registration and to raise the electoral threshold of Slovak parliament to 5 per cent did reflect the conscious choice of party members at that time to limit the

number of parties in parliament (Malova, 1994a). Likewise, the 1994 decisions to raise the threshold for state funding to 3 per cent while also increasing the amount of funding per vote by 400 per cent also reflect decisions to strengthen the position of already strong parties (Malova, 1995a).

Institutional Engineering in Slovakia

The examination of history revealed that the powers of major institutions were crafted according to historical traditions and there was not any other alternative legal blueprint to be carefully considered. Consequently, a question of stability of institution adopted in this way raises. The following part of my chapter will examine the development of institution after the adoption of the constitution. It will be argued that several factors determined institutional engineering in Slovakia. First, it is the relation of political forces during the drafting constitution. Second, the constitution which established parliamentary democracy combined with fragmented political parties without party discipline and coherence led to the unstable position of the executive and to 'government of parliament' situations, and thus attempts to change either the composition of the parliament or to impose party discipline have emerged. Third, the constitution's unclear separation of powers set up a conflict between two elements of executive, namely between the government and the President, which was further combined with personal tensions.

To understand the institutional dynamics of parliamentary democracy in the Slovak Republic, it is helpful to divide recent history into several distinct periods. During those intervals the relationship of the executive and legislative branches of power was different, and, thus, the performance of the parliamentary democracy was different that influenced attempts to change the institutional design of political system in Slovakia. Since the fall of the communist regime in November 1989 Slovakia has had three subsequent elections in 1990, 1992 and the early elections in 1994. The composition of the government has been changed seven times. It means that there were eight Cabinets, which formed either after elections or as a consequence of the vote of no confidence. The composition of the Cabinet was changed also after the reshuffling of the cabinet, and the acceptance of a new party as a member of the ruling coalition. All changes of government took place mainly because the ruling parties split. Moreover, party discipline was so weak that often deputies of the governing party voted down a minister from their own party. The first post-communist government was formed as a result of the Roundtable discussion between the Communist Party of Slovakia and the anti-Communist movement Public Against Violence (VPN). Three new governments were formed after the elections. Vladimir Meciar was elected as the Prime Minister after the each of those elections. In June 1990 he was nominated by the winning Public Against Violence (VPN) as its member. After the split of the VPN he and his supporters organized a new political party, the Movement for Democratic Slovakia (HZDS). The HZDS won the 1992 and 1994 elections. In 1991 and 1994 new governments were formed after the dismissal of the Prime Minister Meciar. In the autumn 1991 he was recalled by the Chairmanship of the Slovak parliament due to VPN's internal split. In March 1994 the parliament voted no confidence in Meciar's, already twice reshuffled Cabinet when his party lost the majority in the parliament. Since the early elections of 1994 till August of 1996 was a period without a change of government in Slovakia. Not even a single change of

minister occurred. No party suffered major split, and only two deputies left their parties: one from the coalition and another from the opposition party. However, on 27 August 1996 took place the Cabinet's reshuffle. Three Ministers had to leave the Cabinet, Economy, Foreign and Interior ministers were replaced. The Prime Minister Meciar said that there were mainly personal reasons that led to changes in the Cabinet.

The present study of the performance of parliamentary institutions focuses on the period after the foundation of the independent Slovak Republic because before attempts to reform political institutions were overshadowed by negotiations on the common state issue. That period can be divided into four different parts according to changes of the relationships between the executive and legislative branches of power. It is argued that the changes of relations between the government and parliament influenced opportunities and constraints of institutional engineering in Slovakia. The only stable feature of this period was constant efforts of the HZDS leaders to change the institutional framework of the Slovak political system. The first period runs from the establishment of Slovakia up through the vote of no-confidence against Prime Minister Vladimir Meciar's government on March 11, 1994. The style of Meciar's rule during this period was marked by controversy and an inability to maintain his political partners, so that he gradually lost his parliamentary majority. Attempts to regain a majority in parliament through institutional changes (including a redistribution of mandates, and establishment of either a chancellor democracy or a presidential regime) had already been made at this time. The second period covers the rule of the broad coalition government (five political parties and parliamentary groups) under the leadership of Jozef Moravcik, which enjoyed the support of the Hungarian political parties in Parliament. This period demonstrated the workability of a broad coalition government within a parliamentary framework on the basis of certain non-parliamentary institutions and procedures designed to impose party discipline, ensure a majority, and facilitate voting along party lines. The third period begins from 10 weeks after the early elections of 1994 and runs until the installation of the new government. This latest period has revealed the weakness of the incumbent government which has led, in turn, to the shift of some important powers (related to privatization) from the government to other bodies that can be controlled only by Parliament. The fourth period started after the formation of the new coalition government under the leadership of re-elected Vladimir Meciar composed of the Movement for Democratic Slovakia (HZDS), the Association of Workers in Slovakia (ZRS) and the Slovak National Party (SNS). During these four distinctive periods the position and the roles of different institutions of parliamentary democracy has been shifting. The government parties cohesion and voting discipline influenced the actual performance of main political institutions. Their performance has been moving between two extreme poles characteristic for parliamentary democracy, on the one hand it was the form of assembly government, and on the other hand there was the party-cracy mode.

The HZDS in the 1992 elections obtained 74 seats in the parliament, which was only two votes short of majority. With the support of the Party of Democratic Left (SDL) and Slovak National Party (SNS) reached the required three fifths majority in the voting on the Declaration of sovereignty and the Constitution of the Slovak Republic. Using Przeworski's

terms for the classification of different relations among political forces, it could be said that the relation of forces was known and uneven in the Slovak parliament (Przeworski, 1991). On the one hand, in the parliament there was a single party with almost half of the seats, and on the other hand there was a politically and ethnically divided opposition. It could be expected that the constitution written under the conditions when the relation of political forces is known and uneven would be durable as long as this relation lasts. In such situations, according to Adam Przeworski the institutions are supposed to be "custom-made for a particular person, party, or alliance" (Przeworski, 1991, p. 82). This hypothesis implies that the durability of the Slovak constitution would be very limited. It could be expected that any substantial political change in the composition of political forces would lead to the amendment of the constitution. However, suitable conditions for a change of the constitution requires three fifths majority in the parliament agreeing on constitutional modification. The Slovak Constitution, compare to other institutional arrangements providing for constitutional changes, can easily be amended and the amending process is within the ambit of parliament. These provisions make a change of the constitution almost effortless and very flexible (Bealey, 1995; Zielonka, 1994). However, the change of the constitution requires also a suitable composition of political forces. The PR electoral system, multi-party system and fragmented parliament usually limit the possibility of constitutional amendment. The political development in Slovakia after the adoption of the constitution has confirmed this expectation.

However, after the adoption of the constitution all its institutional shortcomings combined with other weak features, inherent for the transition of political system such as weak party discipline. The instability and the lost of the HZDS's parliamentary majority originated in mainly in the inherent incompatibility of political forces associated in the HZDS. The broad coalition of national, social democratic and liberal fractions with strongly competing leaders was not able to form firm and coherent government. In Slovakia we can follow characteristic post-authoritarian development; the election has brought in power broad movement without party discipline and with adversarial elite's behavior and strong personal competition among elite. Consequently, the HZDS firstly lost 8 MPs, who created the parliamentary club of independent MPs. In February 1994 the governmental crisis has even deepened, as the meantime established coalition with the Slovak National Party resulted in the split of this party, and two of HZDS' members of government initiated new parliamentary faction.

Leaders of the HZDS have also attempted to stabilize their political power by proposing other political and constitutional arrangements. The vice-chairman of the Slovak parliament from the HZDS asked to sign "a pact of an acceptance of the state's interests" by parliamentary political parties. The Prime Minister even proposed other constitutional changes, firstly, advocating for an implementation of the presidential system instead of parliamentary, and secondly, some of his advisors have emphasized the advantages of chancellor's government. Aforementioned proposals were not submitted to the parliament, because they would not received qualified majority. This assumption was supported by the composition of the parliament and, moreover by the fact, that the Slovak parliament did not pass other governmental bill on the State Defense Council, which would allowed the Prime Minister Meciar to declare an emergency state and to act without parliamentary approval

and control. Furthermore, the HZDS sought to change the law on the Slovak parliament, what would allowed to replace deviant MPs by the partisans and to gain again majority in the parliament. In Spring 1994, when the Prime Minister Meciar was not able to form a government with majority support in parliament, the HZDS decided to push for a referendum calling for early elections and the dismissal of deputies who defected from party which nominated them for the 1992 elections. Meciar began gathering the 350,000 signatures required under Article 95 of the constitution to force a referendum. If the petition would be legitimate, the President would have been obliged to call a referendum within 30 days. President decided he could not call a referendum on dismissing deputies who had changed their party affiliation after the 1992 elections. Such a move would contradict the constitutional prohibition on imperative mandates, he argued, and would also have to be applied retroactively. The presidential office announced on March 16, 1994 that the petition for a referendum on early elections submitted on March 2 by Meciar supporters was invalid, because after the revision of signatures under the petition not required number was valid.

Between the end of the elections in October 1994 and the end of November 1996, no party suffered a major split and only three deputies have so far left their parties choosing to declare independence rather than affiliating with another party or founding a new one. The difference between this period and the previous two is striking. Using Pedersen's Index, a simple calculation of overall change in the number of seats held by parties (Mainwaring, 1995), reveals that over one fifth of all seats in Slovakia's parliament changed from one party to another in the period from the 1990 until a month before the 1992 elections. The volatility of seats during this parliamentary period thus proved almost as high as the volatility from first election to the second. And only slightly smaller movement of deputies occurred within the next parliamentary period and, again, intra-parliamentary volatility rivaled the volatility from the second election to the third. In the most recent parliamentary period the volatility has dropped to just over one percent.

The notable shift in Slovakia's party system toward cohesion and discipline after 1994 appears to reflect a combination of mechanisms to insure parliamentary party unity along with a decline in reasons for splitting or dissenting. The laws governing Slovakia's parliament make no provision for the relationship between parties and deputies after elections. The Act on Parliamentary Procedures (Parliamentary Standing Orders) places no limits on the right of deputies to leave and join parties, and the only major requirement for the formation of a parliamentary caucus is the existence of five deputies so willing (Malova, 1995b). Furthermore, Article 73 of the 1992 Slovak constitution provides broad justification for lack of party discipline by stating that deputies "carry out their mandate personally, according to their conscience and convictions and are not bound by any orders."

In the absence of legal provisions to assist them, parties which desired increased cohesion and discipline learned to establish their own internal mechanisms. Before the 1992 election Slovak newspapers reported that certain parties had asked candidates on their party to promise loyalty to the party in exchange for their seat in parliament by signing "letters of commitment" similar to letters commonly used by

parties during the first Czechoslovak Republic (Malova, 1994b). However, since Article 73 of Slovakia's Constitution precludes legal enforcement of such commitments, they can play no more than a symbolic role. In the campaign of 1994 HZDS introduced a potentially more effective mechanism by requiring candidates to pledge payment of Sk 5,000,000 (USD 166,000, a sum more than ten times the annual salary of a deputy) should they leave HZDS while still remaining in parliament. Such a contract may be no more enforceable than the letters of commitment but testing its legality could prove difficult and fraught with risk.

Slovakia's parliament has been shaped by political parties, once they emerged, in several aspects. The political parties in Slovakia designed not only general rules of parliamentary democracy, but also used their access to power to anchor their positions in the political system. Parties, as it will be analyze later, determined the internal structure, rules and functioning of parliament even to the greater extent than general political framework. The lack of formal structures to support parties has led party leaders to develop their own informal internal rules to promote cohesion and discipline within parties and co-operation across party lines. Parliamentary parties have modified broad parliamentary rules and guidelines to benefit incumbent parties, and they have frequently developed informal and formal mechanisms for easing the co-operation between coalition partners within parliament. The wide constitutional role of parliament in selecting and recalling the Slovakia's executive branch has allowed parliamentary parties to shape broader executive-legislative relations. Splits in Slovakia's parliamentary parties frequently led to new governments, and solidity among other parties has prevented major constitutional change. Among important legislative activities in 1995 belong amendments to the election law which strengthened the control of national party executives over the selection of substitutes. According to previous law in the case that any deputy has to give up his/her seat in Parliament (incompatibility rule, death, etc.) this deputy was replaced by the substitute following the order on party list. The amendment gives the right to political party to decide who will replace leaving deputy.

The current ruling coalition knows that to change the constitution requires three-fifths majority, so after the 1994 elections, Prime Minister Meciar announced that he is seeking for 'seven braves', i.e. seven deputies who would their party affiliation and help to gain required majority. In the same time, however, his party tried to change a composition of the parliament by challenging mandates of the Democratic Union. The HZDS and SNS questioned the DU's eligibility to run in the elections. The Court on 27 October dismissed this complaint. Later, a five-member commission set up by the parliament's Mandate and Immunity Committee ruled on 22 November that the Democratic Union did not have the 10,000 signatures required to participate in this fall's parliamentary elections. The commission, established at the initiative of the Movement for a Democratic Slovakia, was composed of four HZDS members and one member of the Slovak National Party. The controversies on the composition of parliament have continued also in Spring 1995.
Police officials are questioning the 14,929 citizens whose names appeared on the Democratic Union's petition lists to ensure that their signatures are valid. However, even this attempt to expel the DU from the parliament was not successful.

Another line of institutional conflict runs through the relations of the coalition government and the President. The governing coalition since the 1994 elections has continued in a persistent campaign to discredit President Michal Kovac, to limit his powers, and to ouster him from the office. First, on May 2 1995, the government approved a draft law transferring to the government the power to name the chief of the General Staff. The holder of that post is currently nominated by the defense minister and approved by the president. In November 1996 the Constitutional Court decided that this amendment was unconstitutional. Second, the parliament passed a no-confidence vote in Michal Kovac in 1995. The proposal was approved by 80 deputies representing the government coalition. There are no legal consequences of the vote, since the Constitution states that the Parliament can only remove the president for activities "against the sovereignty or territorial integrity of Slovakia" or against the country's "democratic and constitutional system." (Article 106) Even in such case, the vote requires a three-fifths majority (90 votes out of 150). Third, on 2 May 1996, the Constitutional Court rejected an amendment to the referendum law that would have curtailed presidential powers by shifting a right to screen the authenticity of referendum petitions from the President to the parliament. The Court based its decision on the Article 95 and Article 102m of the Constitution, which stipulate that "a referendum shall be announced by the President".

Two different opinions prevail in the current debate over the institutional reform. On the one hand, the Prime Minister Vladimir Meciar's Movement for Democratic Slovakia in the government's program announced efforts to change some of the present pillars of Slovakia's political system. During the March party conference of the HZDS Meciar announced his determination to implement this program. One of its provisions was to revise the constitution. Meciar emphasized that there is a need to decide definitively whether Slovakia is to have a parliamentary or presidential system or one based on a chancellor system. However, to change the constitution requires three-fifths majority in the parliament. After several attempts to reach such majority either by replacing defecting deputies or by breaking down the opposition parties which have failed, he proposed the following scheme. Complaining that the system of proportional representation currently employed results in too many political parties gaining seats in the parliament, Meciar also called for changes of the electoral system, with a view to consolidating the party system. The plan calls for either a first-past-the-post or a mixed electoral system, which would ultimately leave only two main political forces-one of which would be the HZDS.

In contrast, the current opposition has been defending the proportional representation system, fearing the possible increase of Meciar's personal power under a presidential or chancellor system. The opposition argues that the party system has been already formed in quite stable way, and the constitution needs more time to reveal its advantages and shortcoming. Moreover, the institutional stability is a necessary condition for strengthening democratic regime and culture. There is a pronounced lack of political impartiality and professionalism in the debates over a possible reform of the political system. And, since the current government does not have the support of a three-fifths majority necessary to

amend the constitution, the HZDS has been attempting to achieve its goals by passing regular legislation.

Conclusion

Since the 1994 elections the Constitutional Court decided that 12 laws passed by the current majority in the parliament are unconstitutional. Many of them dealt with attempts to change powers of basic political institutions. Others laws were designed to modify rules governing fundamental social and economic policies. The constitution of new parliament and formation of government has been linked with several political disagreements and arguments among political elite which consequently tried to approach the Constitutional Court asking to solve their tensions. An evaluation of almost any political issue in terms of "constitutionality" or "unconstitutionality" became a part of everyday public discourse.

The further institutional and legislative development has raised the question of the effectiveness of constitutional constraints over governmental action. The power struggles between the government and opposition, the government and the President have set up a pattern. The President vetoes legislation, the parliamentary coalition overturns his veto, and the President or the opposition appeals to the Constitutional Court to nullify the law. This repetitive political game casts doubt on the efficiency of the constitutional provisions governing dual executive and the separation of powers. Debates rage on how the current system of checks and balances should be revised in order to sustain governmental efficiency, while limiting the executive. According to the Constitution, the President has the right to veto any bill, but the parliament may simply readopt the bill by majority vote, which the ruling coalition can easily manage. As a result, the Constitutional Court is the only institution capable of blocking the destructive legislation introduced by the ruling coalition, and even then, only if it can find a plausible reason for doubting the law's constitutionality.

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DRAFT VERSION

THE SHAPING OF CONSTITUTIONAL INSTITUTIONS IN THE REPUBLIC OF SLOVENIA

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Institutional Engineering

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THE SHAPING OF CONSTITUTIONAL INSTITUTIONS IN THE REPUBLIC OF SLOVENIA

CONTENTS

1. Introduction

Although a great variety of factors need to be taken into account in order to evaluate constitutional development in post-communist Slovenia, it is the question of the continuity and discontinuity of the constitutional order that is most important for an assessment and projection of this development; not continuity between the new constitution and the previous arrangements (although I will address this point briefly) but the continuity of the new arrangement itself.

Following the collapse of the Habsburg Empire at the end of the First World War (October 1918), Slovenia became part of the unified State of Slovenes, Croats and Serbs, from which soon emerged, after union with the Kingdom of Serbia and Montenegro, the Kingdom of Serbs, Croats and Slovenes (December 1918). After the Second World War Slovenia became part of socialist (communist) Yugoslavia, and so all told, right up until it gained independence, Slovenia subordinated and adapted its political and legal order to that of Yugoslavia, a period of over 70 years. Throughout this entire period, the constitutional order was characterised far more by discontinuity than continuity (in postwar Yugoslavia the continuity was apparent above all else in the monopoly of the Communist Party and the assembly system of state power).

Even in the old Yugoslavia, in 1929 King Alexander annulled the 1921 Vidovdan constitution, dissolved the national assembly and introduced a dictatorship. The next radical element of discontinuity was, of course, the Second World War, following which the Communist Party took over the reins of power and introduced a socialist regime founded on the political monopoly of the Communist Party and on the assembly system of power. In 1946 the (first) constitution of the Federal People's Republic of Yugoslavia was adopted, but in 1953 already a constitutional statute was passed which marked the beginning of the systematic introduction of self-management and hence a crucial intervention in the constitutional arrangement. A new constitution was adopted in 1963 which was subject to a series of amendments at the end of the sixties. More change was to come in 1974 with the adoption of a new constitution, which again was subject to numerous supplements and amendments right up until the collapse of the Socialist Federal Republic of Yugoslavia. Each of these constitutional arrangements brought entirely new elements to the system, although none interfered with the monopoly of the Communist Party.

Throughout the postwar period, the changes to the Yugoslav constitutional regime were matched by changes to the Slovene arrangements (Slovene constitutions were adopted in 1947, 1963 and 1974 with numerous amendments). This development obviously had a strong effect on the legal mentality of the Slovenes, who had no opportunity to develop (a sense for) constitutional continuity or tradition. The adoption and the process of implementing the new Slovene constitution therefore represent a significant test of the maturity of the Slovene nation and of its politics. It is important for the newly-democratic countries in transition (including Slovenia) that they define and preserve the foundations of their new arrangements with as great a consensus as possible. They need to "still the pendulum" and gradually achieve the right balance in the regulation of social relations. If the new democratic constitution implies a clean break with the previous regime and as such plays a strongly progressive (and creative) role then it is perhaps right in

the years immediately after its adoption to place a greater emphasis on its "conservative" role, which, at this highest legal-political level we could term a guarantee of stability of the social order. This does not, of course, imply an *a priori* opposition to any constitutional amendments, but merely an assessment that there is no need for haste in making such changes.

The process of formulating and implementing the new Slovene constitution, adopted on 23 December 1991,[1] was inseparably linked to the processes of democratisation and the achievement of political independence by Slovenia. The democracy process at the end of the 80s and the beginning of the 90s was a condition and the basic framework for the new constitutional arrangement, while the gaining of national independence represented one of the most important aims of this arrangement. But later the independence process "overtook" the adoption of the new constitution,[2] as a result of the many difficulties that had to be faced in the search for the necessary political consensus over the new constitutional solutions. The adoption of the new constitution, and a year later the election of the various organs of power (President of the Republic, National Assembly, National Council) completed the first and most dramatic phase of the Slovene transition (it should not be forgotten that Slovenia's declaration of independence was followed by a 10-day war and a partial international isolation of Slovenia for several months).[3]

Slovenia now finds itself in the second phase of its transition, which is understandably less involved with the "major themes", such as the establishing of democracy and statehood.[4] But this phase is no less problematic. On the one hand various groups in society (political parties, trades unions and other interest groups)[5] are struggling for political and economic supremacy, while on the other hand the citizens are confronted by numerous social and other hardships (high unemployment, the rise in serious crime, ineffective judicial protection). In this context, characterised among other things by a relatively high level of mistrust among the population in their state institutions, it is clearly difficult to assess reliably the real value of the new constitutional arrangements, for their real effects will only become truly visible in the years to come. Nevertheless, the process of adopting and establishing the new Slovene constitution in itself allows for certain fairly reliable assessments to be made, which I will address along with a description of the constitutional process and the various constitutional dilemmas.

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1 Constitution of the Republic of Slovenia (Official Gazette of the Republic of Slovenia, no. 33/91).

2 Slovenia declared independence on 25 June 1991, some six months before the new constitution was passed.

3 By the end of 1991 only 10 countries had recognised Slovenia as an independent state. The watershed came in January 1992, when a further 33 countries recognised Slovenia, including the countries of the European Community. Some 95 countries had recognised Slovenia by the end of 1992, and in this same year the new country was accepted as a member of the United Nations. In 1993 Slovenia was to conclusively establish itself internationally, becoming a member of other important European and international organisations, such as the Council of Europe, the IMF and the World Bank.

4 As far as the process of transition and consolidation is concerned, we can say that some of the essential points of democracy in Slovenia have already been consolidated, but of course the process is far from completion (Bibič 1993: p. 13).

5 On the subject of the development of interest groups in Slovenia and their role in the policy-making process, see Fink-Hafner 1996.

2. The process of formulating the new constitution

2.1. Departure from the previous constitutional arrangement: elements of continuity and discontinuity

As far as the question of continuity and discontinuity between the previous and the new constitutional arrangement[6] is concerned, it must be said that while the new constitution in many respects marks a complete break from the previous constitutional system (the constitutions of the Socialist Federal Republic of Yugoslavia and the Socialist Republic of Slovenia), the new constitution emerged principally through an evolutionary not a revolutionary process. This is clear on the one hand from the fact that the constitution emerged gradually, over an extended period (the draft constitution took around two years to complete and the proposed constitution itself a further year), and on the other hand from the continuity between the old and the new constitutional arrangements, which is reflected above all in the following three aspects: 1. the new constitution has retained certain regulations from the previous constitutional system which are still acceptable under the new constitutional system (primarily provisions relating to human rights where the previous constitution had to a certain extent already met internationally recognised standards, as well as other provisions such as those relating to the constitutional court, which had been established by the 1963 constitution, and certain other postulates such as the principle of legality and the ban on retroactivity); 2. the new constitution was passed by the Slovene assembly; 3. the constitution was adopted in accordance with the procedure for constitutional review set out in the 1974 constitution itself. In terms, therefore, merely of the **continuity** between the old and the new constitutional arrangements, it can be said that such continuity exists **formally** in the sense that the constitutions were adopted by the same body[7] and following the same procedure, and **substantively** in the sense that some of the provisions under the previous and the present constitutions are partly or wholly identical.

Yet the question of constitutional continuity and discontinuity is clearly more complex and, in general, cannot be answered in simplistic terms. There is no doubt that the 1991 Slovene constitution is an **entirely new constitution**; in other words it is not merely an amended version of the old 1974 constitution. The extent and importance of the substantive similarity between the old and new Slovene constitutions are significantly less than the numerous and important differences. In particular, the foundations of the new constitution and the political arrangements they set out represent a complete break with the previous constitutional system. And another significant aspect of discontinuity is the fact that the 1991 constitution was also the (first) constitution of the Slovene state, although at the same time we should not overlook the fact that the transition to Slovene statehood was easier to carry through, legally and politically, on the basis of Slovenia's recognised separate legal status as a political entity within the Yugoslav framework (in the former country Slovenia was a separate federal unit and had its own constitution) and the constitutionally guaranteed right as a nation to self-determination. Furthermore, legally the transition to a new constitutional

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[6] For a detailed review of the previous constitutional arrangement, see Strobl, Kristan, Ribičič 1986. On the new constitutional arrangement, see the collection *Nova ustavna ureditev Slovenije* 1992; Ude, Grad, Cerar 1992; Rupnik, Cijan, Grafenauer 1994; Grad, Kaučič, Ribičič, Kristan 1996; Cerar 1993-1.

However, the tricameral assembly that adopted the new constitution was already composed of deputies elected at the democratic elections held in 1990.

arrangement had gradually been constructed through the adoption of a series of amendments to the 1974 constitution of the Republic of Slovenia. And finally it should be stressed that even before it adopted a new constitution, Slovenia had legally constituted itself as a state with the adoption of a Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia (more on this to follow).

2.2. Phases in the formulation of the new constitution[8]

1) A review of the events which had a direct impact on the changing of the Slovene constitutional arrangements should begin in 1987, with the publication of **Contributions for the Slovene National Programme**.[9] This programme was one of the first influential and organised reactions by the political opposition in Slovenia (the core of which was formed by various Slovene intellectuals) against the authorities, headed by the League of Communists of Slovenia and Yugoslavia. The programme emphasised the key aspects of the separate Slovene identity, which ran strongly counter to the official stance at the time. The authorities categorically rejected the national programme.

2) In April 1988 the Constitutional Commission of the board of the Society of Slovene Writers and the Working Group on Constitutional Development at the Slovene Sociology Society published **material for a Slovene constitution**, in which a special place was occupied by **Theses for a Constitution of the Republic of Slovenia**, which later became more commonly known as the "sociological" or "writers'" constitution. The theses summarised and built upon the ideas contained in the national programme published a year earlier. They were drawn up as a kind of draft framework for the wording of the constitution, and their basic purpose was expressed in the desire to remove ideological principles from the constitution, to remove the constitutional provisions laying down the leading role of the League of Communists, and the desire to begin the process to establish a modern and democratic constitutional order in Slovenia, which should become an independent state.

3) On 27 September 1989 the Slovene assembly adopted **constitutional amendments LX to XC to the 1974 constitution of the Socialist Republic of Slovenia**.[10] The number of amendments alone shows how extensively the constitution was changed, yet without significantly altering the foundations of the political system in Slovenia or the status of Slovenia as a federal unit within Yugoslavia. Individually, some of these amendments could already be judged to be the foundation for a future comprehensive overhaul of the constitutional order, although in the prevailing constitutional context this was not their direct role or purpose.

4) On 16 December 1989 the Presidency of the Socialist Republic of Slovenia passed a resolution setting up a working group to formulate **starting points for a new constitution of the Socialist Republic of Slovenia and a new constitution of the Socialist Federal Republic of Yugoslavia**. The working group set about its task on the basis of

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[8] I will give a brief description of some of the most important events and documents that essentially marked the process of the adoption of the new constitution. For more detail, see: Jambrek 1992: pp. 231-294; Ribičič 1992: pp. 31-41; Rupnik, Cijan, Grafenauer 1994: pp. 19-38; Rizman 1993: pp. 245-246; Cerar 1991: pp. 100-114; Ude, Grad, Cerar 1992: pp. 8-19.

[9] *Nova Revija*, Ljubljana (1987) no. 57.

[10] Official Gazette of the Socialist Republic of Slovenia, no. 32/89.

guidelines drawn from the constitutional amendments adopted that year as well as certain political and expert documents (the Basic Charter, the May Declaration, and the material collated by the working group at the Presidency of the Republic Conference of the Socialist Alliance of the Working People of Slovenia). The starting points for a new constitution[11] announced an orientation towards a new constitutional system characterised, among other things, by democracy and the rule of law, pluralism and equality of forms of ownership, and a market economy. These starting points did not, however, envisage an independent and sovereign status for Slovenia (which was to remain a part of federal Yugoslavia).

5) In April 1990 the opposition, now much stronger politically and enjoying greater influence, published a **Working Draft of the New Slovene Constitution** in its journal *Demokracija*.[12] Containing 164 articles, this draft offered a more precisely differentiated basis for the new constitution and, compared to the "sociological-writers' constitution", was a more complete concept, yet it no way exceeded the bounds of its title.[13]

6) On 25 June 1990 the Presidency of the Republic of Slovenia, which had been elected in April of that year at the first postwar democratic elections, formulated a **Proposal for the Commencement of the Procedure for the Adoption of a New Slovene Constitution.**[14] The proposal stressed that Slovenia should become an independent state, and that its future constitution should primarily embrace the characteristics of statehood and provide all the necessary mechanisms of a democratic state governed by the rule of law.

7) On 13 June 1990 a **Constitutional Commission of the Assembly of the Republic of Slovenia** was established and given as its priority the task of formulating a proposal for a new Slovene constitution to submit to the chambers of the assembly for adoption.[15]

8) On 18 July 1990 the Assembly of the Republic of Slovenia adopted a **Resolution on the Commencement of the Procedure for the Adoption of a (New) Constitution of the Republic of Slovenia.**[16]

9) In accordance with the resolution mentioned above, the Constitutional Commission appointed a group of legal experts, who, based on the working draft of the new Slovene constitution referred to earlier and taking into account the numerous public observations and initiatives that had been expressed in August and September 1990, formulated a **draft proposal for a new Slovene constitution.**

10) Some of the articles of the text drawn up by the group of experts were recast by the Constitutional Commission and then it was officially

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11 Published in *Delo*, 16 December 1989, pp. 28-29.

12 10 April 1990, pp. 1-8.

13 Among the various intellectuals at this time concise ideas were emerging as to the political, economic, sociocultural and other social contexts in which Slovenia found itself and on the conditions and possibilities for independence. In March 1990, *Nova revija* (No. 95) published the opinions, professional and otherwise, of more than 40 authors on the concept of Slovene independence.

14 Published in *Delo*, 3 July 1990, p. 4

15 See the Decree on the Founding, Tasks, Composition and Number of Members of the Commission of the Assembly of the Republic of Slovenia for Constitutional Issues (Official Gazette of the Republic of Slovenia no. 29/90

16 Official Gazette of the Republic of Slovenia, no. 29/90.

adopted on 12 October 1990 as the **draft constitution of the Republic of Slovenia.**[17] Within the governing political coalition at the time the belief still prevailed that the new constitution would be adopted by the end of December 1990, or (according to the "pessimistic variant") at the latest by the spring of 1991 (see, Jambrek 1992: pp. 285-286), yet both inside the coalition as well as among the opposition parties objections were raised against such a tight deadline. Many politicians and constitutional experts in Slovenia believed more time was needed to adopt the most important legal-political document of the state, so as to allow the constitutional solutions to be properly considered. Moreover, this was set against a background of highly divergent political views on further constitutional and political development (some political parties did not even want the new parliamentary elections that would follow soon after the adoption of the constitution).

11) On 6 October 1990 a public presentation was made of a **model for a Yugoslav confederation,**[18] which was devised by experts from the Slovene and Croatian governments in the form of a draft international treaty. The idea of a Yugoslav confederation (of republics), which presumed sovereignty and the status of its members as international subjects, was rejected by the other republics and so never came to fruition (in fact, even Slovenia and Croatia did not opt for such a system).

12) A **public debate on the draft constitution,**[19] which began on 12 October 1990, was officially concluded on 30 November 1990 but in fact lasted much longer (the Constitutional Commission was accepting and debating public initiatives right up until the proposed constitution was finalised).

13) Therefore the original intention of many in the Demos governing coalition to have the Slovene state legally constituted with the adoption of a new constitution failed to materialise towards the end of 1990, and so Demos agreed to the "alternative" solution of holding a **plebiscite.** While the direct initiative for the Slovene plebiscite came from the ranks of the parliamentary opposition, specifically the Socialist Party of Slovenia, Demos itself had already envisaged such a move since even with the original idea the new Slovene constitution was, ultimately, to have been adopted at a referendum (which would have been obligatory and constitutive — Article 163 of the draft constitution).

The plebiscite was held on 23 December 1990 and attracted a turnout of 93.2 per cent; 1,359,901 of the 1,459,752 eligible voters cast their ballots. The result was overwhelming: 1,288,044 (88.2%) voted **for** Slovene independence and sovereignty; 57,877 (4.2%) voted **against**; and 12,398 (0.8%) ballot papers were **spoilt.** The result of the plebiscite underlined the unambiguous legitimacy of the policy of building a sovereign Slovene state.

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[17] Journal of the Assembly of the Republic of Slovenia, 19 October 1990, no. 17/90.

[18] Published in *Delo*, 6 October 1990, p. 20.

[19] Public debates on proposed constitutional amendments were a particular feature of the previous three-stage procedure for amending the constitution. The new constitution introduced a two-stage constitutional amendment procedure, without the obligation to hold a public debate (but there is the possibility of holding a confirmative constitutional referendum as an optional third phase in this procedure).

14) In the continuing process of the legal-political construction of the elements of a Slovene state, in 1990 and 1991 the Slovene assembly passed several **constitutional amendments**, which to a limited extent substituted for the anticipated new constitution in that they allowed some of the activities of independence to be carried through smoothly.[20]

15) On 22 February 1991 the Slovene assembly adopted a **Resolution on a Proposal for the Break-Up of the Socialist Federal Republic of Yugoslavia by Agreement,**[21] which first pointed to the decision taken at the Slovene plebiscite and then put forward specific proposals to carry out the process of splitting up Yugoslavia by agreement. With the exception of Croatia, all the other Yugoslav republics either ignored or rejected the resolution.

16) On 25 June 1991 Slovenia embraced statehood with the adoption of a **Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia** and an **Enabling Statute for the implementation of the Basic Constitutional Charter on the Independence and Sovereignty of the Republic of Slovenia**, and at the same time adopted a **Declaration of Independence**.[22] The first two enactments were of a constitutional nature, while the declaration was a political enactment.

The **Basic Constitutional Charter** is a constitutional enactment *sui generis*, being the first time that an enactment of this nature has been passed in Slovenia. It defines Slovenia as an independent and sovereign state assuming all the rights and obligations which, under the constitution of the Republic of Slovenia and the constitution of SFR Yugoslavia, had been transferred to the organs of federal Yugoslavia, as well as taking over their implementation (as laid down in the enabling statute for the implementation of the charter). Additionally, the (international) borders of the Slovene state were determined, and it was specifically stipulated that the Republic of Slovenia would guarantee to protect the fundamental rights and freedoms of all persons within its territory, and, pursuant to the 1974 constitution, safeguard the legal protection of the Hungarian and Italian ethnic communities living in Slovenia.

The Basic Constitutional Charter only laid down the most urgent matters requiring regulation for the establishment of sovereignty and retained (pending the adoption of a new constitution) the greater part of the 1974 constitution, including the amendments and supplements to it. This constitution, now subordinated to the provisions, or the principles, set out in the Basic Constitutional Charter, encompassed the necessary elements of statebuilding, i.e. the entire institutional construction of state power (assembly, executive council, republic presidency, etc.), whereby the charter made changes only to the provisions on the borders of the state.

The preamble to the new constitution explicitly states that the constitution ensues directly from the Basic Constitutional Charter, which therefore remains valid simultaneously with the new constitution. In practice, this is only important as far as the timing of the birth of the Slovene state is concerned (which coincides with the day on which the Basic Constitutional Charter was adopted) and because of the provision

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[20] Constitutional amendments XCVI to XCIX (Official Gazette of the Republic of Slovenia, nos. 35/90 and 7/91).

[21] Official Gazette of the Republic of Slovenia, no. 7/91.

[22] Official Gazette of the Republic of Slovenia, no. 1/91.

contained in section II of the charter, which defines the borders of the state (the new constitution does not contain such provisions), for all other provisions in the charter are either implicitly or explicitly encapsulated in the constitution.

The Basic Constitutional Charter and the enabling statute for its implementation made possible the first decisive legislative changes to the old legal regime, because it was on the basis of these two documents that the Assembly of the Republic of Slovenia adopted a **collection of independence laws** (laws on citizenship, foreigners, passports, border control, foreign affairs, the customs office, international credit transactions, foreign exchange operations, the Bank of Slovenia, etc.).[23]

17) On 4 December 1991 the Constitutional Commission finalised the **proposed Constitution of the Republic of Slovenia and the proposed Enabling Statute for the Implementation of the Constitution of the Republic of Slovenia.**[24] Both proposals were adopted on 23 December 1991 in all three chambers of the Slovene Assembly with (more than) a two-thirds majority of the votes of all the delegates, and were proclaimed at a joint session on the same day.

2.3. Writers of the constitution

Characteristic of the process of formulating the constitution is the fact that it is hard to identify a small or decisive group of writers of the new constitution, although obviously we know who had the greatest influence on its content. The first to come up with a text for an entirely new constitution were certain intellectuals (lawyers, sociologists and philosophers, as well as writers and others — for the names of the individuals involved, see Jambrek 1992: pp. 257-263), who in the late eighties formed the intellectual core of an emerging political opposition. In formal constitutional debate, including public debate,[25] this outline for a new constitution then underwent numerous amendments and supplements.

Among the writers of the constitution, special mention should be made of the expert group which, authorised by the Constitutional Commission, wrote the official working text of the draft constitution — the so-called Podvin Constitution. The expert group was composed of six prominent legal experts and law professors and one philosopher. After carrying out preliminary studies and compiling international comparative material, the group met in the Hotel Grad Podvin from 20 to 25 August 1990 to write the first draft of the new constitution, which, on 31 August, was submitted to the president of the assembly, Dr France Bučar. As a starting point and the foundation for its work the group used the Working Draft of the New Slovene Constitution (see point 2.2., section 5 above).

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[23] Official Gazette of the Republic of Slovenia, no. 1/91.

[24] The proposals were published, with an explanation, in the journal of the assembly of the Republic of Slovenia, 17 January 1992, no. 1/92.

[25] During public debate on the new constitution lasting many months, several thousand citizens as well as organisations (municipalities, companies, associations) sent ideas and comments to the Constitutional Commission and to the assembly of the Republic of Slovenia. These initiatives were professionally and politically categorised before being put to the assembly or its Constitutional Commission for debate.

The group of experts organised their work such that in the event of opposing opinions, specific solutions were put to the vote. Where the voting produced a majority and a minority view, the group formulated the majority opinion as the basic text of the article or articles of the constitution, and the minority opinion was formulated as a variant text, and the choice between the two was left to the Constitutional Commission. Whenever a given solution was opposed by just one member of the group, then the group formulated that particular solution in accordance with the majority position, and the member taking an opposing position added a dissenting opinion (for the attention of the Constitutional Commission). If the members of the expert group had been required to formulate all the solutions by consensus it would have led them down a blind alley, for even the experts held widely divergent views on certain aspects of the constitution at that time.

As we said earlier, the expert group based its work on established international legal documents, on the constitutions of certain other countries and on the specific circumstances and requirements of Slovenia. In parts of the constitution (particularly the chapter on human rights and the rights of minorities) the group took account of various international conventions and documents, such as the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the European Convention on Human Rights, the European Social Charter, the European Charter on Local Self-Government and the Helsinki Final Act. In its constitutional comparisons the group focused its study on:

a) the constitutions of the countries of continental Europe with a parliamentary system of government (Italy, FR Germany, Austria and the German federal *land* of Bavaria);

b) the constitutions of the Mediterranean countries which, with a certain delay, carried through a transition from dictatorship to democracy after the Second World War (Spain, Portugal and Greece);

c) the constitutions of Hungary and the Socialist Republic of Serbia, in which systematic (constitutional) change was underway;

d) two of the leading constitutional models which have influenced the majority of constitutional systems in the world: the parliamentary system of the United Kingdom and the presidential system of the United States;

e) the semi-presidential system in France (Fifth Republic).

As the constitutional debate progressed, a key role was assumed by the Constitutional Commission of the Slovene assembly and its president, Dr France Bučar. Before his election as a delegate to the assembly, Dr Bučar was active within the emerging political opposition, and in the late 80s and in 1990 he was one of the architects of the aforementioned outlines for a new constitution. He it was who set the underlying tone of the debate in the Constitutional Commission, and he can be said to have been a decisive factor behind, for example, the adoption of the constitutional concepts of local self-government and a national council. The Constitutional Commission was composed proportionately of 25 leading representatives of the parliamentary partics. The expert group worked in permanent cooperation with the Constitutional Commission, although the experts were not entitled to vote. As the constitutional

debate advanced, some of the experts were elected to take up office as judges of the Constitutional Court, and so, for reasons of incompatibility, had to stand down from the group. A number of other legal experts (mainly professors of law, judges and experts from the then Ministry of Legislation) worked with the remaining members of the group under the auspices of the Constitutional Commission. During the course of its work the Constitutional Commission drew up several working versions of the proposed constitution, and these formed the basis for debate.

The adoption of a new constitution required a two-thirds majority of the votes of all the delegates in the assembly of the Republic of Slovenia (at least 160 out of 240).[26] Therefore debate within the Constitutional Commission was directed throughout at achieving the necessary consensus. Yet this consensus proved very difficult to reach because the political structure within the assembly prevented two-thirds agreement being achieved quickly among the parliamentary parties.

2.4. Political framework of the constitutional debate

The establishing of democracy in Slovenia did not require a revolution because the past ten years at least had been relatively prosperous and politically tolerant.[27] It could even be claimed that in this short historic period Slovenia followed the pattern set by contemporary Western history, in which the establishment of the nation as the constitutive subject of the state always preceded the rise of democratic institutions (Rizman 1993: p. 245). Despite the fact that in the 80s and early 90s political events in Slovenia were essentially imbued with ideas of a "European orientation", human rights, democracy, freedoms, etc., it was very quickly recognised (by most people) at the time that none of this would be possible to achieve within a federal Yugoslavia of such extreme cultural, economic and other diversity and in which Serbia had openly begun to assert a hegemonistic role.

The democratic elections in April 1990 made possible the decisive transition from self-management political monism to modern political pluralism (Zajc 1995: p. 61). Nine political parties (of the 16 parties and one independent list that contested the elections) passed the parliamentary threshold (2.5 per cent of the vote). The six-party Demos coalition received 54.51 per cent of the vote and a parliamentary majority in two of the three chambers of the then assembly. What this meant was that the previous power structures (the League of Communists — Democratic Party of Renewal, the League of Socialist Youth of Slovenia — Liberal Party, the Socialist Alliance of Slovenia — League of Socialists) moved into opposition, but Demos did not win enough seats to be able to change the constitution as it wished. Despite the optimism expressed by the members of Demos and its intellectual adherents that a new constitution could nevertheless be adopted soon after the elections, the constitutional process was soon to become bogged down as a result of the strong opposition as well as disagreement within the coalition.

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[26] During the period in which the constitution was being formulated, there was no debate on the possibility of setting up a special constitutional assembly. The idea of a constitutional assembly was already partly implied in the fact that at the democratic elections in 1990 the voters were, for the most part, aware that they were authorising their representatives in the assembly, among other things, to adopt a new constitution.

[27] On some of the basic political aspects of the Slovene transition to democracy, see the collection of papers *Problemi konsolidacije demokracije* 1993.

The parliamentary parties, which succeeded to the so-called sociopolitical organisations of the previous regime, did not publicly oppose the independence of Slovenia but at the beginning of the formal process of adopting a constitution under which Slovenia would be constituted as an independent state it was clear that they did not support the process (on the one hand because of the continuing ties, political and otherwise, with the other Yugoslav republics, and on the other hand because of the danger of military intervention by the Yugoslav Army). Following the plebiscite for an independent Slovenia in December 1990 at which the Slovene population gave unambiguous support to the independence process, it was abundantly clear that the political authorities would have to abide by this decision. And so on this point there was never later any open confrontation between the political forces in parliament or any of the other state organs. Hence the focus of the constitutional debate was only on questions concerning the institutions of the new state and its democratic arrangements, while the statehood of Slovenia was accepted as an assumption of the future political system.

As far as the contentious constitutional questions were concerned (I will look at them in more detail later) there was obviously a need to strike political compromises. Some of these compromises led to a number of rather "unusual" solutions;[28] and in cases where a compromise at the constitutional level proved impossible to find, the writers of the constitution simply avoided regulation of certain constitutional issues.[29]

In principle there was always consensus among the parliamentary parties as far as the following starting points of the new constitution is concerned: 1) the new constitution should not reduce the level of legal protection which was already guaranteed by the 1974 constitution and the amendments to it; 2) the (liberal) principle should apply that the constitution permits everything that it does not explicitly restrict or forbid; 3) the constitution should encompass that which is generally acceptable to the citizens of Slovenia. While the nature of these principles was such that they could not be consistently carried out in the constitutional process (see Ude, Grad, Cerar 1992: pp. 17-19), they did play an important and beneficial guiding role in this process. Moreover, in the constitutional debate there were many such issues on which it was possible to reach a political consensus quickly (e.g., most of the fundamental constitutional principles, the great majority of specific human

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[28] I am referring to certain solutions which were not a standard part of most other parliamentary systems; including the provisions relating to the National Council, which introduce elements of corporativism into parliament (Articles 96 to 101 of the constitution); the somewhat contradictory regulation of the position of the president of the republic, who has very limited powers (Articles 102, 107 and 108 of the constitution) given that the president is directly elected; and the stipulation that ministers of state are appointed by parliament, i.e. the National Assembly (Article 112 of the constitution).

[29] For instance, the constitution does not set out some of the fundamental elements of the electoral system, which, compared with other systems, are considered matters that are subject to regulation by the constitution. The constitution only contains basic provisions on the right to vote (Articles 43, 80 and 103 of the constitution), but, for example, does not contain any provisions relating to the system of allocating seats. The system under which elections are held for the National Assembly, the National Council and the president of the republic is currently regulated by several laws. Elections to the National Assembly are based on a proportional system, although there is an important element of the majority system in that in order to enter parliament a party must win at least three seats (for a more detailed analysis of the Slovene electoral system, see Grad 1992).

rights, certain solutions in the area of economic and social relations, and the political administration of the state).

In general it can be said that the absence of a dominant political bloc enjoying a majority in parliament on questions concerning the new constitution had the effect, on the one hand, of significantly extending the constitutional debate and preventing the rapid adoption of a new constitution. Nevertheless, it was principally this which led to more considered constitutional solutions being adopted by consensus and, to a great extent, this helped to stabilise the political situation in Slovenia and prevent any radical settling of scores between the governing coalition and the opposition (which is a typical inclination in times of radical social change).[30]

2.5. The avoidance of certain constitutional issues

In the draft constitution the Constitutional Commission's expert group came up with a solution that envisaged certain important constitutional questions being regulated by **constitutional laws**. If the constitution were to have been passed very quickly, by the end of 1990 for instance, then in many places the constitutional provisions, either because of the absence of a political consensus or because of the lack of time to draw up professionally-considered solutions, would have merely referred to future regulation by constitutional laws, which parliament would have adopted by a qualified majority. In the hierarchy of legal enactments these constitutional laws would have been formally subordinated to the constitution itself while being at the same level as other (ordinary) laws. Initially, it was envisaged in the draft constitution that the constitutional laws, which would be adopted by a **two-thirds majority of deputies present and voting**, would regulate primarily the following matters:

a) citizenship;
b) the manner in which the Hungarian and Italian ethnic communities (minorities) exercise their rights, the areas in which these communities live and the rights enjoyed by individuals belonging to either community outside their ethnic area;
c) the status and special rights of the indigenous Gypsy community in Slovenia;
d) the conditions under which foreigners may obtain the right to own land;
e) the rights and the conditions under which foreigners may exploit the natural resources of Slovenia;
f) the electoral system;

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[30] Because of the new governing coalition's inability to make rapid and radical changes to the inherited political and legal structure, in many areas of development Slovenia lagged behind the other East European countries emerging from communism (for instance, in the process of privatisation, denationalisation and rectifying postwar injustices committed by the communist regime). Primarily from the economic point of view, but also politically, this period was relatively ineffective. Nevertheless, at the time Slovenia was still a part of federal Yugoslavia and for this reason a great deal of energy was (successfully) expended on the attainment of independence because some of the essential institutional changes were simply not possible in the Yugoslav context (for example, the Yugoslav Army was still stationed in Slovenia and the legal order was still founded on the old constitution and legislation). It must also be recalled that in this initial period of transition the new and old political elites were endeavouring primarily to acquire or retain political and economic ascendancy in Slovenia, and so failed to give sufficiently intensive and consistent attention to a number of the key questions of transition.

g) referendums;
h) the manner, extent and organisation of the military defence of Slovene territory;
i) the organisation and jurisdictions of courts; the direct participation of citizens in the exercise of judicial power; the conditions for the election of judges, and certain other issues related to the judiciary and the holding of judicial office;
j) the status and function of the office of state prosecutor.

In addition to these areas, the draft constitution also encompassed, in the form of variant wording,[31] the possibility of the aforementioned constitutional laws regulating other fields, such as the position and competences of the national bank or the incompatibility of the office of member of parliament. The most far-reaching aspect in this regard was the general clause, which stipulated that "the constitutional provisions in the area of the protection of human rights and freedoms, the electoral system, the right to initiate legislation, referendums, the judiciary, local self-government and other matters stipulated by the constitution shall be laid down in detail in constitutional laws".[32] If a provision of this nature had been retained it would have meant that it would almost have been necessary to adopt another "constitution" in order to implement the constitution itself, since more than fifty of the constitution's articles could only have been made operational through the enactment of constitutional laws. Proposals such as these reflected the high degree of mistrust that prevailed at the time among the various political parties as well as the unpredictable nature of further political development.

Later in the constitutional debate, however, the reasonable position prevailed that the areas mentioned above would be at least basically set out in the constitution and their regulation would not be wholly transferred to constitutional laws, which could have had the effect of frequently blocking the legislative process (a minority in parliament would have been able to thwart the majority). Gradually the idea of constitutional laws came to be completely discounted. While a number of the provisions in the new constitution do refer explicitly to statutory clarification and more detailed regulation, these are cases involving laws adopted by simple majority in parliament. Only in three instances does the constitution refer to the adoption of (ordinary) laws by qualified parliamentary majority; it stipulates that referendums (Article 90 of the constitution)[33] and the type, scope and organisation of the defence of the national territory (Article 124 of the constitution)[34] shall be regulated in detail by laws passed by the National Assembly with a two-thirds majority of the deputies present and voting. The National Assembly also adopts its Standing Orders with the same qualified majority (Article 94 of the constitution). Pursuant to the constitution, the adoption of a law regulating the electoral system requires a two-thirds majority of the votes

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[31] Either variant texts, i.e. alternatives to the basic text proposed, or variant additions, in other words supplements to the basic text.

[32] This was set out in variant addition no. 1 to Article 92 of the draft constitution of the Republic of Slovenia (published in the journal of the Assembly of the Republic of Slovenia, *Poročevalec*, no. 17/1990).

[33] Articles 90 and 170 of the constitution contain basic provisions on legislative and constitutional referendums. This matter is now set out in detail in the Law on Referendums and Popular Initiative (Official Gazette of the Republic of Slovenia, no. 15/94), which was passed by the National Assembly with a two-thirds majority as mentioned.

[34] This field is regulated by the Law on Defence (Official Gazette of the Republic of Slovenia, no. 82/94), which was passed by the National Assembly with a two thirds majority as mentioned.

of *all* deputies (Article 80 of the constitution), which is the same as the qualified majority required for a constitutional amendment.[35]

It is interesting to note also that laws, other regulations and general enactments relating to the exercise of the constitutionally-determined rights and status of the ethnic communities exclusively cannot be adopted without the consent of the representatives of the communities[36] (the two deputies representing the Hungarian and the Italian ethnic community have the right of veto over such laws). Here the constitution seeks, through specific provision, to protect minorities from the majority.

2.6. Some important contentious constitutional questions

Among the more important open questions within the constitutional debate were those which concerned the following fields (see Jambrek 1921: pp. 291-294):

- a constitutional definition of the national basis of the Slovene state;
- the property rights of foreigners;
- the extent of the protection of social and economic rights;
- the status of ethnic minorities;
- the social function of property;
- the rights of workers to participate in management;
- rights connected with conceiving and bearing children;
- a unicameral or bicameral parliament;
- the representation of regions and of social, cultural and economic interests in parliament;
- the powers of the president of the republic;
- the question of whether Slovenia should have an army or adopt a demilitarised status;
- the demarcation of competences between the state and local self-government;
- the appointment and composition of the judicial council;
- the question of a constitutional referendum or a plebiscite on national self-determination.

Some of these questions were resolved in the process of constitutional debate as a direct result of the way events unfolded during this time. For instance, with the holding of a **plebiscite** on Slovene independence the debate on the analogous **constitutional referendum** became superfluous. Similarly, the conflict between the nascent Slovene army and the Yugoslav army in the days immediately after Slovenia declared independence (the so-called "ten-day war for Slovenia") demonstrated Slovenia's need for armed forces and that the question of it having a **demilitarised status** exceeded the bounds of political reality.

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[35] Even that under the Standing Orders of the National Assembly (Official Gazette of the Republic of Slovenia, nos.—40/93 and 80/94) and in accordance with parliamentary practice hitherto, the basic electoral laws are adopted with the above-mentioned qualified majority in a three-phase legislative process (and there is even a fourth deliberation if the National Council opts to exercise its suspensory veto), in the formal sense this process is even more demanding than the procedure to amend the constitution, which has only two phases and which, in the first phase, requires only a two-thirds majority of deputies present and voting (Article 168 of the constitution) in order for a proposal to commence proceedings for an amendment to the constitution to be accepted.

[36] For instance, the Law on Self-Governing Ethnic Communities (Official Gazette of the Republic of Slovenia, no. 65/94), which was passed in October 1994.

As far as the other issues are concerned (and I intend to deal only with the most important of them), we should recall first of all that in the constitutional debate the representatives of some of the right-wing parliamentary parties (such as the Slovene Democratic Alliance) called for the constitution to set out in principle the **national**[37] **sovereignty** of the Slovene state, while the majority advocated the contemporary concept of **popular sovereignty**. Under the former position the "Slovene nation" would have been the constitutive element of the state, while with the latter position the constitutive element was to be the citizens of Slovenia, irrespective of their national or ethnic origin (in other words, other citizens of Slovenia in addition to ethnic Slovenes, mostly coming from other former Yugoslav republics as well as members of the Hungarian and Italian ethnic communities). The latter position advocating "sovereignty of the people" prevailed convincingly, but nevertheless the constitution explicitly stipulates that only the Slovene nation as such (the *narod*) has the right of self-determination in Slovenia.[38] The suitability of this decision by the writers of the constitution is confirmed by, among other things, the fact that extreme national (nationalist) options have a negligible presence in Slovene politics. Furthermore, as a very small state (numbering around two million), Slovenia cannot present even a potential threat to anyone in this regard.

On the question of how the constitution should regulate **social and economic rights**, the position prevailed that the constitution should explicitly guarantee only those social and economic rights whose nature is not so "programmatic" (i.e. policy goals that are very distant from social reality) as to prevent their effective exercise before the courts. Given that even during the constitutional debate it was possible to foresee that in the future Slovenia would by confronted by high unemployment and other economic and social problems, the writers of the constitution consciously rejected laying down, for example, the right to work and the right to adequate housing.[39] One of the characteristics of the previous socialist constitutional system was that the constitution contained numerous highly "programmatic" principles and rights which could not be implemented in practice or brought before the courts, and this gradually led to a general undermining of confidence in the legal system. The new constitution still embraces certain economic and social rights but they are generally dependent upon statutory regulation, which can more easily

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[37] The idea of the "nation" here is understood in the way that is characteristic of central Europe and the Balkans, where the term denotes a homogenous ethnic group sharing an identifiable tradition (language, culture), and where such group cannot be identified with the state (remember that Slovenia left a Yugoslav federation composed fundamentally of nation-republics in order to become independent).

[38] Article 3 of the constitution, in full, reads as follows:
"Slovenia is a state of all its citizens and is based on the permanent and inalienable right of the Slovene people to self-determination.
In Slovenia, supreme power is vested in the people. Citizens exercise that power directly, and most notably, at elections, and consistently with the principle of the separation of legislative, executive and judicial powers."

[39] In these two instances the writers of the constitution adopted a special approach. They transformed both of these rights into the duty of the state to create the opportunity for their achievement. Thus Article 66 of the constitution stipulates that "the state shall be responsible for the creation of opportunities for employment and for work and shall ensure the protection thereof by law", and under Article 78 "the state shall create the conditions necessary to enable each citizen to obtain suitable housing". Although both provisions are of a programmatic nature, they clearly do not involve a (fundamental) right of citizens. In other words, there is no legal remedy (e.g. a lawsuit) directly available to citizens in respect of a guarantee of work and housing.

take account of the real possibility of guaranteeing such rights.[40] Clearly, even a short and abstract definition of a human right or freedom in the constitution means that a constitutional complaint[41] is possible in proceedings to ensure legal protection of such right, which is not envisaged for the protection of other rights.[42]

This constitutional concept has so far proven to be correct because in the past few years numerous problems concerning the protection of the rights of individuals in practice have arisen in the area of economic and social relations. Yet the fact that legal protection in these areas is relatively poor does not directly affect our assessment of the constitution as such — the focus of the problems remains at the level of social and economic policy, statutory regulation and judicial practice.

As regards the individual human rights regulated by the constitution, particular attention was paid in the constitutional debate to the right of workers to participate in management, the property rights of foreigners and the right to freedom of choice in childbearing. Some opposed the **right of workers to participate in management** because it was reminiscent of the right (of workers) to self-management under the previous system, which had proven to be an unrealistic and functionally ineffective ideological stipulation. However, the opposing position prevailed that this was a right which, within certain limits, was established in other modern democracies. Yet this right, too, is only set out in the constitution in terms of principle, and its detailed regulation is subject to law.[43]

With regard to the **property rights** of foreigners, after lengthy debate the solution was adopted that is now encompassed in Article 68 of the constitution. This article stipulates that foreigners may only acquire **title to property affixed to land** under the conditions set out in law. But

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[40] For example, the constitution explicitly guarantees the basic right to social security (Article 50) and to health care (Article 51), but also states that citizens only enjoy these rights under the conditions laid down by statute. Similarly, the constitution guarantees the right to own property (Article 33), but adds (in Article 67) that "the manner in which property is acquired and enjoyed shall be regulated by statute so as to ensure the economic, social and environmental function of such property." Under economic rights, the constitution guarantees, for example, free enterprise, but here again adds that the conditions under which commercial organisations are founded are to be determined by law.

[41] In accordance with the constitution and pursuant to the Law on the Constitutional Court (Official Gazette of the Republic of Slovenia, no. 15/94), any person may bring a constitutional complaint before the Constitutional Court if they believe that their human rights have been violated by a specific act passed by a state body, local authority or public authority. As a rule, a constitutional complaint may only be lodged after all other legal remedies have been exhausted.

[42] Here we should note that the Constitutional Court has taken the position that certain constitutional rights laid down in the third chapter of the constitution ("Economic and Social Relations") are not human rights and freedoms in respect of which a constitutional complaint could be lodged (of course, they enjoy protection before ordinary courts of law). In other words, the right to a healthy living environment (Article 72 of the constitution states: "Everyone shall have the right under the law to a healthy environment in which to live."), for example, is not a "human right" because it is not laid down in the second chapter of the constitution, which carries the title "Human Rights and Fundamental Freedoms". Yet since the constitution is not particularly systematic in this regard, this is a somewhat questionable position to take (for more detail, see Pavčnik 1994: pp. 489-490).

[43] Article 75 of the constitution stipulates that "workers may participate in the management of businesses and institutions in such manner and under such conditions as shall be determined by statute". This area is now regulated in detail by the Law on Workers' Participation in Management (Official Gazette of the Republic of Slovenia, no. 42/93).

foreigners may not acquire **title to land** except by inheritance and on condition of reciprocity. With this solution the writers of the constitution sought to prevent the possibility of a "sell-off" of large parts of Slovene territory, since for a country such as Slovenia with so small a territory (20,256 sq. km), allowing foreigners to buy land would have been a major political risk. Last year this inflexible (and uncompromising) solution proved to be a serious hindrance and could call into question Slovenia's integration into the European Union if the country fails to adapt to the arrangements in place elsewhere—and, at least under certain conditions, allow foreigners the possibility to own land in Slovenia.[44] Clearly the consensus needed to amend the constitution will be hard to achieve on this issue.

One of the biggest problems in the constitutional debate was the right **to freedom of choice in childbearing**. This was a right that had been encompassed in the previous constitution and its incorporation in the new constitution was supported primarily by the left-leaning parties and, to a large extent, by public opinion. In 1991 the opposition by some parties (the Slovene Christian Democrats, for example) to the idea of this matter being regulated at the constitutional level even led to public demonstrations, at which women in particular expressed their public support for the constitutional right to abortion. Despite numerous attempts to reach a compromise formulation of the constitutional provision, it remained uncertain right up until the day on which the constitution was adopted whether the parties which had so decisively opposed this provision would indeed vote to adopt the constitution (in the end, they did).[45] Interestingly, in this year's parliamentary elections none of the political parties raised this constitutional right in their election campaigns.

Looking at the political system, the main question that arose at the beginning of the constitutional debate in the Constitutional Commission was what the position of the **president of the republic** should be, and, by extension, what sort of relationship there would be between the parliament and the executive branch of power in general. To assist in their debate, the Constitutional Commission's expert group formulated two normative models. The first model envisaged a parliamentary system of power in which the parliament would have the prevailing influence on the formation of the government. And under the second model, which we could call semi-presidential or parliamentary presidential (modelled primarily on the French system), it would be the directly-elected president of the republic (see Jambrek 1992: pp. 316-324) who would have the prevailing influence on the formation of the government (i.e.

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[44] In May 1995 the government presented a motion to the National Assembly for the commencement of the procedure to amend the constitution of the Republic of Slovenia, proposing that the constitutional ban on foreigners acquiring title to land be lifted, and that statutory regulation determine the conditions under which this could take place (National Assembly *Poročevalec*, no. 21/95). One of the points the government emphasised in its explanation was that it had given an undertaking that Slovenia, which wishes to become a member of the European Union (it currently has the status of an associate member), would bring its legislation into line with EU legislation by 2001 at the latest, and that the question of changing the arrangements governing the purchase and sale of land was part of this undertaking. The National Assembly has yet to decide on this government proposal.

[45] Article 55 of the constitution states: "Persons shall be free to decide whether to bear children.
The state shall ensure that persons have every opportunity to exercise this freedom and shall create such conditions as enable parents to freely choose whether or not to bear children."

on its appointment and dismissal). At the very beginning of the constitutional debate it was generally agreed that the constitution should establish a parliamentary system along the lines of the first model. The constitutional arrangement is now one in which although the president of the republic is directly elected, he or she only has, for the most part, powers of a general representative and protocol nature,[46] which do not provide any real opportunity for a strong influence on policy-making. This is something that takes place primarily within the government and parliament, although in practice the president of the republic can, of course, have a significant impact on the political sphere by means of personal authority and through informal activities.

We can be fairly certain that the institution of president of the republic was, to a great extent, adapted to suit the then president of the presidency and incumbent president of the republic, Milan Kučan. For his highly successful reformist leadership of the League of Communists in the 80s, Kučan won enormous respect among the people of Slovenia, and so it was clear to all the parliamentary parties that his direct election under the new constitution was almost beyond question. At this time public opinion polls demonstrated indisputably that the Slovenes wished to elect their president directly, and so the parliamentary parties that opposed his election (and they had a majority in the assembly) sought to reduce his political influence by opting for relatively weak presidential powers. In a way this stance reflected the public attitude that prevailed then, and still does today, that the Slovenes do not want to have overly strong, charismatic leaders.

One of the peculiarities of the Slovene constitution is the provision contained in Article 112, stipulating that ministers of state are appointed and dismissed by the National Assembly (parliament) upon the proposal of the prime minister. This solution was not adopted until the final phase of the constitutional debate. It was adopted without great consideration and was not founded on expert arguments. This is another of those decisions which we can presume was adopted with one eye on the specific political situation at the time. The parliamentary parties, unsure of whether or not they would have a part to play in future government coalitions, probably saw in this a way in which to secure for themselves a direct say on the composition of the whole government. Yet the current arrangement is reminiscent of the previous "assembly system" in which, formally, the "executive council" was more or less subordinated in its implementation of the policies of the assembly, which itself was the formal summit of the system of unity of power (in fact the real summit of the system was of course the League of Communists and its Central Committee).

So far, the system under which ministers of state are appointed and dismissed by the National Assembly has not led to any serious problems in practice. During the past four years, i.e. the term of the first parliament, the prime minister has only on a few occasions been forced to enter into protracted negotiations with the coalition partners and other parties in parliament over the proposing of ministers. But were the composition of the parliament to be "less favourable", the appointment of a list of ministers (when the government is being formed following a general election) or the appointment and dismissal of an individual

[46] The relatively weak powers of the president of the republic are set out in Articles 102, 107, 108 and 111 of the constitution. For a detailed review of the constitutional position of the president of the republic, see Ribarič 1996.

minister could be rendered practically impossible, which would cause a government crisis.[47]

On the issue of the **structure of parliament**, the required consensus between advocates of a unicameral system and advocates of a bicameral system could not be achieved, and so in the last months of the constitutional debate the chairman of the Constitutional Commission, Dr Franc Bučar, managed to reach a compromise between the two sides with his proposal concerning the National Council. So under the constitution the parliament is bicameral, because it is composed of a National Assembly and a National Council; but the bicameral aspect is extremely limited. Some people even deny that the National Council, which is modelled in the constitution on the Bavarian Senate (there are, however, certain essential differences between the two), has the status of a house of parliament. What they fail to explain is quite which branch of power they would then categorise it under (see Cerar 1993; Kristan 1996).

The **National Assembly**, composed of 90 deputies elected by the citizens of Slovenia at direct and general elections, is a classic example of a representative and legislative body. The **National Council**, on the other hand, is a corporative body which has 40 members representing social, economic, trade and professional, and local interests, where the representatives of local interests form the majority with 22 members. Members of the National Council are elected through special voting procedures by representatives of employers, employees, farmers, small business persons, independent professionals, non-profit organisations (schools, universities, cultural and sporting organisations, professional health organisations, etc.) and local communities (see Lukšič 1993 and 1996).

The National Council has the following powers (Article 97 of the constitution):

1) it may propose the enactment of laws by the National Assembly;
2) it may transmit to the National Assembly its opinion as to all matters within the jurisdiction of the National Assembly (generally these opinions relate to bills going through the legislative process);
3) it may require the calling of a legislative referendum;
4) it may require that the National Assembly reconsider a law prior to its proclamation (suspensory veto) — under Article 91 of the constitution, in its reconsideration the National Assembly must achieve an absolute majority of votes in order to pass the law in question;
5) it may require that a parliamentary inquiry be commissioned into matters of public importance.

In the four years that the National Council has been in existence (its term is five years), it has had relatively little influence on legislation. It has exercised its suspensory veto in respect of 25 laws.[48] In five cases the laws were not passed upon reconsideration by the National Assembly, but all the other laws went through with no changes to the text (taking

[47] Under Article 17 of the Law on the Government (Official Gazette of the Republic of Slovenia, no 4/93), if the prime minister is unable within a specified period to appoint ministers to all ministerial positions, then the prime minister and all other ministers automatically cease to hold office.

[48] During this period the National Assembly has got through a huge workload: it has adopted 1,493 enactments, including 242 completely new laws and 131 laws to amend or supplement existing legislation.

no account whatsoever of the veto).[49] The National Council has made only one demand for the calling of a referendum (on a proposal for a new electoral system), which will be put to the electorate in December 1996. In political terms the National Council has played a minimal role so far, which is mainly a reflection of the constitutional definition which gives it no powers to adopt final decisions on anything at all. Its primary role is one of initiative and supervision, as a corrective to the activities of the National Assembly and an element in a system of checks and balances.

Another of the major problems that had to be confronted in the constitutional debate was the new concept of **local self-government**, which was to replace the former "communal" system of local self-government based on relatively large municipalities (or "communes" as they were called) that combined a self-management and a state role (see Strobl, Kristan, Ribičič 1986: pp. 283-298), and in which, as the system developed, the state functions of the commune became increasingly stronger at the expense of the self-management functions — in fact, the commune operated more or less as the first level of state administration (see Šmidovnik 1995: pp. 153-155). The new constitution establishes an entirely different concept of local self-government, which is founded on the municipalities as exclusively units of self-government and on the possibility of combining municipalities to form wider units of local self-government (such as regions). Local government is regulated in a separate chapter of the constitution (Articles 138-144).

In the Constitutional Commission there was a strong split between the advocates of regionalism and the centralists. The former (mainly members of the left-wing parties that had come out of the previous regime) argued that the constitution itself should divide Slovenia into several regions, which would enjoy a relatively high degree of autonomy. This was partly linked to their idea of a bicameral parliament in which the second house would represent local interests and would have significantly greater powers than today's National Council has (in certain matters it would have the same decision-making power as the National Assembly). The opponents of this idea (mainly members of the Demos parties) considered Slovenia to be too small for such regionalism; they called for a sharper division between national and local government, with a smaller role for the latter — they also advocated a unicameral parliament. In the end it was the second vision, the centralist concept, which prevailed, but the compromises that were struck when the constitutional articles came to be written are today revealed in the fact that some of the provisions are inadequately formulated and lacking in clarity.

The constitution defines the municipality as the basic self-governing community but permits the linking of two or more municipalities into a wider self-governing community. In practice, however, such linking is doubtful because as a rule the state does not finance even the municipalities[50] let alone the self-governing activities of wider local

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[49] These figures are taken from a report on the work of the National Assembly of the Republic of Slovenia in the period between 23 December 1992 and 16 October 1996.

[50] The state provides certain funds only to municipalities whose poor level of economic development means that they are unable to meet all the expenditures required of them in the performance of their duties and functions (Article 142 of the constitution). Obviously the state finances those duties and functions which it has vested in a municipality or wider self-governing community in accordance with the prior

communities, and so it is hard to see how there could be any interest in having several municipalities link together to form integral regions. Given that the reform of local government is still in progress,[51] it is impossible to provide a thorough assessment of the constitutional arrangement. Nevertheless, it is at least possible to agree with the assertion that Slovenia has a centralist system of political administration, not decentralization with local self-government (Šmidovnik 1995: p. 167).

3. The dynamics of the Slovene constitution

In a static, formal sense a constitution in European continental law generally means a set of normatively defined institutions laid down in legal form in a single act. The dynamic aspect of a constitution comes from the implementation of these institutions in legal and social practice. The constitutional dynamics, which demonstrate the real value of a given constitution, are thus reflected in the entire legal order and in social life in general. The writers of the constitution are "responsible" not merely for the institutions that they explicitly lay down in the constitution itself but also, at least indirectly, for those institutions that they have not specified and have consequently left to regulation at lower levels — here I mean only those institutions whose nature would, in general terms, make them suitable for regulation under constitutional law.

The Slovene constitution focuses on classic constitutional matters (*materia constitutionis*), which means that it primarily lays down the organisation of state authority and the position of the individual in relations with this authority; in other words, basic human rights. Additionally, it also lays down some of the basic issues concerning economic and social relations within the state. In this regard it differs significantly from the 1974 Slovene (Yugoslav) constitution, which was a "basic charter on self-management". This constitution not only regulated the foundations of the political system but it also set out numerous principles relating to specific policy in future social arrangements (in effect, it represented a vision of a socialist self-management political system). Furthermore, it also set out in detail the position and role of the working individual and citizen in narrow and broad "self-managing communities" — all this made the Yugoslav constitution the longest in the world. From this angle, the new Slovene constitution is a classic realist constitution containing only a few policy-related legal provisions.

Of course, certain parts of the new constitution can be criticised for containing provisions that could have been left to statutory regulation, such as the ordering and duration of arrest and the prohibition against double jeopardy (Articles 20 and 31). On the other hand, the constitution is somewhat incomplete in other parts; for instance, its provisions do not precisely regulate the electoral system, the organisation and work of the National Council, the powers of the National Assembly,

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consent of the municipality or community (article 140 of the constitution). On this issue of Slovene local government, see Šmidovnik 1995: pp. 145-261.

[51] Pursuant to the constitution and the Law on Local Self-Government (Official Gazette of the Republic of Slovenia, nos. 72/93, 57/94 and 14/95), which has already twice undergone major amendment, following the holding of preliminary consultative referendums at the local level around 150 municipalities have been established in Slovenia (at the referendums only 111 of the 340 proposed referendum areas of municipalities were accepted). This process has encountered numerous complications and the number of municipalities and their boundaries may well yet change significantly.

certain fundamental rights (e.g. freedom of association),[52] and the procedure for amending the constitution. Various political and other elites are today still unsatisfied with some of these constitutional solutions that, as explained earlier, were the result of compromises being made in the constitutional debate (such as the provisions on local government and on the National Council).

The writers of the constitution were guided throughout by the requirement that they keep the new Slovene constitution short and clear, that it be understandable. Upon reflection we can see that these properties cannot be fully compatible. It general it is fair to say that the new Slovene constitution is relatively short, but this means that it is often unclear or, as we said earlier, incomplete. However, this aspect is more of an asset than a shortcoming since it thus easier for it to develop in a dynamic way, providing, of course, that the dynamics of the constitution remain within the bounds of its basic principles.

The basic principles of the constitution are laid down in its general provisions. These cover primarily the principle of democracy (Article 1); the principles of the rule of law and a social state (Article 2); the principles of sovereignty of the people and the separation of powers (Article 3); the principle of territorial unity and indivisibility (Article 4); the principles of the protection of human rights and the rights of the Italian and Hungarian ethnic communities, and the principle that the Slovene state shall attend to the welfare of ethnic Slovenes throughout the world (Article 5); the principle of the separation of the Church and state and the principle that religious groups shall enjoy equal rights (Article 7); the principle of the supremacy of the generally-accepted principles of international law and ratified international agreements over laws and other legislative measures (Article 8), and the principle of the autonomy of local government (Article 9). These constitutional principles have a special significance, not least because the Constitutional Court often directly invokes them in its adjudication of the constitutionality and legality of legal acts and in its rulings on constitutional complaints. Hence the Constitutional Court deals with cases involving subject matter not explicitly regulated by the constitution on the basis of the theory (doctrine) on which these principles are founded. This is an extremely important dynamic aspect of the constitution whereby it acquires

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52 Despite the fact that freedom of association is one of the most important elements of the new (democratic) arrangements, the constitution does not lay down exhaustive provisions relating to the establishment of political parties. Article 42 merely states that 1: each person shall have the right to freely associate with others, 2: it shall be lawful to restrict these rights by statute in circumstances involving national security, public safety or the protection of the public against the spread of infectious disease, and 3: that permanent defence and police personnel may not be members of political parties. Aside from this aspect, the constitution only contains a prohibition against judges of the Constitutional Court, other judges and state prosecutors being members of any organ in a political party (Articles 133, 136 and 166), a result of the fact that during the constitutional debate political parties had already fully established themselves in Slovene political practice and that the experts and politicians were agreed on the assertion that freedom of association included this and other forms of political association. Applying a broad interpretation of the previous (socialist) statutory regulation of political association, political parties had been able to stand at the 1990 elections, and then again in 1992, but it was not until the end of September 1994 that they became the subject of specific statutory regulation in the Law on Political Parties (Official Gazette of the Republic of Slovenia, no. 62/94). The absence of such regulation for several years did no service to the process of democratisation. Indeed, this legal vacuum gave the political parties an excessively "free hand"; for example, their funding was not regulated in detail, which allowed them to accumulate funds unsupervised, both in Slovenia and from abroad, and use those funds without transparency.

substance through Constitutional Court precedent that is otherwise not directly evident.

If we look at how this applies to the principle of the rule of law, we see that the constitution explicitly lays down a number of principles and rules falling within this framework, such as the principles of constitutionality, legality, equality before the law, the presumption of innocence and the prohibition against retrospective legislation. Yet since the adoption of the new constitution the Constitutional Court has, in more than forty cases, partly based its rulings directly on the principle of the rule of law as such, and on principles derived from it that are not laid down explicitly in the constitution. Such doctrinal principles, which as an essential part of the practice of the Constitutional Court have now become elements in Slovenia's constitutional order, include primarily the principles of legal certainty, trust in the law, proportionality, the ban on arbitrariness and the principle of justice (see Cerar 1996: pp. 243-245).

The extent to which the constitutional order can be established in practice as envisaged in the constitution is largely dependent on the proper functioning of the courts. Figures show that in 1994 first-instance courts had a backlog of 248,979 cases. The following year it had risen to 290,481 and by the beginning of 1996 the backlog was up to 320,000 cases (see Cerar 1996: p. 246). Parties in judicial proceedings wait several years on average for their cases to be dealt with, which greatly diminishes confidence in the system of justice. Even the Constitutional Court is now facing a huge case backlog (of demands for reviews of constitutionality and legality as well as constitutional complaints), which can only worsen the situation.

Another problem is the fact that certain legal institutions are insufficiently implemented in practice (organised and serious crime is on the increase, supervision by the police and inspection services is ineffective, there have been various political and economic scandals, the socially-disadvantaged are increasing in number, etc.). And although to a large extent the intensity of these problems can be objectively attributed to the fact that Slovenia is a country in transition (but most of the problems are also present in the more established democracies too), people are fairly disappointed with the way things have developed and so their trust in state and other institutions is declining

Opinion polls show that Slovenia, compared with the countries of Western Europe, has a low, although rising, level of popular satisfaction with the current state of its democracy. It is interesting to note that among younger people and the well-educated we find a far more positive assessment of the workings of the Slovene democratic system than among older and poorly-educated people (for details, see Toš 1996: pp. 643-644). The following table shows the results of research on the level of trust expressed by Slovene citizens in various institutions between 1991 and 1996:[53]

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53 The figures are taken from the project Slovene Public Opinion 1991-1995 (extended to include data for 1996), covering a representative sample of 1,050 adults. The project was carried out by the Social Sciences Faculty of Ljubljana University (see Toš 1996: p. 652).

SLOVENES (completely or mostly) TRUST (%)						
INSTITUTION	1991	1992	1993	1994	1995	1996
Political parties	12	8	3	5	5	4
The National Assembly	37	20	15	15	10	11
The government	43	34	13	13	28	29
The president of the republic	68	59	45	45	36	40
The courts	35	31	25	26	26	24
The police	43	31	21	28	28	34
The army	54	60	42	49	29	33
Educational institutions	52	57	57	67	72	69
Unions	15	13	11	12	15	14
Church and clergy	29	20	17	19	21	22
The media	34	23	19	24	26	28
Large companies	17	16	14	26	29	29
Banks	12	21	28	35	40	44
The Slovene currency (tolar)	-	-	-	55	55	54

From these figures[54] the following conclusions can be drawn (Toš 1996: pp. 652-653):

a) The political institutions do not generally enjoy a great deal of trust among the population. Some of them (political parties, the National Assembly, the army, the courts and even the president of the republic) recorded a strongly negative trend. The lowest level of trust was expressed in political parties, the National Assembly and the unions.

b) Banks recorded a positive trend, as did large companies, as well as the family and relatives. First place is consistently occupied by family and relatives, followed by schools and other educational institutions, the Slovene currency (tolar), the Bank of Slovenia and banks in general. Therefore the three "subjects" that symbolise a person's informal, cultural and economic environment rank highly.

Despite the extremely negative opinion which citizens have of their political or state institutions, in this opinion poll as many as 88 per cent of the respondents rejected all idea of a return to the old socialist (communist) regime. With similar decisiveness, Slovenes also reject the idea of renouncing their parliamentary democracy, which demonstrates that in people's consciousness the parliamentary system is indeed establishing itself as the only possible, realistic and workable, although strongly criticised, system of (democratic) authority (Toš 1996: pp. 665-667). If we add to this the fact that Slovenia is among the most successful of the former communist countries of Europe in terms of its economic performance, and that basic human rights and freedoms and the rights of ethnic minorities (the indigenous Italian and Hungarian communities) are respected in this country, then we can conclude that Slovenia's democratic development is under no immediate threat. The new constitutional institutions are gradually becoming established in practice and in the consciousness of the citizen. Furthermore, in spite of the friction between the political parties, the political situation itself is

[54] And those contained in a parallel study on trust in family and relatives as well as schools; for detail see the table published in Toš 1996: p. 55.

entirely stable and gives rise for real hope of continuing positive development.

In general we can say that the Slovene constitution is, in the dynamic sense, being implemented for the most part in the spirit of its basic principles and specific provisions, while leaving sufficient space for the development of a so-called civil society; in other words, the non-state sphere of human activity and the various forms of association. At the same time, the constitution is now the most important element of stability in the Slovene legal and political system, which is why, as I mentioned earlier, the effect of significantly amending it (except for minor supplements or "corrections") could be more harmful than beneficial in the long run.

4. Conclusion

In the long term, the gradual and relatively slow process of adopting the new Slovene constitution has turned out to be most suitable, since it has led to a constitution which the citizens and the political elite as a whole acknowledge as the foundation of the system (although there is obviously not a general consensus with regard to certain specific constitutional solutions). Thus, over time, the constitution is becoming the most important element of political and legal continuity in Slovenia. In particular, this is made possible by the considerable (though not excessive) degree of abstraction and the incomplete nature of some of the constitutional provisions, which in relatively large measure transfer the focus of the constitution onto the subjects responsible for its implementation — primarily the parliament, the government, the courts and the Constitutional Court.

The dynamic shape of the constitution is therefore to a great extent dependent on the interpretation it is given by these subjects (in the final instance, by the Constitutional Court). And since, for the time being, the decisions adopted by these subjects generally remain within the framework of the basic constitutional provisions and, at the same time, respect the constitution's checks and balances, a modern democratic system is gradually taking shape in Slovenia in spite of the various problems and deviations that inevitably occur in practice. And in this process the constitution is becoming a guarantor of democracy for the people and their elites, while the elites and the people, for their part, are taking on the role of guarantor of the existence of the constitution — nothing new, perhaps, but a tremendous challenge for Slovenia.

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Istvan Szikinger

Democratic Consolidation in Eastern Europe - Institutional Engineering

The Hungarian Case

1. Do constitutions matter ?

A top manager of law enforcement complained recently that procedural and substantial (!) legal "background" of fight against crime did not satisfy needs of up to date policing and the strategy outlined by him (Kacziba,1996:48). Another expert of the Ministry of Interior called for revision of constitutional principles in order to promote prosecution of crime (Borai,1996). This is the usual approach to law and constitution, not only in the field of public security administration. Law is a "background", a servant of politics and government which continuously has to be adapted to actual needs of administration. Rule of men over law is still the practical interpretation of constitutionalism in Hungary. Constitutions do not matter in this country without real constitutional traditions. No constitution has ever played a determining role within the legal system.

It is difficult to decide whether a new constitution has been adopted here during the political transformation. Formally, of course, not. According to official citation, the constitution is still the Act No. XX. from the year 1949 (as amended). However, practically no single provision survived the numerous modifications except the one declaring that Budapest is the capital of the country. The amendment of 1989 (Act No. XXXI.) changed not only the overwhelming majority of positive rules of the basic law but also its spirit. The comprehensive reform turned the party state constitution enshrining unity of power and distributing basic rights based on political considerations into one structured along the principles of division of powers and superior value attributed to human rights as foundations of any activities of public power.

In short, Hungary has a formally old, substantially new constitution as a consequence of the total revision made by the outgoing communist Parliament which accepted all proposals of the Roundtable talks that had taken place before debates in the House. Nevertheless, the case is not as simple as described by the previous statement. On the one hand, there are, no doubt, residues of the past including, for example, the unchanged legal status of the Prosecution Service originally designed to serve specific purposes of communist political power. There are other examples showing that in spite of the renewal of constitutional wording some structures and mechanisms have been ossified and now it is really difficult to reform them. On the other hand, the form of the constitution certainly underwent not negligible changes. Complying with constitutional requirements today necessarily means beside respect for written provisions of the 1949 Act also following rulings of the Constitutional Court admittedly based not only on the actual text of the basic

law, but on interpretation of an "invisible constitution", that is, the general principles of constitutionalism as well. (Sólyom, 1990). Thus, actual meaning of the constitution includes now, in addition to the text itself, relevant jurisprudence of the Constitutional Court.

The 1989 amendment expressly confirmed temporary character of the constitution that resulted from a compromise between communists and forces of opposition. However, further constitutional development proved to be slow because of slight interest of and little support for parties forming governmental coalition during first term of free elected Parliament (Ludwikowski,1993;230-236). Following the 1994 elections, however, a governing coalition of socialists and the liberal free democrats has relied on a majority of parliamentary seats conveniently enough even to introduce any changes into the constitution. After having adopted some less important amendments, though, the two dominant parties waived their right to modify the basic law. This chivalrous move has been done in the hope that a brand new constitution could be elaborated supported or at least accepted by most of the parliamentary parties. Most interestingly, draft guidelines for the new constitution have been elaborated by delegates of all parties except one by April, 1996 but leadership of the socialists including some Cabinet Ministers, turned down, on the occasion of parliamentary voting, the text that had been previously approved by their representatives in the preparatory Commission. Now, the hope for adopting a new constitution for Hungary is fading again.

As it was mentioned at the beginning, constitutions do not matter in this country. Before 1949 no written constitution had existed here while during dictatorship of the proletariat law was seen as a tool of the ruling political forces to achieve their goals. It was not even the most important tool. At the time of modest liberalization of the economy - in the late 60-s - official declarations were pointing out that a shift was envisaged from legal means to economic ones within social planning and management. In other words, law has been perceived as one of the numerous means to be used in pursuing political ideals and interests. No wonder that the constitution, which by its essence could have limited freedom of political activities, has been pushed into the background and seen rather as a piece of communist symbolism than real law. By the end of 80-s, however, this attitude of the ruling elite slightly changed. Together with the growing awareness of necessary collapse of the totalitarian system survival strategies were elaborated by party leadership and experts committed to values of that system. One of them was the aim at preparing and adopting a new constitution with all characteristics of a democratic basic law built upon the principles of division of powers and respect for human rights. In the late 80-s intensive state sponsored research concluded to realization of necessity of a real, legally functioning constitution. This would have been strictly complied with because of the vital interests of the "Reform-Communists" in retaining as much power as possible. Establishment of a Constitutional Court proved to be even more important than adoption of the supreme law itself. The Court could have acted as a conservative force necessarily relying on provisions of the constitution of the day. This explains why the Act No. I. from the year 1989 created a Constitutional Court before planned adoption of the new constitution drafted by the Ministry of Justice. Naturally, the opposition also had to focus on constitutional issues, because these offered a way to legitimization of political changes. Thus, constitution became an important institution during transformation of the political system. However, it never reached the position of a determinant factor within political and legal systems. Prior to the changes, because it was clear that it did not reflect realities of power, and following them because the new governing forces did not want to handcuff themselves in reconstruction of political order.

Let us turn our attention to one of central motives of designing constitution. András Sajó asserts that fear is a determinant factor in codification on the highest level (Sajó,1995:17-24). Mihály Bihari adds that Hungarian political culture is filled with fears

beyond the level acceptable in a democracy which is, as opposed to dictatorship, not built upon collective fear (Bihari,1993:265-266).

My thesis is that in accordance with the described value attributed to constitution, guarantees have been required and introduced into the basic law in order to moderate fears. Opposition feared of persecution by the administration before the free elections while communists being aware of unavoidable loss of authority feared of retaliation by would be successors in power. Both fears proved to be well founded despite the basically peaceful and negotiated way of changing the system. However, the safeguards laid down could not really prevent undesired behavior of the other side. This is not to say that democratic principles would have been totally neglected by governing forces. Nevertheless, political guarantees still play a more important role in keeping the rules of the game than those rules by their own virtue.

The 1989 amendment required two-third majority for passing any law on basic rights and duties of the citizens. This was, no doubt, one of the most important guarantees introduced to prevent return to arbitrary exercise of power, based on the consideration that both communists and the opposition would have had significant influence in the Parliament convened following the free elections. One of the first decisions of the democratic legislature was, however, to repeal general rule prescribing qualified majority for all Acts on basic rights. Another safeguard of the amendment was strict separation of military from law enforcement. Accordingly, the first democratically formed Government put on the agenda reorganization of border guard, fulfilling simultaneously military and policing functions, into a pure law enforcement agency. As a concession to lobbies of the armed forces, however, instead of carrying out the reform, dual (military and policing) character of the border guard was confirmed by a constitutional amendment enacted in 1993. Even the Constitutional Court proved to be week against governmental efforts to use supreme law rather for satisfying political and bureaucratic needs than to perceive it as a determinant factor limiting possible scope of activities. In one of the early decisions of the Court (3/1990. (III.4.) AB hat.) it was ruled that exclusion of citizens staying abroad at the time of elections from voting was unconstitutional. The Government, in order to avoid difficulties deriving from extension of suffrage to citizens not in Hungary at the time of voting, introduced a Bill amending the constitution, and finally the discriminatory provision was expressly confirmed by the supreme law, thus overriding the Constitutional Court decision.

These examples underpin the statement that constitution in spite of the increased significance cannot play a major role in framing political behaviour. Consequently, it is not able to provide satisfactory guarantees against endeavours discarding provisions originally designed to prevent such efforts. At the same time, self-restricting approach can be observed even in cases where the constitution itself would give more space for lawful exploitation of possibilities to pursue political goals. The Socialist Party, a successor of the communist (Hungarian Socialist Workers') Party, won an absolute majority of seats in Parliament following the 1994 elections. However, partly because of the fear of return to old methods and mechanisms, socialists decided to form a coalition with free democrats who had been most consequent critics of totalitarian rule before change of the system. The coalition now has a qualified majority enough to modify the constitution but, as it was referred to, governmental parties voluntarily refrain from doing so in very substantial issues.

Summing up, constitution plays only a secondary role compared to pure political currents in Hungary. In other words, transition from Rule of Men to Rule of Law has not been completed yet.

It would be, of course, not realistic to expect revolutionary changes within political culture and behaviour. Once the Prime Minister of the first Hungarian Government formed following the free elections of 1990 was asked about reluctance of the administration to introduce radical changes into important fields of political life. He answered: *"If you would have been so kind to make a revolution ...."*. These words reveal much about the nature of Hungarian political transformation and the attitudes attached to it. Indeed, there was no revolution in this country, change of the guard took place in a totally peaceful manner. Impact of the constitution on developing political-legal culture of society and public power is hardly to under-estimate. Growing publicity around constitutional issues together with unavoidable addressing them during political debates certainly contributed to enhancement of legal awareness as precondition for moving toward Rule of Law. On the other hand, frequently experienced violations of spirit, sometimes even letters of the constitution have had an opposite effect.

Evolutionary character of constitutional development in Hungary explains that there were no substantially dissenting opinions on general trends for reforming state institutions. Apart from some debates on issues like method of election of the President of the Republic (referendum versus election by Parliament) no serious challenge has been directed against principal arrangements of the constitution. The highly publicized controversies around presidential elections emerged actually after having been decided that the Head of State should play a mainly representative role without real powers to interfere with important political decisions. Different positions of parties rested mainly on their day-to-day political interests rather than on far reaching varieties in their philosophies. One example is blocking constitutional preparations by leadership of the Socialist Party in June, 1996 based on the demand for inclusion social rights and declaration social commitment of the state in the supreme law. This might seem to be convincing as a Socialist Party has to show by nature interest in proper regulation of affairs influencing life of masses. However, the same Socialist Party had endorsed economic policies of its own government that was not only criticized by the opposition for being socially indifferent but also declared unconstitutional by the Constitutional Court which repealed numerous provisions of the legislative package curbing social rights.

Institutional chaos did not characterize state of affairs either prior to or following change of the political system. Nevertheless, serious problems emerged as the growing opposition challenged legitimacy of the communist leadership in the late 80-s. Actually, protest actions were typically built on exploiting contradictions between constitutional provisions and reality. One of the most successful methods was initiating revocation of deputies of Parliament. Referrals to absence of prohibition on founding political parties on the one hand while pointing out the constitutionally confirmed leading position of the Marxist-Leninist party on the other highlighted the increasing importance of the constitution. But even those highest peaks of pluralism and uncertainty in the field of political leadership did not render the constitution a firm set of rules for the game. New political parties were formed not because there was constitutional possibility to do that but because realities of life enforced the communist party to tolerate such movements. At the same time, some demonstrations were prohibited and prevented despite the constitutional freedom to organize them, and despite the fact that the police issuing prohibition orders did not have any such legal authorization. Finally, a political compromise returned again institutions to their constitutional functions. The bargain was reached at the roundtable talks between communists and the opposition.

Originally, the result of the roundtable talks should have been a "quick fix" of constitution containing those provisions absolutely necessary for managing the change of

system without causing insoluble problems. This would have been the only solution corresponding to the fact that no actors of the talks had clear mandate to engage in constitutionmaking. Reforming electoral law and constitutional foundations of them was, of course unavoidable. However, this is not the case with comprehensive re-codification of human rights and institutions that did not have a chance for commencing activities within a short period of time (e.g. Ombudsmen). The old Parliament did not have the necessary political legitimacy to enact a permanent constitution either. As Kálmán Kulcsár, Minister of Justice at the time of adopting the 1989 constitutional amendments himself confirmed, the task of the old Parliament was strictly limited to pass Acts necessary to ensure peaceful character of the transition. (Parliamentary Records, 1989:4901-4902) Actually, in the course of the negotiations, the "quick fix" turned into preparing an interim constitution. Now, there is a general agreement that even a formally new constitution has to heavily rely on the one being in force. In other words, "quick fix" grew into an interim constitution which covers all traditional constitutional issues. This, again, gradually became practically a permanent basic law because of the inability of political parties to adopt a new constitution. The process described corresponds to the general trend of our political development.

From a procedural point of view it is true that Hungarian constitution lacks of evidence on popular support. On the other hand, continuity can also be explained by emphasizing solid, basically unchallenged authority of the supreme law. There is a piece of truth in both statements. It is, naturally, possible that the founding fathers intuitively grasp the spirit of times and create a long lasting framework for future exercise of public power. As it was mentioned, comprehensive research had been conducted before the draft constitution of the Ministry of Justice was elaborated and this was used as a basis throughout the negotiations, even by the opposition. Another undeniable fact is that the constitution is result of an agreement among parties which still dominate within political power. This led to a situation where interpretation and necessary modifications could be done by using some political skills without enormous difficulties. The other side of the coin is that constitution was and remained an institution of the politics without any significant impact on relations between government and civil society. As István Kukorelli puts: *"The present-day constitution is the result of a bargain between the old and new humanistic professional elite, and it was sanctioned by the old Parliament. The fact that the subject of the constitution is narrowed down still causes damage to the credibility and social acceptance of the constitution"* (Constitutionalism in East Central Europe, 1994:74).

Now, preparations to adopt a brand new constitution are officially still on the agenda, though following the coup-like protest vote by the socialist leadership on June 27 rejecting draft guidelines of a new basic law proposed on grounds of a multy-party agreement including support by socialist preparatory committee members, real chances of success seem to be very weak. This is not a tragedy with regard to the commonly confessed philosophy of drafting that there is no emergency requiring a new constitution in Hungary as the transitional one satisfies democratic needs, while a new constitution could and should conserve determinant features of the present one together with enhancing formal and substantial bases of exercising public power.

Emphasizing positive achievements of the constitution in force does not exclude, of course, criticism concerning some provisions and arrangements of it and proposing some significant changes within institutions of public power. Many of the reasons, however, do not offer answers to problems emerged since adoption of the 1989 amendment. Most of these could be, namely, solved with the help of Constitutional Court rulings. Continuation of debates on constitution-making is in many respects not more than warming up the issues already addressed during Roundtable talks. This is, of course, not a problem in itself, new

experience and even better comparative knowledge can contribute to revise decisions made previously under considerable pressure of time and other factors.

One of the challenges to present solution is the proposal to reorganize the one-house Parliament into one with two chambers. Advocates of the internal division of powers within legislature point out deficiencies of the current representative system built exclusively on expressing territorial and party interests. Low quality of legislation also has been referred to as a problem to be solved or, at least, moderated by introducing upper house as a new check in law-making process (Kulcsár,1996; Samu, 1996). Historical and comparative arguments also seem to support the idea of having a second house in legislature (Sajó,1995:192-197).

Practically, narrow partisan interests dominate parliamentary debates in Hungary excluding any chance for outsider actors to have a significant impact on decisionmaking. National and ethnic minorities cannot delegate deputies to Parliament in spite of a resolute stipulation of the 1993 Act (No. LXXVII) on Rights of National and Ethnic Minorities expressly prescribing such representation. No procedural and organizational arrangements have been made by Parliament to turn the said provision into reality. Attila Ágh describes the underlying contradiction of decisionmaking by political parties in Eastern and Central Europe. His findings apply fully to situation in Hungarian legislature: *"... the weaker the parties are socially, the more they try to prevent the other social and political actors form entering the decision-making process. But the more the other actors are missing, the more the parties themselves are weakened, since it is only the organized meso-system (interest groups) and micro-system (civil society association) that give them a solid social background".* Ágh perceives "overparticization" and "overparlamentarization", that is, expropriation of almost all decisionmaking powers by parties in Parliament as transitory features of early democratic institutionalization process (Ágh,1996:247). The draft guidelines of a new constitution (1996), however, provided for further concentration on party-based decisionmaking without establishing appropriate legal channels for non-parliamentary organizations to reach and influence legislature. This means, initial difficulties of institutional development could not be overridden in the course of constitutional development.

Taking into consideration all the points mentioned, the author assumes that current arrangement of representation does not satisfy justified needs of society and its different strata and groups. Political parties proved to be unable to integrate, even to convey and express legitimate interests of non-partisan organizations, movements and groups. Bad quality of legislation is also a fact beyond doubt. This means, establishment of a second chamber cannot be rejected just because of possible confusion of grounds for representation. However, even creating a senate may complicate the situation by including certain interests while excluding others. The problem of definition of interests, consequently groups worth representation seems to threaten with new conflicts and further tensions. A designed distribution of seats can turn out to be too rigid in light of rapidly changing interest structures within society. Therefore, less formalized, less "parlamentarized" channels of curbing exclusive parliamentary party power appear to be more promising. Combining extra- and interparliamentary instances of decisionmaking is not an insoluble problem. Enhancement of quality of legislation also can be attempted by introducing a preliminary control into the process. This, however should be separated from Constitutional Court competencies because involvement in pre-enactment procedures necessarily weakens control over law in force. Existing, though limited, preliminary control powers of the Court should be passed over a body to be created. In order to avoid extreme slow-down and complication of law-making, the new instance must not be given decisive powers. The institution of Ombudsman already proved that professional authority and reliance on publicity could substitute formal authority.

Another field of controversies is the problem of constitutional regulation of positive rights. This, and some other issues, will be addressed later.

Let us turn now to the issue, which is most decisive for all other questions of constitution-making. This is the legal and political authority, the binding force of the supreme law. If the constitution remains a tool for politics, any constitutional choice will continue to be of secondary importance. The most important constitutional provision to be modified is the one defining conditions and procedure of changing the content of the basic law. At present, § 24, paragraph (3) of the constitution requires two thirds of all deputies to vote for a valid modification. Of course, stabilizing the constitution and providing for its really superior authority is not a matter only or mainly for constitution-writing. Too rigid constitutional provisions can be circumvented by interpretative and other methods. In other words, the section on procedure and amending does not have a value in itself but only as a reflection of an attitude respecting constitution as a determinant legal source.

However, no signs point to upgrading constitution within the political and legal setting. The 1995 working paper of the Ministry of Justice, which preceded elaboration of the draft guidelines for a new constitution proposed three optional versions to prevent shaping the constitution at pleasure of parliamentary parties. From invoking more than one parliamentary terms to referenda different methods of consolidating the basic law had been offered. The draft made by the parliamentary preparatory commission restricted itself to referring to stricter conditions for introducing changes into constitution without going into details of the future provision on the subject. It is not difficult to conclude that at most required majority is going to be increased. A referendum has to confirm an adopted new constitution even according to current law. This would remain but without extending the right of the people to approve partial amendments. The 1989 amendment has not been confirmed by the people's votes because "only" more than 90% of the text changed.

Despite the generally negative evaluation of state of constitutionalism in Hungary, the very existence of the constitution and its particular wording contributed to democratic consolidation. The document has not reached the level of importance it should have reached. This is, though not a problem of the constitution, but rather one for its political environment. At the same time it is clear that some stipulations of the 1989 amendment promoting development of Rule of Law could not be simply discarded. Without provisions on Ombudsmen introduced by that amendment it is hardly to imagine that governments would have created the office. Reluctance in passing the appropriate law and almost insoluble problems of selection delayed implementation of the relevant norms revealing resistance on the side of Government.

It is enormously difficult to point to an optimal constitutional solution for any country. There are two major factors in determining success of a given option. One is the success of grasping the right socio-political tendencies as bases for construction. There are positive and negative examples both from revolutionary and evolutionary constitution-making. Evaluation of this result can only be made retrospective. According to the experience accumulated in Hungary since 1989, main features of the comprehensive amendment satisfy the needs of constitutionalism in general while not colliding with any perceivable national interest. The other factor is state of political and legal culture. In this field we met considerable difficulties. Preparations to adopt a brand new constitution could have greatly contributed to improve the situation by requiring active participation of civil society in discussing main problems of codification. However, the political leadership made

clear that constitutional decisions would remain within the exclusive terrain of parliamentary bargaining.

The classical concept of division of powers among legislature, executive and judiciary is important in designing principally new system of public power. It is important but not enough. Discretion on the level of political government cannot be rationally excluded. Here, respect for division of powers is vitally important to approach and solve problems beyond positive regulation. At the same time, development of the principle requires establishing a system of exercising public power on all levels that is limited and controllable based on legal norms, and that ends up in a justice-like implementation of law. According to the most outstanding Hungarian expert of the subject, up to date principle of division of powers should embrace both aspects (Sári,1995:137).

2. The tension between the division of power and constitutional rights

The 1989 amendment re-wrote structure and particular provisions on human rights. Individual and political freedoms have been given most of the attention and careful safeguarding. This is a very natural consequence of the nature and method of the political-constitutional change and the philosophy behind. Economic, social, and cultural rights have been pushed into the background but retained by the newly edited text. Former rather detailed circumscription of guarantees for this group of rights disappeared, and have been replaced mainly by simple declarations of rights to work, to equal and due compensation for work and to other goods and values. Some rights, like the one to social security, have been accompanied by referrals to state activities and institutions ensuring enjoyment of them without detailed specification of the duties of public power.

Undeniable differences between these positive rights and individual or political freedoms have led many researchers and experts to the conclusion that despite the actual wording of the constitution, economic, social, and cultural rights were better to be understood as tasks of the state without corresponding enforceable subjective claims of the citizens. As a result, constitutional rights would vary depending on level and methods of enforceability (Osiatynski,1994:140).

On the other hand, there are numerous advocates of attributing principally equal legal force to all constitutional provisions. Within this perspective one logical option is to exclude economic, social, and cultural rights from constitutions in order to avoid the threat of rendering basic law a mere worthless piece of paper as the said rights cannot be enforced properly by courts (Sunstein, 1993:36). An alternative to exclusion can be developing legal character of the institutions established to promote real enjoyment of the rights concerned.

Without identifying classical freedoms with economic, social, and cultural rights, it has to be pointed out that considerable convergence in the field of actual enforcement is to be observed. Richard Posner rightly points out that safeguarding negative liberties similarly to positive rights (liberties) requires much energy, organization, and expenses to be provided by public power (Posner, 1995). There are further close relations between positive and negative rights. Privacy of home is, among others, a traditional freedom enshrined in Hungarian constitution. Of course, homeless people hardly enjoy that freedom. State interference is also required to determine construction standards to prevent undesirable intrusion into home privacy. In addition to dependence of realities of freedom on material preconditions, there are very close relations between positive and negative rights on legal level, too. The Hungarian

Constitutional Court ruled that the state had to organize structure, control and curricula of its own schools so that freedom of religion be respected by conveying relevant information in an objective, critical, and pluralistic manner (4/1993. (II.12.) AB hat.). Many other examples give evidence that traditional freedoms have positive aspects, while economic, social, and cultural rights, require among others, respect for freedom and human dignity from the state in the course of maintaining institutions to promote use of positive rights.

Again, the arguments developed do not prove principal identity of negative and positive rights. But they do prove that there are significant legal elements in the system of guarantees for positive rights while classical freedoms also require material safeguards. In other words, there is sufficient legal content in positive rights justifying their inclusion in constitutions (Szikinger,1996:122-124). Naturally, wording of particular provisions has to be moderate in order to avoid unfounded expectations.

Sunstein refers to the provision of Hungarian constitution stipulating the right to an income conforming with the quantity and quality of work performed (Sunstein,1993:35). Of course, this standard can rightly be perceived as a residue of vague communist political and constitutional slogans. This can and should be a ground for omitting it in future constitutions. Here, however, the issue is legal enforceability. The Constitutional Court passed several rulings addressing the problem. Decisions are usually relying on the connected constitutional provision requiring equal pay for equal work. However, there are cases where even independent examination of due payment can be put on the agenda. Now, for example, an initiative is going to be filed to the Constitutional Court against certain provisions of the 1996 Service Relations of Members of Armed Organs Act. The Act itself determines a salary system for military and law enforcement officers. It is not a scheme promising certain amounts of money but one built upon a basic salary unit to be defined yearly considering economic conditions. The Service Relations Act has been in force since September 1, 1996 with all the heavy duties imposed on professional soldiers and law enforcement personnel. However, legislature decided to introduce the new, naturally more advantageous, salary system only in 1999. As a result, officers will not receive compensation for their work for more than two years. This is clearly a case of violation of the constitutional provision on due payment, whereby a purely legal analysis can lead to a decision.

Apparently, there are less difficulties with constitutional provisions covering individual freedoms and political rights. No serious objection to inclusion of these rights in the constitution has emerged in the course of transforming legal foundations for public power. As Hungary has no traditions of a complex constitution structured into separate Acts, it has been quite natural that classical rights and freedoms have formed an integral part of the basic law. Indeed, one of the reasons for adopting a new constitution is that by only amending the old one it was not possible to change its internal structure regulating human rights following sections on state organization. This is a reflection of the socialist-positivist perspective perceiving rights as benefits deriving from discretionary use of power by the state and political actors behind. It would be important to express reverse relationship among others, by putting the chapter on basic rights to the initial part of the constitution preceding description of public power institutions.

Section 70/K of the constitution stipulates that all public authority decisions violating basic rights or touching upon compliance with duties may be challenged before courts. This applies to classical freedoms and political rights as well as to economic, social, and cultural rights. However, there are substantial problems in the field of interpretation and implementation of the constitutional provision referred to. In other words, important cases

remain outside the scope of judicial review because legislature failed to pass appropriate procedural and competence regulations.

One possibility is reporting criminal offenses resulting in violation of basic rights. Nevertheless, this is not an adequate remedy for the individual because public prosecution dominates most of the criminal cases pursuing first of all, goals of the state. As certain state interests may collide with other ones worth respecting, prosecutors often do not insist on investigating cases of alleged infractions by police officers probably because the common interest in detecting criminal activities of ordinary people. Prevalence of direct state interests in criminal procedure can also be illustrated by section 67, paragraph 1 of the 1994 (No. XXIV.) Police Act that introduced a particular "plea bargaining" arrangement derogating basic principles of presumption of innocence, right to appeal etc. The text is as follows: *"With the approval of the prosecutor, in order to obtain information, the Police, promising the refusal or termination of the investigation, may enter into an agreement with the perpetrator of a criminal offense, if the interest of the enforcement of criminal law to be served by the agreement is higher than the interest attached to the criminal prosecution of the case by the state".* Summing up, criminal procedure does not offer satisfactory remedy for victims of human rights violations. Obviously, this is not even the primary function of criminal justice.

Civil litigation seems to be more appropriate to seek legal protection and compensation in cases concerning basic rights. Indeed, as a rule, anyone can sue for even for non-pecuniary damages before civil courts if his personality or property rights had been violated. However, according to section 349 of the Civil code, liability for damage caused in the sphere of state administration shall be established only if the damage could not be prevented by ordinary legal remedies or the damaged person has exhausted ordinary legal remedies appropriate for preventing the damages. This limitation together with the rather vague wording of many pieces of legislation providing for substantial legal basis of public authorities does not really encourage too many people to choose civil litigation as a way of seeking justice. In addition, civil cases usually prove to be very lengthy, and non-pecuniary damages adjudged rather moderate.

Following a decision of the Constitutional Court (32/1990. (XII.12.) AB hat.), an amendment to Administrative Procedure Act (Act No. IV. from the year 1957 as amended) opened the way for judicial remedy of administrative acts by a general clause. Ordinary courts remained the institutions of the review. The Constitutional Court ruled that until particular legislation on review of administrative decisions the constitution had to be implemented directly. However, the Court used the term "resolution" referring to the acts open to challenge instead of "decision" of the relevant constitutional text. This distinction is important because measures as opposed to formal decisions (resolutions) do not fall into the category of acts open to judicial review by virtue of narrowing down the original scope of constitutional protection. At the same time, a great number of measures have an impact on the very elementary human rights including that to life and human dignity. Police, for example, do not issue any formal document on deprivation of liberty for public security purposes. As a consequence, these and many other interventions into rights of paramount importance may not trigger any significant act of revision apart from the complaints procedure leaving the whole case within the police organization.

The Constitutional Court itself has the power to deal with constitutional complaints on alleged violations of constitutional rights (section 48 of the 1989 Act (No.XXXII.) on the Constitutional Court,). However, decision to be reached has to focus on constitutional conformity of the rules applied instead of the behaviour challenged. Thus, this remedy has a

secondary importance taking into consideration that posterior constitutional examination of legal norms can be initiated by anybody without satisfying specific requirements (e.g. exhaustion of all other remedies) attached to constitutional complaint against individual violations of rights.

Leading principle of basic rights' protection in Hungarian constitution is the provision of section 8, paragraph (2) reflecting and practically repeating the words of the German "Grundgesetz" by stating that in the Republic of Hungary Acts of Parliament regulate fundamental rights and obligations, but even they must not impose any limitations on the essential contents of fundamental rights. Our Constitutional Court invoked this principal standard when abolishing death penalty.

Referring to section 54, paragraph (1) of the constitution, the Court ruled that the death penalty was not compatible with a legal system based on the outstanding importance of human life and dignity. The Court reasoned in its decision on abolishment of capital punishment: *"Legal norms on deprivation of life and human dignity by death penalty do not only restrict essential contents of fundamental rights to life and human dignity but they permit total and irreparable destroying life and human dignity, respective the right guaranteeing them. Therefore unconstitutionality of the said regulations is declared by the Court and they are repealed"* (23/1990. (X.31.) AB hat.). It was underlined in the reasoning that human life and dignity were inseparable, representing values prior to all other ones. They form together an integral, unrestrictable basic right which is source and precondition of numerous further basic rights.

One could expect far-reaching consequences for the complete legal system by extension of the ratio decidendi to other pieces of legislation on activities of state organs involving possible use of lethal violence. Although the Court did not go into comprehensive analyses of the issue as it relates to problems outside the scope of death penalty, it is clear that any "official killing" is contrary to the constitutional right to life and human dignity. By declaring unconstitutionality of death penalty because the obvious loss of the essential content of the right to life in case of killing by the representatives of the state, the Court inevitably implied that all actions with similar possible result were to be refrained from in the course of exercising public power within the framework of the constitution.

As an example of legislative disregarding essence of Constitutional Court rulings, Article 54 of the 1994 Police Act can be mentioned which empowers law enforcement officers to use firearms in order to prevent escape of people being under arrest for criminal offense or in any detention ordered by a judicial decision save the person be juvenile. Similarly, police have the right to resort to use of gun to apprehend, or to prevent the escape of, a perpetrator who killed someone intentionally. Needless to say that the danger of exercising these powers as a substitute to death penalty is not negligible. Thus, a clear contradiction emerged with the previously described perspective on superior importance of human life and dignity. There is no legal way to execute people after having investigated thoroughly the case within criminal procedure guaranteeing due process safeguards of suspects' rights while a person can be killed by a police bullet without any deeper examination of the facts. It is also evident that the essential content of the right to life does not depend on the particular nature of the action of state organs resulting in death of an individual.

Without questioning the value of such an approach it has to be realized that rights cannot be divided into an untouchable nucleus and a non-essential part. The Hungarian Constitutional Court, in order to avoid trap of delineating rigid borderline between essential

and non-essential content of rights, similarly to the German counterpart, developed a doctrine relying not so on literal interpretation of the section cited as on a complex, comparative perspective. According to these standards of the Court, restrictions on basic rights will be regarded as constitutional only if they prove to be absolutely necessary in order to protect some other basic right or constitutional value, and only in a manner that is strictly appropriate and proportionate to the objective to be pursued by the restriction (see e.g. 11/1992. (III.5.) AB. hat.).

Based on the measure described, the Court addressed not only problems of individual freedoms and political rights but also those of economic, social and cultural rights. Constitutional rights have been invoked during parliamentary debates on the budget but they do not play a central role in the discussions. The same applies to the whole system of proceedings within the system of divided powers. It is the Constitutional Court that most consequently points out possible or real impact of institutional arrangements on human rights.

3. Freedom of the framers

Constitution-making is an exclusive power of Parliament in Hungary. Two thirds of all MP-s can introduce any change into the system of provisions determining scope, limits, and structure of exercise of public power. The only restriction on this competence has been imposed by the 1989 Act (No.XVII.) on Referendum and People's Initiative. Section 7. of the Act requires confirmation of a new constitution by referendum. Of course, even this rule can be repealed any time by constitutional regulation. Thus, there is no legal border of parliamentary constitution-making power. If "only" 90 per cent of the supreme law is being altered, as by the 1989 amendment, there will be no need even to make the really not too decent step to repeal the provision on obligatory referendum. The Constitutional Court reinforced the perspective on absolute supremacy of Parliament in several decisions. One of them forbade implicit modification of the basic law by referendum although such a negative condition has not been listed in the otherwise exhaustive and categorical regulation of the 1989 Referendum Act (2/1993.(I.22.) AB hat.).

This is not to say that Hungarian legislation be free in all aspects of its activities. There are limitations outlining the actual scope of law-making liberty. These are political constraints surrounding legislature. It had been no question about determinant role of the ruling Hungarian Socialist Workers' Party during communism. Deputies voting on 1989 constitutional amendment were elected in 1985, that is, long before perceivable political changes. Ironically, by the end of 80-s, Parliament gradually became a real center for discussing and regulating affairs important for the whole society. The party simply ceased to exercise its powers while a small number of oppositional deputies were elected typically as substitutes to others revoked by their constituencies following the initiative of nascent democratic parties and movements. This Parliament discussed the draft constitutional guidelines elaborated by the Ministry of Justice (1988-89). Socialist values would have been conserved by the paper but it was based of respect for rights and division of powers. Before commencing debates on particular provisions of the draft constitution, however, the Government revoked the proposal together with some accompanying legislative drafts concerning important political institutions, like parties. The move of the Government satisfied the demands of the National Roundtable which had been established by the agreement among the Oppositional Roundtable, the Hungarian Socialist Workers' Party, and

the so called "Third Side" made up from organizations and movements qualified by the opposition as HSWP satellites [1].

Signature of the agreement on beginning of the National Roundtable Talks on 10 June, 1989 was preceded by the formation of the Oppositional Roundtable [2]. Naturally, organizations and movements protesting and fighting against totalitarian system of government were themselves divided as to the perspective on Hungary's post-communist development. However, a compromise could be reached and a strong, temporarily united opposition displayed a very resolute course aiming at removal of all residues of the past regime.

It has to be emphasized that the National Roundtable was not designed as a Constitutional Assembly. The demand for terminating preparations to adopt a constitution aimed at prevention of a *fait accompli* situation for winners of the free elections. However, it was generally accepted that the future, undoubtedly democratic and legitimate Parliament had to be given the authority to adopt the new constitution of the country. On the other hand, it was also very clear that without certain modifications of the then current text democratic transformation hardly could take place. A new electoral system and depoliticization of some constitutional institutions proved to be unavoidable in the course of creating a framework for the transition itself. Thus, it was quite natural that one of the issues to be addressed by the talks ought to be modification of the constitution in order to remove obstacles to preparing a new system of government (Sajó,1996a).

National Roundtable talks were organized on three levels. Plenary sessions with highest ranking representatives of the parties were to determine general direction for the negotiations and to sanction agreements reached. Intermediate discussions had to deal with substantial problems and prepare decisions of the plenum. Six expert committees had the task to negotiate various problems of the transition. Only one of them was formed to conduct debates on necessary amendments to the constitution. Others had various problems deriving from the provisional situation on the agenda, such as urgent modification of the Criminal Code, the electoral law, etc.

The initial agreement on preventing Parliament to engage in constitution-making and legislation on politically crucial issues, gradually developed into a mutually accepted situation, whereby safeguards to be elaborated were not restricted to the period preceding free elections but for a longer time. Thus, discussions concerning constitutional amendments began to prevail over all other problems of the talks. Roundtable negotiations turned into a quasi-constitutional-assembly. There were, in the author's opinion and according to his experience [3], two main reasons for that. One is a technical cause, namely the very natural interdependence among different provisions of the basic law. In other words, it proved to be extraordinarily difficult to change selected elements of the complex whole of the constitution without causing further difficulties concerning others. As a consequence, many rules of the constitution had to be revised because changing related stipulations. The second, and more important reason was temptation offered by the occasion. Nobody knew, of course, the outcome of the forthcoming elections. As opposed to the uncertain position to be taken following the voters' decision there was a solid and accepted, even by Parliament, ground to shape constitutional structure of the country. No party to the National Roundtable resisted the temptation, the talks turned into a constitution-making and legislative forum.

The irony of the development described is obvious through legitimacy claims and realities. Opposition prevented Parliamentary debates and adoption of constitutional legislation referring to lack of political legitimacy. The same objections applied, of course, to

the HSWP and "Third Side" organizations. On the other hand, there was no proof at all for people's support behind oppositional forces either. In the progress of the talks, however, non-elected representatives of organizations and movements without any evidence of legitimacy occupied constitution-making positions. By doing so, they inevitably raised counterparts into the same place. Thus, a situation emerged whereby Parliament with at least formal, but actually growing political legitimacy had to step back in order to give space to forces having neither formal no proven political authorization from the people to engage in constitution-making. Finally, Parliament accepted the agreement reached at the Roundtable talks and sanctioned the proposed amendment without substantial changes as to their essence. On October 23, 1989, Hungarian Republic replaced the former People's Republic and the constitutional amendment has been promulgated. No referendum confirmed the decisions as "only" about 90 per cent of the original text changed, that is, no new constitution was adopted.

Nevertheless, a referendum took place shortly after introducing the new constitutional arrangements. By the end of the Roundtable talks, namely, the original unity of the opposition dissolved and internal tensions became evident. On September 18, an agreement was signed by the participants concerning major legislative issues of the transition including proposals to a comprehensive constitutional amendment. This document served as a basis for the parliamentary decision. However, certain oppositional parties including free democrats refused signing the agreement and made their dissenting opinion public.

None of the points set by dissenters on the agenda of a referendum after having collected the required number of supporting signatures represented a really deep problem of political philosophy. Among the four questions the most important related to the method of electing a President of the Republic who, according to the constitution in force, would have only representative functions.[4] The referendum brought a slight victory for the initiators. However, the still communist-dominated old Parliament responded by modification of the constitution and thereby repealing the result of the referendum. The Act No.XVI. from the year 1990 restored election of the President by direct voting of the citizens. Needless to say, the new, democratically elected Parliament changed the rules again and introduced election of the President by Parliament (Act No XL form the year 1990). No actual presidential elections took place during the zigzag legislative course, the first President was elected by Parliament on August 3, 1990 according to the final version.

Despite the original plans and the clear statement of the preamble of the constitution in force declaring its transitorial character, no serious attempts were made to prepare a new basic law for the country during the first term (1990-1994) of democratically elected Parliament. Reasons for the reluctance were mainly political (Ludwikowski,1993). The situation radically changed as a result of the 1994 elections. Socialists won an absolute majority but decided to create a coalition with the liberal free democrats. The two governing parties have together a qualified majority convenient to introduce any constitutional change. Their program set constitution-making on the agenda. However, for political reasons, after having adopted some less important modifications, they decided to waive that exclusive right and to establish a broader basis for constitutional preparations. A moratorium on constitutional changes have been declared and a parliamentary Commission formed with equal number of representatives from each faction. Five parties (out of six) and two thirds of delegates to the 25-member Commission [5] have to agree upon a change to be introduced into the draft. If there is no agreement on a particular issue, provisions of the current constitution will remain. Of course, all proposed provisions have to be approved by plenum of the Parliament according to the general rule (two-third majority).

By April 1995 an agreement has been reached by the Commission on the guidelines for a new constitution. The document was published and 45 days stood at the disposal of the public to make comments and raise questions. About 1000 remarks and proposals arrived to the Commission including those of experts and organizations who were directly requested to communicate their opinion. The preparatory Commission adopted several changes to the draft while modification moves also arrived from deputies according to the Standing Order of the House. On June 27, 1996 the plenary session voted on the draft guidelines. 257 affirmative votes would have been necessary to adopt the draft as a basis for future work. Before final voting on the draft as a whole, modification moves had to be decided upon including the comprehensive one of the Commission. To a great surprise of many, even from the Socialist Party, some socialist Ministers and leaders of the party abstained which practically equaled to rejecting the draft that had been accepted by delegates of the party to the Commission. Only 252 votes supported the coordinated proposal and that led to a practical stranding of the whole process. Final voting on the whole draft has been postponed and continuation of preparations requested but actually all achievements reached by June, 1996 have been blown up as a consequence of behaviour of some members of socialist leadership. [6]

It has been a step toward real democracy that the governing parties decided not to use and politically misuse their qualified majority for adopting a new constitution at their pleasure. At the same time, exclusion of all factors but the parliamentary parties from constitution-making reveals an effort to consolidate monopoly of party-dominated Parliament over decisions of paramount importance for the nation while rejecting further monopolies within that system. The 45 days given to the public for learning, evaluating the draft elaborated in camera, and for submitting remarks and proposals, recalled the times of "nationwide discussions" of drafts during totalitarian regime. All materials that arrived have been weighed by the mechanism described, that is, absorbed by party-interest-based evaluation. No wonder that the drafters refused any widening of basis for legislation. Not only proposals for a second house with representation of interests outside the scope of party politics but even those aiming at inclusion of some non-parliamentary coordination in preparing important decisions have been turned down by the Commission. On the contrary, further concentration of powers to Parliament by decreasing influence of referenda and other forms of direct democracy on legislature has been proposed. It is a problem of secondary importance that even the agreement among parliamentary parties themselves proved to be too fragile to succeed.

The developments described confirm the conclusion prevailing among constitutional lawyers in Hungary that constitution-making remained the monopoly of a small elite group excluding any significant impact by outsiders and even due consideration of scholarly arguments (Kukorelli,1995:38-44; Somogyvári,1996:35-37; Lövétei,1996:75).

The institutional framework of preparations explain that no ideological watershed exists among various claims and proposals of the parties participating in the process of constitution-making. This statement relates to the 1989 Roundtable talks and subsequent amendments as well as to the recent endeavour. The 1988 draft guidelines elaborated by the communist Ministry of Justice based on research into constitutional options already contained all the features of a parliamentary republic that have not been challenged seriously in the course of further debates on constitutional legislation. All claims expressed by different parties can, naturally, be classified according to various political philosophies but strategies do not reveal deep rooting contradictions among the perspectives of parties participating in the process. They rather reflect adaptation of principles to actual political positions.

4. Institutional designs at work

Debates of the 1989 Roundtable talks did not focus only on formal institutions of public power. It has to be recalled that communist establishment had been based not on exercising power by state institutions but on making decisions by party entities and using state and law as tools of the ruling forces. Therefore, defining strict border line between broad political and state institutions was an issue of paramount importance during negotiations. It has to be stressed that representatives of the Hungarian Socialist Workers' Party recognized and accepted the necessity of separating party politics from direct public power but they wanted to save as much influence as possible. HSWP was still the most organized political force of the country at the time of the talks despite the obvious decline. The opposition focused attack on the structural strength of communists, namely the existence of workplace organizations. Another issue was demolishing economic dominance of HSWP among political entities of the transformation. In short, the opposition aimed at creating equal legal conditions for parties without conserving actual opportunities of the declining communist party to make use of sources accumulated under totalitarian system. A compromise was concluded at the Roundtable basically satisfying the needs of the HSWP delegation. However, the free democrats and their supporters put the issues on the agenda of the referendum held on November 16, 1989. As a result, further restrictions and obligations were imposed on successors of the totalitarian state party.

The constitution as amended in 1989 provided in section 3, paragraph (3): *"Parties shall not directly exercise public power and, accordingly, no party shall direct any state organ. With a view to separation of parties from public power, positions and public offices incompatible with party membership shall be specified by law".* The 1989 Act No. XXXIII. on Functioning and Finances of Political Parties introduced further guarantees in order to prevent return to the past in confusing party political power with authorization of state organs.

One of the sharpest debates of transformation related to reorganization of local administration. As in other fields, a general agreement had been reached without a serious challenge on the necessity of blowing up the inherited Soviet-type system of councils actually serving the interests of the party center. There was consensus concerning the need to create local self-governments not subordinated in any way to central entities of the state but fulfilling among others tasks determined by legislation. Actual reorganization had to be designed by the Parliament convened after the 1990 free election. The conservative governing coalition of the first democratic parliamentary term, naturally, made efforts to save as much control for the central state as possible not objecting, at the same time, introduction of a significant decentralization. Liberal parties fought for almost unlimited freedom of local governments with powers given mainly to municipal organs. Finally, a strong system of local self-governments emerged displaying a resolute counterbalance to central administration due partly to the fact that liberal parties gained majority in the elected local bodies as opposed to the situation within Parliament.

Local governments got wide powers and independence in the field of economic activities. They were entitled to levy taxes according to Acts of Parliament, and to engage in any business not endangering their actual mission. Section 77 of the 1990 Act (No.LXV) on Local Governments declared:
"(1) The local government offers public services. It disposes of its own property, and manages its budgetary revenues and expenses independently.

(2) The budget of the local governments is part of the public finances; it is connected thereto with the whole of its cash flow. The local government's budget is distinct from the state budget, but is linked to it with state subsidies and other budgetary ties.
(2) The local government provides the means of fulfilling its duties from its own revenues, from central taxes assigned, from revenues taken over from other economic organizations, from the normative/trendsetting contributions of the central budget, as well as from subsidies".

Since the adoption of the 1990 Act on Local Self-Governments a gradual but very resolute re-centralization process is to be observed. Many powers stipulated by the original Act have not really granted to local bodies while state control has been continuously reinforced. One example for that is responsibility for public security. The 1990 Act declared that municipal authorities had to provide for local public security. However, no efforts have been made to create legal framework of local policing. The 1994 Police Act (No. XXXIV) confirmed that local authorities did not have the competence to maintain law enforcement agencies. The only powers of self-governments given by the Police Act include giving opinion concerning establishment, reorganization or abolishment of police units in their territory, hearing the chief of police about the situation of public security. Inquiries into activities can also be initiated by local governments but the final decision as to the merit of the case is always made by the appropriate police superior. In addition, police are not obliged, even more, they do not have the right to enforce local statutes. According to section 97, paragraph (1), subparagraph a. of the Police Act local statutes are not normative legal acts in terms of the Act.

Although centralization tendencies usually do not derive from genuine concern about proper functioning of democracy, it has to be realized that decentralization does not result necessarily in more open administration. Sometimes even interference with local independence can serve constitutional values. The Constitutional Court, for example, repealed certain provisions of the Local Government Act giving freedom to representative bodies to order closed sessions if necessary. It turned out that a number of municipalities used this power to exclude publicity without proper justification. The Court ruled that: *"Those data processed by state organs or local governments which are not personal and which may not be declared confidential on the basis of statutory regulations are classified as accessible to everyone. Only this way can the requirement that citizens be given access to all data of public interest be satisfied"* (32/1992 (V.29.) AB hat).

Delicate problems emerged in the field of state-church relations. On the one hand, representatives of the church supported the transformation process, especially by establishing good contacts to conservative and nationalist parties. It is also true that restoring real freedom of religion needed affirmative action because of the damage caused during long time of suppression under totalitarian regime. On the other hand, though, the principle of separation of church from state had to trigger a cautious approach. The Parliament declared and legally guaranteed freedom of religion in the 1990 Act (No. IV) based on the corresponding constitutional stipulation. Another Act (No. XXXII. from the year 1991.) provided for returning expropriated assets respectively compensating church for unconstitutional interference with property rights under communism. This two logical conclusions, however, led to many conflicts in the practice. Many local schools, namely, had been in church ownership prior to communist rule. As they have been returned to the church, freedom of religion became restricted as no real choice for atheists and followers of beliefs other than the one confessed by the owners of the school remained to avoid undesired religious education. The Constitutional Court ruled that the state had the obligation to compensate those suffered from injustice caused by totalitarian dictatorship. At the same time, the state also was obliged

to ensure not only the theoretical but also the real possibility for receiving education according to belief of the people concerned (4/1993 (II.12.) AB hat.). In another decision the Court pointed out that *"Separation of church and state does not mean that the particular features of churches may not be taken into consideration by the state and that the state must regulate the legal status of the "church" in an identical manner with those of other societal organizations"* (8/1993. (II.27.) AB hat.). That is, distinguished treatment of the church can be perceived as affirmative action in order to enhance conditions of religious freedom.

Due to the negotiated character of transition in Hungary, no organizations have been disbanded by legislation. Some important allies of the communist party, as it was shown, even had the chance to take part in the Roundtable talks and thereby represent their interests during the transformation. There was only one major exception: the case of the Workers' Militia. This armed voluntary organization had been founded by the party following suppression of the 1956 Revolution. Disbanding this formation was one of the principal demands of the opposition during Roundtable talks. However, no concrete agreement was reached by the time of signing the document on necessary legislative measures. Those objecting the compromise put the question also on the agenda of the referendum initiated by the free democrats. Majority of the voters opted for disbanding and Parliament passed the corresponding Act.

Of course, even in absence of particular prohibitive regulations, all organizations have had to comply with the constitution and provisions of the 1989 Act (No. II.) on Law of Association. Although these are flexible enough to tolerate wide scope of common activities including communist-type entities as far as they do not violate the constitution or the criminal code, many organizations and movements decided to terminate their functioning because discontinuity of reasons for existing. The Patriotic People's Front, the Communist Youth Union and other elements of the former totalitarian political system decided to disband themselves. Interestingly, though, despite of foundation of numerous independent trade unions, the Alliance of Hungarian Trade Unions, a very close satellite of the former ruling party, not only survived but it proved to be the overwhelmingly strongest union at the free trade union elections. Farmers' cooperatives have not legally disbanded either but legislation promoted return to individual agricultural activities. Many cooperatives continued functioning while others either have been dissolved or transformed into other forms of enterprise.

As it was referred to, concentration of all powers to parliamentary parties is the general trend within transitional legal development in Hungary. As a natural consequence, no efforts by the Government to widen the scope of preparing political decisions can be observed. On the contrary, even existing coordinative and advisory entities are frequently disregarded in the course of exercising public power. Recent developments in the field of constitution-making also pointed to further exclusion of outsiders from the process of preparing and adopting decisions of paramount social importance. The present socialist-liberal coalition put on the agenda of their governmental program conclusion of a comprehensive agreement with organizations representing social interests but they failed to achieve that goal. Nevertheless, certain forms of compulsory consultation with NGO-s prior to making decisions exist. Section 27 of the 1987 Act on Legislation (No. XI.) is still in force requiring coordination with interested social organizations and representative entities in order to learn their opinion prior to submitting drafts to the Government. However, this provision of the law is often disregarded in practice.

Summing up, there is little chance to have on impact on political process for others than political parties respectively parliamentary factions. At the same time, Hungarian

electoral law does not open the gates of Parliament for newcomers. Indeed, at the 1994 elections the same six parties won the necessary number of votes to go in the House as in 1990, although the proportions changed a lot. The parliamentary electoral system has been, similarly to other basic institutions, elaborated by the Roundtable talks. It is a mixed scheme based on a combination of individual constituencies and party lists. In addition, by counting residual votes not resulting in mandates, a compensatory scheme has been introduced to correct certain deficiencies of the system.

The 1989 Act (No. XXXIV) on Parliamentary Elections provides that would-be candidates have to collect at least 750 electoral recommendations in order to have their names put on the ballot-paper. A territorial (county or capital) list may be drawn up by parties which could nominate candidates at least in a quarter of individual constituencies of the given territorial unit. A national list of candidates may be submitted by a party that acquired the right to present at least seven territorial lists out of 20. Ballots in individual constituencies are valid if more than half of the electors will take part in voting. An absolute majority is required for gaining the mandate in the first round. In case of failure a second round is to be held where 25 per cent participation and a relative majority will suffice for victory. Parliamentary seats among parties nominating territorial lists will be distributed according to the proportion of votes provided that more than half of the electors appeared at the ballots. If participation does not reach the indicated level, the voting will be invalid and a second round will be held requiring a minimum of more than one fourth of all electors to participate. Citizens do not vote directly on national lists. Mandates are distributed upon counting residue votes that have not contributed to getting a mandate. However, without gaining at least 5 per cent of the votes given on territorial lists, parties do not have the right for parliamentary representation based on their lists, consequently, they are excluded from distribution of mandates among national lists, too. Nevertheless, mandates won in individual constituencies are valid without regard to results of territorial or national results.

In sum, the electoral system prefers big parties and prevents fragmentation of parliamentary representation. Only parties in terms of the relevant Act may make use of the rights referred to. Electoral coalitions and connection of lists are, though, allowed. It is also possible that independent candidates run for the mandate but only in individual constituencies.

Those parties, failing to satisfy the above mentioned requirements, have little chance to influence national politics. The same does not apply to local elections where the rules are different. The Workers' Party and the nationalist Party of Hungarian Justice and Life, both without parliamentary seats, have their representatives in numerous local governments. Another possibility for the outsiders to exercise pressure on the peak is offered by channels of direct democracy. However, it has to be mentioned that Parliament refused to decide on organizing a referendum initiated by the Workers' Party on aspirations to NATO membership despite the fact that all legal requirements had been complied with. The reasons (referring, among others, to the long time before making final decision) given by legislature were lacking in any acceptable legal grounds.

Formation of new parties embarrassed only the old Parliament which simply was not prepared to deal with such categories like opposition or factions. The new one has been shaped by and for the parties, therefore no structural tensions emerged as a consequence of changes in party structure. As it was mentioned, the same six parties got into the Parliament at both elections held following adoption of the 1989 constitutional amendment. No special difficulties have been triggered by formation of new parties from within Parliament either. During the first term of democratic Parliament two parties came to life as a consequence of

internal redistribution of mandates while the second term produced again a newborn party following division of the Hungarian Democratic Forum. Both new parties of the previous term failed to reach the 5 per cent limit at the 1994 elections.

5. Evaluation

Constitutional development in Hungary during transition has reflected both strength and weakness of political leadership. Recognition of main trends and challenges has been accompanied by selfish efforts aiming at occupation of better positions by political parties and interest groups within constitutional setting instead of focusing on consequent implementation of reforms. This led to a situation where declaration of universally accepted constitutional values have been codified and institutionalized without having the underlying social or even political basis for their proper functioning. Parties do not have consolidated supporting groups, therefore, earthquake-like changes from election to election characterize people's attitude toward political representation. Actors of politics try to reinforce their actual status within the given framework whereby little attention is being paid to long term construction of a system providing for a solid basis of exercising public power. In constitutional terms, functioning of political superstructure corresponds to general standards while no real progress has been made in the field of human rights apart from some modest results triggered by Constitutional Court decisions (data protection) or international political aspirations (minority rights). However, even here certain erosion of the declared principal rules is to be observed.

Most highlighted constitutional issue of transitional period has been, no doubt, fight for and regulation of the mass media. It is quite natural that the press itself used all possibilities to cover and influence the debates concerning its own future control and development. However, the story is not about the media fight for independence but rather about direct political struggle among parties using media as a battlefield, journalists as soldiers in the war. The Act (No.I.) of 1996 on Radio and Television Broadcasting is one of the typical examples for the phenomenon referred to. On the one hand, there are plenty of declarations in the law on freedom of the press. On the other, however, exclusive powers of parliamentary parties to nominate members to the Board guarding that freedom seems to question seriousness of the efforts toward neutrality. It is difficult to imagine that parties frequently putting their problems concerning particular program contents on the agenda of parliamentary sessions, would send their nominees with the mission to resist any political pressure including their own.

Media war might be the most spectacular constitutional problem of transition but it is surely not the most important one. From the aspect of society at large welfare role of the state and social security of the people have been crucial issues of recent history. Some of the related questions have already been addressed here. Now, the author would like to refer to some developments and debates on the subject without engaging in details.

In March 1995 a Government decision has been passed on cutting social expenditure and changing welfare schemes together with some other economic measures aiming at restoration of the balance of state budget. After the name of the Minister of Finance preparing the set of measures the complex project got the name of "Bokros Package". The Constitutional Court gave, based on a great number of initiatives, a rather prompt answer by repealing substantial provisions of the Act passed as an implementation of the decision. The Court acknowledged the right of the state to change social policies even if the result would be deterioration of the living conditions. However, according to the ruling, all activities of the

state had to be adjusted to the constitutional requirements (43/1995. (VI. 30.) AB hat.). It is true that the Court reasoned many points of the ruling only by referring to legal security and other indeterminate concepts instead of citing concrete constitutional provisions. Both the "Bokros Package" and the series of Constitutional Court decisions triggered controversies. András Sajó published the deepest analytical criticism against the results of judicial review. According to him: *"The Hungarian Constitutional Court, in its early decisions, declared that its mission was to restore the rule of law. Ironically, it ended up propounding a concept of material justice, the sworn enemy of the formal rationality of the rule of law. Material justice will undermine the market economy and limit freedom of contract."* (Sajó,1996b:41).

Without discussing the particular arguments raised by András Sajó, the contributor would like to point out that the challenged activities of the state could not be simply qualified as steps toward market economy. Indeed, it was the Government which left the previous ground of formal justice by introducing the principle of distribution of social benefits based on needs of recipients instead of former citizens' equality. It is evident that the administration plays a very active role in shaping social relations. Communist expropriation destroyed existing property structures without creating new ones because social or state ownership was meaningless in real civil law terms. On the contrary, privatization and the whole economic-social reorganization of our days has far reaching impact on shaping structure of society. Many politicians speak openly out for forming a stronger middle class or pursuing other creative goals. One of the means to constrain arbitrary exercise of power is application of constitutional provisions and principles as measures for evaluation of state interventions. The basic law contains rules on affirmative action and on other issues pointing to concept of material justice. It is true that by going too far in search for social goods the Constitutional Court can easily turn into a pure political entity destroying its own basis of existence. However, the attempt to apply at least minimal requirements deriving from the constitution irrespective of their theoretical foundations is the most promising way to curb misuse of power by the state. Formal and material justice will never be identical. But activities, especially those of the state, cannot be simply classified according to guiding legal or philosophical principles. In other words, interventions into social security affairs of people represent prima facie material justice cases. It is impossible and aimless to legally adjudicate reasonableness and economic value of such activities. However, questions relating to possible discrimination directly touch upon formal justice aspects. On the other hand, freedom of religion is doubtless a negative right to be measured by formal justice indices. But without appropriate material conditions the constitutional right will turn into mere fiction which goes beyond the tolerable contradiction between rights and realities.

Constitution and constitutional justice, therefore, must address all areas of state activities. It is certainly a delicate balance to be struck by any authorized entity of state that satisfies the constitutional requirements. Nevertheless, if the living constitution fails to face the fact that public power plays a major role in the field of "market economy", developments can lead to endangering the whole establishment of legal state.

Recalling the introductory remarks, it has to be emphasized again that turning constitution from a tool of Government and politics into a supreme law constraining public power is still the crucial mission of constitutionalism in Hungary.

Professor Stephen Holmes disagrees with the evaluation outlined here. He perceives danger in accepting solid constitutional framework instead of vesting more powers in Parliament in order to achieve more flexibility and the capacity to adapt institutions to the changing political environment. He criticizes institutions of extra-parliamentary pressure and direct democracy. However, the author assumes, problems do not derive just from a certain

"antiparliamentary feeling"(Holmes,1993). There is plenty of evidence to underpin the statement that flexibility on the level of political design is in many cases nothing more than waste of energy that could be well used to address substantial problems of society. Problems of secondary importance, like the one concerning method of election of a President without real power, occupy the time of legislature instead of dealing with genuinely important matters. Invoking referenda is, of course, not a good answer to challenges. But suppressing lawfully prepared initiatives calling for a referendum (as in happened in Hungary with the one of the Workers' Party on NATO membership aspirations) is a clear rejection of democratic principles. Let the author recall a concrete case in order to illustrate his point concerning parliamentary misuse of power. The 1994 Police Bill was, at the final stage of preparations, based on an agreement among party factions. One of the items of the joint modification move submitted based on the said agreement was a proposed provision prohibiting secret police intelligence activities with the aim of crime prevention regarding parliamentary parties. Needless to emphasize that border line for police intervention possibilities must not be defined along clear political lines. The proposal was dropped immediately before final voting during the last Committee debates.

This is to underline the perspective of the contributor that Hungarian constitutional history seems to prove the classical constitutional principle rejecting monopolistic power even if exercised by an elected body. Parliament has to play a major role in democratic transformation but it can do it only embedded in a wider scope of constitutional institutions ensuring a high degree of responsibility toward a variety of interests worth taking into consideration during debates on issues of paramount importance for the whole society.

Notes

1. Members of the "Third Side" were the following movements and organizations: the Leftist Alternative Association, the People's Patriotic Front, the Hungarian Democratic Youth Union, the Union of Hungarian Members of Resistance and of Antifascists, the Münnich Ferenc Society, and the National Council of Trade Unions. Some of the listed movements and organizations had been actually created by the ruling party as complements and "colours" to the political centrum in order to show certain degree of democracy. However, by the time of the talks growing criticism toward and emphasis on independence from the Hungarian Socialist Party characterized many of the entities formerly serving the party's interests without contradiction. Some of them (the Leftist Alternative, the Münnich Society) were organized with the open intention to form an opposition from the left. Despite expectation from the other two parties of the roundtable talks, the "Third Side" did not just support the position of the HSWP but represented autonomous views concerning the main topics. Nevertheless, based on political realities, the "Third Side" played a subordinate role in the course of the negotiations.

2. The Oppositional Roundtable was made up by following groups, movements, and organizations: Bajcsy Zsilinszky Friends' Association, FIDESZ (Fiatal Demokraták Szövetsége - Union of Young Democrats), FKGP (Független Kisgazdapárt - Independent

Smallholders' Party), KNDP (Kereszténydemokrata Néppárt - Christian Democratic People's Party), MDF (Magyar Demokrata Fórum, Hungarian Democratic Forum), MNP (Magyar Néppárt - Hungarian People's Party), MSZDP (Magyar Szociáldemokrata Párt - Hungarian Social Democratic Party), SZDSZ (Szabad Demokraták Szövetsége - Alliance of Free Democrats). The League of Free Trade Unions (Liga) took an observer status. Informally dominant positions within the Oppositional Roundtable were occupied by the radically liberal SZDSZ and the moderate- nationalist MDF.

3. The author of the present contribution acted as a member (representing the Patriotic Front within "Third Side" delegation) of the probably most important expert group, the one dealing with possible solutions guaranteeing peaceful character of the political change.

4. Actually, the question on presidential elections was about the date of the process. However, the constitution in force stipulated that if the President had been elected before parliamentary elections, he would be authorized by referendum. Following the commencement of the new term of the legislature the power to elect the President belonged to the Parliament. The Free Democrats and their supporters wanted to prevent direct election of a popular socialist candidate (Imre Pozsgay) by postponing the date and thus shifting the power to Parliament.

5. The Chairman of the Commission is the President of the Parliament without the right to vote. In the meantime a new party, the Hungarian Democratic People's Party has been formed within Parliament and included into the preparatory scheme. However, the process is practically stagnating.

6. The Premier was absent at the time of voting but he indicated support for and agreement with those blocking the progress.

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