constitutional tradition is drawn upon, for the purposes of a new polity. It shows the need to understand the impact of culture on constitutional models in their original contexts, as well as the cultural influences that are likely to be brought to bear once transplantation has taken place.

The evolution of the Australian constitutional system and the slow parallel development of a distinctively Australian constitutional culture raise some other issues relevant to the broad topic as well. These include the manner in which constitutional culture is modified; the extent to which it can be constructed; and the respective importance of the attitudes of elites and the people at large in the emergence of constitutional culture. A larger question, just beginning to attract attention is the effect on national constitutional culture of international norms. Underlying it is the contentious issue of whether these are truly international or whether they are themselves culturally derived. In either case, there is an issue of the extent to which departure is justified by reference to national cultural concerns.

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Constitutional Culture of the New East-Central European Democracies

Constitutionalism and Constitutional Culture

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

Following this approach, we can easily find out that constitutionalism is most often linked to the rule of law, the limitations imposed on the powers of government, and the protection of fundamental rights[1]. In addition, some constitutional experts emphasize the relationship of constitutionalism to political culture, understood as a component of *the moral, intellectual and cultural climate in state*[2]. Quite often, constitutionalism means nothing more than the concept of a good constitution. Between the principal demands of constitutionalism, we can find almost all essential precepts of basic democratic laws: popular sovereignty, the right of people for self-determination, the concept of the constitution as supreme law, ideas of democracy and rule of law, limited government, separation of powers, checks and balances, civilian control of military, protection of human rights, and many others[3].

[1] "There appears to be no accepted definition of constitutionalism..." M. Rosenfeld: *Constitutionalism, Identity, Difference and Legitimacy: Theoretical Perspectives,* 1994; see also L. Henkin: "A New Birth of Constitutionalism: Genetic Influences and Genetic Defects", *Cardozo Law Review,* 1993, Vol. *14,* p. *534.*

[2] See M. Rosenfeld: "Modern Constitutionalism as Interplay Between Identity and Diversity: An Introduction", *Cardozo Law Review,* 1993, *Vol.* 14, p. *497.*

[3] See D. P. Franklin, M. J. Baun: *Political Culture and Constitutionalism: A Comparative Approach,* 1995.

[4] See L. Henkin: *A New Birth...,* op. cit., pp. *535-536.* Following this line of argument further, some constitutional expersts clearly refer to constitutionalism as "a political form" with "a body of

The constitutional experts who believe that the rule of law is the single, most fundamental feature of constitutionalism usually agree that it may exist and develop within authoritarian, or even dictatorial states. In this political environment, constitutionalism means the theory that describes the mechanisms of political stability without references to self-sustaining democratic institutions. Contrarily, democratic constitutionalism assumes that the development of constitutional consciousness requires the imposition of limits on the operation of the government; the process of thinking about a constitution began when the first efficient restraints were imposed on the arbitrary power of the rulers[4].

The method of searching for the contents commonly associated with constitutional culture is less successful. It is characteristic that one cannot find a satisfactory definition of this term even in the works written directly on the topic[5]. Constitutional culture was so recently introduced into the costitutional vocabulary that the process of its absorption by the legal scholarship is still far from complete. For this reason, any constitutional scholar trying to explain what constitutional culture means must clear his own path. I will do the same and start with some comments on the relationship between constitutionalism and constitutional culture. As the main aim of this article is to characterize East-Central European constitutional culture, I will successively single out the traits most typical for the new'post-socialist democracies and conclude with observations on the tendency of the region to converge with or diverge from Western constitutional culture.

Constitutionalism, in the narrow sense, may precede the emergence of a constitutional order, as in the way that constitutionalism existed in the political thought of the European Enlightenment long before the adoption of the first written constitutions. Constitutionalism of this period was formed as the way of thinking about the organization of a state and society that would limit the absolutism and arbitrariness of state organs through the adoption of a formal

fundamental laws". This approach seems to link constitutionalism to the written constitutions. A. Arato: "Dilemmas Arising from the Power to Create Constitutions in Eastern Europe", *Cardozo Law Review*, 1993, Vol. 14, pp. 663-664.

[5] See D. P. Franklin, M. J. Baum: *Political Culture...*, op. cit., p. 2.

[6] See K. W. Thompson, R. R. Ludwikowski:Constihaionalism *and Human Rights: America, Poland, and France*, 1991; A. Arato: *Dilemmas...*, op. cit., pp. 663-672.

[7] See generally R. F. Nagel:Constitutional *Cultures: The Mentality and Consequences of Judicial Review*, 1989. Nagel simply associates the essential term of his essay with political culture and assumes that judicial review is its essential component (ibidem, pp. 23-26). His book has been reviewed by Ch. L. Eisgruber: "Disagreeable People", *Stanford Law* Review, 1990, Vol. 43; M. H. Redish: "Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review", *Mich. Law Review*, 1990, Vol. 1340; L. R. Be V ier: "On the Enduring Dilemma of Judicial Review", *Emory Law Journal*, 1990, Vol. 39.

document or series of documents called a constitution[8]. Using the wider, historic concept of the discussed term, we may analyze American, French, Italian, German or other constitutionalisms. Constitutionalism, understood in this way, would encompass both operating constitutions with constitutional orders and concepts of a constitutional regime.

We may observe that historic constitutionalism absorbs the narrow constitutionalism that becomes its *sine qua non* component. Two other elements of this term (operating constitution and constitutional order) are not as essential. We already pointed out that constitutionalism can exist without a written constitution. Similarly, one may observe that the mere fact of the adoption of a constitution does not predetermine the existence of the constitutional order. The state may adopt a purely decorative constitutional act that may contrast with unconstitutional practices. It may make constitutional rules and concepts fictions; the lack of the constitutional order would not, however, rule out the existence of constitutionalism in the same way as it operated for decades in the communist states despite of the *declaratory* character of many of communist constitutional provisions[9].

Constitutional culture is a component of political culture, and as such has the same essential qualities: attitudes, opinions, values, emotions, information and skills. This author would also be inclined not to limit the scope of constitutional culture to purely psychological elements, but incorporate into this phenomenon a behavioral component[10]. Responding to some concerns this approach does not obliterate the fields of interest of political science and political culture. In my

[8] Looking for examples, one may discover the development of constitutionalism without an actual constitutional order in France, in the beginning of the eighteenth century. At the same time, in Poland with her elected monarchs limited by the acts called rota *bene* constitutions, one can find constitutionalism operating along with some inefficient constitutional order. For broader comments see R. R. Ludwikowski, W. F. Fox, Jr.: *The Beginning of the Constitutional Era: A Bicentennial Comparative* Analysis *of the First Modern Constitutions*, 1993, pp. 48-75.

[9] See R. R. Ludwikowski: "«Mixed» Constitutions – Product of an East-Central European Constitutional Melting Pot", **B.** *U. International Law Journal*, 1998, Vol. 16, pp. 68-69.

[10] In the sixties, G. A. Almond and B. Verba were recognized as the main proponents of the "psychological" concept of political culture. Almond wrote, "a political culture is a particular distribution of political attitudes, values, feelings, information and skills", in: G. A. Almond, G. Bingham Powell (eds.): *Comparative Politics Today: A World View*, 2nd ed., 1980. For wider discussion of political culture, see G. A. Almond, B. Verba: *The Civic Culture*, 1963. See also R. R. Ludwikowski: *Polska kultura polityczna. Mity, tradycje i wspolczesnosc*, 1980. For the expression of the "behavioral" concept of political culture, see also W. Pluskiewicz: "Kultura polityczna – ;wiadomo;c polityczna – wiedza polityczna". *Studia Nauk Politvcznych*, 1977; W. Knobelsdorf: *Kultura polityczna i jej rota w systemie politycznym spoleczeristwa socjalistycznego*, 1974.

The problem was widely. discussed at the XI Congress of Polish Historians in 1974. See R. R. Ludwikowski: *Polska kultura...*, op. cit.

opinion, political science focuses on studying human behaviors in their complexity as activities oriented on the accomplishment of political goals; political culture examines them as reflections of human attitudes toward politics and political order. To use an example, it is important for the student of constitutional culture to check whether politicians and scholars compromise or assault each other during constitutional disputes. While political scientists may wonder whether rude political behaviors are successful in battles for political goals; commentators of cultural phenomena might investigate to what extent they are expressions of dissatisfaction in constitutional processes.

This assumption brings us to the conclusion that, in the same way that it occurs in the fields of political science and political culture, the scopes of constitutionalism and constitutional culture overlap to some extent. Constitutionalism in the narrow sense, understood as the set of opinions and doctrines about constitutional order is, in fact, one of the components of constitutional culture; constitutionalism, in the wider sense, grows out of cultural environment and, *vice versa,* effects and transforms this environment. Examination of these intermingled phenomena in East-Central European realities warrants two further introductory observations.

Searching for a Paradigm of East-Central European Constitutional Culture

Descriptive versus Prescriptive Approach

1. My first reflection deals with the level of acceptable generalization of observations on the regional constitutional cultures? Someone who sets about searching for the cultural characteristics of several countries immediately faces the question of whether there are any common cultural features that would distinguish one group of political entities from any other. Finding some similarities still is not enough to justify a thesis about the common cultural fabric or core of the group. The compared designates still can show more differences than commonalties. This reflection brings us to the question of whether, in fact, there is any paradigm of East-Central European Constitutional Culture.

This author spent some time trying to prove that there is no single post-socialist constitutional model, and no single constitution or constitutional system that served as a prototype for the constitutional drafters from the new democracies [13]. The countries of East-Central Europe share some common recent history, but the

[13] *See R. R.* Ludwikowski: "Searching for a New Constitutional *Model* for East-Central Europe", *Syracuse Journal of International Law & Cone,* 1991, Vol. 17.

real roots of their constitutional experience are very different. Some of them have very mature constitutional traditions, some began their constitutional experiments in this century". They have intrinsic similarities which can distinguish them from Western countries, but, on the other hand, they show so many different features that placing them within one single category is problematic, if not virtually impossible".

Searching for the common cultural characteristics of the new democracies is an even more difficult task. The constitutions and constitutional orders are expected to last and their relative longevity facilitates a comparative analysis. Constitutional culture is a much more fluid and flexible subject of examination. It has its more stable components, such as constitutional traditions, memories of the historical models of constitutions or the constitutional mechanisms that have been registered in the constitutional consciousness as good or bad. Dynamics, however, of the most of constitutional culture's elements is substantial. With the recent development of means of mass communication, information and skills can be acquired quickly; opinions and emotions can change overnight. Even attitudes and behaviors can be transformed relatively easily.

All of these observations do not mean that the comparison of constitutional cultures is impossible. They do mean, however, that we should speak about the cultural characteristics of the geographic regions with a solid dose of caution. When we are comparing the cultural phenomena of more than a dozen countries, we speak about tendencies, trends, similarities, and differences, but not about models, patterns, and paradigms.

2. My second reflection addresses the problem of evaluating political cultures[15]. In discussing constitutional transformations many questions naturally arise: are there parallels between the Western and East-Central European constitutional histories? Does Eastern Europe have any liberal or democratic traditions to draw on? Do these countries have *progressive* or *backward* political cultures?"

I admit that the very attempt to evaluate constitutional culture raises almost instinctive reservations. In public opinion, the terms *progressive* or *backward*

[13] *See R. R.* Ludwikowski: *Constitution-making in the Region of Former Soviet Dominance, 1996, pp. 33-36.*

[14] Ibidem, *pp.* 233-234.

[15] *Sonic of these* comments *were* taken *from* the chapter *in* the author's book *Constitutional Legacy. The Confrontation of East and West,* ibidem, pp. *32-36.*

[16] *G.* Schopflin *has written:* "the Western political traditions *always* emphasized pluralism *and the* fragmentation *of power.* In Eastern Europe, which was politically backward, the *state* played *a* much *more* dominant role *as the* principal agent *of* change. This resulted *in a* politically preeminent *bureaucracy* and *a weak society*". *See G.* Schopflin: "*The* Political Traditions *of* Eastern Europe", *Daedalus, Winter 1990,* p. 119.

themselves become measures of what political models are desirable and good or undesirable and bad. In fact, however, it is often difficult to estimate *social progressiveness* in such spheres as art, philosophy, literature, or politics. Some components of political culture are subject to evaluation, while others can only be described. For example, it is possible to measure the degree of society's political knowledge or the amount of information available to the public, but one can hardly evaluate social emotions or attitudes. In the same way, political traditions are a function of a variable that is the sum of its social, economic, and geographical elements. These elements always have some relativistic aspects and can scarcely be evaluated as clearly *progressive* or *backward.*

Admittedly, one can examine liberal or democratic elements of Western or Eastern traditions; one can even argue that from the perspective of social well-being, the Western model led to greater economic prosperity. The West, not the East made greater contributions toward democracy and placed more emphasis on political pluralism and the fragmentation of power. Still, it does not mean that these visible symbols of the West are synonymous with progress. As Montesquieu remarked almost 250 years ago, the value of human arrangements is always relative. In terms of general evaluation, Western and Eastern models are not *backward* or *progressive, good* or *bad;* they are sometimes simply different. The main task of comparative constitutional scholarship is to describe and analyze cultural phenomena, to answer the question *what is the constitutional culture not* and *what it should be.* My point is that, even if we try to analyze the consequences of social attitudes, behaviors, opinions, and emotions, we are still in the area of descriptive examination; evaluations bring us dangerously close to prescriptions that may be recognized as a panacea for all problems.

The Drafters. "New-way" Approach to Constitution-making and Its Consequences

What, among other factors that contributed to Vladimir Meciar's successes — wrote Slubowski — "was repeating that Slovakia is going its own way, different than Russia and different than the countries of the West" [18].This observation reflects the message repeatedly and successfully sent to the public by the political leaders of many East-Central European democracies. The *new way* approach stemmed from several premises. First, from the new post-socialist political elites' feeling of suspension somewhere between their socialist legacy and Western traditions.

[17] *Wprost*, November 15, 1998, p. 111.

Since the very moment the region entered into an era of extensive constitutional transformation it was quite clear that the new democracies would break with their communist past and adopt constitutions that will be marked as *entirely new*. On the other hand, the drafters of the new acts could not disregard the post-socialist societies' sentiments for their communist past. The longing for the illusive communist stability, which is common to all new democracies, is rooted in misinformation or lack of knowledge about life in the West.

For decades, communist propaganda tried to ridicule Western moral and social values. It presented the new generation of people in socialist countries with pictures of rotten societies living in capitalist and Mafia-ruled urban jungles. A widened exposure to Western political, legal, and social culture either reinforced the myth of a rotten and greedy West or contributed to a contrasting, but equally false, image of the West as a paradise. People in the post-socialist countries or socialist states, exposed to Western political, legal and social culture, have problems comprehending that being elevated to a higher standard of living does not automatically guarantee happiness for all. Newly introduced market mechanisms reveal step-by-step that those at the bottom of the social structure are still frustrated, even if their conditions of life are improved significantly. They might be better off than they were in communist times, but they are unequal within a different kind of society and still long for the communist *equality in misery*. All of this resulted in a major confusion of the people in socialist and post-socialist countries about the West and in equally confusing beliefs in the West about an overwhelming yearning of the socialist societies for Western values [19].

The social attitudes, described above, contributed to the very special ambivalent approach to constitutional drafting in East-Central Europe. The drafters of the new constitutions did not have any doubts that they will have to borrow from the West but they wanted to borrow in their own way. On the one hand, they faced so-called "American and Western European universalistic constitutionalism" [20], with its appeal for the reception of well-tested liberal values [21]. On the other hand, they listened to Western scholars suggesting that remedies for the drafters' problems can be found in local traditions rather than in the history of the United States during the era of the Enlightenment [22]. As a result,

For more comments, on post-communist nostalgia for communism, see R. R. Ludwikowski: *Constitution-making...,* op. cit., pp, 190-192.

[19] S. N. Katz: "Constitutionalism in East-Central Europe: Some Negative Lessons from the American Experience", in: V. C. Jackson, M. V. Tushnet (eds.): *Comparative Constitutional Law,* 1999.

[20] B. Ackerman has written, "his said, I want to resist the fashionable relativism that looks upon liberalism as a local prejudice of Anglo-American civilization or maybe even a few English-speaking universities inhabited by rootless cosmopolitans", in: V. C. Jackson, M. V. Tushnet (eds.): *Comparative...,* op. cit.

[21] See S. N. Katz: "Constitutionalism...", op. cit., p. 286.

the drafters more and more decided to reject the well-tested Western constitutional models and produce their *own* constitutions[22].

In one of my studies on constitution drafting in East-Central Europe I tried to compare this *new approach* to constitutional gardening", as contrasted with constitutional *engineering* or surgical *transplanting*. An engineer's or surgeon's work requires some level of exactitude; their freedom to experiment is limited. In contrast, the *constitutional gardeners* did not try to construct their products from well-tested components or to transplant organs into accomplished social organisms. Rather, they were picking seedlings from different gardens and implanting them, piece by piece, into living and constantly changing vegetation composed of rules, norms, and institutions. The *new gardens* do not resemble traditional French or British parks, they have *a mixed* character, blending together features produced by different tastes, cultures, and styles.

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

Consistency is one of the basic features of a good constitution. The term implies that constitutional provisions gel in such a manner that their rationale is fully explainable and that they mesh with other components of the constitutional system. To be consistent, the drafters of the constitutions would have had to acquire a deep comparative knowledge of the countries from whose constitutions they borrowed. Many drafter$, however, did not acquire this knowledge what resulted in striking number of inconsistencies. Guarantees for diversity of ownership [and] free initiative of all economic subjects[24] neighbor declarations that the economy is regulated by the state and coincide with typical socialist statements that economic initiative of juridical and physical persons cannot develop contrary to social interests and should not impair the security, freedom and dignity of man"[25]. Surprisingly, the concept of checks and balances was marred to the idea of separated functions for the organs of power. The principle of supremacy of

[22] Their attitudes, in many ways, were reminiscent of the reactions of the post-colonial African leaders who repeatedly claimed that their constitutions should have local flavor because they were adopted for the people, and that the people do not serve the constitutions. See H. W. O. Okoth-Ogendo: "Constitutions without Constitutionalism: Reflections on *an* African Political Paradox", in: Greenberg et *at. (eds.): Constitutionalism and Democracy, Transitions in the Contemporary World,* 1993, reprinted in V. C. Jackson, M. V. Tushnet (eds.): *Comparative...,* op. cit.

[23] See R. R. Ludwikowski: "<<Mixed>> Constitutions..." op. cit., p. *64.*

[24] See Albanian Constitution, Art. 10 (interim *1991).*

[25] See ibidem.

parliament was artificially combined with a presidential system of governance". A bicameral legislature was established without any clear rationale, and a preventive (French) model of judicial review was adopted without any respect to the fact that the particular country lacks a well-developed system of administrative courts". These kinds of inconsistencies were avoided by countries such as Bulgaria, Poland and Russia. The constitutional drafters of these countries were able to restrain their tendency to blend different constitutional principles and instead borrowed, to some extent, from recognized constitutional models.

The Citizenry. Constitutional Traditions, Information, Emotions

As has already been pointed out, tradition is one of the most stable components of political culture. The people's memory about their past cannot be changed, deleted or replaced overnight. From this perspective, the student of the constitutional culture of the East-Central European states has to admit that the citizenries of the new democracies were entering the era of post-constitutional transformations with a memory that not only lacked lengthy constitutional experiments but was heavily burdened by the socialist legacy.

Poland was the only country in East-Central Europe with constitutional traditions comparable to the West. In 1791, when it adopted the first written European Constitution", Poland already had significant experience with checks and limitations on royal power imposed to guarantee the system of *democracy of the gentry*". In fact, in the eighteenth century, Poland, rather than any other

[26] *See* Kazakhstan's Constitution, Art. *84.*

[27] *See* R. R. Ludwikowski: *Constitution-making...,* op. cit., p. *128.*

[28] *See* R. R. Ludwikowski: *Continuity and Change in Poland,* 1991, *pp.* 1-43.

[29] It has to be noted that a different opinion has been presented by W. Osiatynski, who wrote widely on Poland's constitutional traditions. He claimed that the history of constitutional movement in Poland should be understood as the process of the mler granting privileges to the people (the nobles), not as a contract or bargain between people to provide for limited government. For this reason, argues Osiatynski, democracy was better rooted in the Polish constitutional traditions than in the concept of limited government. This author is of a different opinion. It is true that the Polish history does not know the concept of "a political contract" concluded amongst the people themselves; these types of contracts were everywhere a philosophical abstraction rather than the historical facts, noted by the historians. The Polish history knows, however, a concept of contracts formally signed by the Polish monarch with the people. The so-called "*pacta coneenta",* negotiated by the electoral monarchs and the nobles since the first election in 1573, were formal contracts confirming the rights and privileges of the nobility and the obligations of the king and accepting limitations imposed on his power. See W. Osiatynski: "Perspective on the Current

Western European country became the early symbol of a liberal and constitutional monarchy. The pluralization and fragmentation of power in Poland, however, weakened the state and contributed to the state's loss of independence in 1795 and its partition by Russia, Prussia and Austria. Until World War I, Poles, along with Hungarians, Checks, Slovaks, Lithuanians, Latvians, Estonians, Ukrainians and Belatusians were incorporated into the absolute empires. Other countries of the region, such as Bulgaria and Romania, joined the family of sovereign states in the last decades of the nineteenth century. The independence of Albania was recognized at the Great Powers' 1912 conference in London [10]. Thus, while Western democracies began to flourish, the restraints imposed on the activities of representative bodies in East-Central Europe successfully hindered the development of constitutionalism until the turn of the twentieth century, and in many cases until the end of the World War I. The successive constitutional experience of the countries of this region was again disrupted by the interwar authoritarian transformations of the East-Central European states [11].

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

The concept of the collective, ridiculed after the fall of communism, left, however, its, stigma on the mentality of post-socialist generations. The breakdown of confidence in the constitution stemming from the deterioration of public morality survived to some extent even the fall of communism. The idea of *solidarity* which worked against the common communist enemy, did not serve as a sort of social cement in the circumstances that promoted competition, struggle

Constitutional Situation in Poland" in: *Perspective on the Current Constitutional Situation in Poland*, in: Greenberg et at. (eds.): *Constitutionalism...*, op. cit. See also commentary on this position in V. C. Jackson, M. V. Tushnet (eds.): *Comparative Constitutional...*, op. cit. For comments on the history of Polish "*pacta conventa*", see Z. Kaczmarczyk, B. Lesnodorski: *Historia paristwa i prawn Polski*, 1966, pp. 116-117.

[3°] For more comments on the constitutional history of East-Central European countries, see R. R. Ludwikowski: *Constitution-making...*, op. cit., pp. 9-31.

[11] The trend followed similar responses of the Western European governments to the crisis of the I 930s.

for survival and revengeism. The citizenries of the new democracies learned to speak freely and openly. They were hardly able, however, to digest the lesson that freedom of speech requires dialogue and the ability to listen to the others' arguments. The socialist parliaments were quickly transformed from assemblies composed of compliant *yes-men*, into the fora of deputies, struggling and assaulting political opponents". Defamation and slander became widely used instruments of political battles. The parliamentary conflicts in Moscow in the Fall of 1993, which preceded the violent street clashes between parliamentary supporters and the military units and led finally to the dissolution of the Supreme Soviet in Russia by Yeltsin and the arrest of its Chairman Ruslan Khasbulatov, became vivid symbols of new post-socialist political culture".

It is characteristic that a high level of public emotions, occasionally sparked by constitutional disputes, often goes hand in hand with everyday public political passivity". It is still a combination quite typical for attitudes of the societies of many of the new democracies. It has been frequently observed that the constitutions, hastily adopted in the periods of social and political transformations, serve as symbols of legitimization of new political regimes, but are hardly elements of everyday life that could animate politically passive societies". Passivity and the lack of recognition of the sanctity of a constitution may result in a divergence of the constitution and public opinion, the lack of public identification with the constitution or high level of disapproval for its provisions. A number of Constitutional Court decisions contrary to public opinion are usually the best litmus test of the level of *democratization* of the constitution. One may find supporting arguments in the wide public disapproval of the Hungarian Constitutional Court's decision establishing the unconstitutionality of the death penalty or a similar public reaction to the anti-abortion decision of the Polish Constitutional Tribunal [36].

[3'] In fact, it has to be admitted that political brawls are not entirely unknown to West-European politics. For example, the 1998 case of Jean-Marie Le Pen, barred in France from holding elective office for political assaults. See C. Trueheart: "French Rightist Is Barred From Office for a Year", *Washington Post*, November 18, 1998, p. A32. For an example of a libel case regarding the Hungarian former minister of foreign affairs, see "Case in Constitutional Court, 20/1997", E. *Eur. Constitutional Review*, 1997, Vol. 19.

[33] See *E. Eur. Constitutional Review*, 1994, Vol/3.

[30] See S. Holmes, C. R. Sunstein: "The Politics of Constitutional Revision in Eastern Europe", in: S. Levinson (ed.): *Responding to imperfection: The Theory and Practice of Constitutional Amendment*, 1995.

[36] See H. W. O. Okoth-Ogendo: "Constitutions...", op. cit., p. 228.

[36] See L. Solyom: "The Hungarian Constitutional Court and Social Change", *Yale Journal on International Law*, 1994, Vol. 19, p. 223. The proposal of a nationwide referendum in Poland divided the public and the Sejm, in which (on June 17, 1997) 165 deputies voted in favor and 170 voted against with 26 abstentions. See E. Eur. *Constitutional Review*, 1997, Vol. 6 (19).

Active involvement of the citizenry in constitutional dialogue requires an organized forum for public disputes. As well evidenced by the 1998-1999 case of the impeachment of President Clinton, the parliamentary debates, in spite of the moral sensitivity of the issues discussed, offered the public enormous load of constitutional information. Media reports, disputes, and everyday explorations of public reaction contributed to the common feeling of participation in the process of constitutional interpretation". It is quite characteristic that even the sharp public disagreement with the House impeachment conclusions did not produce any strong criticism of the constitution itself or undermined the consciousness that the people and not the enlightened leaders make the constitution[3t]. Although the level of generalization of this reflection may vary from one East-Central European country to another, one may risk the observation that the new democracies still lack strong identification by the citizenry with the constitution; this trend, combined with the weak constitutional information and the tendency of the leaders to manipulate public emotions, may undermine the stability of the constitution-making process in this region.

Legislatures: Politicization and Parliamentization of the Constitutions

The first constitutions, adopted by the new East-Central European democracies were relatively rigid; their drafters seemed to believe that their products would stand unchanged for a relatively long time[39]. Apparently, they

[3] In the same way, it is quite interesting to observe how much information about the constitutional process in the United States has been passed to the public during the Senate hearings of two candidates for the posts of associate justices of the Supreme Court: Robert FI. Bork and Clarence Thomas. In contrast, the names of judges of the Constitutional Courts in all the new democracies (including even the most active tribunals) are relatively unknown. This fact can be explained to some extent by the *per curiam* character of the courts' judgements and the lack of dissenting or concurring opinions. Still the public recognition of the courts ' role in the constitution-making process is much less impressive than in the West in general, and particularly in the United States. The process of creating so-called "television" or "Internet" parliaments is progressing slowly in the new democracies, and its effectiveness is still far from being complete.

" "Many Romanians still believe that citizens are servants while government officials are masters". M. Macovei: "Legal Culture in Romania", E. *Eur. Constitutional Review,* 1998, Vol. 7 (78). See also the comments of W. Osiatynski on the impact of the tradition of the "leaders' -made" constitution on the current process of constitution-making in Poland in: "The Constitution-making Process in Poland", *Lair & Policy,* 1991, Vol. 13, pp. 125-127.

[30] See L. Garlicki: "Normy konstytucyjne relatywnie niezmienne", in: *Charakter i struktura norm konztymcji,* 1997, pp. 137-155.

were surprised to find that the rigidity, meaningless in the socialist constitutions, made the new, most basic laws hardly amendable[40].

For example, the first post-socialist constitution in the region, adopted by Bulgaria on July 12, 1991, reserves the right to initiate amendments to one-quarter of the national representatives or to the president. The National Assembly may pass a law on amending and supplementing the Constitution by a majority of three-quarters of the national representatives, and after three rounds of balloting on different days. If the motion does not get the required majority but is supported by no less than two-thirds of the votes, it may be resubmitted after two months and than may be passed by the vote of a two-thirds majority[41].

In Romania the revision of the Constitution can be initiated by the president acting in cooperation with the government, by at least one-fourth of the deputies or senators, as well as by the motion of at least 500,000 citizens coming from at least half the counties of the country (including Bucharest) in which the motion received the support of at least 20,000 people. The draft of the amendment must be approved by at least a two-thirds majority of all deputies and senators or, in the case of disagreement between the chambers, by the joint meeting in which the motion has to get approval of at least three-fourth of the votes. The final draft of the amendment has to be approved by a nationwide referendum. Some provisions of the Constitution, concerning the form of the government, the national, independent, unitary and indivisible character of the state, territorial integrity, independence, system of justice, political pluralism, and official language are not subject to revision".

In Estonia, the Constitution may be amended by a law adopted either by referendum or by the Parliament *(Riigikogu).* The initiative to propose the revision is reserved to the president or to one-fifth of the deputies. The draft has to be debated during three readings with a two-month long interval between the first and second reading and one month between the second and the third reading. The amendment has to get approval of at least a majority of the first session and

[4o] The fact that the socialist constitutions, regardless of the level of rigidity were amended at will by the communist controlled legislatures, solidified the illusion that the built-in constitutional rigidity was of little significance.

[41] The regular amendments are adopted by the National Assembly. The adoption of a new constitution and certain amendments, such as on changes in the territory or form of the state, the state administration, and on the rules of amendments themselves, are reserved for the Grand National Assembly composed of 400 national representatives. See R. R. Ludwikowski: *Constitution-making...,* op. cit., p. 370.

[s'] See Romanian Constitution of November 21, 1992, Art. 146-148, reprinted in R. R. Ludwikowski:Constitutiot-making..., op. cit., p. 550. In the Czech Constitution, the provisions on the democratic character of the state and the rule of law are not amenable. See Czech Republic Constitution .of December 16, 1992, Art. 9.

three-fifths majority of the deputies at the second session. The Parliament, in matters of urgency, may adopt the draft submitted by a four-fifths majority of the vote and requiring the approval of three-fourths of the deputies. The draft may be also submitted and approved by referendum, if the appropriate motion was supported by at least three-fifths of the deputies and the referendum was held not later than three months after the vote in the Parliament [41].

The progress of the constitution-making process in East-Central Europe allows several reflections. First, it may be observed that the drafters of the constitutions adopted after the first constitutional explosion of 1991-1992 opted for the distinction of flexibility in the constitutional provisions, rather than for the recognition of an unamenable character of fundamental constitutional rules. For example, the Constitution of the Russian Federation of December 12, 1993 does not have any unamenable provisions. It recognizes, however, that some amendments (to Chapters 3-8) can be adopted by the Parliament (three-fourths of the Federation Council and two-thirds of the State Duma) and approved by no less than two-thirds of the federal components of the Russian Federation[45]. The provisions of Chapters 1, 2 and 9 can be revised only by a Constitutional Assembly and eventually upon its decision submitted for the popular vote[46]. The Constitution of Poland of April 2, 1997 provides for the optional procedure of amending Chapters I, II, and XII by referendum. It states that the subjects authorized to initiate the amendments (the president, at least one-fifth of the deputies and the Senate) may require, within 45 days of the adoption of the bill by the Senate, its submission for referendum, which in this case must be held within 60 days. Other amendments may be adopted by the Sejm by a majority of at least two-thirds of the votes of at least half of the statutory number of Deputies and by an absolute majority of at least one-half of the Senators[°].

Second, the drafters of the new constitutions became more sensitive to the numerous warnings of the Western constitutional experts that each transitory period requires a special degree of flexibility. They realized that the pluralization of the political spectrum in the new East-Central European democracies, combined with the built-in rigidity of the new constitutions, might freeze the

[41] See Estonian Constitution of June 28, 1992, Arts. 161-168, reprinted in R. R. Ludwikowski, *Constitution-making...*, op. cit., pp. 41-42.

[42] In addition, Bulgaria, Romania, Estonia, and several other countries adopted constitutions in this period: Slovakia (September 3, 1992), Poland (interim "Small" Constitution of October 17, 1992), Lithuania (October 25, 1992), Czech Republic (December 16, 1992).

[43] See Russian Constitution, Art. 136, reprinted in R. R. Ludwikowski: *Constitution-making...*, p. 576.

[46] See ibidem, Art. 135.

[°] See Polish Constitution, Art. 235, reprinted in R.R. Ludwikowski: *Constitution-making...*, op. cit.

natural process of constitutional development and, despite the intentions of the drafters, may endanger, rather than strengthen the stability of new constitutions.

The growing concern that the *preferred generations"* of constitution-makers may leave fossilized but defective constitutions for the future contributed to the suggestions that *parliamentization* and *politicization* of the constitution should be viewed as a positive, rather than detrimental, characteristic of constitutional culture in the transitory periods. Parliamentization means usually two things: first, the rigidity of the constitutions should be compensated by leaving the exclusive power to amend the constitutions to the parliaments and second, the constitutions should have some artificially inserted indeterminacy, namely, that the details of the constitutional norms or principles should be left to the regulations of statutory law. Politicization is understood as mixing constitutional politics with ordinary politics. The consequences of both tendencies warrant careful examination.

In fact, the suggestion that full authority to amend the constitution should be vested entirely in the Parliament[49] has not been seriously considered by the drafters of the new basic laws. In Bulgaria and Russia some constitutional amendments require the action of the special Constituent Assembly. In Russia, Lithuania, and Estonia the amendments require approval by referendum. In Poland the referendum is optional. On the other hand, the rigidity of the basic laws was implemented, not by requiring the cooperation of the citizenry or special conventions in the constitution-making process, but by provisions requiring qualified majorities to vote in the parliamentary actions. The pluralization of the legislative bodies, combined with the demands of a *two-thirds* or *threesJourths* majority vote, blocks even the early stages of constitutional revision .

[48] See A. Sajo: "Preferred Generations: A Paradox of Restoration Constitutions", *Cardozo Law Review*, 1993, p. 874. Sajo wrote that "the present generation inevitably imposes its scheme or vision upon future generations, and the constitution-making generation (or the political forces that be) have a particularly strong impact on future generations". Ibidem, p. 850.

[°] "Constitution-making in Eastern Europe must he a long, drawn-out political act. [...] This can be achieved best by vesting the parliament with full authority to frame a new constitution and with a flexible capacity for constitutional amendment". S. Holmes, C. R. Sunstein: "Responding to Imperfection..." op. cit. (quoted from the reprint in V. C. Jackson, M. V. Tushnet: *Comparative...*, op. cit., p. 317).

[50] Trying to compare the amendment process between the Soviet Union and Russia one will find out immediately that, between 1937 and 1974, the Stalinist Constitution was amended 250 times, affecting 73 of the original 146 articles. The attempt to amend the Russian Constitution in December 1988 was immediately blocked by President Yeltsin who declared that "as long as I am president, I will not allow any changes to the Constitution". Using another example, the parliamentary attempts to amend the Latvian Constitution to extend the term of the Parliament and the tenure of the Presidential office, have failed six times, as the required majority of two-thirds

The thesis that a built-in flexibility is an important prerequisite of a constitution's longevity has been an argument often used to defend the ambiguous language of many constitutions". Transparency is an important feature of a good constitution, but reasonable commentators may differ as to the meaning of constitutional provisions. They should not, however, conclude that a constitution's clauses are indeterminate. The drafters of the law should be able to distinguish between flexibility and uncertainty. The former justifies the very existence of constitutional courts, while the latter encourages those courts to arbitrarily take over the power to legislate.

The artificial indeterminacy of the new East-Central European constitutions meant several things. First, it resulted in the tendency to implement into the new basic laws awkward statements, appearing to signify the importance of some social problem but, in fact, providing no command and having no real substance, such as "citizens of the Republic are obliged to pay taxes and fees in accordance with legislation"[52], or "the religion [...] may be taught in schools"[53]. This indeterminacy also meant that the details of the constitutional norms or principles should be left to the regulations of the statutory law; the constitution should be *parliamentarized* by the regular legislative processes".

This approach, used repeatedly by most of the constitutional drafters in the new East-Central European democracies, would make sense if the constitutional norms declared principles, rules, or directives explaining a social value or a pattern of socially desirable behavior, but left the detailed regulations of the procedure or the explanation of what the value or pattern was in practice, to the implementing laws. For example, the declaration that the citizens should pay taxes as imposed by the law is nothing but commonplace, but the constitutional regulation of the principles of apportionment of expenditures and revenues between administrative or federal components of the state seems to meet the above mentioned standard even if the detailed regulations were to be left to the

(66 out of 100 votes) could not be achieved. Finally on Dec. 4, 1988, the Saeima (Parliament) adopted several amendments at the special plenary meeting with 67 votes in favor and one vote against. See K. Redden (ed.): *Modern Legal Systems Encyclopedia,* 1985. For details on amendments see S. Rusinova, V. Rianzhin: *Sovetskoe konstituticionnoe pravo,* 1975, pp. 81-85. See also *E. Eur. Constitutional Review,* 1998, Vol. 7.

[51] As far as the Constitution of the United States is concerned, see arguments of William F. Fox: "Amending the Constitution to Accomplish Social Goals", *Social Thought,* 1983, Vol. 13.

[51] See Kyrgyzstan Constitution of May 5, 1993, Art. 25, reprinted in *R. R.* Ludwikowski: *Constitution-making...,* op. cit, p. 469.

[53] See Polish Constitution *(1997),* Art. *53(4). The* full provision *reads:* "The religion of a church or other legally recognized religious organization may be taught in schools, but other peoples' freedom of religion and conscience shall not be infringed".

[54] See also the author's comments in R. R. Ludwikowski: "nMixedn Constitutions...", op. cit., pp. 66-67.

regular parliamentary legislation[55]. The point here is that references to the implementing laws cannot be used simply to delay the formulation of basic constitutional principles.

The proper level of generality in constitution-making is always disputable, and some of the new constitutions or constitutional drafts were frequently criticized for being either too detailed, such as the Ukrainian draft of June 10, 1992, or too concise and lapidary, such as Russian Constitution of 1993 The commentators of the Polish Constitution of 1997 often claimed that it endlessly refers the citizens to the statutory laws. In fact, it is not the number of references that matters, but the rationale for *parliamentarization* of the constitution[56]. The references to *the other laws* should guarantee that the citizens' rights can only be abridged by the statutory laws and that the scope of the governmental authority can only be expended by the law[57]. The statutory laws implement the constitution but cannot pronounce basic constitutional principles. *Parliamentarization* of the constitution, understood in the way just described, makes the very concept of the constitution meaningless and produces a body of law that is vague, indeterminate and overcomplicated.

Some constitutional commentators went even further and advised that the actual constitutional politics collapse into ordinary politics[that]as they claimed – is not only inevitable but, under current circumstances in Eastern Europe, desirable[58]. This type of *politicization* is already a quite visible trait of East-Central European constitutional culture that has resulted in the numerous manipulations of constitutional mechanisms for purely temporary political goals.

Consider – write Holmes and Sunstein – as a first admittedly untypical example, the Russian Federation. Ruslan Khasbulatov, before, he was deposed by Boris Yeltsin from his position as Speaker of the Russian Supreme Soviet, had several constitutional lawyers on his staff whose job was to tell him when his legislative proposals conflicted with the constitution. When Khasbulatov learned

[55] See for example, Art. 104a of the German Basic Law.

[56] In fact, the objections as to the number of references to the statutory laws of the Polish Constitution, is not quite confirmed by the comparative analyses. The German Basic Law, comprised of 146 articles, slightly shorter than the Polish Constitution (243 articles), refers its readers to "further regulations of the law" in 47 instances, amounting to 31% of constitutional articles. The Polish text does so 87 times, which means in 35% of its articles. The relatively short Constitution of Kazakhstan, 131 articles, does so only 25 times, amounting to 19 per cent of the articles. The number of references does not make the Polish Constitution less crisp or clear than the Constitution of Kazakhstan.

[52] This requirement stems from the fundamental principle of the rule of law: that the citizens can do whatever the law does not prohibit, and the governmental authorities should operate on the basis of the law and within the boundaries of the law.

[58] S. Holmes, C. R. Sunstein: *The Politics...,* op. cit., p. 322. "The very creation of a constitutional culture in post-communist societies depends upon a willingness to mix constitutional politics and ordinary politics", ibidem, p. 316.

of a possible conflict, he did not abandon his legislative proposal, of course, but with breathtaking nonchalance initiated the procedure whereby the constitution itself could be changed. Put, succinctly, constitutional amendments have been used in contemporary Russia (by Yeltsin as well as by Khasbulatov) as just another technique for outmaneuvering one's political enemies of the moment [59].

The power-sharing deal, offered to the Russian Parliament by Prime Minister Primakov, in January 1999, may serve as another clear example of constitutional *politicization.* The suggested promise by Yeltsin's not to dissolve the Parliament or dismiss the Primakov government suspended its impeachment proceedings against Yeltsin and promised not to use the no-confidence vote against the Primakov government is at first glance itself unconstitutional. Such a political deal would abridge the constitutionally guaranteed prerogatives of both the President and Parliament.

The careful commentator may find many more examples. In Kyrgyzstan, the consideration of a bicameral legislature was motivated by reference to the concept of checks and balances. Ultimately, however, the upper chamber was perceived as a political puppet and as an artificially created presidential ally, and the drafters of the Constitution of May 5, 1993 finally decided to establish a single legislative chamber the Jogorku Kenesh[60]. The situation in Belarus took a different turn. The Constitution, adopted by the referendum of November 7, 1996, established a bicameral legislature [61]. The drafters reserved for the President the prerogative to appoint one-third of the senators, a clear revelation of the President's intention to create *a puppet* chamber that he controlled [62]. The examples provide evidence that *politicization* of the constitution *is* a vivid characteristic of East-Central European political culture; it is, however, a component that goes against the very grain of constitutionalism. Excessive rigidity in the basic laws cannot be remedied by the degradation of the constitution itself. The balance between rigidity and flexibility is *a conditio sine qua non* of a good constitution and cannot be substituted by any half-measures [63]. The trend toward the politicization of constitutions works against the social absorption of the concept of the rule and has to be viewed as such.

[59] Ibidem, p. 315.

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

[61] See "Belarus: Lukashenko-Opposition Conflict Heats Up", *Current Digest of the Post-Soviet Press,* September 4, *1996,* available in LEXIS, *Nexis* Library, *NEWS;* CDSP File.

[62] Fora critique *of the* Belarussian bicameralism, see "Analysis of the Draft Constitution of the Republic of Belarus with Alterations and Amendments", *Cent. & E. Eur. Law Initiative* (ABAICEELI, Washington D.C.), October 15, *1996,* pp.16-18.

[63] *For a* different opinion, see S. Holmes, C. R. Sunstein: *The Politics..., op. cit., p. 322.*

The Courts: Judicialization of the Constitution versus Politicization of Judicial Review

As one of the greatest novelties of the post-socialist constitutionalism, judicial review stands on par with such concepts as the division of powers, political pluralism and the doctrine of *etat de droit,* a law-based state. After the fall of communism, the constitutional tribunals mushroomed in East-Central Europe and became an active component of developing constitutionalism *in* this region. Judicial decisions began shaping the constitutional culture of the new democracies equally with legislative actions, implementing decisions of administrations and opinions of the media. Legal scholarship has to answer the questions: what is the appropriate level of the court's activity in their review of constitutionality of laws in their interpretation of the constitution? to what extent are the constitutional courts ready to challenge political bodies or become themselves involved in politics? what is the role of the courts in the *optimization* of the constitution, Meaning to make it fully functional and effective?

The discussions of the *counter-majoritarian problem* are an intrinsic component of Western political culture. Constitutional scholars endlessly agonize about trying to elaborate on the limits of intervention by non-elected judges into the constitution-making processes. Should the judges restrain themselves and follow "an easy presumption that legislation is constitutional unless the contrary is clearly shown"[64], or should they insert their own preferences into the Constituition? Is judicial activism a way of making the Constitution a "living document, flexible enough to be used in modern conditions"[65] or just a limited *coup d'etat?*[66].

The discussion on judicial activism, which is an omnipresent component of constitutional culture in North America, has taken a different turn in East-Central Europe[67]. The so-called American decentralized model is rooted in the concept of

[64] R. A. Epstein:Foreword *to S.* Mecedo: *The New Right versus the Constitution XI,* 1986.
R. F. Nagel: *Constitutional Cultures...,* op. *cit.,* p. *78.* For *more* discussion *of judicial activism* and judicial restraint, *see* "Symposium: Judicial *Review versus* Democracy", *Ohio St. Law Journal,* 1981, *Vol.* 42; "Symposium: Constitutional Adjudication and Democratic Political Theory", *New York University Law Rewiev,* 1981, *Vol. 56; R. Berger: Government by Judiciary, 1977; A.* M. Bickel: *The Leat Dangerous Branch,* 1962; *J. Ely:* On Discovering Fundamental Values", *Harvard Law Review,* 1978, Vol. *92; W. A.* Kaplin: "Judicial Power and Judicial *Review", The Concepts and Methods of Constitutional Law, 1992,* Vol. *49.*

[65] R. H. Bork: "Neutral Principles and *Some* First Amendment Problems", *Ind. Law Journal,* 1971, Vol. 47.

[66] *C. S.* Nino *has* written: "*this* problem, *the counter-majoritarian difficulty* ofjudicial *review, has received much more* attention *from* North American scholars in *the last* decade than *from* scholars elsewhere *in the* world". *C. S.* Nino: "*A* Philosophical Reconstruction *of* Judicial Review", *Cardozo Law Review,* 1993, Vol. 14. See also *A.* M. Bickel: *The Last Dangerous...,* op. *cit.*

constitutional supremacy and constitutional checks and balances[0]. This system implies that one power is balancing, controlling, and supplementing the functions of the other, although no single power can completely subjugate the other. The system vests the regular courts with the power[..] to nullify the decisions of the democratically elected organs, without making the judges equally accountable to the people. As D.J. Maedot has written "the tension between judicial independence and accountability cannot be altogether resolved, and the American doctrine gives the clear preference to the first one securing to all federal judges the right to hold offices during good behavior and making them removable only through impeachment by Congress"[10].

The development of the European doctrine of judicial review took a different tack. In contrast to the American doctrine, the prevailing European model of judicial review concentrates the reviewing authority in a supreme court or in a special court[..]. Blended, as is the case of the German mixed model[..], with some elements of concrete and decentralized review, this model gives individuals direct access to the court, but reserves the right of requesting an abstract issue of constitutionality for the highest governmental bodies or parliamentary groups[..]. The existence of just one constitutional tribunal and limited cooperation of regular courts in the review process, combined with the relatively short tenures of the justices to strengthen their accountability and naturally restrain their tendency to challenge democratically elected legislative organs.

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

Most of the new democracies provide that both the legislative and executive organs should cooperate in selecting the justices, yet the competence of these

[8] *See* R. R. Ludwikowski:Constitution-making..., op. cit., pp. 212-213.

[9] *See* M. Cppalletti: *Judicial Review in the Contemporary World*, 1971; A. R. Brever-Carias: *Judicial Review in Comparative Law*, 1989, pp. 125-182.

[10] See D. 7. Meadot: *American Courts*, 1991, p. 60.

[..] See A. R. Brewer-Carias *Judicial Review...*, op. cit., pp. 183, 222; see also R. R Ludwikowski: "Gldwne kierunki sgdownictwa konstytucyjnego we wspoiczesnym swiecie. Siudium porbwnawcze", *Studio Prawno-Ekonomiozne*, 1993, Vol. 48.

[..] For a closer look at the German and French models of judicial review, see R. R. Ludwikowski: "<<Mixedu Constitutions...", op. cit., pp. 49-50.

[..] For example, the German system permits the Federal Constitutional Court to hear the constitutional complaints of individuals whose rights have been violated by public authorities, but reserves the right to request the review of an abstract issue to the federal government, a Land government, and one-third of the Bundestag members. See *The Basic Law*, Arts. 93(1)2, 4a.

organs varies. In some countries, the appointing functions are reserved almost exclusively for the legislatures, as in Hungary. In other countries, the functions are proportionally distributed among several organs[..]. Most of the justices of the constitutional tribunals in East-Central Europe are elected for periods precisely determined by the Constitutions; in Bulgaria, Romania, Lithuania, and Hungary for 9 years[..], in Albania 2 years, in Belarus I 1 years, in the Czech Republic and the Ukraine, 10 years, in Slovakia 7 years. In Poland, the tenure of the justices used to be 8' years and was extended by the Constitution of 1997 to 9 years[..].

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

The different (than in North America) concept of constitutional review in East-Central Europe decided that the discussion of judicial activity and judicial

[..] In Poland, justices are individually selected by the Sejm, and the President and Vice-president of the Tribunal are appointed by the President from a pool of candidates proposed by all justices of the Tribunal. See Polish Constitution (1997), An. 194. In Bulgaria, one-third of the justices are elected by Parliament, one third are appointed by the President, and one-third are appointed by a joint meeting of the justices of the Supreme Court of Appeals and the Supreme Administrative Court. See Bulgarian Constitution, Art. 147. The Constitutional Court itself elects its President. Romania follows the French model and splits the power to appoint justices between the President and the two chambers of Parliament, each having the right to choose one-third of the Court's membership. See Romanian Constitution, Art. 140. In Russia, the President nominates candidates who are appointed by the Federation Council. See Russian Constitution, Art. 128. In Belarus, the Constitution reserves for the President the power to appoint one-half of the justices; the other half are appointed by the Council of the Republic. See Belarussian Constitution, An. 116. In Lithuania, the justices are chosen by Parliament from a pool of candidates, one-third of whom are nominated by the President. one-third by the Speaker of the Parliament, and one-third by the President of the Supreme Court. See Lithuanian Constitution, Art. 103.

[..] See E. *Eur. Constitutional Review*, 1993, Vol. 16.

[..] See A. M. Ludwikowska *Sgdowniciwo lconstytucyjne or Europie Srod/cowo-Wschodmej w olnesie pr-zeksztalcen demokrotycznych — stadium porownaweze*, 1997.

[..] *See Pol.* Stat. on Constitutional Tribunal, Art. 7/3 (1985); Romanian Constitution, Art. 145.

[..] *See* Lithuanian Constitution, Art. 107.

restraint focused less on the court's right to challenge the legality of actions of the democratically elected organs and more on the question whether the inexperienced judges will be able to distinguish the legal intervention from the inclination to interfere in everyday politics. The problem of correctly *channeled activity* has received more attention by the legal scholarship in this region than the issue of *judicial restraint. Politicization ofjudicial review* rather than the *judicialization of the constitution* became the most vigorously discussed problem.

In fact, the scope of activity of the new Constitutional Courts surprised even the most far-sighted commentators. The Constitutional Courts in several countries have been quickly recognized as formidable enemies both by the executive organs and the legislatures[79]. The political character of conflicts between these Courts and the Presidents in Belarus, Kazakhstan and Russia (before Yeltsin's decision to dissolve Parliament in 1993) have been well documented". In Bulgaria the Socialist Party, and in Slovakia the Movement for Democracy, charged the Constitutional Courts with confusing judicial and legislative function". In Romania, in 1995, the practice of sending almost all bills the Constitutional Court for review became a matter of constitutional routine". In Albania, the attempts of the Constitutional Court to assert more power and actively intervene in the legislative policy of the People's Assembly involved the Association of Judges in the open conflict with President Barisha that resulted in the removal of the progressive Court of Cassation Chairman Zef Brozl .

The question arises as to what extent this initially chaotic activity of the East-Central European Constitutional Courts has evolved into a mature process of *optimization* of the constitution. This function is understood as the

" See A. M. Ludwikowska: *Suldownictwo konstytuc}jne...,* op. cit, pp. *177-182.*

w See *E. Ear. Constitutional Review,* 1993-94, Vol. *18.* Se also *Kazakh Parliament Overrules Constitutional Court* (BBC Radio Broadcast, March *13,* 1995).

"1 In fact, the constitutional challenges of almost all legislative acts in Bulgaria in 1995 almost became routine. In the spring of 1995, more than one dozen statutes were submitted for Parliament's *review. See* "Constitutional Watch", *E. Eur. Constitutional Review,* Summer 1995; "Constitutional Watch", *E. Eur. Constitutional Review,* Fall 1995); *see* also A. M. Ludwikowska: *Srtdownictwo konstytacyjne...,* op. cit., p. 177. In Slovakia, it became a routine that the President s vetoes of numerous statutes were overturned by the parliament, which resulted in the sending of the questioned acts to the Constitutional Court. See "Constitutional Watch", *E. Eur. Constitutional Review,* 1996, *Vol. 5.*

" *See* "Constitutional Watch", *E. Eur. Constitutional Review,* Vol. 4.

"3 *See* R. R. Ludwikowski: "Albania", in: G. T. Kurian (ed.): *World Encyclopedia of Parliaments and Legislatures,* 1998. "Brozi's removal was apparently the result of his increasingly public positions in favor of judicial independence and against government corruption; it was accompanied by numerous legal and procedural irregularities and resulted in protests from numerous international observers". "The Judiciary in Albania", *Central & East European Law Initiative* (ABA/CGELI, Washington D.C.), *1996,* p. 12.

transformation by the court's subjective fundamental rights into *objective principles;* the firsts serving individuals as protections of their freedoms against the state and other individuals' intervention, the second being maxims regulating social relationships and imposing positive obligations on the state's organs[84]. Given the significant discrepancies in the scope of reviewing activity of the Courts of this region, a firm answer to this question is difficult. Some observations are, however, possible.

It has to be noted that most of the Constitutional Courts still focus on the review of the constitutional coherence of the laws and the conformity of international agreements to the Constitution". Within this limited scope of jurisdiction, some of the courts were capable of explaining important constitutional principles. The attempts of the Polish Constitutional Tribunal to analyze the concept *Rechtsstaat clause* (state ruled by law), and particularly principles *of nonretroactivity of laws, equality,* and *vested rights* were widely commented upon". In similar fashion, the Hungarian Constitutional Court explained the principle *offair trial* and imposed on the Parliament the obligation to amend legislation on misdemeanors[e']. However, the process of extension of the constitutional court's jurisdiction over the right to hear individual complaints, which gives the courts opportunity for *optimization of* the fundamental rights, is still slow. Hearing individual constitutional complaints is recognized as the most democratic feature of judicial review but, on the other hand, its introduction overburdened numerous European Constitutional Courts, comprising over ninety percent of their agenda".

" The involvement of the courts in the process of "optimization" of the Constitution has been widely considered an important feature of German Constitutional Culture. "The consequences of interpreting and treating fundamental rights as rights or as principles becomes clear when one views the development of decision-making by the Bundesverfassungsgericht". B. Schlink: "German Constitutional Culture in Transition", *Cardozo Law Review,* 1993, Vol. 14, pp. 711-736. As an example, the German Federal Constitutional Court in 1973 recognized that academic freedom is not only a subjective right of German scholars, but an objective principle which imposes on the government the obligation to leave the organization of the university completely to the academic institutions and free from legislative intervention. See *35 evev/GE79* (May *29, 1973).*

"5 For more comments on the scope of the Constitutuinal Courts' activity, *see R. R.* Ludwikowska: "(Mixed» Constitutions...", pp. *52-58.*

See M. F. Brzezinski, L. Garlicki: "Judicial Review in Post-communist Poland: The Emergence of a Rechtsstaat?", *Stanford Journal of International Law, 1995,* Vol. 31, pp. *34-35; I.* G'udzinska-Gross: "Interview with Professor A. Zoll, Chief Justice of the Polish Constitutional Tribunal", *E. Eur. Constitutional Review, 1997.*

"7 *See E. Em'. Constitutional Review,* 1998, Vol. *18.*

" The number of complaints submitted to the Hungarian Constitutional Court forced this Court to impose some controls on. its own agenda. The Court began checking whether all formal requirements (deadlines, exhaustion of other remedies, direct impact of the violation on the individual situation of the petitioner, binding character of the challenged decision, etc.) were met by

Thus, one has to conclude, that the progress in the process of *optimization* of the constitution by the constitutional courts is steady in some countries but in others it is neither well-understood nor developed. Many of the Courts are still highly politicized and the effectiveness and respect for the Constitutional Courts in East-Central Europe vary from country to country. The Court's full impact on the constitutional culture still has not been felt.

Conclusions. West and East: Convergence or Divergence of Constitutional Culture?

The article identified some features of constitutional culture characteristic for the new East-Central European democracies. The question, however, remains to what extent these countries share attitudes, feelings, reactions toward constitution with the West? I-Iow strong and successful is the tendency to absorb the post-socialist region into the area of Western constitutional culture?

The response to these questions can be given only with some caution. This author is quite aware that it requires more in-depth study. There is definitely the need for reports from all countries of this region on several issues *which* were only mentioned in this work: on the reaction of legal scholarship to judicial decision making, the capability of the legal scholars to anticipate the

the applicants, and finally, decided that violations of social and economic rights cannot be subject to the Court's review. See " Interview with L. Solyom, President of the Hungarian Constitutional Conn", E. *Eur. Constitutional Review,* of their courts followed suit and began to carefully verify the meritorious character of all submissions. At the time of this writing, in addition to Hungary, constitutional complaints are permitted by the Constitutions of the Czech Republic, Slovakia, and Poland (after 1997). The Constitution of Russia, following the old socialist pattern of promising something without a clear explanation of enforcement mechanisms, says that "the decisions of state organs may be appealed in a court of law " and mentions that the Constitutional Court may proceed from complaints concerning violations of constitutional rights and freedoms of citizens, but it does not explain who can file these complaints and does not list the right to hear individual complaints among the competencies of the Court. See Russian Constitution, Art. 46. The right to appeal the decision of administrative organs that abridge or limit a citizen's right is mentioned in Art. 40 of the Constitution of Kazakhstan and Art. 82 sec. 8 of the Kyrgyzstan Constitution. The Constitution of Romania provides that "a person who has suffered damage as a result of the violation of one of his rights by a public authority, through administrative act, or as a result of a failure to have a request resolved by the legal deadline, is entitled to have the right in question recognized and the act revoked and to receive compensation for the damage ", Romanian Constitution, Art. 48. The Constitution, however, does not explain which court will hear these complaints and concludes that "the conditions and limitations for the exercise of this right will be determined by statutory law ". See A. M. Ludwikowska: *Sgdownictwo* konstytae jne..., op. cit., p. 109.

constitutional courts decisiona tt, the level of acceptance of the constitutional courts' rulings, the inclination of the media to inspire the courts to pick up new constitutional problems°0. The well-balanced evaluation of cultural convergence of the East and West requires as the prerequisite the evaluation of the level of cultural uniformity of the new democracies themselves; this objective can be reached only on the basis of national reports.

This study confirms that there are still significant discrepancies in constitutional cultures of the East-Central European countries. The post-socialist societies have different constitutional traditions, unequal experiences with democratic mechanisms, unequally qualified constitutional drafters and staffs of the constitutional courts. In addition to this, one has also to admit that diverse ethnic problems of the new democracies impose different burdens on the constitutional scholarship and constitution-making. As it has been observed, one of the rationales of constitutionalism is to absorb ethnic problems into "demotic" problems of entire societies ᵛ and this process is far from being advanced in East-Central Europe.

The reasonable search must recognize also common cultural features of the new democracies. These traits, exposed by this study, seem to stem more from the transitory situation of the region than constitute an insurmountable obstacle in the process of convergence of political culture of the West and East. It can be reasonably observed that the drafters of the new constitutions share doubts as to a general applicability of the Western universalistic constitutionalism. Their innovative approach is, however, mitigated by the critical reaction of the constitutional scholarship to the inconsistencies of experimental constitutional "gardening". It looks like regional constitutionalism will rather try to incorporate local flavor and local traditions into the Western constitutional traditions than reject full-fledgedly the concept of "imported constitutions".

sy It is quite characteristic, for example, that the German Federal Constitutional Court develops fundamental tenets of Germany's constitutional doctrine and scholarship elaborates on them. (See comments of B. Schlink: "German Constitutional Culture... ", op. cit., p. 730. One may risk the thesis that the involvement of legal scholars in the process of shaping constitutional culture in East-Central Europe is more substantial; still more national in-depth studies are required to confirm this assumption.

'o It *is quite obvious* that, *for linguistic* problems, *national* reports *are a* prerequisite *of any* well-balanced study of these aspects of constitutional culture.

91 *As* U.K. *Preuss wrote: "The* constituent *power of* he people will always encompass *the ethnic* and the demotic elements of he people. But it is the very rationale of the constitution to transform the unfathomable power of the *ethnos* into responsible authority of the *demos* ". (" Constitutional Powering for the New Polity: Some Deliberations on the Relations between Constituent Power and the Constitution ", *Cardozo Law Review,* 1993, Vol. 14, p. 638.

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

The lack of appropriate flexibility of the new constitutions, resulted in tendency toward excessive "parliamentarization" of the new basic laws. The trend will be naturally curbed by the growth of the body of laws implementing constitutional provisions and constitutional court decisions explaining ambiguous language of the constitutions.

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

The Post-Colonial Model