

Drafting Constitutions: Property Rights in Central and Eastern Europe

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This part of the Symposium seeks to answer a number of interesting questions. One is how Western lawyers may influence the constitutional drafting processes in other areas of the globe. A second question is whether, as the basis for a market economy, property rights should be the subject of constitutional entrenchment. I will address this second question. In doing so, I will examine the draft constitutions currently being negotiated in the countries of Central and Eastern Europe and the former Soviet Union.¹

In one sense, the question has already been answered, at least by the nascent democracies in Eastern Europe and the former Soviet Union. Without exception, the draft constitutions of almost all these countries set forth unparalleled guarantees to social and economic rights.² So, the question is not really *should* these constitutions address the issue of social and economic rights, including property rights. Instead, the question is whether the draft constitutions strike a balance between guaranteeing such rights and providing sufficient guidance for statutory and case law to stimulate economic development. In essence, the constitutions must set an overarching philosophy for

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1. For the purposes of my remarks, I will limit my definition of property to "real property." I will also presume that real property rights are merely one component of the "social and economic rights" that may find protection in new draft constitutions. Although rights to other social and economic entitlements (including free education, medical care, work, a minimum living standard, an untarnished environment, social security, and safe working conditions) play a major role in Eastern Europe's new draft constitutions, I will not discuss them here.

2. This is particularly the case for Albania, Bulgaria, Kazakhstan, Lithuania, Romania, Russia, Ukraine, and Uzbekistan. ALBANIAN CONST. (Draft Aug. 23, 1992) (unofficial translation on file with author); BULGARIAN CONST. (Draft Mar. 1991) (unofficial translation on file with author); KAZAKH CONST. (Draft June 2, 1992) (unofficial translation on file with author); LITHUANIAN CONST. (Draft Feb. 26, 1992), *translated in* CEELI, Follow-Up CEELI Technical Legal Assistance Workshop on the Draft Lithuanian Constitution (Mar. 1-8, 1992) [hereinafter CEELI, Lithuania]; ROMANIAN CONST. (Draft Aug. 1991) (unofficial translation on file with author); RUSSIAN CONST. (Draft Dec. 1992), *translated in* CEELI, Analysis of the Draft Constitution of the Russian Federation, app. C (Jan. 21, 1992) [hereinafter CEELI, Russia]; UKRAINIAN CONST. (Draft June 10, 1992), *translated in* CEELI, Analysis of the Constitution of Ukraine, app. C (July 14, 1992) [hereinafter CEELI, Ukraine]; UZBEK CONST. (Draft Sept. 28, 1992), *translated in* CEELI, Analysis of the Draft Constitution of the Republic of Uzbekistan, app. C (Dec. 7, 1992) [hereinafter CEELI, Uzbekistan].

pressing economic issues without creating unenforceable or overly restrictive guarantees that could curtail economic development.

Among the constitutionally guaranteed social and economic rights included in the various constitutions, the right to real property is regarded as the most sacred. For the countries of Central and Eastern Europe and the former Soviet Union, the concept of private property promises both the political antithesis of the Communist system and a guarantee of economic prosperity. Under Communism, the state owned all productive assets, including real property. For instance, until 1990, the Bulgarian Constitution stipulated, "The economic system of the People's Republic of Bulgaria is socialist. It is based on the public ownership of the means of production, precludes the exploitation of man by man and develops into a communist economy in a planned manner."³

In response to this situation, the drafters of the new constitutions in Eastern Europe and the former Soviet Union have recognized that their documents must serve two important goals: (1) divestiture of state property and (2) adequate protection of the new private ownership. Because property laws are essential for the successful transfer of property from the state to private entities, it is not surprising that the new constitutions contain mandatory legal provisions for the protection of private ownership. For example, the new draft constitutions clearly guarantee the right to private ownership of property.⁴ There is a risk, however, to giving high-profile constitutional status to the right of private property. Constitutions must create lasting institutions that instill public confidence. The failure of constitutions to clearly articulate the importance of protecting ownership of private property could easily erode confidence in private property regimes. Unfortunately, an initial review of the draft constitutions reveals serious misunderstandings of the concept of private property, at least within the context of constitutionally protected rights. Various "small print" restrictions attached to constitutional guarantees generate significant uncertainty regarding the nature of private property and could impede economic development.

For instance, the draft constitutions of Russia, Kazakhstan, Lithuania, Ukraine, and Uzbekistan all provide that the right to own property cannot conflict with certain specified interests.⁵ But by its inherent nature, private

3. BULGARIAN CONST. art. 13 (1971).

4. *E.g.*, LITHUANIAN CONST. art. 31 (Draft Feb. 26, 1992) ("The State shall guarantee each individual the right to own property personally or jointly with others, and to make use thereof without violating lawful interests of other persons, as well as the right of inheritance."); UKRAINIAN CONST. art. 36 (Draft June 10, 1992) ("Inviolability of property and the right of inheritance shall be guaranteed by law and secured by judicial protection."); UZBEK CONST. art. 35 (Draft Sept. 28, 1992) ("Everyone has the right to property.").

5. RUSSIAN CONST. art. 57.1 (Draft Dec. 1992) ("The exercise of the right to property shall not contradict the common good."); KAZAKH CONST. art. 19 (Draft June 2, 1992) ("No one has the right to deprive or restrict the rights of ownership, other than in accordance with this Constitution and laws."); LITHUANIAN CONST. art. 3 (Draft Feb. 26, 1992) ("The State shall guarantee each individual the right to own property personally or jointly with others, and to make use thereof without violating lawful interests

ownership of property will always conflict with *some* interest of another individual.⁶ Such provisions therefore will always be susceptible to abuse, particularly by the government.⁷ Moreover, drafters have attempted to restrict ownership of property itself. For instance, the Ukrainian draft states that "the law shall impose certain duties on the landowner, set maximum limits on private ownership of land and encourage efforts aimed at maintaining the quality and fertility of soils."⁸ This language is so vague that it will probably have to be eliminated, or at least rephrased, to specify the duties imposed.⁹

The Uzbek, Belarusian, Kazakh, and Russian drafts could easily cause apprehension among landowners, and particularly among foreign investors, concerning the role of the state in expropriating land. The drafts state that property is "inviolable."¹⁰ Yet other provisions subordinate property to the interests of the state and other individuals.¹¹ To improve these provisions, and to alleviate some of the fears of potential foreign investors, the drafters will need to strengthen the property owner's rights. This can be achieved by requiring "market value" or "just" compensation in the event of the exercise of eminent domain or other legal mechanisms aimed at the deprivation of private property.¹² Drafters can also eliminate the term "inviolability,"

of other persons"); UKRAINIAN CONST. art. 36 (Draft June 10, 1992) ("The exercise of the right of ownership must not contradict the interests of society as a whole or of individual natural persons and legal entities."); UZBEK CONST. art. 51 (Draft Sept. 28, 1992) ("The use of assets cannot harm the environment or violate the rights and interests, protected by law, of the citizens, legal persons, and the state.").

6. Memorandum from Professor Paul F. Rothstein, Georgetown University Law Center, to CEELI (July 5, 1992), *reprinted in* CEELI, Ukraine, *supra* note 2, app. B at 8 (discussing Chapter 4 and inherent contradiction between private use and rights of others); Memorandum from Justice Robert F. Utter, Supreme Court of Washington, to Karim Guen, CEELI (July 2, 1992), *reprinted in* CEELI, Ukraine, *supra* note 1, app. B at 9 ("[T]he use of *any* property almost invariably affects society and other people." (emphasis added) (commenting on Article 36)).

7. Letter from Justice Elizabeth B. Lacy, Supreme Court of Virginia, to John C. Knechtle, CEELI (Dec. 30, 1992), *reprinted in* CEELI, Russia, *supra* note 2, app. B at 3; Memorandum from Professor Paul F. Rothstein, Georgetown University Law Center, to John Knechtle, CEELI (Jan 1, 1993), *reprinted in* CEELI, Russia, *supra* note 2, app. B at 10 [hereinafter Rothstein, Russia] (commenting on art. 57).

8. UKRAINIAN CONST. art. 68.

9. See Memorandum from Eric B. Schnurer, Attorney, to CEELI, *reprinted in* CEELI, Ukraine, *supra* note 2, app. B (suggesting that provision be rephrased to read "The law shall regulate the uses and distribution of land, to ensure rational and ecologically safe use, maintenance of soil quality and fertility, and just social relations.").

10. UZBEK CONST. art. 50 (Draft Sept. 28, 1992); BELARUSAN CONST. art. 42 (Draft Apr. 6, 1992) (unofficial translation on file with author) ("The inviolability of property and the right to its inheritance is maintained by law."); KAZAKH CONST. art. 19 (Draft June 2, 1992); RUSSIAN CONST. art. 57.3 (Draft Dec. 1992) ("Property is inviolable. No one can be arbitrarily deprived of his property. Forcible appropriation of items of property is permitted upon proven social necessity with compensation in cases stipulated by federal law. Confiscation is conducted upon a decision of the court. Nationalization shall not be permitted.").

11. For example, the Uzbek Constitution states, "Property is inviolable, and an owner may be deprived thereof only in the instances and the procedure specified by law." UZBEK CONST. art. 50 (Draft Sept. 28, 1992). These limits are so vague as to provide no real legal protection against expropriation.

12. Letter from Justice Barbara M. Keenan, Supreme Court of Virginia, to John C. Knechtle, CEELI (Dec. 29, 1992) [hereinafter Keenan Letter], *reprinted in* CEELI, Russia, *supra* note 2, app. B at 11.

because it is clear that, given the qualifications in the current draft, property is *not* inviolable.¹³

The draft Albanian Constitution does address this concern, stating:

The expropriation of real property is permitted only for the common interest, as foreseen by law, when such an interest cannot be realized in any other way. Expropriation shall be compensated by a sum equal to the market value of the property at the time the expropriation is declared.¹⁴

The Lithuanian draft also stipulates that "the right of ownership may be abridged, or the property may be appropriated only for reasons and according to the procedure established by law, when there is an urgent public need. The appropriated property must be adequately compensated for."¹⁵ Clearly the requirement that the public need for the property be "urgent" is too strong and too temporal.¹⁶ In addition, the right to adequate compensation for the governmental taking of property should be supplemented by a right to "due process" in such a taking.¹⁷ The current draft sets forth no requirement of "due process." Instead, the draft mandates only those procedures established by law, thus providing guarantees no stronger and no less arbitrary than the legislature chooses in any given case.

One striking provision in the draft Constitution of Kazakhstan states, "The land, its depths, waters, vegetable and animal worlds, and other natural resources are within the exclusive ownership of the Republic of Kazakhstan."¹⁸ Thus, while private ownership of personal property is protected by law, private ownership of *real* property is forbidden. The draft Constitution of Belarus is perhaps at the other end of the spectrum. Its Article 42 states, "The state guarantees every person the right to property."¹⁹ The language of this section may raise concerns that the government could go too far to insure this right. Belarus, however, also qualifies this right by adding the statement that the right is "maintained by law."²⁰

The constitutional drafting process continues in each of these countries. Significant ambiguity remains regarding the implications of private property laws and the extent to which protection of these rights should be incorporated into the new constitutions. Although opportunities for Western lawyers to

13. Letter from Louis Fisher, Senior Specialist in Separation of Powers, Congressional Research Service, to John C. Knechtle, CEELI (Dec. 30, 1992), *reprinted in* CEELI, Russia, *supra* note 2, app. B at 2 (noting that term could lead to "false expectations and probably fruitless litigation").

14. ALBANIAN CONST. ch. 1, art. 15 (Draft Aug. 23, 1992).

15. LITHUANIAN CONST. art. 31 (Draft Feb. 26, 1992).

16. Memorandum from Professor Mary Jane Morrison, Hamline University, to K. Guen, CEELI (Feb. 28, 1992), *reprinted in* CEELI, Lithuania, *supra* note 2, app. B at 6 (commenting on Article 13(2), undated draft of Lithuanian Constitution, *translated in id.* app. D). Morrison suggests that this problem may be due to a faulty translation.

17. Memorandum from Associate Professor William J. Wagner, School of Law, Catholic University of America, to author (Mar. 6, 1992), *reprinted in* CEELI, Lithuania, *supra* note 2, app. B at 7.

18. KAZAKH CONST. art. 47 (Draft June 2, 1992).

19. BELARUSAN CONST. art 42 (Draft Apr. 6, 1992).

20. *Id.*

provide direction and assistance will be limited to technical revision of the drafts, clearly they may still play a significant role in helping the legislatures in those countries address ambiguities in the legal code and to focus attention on the underlying private property concepts at issue.

The current draft constitutions guarantee the right to private ownership of property, and the various countries are clearly committed to incorporating fundamental social and economic rights within the newly adopted constitutions. Yet despite the centrality of private property rights under the new draft constitutions, former Communist countries are still struggling with the many social and political implications of private ownership of property. In fact, the constitutions themselves sufficiently qualify "private property guarantees" to warrant concern among domestic and foreign free market advocates. Legislators within these countries will have opportunities to amend current constitutional provisions, and their success in these efforts will be vital to the emergence of viable market economies. Furthermore, their willingness to address the ambiguities in current privatization laws will bolster the progress of market reforms and will ultimately contribute to the survival of recent political reforms.

