

1995

## Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe

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### Recommended Citation

Rett R. Ludwikowski, Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe, 3 *CARDOZO J. INT'L & COMP. L.* 73 (1995).

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# FUNDAMENTAL CONSTITUTIONAL RIGHTS IN THE NEW CONSTITUTIONS OF EASTERN AND CENTRAL EUROPE\*

*Rett R. Ludwikowski\*\**

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\* This article follows two previously published related studies, Rett R. Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COM. 91 (1991) and Rett R. Ludwikowski, *Constitution-Making in the Countries of Former Soviet Dominance: Current Development*, 23 GA. J. INT'L & COMP. L. 155 (1993). The references to the conclusions reached in these two former studies required that some arguments be either summarized or transplanted into this article. The author is highly indebted to Denise Casula, his research assistant, who was of great assistance collecting the materials for all these works. All three articles will be the basis for a book on the process of constitutional reform in the region of former Soviet dominance.

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## I. INTRODUCTION

Within the past two years, several Eastern and Central European countries, and almost all former republics of the Soviet Union, began drafting their new constitutions. Bulgaria, Czech Republic, Estonia, Kazakhstan, Lithuania, Romania, Russia, and Slovakia, have already adopted new basic laws. Additionally, Albania and Poland approved interim constitutions, and amendments introduced to the Hungarian Constitution have purged it entirely of the remnants of its Stalinist legacy. Also, the new Belarusian and Ukrainian constitutions were expected in Spring 1994. One might even say that East-Central Europe has become a major laboratory of constitutional works.

When several countries in the same region engage in constitution drafting, comparative dimensions underlie the procedure. Constitutions do not emerge in a political vacuum. Countries naturally borrow from each other, and borrow heavily during transitional periods when new political entities are emerging. Thus, experts studying the process of transplantation of various constitutional features must consider whether they witnessed the formation of a new constitutional model in East-Central Europe. These experts assessed the extent to which the new constitutions were based on American, European, East or West liberal and democratic traditions, and how much of the communist legacy would be absorbed by the new acts.

A clear response to these questions is particularly important regarding fundamental constitutional rights. The socialist constitutions contained impressive bills of rights; yet, the records of these countries in actually protecting citizens' rights and freedoms were extremely poor. Both the socialist East and the capitalist West claimed that the other's approach to human rights protection was "formalistic." For the socialist jurisprudence, the lack of appropriate protection for economic, social, and culture rights, typical of Western constitutionalism, meant no protection at all. Socialist ju-

rists professed that equality of political rights and equality before the law, without equivalent guarantees for social and economic rights, created an environment conducive to social inequality, enslavement and exploitation of people, and general social injustice. According to capitalist Western doctrine, the "formalistic" socialist approach to human rights meant only "a paper protection," with no significance whatsoever in reality. An elaborate socialist bills of rights, without an enforcement mechanism, were only decoration, merely resembling a book jacket, and lacking substance.

The drafters of the new post-socialist constitutions faced a difficult task. They tried to implement Western ideals while simultaneously satisfying a people strongly influenced by a socialist upbringing.

The goal of this article is to review the efforts of the drafters. This study analyzes the process of drafting the new bills of rights against the background of the Western experience. The paper consists of two parts. The first examines the genesis of American and European constitutional protection of human rights, including the socialist concept of the bill of rights. The second is an analysis of basic constitutional rights as provided in several new constitutions and constitutional drafts of the countries of former Soviet dominance. The article also examines the actual records of these countries in human rights protection. The conclusions provide some observations on the likelihood of whether the drafters of new constitutions will reach some identifiable consensus, the possibility of a new constitutional model of human rights protection surfacing, and the applicability of the Western concepts of human rights to the East-Central European experience.

## II. THE PLACEMENT OF RIGHTS IN THE CONSTITUTION

### A. *The Origins of the Constitutional Protection of Human Rights*

#### 1. *Drafting the First Bills of Rights*

The concept of natural rights has its foundations in antiquity and was developed in numerous political and legal theories during the Enlightenment. Although many of the ideas on the origin of human rights originated in continental Europe, the belief that a well-governed society should have one framework document providing an extensive coverage for citizens' rights and freedoms is

deeply rooted in the British tradition.<sup>1</sup> At the end of the eighteenth century, this idea buttressed the American constitutional experience.

The formation of the American Bill of Rights was, in fact, an uneasy process. Although declarations of rights were incorporated into the constitutions of several states, the Philadelphia Convention of 1787 adopted the Federal Constitution without a bill of rights annexed to it.

The struggle to ratify the Constitution quickly proved that the Convention erred in not adopting a bill of rights. The public demanded a bill of rights, and the lack of one became a main point in the anti-federalist attack on the Constitution.<sup>2</sup> Thomas Jefferson, in his letters from France, argued strongly that the absence of a statement of rights would result in the "elective despotism" of the Congress.<sup>3</sup> James Madison favored a bill of rights, although he did not believe the omission to be a major defect of the Constitution.<sup>4</sup>

In drafting the Bill of Rights, Madison referred to precedents such as the American Declaration of Independence, state constitutions and bills of rights, ratifying conventions, and British constitutional documents: the Magna Carta of 1215, the 1628 Petition of Rights, and the 1689 Bill of Rights.<sup>5</sup> Though the concept of a bill of rights originated from attempts to limit the power of the British crown, Madison claimed Americans had to develop a more ad-

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<sup>1</sup> HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* 80-88 (1963).

<sup>2</sup> See MELANCTHON SMITH, *AN ADDRESS TO THE PEOPLE OF THE STATE OF NEW YORK OF 1788 reprinted in PAMPHLETS ON THE CONSTITUTION OF THE UNITED STATES PUBLISHED DURING ITS DISCUSSION BY THE PEOPLE 1787-1788*, at 114 (Paul L. Ford ed., 1988). The Anti-federalist Whitehill argued in the Pennsylvania Ratifying Convention of 1787 that "he anticipates annihilation of the state governments which would destroy civil liberties." A. T. MASON, *FREE GOVERNMENT IN THE MAKING IN AMERICAN POLITICAL THOUGHT* 267-73 (1965). For the arguments of the Anti-federalist Lenoir in the North Carolina Ratifying Convention, see *Id.* at 275.

<sup>3</sup> Letter from Thomas Jefferson to James Madison (Dec. 20, 1788) in *FREE GOVERNMENT IN THE MAKING* 329-30 (Alpheus Thomas Mason ed., 3d ed. 1965). See also CHARLES WARREN, *THE MAKING OF THE CONSTITUTION* 81 (1931).

<sup>4</sup> WARREN, *supra* note 3.

<sup>5</sup> *THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES, 1 ANNALS OF CONG.* 431-42 (1934) [hereafter *ANNALS*]. Hannis Taylor wrote: "If anything is certain in the history of any country it is that the essence of the English constitutional system as reformed by the Revolutions of 1640 and 1688 and as defined by Blackstone in 1758, passed into our first state constitutions, whose bill of rights set forth, for the first time, in a written and dogmatic form, the entire scheme of civil liberty as it existed in England in 1776"; HANNIS TAYLOR, *THE ORIGIN AND GROWTH OF THE AMERICAN REVOLUTION* 361 (1911).

vanced bill as the British Constitution did not secure freedom of the press and liberty of conscience, rights highly regarded in America.<sup>6</sup> Madison made no reference to the French constitutional experience, and, with the exception of the consular convention and the letter to the French National Assembly announcing Franklin's death, France was hardly mentioned during the first year of debate in the first United States Congress.

The adoption of the French Declaration of Man and Citizen on August 27, 1789, almost two and half years before the ratification of the American Bill of Rights on December 15, 1791, often puzzles researchers looking for the origin of constitutional bills of rights. The passage of the French document before the American one trivialized the American contribution to French constitutional development. The notion of a bill of rights, which could be used as a preamble to a constitution, is an American concept. Americans translated this idea into the concept of a constitution, a single document providing a basic law superior to any legislative act or statute.<sup>7</sup>

On the one hand, it is unquestionable that the preambles of American state constitutions, such as those of Virginia, Massachusetts, and Maryland, as well as their prototype — the American Declaration of Independence — strongly influenced the authors of

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<sup>6</sup> ANNALS, *supra* note 5, at 436. The British Bill of Rights of 1689 did not proclaim freedom of speech. It provided only that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court." EMLYN C.S. WADE, CONSTITUTIONAL LAW 8 (1970). The American founding fathers correctly viewed the origins of the bills of rights in the procedures and institutions established to limit the power of government. From this point of view, it is quite natural that they looked for precedents in British constitutional traditions rather than in the history of French absolutism. In fact, however, they overlooked the constitutional experience of other European countries which, like Poland, had a four and a half century tradition of struggle to restrain the king's power and to create institutions fundamental to a constitutional government. The Polish nobility had its "Habeas Corpus Act" much earlier than did the nobility in other European countries, and had its due process clause well established at the beginning of the fifteenth century. See Rett R. Ludwikowski, *Two Firsts: A Comparative Study of the American and the Polish Constitutions*, 8 MICH. Y.B. INT'L L. STUD. 121 (1988). See also Wiktor Osiatynski, *Constitutionalism and Rights in the History of Poland*, CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 284-314 (Louis Henkin and Albert J. Rosenthal eds., 1990).

<sup>7</sup> For a more profound analysis of the American contribution to the French Declaration of the Rights of Man and Citizen see Rett R. Ludwikowski, *The Beginning of the Constitutional Era: A Bicentennial Comparative Study of the American and French Constitutions*, 11 MICH. J. INT'L L. 167 (1989).

the French Declarations.<sup>8</sup> On the other hand, the record demonstrates that the drafting of the American Bill of Rights and the French Declaration of the Man and the Citizen almost paralleled each other. On May 4, 1789, the day before the French Estates General met for the opening plenary session in the great *Salle des Menus Plaisirs*, Madison informed Congress of his intention to address the subject of amending a bill of rights to the Constitution.<sup>9</sup> He submitted his draft on June 8, 1789 while Lafayette presented his proposal to the French Assembly on July 11 of that same year.<sup>10</sup> On August 13, 1789, the United States House of Representatives convened as a Committee of the Whole and discussed the report of the Committee of Detail, the working group that took the general principles adopted during the first stage of the proceedings and molded them into a draft document. Then, the Committee of Style, charged with refining the form and style of the draft document and incorporating changes previously made in Convention debate, submitted the report with the third draft of the amendments on August 24-25, 1789, two days before the French Assembly adopted the Declaration of the Rights of Man on August 27, 1789.<sup>11</sup> The amendments passed Congress on September 25, 1789.

The American Bill of Rights was not ratified until 1791, but the drafting process was completed before the adoption of the French Declaration. Thus, the draftsmen of the American version of the bill were not influenced directly by the final text of the French document. They may have been familiar with the early drafts of the Declaration and inspired by the French constitutional debates, but a thorough examination of the record does not confirm this thesis. It is true that the American public was enthusiastic about the French Revolution, and the founding fathers were well informed about the European events. There is, however, no evi-

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<sup>8</sup> As Bernard Fay wrote, "A detailed comparison of the French Declaration of Rights of Man and Citizen with the preambles of these three constitutions brings out a striking resemblance." BERNARD FAY, *THE REVOLUTIONARY SPIRIT IN FRANCE AND AMERICA* 266 (1927). Blaustein, supporting this opinion wrote, "[t]hus, while the famous French Declaration of the Rights of Man and the Citizen of August 1789, was officially the work of LaFayette, Mirabeau, and Jean Joseph Mounier, it also had claim to American parentage." A. BLAUSTEIN, *THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 16 (1986).

<sup>9</sup> ANNALS, *supra* note 5, at 247.

<sup>10</sup> *Id.* at 424-48; *THE PAPERS OF THOMAS JEFFERSON* 230-31 (J. Boyd ed., 1959).

<sup>11</sup> ANNALS, *supra* note 5, at 88, 913; *DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION* 112-14 (F.N. Thorpe ed., 1951).

dence that the American draftsmen drew their ideas from French constitutional thought.

## 2. *The French Declaration and the American Bill of Rights*

An extensive examination of the French Declaration and the American Bill of Rights reveals similarities and differences between these documents. Both texts emphasize “freedoms from” and rights of the criminally accused. While the American Bill of Rights is solely oriented toward the protection of individual rights, the French Declaration makes meaningful reference to “the common good.”

The parallel development of the French Declaration and the American Bill of Rights makes the search for mutual interdependencies between the two acts difficult. To discover the roots of present and future differences in European and American concepts of human rights, it is necessary to take a closer look at: (1) the French Declaration; (2) the American Declaration of Independence; and (3) American state and federal bills of rights. It was in these documents that confluence began, and where both similarities and differences in European and American concepts of human insecurities were revealed.

The French Declaration more notably attached equality to liberty and stressed the importance of this conjunction than did either the American Declaration of Independence or the Virginia Bill of Rights.<sup>12</sup> “By bringing the resounding collapse of privileges and feudalism, the [French] popular revolution highlighted equality as the Anglo-Saxons had not done.”<sup>13</sup> Article 1 of the French Declaration proclaims, “men are born free and equal in rights.”<sup>14</sup> Equal-

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<sup>12</sup> The comments on the comparison of the American Bill and the French Declaration are a lightly edited version of the author's remarks published in *The French Declaration of the Rights of Man and Citizen and the American Constitutional Development*, 38 AM. J. COMP. L. 445, 453 (1990 Supp.).

<sup>13</sup> See G. LEFEVRE, *THE FRENCH REVOLUTION FROM ITS ORIGINS TO 1793* 146 (1962). For the most exhaustive comparison of the French Declaration and the Virginia Bill of Rights, see ROBERT R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTIONS* 518-21 app. IV (1959). The comparison brings Palmer to the conclusion that “there was in fact a remarkable parallelism” between both acts. *Id.* at 487.

<sup>14</sup> *Declaration des Droits de l'Homme et du Citoyen* reprinted in J.M. Roberts, 1 FR. REV. DECL. (1966) [hereinafter *French Declaration*]. The American Declaration of Independence states, “all men are created equal, that they are endowed by their Creator with certain inalienable Rights.” THE DECLARATION OF INDEPENDENCE para. 1 (U.S. 1776). The Virginia Bill of Rights of 1776 declares that “all men are by nature equally free and



ity is also referred to in several of the subsequent articles.<sup>15</sup> The French Declaration guarantees equal rights in courts, equal access to governmental positions, and fiscal equality. Even with all of the egalitarian provisions, equality, although emphasized more firmly than in the Anglo-American doctrine, holds "a lesser place than freedom in the [French] Declaration."<sup>16</sup>

Among the fundamental principles embodied in the French and American documents, liberty is the most important right. Men are declared free from arbitrary persecution and free to communicate their opinions, provided they respect the same liberty in others. Liberty, property, security, and resistance to oppression are recognized as fundamental individual rights stemming from the nature of human beings.<sup>17</sup> Equality was not considered part of these sacred and imprescriptible rights. The French Assembly focused on the condemnation of the unequal position of estates and privileges of minorities, and following Sieyès' argument, decided not to include social equality among the rights protected by the French Declaration.

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independent, and have certain inherent rights." 7 THE FEDERAL AND STATE CONSTITUTIONS 3813 (F. Thorpe ed., 1909) [hereinafter VA. BILL OF RTS.].

<sup>15</sup> French Declaration, *supra* note 14, at 171-73.

<sup>16</sup> JACQUES L. GODECHOT, *LES REVOLUTIONS 1770-1799* 96 (1963). On the one hand, the idea of equality appealed to an American sense of justice; on the other hand, the forefathers feared that in practice it would collide with individual freedom. Generally, they were satisfied with equality before the law and felt uncomfortable with the French attempts to extend equality to social and economic relations. As John Adams wrote,

By the law of nature all men are men not angels - men and not lions - men and not whales - men and not eagles - that is, they are of the same species. And this is the most that the equality of nature amounts to. But man differs by nature from man almost as much as man from beast. The equality of nature is moral and political only and means that all men are independent.

*Quoted in* CHARLES D. HAZEN, *CONTEMPORARY AMERICAN OPINION OF THE FRENCH REVOLUTION* 274-75 (1964). On the limits of American dedication to the creation of an egalitarian society, see RICHARD B. MORRIS, *THE EMERGING NATIONS AND THE AMERICAN REVOLUTION* 21-22 (1970).

<sup>17</sup> In 1789, the French Assembly generally showed a greater sensitivity to egalitarian values than did the framers of the American Declaration. Still, it took several years to turn this sensitivity into a fully expressed egalitarian program. Attacks on private property from such socialists as Mably or Morelly, or Rousseau's well known criticism of law as an instrument of exploitation and his accusation of excessive accumulation and unequal distribution of property, did not find an endorsement in 1789. The Assembly recognized property as sacred in article XVII of the French Declaration, and established a representative system, based on a property qualification. For more exhaustive comments see KINGSLEY MARTIN, *FRENCH LIBERAL THOUGHT IN THE EIGHTEEN CENTURY* 220-58 (J. P. Mayer, 2d ed. 1954).

Contrary to the second French Constitution of 1793, which stressed the significance of social equality, the majority of the Constitutional Assembly in 1788-1791 was satisfied with the protection of equal freedom. The right of equal freedom was formulated more clearly in the French Constitution of 1791 than in the Virginia Bill of Rights. On the other hand, the Virginia Declaration placed greater emphasis on the frequency of elections, and the right to a jury trial. It was also more concrete in its warning against excessive bail and more explicit in its reference to general warrants, suspension of laws, and standing armies.<sup>18</sup>

Religious liberty and tolerance are other areas where the French and American Declarations diverge. A number of deputies of the French Assembly, led by Robespierre, were dissatisfied with the inadequate treatment of religious liberty and religious toleration in the French Declaration. The mild reference to religious toleration was recognized as a failure of the Voltairians during this phase of the Revolution. As a result of these sentiments, at the end of 1789 and in 1790, the French Assembly adopted several acts drastically limiting the dependence of the French Catholic Church on the Pope and tying the clergy to the State's policy.<sup>19</sup>

Contrariwise, the American instruments seemed more religiously oriented. The Declaration of Independence refers to "the Creator," and the Virginia Bill of Rights contains references to Christian and moral virtues.<sup>20</sup> Americans were not only more dedicated to religion than the French, they were also especially determined not to grant priority to any particular creed. France remained a predominantly Catholic country, but with an "air of atheism."

As is often suggested, the populist character of the French Declaration of Rights was more specious than real. While the American Declaration of Independence states that governments derive "their just Powers from the Consent of the Governed,"<sup>21</sup> the French text is more explicitly Rousseauistic by proclaiming that

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<sup>18</sup> See ROBERT R. PALMER, *THE AGE OF DEMOCRATIC REVOLUTION: THE CHALLENGE* 518-20 (1959).

<sup>19</sup> The French Assembly issued a series of acts relating to ecclesiastical reorganization. The Decree of December 2, 1789 on the confiscation of Church property and the Civil Constitution of the Clergy, which bound the clergy with the state through prescribed oaths, salaries, and newly-established ecclesiastical districts, were the most significant of these. J. STEWART, *DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 167-89* (1951).

<sup>20</sup> See PALMER, *supra* note 18, at 250.

<sup>21</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

"law is the expression of the general will."<sup>22</sup> However, both declarations are Rousseauistic only in these phrases.<sup>23</sup> They were manifestos of developing liberalism proclaiming a victory for individualistic philosophy, and recognizing the individual to have certain fundamental rights. Individual autonomy was proclaimed as being worthy of constitutional protection, an individual was declared the best judge of his own well-being, and the interests of the community were recognized as the sum of individual interests.

The framers of both declarations followed Rousseau's concept of the general will only in name. The American Declaration of Independence focused on the reasons why the original thirteen States of the Union severed their colonial allegiance. The interpretation of the principle of the popular origin of power is left to constitutional regulation, which fully recognizes a representative form of government. The French Declaration, which was itself conceived as a preface to the Constitution, more explicitly explains the idea of representation. For most of the deputies, sovereignty was indivisible and inalienable, but the sovereign people could exercise their power through elected representatives. Sieyes' opinion, that deputies were representatives rather than simply "intermediaries," prevailed in the Assembly. He stressed that the will of the majority of the deputies meant the sum of the individual wills. It was Sieyes who, in his popular pamphlet *Quest-ce le Tiers Etat?* argued, "individual wills are the sole elements of the general will . . . [and] it is useless to talk reason if, for a single instant, this first principle, that the general will is the opinion of the majority, and not of the minority, is abandoned."<sup>24</sup>

In summary, the resemblance between the French and American declarations is remarkable. Both acts recognize that society should be organized on principles of liberty, individual autonomy, representative government, and the power of the majority combined with the rights of minorities. However, even with these simi-

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<sup>22</sup> *French Declaration*, *supra* note 14, at art. VI.

<sup>23</sup> The concept of "general will" (*la volonte generale*) was anti-individualistic. It was discussed by Montesquieu, Holbach, Diderot, and other philosophers, but Rousseau was recognized as its main proponent. For Rousseau, the general will was indivisible and inalienable, and embodied the interests of society as a whole. For Rousseau's influence on the French Revolution, see J. McDONALD, *ROUSSEAU AND THE FRENCH REVOLUTION 1762-1791* (1965); J. TALMON, *THE ORIGINS OF TOTALITARIAN DEMOCRACY* (1960); A. MEYNIER, *JEAN-JACQUES ROUSSEAU: REVOLUTIONNAIRE* (1911).

<sup>24</sup> SIEYES, *QUEST-CE LE TIERS ETAT?*, translated in STEWART, *supra* note 19, at 50.

larities, the declarations differ in the emphasis given to particular rights.

Analyzed against this background, the American Bill of Rights is a pragmatic act deprived of theoretical divagations on the meaning and limitations of liberty, interrelations between liberty and equality, and interdependencies between liberty and the idea of limited government. The American document is simply a list of civil liberties<sup>25</sup> or "negative rights" which the individual citizen may assert against the government. As Judge Posner states, "[Our] Constitution is a charter of negative rather than positive liberties . . . The men who wrote the Bill of Rights were not concerned that the federal government might do too little for the people, but that it might do too much to them."<sup>26</sup> In time, the American Supreme Court developed a system to enforce constitutional rights. The United States seemed to monopolize the export of the ideas of constitutional protection and judicial enforcement of human rights.

The French Revolution generated a multiplicity of emotions and focused public attention on the struggle for civil rights and liberties; yet, French constitutionalism seemed to deemphasize the role of Constitutional rights. The Constitution of 1795 supplemented the Rights of Man with nine paragraphs on the duties of the citizen, while subsequent Napoleonic constitutions were more pragmatic, eliminating the sections on the Rights of Man along with a great quantity of the ideology that had sanctioned them.<sup>27</sup> However, for decades to come, the French Declaration still remained a philosophical manifesto for a free world. Its vital influence stemmed from the assertion that "all men are born free and equal in rights" and that their rights are inalienable.

#### B. *Bills of Rights in Modern Constitutions of the Nineteenth and Twentieth Centuries*

In the nineteenth century, the recognition of the fundamental rights of man influenced the development of European constitutionalism.<sup>28</sup> The first European constitutions<sup>29</sup> seemed to follow

<sup>25</sup> See Norman Dorsen, *Civil Liberties*, in *ENCYCLOPEDIA OF THE CONSTITUTION* 263-70 (Leonard Lavy ed., 1986).

<sup>26</sup> *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983) (citations omitted).

<sup>27</sup> See Geoffrey Bruun, *The Constitutional Cult in the Early Nineteenth Century*, in *THE CONSTITUTION RECONSIDERED* 263 (Conyers Read ed., 1938). For the texts of the Constitutions of 1795 and 1799, see STEWART *supra* note 19, at 571-612, 768-79 (1951).

<sup>28</sup> LAUTERPACHT, *supra* note 1, at 89-90.

the American structure by providing a list of typical "Thou Shall Nots." For example, the Constitution of Sweden, adopted in 1809, stated in a single article that

The King . . . shall not deprive anyone nor cause anyone to be deprived of life, honor, personal liberty, or well-being unless he has been legally tried and condemned; he shall not deprive anyone nor permit anyone to be deprived of any real or personal property without trial and judgment in accordance with the provisions of Swedish law; he shall not disturb or cause to be disturbed the peace of any person in his home; he shall not banish any person from one place to another; he shall not constrain nor cause to be constrained the conscience of any person, but shall protect every-one in the free exercise of his religion. . . .<sup>30</sup>

The Swedish constitution also guaranteed freedom of the press, within the limits determined by the law, and prohibited the establishment of preventive censorship.<sup>31</sup> Similar civil liberties were listed in the Constitution of Spain in 1814, and in a separate chapter in the Constitution of Norway of 1814.<sup>32</sup> The drafters of the Constitution of Belgium of 1831 moved the chapter on "Belgian Citizens and Their Rights" to the very beginning of the text and delineated a detailed list of rights.<sup>33</sup> Bills of rights were also incorporated into the constitutions of Liberia in 1847, the Kingdom of Sardinia in 1848, Denmark in 1849, Prussia in 1850, and Switzerland in 1874. After the First World War, bills of rights were adopted by most of the new European states, the Latin-American countries, and the Asiatic states.<sup>34</sup>

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<sup>29</sup> The first written European constitution, and the world's second, was the Polish Constitution of May 3, 1791, and it did not have a separate bill of rights. The Constitution changed the rights of the Polish nobility slightly and recognized the rights of the burgers and peasants. Generally speaking, however, the drafters of the Polish constitution were more concerned about the excessive amount of political freedom that the noblemen had, than about the lack of civil liberties of the rest of the Polish population. See Ludwikowski, *supra* note 6; see also Leslaw Kanski, *Human Rights in Poland from a Historical and Comparative Perspective*, in CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND AND FRANCE 121 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991).

<sup>30</sup> SWED. CONST. (1809) art. XVI, *translated in 2 MODERN CONSTITUTIONS* 223-24 (Walter F. Dodd ed., 1909).

<sup>31</sup> SWED. CONST. art. LXXXVI.

<sup>32</sup> The constitution of Norway provides, "the Evangelical Lutheran religion [to] remain the public religion of the state." NOR. CONST. (1814), *translated in 2 MODERN CONSTITUTIONS* 123 (Walter F. Dodd ed., 1909).

<sup>33</sup> BELG. CONST. (1831), *translated in 2 MODERN CONSTITUTIONS* 127 (Walter F. Dodd ed., 1909).

<sup>34</sup> LAUTERPACHT, *supra* note 1, at 89-90.

Although there was a general preoccupation with constitutional protection of human rights, the American and European approaches to fundamental rights differed in the second half of the nineteenth century. This is exemplified in the differences between the American Bill of Rights and the French Declaration. Following the American and the French revolutions, the other European countries developed their own concepts of fundamental constitutional rights.

Despite numerous efforts, the Europeans did not adopt a successful model of constitutional review until the second decade of the twentieth century,<sup>35</sup> forcing the idea of inalienable rights to remain a philosophical abstraction in Europe.<sup>36</sup> In the United States the prevailing opinion was that fundamental rights were not a gift from society, but were rather natural and inherent. The Europeans believed that rights were granted only by the constitution.<sup>37</sup> As Wiktor Osiatynski correctly observed, “[a]nother important difference between American and European constitutional orders which is worth discussion is that the American order rests on the principle that power is a grant of freedom and the European order rests on the principle that freedom is a grant of power.”<sup>38</sup>

The European constitutions of the nineteenth century declared rights were constitutionally protected within the boundaries of the laws. The constitutional guarantees of rights meant protection against the arbitrariness of governmental decisions, but not against limitations imposed by the legislature. By the end of the nineteenth century, the Europeans were inclined to accept the concept of the division of powers. They believed the powers were not equal, and the legislature, being supreme, could judge the limitations on fundamental rights. Thus, the European constitutions provided elaborate lists of rights which might be exercised only “in the manner expressly provided by law.”<sup>39</sup>

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<sup>35</sup> For an analysis of early experiments with judicial review in Europe see Louis Favoreu, *Constitutional Review in Europe*, in *CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD* 38 (Louis Henkin & Albert J. Rosenthal eds., 1990) [hereinafter *CONSTITUTIONALISM & RIGHTS*].

<sup>36</sup> Helmut Steinberger's comments on fundamental rights in nineteenth century Germany. *Id.* at 202.

<sup>37</sup> *Id.* at 385.

<sup>38</sup> Osiatynski, *supra* note 6, at 156.

<sup>39</sup> See *SPAIN CONST.* (1876) art. IV, VI, IX, XII, *translated in 2 MODERN CONSTITUTIONS* 81 (Walter F. Dodd ed., 1909); *NETH CONST.* (1887) art. V-VII, *translated in 2 MODERN CONSTITUTIONS* 200-01 (Walter F. Dodd ed., 1909).

Following the tradition of French constitutionalism, the European basic laws stressed the social duties of citizens, and became replete with positive rights which the individual might claim against the government. The citizens had certain obligations including: military duties, the duty to educate children, and the duty to perform personal service for the state and the municipalities.<sup>40</sup> While under the American Constitution the government does not provide economic and social benefits to the citizens, the constitutions of the European welfare states impose numerous positive obligations on the governments. "It shall be the duty of the state and the municipalities to maintain the purity, health, and social welfare of the family. Families of many children shall have the right to compensatory public assistance."<sup>41</sup> The Constitution of Finland (1919) provides, "The state shall support, or in case of need shall give grants-in-aid to, institutions for instruction in the technical professions, in agriculture and its allied pursuits, in commerce and navigation, and in the fine arts."<sup>42</sup> As Louis Henkin concluded,

economic-social rights generally are not constitutionally protected [in the United States]. The United States has set an example of commitment and growth in civil and political rights, and has followed Europe in respect of economic-social rights; although President Franklin Roosevelt proclaimed that the commitment of the United States to "freedom from want" would be equal with other freedoms, economic-social rights have not achieved constitutional status in the United States.<sup>43</sup>

Furthermore, Europeans showed a greater amount of sensitivity than Americans to the idea of equality of rights. The Constitution of the United States, in its original version, neither guaranteed universal suffrage nor equal rights to women nor prohibited slavery. In 1788, Condorset lead the French *Societe des Amis des Noirs* (The Society of the Friends of Blacks), whose purpose was to disseminate the idea of the abolition of both the slave trade and slavery. Denmark was the first European state to abolish the slave trade by a royal order in 1792. Most European states followed

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<sup>40</sup> For other examples, see the constitution of the German Reich of (1919) arts. CXIX, CXXXII, CXXXIII, translated in HOWARD L. MCBAIN & LINDSAY ROGERS, THE CONSTITUTIONS OF EUROPE 199 (1922) [hereinafter Const. of Ger. Reich (1919)]; FIN. CONST. (1919), art. LXXV, translated in HOWARD L. MCBAIN & LINDSAY ROGERS, THE CONSTITUTIONS OF EUROPE 482 (1922).

<sup>41</sup> Const. of Ger. Reich (1919) art. CXIX, *supra* note 40, at 199.

<sup>42</sup> FIN. CONST. art. LXXXI, *supra* note 40, at 483.

<sup>43</sup> CONSTITUTIONALISM & RIGHTS, *supra* note 35, at 8-9.

Denmark's lead in prohibiting the slave trade after the Congress of Vienna in 1814. Before the Nineteenth Amendment to the United States Constitution, granting women the right to vote, became law on August 26, 1920, numerous European countries such as Finland (1906), Norway (1913), Denmark (1915), the Netherlands and the Soviet Union (1917), and Austria, Czechoslovakia, Germany, Poland, and Sweden (1920) enacted legislation guaranteeing a woman's right to suffrage.

The American concept of fundamental constitutional rights served as a model for other countries in the 1920's, when the United States Supreme Court actively developed the philosophy of the First and Fourteenth Amendments. The American interpretation of human rights became particularly influential in several major areas such as due process of law, the right of the criminally accused, the right to freedom of expression, and the right to privacy. After a modest beginning, American courts began producing a significant number of decisions relating to the right of equality of treatment without unfair discrimination.<sup>44</sup> American law also had a remarkable impact on the development of the increasing body of international human rights law traceable to World War II and President Roosevelt. As Louis Henkin observed,

A new wave of influence traceable to the United States came with World War II. President Roosevelt encapsulated the idea of rights in his Four Freedoms address, and the United States and its Western Allies incorporated the idea of rights into the aims of the Second World War, into the Nuremberg Charter and the UN Charter, and then into the Universal Declaration of Human Rights and the series of international covenants and conventions that followed.<sup>45</sup>

### C. *The Socialist Concept of Constitutional Rights*

Bills of rights became a typical component of socialist constitutions. Constitutional experts agree that the constitutions of the socialist countries had a common core, which, among other ele-

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<sup>44</sup> For more extensive comments on the growing influence of American jurisprudence in the twentieth century see Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537 (1988); Roger Errera, *The Freedom of the Press: The United States, France, and Other European Countries*, in CONSTITUTIONALISM & RIGHTS, *supra* note 35, at 63-93; John Paul Stevens, *The Bill of Rights: A Century of Progress*, in THE BILL OF RIGHTS IN THE MODERN STATE 13 (Geffrey R. Stone et al. eds., 1992).

<sup>45</sup> CONSTITUTIONALISM & RIGHTS, *supra* note 35, at 13; Richard B. Lillich, *The Constitution and International Human Rights*, 83 AM. J. INT'L L. 851 (1989).



ments, contained a lengthy list of fundamental rights.<sup>46</sup> As Christopher Osakwe wrote, “[t]o demonstrate the superiority of socialist democracy over bourgeois democracy, to prove to the world that socialism holds personal freedom and individual liberty in high esteem the provisions in the socialist bill of rights contain a glowing tribute to all the greatest freedoms of our time.”<sup>47</sup>

Four basic features characterized the socialist bills of rights. First, along with rights and freedoms, they contained elaborate lists of duties. The Soviet Constitution of 1977 proclaims, “[t]he exercise of rights and freedoms is inseparable from the performance by the citizens of duties.”<sup>48</sup> The citizens were obligated to observe the Constitution and the laws, comply with the standards of socialist conduct, uphold the honor and dignity of socialist state, observe labor discipline, combat misappropriation and squandering of state and socially owned property, and make thrifty use of the people’s wealth.

Second, under socialist law, the constitutionally guaranteed rights of citizens could not be exercised to the detriment of the interests of the state.<sup>49</sup> Freedoms of speech, press, assembly, street processions, and demonstrations were guaranteed only if they were exercised in a manner not contrary to the interests of the people, and were exercised in order to strengthen and develop the socialist system.<sup>50</sup> This rule, widely found in all socialist constitutions, stemmed from the general assumption that communal values should take precedence over individual ones. According to Marx-

<sup>46</sup> Chris Osakwe, *The Common Law of Constitutions of the Communist-Party States*, 3 REV. SOCIALIST. L. 155 (1977); see also Rett R. Ludwikowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT’L L. & COM. 125 (1991).

<sup>47</sup> Osakwe, *supra* note 46, at 190. Boris Tchechko’s evaluation of Stalin’s Constitution of 1936 illustrates this thesis well. He wrote,

One such a view of the relentless stages in the economic evolution of mankind and the associated rights of man, the 1936 Constitution of the U.S.S.R., rightly called the ‘Stalin’ Constitution, not only constitutes one of the most decisive stages in the advance of the ideas of the democratic emancipation of man, but also — and this is of vital importance — sets man as a worker in ideal political, social and economic conditions, and gives him facilities for work and intellectual life.

BORIS TCHECHKO, *HUMAN RIGHTS, COMMENTS AND INTERPRETATION* 159 (UNESCO ed., 1949).

<sup>48</sup> KONST. SSSR (1977) [Constitution] art. LIX, translated in DONALD D. BARRY & CAROL BARRIER-BARRY, *CONTEMPORARY SOVIET POLITICS* 371 (1982) [hereinafter U.S.S.R. CONST.].

<sup>49</sup> U.S.S.R. CONST. art. XXXIX.

<sup>50</sup> U.S.S.R. CONST. arts. L, LI.

ist-Leninism, respect for collective values was to follow from the growing unity of the individual and society. Awareness of the superiority of shared interest to that of individual interest was supposed to create a collective mentality, a precondition for the further evolution of the society toward communism. The citizens of the socialist states were expected to subordinate their private interests to the "common good" or to view their rights as a reflection of the duties they were called to fulfill. "Interests of the people" and "needs of socialism" were defined only by the Party and the government.

Third, socialist jurisprudence attempted to distinguish human rights, as a philosophical category, from fundamental constitutional rights, as a political category.<sup>51</sup> The socialist legal theory did not address any theory of inherent or natural rights, nor did it acknowledge them. John F. Copper, attempting to explain this position utilizing a Chinese approach wrote, "To Mao, all rights — civil, political, economic, and social — were 'granted' according to the needs of the party, and the needs of the party changed. Thus, there could be no constant or unchanging tenet of human liberties and rights."<sup>52</sup> The "granted" rights and freedoms were precisely listed in the constitutions. Moreover, they were not "self-executing", which meant that, with the exception of a minimal number of socialist countries experimenting with judicial review, such as Yugoslavia and Poland since the late 1980's,<sup>53</sup> the constitutional enumeration did not provide any legal basis for their enforcement in the courts.<sup>54</sup> It was assumed the legislative body itself was responsible for maintaining the constitutionality of state actions, and constitutional review could not be exercised by extra-parliamentary bodies. Constitutional control was usually reserved for internal organs of the legislative bodies, such as the Presidium of the legislature.<sup>55</sup> Supervision over the observance of laws in the Soviet Union was vested in the Procurator-General who was appointed by, and held accountable to, the supreme legislative body, which was itself controlled by the Party.<sup>56</sup>

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<sup>51</sup> Osakwe, *supra* note 46, at 194-95.

<sup>52</sup> See YUAN-LI WU ET AL., HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 11 (1988).

<sup>53</sup> For additional commentary, see Rett R. Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, 37 INT'L & COMP. L. Q. 89 (1988).

<sup>54</sup> Osakwe, *supra* note 46, at 195.

<sup>55</sup> U.S.S.R. CONST. art. CXXI.

<sup>56</sup> U.S.S.R. CONST. arts. CLXIV, CLXV.

Fourth, to emphasize the superiority of socialist constitutionalism over capitalist doctrine, the socialist bills of rights contained numerous provisions addressing social, economic, and cultural rights. Those provisions included the right to work, rest and leisure, health protection, pensions, housing, education, and other cultural benefits.<sup>57</sup> The socialist experts proudly proclaimed that the elevation of these rights to the top of the lists of fundamental constitutional principles emphasized the commitment of the communist governments toward eliminating capitalist exploitation and inequality. Constitutional guarantees for social, economic, and cultural rights were recognized as a basic criteria to distinguish between the so-called "formal" Western type of democracy and "socialist" democracy. According to the Socialists, "formal" democracy only offered freedom and equality before the law for those producers and consumers who used market mechanisms, while "socialist" democracy was the embodiment of true distributive justice.

### III. BILLS OF RIGHTS IN THE NEW CONSTITUTIONS OF COUNTRIES OF FORMER SOVIET DOMINANCE

During the process of developing new constitutions, the countries dominated by the former Soviet Union demonstrated several factors in common. For instance, socialist features were incorporated into the new constitutions, constitutions developed by Western experts were not enthusiastically adopted, and no single constitution emerged as a model.

First, the ridiculed socialist constitutional model is not entirely "dead" as some of its features were transplanted into the constitutions of the new democratic states. Signs of a quick economic recovery or the symptoms of further economic stagnation affected the sentiments of the people in East-Central Europe for their communist past. The graver the economic hardships in the new democracies, the stronger the people yearn for a return to the illusive state protectionism of the communist era. Such a scenario increases the possibility of the communist reformers returning to power.<sup>58</sup> Purging the political culture of East-Central Europe of

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<sup>57</sup> U.S.S.R. CONST. arts. XXXIX-XLVI.

<sup>58</sup> Nostalgia for communist stability, which in some degree is common to all new democracies, is a fascinating social phenomenon. The longing for the communist "equality in misery" has its roots in the misinformation, or lack of knowledge, about life in the West. The wider exposure to Western political, legal, and social culture that resulted from "glas-

post-socialist myths requires a great deal of time and effort. Resistance to a communist comeback did not automatically amount to economic and political success.

The communist governments who retained power were sometimes more efficient in terms of the speed of constitutional transformation. The “post-communist communists” tried to incorporate into the new constitutional drafts a number of features bearing communist stigmas. The communist relics effected the coherence of the new constitutions and were highly dysfunctional for the developing market mechanisms. The communist flavor of the new constitutions reflect the true sentiments of the people in the region.

Second, to the Western experts’ surprise, the venerated constitutional models they advocated were neither enthusiastically welcomed in East-Central Europe nor automatically recognized as superior to those devised by socialist constitutional institutions. A post-socialist lawyer is less concerned with Eastern Europe’s reception of Western constitutional models, and more concerned with finding a constitution that compliments the needs of the newly democratized countries. The failure of Western experts to take this sentiment into consideration resulted in misunderstandings and communication problems.

Third, no single constitutional model surfaced in East-Central Europe even though many of the new constitutions were drafted

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not” and “perestroika” verified the myth of “a rotten and greedy West”, and contributed to a contrasting but equally false image of the West as a clear paradise. The people in the new democracies never understood that an elevation to a higher standard of life did not automatically guarantee happiness for all. The introduction of market mechanisms gradually revealed that those who were at the bottom of the social structure were still frustrated, even if their conditions of life improved significantly. They might be better off than they were in communist times, but they were still on the low end of the economic scale. Communism left them longing for a better life. It also left them believing the myth that equality was a *conditio sine qua non* of happiness.

Paradoxically, it was difficult to understand that a happy world in which all people are equal and wealthy was utopian, not because the wealth could not be distributed equally, but because a distribution deprived individuals of the satisfaction which stems from the possibility of improving their lives at the cost of the others. Wealth is always relative, and equal wealth quickly ceases to be wealth at all.

Communism elevated the concept of the world of happy and equally wealthy people to the rank of a sacrosanct dogma. However, the theory and practice of Marxist-Leninism varied substantially. Instead of delivering the promised paradise, communism suppressed economic vitality and spontaneity, protected its own incurability, and locked people in the “vicious circle” of equality in misery. Still, for those who suffer the most severe hardships of the market transformation, the communist equality and unhappiness of many seem to be better than the capitalist unhappiness and inequality of few. The communist helplessness appears to be less painful than the capitalist combination of heaven and hell.

under similar circumstances. In order to construct a model or a special type of constitution, the comparative expert must be able to categorize constitutions by their features. The comparative analysis of the new constitutions hardly satisfied this requirement. The new constitutions have similar structures, and most reveal the drafters' intentions to base the stability of the new constitutional systems on a significant degree of rigidity.

An analysis of the new constitutions reveals, however, as many similarities as differences. On the one hand, the new democracies share with Western countries a general tendency to limit the power of the government and to distribute its prerogatives among several governmental branches. On the other hand, some countries prefer a parliamentary system, while others experiment with a presidential or parliamentary-presidential system. With respect to constitutional enforcement, there was a general tendency to adopt mechanisms of judicial review from other countries; still no single model attracted the attentions of the drafters of the new constitutions.

Fundamental rights is an area in which the new East-Central democracies absorb most Western concepts into their constitutional models. This part of the article will review, country by country, how the new bills of rights were formed, and will evaluate the record of East-Central European countries in the protection of constitutional rights.<sup>59</sup>

#### A. *Albania: Drafting the Bill of Rights*

The constitution-making process in Albania began in 1990, when a parliamentary commission, assisted by an extra-parliamentary expert group, was formed to write a new constitution.<sup>60</sup> The first draft was completed in December 1990, and work on a second draft proceeded as Albania moved toward the Spring 1991 elections.<sup>61</sup> The draft dated March 1991 ("Draft"), was submitted to

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<sup>59</sup> The analysis begins with countries, such as Albania, Bulgaria, and Romania, which still experience many problems in protecting human rights, and it concludes with Poland where human rights violations are relatively rare.

<sup>60</sup> *Constitution Watch: Albania*, E. EUR. CONST. REV., Summer 1992, at 2.

<sup>61</sup> *See Id.* at 4.

Western constitutional experts for evaluation,<sup>62</sup> and the analysis was forwarded to Albania at the end of September 1991.<sup>63</sup>

Disputes over the Draft focused on several key issues: separation of powers, regulation of economic activity, human rights protection, and the status and function of the judiciary and the Constitutional Courts. Constitutional experts evaluating the Draft raised numerous concerns. They argued that the framework describing the basic philosophical concepts of the Albanian Constitution was unclear.

The Draft referred to Albania as a "juridical state . . . based on social justice, the protection of human rights and freedoms and on political pluralism."<sup>64</sup> One may observe, however, that the traditional interpretation of "juridical state" encompasses the notion of division of powers, the most venerated principle of Western constitutionalism. Contrarily, socialist constitutional jurisprudence usually rejected the doctrine of division of powers.

The Draft offered the traditional parliamentary framework, combining the legislative and executive branches. This enabled the legislature to vote the executive out of office without a national election by the people. The legislature, known as Albanian People's Assembly, possessed exclusive *pouvoir constituant* (the right to adopt and amend the constitution), the right to adopt statutes, and elect the President and the Council of Ministers. Western experts commented:

The vesting of primary government power in the legislature has been a hallmark for socialist regimes in Central and East Europe for many years under the Communist system. During that time, the legislatures acted primarily as a rubber stamp to Communist Party dictates, and were not expected to carry out the full exercise of governance and policy making. Under a more democratic system, the vesting of almost total power in the legislature is an invitation to authoritarianism and abuse of power. This threat can be prevented only by establishing in the constitutional framework a more evenly balanced distribution of powers between the executive, legislative and judicial branches.<sup>65</sup>

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<sup>62</sup> The March 1991 draft, analyzed *infra* note 63 [hereinafter DRAFT].

<sup>63</sup> AMERICAN BAR ASSOCIATION CENTRAL AND EAST EUROPEAN LAW INITIATIVE (CEELI), ANALYSIS OF THE DRAFT CONSTITUTION OF ALBANIA, Sept. 30, 1991 [hereinafter CEELI ALBANIAN ANALYSIS].

<sup>64</sup> DRAFT, *supra* note 63, at art. II.

<sup>65</sup> CEELI ALBANIAN ANALYSIS, *supra* note 63, at 3.

The drafters sought to maintain the socialist model for the notion of ownership. Although the Draft provided that private property could be expropriated only for public need, and that the state does not maintain a monopoly over ownership, public ownership was still privileged. Land and underground resources were the property of the state, with the distribution of land only for the use of physical persons. Absent in the Draft were declarations of the marketization of the economy. In fact, the Draft contained numerous references to "central planning" as a "mechanism of harmonization of national and local interests," reminiscent of the traditional rhetoric of the Stalinist constitutions.<sup>66</sup> These provisions ran contrary to Western standards.

Western commentators were particularly concerned with the treatment of human rights protection. The list of fundamental rights enumerated in the Draft was relatively long, and looked impressive at first glance. Although the list was adopted after Western experts evaluated it, it provoked numerous reservations.

The list of rights offered several features typical of communist constitutions. First, it provided an elaborate list of social and economic rights. As argued above, the inclination to give these rights a constitutional status goes beyond the communist legacy and stems from the broader practice of several continental European states. Thus, socialist constitutionalism was not criticized for mere constitutional coverage of social and economic rights, but rather, for the purely declaratory or descriptive character of the protection offered by the socialist basic laws.

Despite all the deficiencies of constitutional enforcement mechanisms, the socialist state managed to provide its citizens with numerous social benefits. The quality and enforceability of these services could be challenged, but their accessibility to the average East-Central European citizen was unquestionable.

The broad coverage of social and economic rights in post-socialist constitutions generated more concern than did their presence in the basic laws of the Stalinist era. The economic blunders and inefficiencies of Communism are well known and do not require further examination. State controlled economies were, however, in a position to distribute social benefits, whereas market economies are not. The experiences of wealthy European welfare states, such as Sweden, Belgium, France, and Germany clearly

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<sup>66</sup> DRAFT, *supra* note 63, at art. XIX.

demonstrate this phenomenon. Communist regime promises were carried out at great social expense. At least, however, this policy was consistent with communist programmatic manifestos. The relatively poor, new market-oriented democracies can neither offer or deliver these benefits.

In summary, the absorption of social, economic, and cultural rights from the old socialist constitutions to the new basic laws of the post-socialist era appears to contradict the clear intention of the state to support market mechanisms, rules of fair competition, and individual entrepreneurship. Several East-Central European states attempted to change the language of their constitutions and replace declarations of "social and economic rights" with general statements of a lesser promissory character. Instead of "granting rights" the state was to "promote policies" in favor of these rights. This approach would be more consistent with the availability of national resources in Albania, the poorest country in Eastern Europe.

The second reservation concerned the classification of fundamental rights and freedoms into two separate categories, namely those which were offered to all persons regardless of their nationality, and those given only to the citizens of the state. There were a number of civil liberties that an individual could claim against the state as an individual and not as a citizen. If a state intended to meet international human rights standards, it should guarantee, among other fundamental rights, the right to life and dignity, liberty and personal security, equal protection, freedom from cruel and inhuman punishment, and rights in the criminal process, to all persons.

The catalog of rights in the Albanian Draft Constitution granted most basic civil liberties such as, the right to be free and to enjoy personal security; not to be discriminated against on the basis of sex, race, color, nationality, or language; the right to personal defense; to freedom of conscience; and freedom of thought and speech, but only to Albanian citizens. These comments are still on the Draft Constitution which was replaced by the actual Charter of Rights.<sup>67</sup> Measured by international standards, this approach was not satisfactory. Moreover, the wording of the article, which granted equal rights to women, was vague and confusing. The provision listed activities in which women were to be treated equal to

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<sup>67</sup> See *infra* p. 525.



men. This implied that in other areas not listed, such as cultural activities, women received inferior rights.

Third, some experts believed that a bill of rights, coupled with implementing laws, should maintain a balance between constitutional guarantees and detailed regulations of individual activities. Although leaving extensive regulation of the boundaries of fundamental rights to statutory law is not entirely inconsistent with the experience of some Western European countries, it seems to undermine the constitutional status of fundamental rights.

### 1. *Human Rights Practices in Albania*

While the Draft discussion was still in progress, the People's Assembly in Albania moved to adopt an interim constitution. On April 29, 1991, the Assembly approved the "Law on the Major Constitutional Provisions," which immediately took effect.<sup>68</sup>

The Interim Constitution, far from meeting Western standards and similar to the Draft, had numerous inconsistencies. Article III recognizes the principle of division of powers, but typical of socialist constitutionalism, it continually refers to the People's Assembly and the president as "the Supreme Organs of the State Power," and to the government as "the Supreme Organ of State Administration."<sup>69</sup> This language suggests that the executive and the legislature are not "the powers," but rather organs of a unified and undivided power.

The Interim Constitution increased the power of the president, but left his prerogatives vague, and his relationships with the parliament unclear. On the one hand, the Constitution gave the president the right to appoint the chairman of the Council of Ministers, accept his resignation, and the right to appoint and discharge the members of the government between sessions of the Assembly.<sup>70</sup> On the other hand, the Interim Constitution gives the People's Assembly control over the Council of Ministers, and the president's appointments are subject to the Assembly's approval.<sup>71</sup> The president is also allowed to ask the People's Assembly to re-examine a law it passed, and to dissolve the parliament. The president may

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<sup>68</sup> Law on the Major Constitutional Provisions of the People's Assembly of the Republic of Albania of 1991, *translated in* The BBC Summary of World Broadcasts, May 4, 1991 [hereinafter INTERIM CONST.].

<sup>69</sup> INTERIM CONST. chs. II, III.

<sup>70</sup> INTERIM CONST. art XXVIII(6), (7).

<sup>71</sup> INTERIM CONST. art. XVI(10).

take action when the Assembly's "composition does not allow the performance of the functions of the Assembly itself and makes impossible the country's running."<sup>72</sup> This standard failed to give clear guidance as to when the president may use his dissolution power.

The Interim Constitution recognizes Albania's tendency to develop market mechanisms, but uses ambiguous language to discourage foreign investment. Article XXVII provides, "[t]he country's economy is based on the diversity of ownership, free initiative of all economic subjects," but it also states the economy is regulated by the state, and that "economic initiative of juridical and physical persons cannot develop contrary to social interest and should not impair the security, freedom and dignity of man."<sup>73</sup> The drafters of the Interim Constitution tried to respond to the concerns of Western commentators that Albanian law still favored state-owned property. Hence, the statement "the land and underground resources are the ownership of the state" was omitted from the Draft. Still, the drafters left room for the incorporation of the principle by implementing the laws to that affect. The Interim Constitution provides, "all kinds of ownership are equally defended by law," but it also states in the Constitution's typically ambiguous manner, "the assets which are of the state property are set by law."<sup>74</sup>

In April 1992, one year after the adoption of the Interim Constitution, the People's Assembly amended the Law on Major Constitutional Provisions, adding the chapter on the judiciary and the Constitutional Court. The drafters adopted the German model of a "mixed," concrete, and abstract review,<sup>75</sup> which could be triggered either by the highest executive officials, one fifth of the Deputies, local courts and local governments, or any person claiming a violation of fundamental constitutional rights. The Constitutional Court can also initiate a review on its own motion.<sup>76</sup> The Court

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<sup>72</sup> INTERIM CONST. art. XXVII(9).

<sup>73</sup> INTERIM CONST. art. X.

<sup>74</sup> INTERIM CONST. art. XI.

<sup>75</sup> The concrete or "incidenter" review is initiated by the introduction of constitutional issues before ordinary tribunals in connection with regular adversary proceedings. The abstract or "principaliter" review is triggered by the action of special government authorities submitting a law or abstract constitutional question for the court's review. See Mauro Cappelletti and William Cohen, *Two Methods of Reviewing a Constitutional Question: "Incidenter" and "Principaliter" in COMPARATIVE CONSTITUTIONAL LAW: CASES AND MATERIALS* 84-90 (1979).

<sup>76</sup> INTERIM CONSTITUTION arts. XXIV, XXV.

also has the broad power to interpret the Constitution and the laws, and to investigate the legality of elections and charges against the President of the Republic. It has jurisdiction over disputes regarding constitutional powers, and the constitutional status of the parties and other political and social organizations. The Court seems to have only suspensory power with regard to the laws, but its decisions are final in respect to other normative acts at the sub-statutory level. Unsatisfied with its given role, the Court tried to assert more power, and actively intervene in the legislative policy of the People's Assembly.<sup>77</sup>

Throughout 1992 and 1993, the Albanian Constitutional Commission struggled to improve the many defects of the first constitutional drafts, with little progress made in drafting a complete constitution. In March 1993, the Commission failed to introduce to the People's Assembly a new constitutional draft and instead submitted a Bill of Rights which was subsequently passed by a qualified majority of parliament.<sup>78</sup> In November 1994, a new version of the constitution was submitted to a national referendum, but it was opposed by more than sixty percent of the voters.<sup>79</sup>

On paper, the Charter of Rights looks even more elaborate than its predecessor. The catalog of rights is long, the number of freedoms all are entitled to was expanded. Freedoms are not contingent on duties and can be restricted only by law for reasons precisely enumerated in the Constitution. The ambiguous language of some of the criteria allowing infringement of human rights, such as "protection of morals" or "prevention of the disclosure of information received in confidence," can still pave the way for abuses of freedom of expression and information. While the Charter looks impressive, the actual Albanian record on human rights protection generates concern.

During the period of Communist rule in Albania, the country was considered the scene of probably the worst human rights abuses in Europe. After the downfall of Communism in 1990, Al-

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<sup>77</sup> In Albanian Constitutional Court Decision No. 8, the Court rewrote a section of article XIV.IV of The Law on Weapons of May 25, 1992 (No. 7566). This was widely viewed as an encroachment into the competence of the legislative body. See John Paul Jones, *The Tribunal in Tirana*, E. EUR. CONST. REV., Spring 1993, at 52-53.

<sup>78</sup> See E. EUR. CONST. REV., Spring 1993, at 2. The Charter of Rights was published in English translation on March 31, 1993, under the title "Law on a Supplement to the Law No. 7491, dated April 29, 1991 'On Principal Constitutional Provisions.'" "

<sup>79</sup> *Albanian Charter Losing*, WASHINGTON POST, Nov. 8, 1994.

bania moved away from isolationism and sought to reform itself.<sup>80</sup> The 1991 Law on Major Constitutional Provisions<sup>81</sup> guarantees the right for citizens to change their government “by free, general, direct and secret ballot.” It provides for political pluralism, and requires political parties be completely independent from state institutions, and not be ethnically or religiously based. These provisions were put to the test in the March 1992 parliamentary elections, which most international observers noted as being generally free and fair.<sup>82</sup> Upon joining the International Covenant on Civil and Political Rights (“Covenant”) in October 1991, the Albanian government attempted to prove its respect for the Covenant’s basic freedoms of expression and assembly. For example, it gave all parties access to mass media,<sup>83</sup> and allowed rallies to be held by the opposition parties.<sup>84</sup> Although no major irregularities were noted, the socialist leaders complained that some of their meetings were broken up by opponents.

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<sup>80</sup> When Albania expressed interest in becoming a member of the Conference on Security and Cooperation in Europe (“CSCE”), a CSCE delegation was sent to Albania in August 1990 and in March 1991 to observe the country’s first multi-party election. During the visit, the delegation noted the many changes that had taken place in Albania, including the extent to which the Albanian society had opened up, the presence of opposition political parties, and the Albanian people’s desire to seek out and talk to foreigners. The delegation also met with Arben Puto, chair of the Forum for the Defense of Human Rights and Fundamental Freedoms, who agreed that while many changes had occurred in Albania, there was still a lot more to be done. Specifically, he informed the delegation that there were still about 300 political prisoners in Albania. After the delegation’s intervention 270 prisoners were released. As a result of the visit, Albania was granted observer status to the CSCE. COMMISSION ON SECURITY AND COOPERATION IN EUROPE REPORT ON THE HELSINKI COMMISSION DELEGATION VISIT TO HUNGARY, YUGOSLAVIA AND ALBANIA, at 34-37 (1991), [hereinafter CSCE REP.: ALBANIA].

<sup>81</sup> Interim Constitution, *supra* note 67.

<sup>82</sup> U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES IN 1992, ALBANIA 8 (Comm. Print 103-07, 1993) [hereinafter STATE DEP’T REP.: ALBANIA].

<sup>83</sup> The international observers noted the opposition parties were able to freely use radio, television, and newspapers to conduct their campaigns. Some irregularities were found in ethnic Greek areas where ethnic Greek candidates to the parliament were harassed. To avoid similar incidents in the future, an independent group organized the Society for Free Elections and Democratic Culture “to monitor elections and to assist with the country’s difficult transition to democracy.” *Id.* at 9.

<sup>84</sup> The detailed regulations on political manifestations are provided by the July 1990 Albanian Parliamentary Decree No. 7408 “On Meetings, Rallies, and Demonstrations of Citizens in Public Places.” The Decree does not differentiate between meetings, rallies or demonstrations, but meetings in which the participants move from the agreed locations to another are considered “illegal” and are not permitted. See AMNESTY INTERNATIONAL, ALBANIA; HUMAN RIGHTS ABUSES BY POLICE, 4, 5 (1993) [hereinafter AMNESTY REP.].

The 1992 elections resulted in the first anti-communist take-over since 1944. Although the Democrats won the elections, defeating the Socialists as predicted, they inherited a country in serious economic trouble, with hungry and unemployed masses, rising inflation, widespread crime, and a collapsed economy. The Democratic Party obtained control over sixty-two percent of the seats in the National Assembly, giving Albania's parliament the largest democratic majority in all of East Europe.<sup>85</sup> Parliament appointed Democratic Party leader Sali Berisha as Albania's first non-communist president. Much to the satisfaction of the Democrats, on April 4, 1992, President Alia, the "last of the communist style dictators in Eastern Europe," resigned before the parliament could remove him from office.<sup>86</sup>

As promised, after the elections the new government submitted a bill which proposed to bar all "fascist, racist, anti-national, Marxist-Leninist, Enverist (followers of former dictator Enver Hoxha) and Stalinist" parties. It was passed by the new parliament in July 1992.<sup>87</sup> President Berisha also pursued economic reform in Albania by way of "shock therapy." By strictly adhering to the reforms suggested by the IMF, Berisha created 100,000 jobs in the private sector, increased agricultural production by twenty percent, and reduced the inflation rate to zero in June 1993. Despite these benefits, Albania is far from economic prosperity, and its people are not happy with the current economic policy being pursued.<sup>88</sup>

As in the other new democracies of East-Central Europe, the dissatisfied Albanians began turning to the former communist parties. The Albanian Socialist Party continued amassing support, since its impressive showing in the 1993 local elections where it won fifty-four percent of the vote. In the same elections, the Democrats received merely thirty-two percent of the votes. Recently, the Socialist Party adopted a "social democratic" platform under which it supports a market economy and multi-party democracy,

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<sup>85</sup> Janusz Bugajski, *A Pivotal Time in Albania*, CHRISTIAN SCI. MONITOR, Apr. 15, 1992, at 19.

<sup>86</sup> Graham Barrett, *Albania: Alia Resigns*, REUTER TEXTLINE, THE AGE MELBOURNE, Apr. 4, 1992 available in LEXIS, World library, ALLWLD file.

<sup>87</sup> The ban was challenged before the Constitutional Court, which affirmed the law on the basis that under the amended Constitution, Albania was a free market system; therefore, only parties which followed that system had the right to exist. STATE DEP'T REP.: ALBANIA, *supra* note 82 at 7.

<sup>88</sup> David B. Ottaway, *Europe's Backwater Turns Turbulent; Albania Fears Missteps as it Strides into Modern Democratic Age*, WASH. POST, July 23, 1993, at A25.

albeit at the expense of a slower pace of economic transition and a temporary re-opening of state-run factories to create jobs. Moreover, the Socialist Party leadership considers the Party the "country's true new democrats," and accused Berisha's government of moving toward a dictatorship.<sup>89</sup>

The biggest clash between Berisha's Democratic Party and the former communists came as a result of the People's Assembly vote on July 28, 1993 to lift the immunity of deputy Fatos Nano, former premier of Albania and chairman of the Socialist Party. Nano's immunity was lifted so he could be arrested for crimes committed while he was the prime minister of Albania. Nano lashed out at Berisha and his Democratic Party government, and maintained that the "Socialist Party and genuine democracy will triumph in Albania."<sup>90</sup>

On July 30, 1993 Nano was arrested for past abuses of power, and falsification of official documents. In addition to Nano, eight former leading communists, including former communist president Ramiz Alia and four former low-ranking officials, were arrested. In response to these arrests, the opposition Socialist Party demanded the release of their leader Nano, claiming "he is the victim of a government with dictatorial tendencies."<sup>91</sup> Even foreign diplomats have taken issue with these arrests, suggesting that such a return to authoritarian methods could seriously impede the reforms that Berisha so rigorously pursued.<sup>92</sup>

Generally speaking, international observers showed much concern that there has been an increase in the number of human rights violations committed by the police in Albania. In October 1993, Amnesty International compiled a report based on media reports and testimony of witnesses and victims of police violence. The report primarily focused on incidents which occurred in 1993 involving the police's use of violence to break up demonstrations by people supporting the Socialist Party, or protesting against the government. Amnesty claims the police used "excessive force in

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<sup>89</sup> *Id.*

<sup>90</sup> *Albania: Fatos Nano Hits Out at Democratic Party After Assembly Lifts His Immunity*, BBC Summary of World Broadcasts, July 31, 1993, available in LEXIS, News Library, BCSWB File.

<sup>91</sup> Benet Koleka, *Albania: Albanian Opposition, Citing Arrests, Warns of Dictatorship*, REUTER TEXTLINE, REUTER NEWS SERVICE CIS and E. Eur., Aug. 25, 1993, available in LEXIS, World Library, ALLWLD File.

<sup>92</sup> *Id.*

controlling and detaining demonstrators and failed to discriminate between violent and non-violent demonstrators or protestors.<sup>93</sup> Moreover, even though there have been major changes in Albania since 1990, Amnesty fears that human rights violations by police are officially accepted in some circumstances, and imprisonment of prisoners of conscience is still occurring.<sup>94</sup>

Of special concern to Western observers were serious problems in the treatment of ethnic minorities. The approximate ethnic composition of Albania is: Albanian, ninety percent; Greeks, eight percent;<sup>95</sup> Vlachs, Serbs, Gypsies, and Bulgarians, two percent.<sup>96</sup> Ethnic Greeks, by far the largest and most organized minority group, receive the most attention and support from abroad. In 1992-93, tension between the ethnic Greek minority and the Albanians continued to escalate, with both sides accusing the other of ill-treatment and violations of human rights.<sup>97</sup>

One of the areas of conflict became the election law which passed in February 1992, and prevented ethnically-based parties from participating in the elections. The Greek minority viewed this law as directed toward Omonia, the political and cultural organization of the ethnic Greek minority that won five seats in parliament in the 1991 elections.<sup>98</sup> Omonia protested against the 1992 law both locally and abroad, but was not allowed to participate in the elections. In response, Omonia leaders created the Unity for Human Rights Party, which was approved by the government and was successful in fielding candidates in the ethnic Greek areas of southern Albania.<sup>99</sup>

Albanians, in turn, were outraged by the treatment of the Albanian minorities in Greece. In July 1993, the Democratic Party of Albania, the Social Democratic Party of Albania, and the Democratic Alliance of Albania denounced "the shameful acts of the

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<sup>93</sup> AMNESTY REP., *supra* note 84, at 2.

<sup>94</sup> *Id.*

<sup>95</sup> There appears to be much controversy over exactly how many ethnic Greeks are located in Albania. The Commission on Security and Cooperation in Europe noted, according to Albanian figures, the total number in 1990 was between 59,000 (the official figure) and 400,000. See CSCE REP.: ALBANIAN, *supra* note 78, at 79. The State Department reported that ethnic Greek leaders claim there are 70,000-80,000 ethnic Greeks in Albania. STATE DEP'T REP.: ALBANIA, *supra* note 82, at 10.

<sup>96</sup> *Country: Albania*, KCWD/Kaleidoscope, 1993 ABC - Clio, Inc., June 17, 1994, available in LEXIS, World Library, PROFILE File.

<sup>97</sup> STATE DEP'T REP.: ALBANIA, *supra* note 82, at 10.

<sup>98</sup> *Id.* at 2, 10.

<sup>99</sup> *Id.* at 2, 9.

maltreatment, beating, torturing, violent plundering and massive expulsion of Albanian emigrants in Greece,"<sup>100</sup> claiming that such acts are "not spontaneous, but made in the course of expulsions ordered time and again for the Albanian emigrants."<sup>101</sup>

In late October 1993, after several violent border clashes between Greeks and Albanians, Greece summoned its ambassador to Albania back to Greece for consultations. The Albania people had hoped that under the new Greek government of Premier Andreas Papandreou relations between Greece and Albania would improve. Papandreou, however, stated that "good relations depend on Tirana's treatment of its Greek minority."<sup>102</sup>

The conflict between the Albanians and the Greek minority is also based on religious grounds. In 1990, the Albanian Government legalized both the private and public practice of religion, resulting in the reopening of both churches and mosques. Albania was declared a "secular state" that "observes the freedom of religious belief and creates conditions to exercise it."<sup>103</sup> Although the freedom of religion seemed to have been established in both theory and in practice, there is concern over the extent of the government's role in religious and church affairs.<sup>104</sup> This concern stems from the government's refusal to agree on the appointment of three bishops of Greek origin. The government reportedly acted in response to public opinion, which supported only ethnic Albanians being appointed to such positions, even if they are not qualified to accept such appointments.<sup>105</sup>

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<sup>100</sup> *Albanian Political Parties and Trade Unions Denounce Expulsions From Greece*, REUTER TEXTLINE, BBC Monitoring Service: E. Eur., July 5, 1993, available in LEXIS, World Library, CURRENT NEWS File.

<sup>101</sup> *Id.*

<sup>102</sup> See Stephen Weeks, *Greece Recalls Ambassador to Albania After Border Incidents*, REUTER TEXTLINE, REUTER NEWS SERVICE: W. Eur., Oct. 26, 1993, available in LEXIS, World Library, CURRENT NEWS File.

<sup>103</sup> Law of the Major constitutional Provisions of the People's Assembly of the Republic of Albania, art. VII (1991).

<sup>104</sup> STATE DEP'T REP.: ALBANIA, *supra* note 80, at 7.

<sup>105</sup> Because religion was forbidden from 1967 to 1990, the natural result was a shortage of clergy members. Because of this shortage, the Albanian authorities allowed foreign clergy members to come in to the country and "revive religious institutions and train Albanian clergy." In 1992, the spiritual head of the Christian Orthodox church appointed a Greek citizen, Archbishop Anastasios, as head of the Orthodox church in Albania. See AMNESTY REP., *supra* note 84, at 8. See also STATE DEP'T REP.: ALBANIA, *supra* note 82, at 7, 8. Ethnic tensions based on the religious background further increased in June 1993 when the Albanian government arrested and expelled an Orthodox priest and Greek citizen, Archimandrite Chrysostomos, on the charge that he had used his position to preach



Thus, despite the progress noted in the protection of human rights, Albania still is one of the most volatile regions in Eastern Europe. In July 1993, Albanian Prime Minister, Aleksandr Meksi, assured the Conference on Security and Cooperation in Europe ("CSCE") high commissioner for national minorities that Albania, as a CSCE member, is "committed to observe and implement all the principles of the charters and other documents of CSCE when it is about national minorities."<sup>106</sup> Whether Albania will follow this in practice remains to be seen. Chairman of the CSCE, Steny H. Hoyer, summarized the situation in Albania in 1991, which holds true even today in 1994. He said, "[t]his is only the beginning. The question is where Albania will go from here. While the path to multi-party elections was not an easy one for Albania, the road ahead poses even greater challenges."<sup>107</sup>

### B. *Bulgaria: Constitutional Transformation*

The pressure for reform that swept through Eastern Europe took effect in Bulgaria when President Tudor Zhivkov resigned unexpectedly on November 11, 1989.<sup>108</sup> Petar Mladenov, the former Foreign Minister, replaced Zhivkov as the new president, and the leader of the Bulgarian Communist Party.<sup>109</sup>

Until December 1989, the opposition movement in Bulgaria consisted of various separate and small groups with different objectives and strategies. In early December 1989, Bulgaria's nine leading opposition groups, led by Zhelyu Zhelev, joined together to form the Union of Democratic Forces ("UDF").<sup>110</sup> Under pressure from the opposition, the National Assembly voted on January 15, 1990, to end the Bulgarian Communist Party's monopoly on political power.<sup>111</sup> In addition, the Assembly approved provisions pro-

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separatism to the Greek minority. In response, the Greek authorities also expelled a large group of Albanians who had been working illegally in Greece. See AMNESTY REPORT, *supra* note 84, at 8.

<sup>106</sup> Albanian Premier, *President Assure CSCE Commissioner of Respect for Human Rights*, REUTER TEXTLINE, BBC Monitoring Service: E. Eur., July 31, 1993, available in LEXIS, News Library, WIRES File.

<sup>107</sup> Steny H. Hoyer, Statement at the Hearing on Democratic Developments in Albania 25 (May 22, 1991).

<sup>108</sup> Mary Battiata, *Bulgaria's Zhivkov Quits After 35 Years; Foreign Minister, 53, Replaces East Bloc's Longest-Serving Leader*, WASH. POST, Nov. 11, 1989, at A1.

<sup>109</sup> *Id.*

<sup>110</sup> *Union of Democratic Forces Sets Out Its Aims*, BBC Summary of World Broadcasts, Dec. 9, 1989, available in LEXIS, World Library, ARCNEWS File.

<sup>111</sup> *Bulgaria Tumbles Communist Monopoly*, L.A. TIMES, Jan. 15, 1990, at P2.

protecting the rights of Bulgaria's ethnic Turk and Moslem minorities. Responding to the UDF's pressure for a speedy transition to a democracy, the Assembly agreed to discuss further constitutional changes with the opposition.

The Bulgarian opposition faced several difficult problems. First, it was inexperienced and staked its future heavily on a negative campaign against the communists.<sup>112</sup> Second, the UDF lacked charismatic leaders, such as Walesa of Poland or Havel of the Czech Republic. Third, the UDF lacked a viable remedy for the ailing Bulgarian economy weakened by a mounting foreign debt, a substantial trade deficit, shortages of basic foods, and poor quality of consumer products. Fourth, the UDF had to win the confidence of a society which feared rapid change, especially economic shock-therapies. The UDF's effort to accelerate the process of economic reform met with the electorate's reservations and criticisms.

All these factors contributed to the unexpected victory of the Bulgarian Communists, renamed the Bulgarian Socialist Party ("BSP"), in the June 1990 elections. Bulgaria became the first country in Eastern Europe to return the communists to power after holding free multi-party elections.<sup>113</sup> After five unsuccessful attempts to elect a president, the parliament agreed to a "compromise candidate," Zhelyu Zhelev, who ran unopposed and obtained 284 of 389 votes.<sup>114</sup>

The elections marked the beginning of a diarchy in Bulgaria. After its victory, the BSP, led by Prime Minister Andrei Lukanov, formed a "coalition government of experts" with the Agrarian Union and the Movement for the Rights and Freedoms ("MRF").<sup>115</sup> The UDF refused to join the socialist coalition, saying that it did not want to be held responsible for the economic mistakes that the interim BSP government made under Prime Minister Lukanov.<sup>116</sup>

The division of the National Assembly caused excessive polarization of its political forces. Yet, the existence of just two major

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<sup>112</sup> Maria N. Todorova, *Improbable Maverick or Typical Conformist? Seven Thoughts on the New Bulgaria*, in *EASTERN EUROPE IN REVOLUTION* 148, 165 (Ivo Banac ed., 1992).

<sup>113</sup> Albanian multi-party elections were held for the first time in March and April 1991, in which the Communist APL got over a two-thirds majority in the Albanian parliament.

<sup>114</sup> *Bulgaria Picks Non-Communist*, L.A. TIMES, Aug. 1, 1990, at P2.

<sup>115</sup> *Bulgarian Socialist Party Nominates Lukanov for Prime Minister*, REUTERS, REUTER LIBR. REP., June 30, 1990, available in LEXIS, News Library, WIRES File.

<sup>116</sup> *Bulgarians Rally to Support Strike for Democracy*, REUTERS, REUTER LIBR. REP., June 25, 1990, available in LEXIS, News Library, WIRES File.

opponents kept the Assembly operational. Using its significant electoral victory in 1990, the socialist coalition was in a position to push forward the drafting of a constitution. Hence, the Grand National Assembly, elected in 1990, adopted the first new constitution in East-Central Europe in July 1991.

The Constitution was carefully purged of rhetoric typical of the Stalinist constitutions. It dropped terms such as "people's republic," "socialist state," "socialist achievements," and "central planning." Instead, the Republic of Bulgaria is characterized as a democratic, law-governed, social state, based on the rule of law, principles of people's sovereignty, political pluralism, division of powers, enforcement of ratified international treaties over conflicting domestic legislation, and wide protection of fundamental rights of citizens.<sup>117</sup>

The 1971 Constitution of the People's Republic of Bulgaria rejected the principle of division of powers, vesting all power in the representative organs, consisting of the National Assembly and People's Councils.<sup>118</sup> In contrast, the 1991 Constitution clearly provides that "[t]he power of the state shall be divided between a legislative, an executive and a judicial branch."<sup>119</sup>

The changes in the system of governance are less elaborate. The structure of the government does not change. Article I of the 1991 Constitution provides, "Bulgaria shall be a parliamentary republic."<sup>120</sup> The drafters shifted the functions of the State Council, the collegiate head of state, to the president. Many of the elements of the Bulgarian presidential system were borrowed from the French model.<sup>121</sup> For example, under the new constitution, the president is directly elected, and a person cannot be both a minister and a national representative at the same time.<sup>122</sup>

The president was envisaged as that of a senior statesman, who represents Bulgaria in international relations, and who consults parliamentary groups in the process of nominating a candidate for

<sup>117</sup> BULG. CONST. (1991) pmb., arts. I, IV, V, VIII, XI, XXII-LIX [hereinafter BULG. CONST.].

<sup>118</sup> BULG. CONST. (1971) art II(2), translated in THE CONSTITUTIONS OF THE COMMUNIST WORLD 38 (William B. Simons ed., 1980).

<sup>119</sup> BULG. CONST. art. VIII.

<sup>120</sup> BULG. CONST. art. I.

<sup>121</sup> For the explanation of French model see Ludwikowski, *Constitution-Making in the Countries of Former Soviet Dominance: Current Development*, supra note \*, at Part II, Chapter D: Presidential Vs. Parliamentary System.

<sup>122</sup> BULG. CONST. arts. XCIII(1), LXVIII(2).

prime minister.<sup>123</sup> The president's discretion to pick his own candidate is limited. The nominee for prime minister has to be either the candidate of the largest parliamentary group, or the candidate of the second-largest, or other major parties. If the National Assembly is subsequently unable to nominate its own candidate, the president must appoint a "caretaker cabinet" and dissolve the Assembly. The president does not have the right to veto legislative acts, rule by decree, hold referenda, or declare martial law or a state of emergency; nor is the president the chief executive.

Justice is administered by the courts, which are supervised by the Supreme Court of Appeals. The judiciary has independent and coequal status with the legislature and the executive.<sup>124</sup> The 1991 Constitution also provides for a system of administrative adjudication exercised by the Supreme Administrative Court.<sup>125</sup> Judges, prosecutors, and investigators are appointed, promoted, demoted, transferred, or dismissed by the High Judicial Council. The High Judicial Council is a self-governing judicial body composed of the presidents of the Supreme Courts, appointees of the National Assembly, and judicial authorities. The president of the Supreme Courts, the president of the Supreme Administrative Court, and the Prosecutor General are appointed or dismissed by the president based on the recommendation of the High Judicial Council.<sup>126</sup>

The Bulgarian Constitution establishes a Constitutional Court based on Western European models.<sup>127</sup> The Constitutional Court consists of twelve justices, one-third of which are elected by the National Assembly, one-third by the president, and one-third by the justices of the Supreme Court of Appeals and the Supreme Administrative Court. The Court has elaborate advisory and arbitration functions. The Constitution also vests in the Court the power of abstract constitutional review, which may be exercised if no less than one-fifth of the national representatives, the president, the Council of Ministers, the Supreme Court of Appeals, the Supreme Administrative Court or the Prosecutor General initiate it. The decisions of the Court are final, and any act ruled unconstitutional

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<sup>123</sup> BULG. CONST. arts. XCII(1), XCIX.

<sup>124</sup> STATE DEP'T REP.: ALBANIA, *supra* note 82.

<sup>125</sup> BULG. CONST. arts. CXIX(1), CSSIV, CXXV.

<sup>126</sup> BULG. CONST. arts. CXXIX, CXXX.

<sup>127</sup> For a more detailed explanation of Western models see Ludwikowski, *Constitutional-Making in the Countries of Former Soviet Dominance: Current Development*, *supra* note \*, at Part II, Chapter E: Constitutional Enforcement.

becomes invalid as of the day of the ruling.<sup>128</sup> Until recently, the Court focused on issues dealing with separation of powers, and was criticized as not being active in human rights cases. As Rumyana Kolarova wrote, "During the last year and a half, the Bulgarian Constitutional Court has played a key role in almost all essential political changes. But it has done so through careful self-restricting decision-making, more as a moderator than an active participant."<sup>129</sup>

The list of fundamental rights is long and impressive, and the drafters successfully avoided many defects of other post-socialist bills of rights. Foreigners who reside in the Republic of Bulgaria were granted all the rights under the Constitution, except for a few political freedoms reserved for Bulgarian citizens.<sup>130</sup> The drafters replaced the typical socialist clause, which limited individual rights and freedoms in the interests of the society, with the well-known liberal formula of "equal freedom;" limited only by equal rights of shareholders of social wealth. The Constitution declares that "[t]he fundamental rights of citizens are irrevocable. These rights may not be abused and may not be exercised to the detriment of the rights or legitimate interests of others."<sup>131</sup>

The catalog of social, economic, and cultural rights is exhaustive, but the drafters emphasize that the constitutional provisions are a declaration of the policies promoted by the state. For example, the Constitution confirms, "[c]itizens have the right to work,"<sup>132</sup> but drafters added a less promissory statement that "[t]he state is concerned with providing conditions for the exercise of this right."<sup>133</sup> Private and public properties are protected by law, and Bulgaria's economy is described as one "based on free economic initiative."<sup>134</sup> Still, Bulgaria, a "social state," is the sole owner of all underground resources, coastal beaches, public roadways, waters, forests, and national parks. The language used for the description of ownership of land seems to be deliberately ambiguous. The Constitution states only that "[l]and, as a chief national asset, shall enjoy particular concern and protection on the part of the

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<sup>128</sup> BULG. CONST. arts. CXL-CLII.

<sup>129</sup> Rumyana Kolarova, *A Self-Restricting Court*, E. EUR. CONST. REV., Spring 1993, at 48, 50.

<sup>130</sup> BULG. CONST. art. XXVI(2).

<sup>131</sup> BULG. CONST. art. LVII(1), (2).

<sup>132</sup> BULG. CONST. art. XLVIII(1).

<sup>133</sup> BULG. CONST. art. XLVIII(1).

<sup>134</sup> BULG. CONST. art. XIX(1).

state and society," and that "arable land shall be used for agricultural purposes only."<sup>135</sup>

In sum, the Bulgarian Constitution of 1991 can be praised for its clarity and coherence, its well-balanced concept of a parliamentary system, and its elaborate system of judicial self-government with judicial review of administrative actions. The presidential-executive relations are still confusing, and the Bulgarian Prime Minister lacks the maneuverability of the British Premier or the German Chancellor. The scope of constitutional review is fairly limited, and the functions of the Constitutional Court, which cannot be activated by either the ordinary courts or individual petitions, are predominantly advisory.<sup>136</sup> Despite these shortcomings, the 1991 Bulgarian Constitution attracted significant media attention as the first new constitution of the post-glasnost period in East-Central Europe.

### 1. *Political Changes After the Adoption of the Constitution*

After two weeks of street protests, a four day general strike led by the new trade union called Podkrepa, and severe economic crisis plaguing the country, Premier Lukanov was forced to resign on November 29, 1990.<sup>137</sup> On December 7, 1990 parliament chose Dimitar Popov, a politically independent judge, to be the new prime minister.<sup>138</sup>

In February 1991, the Bulgarian economy faced drastic reforms implemented to facilitate the transition to a market economy. Price controls were dropped leading to a ten-fold price increase on many basic items. Bulgaria also suffered severe shortages of fuel and other necessities. Production fell thirty percent since 1989 and continued to drop. Unemployment was seven percent and rising, and inflation was five hundred percent.<sup>139</sup>

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<sup>135</sup> BULG. CONST. art XVIII(1), (2). Article XIX provides also that "no foreign physical person or legal entity shall acquire ownership over land. On terms established by a law, they shall be free to acquire user rights, building rights and other legal rights."

<sup>136</sup> Two more widely discussed decisions of the Constitutional Court dealing with human rights addressed the constitutionality of the MRF, the mainly Turkish Movement for Rights and Freedoms, and on the constitutionality of a law on de-Communization of science and education passed by the parliament in December 1992. See Kolarova, *supra* note 129, at 50.

<sup>137</sup> THE POLITICAL HANDBOOK OF THE WORLD 90 (Arthur S. Banks ed., 1991).

<sup>138</sup> *Judge Chosen as Bulgaria's Prime Minister*, L.A. TIMES, Dec. 7, 1990, at P3.

<sup>139</sup> *Bulgaria Gets Few Points for Progress*, CHI. TRIB., Oct. 25, 1991, at C1.

Faced with such a grim circumstance, economic concerns dominated the elections of 1991. The elections resulted in a draw. Both major parties received almost identical support from the electorate. The UDF won 110 seats and 34.36% of the vote, and the BSP won 106 seats and 33.14% of the vote.<sup>140</sup> Although the UDF received a nominally higher percentage of votes than the socialists, the UDF was short of securing a majority of the seats in parliament. The Socialists obtained enough seats to slow the pace of reform.<sup>141</sup>

The next showdown between the UDF and the BSP was the presidential election held on January 12, 1992. This was the first time in Bulgaria's history that the people were allowed to elect a president. The main issues in the election were the economy, with a monthly inflation rate of 3.5%, and the unemployment rate at ten percent, and nationalism, directed against the ethnic Turk minority. The incumbent President Zhelev and his Vice-President Blaga Dimitrova ran against twenty-one other candidates and won in a runoff against the BSP candidate Velko Valkanov.<sup>142</sup>

The UDF government faced an electorate exhausted by factional politics and ready to support any party that would offer a coherent program of economic recovery. Many Bulgarians, disillusioned by the economic crisis, as well as the government's confrontational stance toward unions and the press, have turned against President Zhelev and, the UDF government under Prime Minister Dimitrov, including the powerful anti-communist union Podkrepa, the post-communist Independent Syndicate Confederation, the Confederation of Independent Trade Unions, and the Movement for Rights and Freedoms.<sup>143</sup> Many critics opposed the strong anti-communist stance taken by the UDF government, saying it had only added to the economic problems of Bulgaria. They claimed there was still a strong pro-communist sentiment in the country, and communist opposition was a fact with which the UDF

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<sup>140</sup> *Final Official General Election Results*, The BBC Summary of World Broadcasts, Oct. 23, 1991, available in LEXIS, News Library, BBCWB File.

<sup>141</sup> By a vote of 131-94, the Parliament chose Philip Dimitrov, a lawyer and leader of the UDF, as the new prime minister of Bulgaria. See *Dimitrov Elected Bulgarian Prime Minister*, UPI, Nov. 8, 1991, available in LEXIS, World Library, ARCNEWS File.

<sup>142</sup> Zhelev did win fifty-three percent of the vote, defeating Valkanov who received 46.6%. *Bulgarians Endorse Reform*, FIN. TIMES, Jan. 24, 1992, available in LEXIS, World Library, ALLWLD File.

<sup>143</sup> Vessela Sergueva, *Crisis Looms Large in Bulgaria*, MIDDLE EAST NEWS NETWORK, Sept. 13, 1992, available in LEXIS, World Library, ALLWLD File.

had to face. Opinion polls for Fall 1992 gave the UDF thirty-one percent of the vote, down from thirty-five percent at the beginning of the year, and gave the BSP twenty-six percent.<sup>144</sup>

In the Fall of 1992, the alliance between the UDF and the ethnic Turk's Movement for Rights and Freedoms ("MRF") broke down, resulting in the defeat of the anti-communist alliance in a parliamentary vote, and the resignation of Prime Minister Filip Dimitrov and his government.<sup>145</sup> The popularity of the UDF also decreased, due to the failure of economic reforms and the problems with the return of land seized by the communists. Even President Zhelyu Zhelev attacked Dimitrov, stating that his "anti-communist witch hunts" were dividing the country at a "time it needs unity."<sup>146</sup>

The appointment of a new government caused many problems for President Zhelev. An attempt to set up a new coalition cabinet, composed of both UDF and MRF members, failed.<sup>147</sup> In December 1992, fifty-one representatives of the National Assembly turned to the Constitutional Court requesting a binding interpretation of the provisions of the Constitution which regulated the creation of a new government. In a closed session on December 17, the Court issued a ruling which, among other things, stated:

At the beginning of this procedure (the procedure for the creation of a new government) the president is bound by the proportion of the political forces, expressed by the size of the parliamentary groups in terms of numerical strength, as well as by the order specified by the Constitution. This order, in accordance with which the candidate indicated by the parliamentary group with the greatest numerical strength is appointed first of all (Article 99, paragraph 1) and next the candidate indicated by the second largest parliamentary group (Article 99, paragraph 2) is inviolable. The president may not at this phase make a judgment regarding whom to charge with a trial mandate and may not himself seek a candidate from another parliamentary group or outside of parliament. Matters are different, however, in the event of the inability of the first two parliamentary groups to

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<sup>144</sup> *Id.*

<sup>145</sup> *Coalition Should Not Affect Reform*, FIN. TIMES, Nov. 19, 1992.

<sup>146</sup> Chris Stephen, *Bulgarian Party Will not Drop PM*, THE GUARDIAN, Nov. 12, 1992, available in LEXIS, World Library, ALLWLD File.

<sup>147</sup> *MRF Refuses to Form Coalition with the UDF; New Elections a Possibility*, BBC Summary of World Broadcasts, Nov. 21, 1992, available in LEXIS, World Library, ALLWLD File.



form a government. In this event, in conformity with Article 99, paragraph 3, the Constitution assigns the designation of a candidate for prime minister to one of the following groups. The expression used premises the existence of more than three parliamentary groups. In light of this, the Constitution prescribes that the president bestow the trial mandate on one of the next parliamentary groups, but not necessarily on the one immediately succeeding in numerical strength.<sup>148</sup>

The Court further explained that when the National Assembly consists of three parliamentary groups, and attempts to turn to the two strongest parties have failed, the president must entrust the parliamentary group ranked third in numerical strength with the task of designating a candidate for prime minister. The president is to judge whether that group would be able to implement such a mandate.<sup>149</sup> In December 1992, President Zhelev exercised his constitutional authority and turned to the BSP to nominate its candidate Petar Boyadzhiev to form a new government.<sup>150</sup> He canceled the nomination a week later after discovering that Boyadzhiev maintained dual citizenship, precluding him from becoming prime minister.<sup>151</sup> Zhelev then made an offer to the MRF to appoint a subsequent candidate, and announced his approval of that party's nominee, Lyuben Berov, an economic advisor to the president, and professor of economics at Sofia University. On December 30, 1992, by a parliamentary vote of 125 to 24, Lyuben Berov was elected prime minister, drawing support from the MRF and the BSP. The UDF boycotted Berov's appointment, accusing him of serving the communists; some UDF members, however, participated in the vote.<sup>152</sup>

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<sup>148</sup> Decision of the Bulgarian Constitutional Court No. 20 on Creation and Tenure of New Government of 12/92. 1992 U.S. Dept. of Commerce - NTIS, Central & Eastern Europe Legal Texts, Dec. 1992.

<sup>149</sup> *Id.*

<sup>150</sup> *Zhelev Begins Consultations on Forming Cabinet; BSP to Nominate Premier*, BBC Summary of World Broadcasts, Nov. 27, 1992, available in LEXIS, World Library, ALLWLD File.

<sup>151</sup> *Bulgarian PM - Designate Hits Nationality Snag*, REUTER LIBR. REP., Dec. 10, 1992, available in LEXIS, World Library, CURNWS File.

<sup>152</sup> Elizabeth Konstantinova, *Bulgarian Turks' Nominee Asked to Form New Government*, REUTER LIBR. REP., Dec. 23, 1992, available in LEXIS, World Library, CURNWS File; see also Liliana Semerdjieva, *Ex-Communists, Ethnic Turks Elect New Bulgarian Premier*, REUTER LIBR. REP., Dec. 30, 1992, available in LEXIS, World Library, CURNWS File; *Bulgaria Elects Prime Minister Nominated By Turks*, REUTER LIBR. REP., Dec 30, 1992, available in LEXIS, World Library, CURNWS File.

Berov's government entered 1993 with solemn declarations that his would be a government of privatization and continuation of reform towards a market economy.<sup>153</sup> Neither one of these goals was reached by the Berov cabinet. The volatile political situation further contributed to the faltering state of the Bulgarian economy. Furthermore, privatization did not take hold in Bulgaria, and as of late August 1993, only two medium-sized firms were privatized.<sup>154</sup> In September 1993, President Zhelev criticized Berov's cabinet, and even the prime minister conceded the "total failure of the government in privatization."<sup>155</sup> The UDF proposed several no-confidence votes in the government which were defeated because of cabinet support from both BSP and MRF members of parliament.<sup>156</sup> The result was an increasing support for the UDF from the urban areas, and a growing sense that the current stalemate would not be broken without new elections.<sup>157</sup>

## 2. *Human Rights Situation in Bulgaria*

The overall human rights situation in Bulgaria was described as "generally good" in 1992 by the Department of State in its annual country-by-country report to Congress.<sup>158</sup> Constitutional rights such as freedom of the press, freedom of association, and freedom to travel were "generally respected."<sup>159</sup> Moreover, according to the Commission on Security and Cooperation in Europe, Bulgaria made "impressive strides towards becoming a

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<sup>153</sup> *Berov Issues Policy Declaration; UDF Says He Will Be Hostage to Communists*, BBC Summary of World Broadcasts, Dec. 30, 1992, available in LEXIS, World Library, ALLWLD File.

<sup>154</sup> *Government Adopts Mass Privatization Plan*, REUTER TEXTLINE, Aug. 4, 1993, available in LEXIS, World Library, ALLWLD File; *Bulgaria: Sink or Swim Bulgarian Privatization*, REUTER TEXTLINE, Sept. 1, 1993, available in LEXIS, World Library, ALLWLD File; *Privatization Agency Chief Dismissed Due to "Slow Pace" of Reform Policy*, BBC Summary of World Broadcasts, Aug. 26, 1993, available in LEXIS, World Library, ALLWLD File.

<sup>155</sup> *Zhelev Criticizes Cabinet Over Slow Privatization*, REUTER TEXTLINE, Sept. 15, 1993, available in LEXIS, World Library, CURNWS File.

<sup>156</sup> *Bulgarian Opposition Proposes No-Confidence Vote*, REUTER TEXTLINE, July 14, 1993, available in LEXIS, World Library, CURNWS File.

<sup>157</sup> *Support for President Slipping: More Bulgarians Want Fresh Elections*, BBC Summary of World Broadcast, Sept. 17, 1993, available in LEXIS, World Library, CURNWS File.

<sup>158</sup> U.S. DEP'T OF STATE, 103D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992: BULGARIA 1 (Comm. Print 103-7, 1993) [hereinafter STATE DEP'T REP.: BULGARIA].

<sup>159</sup> *Id.* at 1.

democratic state based on the rule of law" since 1989.<sup>160</sup> Finally, Bulgaria was considered to have "a good record of compliance with its CSCE human dimension commitments."<sup>161</sup> In 1992, Bulgaria ratified the European Convention on Human Rights and accepted the optional protocol under the International Covenant on Civil and Political Rights. In May 1992, Bulgaria was also admitted as a full member of the Council of Europe.

Despite the progress that Bulgaria made in respecting human rights, there were still critical areas which Bulgaria had to improve. As mentioned above, the Bulgarian Constitution lists many rights and freedoms, which were generally respected in Bulgaria. However, there is no concrete legislation which could strengthen the rights enumerated in the Constitution, nor is there a coherent judicial procedure for handling individual petitions for human rights violations in the Constitutional Court.

Perhaps the most problematic issue is the widespread discrimination against ethnic minorities. This problem deteriorated due to the critical economic situation in Bulgaria. Although the current government is addressing the problems of the minorities, there are still constitutional provisions and societal forces that promoted the marginalization of the various ethnic minorities.

The ethnic composition of Bulgaria is divided between a Muslim-Turkish minority of approximately 822,000, a Roma (Gypsy) minority of approximately 288,000, as well as other smaller ethnic groups consisting of Pomaks, Macedonians, Armenians, Jews, and Greeks.<sup>162</sup>

The Bulgarian Constitution guarantees individual rights and equality,<sup>163</sup> but does not protect the collective rights of minorities, rejecting the term "minority" altogether.<sup>164</sup> Despite the intention of the drafters to deny the seriousness of ethnic problems in Bulgaria, the existence of such problems was confirmed by numerous Western commentators.

The current government continues to work toward redressing the grievances of those Turks living in Bulgaria who were subject to

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<sup>160</sup> COMMISSION ON SECURITY AND COOPERATION IN EUROPE REPORT ON IMPLEMENTATION OF THE HELSINKI ACCORDS: HUMAN RIGHTS AND DEMOCRATIZATION IN BULGARIA 1 (1993) [hereinafter CSCE REP.: BULGARIA].

<sup>161</sup> *Id.* at 5.

<sup>162</sup> The total population of Bulgaria by a 1992 estimate was 8,472,700. *Id.* at 13.

<sup>163</sup> BULG. CONST., arts. IV(2), VI(1), (2), XXVI(1), (2).

<sup>164</sup> CSCE REP.: BULGARIA, *supra* note 160, at 9.

mandatory assimilation by the communist government under the leadership of Todor Zhivkov during 1984-1989.<sup>165</sup> Under the forcible assimilation campaign, the Turks were forced to, among other things, adopt Bulgarian names. In addition, they were prohibited from speaking their native language and practicing their religion and culture. This campaign resulted in the 1989 flight of over 350,000 Turks to Turkey.<sup>166</sup>

Since the downfall of the communists in 1989, the treatment of the Turks and other ethnic minorities has clearly improved.<sup>167</sup> Yet, some forms of discrimination still exist. For instance, the minorities in Bulgaria are still unable to give full effect to their cultural and political rights.

The Constitution provides for the right to peaceful and unarmed assembly and the right to form associations.<sup>168</sup> Although peaceful protests are by and large permitted in Bulgaria,<sup>169</sup> in actuality, they are subject to restrictions. First, the provision only protects Bulgarian citizens, and permits are required for rallies and assemblies held outdoors. Second, organizations that threaten the country's territorial integrity or unity, or that incite racial, ethnic, or religious hatred, are not permitted to assemble.<sup>170</sup> Third, the Constitution specifically forbids the establishment of ethnically based political parties,<sup>171</sup> and prohibits its citizen's associations, including trade unions, from engaging in political activities.<sup>172</sup> These provisions directly affect the ability of the ethnic Turkish groups, the Gypsies, and other ethnic minorities in Bulgaria from having a meaningful role in politics. In early October 1993, the U.S. Ambassador to Bulgaria, William Montgomery, promised to seek

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<sup>165</sup> *Id.* at 10.

<sup>166</sup> *Id.* at 11.

<sup>167</sup> A leader of the Movement of Rights and Freedoms ("MRF"), Ahmed Karaali, stated that the Turks have come a long way since the downfall of the communists in 1989. Karaali points to the fact that the Turks "have restored all the rights taken from [them]. [Their] mosques are open, circumcision is permitted, [they] can speak Turkish, [they] have restored [their] Turkish names, and can again wear traditional Muslim clothes." Moreover, a new law provides for the return of homes to those who had been forced to give up their possession during the forced assimilation campaign. See, Mike Power, *Bulgaria's Muslim Minority Enjoys Peaceful Resurgence*, THE GUARDIAN, June 17, 1992, available in LEXIS, World Library, TXTNWS File.

<sup>168</sup> BULG. CONST. arts. XXXVII(1), XXXVIII(1).

<sup>169</sup> CSCE REP.: BULGARIA, *supra* note 160, at 6.

<sup>170</sup> BULG. CONST. art. IX(4).

<sup>171</sup> BULG. CONST. art. IX(4).

<sup>172</sup> BULG. CONST. art. X(4).

changes to the Bulgarian Constitution, specifically with regard to the provision that prevents ethnically based political parties.<sup>173</sup>

Likewise, there is a clause in the electoral law which prohibits any organization, not legally registered as a political party, from running an independent list of candidates in parliamentary or local elections.<sup>174</sup> This provision, along with the ban on ethnically based political parties, effects the MRF, a political party created by the Turkish minority in January 1990. In 1991, a court denied MRF the right to renew its registration as a political party. However, the Central Electoral Commission ruled that the MRF's 1990 registration for the parliamentary elections was still valid. The Electoral Commission's ruling was challenged in both the Constitutional Court and the Supreme Court. The courts' decisions softened the interpretation of the constitutional ban, indicating that it had to be interpreted in accordance with other portions of the Constitution, and that no ethnically-based political party would be allowed if the party sanctioned ethnic supremacy or conflict. As a result of these decisions, the MRF played an important role in the most recent parliamentary elections of October 1991, by securing twenty-four seats in the National Assembly and joining forces with the UDF to form a coalition government. The coalition dissolved in 1992.

Most problematic, as is the case in most other Central and Eastern European countries, is the treatment of the Gypsies, also known as Roma.<sup>175</sup> Although basic freedoms for this minority group improved since the communist era, the Gypsies still face discrimination. There have been numerous reports of police mistreat-

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<sup>173</sup> *Ambassador Wants Changes to Bulgarian Constitution*, REUTER TEXTLINE, Oct. 8, 1993, available in LEXIS, World Library, TXTNWS File. The statement of Ambassador Montgomery caused quite a disturbance in the Bulgaria Media, which responded by stating "Bulgaria is a sovereign state and no one can dictate what [it] should do." The Media accused Montgomery of trying to interfere with the domestic affairs of Bulgaria. Despite this reaction, the U.S. State Department confirmed that Montgomery's comments accurately reflected the Department's views. See Philippa Fletcher, *Bulgaria: U.S. Sofia Envoy Moves To Defuse Over Ethnic Rights*, REUTER TEXTLINE, Oct. 11, 1993, available in LEXIS, World Library, TXTNWS File; See also *Bulgaria: Presidential Advisor Says Ban on Ethnically-Based Parties "Discriminatory"*, REUTER TEXTLINE, BBC Monitoring Service: E. Eur., June 15, 1993, available in LEXIS, World Library, TXTNWS File.

<sup>174</sup> STATE DEP'T REP.: BULGARIA, *supra* note 158.

<sup>175</sup> Articles XI and XII of the Bulgarian Constitution were also utilized to deny registration of the Democratic Roma Union as a political party, even though membership in the Union is open. In October 1992 the Union re-emerged under the name "United Roma Organization" ("URO"). *Id.*

ment of the Gypsies.<sup>176</sup> In June 1993, the leadership of the Gypsy Union stated, "Bulgarian Gypsies are subjected to discrimination, police violence, human rights violations, manipulation by parties and the media, administrative oppression, insolence in the administration of the law, and cynical nationalism."<sup>177</sup> In September 1992, Amnesty International wrote a letter to the Minister of Justice concerning the treatment of the Roma. In October 1992, the Minister of Justice responded that "the Ministry of the Interior has initiated a prompt and impartial investigation of the minority situation here in Bulgaria."<sup>178</sup>

Human rights monitoring agencies also observed that since the fall of communism, religious freedoms expanded allowing the average citizen to freely exercise his or her religion.<sup>179</sup> The Constitution provides for freedom of religion,<sup>180</sup> and there are no restraints on attending religious services, receiving religious education, obtaining religious publications, or contacting other religious people abroad.<sup>181</sup> Religious materials, including Bibles, can be freely imported and printed. Various religious newspapers for Muslims, Catholics, and Jews are printed regularly.<sup>182</sup> Church property, confiscated or closed during the communist rule, has been returned or reopened.

Freedom of religion guaranteed by the Constitution is limited by two provisions. The first recognizes the Eastern Orthodox religion as the traditional religion of Bulgaria.<sup>183</sup> The second provides that all religious entities must register with the Directorate of Religious Affairs ("DRA"), which was created in 1991.<sup>184</sup> Since its establishment, DRA has been involved in a number of contentious removals of the leaders of both the Eastern Orthodox and Muslim religions.<sup>185</sup> Currently, over twenty-five religious groups are registered with the DRA,<sup>186</sup> yet, registration is only permitted if the

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<sup>176</sup> *Bulgaria: Gypsy Union Protests Against Discrimination and Violations of Human Rights*, REUTER TEXTLINE, June 25, 1993, available in LEXIS, World Library, TXTNWS File.

<sup>177</sup> *Id.*

<sup>178</sup> AMNESTY INTERNATIONAL, ANNUAL REPORT ENTRY 1993: BULG. (1993).

<sup>179</sup> CSCE REPORT: BULGARIA, *supra* note 160, at 7.

<sup>180</sup> BULG. CONST. art. XXXIV.

<sup>181</sup> CSCE REP.: BULGARIA, *supra* note 160, at 7.

<sup>182</sup> STATE DEP'T REP.: BULGARIA, *supra* note 158.

<sup>183</sup> BULG. CONST. art. XI(3).

<sup>184</sup> CSCE REP.: BULGARIA, *supra* note 160, at 8.

<sup>185</sup> *Id.*

<sup>186</sup> STATE DEP'T REP.: BULGARIA, *supra* note 158.

religion's tenants are consistent with Bulgarian law and elections of religious officials is conducted properly.<sup>187</sup> Although no religious group was denied the right to register with the DRA, commentators noted that this provision contradicts the constitutional provision of separation of church and state.<sup>188</sup>

Under the Constitution, Bulgarians have the right to emigrate and travel abroad and, as of January 1991, they no longer need to obtain exit visas.<sup>189</sup> The only restriction on this right to freely travel is for exceptional circumstances, such as national security.<sup>190</sup> Every citizen has the right to return to Bulgaria,<sup>191</sup> and may not be forcibly expatriated,<sup>192</sup> or deprived of citizenship acquired at birth.<sup>193</sup> In response to the economic strife that existed in the country in 1992, thousands of Bulgarians emigrated to seek better economic opportunities abroad.

The Bulgarian media is relatively free after years of state control. The Constitution forbids censorship.<sup>194</sup> In fact, there is a wide variety of political views expressed in an array of newspapers, journals, and books. There has also been an emergence of independent radio stations. Because many newspapers are affiliated with political parties or trade unions, they are highly politicized.<sup>195</sup>

Recently there have been charges of censorship in the form of various dismissals of media personnel. Parliament removed Asen Agov, director general of the national television under the UDF-Dimitrov government, after Agov made numerous innovative changes in Bulgarian television. In June 1993, Prime Minister Berov removed Ivo Indzev, director of the state news agency, for giving distorted information pertaining to state institutions. In July 1993, the Bulgarian Supreme Court stated that the government had no authority to exercise control over the agency, and ruled that the removal of Indzev was unconstitutional.<sup>196</sup>

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<sup>187</sup> CSCE REP.: BULGARIA, *supra* note 160, at 8.

<sup>188</sup> STATE DEP'T REP.: BULGARIA, *supra* note 158.

<sup>189</sup> CSCE REP.: BULGARIA, *supra* note 160, at 7.

<sup>190</sup> BULG. CONST. art. XXXII(1).

<sup>191</sup> BULG. CONST. art. XXXII(2).

<sup>192</sup> BULG. CONST. art. XXIII(4).

<sup>193</sup> BULG. CONST. art. XXV(3).

<sup>194</sup> BULG. CONST. art. XXXVI(1).

<sup>195</sup> CSCE REP.: BULGARIA, *supra* note 160, at 6.

<sup>196</sup> *Id.* See also Rumyana Kolarova & Dimitr Dimitrov, *Media Wars in Sofia*, E. EUR. CONST. REV., Summer 1993, at 48-51.

The conclusions of the CSCE Report on human rights and democratization in Bulgaria correctly summarized the situation in Bulgaria:

While Bulgaria faces considerable problems in its post-communist transition, and will continue to in the foreseeable future, it is doing much better than most of its Balkan neighbors. Moreover, it is exceeding the expectations of those who until recently viewed Bulgaria through the prism of being the Soviet Union's "16th republic" and the home of papal assassination plots and forcible assimilation campaigns. Despite its very real problems, Bulgaria is indicating that it is more tolerant, pluralistic, democratic and stable than many would have supposed.<sup>197</sup>

### C. Romania: Post-communist Communism

The end of communist dictator Nicolae Ceausescu's rule in late December 1989 did not terminate communist dominance in Romania. The 1990 elections resulted in a landslide victory for the left-wing National Salvation Front ("NSF"). The candidate of this party, Ion Iliescu, was elected President of Romania, receiving 85.07% of the vote. The NSF won a two-thirds majority in both houses of parliament, receiving 62.31% of the vote of the lower house and 67.02% of the vote for the upper house.<sup>198</sup> Although the victories of both the NSF and Iliescu were predicted, the extent of the landslide was surprising.

The second elections in 1992 did not significantly change the balance of power in Romania, leaving communists at the helm of the country's politics. As was predicted in the presidential race, no candidate won an absolute majority, thus making a second round run-off election mandatory. Surprisingly, despite national opinion polls, Iliescu received a higher percentage of votes than the main opposition candidate, Emil Constantinescu. The second round run-off presidential election was held on October 11, 1992, with Iliescu winning over sixty-one percent of the votes to defeat Constantinescu, who obtained only thirty-nine percent of the votes.<sup>199</sup>

In the parliamentary elections, the results were even more surprising. The former communists defied earlier predictions by re-

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<sup>197</sup> CSCE REP.: BULGARIA, *supra* note 160, at 23.

<sup>198</sup> *Final Election Returns*, BBC Summary of World Broadcasts, May 28, 1990, available in LEXIS, World Library, TXTNWS File.

<sup>199</sup> *Rumanian President Calls for 'Exceptional Measures' Against Crime*, UPI, Oct. 13, 1992, available in LEXIS, World Library, TXTNWS File.



ceiving about thirty percent of the votes and prevailed over the democrats, who only received about twenty percent of the votes.<sup>200</sup> Because no party won a clear majority, future legislative action depended on the winners' ability to form a coalition government. The task of appointing a prime minister took almost a month; finally, on November 4, 1992, at a meeting between Ilescu and parliamentary party leaders, Nicolae Vacaroiu was appointed the new prime minister.<sup>201</sup> Ilescu appointed the non-partisan Vacaroiu, calling him a "man of reform."<sup>202</sup>

In March 1993, Vacaroiu presented a four-year economic program of "the continuation and consolidation of reform," which provoked a furious reaction from the opposition, led by former prime minister Petre Roman's NSF. The program continued free-market economic reforms of the previous post-communist governments, but according to the opposition it makes no promises with regard to economic revival in the near future, and only paid lip-service to social welfare. Furthermore, the opposition maintains the program fails to mention specifics, and sets no timetables for affecting the reforms, thus departing from the economic shock therapy previously attempted by post-communist governments.<sup>203</sup> To display their disapproval of Vacaroiu's program, the opposition parties made several unprecedented moves for post-war Rumanian political culture. In early January 1993, the opposition formed a "shadow cabinet" to "fight the shortcomings of the present government,"<sup>204</sup> and on March 12, 1993, it submitted a motion of no-confidence for the economic program.<sup>205</sup> According to the Constitution, such a motion must be debated by parliament within three days and then submitted for a secret ballot. The motion described the current government as "disoriented" and said its plans would "plunge Romania deeper into economic crisis."<sup>206</sup> On March 19,

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<sup>200</sup> *Romania: After the Victory, a Deluge?*, E. EUR. NEWSL., Oct. 5, 1992.

<sup>201</sup> *Nicolae Vacaroiu Named as New Rumanian Premier*, BBC Summary of World Broadcasts, Nov. 5, 1992, available in LEXIS, World Library, TXTNWS File.

<sup>202</sup> *Tough Times Ahead for New Rumanian Premier*, AGENCE FRANCE PRESSE, Nov. 5, 1992, available in LEXIS, World Library, AFP File.

<sup>203</sup> Peter Humphrey, *Rumanian Government Faces Crucial Economic Debate*, REUTER ASIA-PACIFIC BUS. REP., Mar. 8, 1993, available in LEXIS, World Library, TXTNWS File.

<sup>204</sup> *Romania's Ex-Ruling Party Forms Shadow Cabinet*, REUTERS, Jan. 7, 1993, available in LEXIS, World Library, TXTNWS File.

<sup>205</sup> Peter Humphrey, *Romania Opposition Formally Submits Confidence Motion*, REUTERS LIBR. REP., Mar. 12, 1993, available in LEXIS, News Library, WIRES File.

<sup>206</sup> Peter Humphrey, *Romanian Government Survives No-Confidence Vote*, REUTER EUR. BUS. REP., Mar. 19, 1993, available in LEXIS, News Library, WIRES File.

1993, the government's economic strategy was put to a vote in parliament. This was the first parliamentary no-confidence motion in seven decades. The result was 260-192 in favor of the government.<sup>207</sup> Although the government survived this vote, the government's position was nonetheless severely weakened by the slowdown in economic reforms, rising unemployment, triple-digit inflation, and low wages. Pressure from the opposition is quickly mounting for a change in government. This factor, combined with conflicts within the ruling coalition, can lead to early elections or a possible removal of the current government.

### 1. *Constitutional Development*

The communist dominance in the Rumanian National Assembly during 1990-91 undoubtedly had one beneficial aspect. The communists, attempting to establish their reputation as reformers, declared the primary task of the new parliament would be to draft a new constitution. The communist-dominated parliament completed its task of adopting a new constitution fifteen months after a Constitutional Commission was formed in June 1990.<sup>208</sup> The Commission, consisting of parliament deputies from Iliescu's National Salvation Front, discussed the draft Constitution with a number of experts from the Central and East European Law Initiative ("CEELI") in the Summer and Fall of 1991 in Bucharest and Washington, D.C. Preliminary and final drafts were debated in the full Constituent Assembly and, after submitting it to a referendum, the final draft was passed on November 21, 1991, and promulgated on December 8, 1991.<sup>209</sup>

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

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<sup>207</sup> *Id.*

<sup>208</sup> *Constitution Watch: Romania*, E. EUR. CONST. REV., Spring 1992, at 4.

<sup>209</sup> *Id.*

A more careful examination of this list raises several concerns. For example, minority interests, a notorious problem in Romania, require more sophisticated safeguards than regular guarantees of equality before the law; such as, impartiality of the courts, and respect for minorities' languages.<sup>210</sup>

The protection of the rights of aliens does not measure up to current international standards.<sup>211</sup> Among other problems, if the freedom of movement of citizens is to be protected, the restrictions of this right should be laid down under the Constitution, not ordinary law. Restriction on the exercise of individual rights and freedoms, when viewed as offending a vaguely defined "public morality," also raises some concern.<sup>212</sup> Still, with all these deficiencies, the Western observers concluded that the "letter and the spirit of the Constitution of Romania amply meet the requirements of the European Convention on Human Rights."<sup>213</sup> They commented on a sort of "dual strategy" being utilized by the state authorities by which, "on the one hand there is at least a formal reliance on the Constitution, which is clearly pluralistic and democratic. On the other hand, there are still structures dating back to the former system and harboring officials who served under the dictatorship."<sup>214</sup> Because of the lack of legislation, which could strengthen and implement the Constitution, the Rumanian people do not avail themselves of the rights granted by the basic laws, and do not file administrative complaints regarding the numerous violations of the constitutional provisions.<sup>215</sup>

Furthermore, in order to properly evaluate the constitutional rights, it is essential to examine the judicial enforcement of the constitutional guarantees. The Rumanian Constitutional Court, established by a law adopted by the National Assembly on May 16, 1992,<sup>216</sup> mimics the French model of political, rather than "sensu

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<sup>210</sup> ROM. CONST. arts. VI, LIX(2), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD (Gisbert Flanz ed., 1992).

<sup>211</sup> ROM. CONST. art. XVI.

<sup>212</sup> ROM. CONST. arts. XXVI, XLIX.

<sup>213</sup> Alphonse Spielmann & Jochen A. Frowein, *Report on Human Rights in Romania*, 14 HUM. RTS. L.J. 133, 136 (1993).

<sup>214</sup> Jochen A. Frowein, *Report on the Visit to Romania*, 14 HUM. RTS. L.J. 136, 137 (1993).

<sup>215</sup> *Id.* at 139. See Spielman & Frowein, *supra* note 213, at 133.

<sup>216</sup> The Court was founded on June 3, 1992. See *Constitution Watch: Romania* E. EUR. CONST. REV., Summer 1992, at 5.

stricto," judicial review.<sup>217</sup> The Court may not convene on the initiative of other courts, or on its own initiative. The right to initiate constitutional review is reserved for a few political figures who usually belong to the same majority which passed the challenged statute. The political figures consist of the presidents of both chambers, fifty deputies, and twenty-five senators.<sup>218</sup> The Court can neither decide on the constitutionality of laws in force nor ratify international agreements. The Court's power to hear individual complaints on violations of constitutionally guaranteed rights is very vague. With the exception of the power to review a legislative enactment that was drafted but not yet promulgated, and some additional supervisory functions, the powers of the Court are very limited. The decision of the Court concerning the unconstitutionality of laws may be overruled by a two-thirds majority of parliament. In France, this system works in combination with the network of administrative courts, with the Conseil d'Etat (Council of State) at the top, reviewing the legality of the administrative acts. In the absence of this system, judicial enforcement of constitutional rights in Romania may still be difficult.

The Constitution creates a parliamentary form of government with a dual executive and a bicameral legislature. The rationale for the existence of the second chamber in the Rumanian system is not clear. The chambers are equal and elected in the same way. The members of the Parliament, deputies and senators, represent the entire country and cannot be bound by the instructions of their constituencies. The frequency in which the chambers meet in joint sessions further confirms the belief that their functions are basically the same.

There are four justifications for two chambers. First, a second parliamentary chamber is usually established to promote regionalism, as is the case of Belgium, Spain, and Italy. Second, at times the second chamber is a federal component of the legislative body, as is the case in the United States, Germany, Switzerland, Russia, and Yugoslavia. Third, a two chamber system simply survived in countries with strong traditions of bicameralism, such as the United Kingdom. Fourth, in some new democracies of East-Cen-

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<sup>217</sup> For further commentary on the French model of constitutional review see Ludwikowski, *Constitution-Making in the Countries of Former Soviet Dominance*, *supra* note \*, at Part II, Chapter E: Constitutional Enforcement.

<sup>218</sup> The Court can also convene at the request of the President of Romania and the Supreme Court of Justice. ROM. CONST. art. CXLIV.

tral Europe, such as Poland, second chambers were set up for political reasons to counterbalance the influence of the communist nomenclature in the first chamber. As none of these reasons characterize the Rumanian political environment, the existence of two chambers seems to be of little use.

The prerogatives of the directly elected President are limited. Before promulgation, the President may refer a law to Parliament for reconsideration, but the law is promulgated if Parliament passes it again by a simple majority.<sup>219</sup> The President nominates a candidate for the post of prime minister, who is appointed only if there is a vote of confidence from Parliament.<sup>220</sup> The President, after consulting the presidents of both chambers, may dissolve Parliament once a year if Parliament does not approve the formation of the government within sixty days of the first request.<sup>221</sup> The President is the commander-in-chief, and can institute a popular referendum, after consulting Parliament.<sup>222</sup>

Despite several flaws, the Constitution set up a solid framework for the further development of democratic mechanisms in Romania. Whether this framework will be used to strengthen the communist legacy or to peel off the country's neo-communist label depends on the Rumanians themselves.<sup>223</sup> In an interview on September 25, 1992, preceding his electoral victory, President Iliescu said, "It is not up to others, but up to the Rumanian people to decide who is the best representative for them."<sup>224</sup> At least until recently, this seemed to be true.

## 2. *Human Rights Practices in Romania*

As was the case of Albania and Bulgaria, the Department of State in its Report on Human Rights Practices for 1992 stated that in Romania, "respect for human rights continued to improve in 1992, particularly with regard to institutionalizing democratic principles and respect for human rights in Romania's legal system and

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<sup>219</sup> ROM. CONST. art. LXXVII.

<sup>220</sup> ROM. CONST. art. LXXXVIII.

<sup>221</sup> ROM. CONST. art. LXXXIX.

<sup>222</sup> ROM. CONST. arts. XC, XCII.

<sup>223</sup> Peter Maass, *Psst! Iliescu Reelected President*, WASH. POST, Oct. 13, 1992, at A18.

<sup>224</sup> *Romania's Ex-Communist President Faces Tough Reelection Bid Today*, WASH. POST, Sept. 27, 1992, at A44.

the conduct of generally free and fair elections."<sup>225</sup> There is a consensus among the observers<sup>226</sup> that since 1990 there had been a decrease in violence related to the elections, and during the 1992 campaign, all the major parties had access to the media.<sup>227</sup> According to the United States Department of State, the press was "free of state censorship or interference and published a wide variety of opinions."<sup>228</sup>

With regard to freedom of expression, the Constitution provides that censorship of any kind is prohibited.<sup>229</sup> Thus, at least theoretically, Rumanians can freely express virtually any opinions they desire. Still, careful observation reveals some limitations imposed on this freedom. For example, the Constitution prohibits defaming the country.<sup>230</sup> This provision could be construed as restricting people from criticizing the government.<sup>231</sup> On the other hand, some other constitutional limitations imposed on freedom of expression are not observed in practice. The Constitution forbids, among other things, provoking war, aggression, or ethnic, racial, class, or religious hatred.<sup>232</sup> However, there is a small but influential ultranationalist press in Romania which targets Jews, Hungarians, and Gypsies and is tolerated by the government. The opposition also claims that their freedom of expression is curbed by the government's interference with the supply of printing materials.<sup>233</sup> Although the political races of 1992 exposed these irregularities, the observers concluded that they did not seem to affect the final results of the elections.<sup>234</sup>

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<sup>225</sup> U.S. DEP'T OF STATE, 103D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992: ROMANIA 876, 877 (Comm. Print 103-07, 1993) [hereinafter STATE DEP'T. REP.: ROMANIA].

<sup>226</sup> Over 7000 Rumanian citizens, including human rights groups and civic organizations, monitored the elections. *International Human Rights Law Group, Most-Favored-Nation (MFN) Trade Status For Romania: The Current Human Rights Situation 2* (1993) [hereinafter Law Group Report].

<sup>227</sup> *Id.* at 2; COMMISSION ON SECURITY AND COOPERATION IN EUROPE, REPORT ON THE U.S. HELSINKI COMMISSION DELEGATION TO ROMANIA, MACEDONIA, KOSOVO AND VIENNA 2 (1993) [hereinafter HELSINKI COMMISSION REP.]; STATE DEP'T REP.: ROMANIA, *supra* note 225, at 887.

<sup>228</sup> STATE DEP'T REP.: ROMANIA, *supra* note 225, at 879.

<sup>229</sup> ROM. CONST. art. XXX(1), (2).

<sup>230</sup> ROM. CONST. art. XXX(7).

<sup>231</sup> See STATE DEP'T REP.: ROMANIA, *supra* note 225.

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* at 879.

<sup>234</sup> Law Group Report, *supra* note 226, at 3.

The 1992 campaigns also gave human rights observers an opportunity to comment on freedom of assembly and association, which are clearly guaranteed by the Constitution.<sup>235</sup> During the parliamentary and presidential campaigns, Rumanians attended many political rallies, and the general opinion was that both the constitutional provisions and the more detailed regulations of the law on public assembly were respected.

The government generally did not interfere with the actions of human rights groups, which mushroomed in Romania following the revolution of 1989<sup>236</sup> and it ratified international protocols and conventions on human rights protection. The Rumanian Constitution provides that international law takes precedence over national law. Article 20 specifically refers to international treaties dealing with human rights.<sup>237</sup> These provisions gave rise to several actions by Rumanian human rights groups in conjunction with international organizations. For example, the Hungarian Democratic Union of Romania ("HDUR"), which represents 1.6 million ethnic Hungarians, requested that the Council of Europe investigate the treatment of ethnic minorities before allowing Romania admission. The HDUR submitted to the Council's Secretary General a report listing specific complaints. The HDUR maintained that the Constitution promoted assimilation and discrimination by stipulating that Romania is a national unitary state where Rumanian is the official language. Moreover, HDUR asserted that Romania should accept

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<sup>235</sup> "Meetings, demonstrations, parades, or any other form of assembly are free and may be organized and held only in a peaceful manner, without any kind of weapons." ROM. CONST. art. XXXVI. Furthermore, the law on public assembly provides for the right of Rumanians to assemble peacefully as long as meetings do not "interfere with other economic and social activities[,] . . . [take place] near locations such as hospitals, airports, or military installations[,] . . . espouse Communist, racist, or Fascist ideologies or commit actions contrary to public order or national security." See STATE DEP'T REP.: ROMANIA, *supra* note 225, at 880. Moreover, Romanians can create associations and political parties and then secure legal status for these groups by proving a membership of no less than 251 people. *Id.*

<sup>236</sup> The most active human rights groups are the League for the Defense of Human Rights ("LADO"), the Pro-Democracy Association, local groups of the Helsinki Watch and the Helsinki Committee, the Independent Rumanian Society for Human Rights, and the Association of Former Political Prisoners.

<sup>237</sup> Art. XX(1) provides, "Constitutional provisions on the rights and freedoms of citizens shall be interpreted and applied in accordance with the Universal Declaration on Human Rights and with other treaties and pacts to which Romania is a party." Art. XX(2) states, "[i]f there is disagreement between the pacts and treaties on fundamental human rights to which Romania is a party and domestic laws, then international regulations will have priority." ROM. CONST. art. XX(1), (2).

both the European Convention on Human Rights and the European Charter on Minorities Languages. The Secretary General showed some attention to the HDUR's concerns, stating, "Romania should continue to take steps in favour [sic] of human rights and the rights of ethnic minorities."<sup>238</sup>

In fact, there was much controversy over granting Romania full membership to the Council of Europe. In late September 1993, the Parliamentary assembly conditionally approved Romania's application. Specifically, there was concern with Romania not being "entirely democratic." Furthermore, the justice system, freedom of the press, and the treatment of ethnic minorities in Romania were widely criticized.<sup>239</sup>

Finally, on October 4, 1993, Romania became the twenty-third member of the Council of Europe, despite lingering questions surrounding Romania's human rights situation. While the Council recommended granting full membership to Romania, the parliamentary assembly nonetheless demanded that the Council monitor guarantees made by Romania regarding ethnic minority rights, freedom of the press, the independence of the judiciary, religious education, and the decriminalization of homosexuality.<sup>240</sup>

Another freedom widely discussed in connection to Romania is the freedom of movement. The Constitution allows free travel within Romania, as well as the right to emigrate, to travel, and to return.<sup>241</sup> There are no official restrictions on this freedom, except that people are forbidden to travel to certain areas used for military purposes. Moreover, the State Department Report confirmed that freedom of movement is respected in Romania.<sup>242</sup>

Freedom of movement, however, caused some problems for the Rumanian government. In September 1993, a bilateral agreement was signed by Romania and Germany providing for the return of approximately 30,000 Rumanians, mostly Gypsies who had been denied asylum in Germany to Romania. The Rumanian government confirmed the Gypsies' right to travel abroad, but also ad-

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<sup>238</sup> Adrian Dascalu, *Romania's Ethnic Hungarians Complain To European Council*, REUTER LIBR. REP., Sept. 2, 1993, available in LEXIS, News Library, WIRES File.

<sup>239</sup> *France: Council of Europe Body Critical of Romania Rights*, REUTER EUR. COMMUNITY REP., Sept. 28, 1993, available in LEXIS, News Library, WIRES File.

<sup>240</sup> *Romania Admitted to Council of Europe*, REUTER EUR. COMMUNITY REP., Oct. 4, 1993 available in LEXIS, News Library, WIRES File.

<sup>241</sup> ROM. CONST. art. XXV(1), (2).

<sup>242</sup> STATE DEP'T REP.: ROMANIA, *supra* note 225, at 880.



mitted that those who returned found reintegration problematic. The authorities continue to face problems with providing any sort of resettlement assistance for them.<sup>243</sup>

In 1991, Romania signed the 1951 Convention and its 1967 Protocol relating to the Status of Refugees. The Department of State noted that the Rumanian government does not have a plan, and is not taking any steps to prepare to implement the 1951 Convention. The observers confirmed that refugees in Romania live in inadequate conditions while awaiting a determination of their status.<sup>244</sup>

Regarding religious freedoms, most problems faced by the Rumanian government stem from claims for restitution of assets by religious groups. There are 130 religious sects registered in Romania, including Rumanian Orthodox (eighty percent), Roman Catholic (six percent), and Calvinist, Lutheran, Jewish, and Baptist (four percent combined). Virtually all registration applications are accepted. The Mormon Church's application is still pending.<sup>245</sup> Since the 1989 revolution, the government returned to the churches only a few pieces of property. This small distribution gave rise to major disputes between the Byzantine Rite Catholic Church and the Rumanian Orthodox Church over the rights to these assets.<sup>246</sup>

Thus, one may conclude, that there is a general desire and willingness by the Rumanian government to reform and improve the overall human rights situation in Romania. However, Romania's treatment of ethnic minorities can improve. The Department of State estimates there are twenty-two ethnic minority groups in Romania, representing ten percent to twelve percent of the population.<sup>247</sup> Romania's ethnic composition is Rumanian (89.1%), Hungarian (7.8%), German (1.5%), and Ukrainian, Serb, Croat, Russian, Turk, and Gypsy (1.6% combined).<sup>248</sup> The International Human Rights Law Group considered the situation of ethnic Hungarians to be the "most politically contentious minority issue in

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<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Id.* at 881.

<sup>248</sup> KALEIDOSCOPE, COUNTRY: ROMANIA, Aug. 24, 1993, available in LEXIS, Europe Library, KCWD File.

Romania."<sup>249</sup> Ethnic Hungarians had continually demanded rights of speech and education in their language, claiming that they are deprived of control over their cultural autonomy.<sup>250</sup>

The primary area of discrimination against ethnic Hungarians is in the Transylvanian city of Cluj, where Mayor Gheorghe Funar systematically denied Hungarians various rights and privileges. A delegation from the Helsinki Commission, sent to Romania in April 1993, expressed concern with the volatile situation in Cluj, and described the situation as "perhaps the most visible example of continuing tensions between ethnic groups."<sup>251</sup>

The Gypsies, another ethnic minority, continued to suffer discrimination in the workplace and school, as well as economic discrimination, police mistreatment, and discrimination by ultra-nationalist groups. In 1991, a commission of the International Labor Organization (ILO) reported that Rumanian Gypsies were subjected to various forms of discrimination directly related to their lower status in society. Gypsies were saddled with the least paying, lowest status jobs, and denied employment or academic advancement available to other Rumanian citizens. Although the government purportedly tried to remedy these problems, in June 1992 the ILO issued a report stating the situation of the Gypsies "had not changed appreciably."<sup>252</sup>

Because Rumanians have a tendency to associate Gypsies with criminal social elements, many Gypsies suffer numerous vigilante style attacks.<sup>253</sup> Last year Amnesty International claimed Romania had violated human rights by allowing the lynching of three Gypsies in September 1993.<sup>254</sup> Amnesty International wrote to President Ilescu, noting its concern with the violence against the Gypsy community.<sup>255</sup>

In 1993, the Rumanian record on human rights protection was carefully studied, with an eye toward regranting the United States's

<sup>249</sup> Law Group Report, *supra* note 226, at 12.

<sup>250</sup> *Id.*

<sup>251</sup> HELSINKI COMMISSION REP., *supra* note 227.

<sup>252</sup> STATE DEP'T REP.: ROMANIA, *supra* note 225 at 881-82.

<sup>253</sup> *Id.* at 882. According to *Expres*, a weekly independent magazine, over one hundred Gypsy homes have been set on fire or vandalized over the past three years. See Adrian Dascalu, *Romanian Gypsies Fall Victim to Race Attacks*, REUTERS, Oct. 25, 1993, available in LEXIS, News Library, WIRES File.

<sup>254</sup> See *Romanians Vent Old Hatreds Against Gypsies*, THE INDEPENDENT, Oct. 19, 1993, available in LEXIS, News Library, MAJPAP File.

<sup>255</sup> Law Group Report, *supra* note 226, at 12.

Most-Favored-Nation ("MFN") trading status. Rumania's MFN status was unilaterally rescinded in 1989, before the fall of Ceausescu, and has since been delayed by Congress because of human rights concerns.<sup>256</sup> In response to congressional concerns in August 1993, the International Human Rights Law Group issued a report noting that, despite all of the problems mentioned above, the human rights situation in Romania had "improved during the past year in several respects."<sup>257</sup> They recommended that the United States restore Romania's MFN status in support of these advancements. In late October 1993, Congress finally approved Romania's MFN status, despite concerns about President Ilescu's commitment to reform. MFN treatment is reviewed yearly, with the U.S. President assuring Congress that the Rumanian government is observing human rights.<sup>258</sup>

#### D. *Czech Republic and Slovakia: The Velvet Divorce of the Czechs and the Slovaks*

As the Republic of Czechs and Slovaks approached the 1992 elections, the dissolution of the seventy-four year old federation became an issue of utmost importance. The dissolution issue established the tone for the 1992 presidential elections, resulting in the parliament, led by Slovak deputies, rejecting the reelection of Vaclav Havel. Although Havel was the only candidate in the first round of voting, he was barred from the next round which was scheduled for later in July. Havel was entitled to remain in office until October 5, 1992 if parliament could not appoint a successor. However, he resigned in response to the Slovak parliament's declaration of Slovakia's sovereignty on July 17, 1992.<sup>259</sup> Moving closer to separation, the Slovak parliament approved a draft constitution on September 1, 1992, providing for the dissolution of the federation. This left the two republics cooperating only in custom and

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<sup>256</sup> *U.S. Rights Group Urges MFN for Romania*, REUTER EUR. BUS. REP., Aug. 13, 1993, available in LEXIS, News Library, WIRES File.

<sup>257</sup> *Id.*

<sup>258</sup> *Congress Approves Romania Trade Ties*, REUTER BUS. REP., Oct. 22, 1993, available in LEXIS, News Library, WIRES File.

<sup>259</sup> Stephen Endelberg, *Slovakia Deputies Block Re-election of Vaclav Havel*, N.Y. TIMES, July 4, 1992, at A1. On January 26, 1993 Vaclav Havel was elected first President of the Czech Republic after winning 109 of 200 votes during a "stormy session" of the Chamber of Deputies in Prague. See *Vaclav Havel Elected First President of Czech Republic*, BBC Summary of World Broadcasts, Jan. 28, 1993, available in LEXIS, Europe Library, EUROPEAN NEWS File.

monetary matters.<sup>260</sup> On December 16, 1992 the Czech National Council adopted a new constitution.<sup>261</sup> By January 1, 1993 the velvet divorce of the Czechs and Slovaks became an accomplished fact.

### 1. *The Constitutions of the Slovak and Czech Republics Compared*

The constitutions of both countries show remarkable similarities and few important differences. Both are of moderate length, with short preambles and lengthy lists of rights and freedoms. In the case of the Czech Republic, the Charter of Fundamental Rights and Freedoms was enacted prior to the Constitution and is referred to as a "part of the constitutional order of the Czech Republic."<sup>262</sup> Both constitutions describe the republics as "sovereign, unified, and democratic law-governed state[s]."<sup>263</sup> While the Czech Constitution focuses on the description of the state and the distribution of powers, the Slovak Constitution is more elaborate in describing the economic system as a "socially and ecologically oriented market economy."<sup>264</sup>

Both constitutions provide for a parliamentary system, with the president as the head of state<sup>265</sup> and the prime minister as the head of government.<sup>266</sup> The composition of the parliaments is different. Slovakia's Constitution provides for a one-chamber legislature, the National Council, composed of 150 members elected for four year terms.<sup>267</sup> The Czech Basic Law establishes a bicameral parliament, with a 200 member Chamber of Deputies elected for four years, and a eighty-one member Senate elected at staggered six year terms.<sup>268</sup> Although the idea of amending the Constitution to eliminate bi-cameralism has been repeatedly rejected by the

<sup>260</sup> *Slovak Parliament Approves Constitution*, REUTERS, Sept. 1, 1992, available in LEXIS, Europe Library, EUROPEAN NEWS File.

<sup>261</sup> HOSPODARSKÉ NOVINY [Constitution] (Czech), translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD VOL. V (Albert P. Blaustein & Gisbert H. Flanz, eds. 1993) [hereinafter CZECH CONST.].

<sup>262</sup> CZECH CONST. art. III.

<sup>263</sup> CZECH CONST. art. I; SLOVAK CONST. art. I, translated in CONSTITUTIONS OF THE COUNTRIES OF THE WORLD VOL. XVII (Albert P. Blaustein & Gisbert H. Flanz, eds. 1993).

<sup>264</sup> SLOVAK CONST. art. LV(1).

<sup>265</sup> SLOVAK CONST. art. CI(1); CZECH CONST. art. LIV(1).

<sup>266</sup> SLOVAK CONST. art. CIX(1); CZECH CONST. art. LXVII(2).

<sup>267</sup> SLOVAK CONST. arts. LXXII, LXXIII(1).

<sup>268</sup> CZECH CONST. arts. XV, XVI.

Chamber of Deputies, the Senate still has not been elected at the time of this writing. Its functions have been taken over by the Legislative Chamber, and elections are not expected to occur before late 1994.

The presidents of both republics are elected for five year terms. In Slovakia, votes from the majority of three-fifths of the one-chamber parliament is required; in the Czech Republic, an absolute majority of the two-chamber parliament is necessary.<sup>269</sup> Besides ceremonial and representative functions, the presidents have some legislative and executive duties. They have the right to be present at the parliamentary meetings as well as return laws for reconsideration.<sup>270</sup> They lack, however, the right to veto laws, and their refusal to sign laws may be overruled by the majorities of the National Council of the Slovak Republic and the Chamber of Deputies of the Czech Republic.<sup>271</sup> The Chamber of Deputies may also overrule a decision of the Czech Senate rejecting a bill.<sup>272</sup>

The presidents appoint and recall the prime ministers and other members of the government.<sup>273</sup> The appointees, however, are accountable to the parliament, and must receive its approval within thirty days of the appointment.<sup>274</sup> The appointees can also be rejected by a majority vote of Slovak and Czech deputies.<sup>275</sup> In both countries the members of the government seem detached from the legislature, although this principle is not clearly pronounced in the Czech Constitution.<sup>276</sup>

The Slovak Constitution employs the mechanisms of direct democracy to a greater degree than does the Czech Constitution. It reserves a separate subchapter for referenda used to decide "important issues of public interest," and particularly to confirm "a constitutional law on entering into an alliance with other states or

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<sup>269</sup> SLOVAK CONST. art. CI(3); CZECH CONST. art. LVIII.

<sup>270</sup> CZECH CONST. arts. LXII(h), LXIV(1); SLOVAK CONST. art. CII(p), (n).

<sup>271</sup> SLOVAK CONST. art. LXXXVII(3); CZECH CONST. art. L.

<sup>272</sup> CZECH CONST. art. XLVII(1).

<sup>273</sup> CZECH CONST. art. LXII(a); SLOVAK CONST. art. CII(f).

<sup>274</sup> SLOVAK CONST. art. CXIII; CZECH CONST. art. LXVIII(3).

<sup>275</sup> SLOVAK CONST. art. CXIV(1); CZECH CONST. art. LXXII.

<sup>276</sup> SLOVAK CONST. art. LXXVII(2) reads in part, "If a deputy is appointed member of the Government of the Slovak Republic, his mandate as a deputy does not cease while he executes the government post, but is just not being exercised." CZECH CONST. art. XXXVIII(1) declares, "A member of the government has the right to participate in meetings of both chambers and their committees and commissions." *But* art. LXX provides only that, "A member of government may not engage in activities the nature of which is in conflict with the execution of his office. Details shall be set out in a separate law."

on withdrawing from that alliance.<sup>277</sup> Referenda are called by the president of the Republic, if 350,000 citizens sign a petition requesting one, or if the National Council passes a resolution for one.<sup>278</sup> The results of the referendum are valid if more than fifty percent of eligible voters participated in it, and if a majority of the participants endorse it.<sup>279</sup>

Detailed regulations pertaining to the court structures are not stated in the Constitutions, but in separate enactments. The Czech Constitution anticipates the Republic will have a network of administrative courts. The Slovak Republic reserves challenges against central and local administrative decisions for the Constitutional Court.<sup>280</sup>

Judicial review of the constitutionality of laws is fully endorsed by both Constitutions, which clearly adhere to the Austrian model of constitutional enforcement. They vest the right to review in one central Constitutional Court, described as an "independent judicial body charged with protecting constitutionality."<sup>281</sup> In both countries the Constitutional Courts are institutions of final review. No legal recourse against their rulings is available.

The Slovak Constitution gives the Constitutional Court<sup>282</sup> vast jurisdiction to decide the constitutionality of laws,<sup>283</sup> governmental decrees,<sup>284</sup> and administrative acts.<sup>285</sup> The Court is also authorized to resolve jurisdictional disputes among central and local agencies.<sup>286</sup> The Constitutional Court also has the power to review individual complaints claiming the decisions of state administrative bodies violates basic rights and liberties of citizens,<sup>287</sup> verify elections results,<sup>288</sup> and serves as a high court on high treason charges filed by the National Council of the Slovak Republic against the

<sup>277</sup> SLOVAK CONST. art. XCIII(2), (1).

<sup>278</sup> SLOVAK CONST. art. XCV.

<sup>279</sup> SLOVAK CONST. art. XCVIII(1).

<sup>280</sup> CZECH. CONST. art. XCI; SLOVAK CONST. art. CXXVII.

<sup>281</sup> SLOVAK CONST. art. CXXXIV; CZECH. CONST. art. LXXXIII.

<sup>282</sup> The Slovak Constitutional Court consists of ten judges appointed by the president for a period of seven years. The judges are picked out of twenty people recommended to the president by the National Council. SLOVAK CONST. art. CXXXIV (1), (2).

<sup>283</sup> SLOVAK CONST. art. CXXV(a).

<sup>284</sup> SLOVAK CONST. art. CXXV(b).

<sup>285</sup> SLOVAK CONST. art. CXXV(d).

<sup>286</sup> SLOVAK CONST. art. CXXVI.

<sup>287</sup> SLOVAK CONST. art. CXXVII.

<sup>288</sup> SLOVAK CONST. art. CXXIX(2).

President.<sup>289</sup> The Court can initiate proceedings if a proposal is submitted by at least one-fifth of the deputies of the National Council, the president, the Government, the ordinary courts, the general prosecutor, and individual petitioners who claim their constitutional rights were violated.<sup>290</sup>

The jurisdiction of the Czech Constitutional Court<sup>291</sup> is explained less clearly in the Constitution. The chapter on constitutional review was hastily drafted, and it left a number of important matters, such as initiation of legal proceedings before the Court, or execution of the Court's decisions, to further regulation.<sup>292</sup> Statements such as "[t]he law may provide that the Supreme Administrative Court rather than the Constitutional Court shall decide on . . ." <sup>293</sup> or "[t]he Constitutional Court decides on disputes regarding the powers of state bodies and territorial self-administrative bodies, if they do not fall under the jurisdiction of another body by law" <sup>294</sup> are indecisive and need future clarification.

In summary, the constitution-making processes of both republics of the former Czechoslovakia are far from completion. The two acts analyzed above resemble hastily drafted interim constitutions rather than full-fledged basic laws. In order to create a truly democratic society governed by the rule of law, both Constitutions must be substantially amended, or the countries will have to adopt and implement numerous constitutional acts. In both cases the success of constitutional reform depends on the cooperation of the democratic forces, and the people in charge of the new mechanisms on political pluralism.

## 2. *Human Rights Situation in Czech Republic and Slovakia*

During the year after the velvet divorce, the economic gap between the Czechs and Slovaks widened, but cultural and ethnic problems between the countries remained mostly unchanged.<sup>295</sup> In both republics, three areas can be identified as the most troublesome in human rights protection. As with all other East European

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<sup>289</sup> SLOVAK CONST. art. CXXIX(5).

<sup>290</sup> SLOVAK CONST. art. CXXX(1)(a-f).

<sup>291</sup> The Czech Constitutional Court is composed of fifteen judges appointed by the president for a ten-year term. CZECH. CONST. art. LXXXIV.

<sup>292</sup> CZECH CONST. art. LXXXVII.

<sup>293</sup> CZECH CONST. art. LXXXVII(2).

<sup>294</sup> CZECH CONST. art. LXXXVII(1)(k).

<sup>295</sup> For this reason the human rights situation in both republics will be analyzed jointly.

countries, the treatment of ethnic minorities in the new republics was the most serious concern. Moreover, human rights observers in both countries noted some irregularities in the treatment of former communist collaborators, and in the protection of freedom of speech and freedom of the press.

While numerous ethnic minorities existed in Czechoslovakia, the censuses drastically under-represented them.<sup>296</sup> Both the Czech and Slovak Constitution provide for equality of citizens and forbid discrimination.<sup>297</sup> However, the Slovak Constitution's protection of ethnic minorities is more controversial because of the document's strong sense of nationalism. For example, the introduction of the Slovak Constitution provides, "Slovak is the state language on the territory of the Slovak Republic. The use of other languages in dealings with the authorities will be regulated by law."<sup>298</sup> It further states, "membership of any national minority or ethnic group must not be to anyone's detriment . . . [and] the enactment of the rights of citizens belonging to national minorities and ethnic groups that are guaranteed in this Constitution must not be conducive to jeopardizing the sovereignty and territorial integrity of the Slovak Republic or to discrimination against its other inhabitants."<sup>299</sup> As the CSCE Report notes, "[t]his language has given rise to fears that the mere discussion of minority concerns may be deemed 'conductive' to discrimination and will be restricted under this clause."<sup>300</sup>

In Slovakia, as in most other European countries, the Gypsies are the minority group who face a considerable amount of discrimination. The discrimination Gypsies face stems from societal prejudices, rather than from deliberate governmental action or policy. This prejudice results from and is perpetuated by lower standards of living, illiteracy, crime, and high unemployment in the Gypsy community. They are denied service in shops and restaurants, and are the targets of violent attacks.<sup>301</sup>

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<sup>296</sup> COMMISSION ON SECURITY AND COOPERATION IN EUROPE, HUMAN RIGHTS AND DEMOCRATIZATION IN SLOVAKIA (1993) [hereinafter CSCE REP.: SLOVAKIA].

<sup>297</sup> SLOVAK CONST. art. XII(1), (2); Czech Charter of Fundamental Rights and Freedoms art. I (3(1)).

<sup>298</sup> SLOVAK CONST. art. VI (1), (2).

<sup>299</sup> SLOVAK CONST. arts. XXXIII, XXXIV(3).

<sup>300</sup> CSCE REP.: SLOVAKIA, *supra* note 296, at 9.

<sup>301</sup> See generally Henry Kamm, *End of Communism Worsens Anti-Gypsy Racism*, N.Y. TIMES, Nov. 17, 1993, at A12.



Perhaps most alarming has been the fact that even the public officials demonstrate prejudice towards the Gypsy community. In September 1993, Premier Meciar, noting the high birth rate in the Gypsy community, indicated, "if we do not deal with them now, in time they will deal with us. It's necessary to understand them as a problematic group which rises in numbers."<sup>302</sup> Although steps have been taken to improve the Gypsies' situation, such as the creation of the Romany Culture Center to educate teachers in the native Romany language, the Gypsies have been unable to mobilize due to disorganization and factionalism.<sup>303</sup>

It appears that the Gypsies have suffered the most from the fall of communism in Central and Eastern Europe because they lost the economic and social protection they enjoyed under it. With the introduction of the competitive spirit of a market economy, the "open prejudice and persecution that have marked the history of the Roma"<sup>304</sup> were rekindled. As a result, many Gypsies will likely vote along communist lines in future elections.<sup>305</sup>

The divorce of the Czech Republic and Slovakia raised international human rights concerns as to the treatment of the sizeable Czech and Slovak minorities living in both countries. The problem has been particularly acute in the Czech Republic where, by the end of 1992, approximately 30,000 Slovaks asked for Czech citizenship and 3,000 new applications were coming in daily. In response to the situation, in December 1992, the Czech parliament passed a law on citizenship which became effective the moment the republics split. The law provides that Slovaks who wish to establish Czech citizenship must have not committed a crime within the previous five years, and must have been a permanent resident of the Czech republic for at least two years.<sup>306</sup> Furthermore, because the Czech Constitution forbids dual citizenship, those Slovaks who seek Czech citizenship must additionally submit an affidavit indicating their revocation of Slovak citizenship.<sup>307</sup>

Slovakia faced fewer problems with Czechs wishing to reside there, but has been particularly troubled by the concerns of the

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<sup>302</sup> CSCE REP.: SLOVAKIA, *supra* note 296, at 13.

<sup>303</sup> *Id.*

<sup>304</sup> Kamm, *supra* note 301.

<sup>305</sup> *Id.*

<sup>306</sup> *Czechoslovakia: Czech Parliament Passes Law on Citizenship*, REUTER TEXTLINE, Dec. 29, 1992, available in LEXIS, Europe Library, EUROPEAN NEWS File.

<sup>307</sup> *Id.*

Hungarians, the largest minority in this state. The Hungarians, who are concentrated in the southern part of the country and total an estimated half million,<sup>308</sup> expressed much concern with the 1990 Language Law. This law, while sanctioning Slovak as the official language, permits minorities to use their native language only in areas where at least twenty percent of the population consisted of their ethnic groups.<sup>309</sup> Furthermore, the Slovak Constitution grants several rights to ethnic minorities, such as the right to develop their culture, the right to conduct business in their native language, and the right to join national minority organizations.<sup>310</sup> The Hungarian minority maintains, however, that Slovak society, as well as the leadership and the government, has been inactive and unresponsive in securing these rights.<sup>311</sup>

For the commentators focused on the further development of political pluralism in the countries of former Soviet dominance, the treatment of the former communists, and particularly the communist collaborators, gave rise to some concerns. International observers were concerned that the "purge" laws may be used in the future to block neo-communists and other leftist groups from political "free competition" guaranteed by the Constitutions.<sup>312</sup> On October 4, 1991, the Czechoslovak parliament adopted a law providing for a "sweeping purge from government of former communist party top officials and secret service agents."<sup>313</sup> The law requires citizens seeking high-level jobs to provide evidence that they did not collaborate with the secret police.<sup>314</sup> The law bars those who collaborated with the former secret police from holding public office for at least five years. This law is the first such lustra-

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<sup>308</sup> CSCE REP.: SLOVAKIA, *supra* note 296, at 11. Approximately 25% of Slovakia's total population consisted of ethnic or religious minorities, such as Poles, Germans, Ukrainians, Ruthenians, and Gypsies. The Slovaks are predominantly Catholic, but approximately 400,000 Lutherans and 3,000 Jews live there. *Id.*

<sup>309</sup> U.S. DEP'T OF STATE, 103D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1992: CZECH AND SLOVAK FEDERAL REPUBLIC, (Comm. Print 103-07, 1993) [hereinafter STATE DEP'T REP.: CZECH].

<sup>310</sup> SLOVAK CONST. art. XXXIV.

<sup>311</sup> CSCE REP.: SLOVAKIA, *supra* note 296, at 14.

<sup>312</sup> CZECH CONST. art. V; SLOVAK CONST. art I.

<sup>313</sup> *Czechoslovak Parliament Adopts Sweeping Purge Law*, AGENCE FRANCE PRESSE, Oct. 4, 1991, available in LEXIS, News Library, WIRES File [hereinafter *Czechoslovak Parliament*].

<sup>314</sup> Leszek Mazan, *Czecho-slovakia: Communist by a Different Color*, THE WARSAW VOICE, Apr. 12, 1992, available in LEXIS, News Library, WRSWV File.

tion law passed in post-communist Eastern Europe<sup>315</sup> and was met with much criticism, both locally and abroad.<sup>316</sup> Although the Havel government initially supported and helped draft the law, the final version of the law is harsher than Havel's proposed version.<sup>317</sup>

This "purge" law applies to two groups. The first group, which consists of agents, informers, and owners of conspiratorial apartments, is guilty under the law merely because their names are in the files at the Ministry of Internal Affairs. To make matters worse, this group cannot appeal this finding of guilt. The second group of the so-called "conscious collaborators" includes those who initially refused to cooperate with the former State Security Agency but whose names remain in the register. This group can seek redress.<sup>318</sup>

In February 1992, an independent appeals commission was established. This commission soon discovered yet a third group of people. Referred to as "Category C" individuals, these people are listed in the files of the former State Security Agency, usually because they had been called in for questioning at some point. By October 1992, only fifteen of the 70,000 people listed in the files of the former State Security Agency were deemed "conscious collaborators." Finally, by November 1992, the Constitutional Court ordered that while Category C should be eliminated, the rest of the law should apply.<sup>319</sup>

On July 9, 1993, a decommunization law was passed by the Czech parliament.<sup>320</sup> The new law denounces communism "as of 1948." If this law is applied retroactively, it might allow Czech authorities to isolate those communists who are accountable for ordering and carrying out crimes.<sup>321</sup> In Slovakia, the purge law remains in effect and reportedly, it is arbitrarily applied. When the Slovak government declared that it would revoke the purge law in

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<sup>315</sup> *Lustration in the Czech and Slovak Republics*, 10 RESEARCH BULLETIN 5 (1993) (RFE/RL Institute ed., 1993) [hereinafter *Lustration in the Czech*].

<sup>316</sup> The Czech Minister of Justice, Leon Richter, stated that the law contravenes both the Charter of Fundamental Rights and Freedoms and Czech's international obligations, because the law does not allow for case-by-case screening of individuals. See *Czech Justice Minister Criticizes Screening Law*, CTK Nat'l News Wire, Oct. 15, 1991, available in LEXIS, News Library, WIRES NEWS File. The International Helsinki Commission also claimed that the purge law contradicts human rights accords. See *id.*

<sup>317</sup> *Czechoslovak Parliament*, *supra* note 313.

<sup>318</sup> *Lustration in the Czech*, *supra* note 315.

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

1992, opinion polls at the time indicated that over fifty percent of Slovaks wanted to retain the law.<sup>322</sup>

The international observers were also concerned with other human rights protection issues; specifically, freedom of speech and freedom of press. There are some differences between Czech Republic and Slovakia in this matter. In 1992, in Czechia one could openly speak out and criticize the government and public figures. Political and independent newspapers were freely circulated, as the print media was uncensored.

In Slovakia, however, there was concern that the government attempted to infringe upon the constitutional guarantee of freedom of the press. The government refused to privatize Danubiaprint, a state-owned manufacturer of newsprint. Moreover, Prime Minister Meciar's request for "ethical self-regulation" was viewed as a call for self-censorship. Furthermore, newspapers that printed articles criticizing Meciar or the ruling party, as the Movement for a Democratic Slovakia ("HZDS") did, were censored by the Minister of Culture and his deputy for media affairs. Finally, in the Fall of 1992, Premier Meciar called for the establishment of "journalist senates," or extraconstitutional bodies, to expedite hearings for journalists accused of defaming public officials. At this time Cabinet level government officials began to warn journalists that they would be punished for "not telling the truth about Slovakia." These events created tension in Slovakia and raised concern over the future of freedom of the press.<sup>323</sup> It was evident that the Slovakian government was attempting to generate favorable reports of public leaders and officials by maintaining state ownership of the broadcast media and a large part of the newspapers.

Through 1992, the CSFR television broadcast media was state-owned. The granting of licenses to private television stations was delayed until after the breakup of the CSFR. The parliaments of both the Czech Republic and Slovakia created television boards. There were numerous debates over the independence of members of the board whom individual Republic governments appointed. In September 1992, the Slovak Parliament adopted legislation, converting the Television Council into an independent, non-politicized entity. There was concern that this law, which gave the Parliament,

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<sup>322</sup> *Id.*

<sup>323</sup> STATE DEP'T REP.: CZECH, *supra* note 309.

and the Television Director, the power to elect members to the Council, would give the government power over Slovak television.

Therefore, the divorce of the Czechs and Slovaks was not as "velvet" as the mass media in both nations proclaimed. Clearly, the decision about the split was made by the political leaders and confirmed by representative federal bodies, highly paralyzed by the growing controversies between two national representations.<sup>324</sup>

The divorce left both countries politically and economically vulnerable, and created the potential for severe abuse of human rights and policy. Despite governmental assurances that fundamental constitutional freedoms would be protected in both republics, the situation of minority communities was difficult and the protection of their rights, particularly in Slovakia, is insufficient. With respect to the policy of Meciar's government, the CSCE Report concluded, "democracy and minority rights will stand or fall together. Infringements on the rights of minorities inevitably impact negatively on society as a whole, and government policies which limit academic freedom, unduly restrict the media, or slow process of privatization are likely to disproportionately burden minorities."<sup>325</sup> The governments in both republics claim that irregularities in human rights protection have been intensified by the economic hardships faced by all East-Central European countries and that, despite economic, political, and cultural problems, they are committed to fulfilling human rights obligations. How successful these efforts will be remains to be seen.

#### E. *Hungary: Amending the Constitution*

Of all Central European countries, Hungary seems to be the least determined to adopt a brand new constitution. The current political structure in Hungary was formulated by the 1949 Constitution which was heavily amended in 1989. It contains a broad range of human rights protections, and provides for a democratically elected Parliament, a parliamentarily elected President, and

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<sup>324</sup> On the one hand, the decision about the split was taken without any appeal to the mechanisms of direct democracy. On the other hand, the 1994 elections in Slovakia proved that Meciar's party (the Movement for Democratic Slovakia - MDS), which orchestrated the Czechoslovakia split, still had significant support from the Slovak voters.

<sup>325</sup> *Id.* at 19.

an independent judiciary.<sup>326</sup> The 1989 amendments confirmed the temporary character of the Constitution but further constitutional development had been slow. Currently, the chance for a quick adoption of a brand new Hungarian basic law seems to be slim.

Although the Hungarians did not adopt a new constitution, the amendments introduced in 1989 and 1990 to Constitutional Act XX of 1949 were the first thorough constitutional transformations in the Soviet bloc.<sup>327</sup> Under the Amended Constitution, Hungary's official name changed from the Hungarian People's Republic to the Republic of Hungary. This transformation reflects the view that the country is no longer a socialist state where all the power rests with the working people and the Marxist-Leninist party. Hungary became "a constitutional state [with] a multiparty-system, parliamentary democracy, and social market economy."<sup>328</sup>

When Hungarian legislators formulated the constitutional amendments, they drew from both the Western-type democracy and traditions of democratic socialism. With the exception of the introductory statement in the Constitution, the word "socialism" was carefully deleted from the remainder of the text. The typical statements of socialist constitutions: (1) "lay[ing] down the foundations of socialism,"<sup>329</sup> (2) "oppos[ing] every form of the exploitation of man by man and organiz[ing] the forces of society for socialist construction,"<sup>330</sup> and (3) "striv[ing] to apply in practice the socialist principle: '[f]rom each according to his ability, to each according to his work,'"<sup>331</sup> were omitted in the Amended Constitution.

Unlike the former Constitution,<sup>332</sup> the Amended Constitution does not give special protection to social ownership; instead, because Hungary maintains a market economy both public and pri-

<sup>326</sup> For a more detailed analysis of the Hungarian constitutional reform see Ludwikowski, *Constitution-Making in the Countries of Former Soviet Dominance: Current Development*, *supra* note \*, at 157-64.

<sup>327</sup> A uniform structure of the Constitutional Act XX of 1949 and its amendments was published in *MAGYAR KOZLONY* (The Hungarian Official Gazette) in August 24, 1990. The English version is quoted from the official translation of the constitutional text, which was sent to the author by the Hungarian Embassy in Washington, D.C.

<sup>328</sup> A *MAGYAR KÖZTARSASAG ALKETMANYA* [Constitution] pmb. (Hungary) (as amended 1989, 1990) [hereinafter *AMENDED CONST.*].

<sup>329</sup> A *MAGYAR KÖZTARSASAG ALKETMANYA* [Constitution] introductory statement (Hungary) [hereinafter *1949 CONST.*].

<sup>330</sup> 1949 *CONST.* art. III.

<sup>331</sup> 1949 *CONST.* art. IX, § 4.

<sup>332</sup> 1949 *CONST.* art. VI.

vate ownership receive equal rights and protections.<sup>333</sup> The Amended Constitution states that property can be expropriated only to protect the public interest. The Constitution promotes and preserves the right to free competition, and guarantees the right of inheritance.<sup>334</sup>

Hungary is a parliamentary democracy, with the Parliament acting as the "supreme organ of state power and popular representation."<sup>335</sup> The Parliament has vast power in electing the highest executive and judicial officials of the country; such as, the members of the Council of Ministers, the Constitutional Court, the Commissioners of Citizens' Rights, the Presidents of the State Audit Office, the National Bank, the Supreme Court, and the Chief Public Prosecutor.<sup>336</sup> However, under the Amended Constitution, the term for a member of Parliament was reduced from five years to four.<sup>337</sup> Also, in order for the Parliament to declare a state of war and pronounce states of exigency and emergency, it needed a two-thirds majority.<sup>338</sup> In addition, the amendments imposed new checks on the power of Parliament by eliminating the collegiate head of state, the Presidium of the Hungarian People's Republic, and creating the separate office of the President of the Republic. The amendments invited direct participation by the people as Parliament could call for a national referendum.<sup>339</sup>

After numerous unsuccessful attempts to have the president elected directly by the Hungarian people, the Amended Constitution provides that the president is to be elected for four years by the Parliament,<sup>340</sup> and could only be reelected for one additional term.<sup>341</sup> A nomination for the presidency requires the support of at least fifty Members of Parliament, and each Member could only support one candidate.<sup>342</sup>

The election for president could take several rounds. In the first two rounds the president can be elected only by a qualified

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<sup>333</sup> AMENDED CONST. § 9(1).

<sup>334</sup> AMENDED CONST. §§ 9(2), 13, 14.

<sup>335</sup> AMENDED CONST. § 19(1).

<sup>336</sup> AMENDED CONST. § 19(3)(k).

<sup>337</sup> AMENDED CONST. § 20(1).

<sup>338</sup> AMENDED CONST. § 19(4).

<sup>339</sup> AMENDED CONST. § 19(5).

<sup>340</sup> AMENDED CONST. § 29/A(1).

<sup>341</sup> AMENDED CONST. § 29/A(3).

<sup>342</sup> AMENDED CONST. § 29/B(1).

majority of two-thirds.<sup>343</sup> In the third round, where only two candidates remain, the candidate who receives the plurality of votes becomes president.<sup>344</sup>

The president cannot be recalled by the Parliament. Most of his decisions have to be consigned by one of the ministers, who is elected and dismissed by Parliament.<sup>345</sup> The president is a senior statesman who is an intermediary between the Parliament and the prime minister. After consulting with the leaders of the Parliamentary Panels, the president gives the prime minister "the mandate to form a government."<sup>346</sup> Moreover, the Council of Ministers has to answer to Parliament<sup>347</sup> because it elected the former.<sup>348</sup> Only the president may appoint and dismiss secretaries of state, the vice-presidents of the National Bank of Hungary, and university professors.<sup>349</sup> The president represents the Hungarian State<sup>350</sup> and is the commander-in-chief of the armed forces.<sup>351</sup>

If the president violates the Constitution, or any other Act, he could be impeached as long as one-fifth of Parliament approves it<sup>352</sup> and impeachment procedures begin only after two-thirds Parliamentary approval.<sup>353</sup> Impeachment proceedings can also be initiated by the Council of Judgment/Judicatory Council, which is made up of twelve members of Parliament,<sup>354</sup> approved by the president.<sup>355</sup>

The president does not have the constitutional right to veto legislative acts. He can, however, ask Parliament to reconsider an act.<sup>356</sup> If the president thinks an act is unconstitutional, he can submit it to the Constitutional Court to review the constitutionality

<sup>343</sup> AMENDED CONST. § 29/B(2).

<sup>344</sup> AMENDED CONST. § 29/B(4).

<sup>345</sup> AMENDED CONST. § 30/A(2).

<sup>346</sup> *Id.*

<sup>347</sup> AMENDED CONST. § 39(1).

<sup>348</sup> AMENDED CONST. § 19(3)(k).

<sup>349</sup> AMENDED CONST. §§ 30/A(h), (i).

<sup>350</sup> AMENDED CONST. § 30/A(1)(a).

<sup>351</sup> AMENDED CONST. § 29(2).

<sup>352</sup> AMENDED CONST. § 31/A(2).

<sup>353</sup> AMENDED CONST. § 31/A(3).

<sup>354</sup> AMENDED CONST. § 31/A(5).

<sup>355</sup> *Id.*

<sup>356</sup> AMENDED CONST. § 26(2).



question.<sup>357</sup> If the Constitutional Court does not declare the act to be unconstitutional, the president must sign it within five days.<sup>358</sup>

The president can dissolve the Parliament under two conditions; if the latter withdraws its vote of confidence for the Council of Ministers at least four times within a twelve months period, or if Parliament "does not provide a vote of confidence for the incoming Council of Ministers."<sup>359</sup> The newest constitutional amendments recently dropped the provision allowing the president to dismiss the Parliament only twice during his tenure.<sup>360</sup>

The major changes to the Constitution were introduced in Chapter XII under Fundamental Rights and Duties. The economic rights that, for their propaganda value, were put in all Stalinist constitutions at the forefront of the Constitution, were replaced by the declaration of human rights to life and dignity, and the due process rights of citizens in criminal proceedings. The Hungarian Constitution now guarantees: (1) due process rights against unlawful criminal prosecution; (2) the right to liberty and personal safety;<sup>361</sup> (3) the right to compensation for victims of unlawful arrest and detention;<sup>362</sup> (4) the presumption of innocence;<sup>363</sup> (5) the right to defend oneself against penal charges;<sup>364</sup> and (6) the observance of the principle *nullum crimen sine lege*, no person shall be convicted or punished for an action that, at the time of commission, did not qualify as a criminal offence under the law.<sup>365</sup> The list of civil rights and freedoms is impressive, and includes the right to freedom of thought, conscience, and religion,<sup>366</sup> expression of opinion,<sup>367</sup> liberty of press,<sup>368</sup> the right to freely create organizations or communities,<sup>369</sup> and the right to strike.<sup>370</sup> The Constitution no longer

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<sup>357</sup> AMENDED CONST. § 26(4).

<sup>358</sup> AMENDED CONST. § 26(5).

<sup>359</sup> AMENDED CONST. § 28(3).

<sup>360</sup> AMENDED CONST. § 32/A(4). The introduction of a new Constitutional Court, composed of fifteen members elected by two-thirds of Parliament, and vested with the right to annul unconstitutional laws, is yet another remarkable change.

<sup>361</sup> AMENDED CONST. § 55(1).

<sup>362</sup> AMENDED CONST. § 55(2).

<sup>363</sup> AMENDED CONST. § 57(2).

<sup>364</sup> AMENDED CONST. § 57(3).

<sup>365</sup> AMENDED CONST. § 57(4).

<sup>366</sup> AMENDED CONST. § 60(1).

<sup>367</sup> AMENDED CONST. § 61(1).

<sup>368</sup> AMENDED CONST. § 61(2).

<sup>369</sup> AMENDED CONST. § 63(1).

<sup>370</sup> AMENDED CONST. § 70/C(2).

states that the exercise of rights is inseparable from the duties of citizen. It does, however, enumerate several basic duties in Chapter XII, such as: the duty to defend the country,<sup>371</sup> the duty to pay taxes in proportion to one's income and property ownership,<sup>372</sup> and the duty of parents to educate their children.<sup>373</sup>

In short, the Hungarian constitutional amendments, although in need of further refinement, created a solid framework for further economic and social restructuring. The reform, initiated from within the party, embodied non-communist elements, and continued without losing momentum. Despite the ethnic and social problems that plague Hungary, both the country's political restructuring and the flexibility of the competitive political forces has allowed Hungary to gain some credibility with the Western countries. This facilitated the country's progress toward marketization and privatization.

### 1. *The Constitution in Operation*

Although Hungary seems to have fewer problems with human rights violations than other central and Eastern European countries, it shares with them a major concern regarding ethnic minority rights. Because there are a substantial number of Hungarians who lived abroad as minorities<sup>374</sup> and were often subjected to discrimination and human rights violations, Hungary has tried to grant better protection to its own ethnic minorities. For instance, in September 1990, the government created the Office for National and Ethnic Minorities and set up a Minority Roundtable which consists of representatives from each of the ethnic minority groups.<sup>375</sup> In November 1992, Hungary ratified the European Human Rights Convention and agreed to be subject to the jurisdiction of the European Human Rights Committee and the European

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<sup>371</sup> AMENDED CONST. § 70/H(1).

<sup>372</sup> AMENDED CONST. § 70/I.

<sup>373</sup> AMENDED CONST. § 70/J.

<sup>374</sup> There were about 600,000 ethnic Hungarians living in Slovakia, 350,000 in Vojvodina, and two million in Romania. See David B. Ottaway, *Ethnic Hungarians in Slovakia Are Demanding Self-Government*, WASH. POST, Jan. 10, 1994, at A12.

<sup>375</sup> *Department of State Country Reports on Human Rights Practices for 1992: Hungary*, (Annual Report Submitted to Congress, Available from the Department of State) [hereinafter STATE DEP'T REP.: HUNGARY].

Human Rights Court.<sup>376</sup> Hungary was also a signatory to the European Charter of Regional and Minority Languages and signed with Russia the Hungarian-Russian Declaration on Minority Rights.<sup>377</sup>

The Hungarian Constitution provides for the protection of ethnic minorities in several sections. First, there is a general clause that protects virtually everyone in Hungary from discrimination.<sup>378</sup> Second, an entire article in the Constitution states ethnic and national minorities shall be constituent factors of the state, shall participate in public life, have the right to foster their culture, conduct education in their languages, establish local and national self-governments and be represented in the central organs of the state.<sup>379</sup> Moreover, the Parliament implemented legislation which pertains to national and ethnic minority rights. The law was passed by a vote of 304 to three and, among other things, prohibited all forms of discrimination against minorities.<sup>380</sup> This law defines national and ethnic minorities as "all ethnic groups which have lived in the Republic of Hungary for at least a century and who are Hungarian citizens and have their own language, culture, and traditions."<sup>381</sup> It gives minorities the right to set up local and national authorities and provides for an ombudsman to be elected by parliament which will "control and promote the enforcement of [minorities'] rights."<sup>382</sup>

Despite these theoretical protections, foreign and local observers from a variety of human rights groups stated that, in practice, the minorities continue to face prejudice and discrimination

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<sup>376</sup> *Hungary Ratifies Human Rights Convention, Signs Minority Language Charter*, MTI HUNGARIAN NEWS AGENCY, Nov. 5, 1992, available in LEXIS, Europe Library, EUROPEAN NEWS File.

<sup>377</sup> The European Charter of Regional and Minority Languages was drafted to save "dying regional and minority languages." It required signatories to "abolish groundless restrictions on the usage of regional and minority languages" and promote the usage of native languages. The Russian-Hungarian Declaration on Minority Rights protected the rights of national, ethnic, religious, and language minorities and required that the two countries have the same goal of guaranteeing rights of minorities and preventing discrimination. *Hungarian-Russian Declaration on Minority Rights*, MTI HUNGARIAN NEWS AGENCY, Nov. 12, 1992, available in LEXIS, Europe Library, EUROPEAN NEWS File.

<sup>378</sup> AMENDED CONST. § 70/A(1).

<sup>379</sup> AMENDED CONST. art. LXIX(1), (2), (3), (4).

<sup>380</sup> *Parliament Passes Minority Law*, MTI HUNGARIAN NEWS AGENCY, July 7, 1993, available in LEXIS, Europe Library, EUROPEAN NEWS File.

<sup>381</sup> *Id.*

<sup>382</sup> *Local Government and Parliamentary Representation for Minorities in Hungary*, MTI HUNGARIAN NEWS AGENCY, Aug. 24, 1993, available in LEXIS, Europe Library, EUROPEAN NEWS File.

that has manifested in many forms, including harassment and violent attacks.<sup>383</sup> Such mistreatment mostly affected Gypsies, the largest minority group in Hungary, and Jews, the fourth largest of the Hungarian minority groups.<sup>384</sup> Although the press continually reports stories detailing police brutality against the Gypsy community, these reports have not been investigated. Moreover, as is the case in Romania, stereotypes are harmful to the Gypsies, who are perceived, and therefore treated, as untrustworthy and socially dangerous people.<sup>385</sup> While the government criticizes both violent attacks on Gypsies and discrimination against the Gypsy population, it does not seek to actively prosecute such perpetrators. Skinheads who harass or attack the Gypsies, as well as other ethnic minorities, are usually only charged with the crimes of hooliganism or assault with intent to do serious bodily harm.<sup>386</sup>

The State Department delegation visiting Hungary also noted numerous anti-Semitic attacks. The Helsinki Commission group confirmed that although "the government has consistently condemned anti-Semitic activities and has taken measures to protect and affirm the status of Hungary's Jewish community," anti-Semitism is an issue of special concern in this country.<sup>387</sup> While the government does not condone anti-Semitic expression, there are prominent members of the Hungarian Democratic Forum ("MDF") who, through their publications, have incited anti-Semitic opinion. The most publicized example of this is a highly controversial paper written by Istvan Csurka (former vice president in the MDF), in which blatant anti-democratic and anti-Semitic language was used. In another publication, a MDF member of parliament and member of the party presidium proclaimed that "former Communists, liberals and Jews" have "seized power" in Hungary.<sup>388</sup>

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<sup>383</sup> The following human rights groups exist in Hungary: the Hungarian Helsinki Commission, the Wallenberg Association for Minority Rights, the Hungarian Human Rights League, the Martin Luther King Organization (formed by foreign students), and a twenty-five member parliamentary commission for Human, Minority, and Religious Rights. STATE DEP'T REPORT: HUNGARY, *supra* note 375.

<sup>384</sup> There were between 400,000 to 600,000 Gypsies, and 80,000 Jews living in Hungary. *Id.*

<sup>385</sup> *Id.*; see also CSCE REP: ALBANIA, *supra* note 80, at 2, 3, 5.

<sup>386</sup> STATE DEP'T REP.: HUNGARY, *supra* note 375.

<sup>387</sup> CSCE REP.: ALBANIA, *supra* note 80, at 1; STATE DEP'T REP.: HUNGARY, *supra* note 375.

<sup>388</sup> STATE DEP'T REP.: HUNGARY, *supra* note 375, at 7, 8.

Commentators noted no major violations or irregularities concerning political rights and social freedoms. The Constitution provides for the right to form organizations and assemble peacefully<sup>389</sup> and in practice this right is basically unrestricted.<sup>390</sup> Furthermore, permits are generally not required for public assembly, unless it is being held near military installations, embassies, or key government buildings. Although the police may occasionally revoke permits, there were no reports that the police abuses this power.

The Constitution provides for both freedom of movement within Hungary and freedom to leave Hungary to all persons staying lawfully in the country.<sup>391</sup> Citizens cannot be expelled from the country and have the right to return to Hungary from abroad at any time.<sup>392</sup> They can freely emigrate, unless they have substantial court-assessed debts or knowledge of state secrets. These liberal constitutional provisions exposed the Hungarian government to several problems, mostly due to the influx of refugees from the former Yugoslavia. The government estimated that there are approximately 50,000 to 60,000 refugees who required food and housing assistance. In an effort to reduce the number of refugees, Hungary granted refugee status to only European nationals. Because of this policy, the government was faulted by both local and international human rights groups for detaining illegal aliens in "unacceptable conditions for excessively lengthy periods" at a detention center in Kerepestarcsa. Delegations of the United Nations High Commissioner for Refugees regularly visit the center and have asserted that few of the illegal aliens can be classified as refugees.<sup>393</sup>

With regard to freedom of speech there has been an ongoing battle as to how much control the government should exercise. The struggle for the freedom of the media reached its climax after the Prime Minister's attempts to have the presidents of the national radio and television ousted for mismanagement. In short, one may observe the parliamentary opposition, composed of liberals and socialists, supports media autonomy, while the parties in the governing coalition support a supervisory board which would keep partisanship out of the media.

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<sup>389</sup> AMENDED CONST. arts. LXX/C(1), LXII(1).

<sup>390</sup> STATE DEP'T REP.: HUNGARY, *supra* note 375, at 4.

<sup>391</sup> AMENDED CONST. art. LIII(1).

<sup>392</sup> AMENDED CONST. art. LXIX(1), (2).

<sup>393</sup> STATE DEP'T REP.: HUNGARY, *supra* note 375, at 5. *See also Amnesty International Annual Report Entry 1993: Hungary.*

Freedom of religion is generally unrestricted in Hungary. The Constitution separates Church and State.<sup>394</sup> Although Roman Catholicism is practiced by approximately sixty-five percent of the Hungarian population, the other religions are formally allowed to freely practice their faith. Still, observers noted some attempts to give special benefits to traditional and well established religious groups. In July 1993, 63,414 Hungarians signed a petition protesting the proposed amendments to the 1990 Church law, which provides for the revocation of legal church status from any religious group "if it had not operated in Hungary for at least 100 years or if it did not have a certified membership of 10,000."<sup>395</sup>

In short, the majority of reports from Hungary confirmed the Hungarian government continues to operate within the limits imposed by a freely elected legislative assembly. It respects the principles of a parliamentary democracy, struggles to facilitate the country's transition from a centrally controlled to a market economy, and, despite some irregularities, creates the conditions in which fundamental constitutional human rights and civil liberties are respected.

#### F. *Poland: The Interim Constitution*

The work on a new constitutional draft in Poland has made headway, but it is far from completion.<sup>396</sup> After amending the 1952 Constitution in 1989, separate constitutional committees were formed in the two chambers of the Polish parliament in order to draft versions of a new charter.<sup>397</sup> The conflicts between the two committees, which resulted in the breaking off of all contacts with one another, stemmed primarily from the discussion of the Polish

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<sup>394</sup> AMENDED CONST. art. VI(1)-(3).

<sup>395</sup> *Hungary: Over 60,000 Signatories Attack Church Law Amendment*, BBC Monitoring Service, July 8, 1993, available in LEXIS, News Library, BBCSWB File.

<sup>396</sup> Some Polish constitutional experts believe the Polish Sejm lost momentum after the completion of the Round Table negotiations. "The biggest mistake the government has committed since the changes began — says Mr. Szczepanek, of the office of Kazimierz Barczyk, Representative to the Sejm — was to neglect putting forth a constitutional draft quickly; trying it out to see if it succeeds and if it does not then discarding it." Interview with Representative Kazimierz Barczyk and his associates, Mr. Szczepanek and Mr. Gadowski (June 29, 1992).

<sup>397</sup> The precise date of the commissions' appointment was not clear. Andrzej Rapaczynski mentions early 1990; other commentators date the beginning of the constitutional works to December 1989. See Andrzej Rapaczynski, *Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament*, 58 U. CHI. L. REV. 595, 601 (1991); cf. *Constitution Watch*, E. EUR. CONST. REV., Spring 1992, at 2.

preferences for either a parliamentary or a presidential system.<sup>398</sup> The issue of the applicability of either model in the Polish geopolitical circumstances generated a great deal of emotion.

In the Spring of 1992, the procedure for the adoption of a new constitution generated the most heated discussion.<sup>399</sup> In accordance with the bill passed by the Sejm, forty-six members of the Sejm and ten members of the Senate composed the new Constitutional Committee. The bill granted Constitutional initiative to the Constitutional Committee of the Parliament, to any group of forty-six deputies to the Sejm, and to the President. The Constitution was to be adopted by a two-thirds majority of the National Assembly, *i.e.*, the Sejm and the Senate combined, and subject to ratification by popular referendum.

The bill met with opposition from both the President and the Senate. President Walesa wanted the Committee to include representatives of the Government, the Supreme Court, and the Constitutional Tribunal, who were given only observer status by the bill. The Senate introduced amendments which proposed to increase the ratio of senators to deputies on the Constitutional Committee, and suggested that the constitution be adopted in the National Assembly by a fifty-five percent majority, rather than two-thirds. A vote of two-thirds of the Sejm invalidated the Senate amendments, which confirmed that the Constitution would be drafted, adopted, and ratified according to the Sejm's bill.<sup>400</sup>

In the interim, the Extraordinary Commission of the Sejm worked on the constitutional act, "The Constitutional Statute on Appointing and Dismissing the Government and Other Changes Regarding the Highest State Organs," submitted to the Sejm by the President Walesa.<sup>401</sup> In response to the presidential proposal, the Democratic Union, the largest party in the Parliament, prepared and submitted to the Sejm in February 1992, a draft of the Interim

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<sup>398</sup> E. EUR. CONST. REV., *supra* note 397.

<sup>399</sup> Minutes of the Legislative Commission of the Polish Sejm, BIULETYN [Report], Feb. 5, 1992, Feb. 11, 1992, and Feb. 14, 1992; *cf.* Constitutional Bill on "the Procedure of the Adoption of a New Constitution," submitted by the Sejm's Marshal Wieslaw Chrzanowski, Mar. 10, 1992.

<sup>400</sup> *Interim Constitution Approved in Poland*, E. EUR. CONST. REV., Spring 1992, at 12-13; records of the constitutional debates taken personally by the author.

<sup>401</sup> The full title of the act was "The Constitutional Statute on Appointing and Dismissing the Government and Other Changes Regarding the Highest State Organs." *See* draft of the act submitted to Wieslaw Chrzanowski, Sejm's Marshal by the President Lech Walesa on Mar. 12, 1991.

Constitution. The draft, called "The Constitutional Act on Mutual Relations between Legislative and Executive Powers of the Polish Republic," or "The Small Constitution" for short, focused on checks and balances between the Parliament, the President, and the Government, leaving the new constitution to regulate other issues.<sup>402</sup>

Compared to the Amended Constitution of 1952, currently in force, the draft of the Small Constitution<sup>403</sup> proposed several major changes.<sup>404</sup> First, the 1952 Constitution provides that upon motion of the President the Sejm shall appoint and recall the Prime Minister. The Small Constitution, however, suggests that the President designate, subject to the approval of Parliament, the Prime Minister and the Cabinet. The procedure for designating the Government is elaborate and cunning.

In refusing to approve the presidential candidate for Prime Minister by an absolute majority, the Sejm receives the opportunity to designate a successive candidate by the same majority. If the Sejm fails, the President is to again designate a Prime Minister, subject to the approval of the plurality. If a plurality is not reached, the Sejm may then elect its candidate by a plurality of the votes cast. However, if the parliament's candidate fails to win the required support, the President can either dissolve the parliament or appoint a Provisional Government for six months.<sup>405</sup>

Second, the draft of the Small Constitution introduces the "constructive vote of no confidence" which provides that, if the Sejm dismisses the Prime Minister, it must simultaneously designate a successor by an absolute majority.<sup>406</sup>

Third, the draft significantly increases the power of the Cabinet. The Prime Minister is made directly responsible to the Sejm, and the President is stripped of the power to ask Parliament for the Cabinet's dismissal. On the other hand, the draft delegates the

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<sup>402</sup> See Jaka Konstytucja [*What Constitution*], GAZETA WYBORCZA, [ELECTORAL GAZETTE], June 29, 1992; Osiatynski, *supra* note 6; *Interim Constitution Approved in Poland*, *supra* note 400.

<sup>403</sup> The text of the Small Constitution was published as *Ustawa Konstytucyjna of August 1, 1992 on Mutual Relations Between the Legislative and the Executive Power and on the Local Government in* EKONOMIA I PRAWO, [ECONOMICS AND LAW], Aug. 7, 1992, Nr. 185, at VIII [hereinafter Small Constitution].

<sup>404</sup> See Lech Mazewski, *Wzmocnienie Państwa (Reinforcing the State)*, RZECZYPOSPOLITA [REPUBLIC], Sept. 18, 1992.

<sup>405</sup> *Konstytucja*, *supra* note 402, at 11.

<sup>406</sup> *Constitution Watch: Poland*, E. EUR. CONST. REV., Spring 1992, at 2.



President and the Prime Minister the joint power to replace ministers without asking the Sejm for its consent. In contrast to the Constitution in force, the draft allows the Cabinet to ask the Sejm for permission to legislate by decree.

Fourth, the amended 1952 Constitution provides separate statute to determine which acts of the President need to be countersigned by the Prime Minister. The statute, however, has never been passed. The draft provides a list of actions, such as calling elections of the Parliament, dissolving the Parliament, vetoing the Parliament's legislature, and appointing judges, which do not need the countersignature of either the Prime Minister or of one of the ministers. In the other actions, the President must cooperate with the Cabinet. The President has important checks on the Sejm, through the veto power, and on the government, through the right to veto the government's decrees. In contrast, should the President attempt to bypass the Sejm by means of referendum, the cooperation of the Senate is required.<sup>407</sup>

The draft of the Small Constitution is widely praised as the result of a clever compromise, which could be recognized as a "success of the Polish democracy."<sup>408</sup> The Center Alliance and the Movement for the Republic, headed by former Prime Minister Jan Olszewski, attacked the Small Constitution. They claimed the draft gives preference to the presidential system.<sup>409</sup> Despite the opposition of these two parties, on August 1, 1992, the Sejm adopted the draft by a two-thirds majority.<sup>410</sup> The draft was submitted to the Senate, who returned a heavily amended version. For final adoption, the interim Small Constitution needed the vote of a two-thirds majority of the Sejm in order to override the Senate's opposition.<sup>411</sup>

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<sup>407</sup> *Konstytucja*, *supra* note 402.

<sup>408</sup> Wiktor Osiatynski, *Skazani na Oryginalnosc [Doomed to Originality]*, GAZETA WYBORCZA [ELECTORAL GAZETTE], Aug. 29, 1992, at 8. Zbigniew Witkowski, counselor for the Senate Constitutional Commission, is of a different opinion and claims that the draft "is not a great success of Polish democracy. It is rather evidence that we do not know how to reach democracy." *Jaka Bedzie Ta Mala? [What will be this Small?]*, GAZETA WYBORCZA [ELECTORAL GAZETTE], Sept. 18, 1992.

<sup>409</sup> *Interim Constitution Approved in Poland*, *supra* note 400.

<sup>410</sup> *Mala Konstytucja Uchwalona (The Small Constitution Adopted)*, GAZETA KRAKOWSKA, (CRACOW'S GAZETTE), Oct. 17-18, 1992, at 1.

<sup>411</sup> *Regulamin Niekonstytucyjny (Unconstitutional Procedure)*, GAZETA WYBORCZA, (ELECTORAL GAZETTE), Oct. 19, 1992, at 2.

The procedure for the Sejm's voting on Senate amendments became a matter of major controversy. The Sejm's procedural rules provided initially that the Sejm should vote on the amendments twice, once to reject an amendment, and the second time to accept it, if the amendment had not been voted down. In both instances, a majority of two-thirds was required to decide on the future of an amendment. It was noted, however, that this procedure may result in a legislative deadlock. If one-half of the Sejm deputies voted against the amendment, it was not rejected, because two-thirds majority was needed for this purpose. If, however, the other half of the deputies supported the amendment it would not be accepted either, due to the lack of the required qualified majority of two-thirds. The amendment was neither rejected or accepted, as is an act, a constitution, or a regular statute which had been subject to the amendment process. The described scenario created a clear legislative impasse.

The rules of procedure were changed in July 1992, when it was decided that the Sejm would vote once. A two-thirds majority was needed to reject the Senate's amendments, but when they were not rejected they were automatically adopted. This immensely increased the role of the Senate, because the support of one-third of the Sejm's deputies would be sufficient to adopt the Senate's amendments.

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

The decision to change procedural rules was challenged as unconstitutional in the Constitutional Tribunal, which delayed the

process of the adoption of the Little Constitution by one month.<sup>412</sup> In mid-November the Constitutional Tribunal ruled in favor of the Sejm's action, and, on November 17, 1992, President Walesa signed a new interim Polish Constitution.

Although the Little Constitution was published with constitutional provisions which continued in force,<sup>413</sup> the President planned to supplement it quickly with a new bill of rights. In December 1992 the Helsinki Foundation for Human Rights in Warsaw prepared a draft of a Charter which was to complement the Interim Constitution.<sup>414</sup> The extraordinary commission of the Polish parliament was called to review the draft, but its work progressed very slowly and as of April 1993 the commission approved only five of the Charter's forty-nine articles.<sup>415</sup> This initiative, as well as other amendments to Little Constitution proposed by President Walesa, have been hampered by the dissolution of the Parliament, resulting from the government's failure to win a vote of no confidence in May 1993. The new elections held in September 19, 1993 brought to power the ex-communist Democratic Left Alliance, along with its political partner, the Polish Peasant Party.<sup>416</sup> The change of the political balance in Poland effected the speed of the constitutional works and, at least at the moment of this writing, it seems very unlikely that the drafting of a brand new constitution will be completed by the end of 1994.

### 1. *Human Rights Practices in Poland*

Poland recognized relatively early the need for non-governmental oversight of the human rights situation. The Polish model of administrative and constitutional judicial review was established by the Statutes on the Supreme Administrative Court of January 31, 1980, and on the Constitutional Tribunal of April 29, 1985.<sup>417</sup>

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<sup>412</sup> Włodzimierz Bieron, *Regulamin Sejmii przed Trybunałem* (The Sejm's Procedure before the Tribunal), RZECZYPOSPOLITA (Republic), Oct. 20, 1992.

<sup>413</sup> See *The Constitutional Act of 17th October 1992 on the Mutual Relations Between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-Government with Constitutional Provisions Continued in Force*, 84 JOURNAL OF LAWS OF THE REPUBLIC OF POLAND 426 (1992).

<sup>414</sup> *Constitution Watch: Poland* EAST EUR. CONST. REV., Spring 1993, at 10.

<sup>415</sup> *Id.*

<sup>416</sup> John Pomfret, *Poland's Victorious Ex-Communists Take Steps Toward Return to Power*, WASH. POST, Sept. 21, 1993, at A15, col. 1-4; see also *Former Communists Take Strong Lead in Polish Election*, WASH. POST, Sept. 20, 1993, at A12, col. 1-6.

<sup>417</sup> Rett R. Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, 37 INT'L & COMP. L.Q. 89-108 (1988) [hereinafter *Judicial Review*]; Mark F.

Adopting a so-called Austrian "centralized and abstract" model of judicial review, the Polish Sejm granted the Tribunal a limited right of constitutional review, activated either directly by the petition of the highest political and judicial officials of the state, the Sejm committees, groups of at least fifty deputies, local authorities, or indirectly by the inquiries of the regular courts. The Tribunal is vested with the right to issue final decisions invalidating "sub-statutory acts" (orders, ordinances and instructions) and suspensory decisions concerning the "statutory acts" (either statutes or decrees) that could be overruled by a qualified two-thirds majority of at least half the deputies voting.<sup>418</sup> Furthermore, in 1987 Poland created the organ of Ombudsman, a non-governmental, independent body that investigates alleged violations of civic rights and liberties. Actions taken by the Ombudsman include investigation of public complaints and the presentment of governmental acts and decrees to the Constitutional Tribunal that allegedly were in violation of human rights. Moreover, both the Helsinki Commission and the Senate Office of Intervention examine public grievances and complaints.

The government does not place restraints on international human rights organizations that wish to visit Poland. In October 1992 Poland ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms.<sup>419</sup> Effective May 1993, Poland's membership in the European Human Rights Convention allowed persons claiming human rights violations to appeal to the European Commission for Human Rights.<sup>420</sup>

With regard to religion and ethnic composition, Poland is a more homogeneous country than the other East-Central European new democracies.<sup>421</sup> Though Polish minorities are not numerous, they face various forms of prejudice in society. This problem, how-

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Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 2 XLI AM. J. COMP. L. 153-200 (1993).

<sup>418</sup> See Ludwikowski, *Judicial Review*, *supra* note 417, at 100-08.

<sup>419</sup> Department of State Country Reports on Human Rights Practices for 1992, at 866-67 (Annual Report submitted to Congress, Available from the Department of State) [hereinafter STATE DEP'T REP.: HUMAN RIGHTS].

<sup>420</sup> *Poland Joins Human Rights Convention*, POLISH NEWS BULLETIN, (Apr. 29, 1993).

<sup>421</sup> Minorities constitute only 2.6% of the population of Poland which is approximately 38.3 million. Polish is the only official language of the country. The more sizeable minorities are: Ukrainians, 350,000; German-speaking minority residing along the Baltic Coast and in Silesia, 350,000; Belorussians, 200,000; Czechs and Slovaks, 30,000; Lithuanians, 250,000; Gypsies, 25,000; and Jews, 150,000. Approximately 95% of Poland is Roman Catholic, and until recently Eastern Orthodox and Protestant communities had only a

ever, has been recognized and in last two years the Polish government attempted to ameliorate the conditions of the ethnic groups.<sup>422</sup> For example, in 1992, Poland signed bilateral treaties with both Germany and Belarus providing national minorities the right "to cultivate their national identities." Also, even though Poland is predominantly Roman Catholic, minority religions, such as Eastern Orthodox, Ukrainian Catholic, Protestant, Jewish, and Muslim groups are able to practice without governmental interference or restrictions. There have, however, been several reports of discrimination against minority religious groups which complain, for example, that in a failing enterprise it is less likely that a Catholic would be dismissed than a member of a minority religion.<sup>423</sup> With regard to religious education, there is no longer a compulsory course in religion and ethics. Rather, the Ministry of Education issued a directive requiring a student or his parents to choose either a course in religion, ethics or neither. This directive provides for using public money to pay religion teachers, allows religious symbols to be placed in schools, and allows prayer before and after class.<sup>424</sup>

Political and due process rights are respected in Poland. Incidents of police brutality or degrading treatment declined significantly since the defeat of communism and there are no reported allegations of torture.<sup>425</sup> Politically, Poland is a multiparty democracy and the respect for the rights of its citizens to change the government was well confirmed in last several elections. As far as civil liberties are concerned, the Department of State observers did not note any major irregularities. The Constitution provides for freedom of assembly and freedom of association.<sup>426</sup> People are permitted to assemble, either formally or informally, peacefully and nonviolently, and to protest against the government. For public meetings, a permit is not required; however, the organizers must apply to the local authorities for a permit and must notify police

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small presence in Poland. See POLAND, YOUR BUSINESS PARTNER 1/1 (1992); POLAND, A PROFILE 8-9 (1993).

<sup>422</sup> STATE DEP'T REP.: HUMAN RIGHTS, *supra* note 419, at 867.

<sup>423</sup> *Id.*

<sup>424</sup> In August 1992 (when the materials for this article were collected) the Constitutional Court was asked to review this directive; the Commissioner for Human Rights Protection alleged that the directive "violates the freedom and anonymity of religious beliefs." *Id.* at 866.

<sup>425</sup> *Id.* at 863.

<sup>426</sup> Small Constitution arts. 83, 84(1).

for larger gatherings. If a permit is not obtained, however, the authorities will not interfere, as long as the gathering is peaceful. With regard to private associations holding meetings, government approval must be obtained. Governmental approval in these situations is almost always granted.<sup>427</sup>

The Constitution provides for freedom of speech and freedom of the press,<sup>428</sup> and these rights generally "exist in practice" as well.<sup>429</sup> For the most part, Poles are free to express their opinions in public and in private. However, one can be incarcerated under the current criminal code for insulting a state body.<sup>430</sup> In August and October 1992, this provision of the Penal Code was invoked, and both instances resulted in suspended sentences for the guilty parties.<sup>431</sup>

With regard to newspapers, they are considered to be "independent, uncensored and politically diverse," and there are no restrictions on creating a private newspaper other than the usual need for financial backing and public interest and demand.<sup>432</sup> In December 1992, the Sejm passed a new broadcast law which, among other things, ended the State's monopoly over the broadcast media, established a process for issuance of broadcast licenses, and required public broadcasters to "respect the religious feelings of the audience and in particular honor the Christian system of values."<sup>433</sup> With regard to this part of the act, Helsinki Watch and the Freedom of Speech Fund called on the Polish government to abolish the references to "Christian values" as it "could force journalists into self-censorship."<sup>434</sup>

There have been several significant changes in the area of freedom of movement. First, Polish citizens wishing to travel abroad can obtain passports. Also, there is no longer a registration requirement for either Polish citizens or legal permanent residents

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<sup>427</sup> STATE DEP'T REP.: HUMAN RIGHTS, *supra* note 419, at 865.

<sup>428</sup> Small Constitution art. 83.

<sup>429</sup> STATE DEP'T REP.: HUMAN RIGHTS, *supra* note 419, at 865.

<sup>430</sup> Paragraph 270 of the Polish Criminal Code. See Jacek Kalabinski, *U.S. Organizations Against Censorship in Poland*, POLISH NEWS BULLETIN, Aug. 31, 1993, available in LEXIS, Europe Library, PNBUL File.

<sup>431</sup> In August, after insulting President Walesa, a person was given a three year suspended sentence. In October, a former newspaper editor was given a two year suspended sentence for publishing a statement that offended the Solidarity trade union. STATE DEP'T REP.: HUMAN RIGHTS, *supra* note 419, at 865.

<sup>432</sup> *Id.* at 865.

<sup>433</sup> *Id.* at 865.

<sup>434</sup> Kalabinski, *supra* note 430.

each time they change their residence. With regard to emigration, Poland framed its policy in accordance with the European Community, and focuses on stopping illegal passage into its neighboring countries, especially Germany. Therefore, the number of people who applied for asylum in 1992 was less than fifty, whereas in 1991 there were 2236 applications.<sup>435</sup> Poland abolished most of its visa requirements for countries in Europe, including neighboring East European countries and the former Soviet republics.

In conclusion, Poland's record in human rights protection greatly improved during the first years of its independent and democratic existence. The State Department's annual report to Congress on Human Rights Practices noted that such violations, which were typical of and characteristic of the communist era, "were an exception in 1992."<sup>436</sup>

#### IV. *Conclusion: Between the West and East*

Where have the new European democracies looked in search of ideas? For a comparativist wishing to respond to this question, a review of the new bills of rights and actual practices of the former Soviet satellites in the protection of their constitutional freedoms and liberties, against the background of Western and socialist traditions, seems to be very instructive. Although as to future progress of constitutional reform in the region of former Soviet dominance, this question remains to be debated; yet, some observations already deserve notice.

As argued above, the original idea that basic laws should absorb bills of rights stems from the recognition that some liberties and rights should be protected because they are features of human nature. These rights, being inviolable and inalienable, are pronounced and guaranteed by the constitutions. Nineteenth century European constitutionalism abandoned some aspects of this naturalistic approach and emphasized a consensus reached by the people at the moment of a constitution's adoption. The rights and freedoms were granted as a result of legislative actions which constituted new legal situations. Thus, they could be curbed or expanded through further legislation by legislative assemblies acting as organs of state power. The concept of "granted" rights decisively gained an upper hand in socialist constitutionalism.

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<sup>435</sup> STATE DEP'T REP.: HUMAN RIGHTS, *supra* note 419, at 866.

<sup>436</sup> *Id.* at 863.

In tracing these influences in the new East-Central European bills of rights, one would find that the approach of the drafters of these acts varies. For example, the Constitution of Hungary states, it "recognizes the *inviolable and inalienable* fundamental human rights"<sup>437</sup> and the Constitution of Slovakia declares, "[b]asic rights and liberties are *inviolable and inalienable*, secured by law, and unchallengeable."<sup>438</sup> On the other hand, the Rumanian Constitution guarantees only, "[t]he citizens enjoy the rights and freedom granted to them by the Constitution and other laws . . . ."<sup>439</sup> The Republic of Albania Charter of Rights provides that "[t]he fundamental freedoms and human rights are sanctioned and guaranteed by means of the following provisions . . . ."<sup>440</sup> Upon close analysis, these introductory pronouncements of the bills of rights are clearly different; still, at this moment, it is difficult to determine to what extent the drafters of the new constitutions deliberately followed more positivistic or naturalistic approaches, and to what degree they simply transplanted into the new bills the rhetoric that they were familiar with.

Similarly, the idea that citizens have both rights and duties is well known to Western European constitutionalism. It received full recognition in socialist jurisprudence. Some of the new constitutions seem to play down the role of the duties. The Charter adopted before the "velvet split" of Czechoslovakia by the Federal Assembly of the Czech and Slovak Federal Republic in January 1991, referred only to "Rights and Freedoms". The adopted Albanian Act of March 31, 1993 is just "Charter of Rights". The Slovak Constitution of September 15, 1992 states cautiously, "[d]uties can be imposed only on the basis of law, within its limits, and while complying with basic rights and liberties."<sup>441</sup> Even the traditionally recognized duty "to defend the Motherland" was replaced by the declaration, "the defense of the Slovak Republic is a matter of honor for each citizen."<sup>442</sup> Other constitutions, such as Bulgaria, Hungary, Poland, and Romania provide separate chapters on "fun-

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<sup>437</sup> AMENDED CONST. art. VIII § 1 (emphasis added).

<sup>438</sup> SLOVAK CONST. art. 12(1) (emphasis added).

<sup>439</sup> ROM. CONST. art. 15 § 1, (emphasis added).

<sup>440</sup> Republic of Albania, Charter of Rights Supplement No. 7491, of April 29, 1991, "On Principal Constitutional Provisions, the Preamble."

<sup>441</sup> SLOVAK CONST. art. 13(1).

<sup>442</sup> SLOVAK CONST. art. 25(1).



damental rights and duties" and emphasize the links between citizens' freedoms and obligations.

The typical socialist pronouncements of a "communal character of rights" which could not be exercised "to the detriment of the society's interest" have been either dropped or replaced by the statement, "people are equal in rights and their individual freedom is limited by equal freedom of the others."<sup>443</sup>

The appeal to "collective interests," typical for socialist constitutionalism, seems to be recognizable in the provisions on social and economic rights. Following European, and particularly socialist traditions, the new democracies claim wide constitutional protection for economic, social and cultural rights and, as has been observed above, some new bills of rights offer even more protection than the economically vulnerable new states can deliver. The new constitutions declare the new states' dedication to principles of a market economy, but provide, individual economic initiative "cannot develop contrary to the social interest."<sup>444</sup> Generally speaking, with regard to an economic system, the new democracies are most often described as "social market economies," with the term "social" meaning widespread support for a large role still played by the state in the intended egalitarian distribution of wealth and in mitigating hardships caused by free competition.

One may observe the general tendency to reduce the list of the "citizens' rights" and expand the number of "everybody's rights" guaranteed to everyone regardless of sex, race, color of skin, language, creed or religion, political or other beliefs, national or social origin, affiliation to a nation or ethnic group, property, descent, or another status.

The socialist doctrine's traditional approach of not recognizing the need for judicial review is no longer accepted. Constitutional review became the greatest novelty of the post-socialist world, and the selection of a model of judicial review, applicable to the legal traditions of the post-socialist countries, became one of the most controversial issues in the constitutional debate across East-Central Europe. The models of constitutional review based on Austrian, German, or French experiences were more appealing to the

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<sup>443</sup> Albanian Charter of Rights, March 31, 1993, art 2.

<sup>444</sup> INTERIM CONST., *supra* note 68, at art. 10.

drafters of new East-Central European basic laws than the American decentralized and concrete system of review.<sup>445</sup>

Last, one looking for an overall evaluation of the actual record of the countries of former Soviet dominance in human rights protection must note the general improvement in this field. Some countries, such as Albania, Slovakia, and Romania still must acknowledge the existence of numerous violations of human rights, while other countries such as Bulgaria, Hungary, and the Czech Republic have improved, and in others, such as Poland, incidents of violations of human rights are rather exceptional.

Most of the new democracies ratified the European Human Rights Convention, joined the Council of Europe, and permit international human rights groups to monitor these states' practices in human rights protection. The reports from human rights organizations operating in this region indicate the general improvement with regard to respect for political rights. With the exception of some incidents in Albania and irregularities noted in Romania, the elections in most of these new democracies were held freely, and the basic principles of democratic pluralism have been respected by the newly elected governments. As far as freedom of expression and press were concerned, some irregularities have been observed even in the countries with lengthy democratic traditions, such as Hungary or Poland. Freedom of movement within the territory of these countries and abroad was unrestricted, with the exception of the refugees who faced mistreatment in several countries including Romania, Albania and Hungary.

Discrimination against ethnic communities is still a major problem for countries such as Albania, Romania, and Bulgaria. Some violations of minorities' rights have been noted in Slovakia, Hungary, the Czech Republic, and even in the ethnically more homogenous Poland. It seems that the democratization of political and social life opened a Pandora's box of ethnic problems, and that tension between ethnic groups, especially in East-Southern Europe, increased after the fall of communist dictators. In short, although the gap between theory and practice in human rights protection has been reduced, it still exists and will remain visible for some period of time. Democratic processes in these countries

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<sup>445</sup> For more comments on the reason for the repudiation of the American model of constitutional review see Ludwikowski, *Constitution-Making in the Countries of Former Soviet Dominance: Current Development*, *supra* note \*, at 257-61.

seem to be irreversible but their further advancement requires time, foreign assistance, knowledge and patience. Time is required to heal the wounds left in the mentality of all living post-socialist generations. Time is needed to form a mature political culture, in which politics would not have to take precedence over morality, where communal values would not take precedence over individual ones, and the law would be more than a mere instrument in the hands of politicians.

There is no single constitutional model surfacing in the region of former Soviet dominance and there is no single stereotype of a perfect bill of rights to be adopted there. The problems faced by the new democracies are similar, and common is the feeling of suspension between the West and the East. Still, with time passing, and with the growing experience and knowledge of the drafters of new basic laws, their recognition of the different needs of their societies increases, as does the inclination to borrow from different sources. This tendency should not be underestimated by the Western experts who are expected to supply information about constitution-making techniques, rather than about constitutional models ready for adoption.