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POST-COMMUNIST CONSTITUTIONALISM:  
A TRANSITIONAL PERSPECTIVE

by Ruti Teitel*

I. POST-COMMUNIST CONSTITUTIONALISM: A TRANSITIONAL PERSPECTIVE

There is a popular view among scholars and political analysts that “liberal” revolutions should culminate in constitution-making.¹ Yet the events of the contemporary transformations in Eastern Europe and the former Soviet Union demonstrate that this claim has not been borne out. The end stage of the velvet revolution² has not been constitution-making. Virtually all of the post-communist states have eschewed a constitution-making process with special constituent assemblies. Where there has been constitutional change, it has tended to occur not through special bodies or processes, but rather in ordinary parliamentary processes and often in piecemeal fashion. Moreover, the popular normative claim that there is a relation between constitution-making and effective transitions to democracy is challenged by the fact that states far along in their reforms still function under Stalinist-era constitutions, albeit much amended.³ Making new constitutions is not the primary successor response in the former communist bloc. Some states have even indefinitely postponed adopting a new constitutional document. Instead of new constitutional texts, the dominant constitutional phenomenon in the post-communist transitions throughout Eastern Europe and the former Soviet Union is the emergence of constitutional courts. What is the significance of these new institutions?

The constitutional politics of the former Soviet bloc are best understood, I contend, from a “transitional perspective.” By this, I mean that the nature of the constitutional developments in the region should not be evaluated from the vantage point of a priori assumptions about the nature and role of constitutions. Instead, the constitutional

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2. The overthrow of the communist regimes in Eastern Europe in 1989 has been termed a “velvet revolution” due to the largely non-violent nature of the transitions. For an account of the events of 1989, see Timothy Garton Ash, The Magic Lantern 78 (1990).

developments in the former Soviet bloc are, I contend, best explained in the context of the movement out of the prior communist constitutional culture. "Transitional constitutionalism," I suggest, refers to the constitutional developments that occur in particular, limited periods that immediately follow periods of substantial political change.

Constitutional developments in the region are more clearly understood when interpreted in light of the context of the prior constitutional culture. For example, the normative claim that revolutionary periods should culminate in constitution-making does not account for the phenomenon of constitutionalism in the post-communist transitional period. The postponement of constitution-making in the former Soviet bloc is best explained by the aftermath of totalitarianism, and the distinct legacy of socialist law. All over the region, there is evidence of a struggle over competing conceptions of constitutionalism arising from the radical political transition. The region is attempting to move from one constitutional culture to another.

What is the legacy of socialist constitutionalism? In socialist constitutional culture, constitutions did not present a constraint on the State, nor were they meaningful sources of individual rights.  

4. Despite constitutional enumeration of rights in virtually all of the constitutions in the region, judicial review limiting state power and protecting individual rights was regarded as antithetical to the socialist understanding of the State. For instance, even during periods of reform in the Soviet Union when particular individual rights were made enforceable by courts, such rights enforcement was explicitly subordinate to the needs of the State. It was only after perestroika and the creation of the "Committee for Constitutional Supervision of the U.S.S.R." in 1990 that individual rights began to find some protection through constitutional judicial review. See Molly Warner Lien, Red Star Trek: Seeking A Role for Constitutional Law in Soviet Disunion, 30 Stan. J. Int'l. L. 41, 65-87 (1994).

In the Eastern bloc countries, the situation was much the same, with one scholar concluding that as a general matter a right to petition state administrators was "the sole means of defense against measures taken by the state." George Brunner et al., Before Reforms: Human Rights in the Warsaw Pact States, 1971-1988, at 436 (1990). Although Hungary and Poland in the mid-1980s established bodies to review statutes for compliance with their constitutions, individuals had no right to petition. Moreover, neither body had the power to invalidate a statute it found unconstitutional upon abstract review. Instead, statutes were sent to the legislature for amendment. However in Poland, an objectionable provision became invalid if the legislature did not amend it within 3 months. This procedure appears to have been unique in its approximation of the current state of judicial review. For a discussion of individual remedies against the State, including a description of the Hungarian and Polish experiments, see id. at 434-457.
characterized the prior constitutional arrangement in the region was the unity of state power. Though as a theoretical matter, the constitutional system was predicated upon parliamentary supremacy, in practice, the Communist Party apparatus exercised absolute control — without constitutional restraints. To the extent that the communist constitutions enumerated rights — and they often did in great detail, enumerating all sorts of social and economic rights — these rights were often illusory in nature. Continuation of this constitutional culture would mean no real constitutional change.

The question then becomes how to transform the region's constitutional legacy. Throughout, the common response has been to create new institutions: the constitutional courts. Pursuant to new constitutional mandates, all of the post-communist constitutional courts have the power to engage in judicial review to enforce constitutional limits on law-making. These institutions, and this judicial review power, are virtually unheard of in the region. The courts can make a break with the prior constitutional system because their mandates empower them to limit state power by subjecting lawmaking of the political branches to judicial review. The courts are also empowered to enforce individual rights.

In this transitional moment, I contend that the constitutional courts are playing a defining role in forging post-communist constitutionalism. The post-communist constitutional courts point to a form of judicial review that is actively involved in delimiting the lawmaking of the new states. The courts' potential to change the past constitutional culture may be limited paradoxically only by their


6. For a detailed discussion of the discrepancies between Soviet law as written and as practiced in the sphere of economic and political rights, see generally Olympiad S. Ioffe, Soviet Law and Soviet Reality (1985). On Eastern Europe, see generally Brunner et al., supra note 4.

7. Although all of the countries had constitutions, almost all lacked judicial review. Yugoslavia, Czechoslovakia, Hungary and Poland provided at different times for constitutional tribunals of sorts, but these were lacking in significant features. On judicial review in these countries in general, and the Yugoslav and Czech tribunals in particular, see Brewer-Carias, supra note 5, at 190, 236-242. See also Brunner et al., supra note 4, at 453-455 (1990) (bodies were created with the purpose of providing some review of legislation, but they never approached the character of courts and their impact was limited).
success. That is, by the courts' tendency, even in their brief history, to become overly enmeshed in the controversies of the region. Such political involvement, should the courts be perceived as partisan, could compromise the independence of the judiciary, threatening the construction of a fledgling constitutional culture and the rule of law.

Below, I explore some of the ways in which the creation of the new constitutional courts facilitates transition out of the prevailing constitutional understanding to another constitutional culture defining and protecting a new understanding of rights and separation of powers.

II. FROM THE PAPER CONSTITUTION TO THE CONSTITUTION IN FORCE

There are a number of signs of the attempt to transform the preceding constitutional regime in post-communist constitutionalism. The turn away from the prior approach is seen in three places: in the delay in enacting rights components to the constitutions, in the approach to enumerations of rights in constitutional texts, as reflected in the amended constitutional documents, and, finally, in what I contend is the most significant change — the establishment of the constitutional courts.

Notwithstanding the normative arguments for ending political revolutions with constitution-making, invoked largely by American constitutional scholars, there has been noticeable delay between the end of the revolutions in the region and their constitution-making processes. The states in the more advanced stages of economic development, Hungary and Poland, are still functioning under amended Stalin-era constitutional documents. The delay in the adoption of rights charters is perhaps best exemplified by Poland, where a “Little Constitution” creating the governmental structure was adopted shortly after the political change, but adoption of a rights charter has been indefinitely postponed, leaving the rights provisions

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8. See discussion, infra notes 58-66 and accompanying text.
9. See Ackerman, supra note 1, at 46-68.
10. Though this was generally true throughout the region, Czecho-Slovak and then Czech President Vaclav Havel and Russian President Boris Yeltsin were particularly vocal about their dissatisfaction with the delay. See, e.g., Vaclav Havel, Summer Meditations 21-28 (1992).
of Poland's 1952 constitution still in force. Prolonged debates over constitution-making in the region point to diverging views over the role of constitutions in the political transition.

The struggle in the former Soviet bloc to move from one constitutional culture to another can also be seen in the ongoing substantive constitutional debates over which rights to include in the new constitutions. The debate has been framed as a controversy over the extent to which the post-communist constitutions should include "aspirational" norms. And in this regard, Western constitutional scholars have differed over whether, as a prescriptive matter, economic rights entitlements should be included in the post-communist constitutions. But I contend that the framing of the debate is inapposite, because it does not sufficiently account for the transitional nature of contemporary post-communist constitutionalism. It is not useful to fashion normative constitutional principles about the entrenching of constitutional rights, divorced from preexisting constitutional culture and politics.

Which constitutional rights are to be enumerated in a constitutional document is better understood from a transitional perspective. In the legacy of communist constitutionalism, inclusion of constitutional rights in post-communist constitutions presents a distinct dilemma. The problematic role of social and economic norms

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12. See Chapter 8 of the Polish Constitution, entitled "The Fundamental Rights and Duties of Citizens," which includes such rights as the right to work, Pol. Const. art. 68, and the right to rest and leisure, id. art. 69. An array of civil and political rights are provided for by the 1952 Polish Constitution, but these were simply declarations and did not afford any means of enforcement. See Wiktor Osiatynski, A Bill of Rights for Poland, E. Eur. Const. Rev., Fall 1992, at 29.

For another perspective on the meaning of the Polish holdover constitution, see Andras Sajo, Rights in the New Constitutions (draft paper for Conference on The Meaning of Rights in the Former Soviet Bloc Countries, Central European University, Budapest, June 4-5, 1994) (on file with author).


The question is not whether particular rights such as welfare rights, for example, are difficult to enforce and for that reason ought not be included in the post-communist constitutions. Analyzed from a transitional perspective, I contend that what is at stake is the nature of the successor society's response to a predecessor constitutional culture of generally underenforced rights.
in the post-communist constitutions is distinguishable from the inclusion of such norms in late capitalist constitutional systems. In the light of the past, the inclusion of rights provisions in the post-communist constitutions which are either unenforceable or underenforced is problematic, because it carries the risk of harking back to the prior constitutional culture, signaling the persistence of socialist-style constitutionalism.  

In the period of transition, the deliberations over whether particular rights should be constitutionalized or left to the political process implies a threshold determination as to whether to transform or to maintain the predecessor constitutionalism. Where there is a consensus on the purpose of constitutional change, transitional constitutionalism could, I suggest, be termed “critical,” in that it responds to the past and is intended to transform the prior understanding. To the extent that there is constitutional continuity, I term such developments as “residual,” because they reflect the continuity of prior constitutional culture.

Evidence of “critical” constitutionalism in the post-communist transitions is seen in what, I contend, is the most significant change regarding the conception of constitutional rights in the region — the explosion of constitutional courts. In the post-communist bloc, transitional constitutional justice implies not necessarily new text, but new institutions. Most of the constitutional courts are utterly new bodies. The post-revolution legitimation crisis has stimulated the creation of political institutions.

The widespread phenomenon of constitutional courts occurs at the same time as the notable absence of constitutional constituent assemblies, suggesting that constitutional deliberation — “rights talk” — has taken second seat to constitutional enforcement — “remedies talk.” Post-communist constitutionalism embraces the

14. For a variant of this argument, see Sunstein, Against Positive Rights, supra note 13.
enforceable right. The new courts attempt to close the gap between paper rights and rights made real. The turn to judicial review for enforcement of individual rights illuminates a view of rule of law as defined and protected by courts.

From a "transitional" perspective, it is the legacy of Soviet-style constitutionalism that best explains the sudden proliferation of the constitutional courts. These can be well understood as illustrations of what I have termed "critical" responses to the former constitutional regime. Whereas in the eighteenth-century transitions, constitutional change was evinced in the adoption of new constitutional documents, in the late twentieth century, prior repressive regimes often do not lack constitutions, so the test becomes whether the constitution is enforced or not. Under the socialist system, laws and constitutions were enacted and used as instruments of repression. To the extent that there were constitutional rights, they were rights on paper. It follows that in the post-communist transitions, merely enacting new constitutional texts, enumerating rights, will not produce a sense of constitutional justice. The emergence instead of new institutions in the constitutional courts in virtually all of the former Soviet bloc states responds to this distinct legacy of constitutional injustice. The attempt to move from underenforced constitutions to ones that are enforced is

16. As recognized by the chairman of the Constitutional Commission of the Russian Parliament in remarks delivered to the Supreme Soviet of the Russian Soviet Federated Socialist Republic on October 10, 1991: "The new constitution is not simply a declaration of the stability and alienability of the rights and freedoms of the individual. . . . [Y]ou have seen that the last Congress of Deputies of the Union was able to declare the rights and freedoms of the individual, having passed a declaration to that effect, but without any guarantees, without institutions and methods for the realization of these rights and freedoms. We too in the Supreme Soviet can pass a law about the rights of the individual, but it will mean nothing by itself." E. Eur. Const. Rev., Summer 1992, at 35.


18. Thus, at least one political theorist has offered as a criterion of distinguishing illiberal regimes from liberal ones the extent to which constitutionalism is enforced. See Karl Loewenstein, Political Power and the Governmental Process (2d ed. 1965).

19. See generally Ioffe, supra note 6. See also Brunner et al., supra note 4.

a critical response, and it signals a turn away from totalitarian constitutionalism towards adoption of a constitutional system common to many liberal democracies.  

What is the potential for the constitutional courts in the creation of consciousness of post-communist rights? At least one constitutional scholar is pessimistic. Herman Schwartz suggests that because of the centralized nature of the system of judicial review adopted in the region, whereby the full burden of constitutional review falls on the constitutional courts, such judicial review cannot foster broad development of a rights-based constitutional culture. This argument largely depends upon a comparison of post-communist judicial review with American judicial review, which is incidental to ordinary adjudication and diffused throughout a wide court system. When compared to a system of multiple courts, all interpreting and enforcing rights, the constitutional courts are seemingly inadequate to the profound challenge of constitutional transformation.

But let me suggest at least two reasons why pessimism about the new judicial review is not warranted. Paradoxically, even though centralized review on the superficies may appear to be less effective than a system of diffused judicial review, it may be better, given the fact of radical constitutional and legal transition. Taking into consideration the political transition and the absence of meaningful judicial review under the prior system, constitutional change, if it is to occur in the transition, is advanced by institutional and personnel change. It is rather difficult to imagine meaningful change in judicial review by a judiciary educated in socialist constitutional thought. Nevertheless, following the collapse of communism, there have not been widespread overhauls of the judiciary in the region. In this regard, it would seem indubitably easier to change one discrete institution. Though the rules applicable to the constitutional courts vary, as new institutions they have generally implied new

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21. I am not making a normative claim here for the necessity of such review. Great Britain, of course, is the leading counterexample.


23. East Germany and the Czech Republic are prominent exceptions where there have been massive purges of the judiciary.
appointments. A new judiciary should make it easier to transform the constitutional culture.  

Another consideration concerning the potential impact of centralized judicial review in the post-communist bloc is that in contrast to the role of such a court in the 1920s when it was first created, in the contemporary period constitutional adjudication

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\text{24. Constitutional provisions regarding judicial appointments include:}
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Czech Republic Constitution: “The Constitutional Court judges are appointed by the President of the Republic with approval by the Senate.”

Hungarian Constitution: “The Constitutional Court shall be composed of fifteen members elected by Parliament. A commission that includes one person from each of the representative groups of the parties represented in parliament will recommend the members of the Constitutional Court . . . .”

Bulgarian Constitution: “The Constitutional Court consists of 12 justices; one-third of whom are elected by the National Assembly; the second third is appointed by the president, and the final third is elected at a joint meeting of the justices of the Supreme Court of Appeals and the Supreme Administrative Court.”

Russian Constitution: “Justices of the Constitutional Court . . . are appointed by the Federation Council on the submission of the President of the Russian Republic.” The Federation Council itself was a new body, to come into existence if and when the new constitution was ratified and after simultaneous elections.

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\text{25. The Austrian or Kelsen model for concentrated judicial review called for one separate constitutional tribunal which would engage in abstract review of legislation. This system of concentrated review sought to guarantee constitutional supremacy in part by prohibiting ordinary judges from engaging in judicial review. See Brewer-Carias,}
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\[\text{supra note 5, at 195. The model was first emulated in the region in the 1920 Czech Constitution and then later in Yugoslavia, in its constitution of 1963. See Cappelletti &}\]
functions in a context of mass media revolution, implying greater publicity and access, and a radically changed public sphere. This greater reach enhances the transparency and transformative potential of the post-communist constitutional courts.

III. From the Unity of State Power to a Government of Enumerated and Separated Powers

What else does the development of the constitutional courts signify? In addition to the move to enforced rights, the emergence of the constitutional courts reveals a radical development in the attempt to transit out of the Soviet-style governmental system of entirely centralized state power. Socialist constitutional thought opposed judicial review of legislation as an element of separation of powers doctrine and therefore as antithetical to the belief in the unity of power in the people. In a number of ways, these courts advance the move toward a system of separated powers. First, the courts themselves constitute new divisions in state power. Further, through constitutional review, the courts enable enforcement of a new governmental system of separated powers.

The dominant response to the prevailing political system throughout the region has been to divide up state power. In most of the new nation states, power has been divided up by the addition of two branches: a presidency, which, in addition to the preexisting parliamentary system, results in the creation of a mixed presidential-parliamentary system, and a constitutional court. That the courts are authorized and indeed expected to constrain the parliament is made very clear in the enabling constitutional provisions and legislation. Unlike the United States Constitution, which is conspicuously silent on the matter of judicial review, the post-

Cohen, supra note 15, at 13-16. For a thorough analysis of the development of judicial review in the modern state and of the concentrated and diffuse systems of judicial review, see generally Brewer-Carias, supra note 5.


29. It was ultimately a creature of constitutional interpretation in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
communist constitutional courts by design have been given an explicit mandate to annul unconstitutional laws. In many of the states, they are the new political system's most powerful check. Most of the constitutional courts share similar jurisdictional principles, mainly their mandate to engage in abstract judicial review.\(^{30}\)

Most of the constitutional courts are explicitly authorized to engage in judicial review, and there is a general understanding of judicial supremacy. The supremacy of judicial power is made very clear in the amended Hungarian Constitution. According to Chapter IV, if the constitutional court finds laws unconstitutional, it “annuls” them.\(^ {31}\) Similarly, the Czech Constitution confers jurisdiction on the court to “declare void acts of Parliament.”\(^ {32}\) The Russian Constitution provides that the constitutional court of the Russian Federation is expected to “examine the constitutionality of the law that has been applied” and that “enactments . . . that are deemed unconstitutional lose their force.”\(^ {33}\) Romania’s Constitution similarly provides that the Constitutional Council has the prerogative “to make pronouncements . . . upon the constitutionality of the laws,” and the decision “shall be compulsory and final”; however, decisions which are the result of legislative, judicial or executive initiative may be overridden by a two-thirds majority in both chambers of the legislature.\(^ {34}\) Poland’s Little Constitution authorizes the Constitutional Tribunal to “adjudicate[] on the conformity of laws, with the Constitution and other normative acts enacted by main and central State organs . . . .”\(^ {35}\)

The constitutional courts in the region appear to be acting on their constitutional mandates. The activism of the constitutional courts, particularly as a check on parliamentary power, is evident by comparison with the United States Supreme Court, which over much of its history rarely has invalidated a federal law, instead tending to

\(^{30}\) Abstract judicial review is best understood in juxtaposition to incidental judicial review. Abstract judicial review allows the courts to review legislation for its constitutionality outside the confines of a particular case or controversy. While incidental judicial review requires that a plaintiff allege that he or she is adversely affected by legislation, abstract judicial review allows for review at the request of political actors, often before legislation has been implemented. See Cappelletti, supra note 15, at 85-90.

\(^{31}\) Hung. Const. ch. IV, § 32/A(2).

\(^{32}\) Czech Const. art 87.

\(^{33}\) Russ. Const. art. 125.

\(^{34}\) Rom. Const. of Nov. 21, 1991, art. 144–145.

\(^{35}\) Pol. Const. of May 1, 1990, art. 33a. But under the Polish scheme, there is no judicial finality. See infra note 40.
defer to Congress, a co-equal branch. For example, Hungary's Constitutional Court has a very high rate of statutory invalidations and has repeatedly struck down popular parliamentary measures. Poland's Constitutional Tribunal often invalidates sub-statutory regulation. Throughout the region, courts are actively enforcing the constitutional constraints on legislative and administrative power.

Nevertheless, transiting from a system predicated on the unity of state power is a deep challenge. There is still a strong tendency to merge executive, legislative, and judicial powers. This can be seen in the offices of the new presidencies in the region.\textsuperscript{36} The Russian presidency is an extreme example. The Russian presidency is a potent mix of executive, legislative and judicial powers. Not only does the president wield executive powers, but the president also has generous lawmaking powers by "edict and directive."\textsuperscript{37} According to the constitution, and corresponding to President Boris Yeltsin's role to date, the president is the guardian of the democratic order.\textsuperscript{38} And most extraordinarily, in addition to executing and making law, the president also has what can only be termed interim "judicial review" power.\textsuperscript{39}

The blurring of powers is also seen in the Polish system. The Polish constitution provides that the Constitutional Tribunal's decisions on the constitutionality of parliamentary statutes are automatically returned to the Sejm (Parliament), which has the power to reject the Court's verdict.\textsuperscript{40} Here, judicial and legislative powers are mixed. These two examples suggest that the understanding of separation of powers is far from entrenched in the region. The amended constitutions are rife with admixtures, reflective of the

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\textsuperscript{37} "The President of the Russian Federation shall issue decrees and executive orders . . . . The decrees and orders of the President of the Russian Federation shall be binding throughout the territory of the Russian Federation." Russ. Const. art. 90(1), (2).
\textsuperscript{38} Id. art. 80.
\textsuperscript{39} "The President of the Russian Federation shall have the right to suspend acts by organs of executive power of the subjects of the Russian Federation if such acts contravene the Constitution of the Russian Federation and federal laws, the international obligations of the Russian Federation, or violate human rights and civil rights and liberties, pending the resolution of the issue in [the] appropriate court." Id. art. 85(2).
\textsuperscript{40} "Judgments of the Constitutional Tribunal on the non-conformity of laws to the Constitution are subject to examination by the Sejm." Pol. Const. of May 1, 1990, art. 33a(2).
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predecessor regimes' approaches to state power. Nevertheless, the most profound and threshold step toward separation of powers is the establishment of the constitutional courts themselves.

IV. ABSTRACT REVIEW AND HUMAN RIGHTS: COMMUNISTS IN THE COURTS — FOUR TEST CASES

The contribution of the constitutional courts is perhaps best understood through actual cases. There are no better cases by which to gauge the constitutional courts' readiness to stand up to the parliaments than the cases involving the rights of communists. Just after the political changes in the region, anti-communist sentiment was at its peak, and many states enacted a variety of laws either to prosecute the communist officials and/or to disqualify them from public employment and other benefits.

In some of the countries, the anti-communist laws were challenged even before enactment, under the constitutional courts' power of abstract judicial review. The anti-communism cases illustrate that the courts do exercise their independence and are able, to some degree, to serve as a credible check on the parliaments. In Hungary in 1991, the parliament enacted a law which would have allowed the prosecution of crimes committed in the suppression of the 1956 uprising. It threatened to revive those cases which for political reasons had not gone forward under the old regime.\(^41\) When the bill went to Hungary's president for signature, he sent it instead to the Constitutional Court. The court struck down the law on grounds that it was ex post facto.\(^42\) Though Parliament followed this bill with another proposal which passed constitutional muster, this second law enabled only prosecutions limited to crimes against humanity — which the Constitutional Court considered as internationally recognized norms not subject to domestic law limitations.\(^43\) Without question, in

\(^{41}\) Law on the Right to Prosecute Serious Criminal Offenses Committed Between Dec. 21, 1944 and May 2, 1990 That Had Not Been Prosecuted for Political Reasons, Nov. 4, 1991 [hereinafter Zetenyi Law].


\(^{43}\) For an analysis of the Act on Procedures Concerning Certain Crimes Committed During the 1956 Revolution and the court's decision, see Krisztina Morávi, Retroactive Justice Based on International Law: A Recent Decision by the Hungarian Constitutional Court, E. Eur. Const. Rev. 32, Fall 1993, at 32.
Hungary, the Constitutional Court has had a significant impact in shaping the direction of anti-communist measures.

Though many of the states of Eastern Europe have eschewed trials, some of these states have enacted other forms of anti-communist legislation, chiefly laws designed to exclude former communists from public employ and other public benefits. The constitutional courts in the region have played a significant role in the judicial review of these sanctions. In the former Czechoslovakia, in one of the most notorious decisions of the country's short-lived unified Constitutional Court, the court reviewed the constitutionality of the so-called "Lustration Law," which provides for the disqualification of secret police and collaborators from State employ.\(^4\) The law was challenged by ninety-nine parliamentary deputies who had opposed the law in the parliament. Though the court upheld the law, significantly it did not uphold the law in its entirety, holding it unconstitutional in part for lack of sufficient evidence in the exclusion of "potential" collaborators.\(^5\)

A similar law was written in Bulgaria. Whereas some anti-communist legislation was sustained, the country's Constitutional Court drew the line at sanctions it considered to imply takings and employment discrimination. Two of the three lustration laws which passed the parliament were challenged before the court on petition by President Zhelyu Zhelev and struck down by the Constitutional Court. Legislation which would have deprived former communists of employment in the banking sphere\(^6\) was found to violate

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44. Act No. 451/1991 CoL Specifying Some Further Prerequisites for the Discharge of Some Functions in State Organs and Organizations of the Czech and Slovak Federal Republic, October 4, 1991 (unofficial translation on file with author). The law is known as the "Lustration Law," from the Czech lustrare meaning "illumination or purification," referring to the exposure of subjects past by the "lustration" procedure. In the contemporary post-communist period, the term "lustration laws" describes the purging or screening laws directed against communist-era leadership, party members, or collaborators. For a description of these laws, see Herman Schwartz, Lustration in Eastern Europe, 1 Parker Sch. J. E. Eur. L. 141 (1994).


constitutional prohibitions on employment discrimination. 47 A second law, which would have eliminated time spent working for communist party offices from the calculation of pensions, 48 was also struck down as a violation of the right to social security. 49 A third lustration law, relating to appointments to the governing bodies of universities, 50 was challenged by a group of 102 deputies with the support of the president and upheld on the grounds that the persons excluded could be deemed unprofessional. 51 Thus, the record of the Bulgarian Constitutional Court is somewhat uneven regarding protection of individual rights in this area. However, the inability of the parliament to pass other anti-communist lustration laws having an even broader sweep 52 has been attributed to the court's first two decisions, as well as to the opposition of the president to such laws. 53

After the revolution, "the first thing we do, let's kill all the lawyers." 54 That is what Albania's parliament attempted to do, at least effectively, through its proposed purge laws after the collapse of

47. Decision No. 8 of July 27, 1992 (Const. Ct. of Bulg). The court found that the law violated the constitution's guarantees of equal protection, Bulg. Const. art. 6, and the right to choose an occupation, Bulg. Const. art. 48. See generally Helsinki Watch, supra note 46, at 30.


49. Ruling No. 11 of July 29, 1992 (Bulg. Const. Ct.). Article 51(1) of the constitution guarantees the right to social security. Helsinki Watch, supra note 46, at 32.

50. Law for the Temporary Introduction of Additional Requirements for Members of the Executive Bodies of the Scientific Organizations and the Higher Certifying Commission of Dec. 9, 1992, cited in Helsinki Watch, supra note 46, at 8-9 [hereinafter Panev law]. The law excludes not only those who held positions in the Communist Party or collaborated with the secret police, but also those who had been "on the teaching and research staff of the Academy for the Social Sciences and Social Management and its branches" and those who "taught History of the Communist Party of the Soviet Union, History of the Bulgarian Communist Party, Marxist-Leninist Philosophy, Political Economy, Scientific Communism or Party Building." Id. art. 3.

51. Decision No. 1 of Feb. 11, 1993 (Bulg. Const. Ct.), cited in Helsinki Watch, supra note 46, at 9-11. The law was challenged as constituting employment discrimination on the basis of political opinion. Human rights groups have criticized the court's decision as pretextual: "The court has created a fiction in its reading of the law. The law does not set future professional standards, but establishes a penalty for prior membership and/or activities." Id. at 11.

52. The "Draft Law for Decomunization in the Sphere of Government" and the "Draft Law for Overcoming the Consequences of Communist Rule" are two examples. Id. at 4.

53. See generally id.

54. William Shakespeare, The Second Part of King Henry the Sixth act 4, sc. 2.
communist rule, before it was stopped by the country's Constitutional Court. A minority party in the parliament challenged a lustration law aimed at private lawyers, which required that a new commission under the minister for justice "re-evaluate" all licenses to practice law.\(^{55}\) In a landmark decision, the court found that the law violated the Albanian Constitution's separation of powers.\(^{56}\) The court reasoned that in enacting exclusion categories, the parliament was legislating punitive sanctions against communists, which meant it was usurping judicial powers.\(^{57}\) In striking the law, the court simultaneously protected individual rights and checked the parliament, protecting separation of powers.

All four cases show that when confronted with popular anti-communist measures implicating individual rights, political actors turned to the courts, and the new constitutional courts were able, to varying degrees, to draw a thin but bright line demarcating the rule of law. These precedents illuminate the potential of abstract judicial review for timely, principled resolution of political controversies and the protection of human rights in post-communist transitions.

V. DILEMMAS OF CONSTITUTIONAL RECONSTRUCTION

A. Post-Communist Judicial Review: A Paradigm of Judicial Activism

Analysis of the workings of constitutional review in the communist cases points to a distinctive model of judicial review in the East European constitutional courts. The communist cases suggest that what distinguishes the workings of the post-communist courts is the connection between the courts' protection of individual rights, and its involvement in political controversies. In the communist cases, judicial

\(^{55}\) Law No. 7666 of Jan. 26, 1993, cited in Kathleen Imholz, *A Landmark Constitutional Court Decision in Albania*, E. Eur. Const. Rev., Summer 1993, at 23 (creating a commission for the re-evaluation of licenses to practice law) (unofficial translation of statute on file with author). Under the law, the commission summarily revoked the licenses of 47 lawyers. Soon after this decision was made, parliamentary members of the minority Socialist Party brought a petition to the Constitutional Court. Id.

\(^{56}\) Decision No. 8 of May 21, 1993 (Alb. Const. Ct.). The court said that such laws violated separation of powers because the legislature was ruling on guilt — a determination which according to the constitution was for the judiciary. Id.

\(^{57}\) See generally Imholz, supra note 55, at 25.
review was initiated at the request of political actors, the presidents in Hungary and Bulgaria, and factions of minority legislators in the Czech Republic. Moreover, pursuant to the rules allowing abstract review in the region, judicial review occurred before the laws took effect. Thus, the courts' review meant involvement in what in many countries was the dominant political controversy of the day — the question of the extent of retribution exacted against the prior regime and its supporters.

This judicial activism challenges the prevailing American conception of the appropriate role of judicial review. In American constitutional thought, we describe the potential for judicial review in dichotomous terms: we distinguish between the role of review in delimiting powers among the political branches. Its role in protecting rights in individual cases. In the American model we extol a distinct paradigm of judicial review whereby it is analogized to simple adjudication, which manages to protect individual rights while avoiding unnecessary involvement in political questions. Moreover, in American theorizing about judicial review, the justification for judicial review has become conflated with the limits on its exercise. Thus, the dominant American understanding of the role of the Supreme Court conceives of its very legitimacy as hinging on a view of judicial review that is incidental and passive. According to the analogy to simple adjudication, it is now dogma that the proper role of judicial review pertains to the application of constitutional principles to legislative policies as they relate to concrete cases. The very workability of judicial review is thought to depend upon avoiding confrontation with political branches. To some extent, the claim is

58. See Ackerman, supra note 1, at 106-09.
60. For the classic work on the role of the American Supreme Court, see Alexander M. Bickel, The Least Dangerous Branch: The Supreme Court at the Bar of Politics (2d ed. 1986).
61. In discussing the principles limiting abstract review in the American model, Bickel argues that the concepts implied by case and controversy, standing requirements and advisory opinions constitute not so much limitations on the power of judicial review as necessary supports for Marshall's argument in establishing it. Id. at 114-15.
62. These have been described by Bickel as the "passive virtues." Id. at 111-98. Principles relating to justiciability, such as jurisdiction, standing, the case/controversy requirement, and the political question doctrine could be considered as mechanisms to protect these institutional virtues.
paradoxical, in that the Courts' very effectiveness is considered to depend in large part on inaction, and on forbearance. In its most extreme form, the theory of judicial review considers judicial restraint not merely as a virtue but as necessary to the Court's very survival.

Under the prevailing paradigm and its analogy to ordinary courts, the constitutional courts' effectiveness depends on their closely adhering to the nature and function of ordinary courts. The most extreme version of the theory contends that constitutional courts' very effectiveness, and even their ability to endure, is considered to depend on their passivity and forbearance.

The post-communist constitutional courts seriously challenge the prevailing American paradigm. As seen in the communist cases, the courts are protecting individual rights, even as they confront the political branches. Indeed, this interaction appears inevitable in light of the jurisdictional principles governing the courts. Many of the enabling acts regarding the courts specifically contemplate access to judicial review by political actors, such as the president or other public officials. Indeed, the provenance of the cases lies in the initiatives of political actors on the losing side of the political issue, challenging legislation. To the extent that the post-communist constitutional courts are reviewing government policy in these rights cases prior to its enforcement and application and at the behest of political actors, this profoundly challenges the prevailing American paradigm of judicial review.

The workings of the post-communist constitutional courts point to an alternative paradigm, that of an active court. The constitutional courts are involved in defining principled parameters of the lawmaking of the transitional period. To a large extent, I contend, the emerging

63. See infra notes 64, 68-70, and accompanying text.

64. Examples include article 144 of the Romanian Constitution, which provides that the Constitutional Court has the duty "to pronounce on the constitutionality of laws before their promulgation at the request of the president of Romania, one of the presidents of the two chambers of the government, the Supreme Court of Justice, at least 50 deputies or at least 25 senators . . . ." Rom. Const. art. 144.

Similarly, article 125(2) of the Russian Constitution provides: "The Constitutional Court of the Russian Federation on request by the President of the Russian Federation, the State Duma (Parliament), one-fifth of the members of the Federation Council or deputies of the State Duma, the Government of the Russian Federation, the Supreme Court of the Russian Federation or the Supreme Court of Arbitration of the Russian Federation, bodies of legislative and executive power of subjects of the Russian Federation shall resolve cases about the compliance with the Constitution of the Russian Federation." Russ. Const. art. 125(2).
paradigm of active judicial review appears to relate to the political circumstances of the transition. Whereas the prevailing American paradigm of incidental judicial review and a generally passive Supreme Court assumes the circumstances of ordinary political life in established democracies, the relevance of the model is questionable in extraordinary periods. The paradigm of active judicial review developing in the post-communist transitions appears to respond instead to the necessities of a transitional time. Thus, for example, whereas in incidental judicial review there is a pronounced time lag between lawmaking and its review implied by the "standing" and "case and controversy" requirements, a time lag which is considered to insulate the Court against the consequences of political involvement, the post-communist courts are not similarly insulated. Instead, the courts' abstract review of laws prior to enactment assures timely resolution of controversial issues. Efficiency considerations appear to support the courts' resolution of controversies prior to the laws going into effect. In post-revolutionary periods there is considerable new lawmaking, and hence greater controversy about governmental policies, than in ordinary periods in established democracies. Whether or not this would be true as a general matter, the sheer burden of new lawmaking during transitional periods may well justify abstract review and an active role for the constitutional courts.

To the extent that the constitutional courts in the former Soviet bloc display the features of a contrasting model of judicial review, they illuminate what I term the "active virtues" and the potential of robust judicial review in periods of political change. Post-communist judicial review may well lead to rethinking our view of judicial review. Though the restraints placed on judicial activism may well offer an absolute security against politicized review, judicial involvement in political controversies, without more, is not tantamount to politicized judicial review. Indeed, the success with which the constitutional courts are able to confront the political branches in a principled fashion illustrates the potential for an active constitutional court in periods of political transformation.

65. See Bickel, supra note 60, at 115.
66. In contradistinction to the "passive virtues." See id.
B. The Problem of Constitutional Legitimacy

The East European constitutional courts offer the promise of a newfound source of political legitimacy. They do so in a number of ways. Like constitutional conventions, the constitutional courts are new forums specially created in the transition. As such, the establishment of the courts, like the making of new constitutions, defines a break from the arrangements of the prior regimes. Other features of the courts compound their potential in the new constitutional system. In many of the courts, there are no case and controversy or political question constraints. Petitions for review need not be accompanied by any personal harm or other connection to the lawsuit. Some of the courts allow all citizens standing. Hungary's Constitution goes the furthest and allows standing to all persons, including foreigners, without any need to show an individual connection to the particular case.

Popular access for enforcement of individual rights is a potent symbol of a new governmental openness. Beyond the symbolic, the breadth of access to the constitutional courts means a form of participation in the fledgling democracy, through constitutional litigation. Participatory democracy, through access to the courts, is graphically represented in the notion of “standing” before the courts. Through the rule of standing, citizens’ views can be more broadly represented in the states’ public institutions. Some of the East European constitutional courts contemplate access largely to political actors, whereas others have generous standing rules. Statistics gathered on the Hungarian Court indicate that it is being widely used,

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67. Compare Ackerman, supra note 1, at 46-68 (arguing for “constitutionalizing revolution”).

68. See, e.g., Rom. Const. art. 144 (stating that it is the court’s duty “to pronounce on the constitutionality of laws before their promulgation . . .”).

Under Article 149 of Bulgaria’s constitution, the Constitutional Court “provides mandatory interpretation of the Constitution” and “rules on requests to decide the constitutionality of any law or legal act passed by the National Assembly or the president.” Bulg. Const. art. 149. Article 125 of the Constitution of the Slovak Republic states that the Constitutional Court decides “whether Acts of Parliament and laws are in accordance with the Constitution and constitutional laws.” Slovak Const. art. 125.

69. See, e.g., Slovak Const. arts. 127, 130(0); Russ. Const. art. 125, ¶ 4.

70. Sec. 32A(3) of the Hungarian Constitution provides that “[e]verybody has the right to initiate Constitutional procedures in cases provided by an Act.” Hung. Const. § 32A(3).
with an astounding annual average of 2000 petitions from citizens.\footnote{Interview with Andras Sajo, Professor of Law, Central European University, Budapest, Hung., and former counsel to Hungarian President Arpad Goncz (June 4, 1994).} What is presumably in the midst of developing is an understanding of judicially enforced individual rights and limited government. Broad access to the courts over time enables popular input into constitutional interpretation. Such popular participation — during times of great transformation — may well be analogous to that galvanized at discrete moments through constitutional conventions. This form of popular participation may ultimately translate societal consensus into constitutional interpretation and legitimation of the changed constitutional structure.

To what extent will the post-communist constitutional courts be able to deliver political legitimacy? The dilemma is whether the courts can be active, without becoming politicized. One implication of abstract judicial review is extensive constitutional court involvement in the political life of the state. The current constitutional arrangements specifically contemplate such involvement in enabling political actors to obtain review of legislative proposals prior to their enactment into law. Judicial resolution of divisive and controversial political questions has been increasingly sought by political actors in the region, including by the presidents of Hungary and Russia, as well as by various legislative factions in states in the region.\footnote{Examples include the petition of Hungarian President Goncz regarding the Zetenyi law, \textit{supra} notes 41-43 and accompanying text, the numerous petitions of Russian President Yeltsin and members of the parliament, each requesting review of the constitutionality of the acts of the other, \textit{see infra} references at note 76, and the petition of 99 parliamentary deputies for review of the Czech lustration law, \textit{supra} notes 44-45 and accompanying text.}

Such judicial review raises a deep dilemma about the desired role of the constitutional courts in the post-revolutionary period. Thus, for example, when Hungary's Constitutional Court was asked by President Arpad Goncz to review the constitutionality of the law reviving the statute of limitations for communist crimes\footnote{\textit{See supra} notes 41-42 and accompanying text.} and the court struck down the proposal, it reaffirmed the principle of legal continuity between the regimes. In so doing, the court put itself forward as the guardian of the constitutional system. But was the question before the court regarding the legality of the prior regime properly for the judiciary, or was it instead a matter for political...
deliberation? In a transitional period, where is the authority to decide on the legality of the transition? In the communist rights cases, Hungary's Constitutional Court assumed that authority.

Perhaps this makes sense. The post-communist constitutional courts are the new institutions of these transitions, and they thus carry with them the legitimacy of hope. The question of legitimacy raised by the new tribunals came up as the converse of the American model. Whereas in the American context, the concern is the "counter-majoritarian difficulty," by contrast, the constitutional courts develop at a time of "anti-politics." Distrust of politics and parliaments, built up over the years of one-party rule, pervades the region and is not merely a function of the post-1989 changeover elections. Perhaps the extreme example of parliamentary distrust was Russia's executive-legislative constitutional crisis. In this political context, the problem is not how to legitimize the courts, but rather how to legitimize politics. And here the courts may have a part to play, by defining a more principled politics.

The dilemma raised by the political involvement of the constitutional courts is best appreciated in comparative perspective. The prototype court varies from country to country, related to the state's understanding of constitutional politics. Consider the role of constitutional courts in transitional periods as a function of the relation of constitutional to ordinary politics along a spectrum. One might imagine a graph, one axis of which represents the level of access to judicial review, the other axis of which represents the level of political involvement of the court. Considered within these parameters, the United States Supreme Court would lie at one end, denoted by severe constraints on judicial review, no abstract review whatsoever, and correlated with a very low level of involvement in political questions. By contrast, the new constitutional courts of Eastern

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74. See generally Vaclav Havel, supra note 10 (describing this anti-political sentiment).
75. See Rapaczynski, supra note 11, at 595.
78. See Martin Shapiro, Courts: A Comparative and Political Analysis (1981) (discussing the American system of incidental judicial review as a prototype, but noting that the model has been replicated in few other countries). Regarding the European courts, see Stone, supra note 77, for a discussion of the political role played by the French Constitutional Council in comparative perspective. In Germany, political factions
Europe function under rules of access to judicial review enabling substantial judicial intervention in the political transformations. In this respect, the East European constitutional courts are more like the West European constitutional courts than the United States Supreme Court. The role of the East European constitutional courts in abstract review has enmeshed the courts in the political life of the region, placing them at the thin line between ordinary and constitutional politics. The Russian Constitutional Court with its past, concededly heavy, involvement in politics, lies at the other extreme in terms of politicization.

In the legacy of communism, and in the absence of a tradition of liberal democratic politics, post-communist constitutional courts simply do not follow the constitutional politics envisioned by our prevailing constitutional theory. To some degree, the constitutional politics is an inevitable consequence of the pivotal role of the new tribunals in these transitions, given the prior constitutional legacy. American constitutional culture and notions of judicial review are inapposite. In recent years in the United States, we have had a rich

are increasingly turning to the German Constitutional Court to settle political controversies. Thus, the German Constitutional Court was asked to rule on the constitutionality of German troop involvement in Bosnia-Herzegovina and in Somalia. The Constitutional Court was also asked to rule on the Maastricht Treaty, a politically divisive issue in Germany. See Francine S. Kiefer, German Politicians Cede Hard Decisions to Highest Court, The Christian Sci. Monitor, June 22, 1993, at 3.

79. For examples of relevant constitutional provisions, see supra note 4. See also Ethan Klingsberg, Judicial Review and Hungary's Transition from Communism to Democracy: the Constitutional Court, the Continuity of Law and the Redefinition of Property Rights, 1992 B.Y.U. L. Rev. 41.

80. See supra notes 77-78 and accompanying text. For a description of the West European constitutional courts in this context, see Stone, supra note 77, at 225-53.
debate over the problem of executive branch involvement in constitutional adjudication and the danger of creating a branch above the law. In some sense, the new constitutional courts appear to raise the same danger. How to evaluate this phenomenon? Should the post-communist constitutional courts become politicized, they would exacerbate a trend in the region, and set back the effort to move towards a more liberal society adhering to the rule of law. An even greater threat of judicial politicization would be the loss of constitutional legitimacy. The danger is the perception of a fledgling institution that attempts to enforce constitutional limits but flouts this principle through its own judicial review.

Ultimately, the legitimacy of incipient post-communist constitutional culture will depend on the popular perception of the courts' practices of review. To the extent that judicial activism is not equivalent to politicized judicial review, the constitutional courts will be respected. The workings of the East European constitutional courts suggest a distinctive brand of constitutional politics in the region, one which should be understood in the context of prior socialist constitutional culture. My suggestion here has been to observe that these developments respond to particular historical and political contingencies generating a transitional constitutionalism.