

## Introductory Remarks

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Is an independent judiciary consistent with a commitment to popular sovereignty? Can a body dedicated to enforcing the principles of a written constitution honor the will of the people? These questions have haunted American constitutional scholars since the founding of the nation, and yet they remain unresolved. Judicial review is an established institution, but its legitimacy is still intensely debated.

The year 1989 marked the beginning of a new epoch in world history. The Soviet empire collapsed, and then the Soviet Union itself disintegrated. A number of new nations emerged in Central and Eastern Europe and in Central Asia, and soon pledged their allegiance to democracy and constitutionalism. They now find themselves confronting the very same question that has troubled Americans for so many years: how to reconcile the power of judicial review with the prerogatives of the demos. As these new nations try to give specific content to the ideal of a constitutional democracy, they will both advance and stumble, in much the same way we have. Yet there are certain aspects of their situation that give their encounter with this ideal an extra measure of urgency and difficulty.

First, there is uncertainty in many of these countries as to whether or not a constitution exists in any but the most formal sense. For example, Russia established a constitutional court at a time when it arguably had no constitution to enforce.<sup>1</sup> Forged in the Brezhnev era, with over three hundred amendments, the so-called "constitution" was internally contradictory and more a crazy quilt ordinance than a charter of governance.<sup>2</sup> In Hungary, the Constitutional Court has had to work with the scantiest of documents: a statement of fundamental principles adopted by the legislature in the waning days of the old regime. In such settings, judges are acutely aware that they are making, not simply interpreting, a constitution.

Second, the judiciaries of these new nations have very little institutional capital. The U.S. Supreme Court confronts doubts as to the legitimacy of judicial review on an ongoing basis, but does so in a comforting context: the Court has a long and noble history and knows that it has a secure place in

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1. See, e.g., Serge Schemann, *Crisis in Moscow: Hard Liners Plan a Court Challenge to Yeltsin's Move*, N.Y. TIMES, Mar. 22, 1993, at A1.

2. Martin Malia, *Yeltsin's Revolution*, N.Y. TIMES, Mar. 28, 1993, § 4, at 15.

both the structure of American government and the minds of the American citizenry. In the new democracies of the East, however, the judiciary cannot take its authority for granted. Not only must it fashion a constitution, it often must give life and force to the idea of a constitutional court. Judges on these courts must convince their fellow citizens that law is distinct from politics, and that they are entitled to decide what that law is. Often, as has been the case in Russia, efforts to build respect for the law and for the courts are hindered by painful remembrances of how law was used as an instrument of the ruling party. Many of those who are now judges obtained their position because of their success as power brokers and cannot resist the temptation to continue in that role.<sup>3</sup>

Among the many challenges that the new constitutional courts face is that of managing the transition itself. They must construct constitutional principles that span a historical divide. In America, the most stable of all democracies, the Supreme Court interprets the Constitution against a backdrop of continuous governmental structure, which allows it to formulate principles having a tacit timeless quality. In contrast, the constitutional courts of Eastern and Central Europe and the former Soviet Union must decide whether certain general principles of constitutional law should restrain the new regime from using its power to deal with the injustices of the past. Should, for example, the new regime be able to prosecute the old regime or those who served it? Most American constitutional lawyers would be offended by such prosecutions, as they inflict punishment upon individuals for actions that, when committed, were lawful or subject to less severe punishment. But, in the papers that follow, Justice Sólyom and Professor Teitel consider whether such a general aversion to retroactive laws is appropriate in situations where the government has undergone a radical regime shift.

These special features of constitutionalism in the post-Cold War era — uncertainty, in some cases, about whether the document being construed as a constitution can be distinguished from a repeatedly amended statute; the paucity of respect for courts of law in general; and the difficulties of applying general legal principles to governments that have undergone radical ideological and political transformations — counsel against advancing the American constitutional experience as a prototype for all to follow. At most, those struggling with the dilemmas of constitutional democracy for the first time can use the American experience as a resource — a living library to be consulted for whatever pertinent knowledge it may contain. Meanwhile, Americans should recognize that, because of the developments of 1989 and the disintegration of Soviet totalitarianism, now, more than ever, constitutional democracy has a global dimension, and that we thus have new resources for enriching our own appreciation of this ideal. The experience of these recently transformed

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3. See, e.g., Serge Schemann, *Crisis in Moscow: Top Russian Jurist Urges Compromise*, N.Y. TIMES, Mar. 23, 1993, at A1.

nations may enhance our understanding of the legitimacy of judicial review and throw new light on questions that still plague us some two hundred years after the creation of our constitution. The best of all comparative exercises are reciprocal.

