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To my family and my wife...


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INTRODUCTION

The last decade of the 20th century saw radical changes in Eastern Europe and the former USSR. Most of these countries made a transition from totalitarianism or authoritarianism to democracy and from central planning to a market economy. Adding to the latter, a number of national entities gained their independence after the disintegration of the federative states of the USSR, Yugoslavia and Czechoslovakia. Many recent studies have focused on these double, in some cases triple transitions, and scholars from different fields analyzed the so-called “1989 Revolution” from different perspectives. Lawyers and political scientists have been interested particularly in constitutional developments accompanying these multi-dimensional transitions. As a result, past and present aspects of constitutionalism in Eastern Europe and the former USSR have been extensively studied in recent years. Nevertheless, rather less scholarly attention has been paid to the future of post-communist constitutions and prospects for constitutionalism in these countries. Given the theoretical and practical difficulties besetting the topic, this scholarly vacuum is not surprising. At the practical level, since the fine-tuning of new constitutions—or even in some countries constitution-making—is still continuing, one may argue that studying the future of newly-born, even unborn documents is mere speculation. At the level of theory, the variety of factors shaping the changes in post-communist countries and the peculiar characteristics of resulting constitutional documents create several problems in employing an appropriate method as well as in choosing a suitable approach. None of these theoretical and practical difficulties, however, can justify disregarding such an important topic.

1. We mean by East European countries: Poland, Hungary, the Czech Republic, Slovakia (East Central Europe); Albania, Bulgaria, Romania (the Balkans); and we mean by the former USSR: the Russian Federation; Ukraine; Belarus; Moldova; Estonia; Latvia; Lithuania (the Baltics); Armenia, Azerbaijan, Georgia (Transcaucasia); Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan, Uzbekistan (Central Asia). We exclude the former Yugoslavia from this study because at the time of writing there were still some uncertainties about the constitutional structure of the successor states. Although some of them already promulgated their new constitutions and made progress in consolidating their constitutional governments, we believe that little could be gained by studying only certain countries in the region. Thus we leave this topic to future studies which would cover all the former Yugoslav republics in a comparative perspective.

2. For one of the few studies on this topic, see Istvan Pogany, “Constitution-Making or Constitutional Transformation in Post-Communist Societies”, 44 Political Studies 1996, 568-591.
The main questions we shall be dealing with throughout this study can be formulated as follows: Will liberal democratic constitutionalism take root in these countries? Will new constitutions in Eastern Europe and the former USSR perish or survive? Apart from these, this study also aims at contributing, even though partially, to the construction of a general constitutional theory by studying the causes and dynamics of constitutional change in general. This topic is highly important for modern constitutional studies at least for two reasons. First, the global rise of democracy at the end of the 20th century increases the hopes for the prospects for democracy. Although today the bulk of the countries in the world are ruled by non-democratic regimes, the number of democracies may increase in the next millennium. The constitutional problems of future democracies will most likely be similar to those of post-communist countries. Accordingly, those scholars interested in constitutions may now find an opportunity to get acquainted with such problems within the context of post-communism. Second, constitutional change is not only on the East European, but also on the West European constitutional agenda. The purpose of this study is not to introduce a general theory about constitutional instability, but studying post-communist constitutions will help us to understand the causes and dynamics of constitutional change from a broader perspective.

3. Jan-Erik Lane noted that today one could hardly speak of a general constitutional theory. For this argument and an attempt to analyze current constitutional theories deriving from jurisprudence, political science and economics, see Jan-Erik Lane, Constitutions and Political Theory, Manchester University Press, Manchester 1996.

4. The recent swelling of democracy, also known as the third wave of democratization, started with the Portuguese Revolution of Carnations in 1974 and continued with the collapse of authoritarian regimes in Greece and Spain. The latter were followed by the transitions in Latin America, Eastern Europe and the former USSR. See Samuel P. Huntington, The Third Wave: Democratization in the Late Twentieth Century, University of Oklahoma Press, Norman 1991.


CHAPTER 1
CONCEPTUAL FRAMEWORK

1.1. Introduction

Having posed the basic problems we shall be dealing with in this study—the future of post-communist constitutions and prospects for constitutionalism in post-communist countries—it would be appropriate to address several methodological problems at the very outset. These problems mainly derive from the politico-legal nature of constitutions. That is to say constitutions are neither purely legal, nor purely political documents; they appear mainly as sets of legal rules constituting the supreme law of the land, but they differ from other legal rules in their function to organize, limit and divide political power. The Janus-faced nature of constitutions offers their students a number of methodological options, legal and political approaches being the most important ones. The peculiarity of the current study’s topic makes such methodological problems even more complex.

It has generally been said that political science has sprung from history, philosophy and law. This was particularly true for the Anglo-American social science tradition. Indeed, the legal-institutional approach was central both to legal and political sciences in Britain and America at the beginning of the century, but as a result of a struggle to become independent of constitutional law, political studies became more separate from constitutional law. Today, one can speak of independent legal and political sciences with their distinct methods and approaches; constitutional studies are placed at the intersection of the two. We shall first study legal and political approaches as they have been developed in the Anglo-American social science tradition and attempt to show their merits and drawbacks within the context of the current study. Then we shall turn to another important methodological problem:


whether post-communist constitutions should be studied comparatively or as case studies.

A Legal Approach to Constitutions

Three mainstream theories can be distinguished in legal science: dualist theories (those theories accepting the hypothesis about the dualism between "positive" and "natural" law), positive law theories (those theories rejecting the dualism between natural and positive law) and sociological theories (those theories viewing law as a social product). Of course this list is not exhaustive, given new or emerging theories in modern legal science, but it would furnish some evidence about the nature of constitutional law studies in the Anglo-American tradition.

The natural law/positive law dichotomy relates to the content of legal rules. Natural law theory sees law as the embodiment of certain moral or religious principles, whereas positive law theory sees it as a set of human-designed rules posited by legislators. Lawyers generally study constitutions from a positivist point of view. They not only investigate the relationships between constitutional provisions and other legal rules in a given legal system, but also endeavor to determine the meaning of these provisions in individual cases. Accordingly, the positive law theory would be helpful in explaining such problems as whether given constitutional changes have been made in accordance with the amendment rules of the existing constitution, whether these changes have been made by authorized agencies or whether they will affect other constitutional provisions or the legal system as a whole, but it would not be adequate to understand and explain the main topic of the current study—the causes and dynamics of probable constitutional changes in post-communist countries. In other words, studying legal aspects of constitutional changes may explain at best "how" they have occurred, but not "why" they have occurred.

The third set of legal theories, i.e., sociological theories, may complement the positive law theory in explaining constitutional changes. These theories analyze law in its social context and focus on such problems as the impact of law on society, the acculturation of law and the relationships between social and legal changes. Since constitutions are basically social products, one cannot disregard the importance of sociological elements in constitutional change. Such concepts as legitimacy, legal culture and legal institutions may serve to understand and explain the problem of constitutional change. For example, those authors contributing to sociological theories put emphasis on the importance of an appropriate legal culture for the viability of legal institutions. This would also apply to constitutions. That is to say, one may argue that the survival of a given constitution—as a set of legal institutions or as a supreme legal institution—may depend on the congruence between the constitution and the legal culture of a given society.

Despite the relevance of these arguments of legal-sociological theories, they still seem to explain the problem of constitutional instability within the realm of law. Put another way, if one employs a legal approach, one may miss the point that there is a close relationship between political regimes and constitutions. First, since a constitutional change usually follows a regime change, their causes and dynamics may overlap. This urges us to study the relationships between constitutional change and regime change. Second, the fate of post-communist constitutions may affect the consolidation of emerging liberal democratic regimes in post-communist countries. Thus it is inevitable to focus on the relationships between constitutional change and consolidation of democracy. Third, constitutional change appears as a political, rather than a legal activity involving mainly political actors and institutions. This makes it necessary to study the process of constitution-making from a political point of view. Legal-sociological theories seem to fail to cover these aspects of probable constitutional changes in Eastern Europe and the former USSR.

A Political Approach to Constitutions

We can study the political dimension of probable constitutional changes in post-communist countries by employing a political approach. Today the political approach consists of various theories, and most of them are directly or indirectly related to constitutions. Thus it is not so easy to make a choice between these theories to study prospects for constitutionalism in post-communist countries.

The history of political science can roughly be broken up into three periods. The first period can be characterized by the dominance of the institutional approach, today known as "old institutionalism," and by the

amalgamation of legal and political studies. In this period, constitutions, typically defined as institutional frameworks of political regimes, were one of the main research fields of political scientists. For example, Herman Finer, one of the early institutionalists, defined a constitution as "[t]he system of fundamental political institutions..." The second period bears the stamp of criticisms of and reactions to the legal-institutional approach. Those claiming that political scientists ought to look beyond constitutions to understand and explain the actual working of a political system abandoned the legal-institutional approach and developed a new theory known as "behavioralism." Its proponents attempted to explain political behavior at the individual or aggregate level by employing several empirical methods. Certain authors, particularly focused on cultural aspects of politics and developed the concept of political culture. Owing to these developments, constitutions lost their central position in political science. Vernon Bogdanor observed this tendency in post-war political studies:

"Amongst political scientists... there was a reaction against the study of constitutions which was held to be static, formal and legalistic, in favor of analyzing the socio-economic realities which allegedly underpinned constitutional life. Constitutions, in short, were seen largely as epiphenomena, expressions of an underlying political culture, and it was this political culture which ought to be the prime object of analysis."

The behavioral approach in general and cultural studies in particular came also under criticism in the third period. This period saw the rise of several new approaches, e.g., the rational choice theory and the discourse theory, as a reaction to the behavioral approach. More importantly, political scientists recently re-discovered political institutions which led to the emergence of a new approach known as the "new institutionalism". The latter, as a balanced approach between the "old institutionalism" and "behavioralism", has attracted many scholars.

Chapter 1. Conceptual Framework

Both institutionalism and behavioralism offer valuable insights within the context of this study. We shall try to explain probable constitutional changes in post-communist countries on the basis of the concept of legitimacy which basically derives from political culture and effectiveness. In this regard, behavioral studies and the concept of political culture will help us to understand the social bases of new constitutions. Institutional studies, in turn, will be useful in evaluating the performance of newly-created legal and political institutions in post-communist countries. Both behavioral and institutional perspectives, therefore, will illuminate different aspects of the core problem of this study. We shall also consult democratization studies (those studies aiming to explain the causes and dynamics of the global resurgence of democracy at the end of the 20th century) and focus particularly on the relationships between transition to democracy and constitution-making in post-communist countries.

These political science approaches will most likely serve our purpose within the context of this study, but this does not necessarily mean that we shall completely abandon the legal approach. True, the latter cannot explain the underlying causes of probable constitutional changes, but it is essential to employ it to depict accurately the basic characteristics of pre-communist, communist and particularly post-communist constitutions. The legal approach will help us to make a descriptive analysis which would supplement behavioral and institutional theories. Consequently, we shall attempt to establish a link between legal and political approaches by combining behavioral and institutional perspectives within the framework of democratization studies.

Comparative or Case Studies

The comparative method is widely employed both in constitutional law and political science. The proponents of this method maintain that such studies would prevent us to run into ethnocentrism, and that they would enable us to generate and test theories, hypotheses and concepts. More specifically, however, it has been noted that comparative studies would give us a chance

Prospects for Constitutionalism in Post-Communist Countries
democratic or authoritarian. Let us look closer at these aspects of constitutions respectively by reviewing several definitions of the constitution made by different authors.

Hans Kelsen typically defined the concept of constitution as the supreme law of the land. The author distinguished between constitutions’ material (i.e., the positive norm or norms regulating the creation of general legal norms) and formal (i.e., a document called “constitution”) meanings. He wrote that “[c]onsidering only a national legal order, the constitution represents the highest level of positive law.” 18 Thus the constitution, as a source of validity for all other norms in a hierarchical legal system, performs a legitimation function and authorizes “specific persons to create general norms.” 19 Carl J. Friedrich and Zbigniew Brzezinski, in turn, stressed the political manifesto character of constitutions. According to them: “Every constitution contains strong ideological element. Not only any bill of rights it may contain, but also the organizational fixation it undertakes, are ideologically oriented.” 20 Indeed, today no constitution is ideologically neutral in the modern world. Their preambles, in particular, mirror the bitter memories, glorious victories and the sacred goals of a given nation. Apart from their legal and ideological characteristics, constitutions also organize political power. S.E. Finer, Vernon Bogdanor and Bernard Ruden underlined the “power map” characteristics of constitutions. According to them: “Constitutions are codes of norms which aspire to regulate the allocation of powers, functions, and duties among the various agencies and officers of government, and to define the relationships between these and the public.” 21

It is important to note that today almost every modern constitution performs these functions (i.e., it validates hierarchically inferior legal rules, reflects a nation’s political experiences and goals, and serves as an organizational chart) whether it is promulgated in a liberal democratic or an authoritarian regime, but in a liberal democratic regime a constitution performs a much more important function: it divides and limits political power. The latter point highlights the relationships between the concepts of constitution and constitutionalism. Giovanni Sartori gave a definition of constitution in connection with constitutionalism. According to him, a constitution is “...a


Chapter 1. Conceptual Framework

frame of political society, organized through and by the law, for the purpose of restraining arbitrary power." A political system, therefore, may have a constitution, but this does not necessarily mean that the authorities in the system act in accordance with the principles of constitutionalism. Communist regimes provided a typical example of such incongruity.

So, what is liberal democracy? Today the terms of liberal democracy and democracy are generally used interchangeably, but as Giovanni Sartori put it:

..."democracy" is only a shorthand—and a misleading one at that—for an entity composed of two distinct elements: 1) freeing the people (liberalism) and 2) empowering the people (democracy). One could equally say that liberal democracy consists of 1) 'demo-protection', meaning the protection of a people from tyranny, and 2) 'demo-power', meaning the implementation of popular rule. Historically, the creation of a free people was the accomplishment of liberalism (from Locke to, say, Benjamin Constant, the major French constitutionalist), and this element is generally singled out by the notions of constitutional democracy and/or liberal constitutionalism. A free demos, however, is also a demos that gradually enters the house of power, asserts itself, 'demands' and 'obtains'. And this is democracy per se.23

Accordingly, the concept of democracy can be defined in two ways.24 In its narrower meaning, democracy consists of two elements, "contestation" and "participation". The latter relates to the selection of leaders and policies through regular elections. The former refers to the free competition between individuals and parties to come to power. Such a minimalist definition of democracy has been inspired by Joseph Schumpeter's definition of democracy as a system "...for arriving at political decisions in which individuals acquire the power to decide by means of competitive struggle for the people's vote".25 Those defining democracy in such a way may be content with the existence of regular, free and fair elections to qualify a political system as democracy. Nevertheless, some authors have pointed out that democracy requires more than this. Robert Dahl, for example, expanded the definition of democracy in such a way that it comprised civil liberties and political rights. Those defining democracy in a broader way argue that contestation and participation would only be meaningful, if such rights as freedom of expression, freedom of the press and freedom to form and join organizations are guaranteed in a political system. Consequently, democracy has been termed in its narrower and broader senses "electoral" and "liberal" democracy respectively, and constitutionalism relates to the broader meaning of democracy, i.e., liberal democracy.

One should note that to define democracy in a broader sense raises another problem. Given the constraining functions of constitutions, some authors have argued that there is an inherent tension between constitutionalism and democracy—or between limited government and self-government—because constitutional limitations may prevent the majority from implementing its will freely.26 The solution to this problem lies in the redefinition of the concept of constitutionalism from a different perspective. If we accept that constitutions are not merely disabling, but enabling documents, i.e., they enable the majority of "free" people to make the collective decisions concerning the entire polity, we may ease the tension between constitutionalism and democracy. No doubt, liberalism historically precedes democracy, but today one cannot maintain that one is more important than the other; i.e., one cannot imagine liberalism without demo-power, nor democracy without demo-protection. Thus it would be more suitable to see the relationships between the two as an interaction involving a delicate balance. If one puts too much emphasis on liberalism, i.e., demo-protection, the majority of people may be paralyzed and lose its governing ability. If one puts too much emphasis on democracy, i.e., demo-power, the majority may tyrantize the minority. In this respect, constitutionalism plays a significant role in striking a balance between these two elements. According to Stephen Holmes: "To discover the mutually reinforcing relation between liberalism and demo-

nacy, we need to see constitutionalism in a more positive light. A liberal democratic constitution is not merely a preventive device. It is an instrument of government. It is a way of organizing the state. It is a technique which makes it possible for a community, in some sense, to rule itself. 29 He employed the term of "positive constitutionalism" to stress that constitutions are not only disabling, but also enabling documents. Thus today constitutionalism should be understood in a way that it not only consists of demo-

protection, but also of demo-power elements. Put differently, today one should speak not only of "negative constitutionalism", but also of "positive constitutionalism". 30 This distinction is particularly important in studying the effectiveness of constitutions. We shall return to this point later on and attempt to define the functions of constitutions in liberal democratic regimes not only from a negative, but also from a positive standpoint. Now, it suffices to note that within the framework of this study we see constitutionalism as an inseparable part of democratic regimes and define it in such a way as to encompass both demo-protection and demo-power elements. That is why we shall usually use the term of liberal democratic constitutionalism, instead of liberal constitutionalism 31 or constitutionalism, 32 to emphasize this double-edged characteristic of the concept of constitutionalism.

Lastly, we wish to point out that one still needs another conceptual clarification before using the term of constitutionalism even in its conven-


32. According to Charles Howard Mcllvaine: "...constitutionalism has one essential quality: it is a legal limitation on government; it is the antithesis of arbitrary rule; it is despotic government, the government of will instead of law," Constitutionalism, Ancient and Modern, Revised edition, Cornell University Press, Ithaca/New York 1947, 21-22.

33. According to Carl J. Friedrich, for example: "Division of power is the basis of civilized government. It is what is meant by constitutionalism." Constitutional Government and Democracy: Theory and Practice in Europe and America, Fourth edition, Waltham, Blaisdel 1968, 5.

34. Jan-Erik Lane underlined this point: "Two ideas are basic to constitutionalism: (a) the limitation of the State versus society in the form of respect for a set of human rights covering not only civil rights but also political and economic rights; and (b) the implementation of separation of powers within the state. While the first principle is an external one, confining State powers in relation to civil society, the second principle is an internal one, making sure that no State body, organ or person can prevail within the State." Lane, op.cit. note 3, 25.


"...the formal and informal structure of governmental roles and processes. Included within this concept of regime are methods of inauguration of governments, formal and informal representative mechanisms and patterns of coercion." These definitions imply that there is a close relationship between regimes and constitutions because both organize political power and structure governmental roles and processes, but they do not make a distinction between the two concepts. Then we need more clarification to distinguish regimes from constitutions. In this respect, the definition proposed by Philippe C. Schmitter and Terry Lynn Karl may be helpful. These authors saw the constitution as the institutional framework of a regime and defined a regime or system of governance as "...an ensemble of patterns that determines the methods of access to the principal public offices; the characteristics of the actors admitted to or excluded from such access; the strategies that actors may use to gain access; and the rules that are followed in the making of publicly binding decisions." They added that: "To work properly, the ensemble must be institutionalized—that is to say, the various patterns must be habitually known, practiced, and accepted by most, if not all, actors. Increasingly, the preferred mechanism of institutionalization is a written body of laws undergirded by a written constitution, though many enduring political norms can have an informal, prudential, or traditional basis."

One may infer from these definitions that regimes involve several formal as well as informal structures organizing political power. Regimes, as it were, consist of two constitutions: a constitution on paper (i.e., the formal structure) and a constitution in operation (i.e., the informal structure). When we use the term of constitution, we usually mean a constitution on paper, i.e., a written constitution comprising a set of legal rules. Ideally, authorities exercise political power as prescribed by constitutional provisions. In these cases, the latter may accurately reflect how state institutions are actually run. But in reality it is always possible to find discrepancies between a constitution on paper and a constitution in operation. In these cases, the interaction between the political actors in a given political system are not determined by the rules set by the constitution, but by the informal structure. One may conceive at least two reasons why constitutional reality diverges from constitutional formality. First, authorities in a given political system may simply ignore the constitution; then the latter may be reduced to

37. Donald Scharf, "Transition to Democracy and Transition Through Transaction", in Comparative Political Studies 1987, 527.

Chapter I. Conceptual Framework

window dressing. Second, a written constitution cannot regulate every aspect of constitutional practice; then customs, conventions and precedents complement the constitution on paper. Consequently, the term of "regime" can be used as an inclusive term comprising the constitution on paper and the constitution in operation. When necessary, a distinction will be made between the two.

True, formal as well as informal rules and procedures make up the essence of regimes, but they also consist of norms and principles. A further distinction between basic regime elements (i.e., between norms and principles and rules and procedures) will enable us to identify two types of constitutional change: constitutional change concomitant with regime change and constitutional change within a regime. Stephen Krasner, studying the concept of regime in an international context, put this point as follows: "Principles and norms provide the basic defining characteristics of a regime. There may be many rules and decision-making procedures that are consistent with the same principles and norms. Changes in rules and decision-making procedures are changes within regimes, provided that principles and norms are unaltered." Consider the principle of the separation of powers as an example. The principle, providing that power should be divided and exercised by separate state agencies in liberal democratic regimes, can be applied in different ways through constitutions. Thus all modern liberal democratic constitutions allocate power among executive, legislative and judicial organs, but they regulate the relationships between them differently. Some of them, for example, provide that the executive should be elected directly by the people, whereas others require the election of the executive by the legislature. These two variations correspond to two well-known constitutional types, parliamentary and presidential constitutions. If a given political system shifts from parliamentarism to presidentialism, or vice versa, this would not change the liberal democratic nature of the regime, so long as its norms and principles are not violated. In the same vein, the principle of the

rule of law constitutes one of the most important characteristics of liberal democratic regimes. All liberal democratic constitutions mention this principle explicitly or implicitly, but they implement the same principle in different ways. Some of them establish a special constitutional court to review the constitutionality of laws, whereas others confer this power on ordinary courts. They both, however, aim at guaranteeing the supremacy of the constitution.

1.3. Constitutional Stability and Change

This study is mainly concerned with the future of post-communist constitutions. So, what would happen to them in the foreseeable future? Given the distinction we have made above between constitutional change concomitant with regime change and constitutional change within a regime, one may conceive at least three possibilities. At best, both regimes and constitutions survive and the latter turn into social contracts accepted and supported by most major political groups within existing regimes. At worst, both regimes and constitutions perish and the latter are abolished, suspended or replaced by new ones following major political crises, such as a revolution or a coup d'état. Another possibility is that regimes survive (i.e., their norms and principles remain intact), but constitutions are amended (i.e., the formal rules and procedures of the respective regimes are changed). All these possibilities shall be discussed in this section.

Why do regimes, particularly democratic ones, remain stable? Today it is widely accepted that the stability of democratic regimes rests on their legitimacy.42 So, how can we define the concept of legitimacy? According to Seymour Martin Lipset: "Legitimacy involves the capacity of the [political] system to engender and maintain the belief that the existing political institutions are the most appropriate ones for the society."43 Juan J. Linz defined this concept in a similar way as: "...the belief that in spite of shortcomings and failures, the existing political institutions are better than any other that might be established...."44 Larry Diamond and Seymour Martin Lipset, in turn, pointed out that to speak of legitimacy: "Elites and the masses must share the belief that the system—that is, the set of constitutional arrangements, not the particular administration—is the best form of government (or the least evil)."45 Here, it is important to distinguish between trust and legitimacy. While the former relates to incumbent authorities, the latter relates to the entire political system. The most important implication of this distinction is that members of a given political system may distrust authorities, while not rejecting the political system as a whole.46 This brings us to the concept of political support. This means that legitimacy can also be defined as "...a kind of supportive sentiment that may be directed to any one of the components of the political system..." particularly to the regime and the authorities.47 Accordingly members of a given political system may be dissatisfied with the performance of authorities, but may continue to support the regime.

We have made a distinction above between the two sets of regime elements: norms and principles; rules and procedures. Is people’s belief in the appropriateness of abstract norms and principles sufficient to consider a given regime legitimate? Is the support of the people for the rules and procedures of the regime as important as the support for norms and principles in evaluating the overall legitimacy of the system? These questions lead us to redefine the concept of legitimacy at two levels: "...as a general principle, that the democracy is the best form of government possible, and as an evaluation of the believers’ own system, that in spite its failures and shortcomings, their own democratic regime is better than any other that might be established for their country."48 For the sake of convenience, we can refer to these levels as “abstract” and “national” levels. In some cases members of a given political system give their support to the regime at both levels. For example, it has been argued that the American people believe that democracy, not only in the abstract, but also at the national level is the best form of government; today the American people tend to identify democracy with American democracy49 and American democracy with the American Consti-

49. Dahl underlined that point: "Support for popular government was intertwined with support for a specifically American form of government... Most of the men who attended the Constitutional Convention lived to see their patchwork of compromises, the American
In many cases, however, one may observe striking differences between support for democracy at the abstract and national levels. The Italian case may illustrate this point. According to the Four Nation Survey, carried out in 1985, 70% of the Italian people said “democracy is always preferable”, whereas when they were asked their opinion about “their” democracy, only 4% said “our democracy works well”. The 1992 Eurobarometer survey found similar results. 51

Popular support for democracy at the abstract level derives ideally from political culture. This means that if the norms and principles of democracy are congruent with people’s beliefs and values, they may easily be accepted and supported. If members of the political system are not familiar with or reject such basic principles as “the participation of the people in decision-making through their representatives”, the “separation of powers” and the “rule of law”, the establishment of democracy at the national level becomes very difficult. Democratic norms and principles, which have been accepted and supported by elites and masses, can be incorporated into the national political system through rules and procedures. During the process of constitution-making, constitution-makers choose the most appropriate set of rules and procedures for their society. Once members of the political system have expressed their commitment to democracy in the abstract, constitution-making mainly revolves around the negotiations and compromises between major political forces. Accordingly, other factors than political culture assume importance in the constitution-making process. For example, in many cases the interests of the actors who have taken part in the process of constitution-making play a most significant role in choosing between the Constitution, became an object of veneration. Within a few years it had already become dangerous to attack the Constitution, perhaps even before it had become politically dangerous—and futile—to attack popular government. An understanding quickly developed that all controversies, particularly constitutional controversies, must take for granted the overriding legitimacy of the Constitution and the superiority of the American institutions. Opposition groups were therefore restricted to changes that (to supporters would argue) were consistent with the Constitution.” Robert A. Dahl, “The American Oppositions: Affirmation and Denial”, in Political Oppositions in Western Democracies, (Robert A. Dahl, ed.), Yale University Press, New Haven/London 1966, 36-37.

50. As Devine observed: “it was the Constitution itself which provided the most important symbol for national regime identity. The place of the Constitution in the United States is probably unmatched in any other society... It represents—and to some extent is—the regime.” Donald J. Devine, The Political Culture of the United States, Little, Brown and Company, Boston 1972, 88.


presidential and parliamentary forms of government. However, this does not necessarily mean that political culture is completely irrelevant at this stage. The constitution-making process imparts to the regime its national characteristics. Putting it another way, democracy, as a set of abstract norms and principles, turns into American democracy, French democracy, or Italian democracy thanks to constitutions. A constitution, therefore, must serve the further reflection of the beliefs and values of the people. For example, presidentialism may be accepted and supported more easily than parliamentarism in a society where a one-man leadership tradition have firmly taken root. Consequently, a constitution-making process can be considered successful if the final document satisfies all major political groups within the political system. Constitutional engineering offers several institutional alternatives for an emerging democracy such as federalism-unitary state, presidentialism-parliamentarism, unicameralism-bicameralism, etc. Ideally, constitution-makers negotiate and compromise on a specific institutional configuration to provide a consensual basis for the new regime. If, however, they cannot agree on the rules and procedures, this may create “birth defects”, as it were, and this would eventually bring about constitutional change within the regime. In Portugal, for example, during the making of the Constitution of 1976, major political groups were opposed to certain constitutional arrangements and declared their intention to amend them immediately after its promulgation. Especially, the socio-economic model created by the Constitution and the balance of powers between state agencies came under strong criticism. In the end, these birth defects caused the revision of the 1976 Portuguese Constitution in 1982. 52

Once the rules and procedures are in place, the regime begins to fulfill its functions at the national level. Rules and procedures provide a common framework in which individual actors interact with each other to produce several political and economic outcomes. If a given democratic regime works effectively at the national level (i.e., if it fulfills the expectations of members of the political system), this most likely reinforces support for democracy at the abstract level. As Lipset put it: “Legitimacy is best gained by prolonged effectiveness...” 53 If, however, elites and masses are dissatisfied with the performance of a democratic regime at the national level, this ultimately affects negatively its legitimacy at the abstract level. Popular dissatisfaction with democracy at the national level may derive first and foremost from the lack of trust in incumbents, i.e., people may think that


able authorities can provide desired outcomes within existing institutions. As a result, they replace ruling cadres by new ones thanks to certain constitutional mechanisms, free and fair elections being the most important ones. If successive incumbents prove to be inadequate to satisfy people's expectations, then most likely rules and procedures according to which individual actors fulfill their functions come under criticism. Here, one should take into consideration the distinction we have made above between constitutions on paper and constitutions in operation. If there are informal structures regulating the relations between individual actors along with formal structures, then it is conceivable that people may first assign the failure of "their" democracy to informal structures. Dieter Fuchs, Giovanna Guidorossi, and Palle Svensson placed the informal structure between the level of the formal structure and individual actors. According to the authors, when "consistently perceived performance deficits are no longer assigned to individual actors but they are not yet assigned to the formal structure of democracy", people most likely hold the informal structure responsible for the failure of the regime in satisfying their expectations. The gap between constitutions on paper and constitutions in operation may derive from the fact that authorities simply ignore constitutional provisions. For example, if constitutional provisions regulating the rights and liberties of citizens are not upheld by the authorities, this may cause popular dissatisfaction with the political performance of the regime. In this case, the application of constitutional provisions may satisfy members of the political system. Constitutions in operation may diverge from constitutions on paper not only because of authorities ignoring constitutional provisions, but also from the fact that the constitution cannot regulate every aspect of political life. In this case, changes or revisions in the informal structure of the regime, e.g., changes in the political party system, may make the regime more effective. If even this cannot be achieved or if it cannot provide a solution to the problem of popular dissatisfaction, then inevitably the formal structure (i.e., the constitution) comes to be seen as the main cause of the ineffectiveness of the regime. This will most likely bring about constitutional changes within regimes too. For example, it is not surprising that constitutional reform has been on the Italian political agenda since the 1960's. Given the survey results mentioned above, this can be interpreted in a way that most people in Italy think that democracy is the best regime there is, but the Constitution is not the best one that might be drawn up. Putting it another way, they are committed to democratic norms and principles, but they tend to replace the existing set of (formal) rules and procedures by another one.

Today, popular dissatisfaction deriving from the failure of the regime to produce political and economic outcomes is common to many old democracies where regimes have been in operation for decades. However, one can hardly expect that such dissatisfaction would reach the level of rejection of the norms and principles of democracy in such regimes which rely on a long tradition of liberal democratic constitutionalism. Constitutional changes within regimes, therefore, appear as a solution in consolidated democracies for appeasing the dissatisfaction of members of the political system. Given the fact that consolidation of democracy is not a one-time, irreversible process, Larry Diamond, Juan J. Linz and Seymour Martin Lipset implied that such constitutional changes are necessary for democratic regimes in order to maintain their legitimacy. According to the authors: "In contrast to all other regimes, democracies depend for their survival almost exclusively on a widely shared belief in their legitimacy. This belief is passed on from generation to the next, but it must be renewed in each generation—not only through faith and ritual but also through practice and performance. What enables performance to continue to be effective, and institutions to work and command legitimacy, is not just stability but periodic adaptation and reform as well." The French case provides a typical example for constitutional change within the regime in a consolidated democracy. According to a public opinion survey, not only democratic norms and principles, but also the relevant rules and procedures as embodied in the Constitution of 1958 were accepted by the majority of elites and masses in France. There was, however, general agreement on the Constitution's failure in persuading citizens to become more involved in public affairs. As a result, Article 11 of the Constitution was amended in 1995 to allow higher popular involvement


57. According to a survey carried out in 1989, 94.8% of the French people said that they were in favour of the idea of democracy. 78% of them also saw democracy as the best form of government. See Fuchs, Guidorossi, and Svensson, op.cit. note 54, 349.
by granting the president the right to call referendums on a wide range of issues.60

Thus, constitutional changes in consolidated democracies may contribute to the maintenance of legitimacy by mitigating the dissatisfaction of members of the political system deriving particularly from the ineffectiveness of the regime. Such changes may even be more desirable in emerging democracies because not only ineffectiveness, but also incongruity between political culture and political institutions as well as unsuccessful constitution-making campaigns feed the dissatisfaction of both elites and masses. Accordingly, constitutional changes may serve the construction of legitimacy after transition to democracy so long as the norms and principles of democracy are firmly supported by elites and masses. Constitutional changes within regimes may reinforce popular support for democracy at the national level; this, in turn, may reinforce popular support for democracy at the abstract level; this ultimately may increase the overall legitimacy of the regime. Consequently, the instability of regimes and constitutions can be explained by a three-pillar legitimacy model whose components are political culture (i.e., the orientations of the members of a given political system towards the components of the system), constitution-making (i.e., the process of the creation of basic regime institutions) and effectiveness (i.e., the capacity of a regime or a constitution for satisfying the expectations of these members).

So far, we have developed an analysis to study the stability of regimes and constitutions, and made a belief-based definition of the concept of legitimacy within the framework of this analysis. Now, we wish to say a little about criticism concerning such belief-based definitions before concluding this chapter. The concept of legitimacy, in fact, has been understood and defined in different ways by several authors. Max Weber’s tripartite typology of authority or “domination” is perhaps the best known analysis of the concept.61 Although his analysis has been very influential in social sciences, it could not escape criticism. His scheme was found “obsolete”62 and “lame”63.

60. For these amendments, see Jeremy Jennings, “From ‘Imperial State’ to ‘L’Etat de Droit’”, Benjamin Constant, Blandine Kriegel and the Reform of the French Constitution”, 44 Political Studies 1996. 488-304.
66. Ibid., 49.

Ited.”64 Such criticisms produced alternative explanations of the concept from different perspectives. For the purpose of this study we have adopted a minimalist definition, proposed by Seymour Martin Lipset and Juan J. Linz, to link, on the one hand, the concept of legitimacy with the concept of culture, on the other, to explain constitutional change within regimes on the basis of the problem of legitimacy. Apart from these advantages, however, there are some disadvantages of such belief-based definitions.64 According to John Schaar, for example: “The new definitions all dissolve legitimacy into belief or opinion. If a people holds the belief that existing institutions are ‘appropriate’ or ‘morally proper’, then their institutions are legitimate. By a surgical procedure, the older concept has been trimmed of its cumbersome ‘normative’ and ‘philosophical’ parts.” Thus, “...the investigator can examine nothing outside popular opinion in order to decide whether a given regime or institution or command is legitimate or illegitimate.”65 Another critical remark by Schaar focused on the capacity of leaders to shape the beliefs of people. According to him: “Another important feature of new definitions, which emerges clearly from their contexts, is that they see legitimacy as a function of a system’s ability to persuade members of its own appropriateness. The flow is from leaders to followers. Leaders lay down rules, promulgate policies, and disseminate symbols which tell followers how and what they should feel and do.”66 Accordingly, people’s beliefs in legitimacy might be an outcome of the success of power-holders in public relations campaigns. This is quite conceivable in the age of propaganda and public relations. Power-holders can convince people that their rule is legitimate. In this way, the problem of legitimacy comes under the total control of public authorities.67

Reducing the concept of legitimacy to people’s beliefs carries several dangers, also in the post-communist context. Nationalistic groups, for example, commanding a sufficient majority in parliament, may insert certain provisions into a given constitution which would harm the interests of ethnic and religious minorities. Can we consider a constitution institutionalizing ethnic discrimination legitimate just because people believe that it is better than any other that might be drawn up? On the other hand, people’s beliefs can easily be manipulated by national leaders particularly after such major political crises as post-communist transitions. Can we maintain that a consti-
tion, approved by people thanks only to their leaders' successful public propaganda, will enjoy profound legitimacy even after these leaders? To answer these questions affirmatively is really difficult, but it is still tenable to say that people act in most cases under the guidance of their beliefs, i.e., what is right or what is wrong in their perceptions. Accordingly, bearing in mind all these criticisms, we may continue to develop our analysis on the basis of the belief-based definition of the concept of legitimacy.

1.4. Conclusions

In this chapter we have attempted to create a conceptual framework which will be used in the rest of the study. First, we have addressed several methodological problems and discussed particularly the relevance of legal and political approaches for our analysis. Then we have defined such basic concepts as constitution, constitutionalism, liberalism and democracy. Finally, we have explained the instability of democratic regimes and constitutions on the basis of their legitimacy deriving from political culture, constitution-making and effectiveness. Can we expect to see constitutional changes in post-communist countries in the near future? We shall try to demonstrate in the following chapters that there are serious legitimacy problems in these countries concerning political culture, constitution-making and effectiveness. First, although most post-communist constitutions reflect post-communist political culture, the latter is too fluid to provide a firm basis for the former. Apart from this, past experiences of post-communist countries are mixed. The absence of a liberal democratic constitutional tradition in certain countries may negatively affect newly-adopted constitutions. Second, the constitution-making processes in the countries under survey produced documents which are hardly satisfactory for the major political groups. This may cripple the legitimacy of post-communist constitutions from the very beginning. Third, almost all post-communist constitutions seem to have certain effectiveness problems in the near future. Constitutions in some countries have already failed to fulfill the expectations of elites and masses. All these legitimacy problems tend to bring about constitutional changes. So the question is whether these changes take place within emerging democratic regimes. We shall try to show in the next chapter that there is popular support for democratic norms and principles in certain countries. On the basis of these findings, we shall argue that one may expect to see several constitutional changes within regimes in these countries (particularly those in East Central and Eastern Europe) which would play a crucial role in the consolidation of democracy therein. We shall also argue that in other countries (e.g., certain former Soviet republics), where there is weak or no popular support for democratic norms and principles, constitutional changes may be a cause or a consequence of transition to semi- or non-democratic regimes.

68. For the relevance of beliefs to political action, see Dahl, op. cit. note 26, 124-188. According to Dahl: "Beliefs guide action not only because they influence or embody one's more distant goals and values—one's religious salvation, for example, one's security in old age, or the independence of one's country—but because beliefs make up our assumptions about reality, about the character of the past and the present, our expectations about the future, our understanding of the hows and whys of action: in short, our 'knowledge'": Dahl, op. cit. note 26, 125.