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# A NEW CONSTITUTION FOR ROMANIA AND A NEW IDEA FOR THE EASTERN EUROPEAN BLOC: AN INDEPENDENT JUDICIARY

Remarks by Justice Ben F. Overton\*

## I. INTRODUCTION

IN the latter part of 1990, the author was selected by the American Bar Association's Central and East European Law Initiative (CEELI)<sup>1</sup> to participate as part of a United States Delegation in a symposium entitled *Constitutional Changes and Prospects in Eastern Europe*, held in Bucharest, Romania. In addition to the author, four other participants comprised the American Delegation.<sup>2</sup> The five-day symposium in November, 1990, was sponsored and funded jointly by the Constitutional Drafting Committee of the Romanian Parliament and the Romanian Association for International Law and Relations. Seventeen countries were represented<sup>3</sup> and each delegate-participant in the symposium was requested to prepare a written paper and present it

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\* Justice Overton received his B.S.B.A. and J.D. degrees from the University of Florida and his L.L.M. in Jurisprudence from the University of Virginia. He served as a circuit court judge for nearly ten years before his appointment to the Florida Supreme Court in 1974. During 1976-78, Justice Overton served as Chief Justice. He was awarded the Florida Bar Foundation's medal of honor in 1984. From 1986 to 1991 he was the chairman of the U.S. Constitution Bicentennial Commission of Florida. Justice Overton, the Senior Justice on the Court, is a part-time faculty member at the Florida State University, College of Law, and has also served in that capacity at Stetson University. For a period of twenty years, he was on either the faculty or the Board of Directors of the National Judicial College.

The author wishes to express his appreciation to his intern, Robert Samouce, the Florida State University, College of Law, Class of 1992, for his assistance in the research and preparation of this Article.

1. The Central and East European Law Initiative (CEELI) is a project of the American Bar Association (ABA) designed to support the process of law reform underway in Central and Eastern Europe. Through a variety of program components, CEELI makes available U.S. legal expertise and assistance to countries that are in the process of modifying or restructuring their laws or legal systems.

2. Dean Jerome A. Barron, former dean and professor of law at George Washington University, and former counsel for the Senate Watergate Committee; Ms. Gabriela P. Cacuci, who emigrated from Romania to the United States in 1975, graduated from Columbia University and the University of Virginia College of Law, clerked for a federal judge, and who now practices law in New York City; and Dr. Melvin Laracey and Dr. Ashley Woodiwiss, both Fulbright scholars and visiting professors at the University of Bucharest.

3. Belgium, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, The Netherlands, Norway, Portugal, Spain, the former U.S.S.R., U.S.A., Yugoslavia, and Romania.

on one of six major topical areas.<sup>4</sup> The author chose the following subject: "The Function and Power of an Independent Judiciary."

Because members of the American Delegation recognized that most of the Romanians had limited knowledge of the separation-of-powers doctrine or how an independent judiciary functioned in the American form of government,<sup>5</sup> one of the other American delegates as well as this author determined that our papers should be written in a fundamental fashion.

Following the symposium, the Romanian government submitted three succeeding drafts of a proposed constitution for comment in January, April and July of 1991. The July, 1991 draft<sup>6</sup> was discussed at a follow-up workshop held in August, 1991 in Washington, D.C.,<sup>7</sup> with representatives of the Constitutional Drafting Committee of the Romanian Parliament and other Romanians representing various interests in Romanian society. The Constitution of Romania<sup>8</sup> was subsequently approved and became effective November 21, 1991.<sup>9</sup>

These remarks contain excerpts of the paper submitted and presented orally on the second morning of the symposium, as well as portions of the report made to CEELI upon the author's return to the United States. Next, a discussion will be made of comments delivered at a follow-up workshop held in Washington in August, 1991, concerning an independent judiciary. Finally, the author will discuss several significant sections of the Constitution of Romania adopted in November, 1991, which establish and support independent judicial power.

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4. 1) Relationship Between the Legislative and Executive Branches; 2) The Institution of the Presidency; 3) Powers and Function of the Judiciary; 4) Constitutionality: Who decides on such issues?; 5) Allocation of Powers between Central and Local Governments; 6) Constitutional Guarantees of Individual Rights. Memorandum from Mark S. Ellis, Executive Director, CEELI, to participants attending Symposium on the Drafting of East European Constitutions (Oct. 29, 1990) (later entitled "Constitutional Changes and Prospects in Eastern Europe," on file with the *Journal of Transnational Law & Policy*).

5. In making this determination, the American Delegation noted that the National Salvation Front and President Iliescu won landslide victories in a May, 1990 election, five months after Nicolae Ceausescu was overthrown and executed. During the election, it was promised that a new constitution would be presented to the people within a year. Many of the members of the National Salvation Front, who are now in control of the country, are former communist officials who served in the Ceausescu regime. Handout provided by CEELI entitled ROMANIA (Oct. 1990) (on file with the *Journal of Transnational Law and Policy*).

6. DRAFT OF ROM. CONST. (1991) (on file with the *Journal of Transnational Law and Policy*).

7. See *infra* text and accompanying notes 53-69.

8. ROM. CONST. (1991) (on file with the *Journal of Transnational Law and Policy*).

9. See *infra* text and accompanying notes 70-75.

II. EXCERPTS FROM FUNCTION AND POWER OF AN INDEPENDENT JUDICIARY ORALLY PRESENTED AT THE CONSTITUTIONAL CHANGES AND PROSPECTS IN EASTERN EUROPE SYMPOSIUM, NOVEMBER 19-23, 1990, BUCHAREST, ROMANIA<sup>10</sup>

Under the American governmental structure, the function and power of the judiciary is directly related to the protection of individual rights set forth and guaranteed in the United States Constitution. An independent judiciary is an important means to protect those individual rights and to assure that government acts within the provisions of its adopted constitution.

The power and independence given to the American judiciary in general, and to the Supreme Court of the United States in particular, is greater than that which is given to the judiciary in any other governmental structure in the world.<sup>11</sup> The power and authority of the United States Supreme Court as an independent institution of government was an entirely new concept when the court was created.<sup>12</sup>

James Madison, one of the primary authors of the United States Constitution, explained that one of the greatest dangers to liberty in a free society would come not from government's acting contrary to the wishes of the majority but, rather, from government's acting as a mere instrument of the majority and contrary to the individual rights of the minority.<sup>13</sup> The framers of the Constitution realized that setting forth individual rights and liberties in the Constitution was not necessary to protect the majority; the majority in a republic has the power to protect itself. The reason was to assure that the rights of minorities would be protected. These provisions were intended to protect the citizens from acts of government as well as from acts of other individual citizens or entities.<sup>14</sup>

The next major concern of the drafters of the United States Constitution was how the rights and the other provisions of the Constitution were to be enforced. The authors determined that this responsibility

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10. Ben F. Overton, *Function and Power of an Independent Judiciary* (Nov. 1990) (unpublished paper, on file with the *Journal of Transnational Law & Policy*) (In preparing this paper, the author utilized portions of various sources. See Robert S. Peck, *The Constitution and American Values*, in *THE BLESSINGS OF LIBERTY: BICENTENNIAL LECTURES AT THE NATIONAL ARCHIVES 129* (Robert S. Peck & Ralph S. Pollock eds., 1989); JETHRO K. LIEBERMAN, *MILESTONES! 200 YEARS OF AMERICAN LAW: MILESTONES IN OUR LEGAL HISTORY* (1976) [hereinafter *MILESTONES*]).

11. *MILESTONES*, *supra* note 10, at 67-68.

12. See Maeva Marcus, *The Supreme Court: The First Ten Years*, in *THE BLESSINGS OF LIBERTY: BICENTENNIAL LECTURES AT THE NATIONAL ARCHIVES 129* (Robert S. Peck & Ralph S. Pollock eds., 1989).

13. PECK, *supra* note 10, at 130.

14. *Id.*

should be placed largely on the judiciary. Also, the drafters clearly set forth the superior authority of the Constitution and stated that no legislative act contrary to the Constitution could be valid. The authors explained the power of the judiciary in this manner:

[T]he courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. The interpretation of the laws is the proper and peculiar province of the courts. A Constitution is, in fact, and must be regarded by the judges, as a fundamental law. . . .

. . . .  
[T]he courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments. . . .

This independence of the judges is equally requisite to guard the Constitution and the rights of individuals. . . .<sup>15</sup>

Clearly, the judiciary was intended to protect the people from governmental excesses.

The controlling institution of the American judiciary is the Supreme Court of the United States, composed of nine persons appointed for life. As intended by the authors of the Constitution, the Court has the authority to strike laws enacted by the legislative branch, whether federal or state, determined to be unconstitutional and void. The Court also has the power to declare orders or actions of the President or any other executive branch officer to be unconstitutional or illegal and consequently void. The system works solely because of the support that the people give to the constitutional structure as a whole and to the courts as credible institutions in that structure.

Several decisions handed down by the United States Supreme Court during the last two hundred years illustrate the power and independence of the judicial branch under the Constitution. *Marbury v. Madison*<sup>16</sup> is the case that established the power of the United States Supreme Court to conduct judicial review by invalidating laws determined to violate the Constitution. In this landmark decision, Chief

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15. THE FEDERALIST NO. 78, at 228-31 (Alexander Hamilton).

16. 5 U.S. (1 Cranch) 137 (1803). When the United States Supreme Court began its 1803 term it was faced with the issue of defining judicial power in relation to the other two branches of American government. At that time the Court was partisan, comprised principally of members of the Federalist party. The Republican-dominated Congress disputed the Court's claim to power, but significant political opposition to the *Marbury* ruling failed to gather. It has been speculated that had the decision immediately affected the interests of the Republicans, the Congress might well have considered impeaching the sitting Justices. JOHN E. NOWAK ET AL., CONSTITUTIONAL LAW § 1.2, at 3 (3d ed. 1986).

Justice John Marshall recognized the federal Constitution to be the supreme law of the land and stated that the Supreme Court possesses the power to interpret the Constitution and declare void any laws enacted by the federal or state legislatures, or act of state or federal executive officer, judged to be unconstitutional.<sup>17</sup>

The United States Supreme Court demonstrated the importance of individual rights under the Constitution in 1954 in its decision in *Brown v. Board of Education*.<sup>18</sup> At the time, several states had established by law public school systems that provided separate schools for black and white students. The states relied on the United States Supreme Court decision in *Plessy v. Ferguson*<sup>19</sup> rendered just before the turn of the century (in 1896), which had approved "separate but equal" railway passenger cars. However, in its 1954 *Brown* decision, the Court overruled *Plessy* declaring that times had changed and that the laws providing for separate schools for black and white students were unconstitutional.<sup>20</sup> The Court stated:

Today, education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

. . . .  
To separate [children in grade and high schools] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . .

We conclude that in the field of public education the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal.<sup>21</sup>

As a result of this Supreme Court decision, local governments throughout the entire country were required to desegregate their school systems.

17. *Id.* at 177-78, 180.

18. 347 U.S. 483 (1954).

19. 163 U.S. 537 (1896). The *Plessy* Court held that a person could be legally classified and treated in a discriminatory manner based upon race as long as the law so doing was reasonable. "Reasonable" was found to mean that the law merely need be a good faith attempt under the state police power to promote public welfare and not oppress any particular race by design. Although the *Plessy* separate but equal doctrine was judicially applied only to accommodations on public transportation, it was used by the courts to uphold laws mandating systemic segregation in public institutions such as schools and privately-owned businesses. NOWAK, *supra* note 16, § 48.8 at 568-69.

20. *Brown*, 347 U.S. at 494-95.

21. *Id.* at 493-95.

The decision of the United States Supreme Court in *United States v. Nixon*<sup>22</sup> illustrates the judiciary's authority over the executive branch. In this decision, the Court ordered a sitting President of the United States to surrender tape recordings that the President had made of conversations with his staff relating to the burglary of the opposing political party's headquarters during the prior presidential campaign.<sup>23</sup> A special prosecutor had been appointed, contrary to the wishes of the President, at the insistence of the legislative branch. The special prosecutor sought the tapes as evidence in the criminal trial of the individuals who were charged with committing the burglary and who had direct connections to the Office of the President. The President challenged the authority of the Court, claiming that these tapes were protected by the executive privilege of the President of the United States and that such a policy would substantially interfere with the ability of the President to govern. The Supreme Court unanimously rejected the President's challenge and entered an order directing him to release the tapes, stating:

The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material . . . .<sup>24</sup>

These are very significant cases in American history, but lower federal and state courts regularly declare statutes enacted by the legislatures, or rules or orders entered by executive branch officials, to be unconstitutional. Often such decisions are not based on the merits of the legislation. Rather, a court may strike a statute because it does not provide affected citizens an opportunity to be heard (due process),<sup>25</sup> or

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22. 418 U.S. 683 (1974).

23. *Id.* at 687-88.

24. The President reluctantly complied with the Court's order directing him to furnish the tapes to the special prosecutor, and, sixteen days later, he became the first president in American history to resign from office. MILESTONES, *supra* note 10, at 395. (Interestingly, President Nixon had appointed the Chief Justice who wrote the opinion, and two other justices who joined in the unanimous opinion. This decision illustrates the independence of the judiciary and the fact that no person, no matter how high the office, is above the law of our land).

25. *E.g.*, *Bell v. Wolfish*, 441 U.S. 520 (1979) (due process requires fair procedures for determining guilt prior to punishment); *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277 (1867) (ex

because it does not treat one group of citizens the same as other similarly situated citizens (equal protection),<sup>26</sup> or because the rights of a criminal defendant have been violated.<sup>27</sup>

Courts in all judicial systems are created to enforce the criminal laws and resolve disputes. In so doing, they apply the laws enacted by the legislature, and, to the extent appropriate, apply regulations and directives of the executive officials. The authority of the American courts as an independent judiciary is more extensive. United States courts, in certain instances, may make law by addressing substantive duties and rights raised by the parties in a particular case concerning questions and problems that have not been addressed by the legislative branch. In this regard, courts make law where there is no law. In this area of responsibility, however, their determination is subordinate to that of the legislative branch. While the legislature cannot change the law as it affects the particular case already decided by the court, it may change the law for future cases.

Under most European systems of government, the judiciary has limited independence and operates under a justice or public safety department of the executive branch of government.<sup>28</sup> In the United

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post facto laws and bills of attainder violate due process protections); *Lochner v. New York*, 198 U.S. 45 (1905) (due process prevents a state law from arbitrarily and unnecessarily interfering with the freedom to contract between an employer and employee); *Nixon v. Herndon*, 273 U.S. 536 (1927) (it is violative of due process for a state to preclude blacks from participating in a primary party election); *Buchanan v. Warley*, 245 U.S. 60 (1917) (due process protections disallow city ordinances that preclude blacks from moving into primarily white neighborhoods); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (a state statute prohibiting the use of contraceptives by married persons is violative of due process guarantees to privacy).

26. *E.g.*, *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (equal protection will disallow a zoning ordinance if it can be proven the purpose and effect of the ordinance is the exclusion of racial minorities from a residential area); *Reed v. Reed*, 404 U.S. 71 (1971) (gender is not a valid basis for determining the executor of an estate under equal protection); *Guinn v. United States*, 238 U.S. 347 (1915) (equal protection prohibits the use of literacy tests to discriminate by race regarding voting rights); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (electoral districting is violative of equal protection if it results in virtually total separation of black and white voters); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (equal protection will invalidate hiring criteria based upon level of education and intelligence tests if a disproportionate impact is found on job applicants of racial minorities); *Strauder v. West Virginia*, 100 U.S. 303 (1879) (state statutes excluding blacks from serving on juries are violative of equal protection rights).

27. *E.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966) (due process requires that criminal defendants in custody be advised of their rights prior to any waiver of those rights); *Mullaney v. Wilbur*, 421 U.S. 684 (1975) (the government must prove criminal defendants' guilt beyond a reasonable doubt to comport with due process); *Douglas v. California*, 372 U.S. 353 (1963) (due process provides that states are required to provide counsel for indigent defendants' first appeal); *Rochin v. California*, 342 U.S. 165 (1952) (evidence gathered by unreasonable methods will not be admissible in court under due process); *Turner v. Pennsylvania*, 338 U.S. 62 (1949) (due process bars the admissibility in court of a coerced confession).

28. See *MARCUS*, *supra* note 12.



States, the judicial branch is composed of only the judiciary; it does not include any police, criminal investigatory, or prosecutorial officials. Under the American structure, the police and prosecutorial responsibilities belong to the executive branch.

There are two other major distinguishing characteristics between the United States judicial system and most Western European judicial systems. First, at the trial court level, America uses a jury chosen at random from the populace in the geographic area served by the particular court. The jury is the fact-finder in most criminal cases in America and in some civil cases. In almost every instance where an individual may be faced with deprivation of his liberty or his property, the individual is entitled as a matter of right to have a jury be the fact-finder. The judge is then required to apply the law to the facts as found by the jury. The second distinguishing factor is that lawyers in our system have the responsibility to present the evidence to the court at the trial level. Lawyers representing both parties are entitled to examine their own witnesses as well as cross-examine the opposing side's witnesses. The judge may also examine witnesses, but his role is principally to clarify the testimony and assure that all relevant evidence is properly presented before he applies the law to the facts.

The judge is intended to be an impartial decision-maker who is removed from any direct or indirect influence from the executive or legislative branch. If the government is a party to a case before a court, the government's position must be presented just as that of any other party involved in the proceeding. Moreover, trials are conducted in open court with all parties present. Communications to the judge by a party out of the other party's presence are prohibited, and the judge must decide the case solely on the basis of the evidence presented in court.

There are limitations, however, on the decisional authority of a judge. While judges are independent, they are not free to decide issues and cases based upon their personal views. The judge must apply the law to the facts as set forth in the Constitution or statutes or in written decisions of higher courts.<sup>29</sup> This is the basis for the maxim that

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29. The following is a quote from a judge's order in a death penalty case, a sensitive issue in Florida, which illustrates how judges must apply the law once the facts have been established, notwithstanding their personal views:

I have, at various times in my life, been in favor of and opposed to capital punishment. My present feeling is that it is not a deterrent to capital crime. I believe killing people is a poor way to teach people that it is wrong to kill people. I believe a true life sentence, coupled with severe sanctions, including permanent solitary confinement in the case of intractable prisoners, would suffice to protect the public. I believe the legal costs expended in trying to enforce the death penalty would more than cover the cost

we are a government of law, not a government of men.<sup>30</sup> This principle was adopted to eliminate the vagaries of man and to promote consistency, so that all citizens are treated alike under similar facts. Our judges do have discretion; however, it is a discretion controlled by legal principles and subject to higher court review.

To further ensure fairness and impartiality, a judge cannot have an interest in the outcome of the case or be related in any way to the parties. Also, a judge, while being cloaked with the authority of independence, is stripped of his right to participate in political activity. A judge is expressly prohibited from engaging in any other governmental functions and, consequently, is almost totally removed from the political arena.

The United States Constitution established the American independent judiciary, with regard to the authority of each branch of government, as follows:

#### Article I.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States . . . .<sup>31</sup>

. . . .

#### Article II.

Section 1. The executive Power shall be vested in a President of the United States of America. . . .<sup>32</sup>

. . . .

#### Article III.

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.<sup>33</sup>

The Constitution of Florida, where this author resides, similarly vests power in each of the three branches of government. The Florida constitutional provision concerning the judicial branch states: “[t]he judicial power shall be vested in a supreme court, district courts of

of incarceration for life. I believe the notion capital punishment reduces the population of death row is not well-founded. Legal proceedings serve to forestall the imposition of the penalty, while more and more persons are sentenced to death each year. I believe that sooner or later, if we have not already, we will execute an innocent man. Finally, I believe we have not the right to impose this penalty. I recognize, however, that what I believe is of no moment as to the proper penalty to be imposed in the case. That decision is controlled by section 931.141, Florida Statutes.

State of Florida v. Craig, No. 87-5216-CF AO2 (Fla. 15th Cir. Ct. Oct. 24, 1988) (order imposing death sentence).

30. See Robert A. Rutland, *Vox Populi—Ratification of the Constitution*, in *THE BLESSINGS OF LIBERTY: BICENTENNIAL LECTURES AT THE NATIONAL ARCHIVES* 129 (Robert S. Peck & Ralph S. Pollock eds., 1989).

31. U.S. CONST. art. I, § 1.

32. U.S. CONST. art. II, § 1.

33. U.S. CONST. art. III, § 1.

appeal, circuit courts and county courts. No other courts may be established by the state . . . .”<sup>34</sup> This constitutional provision is more specific than that of our federal Constitution, and it eliminates the legislature’s discretion to create inferior courts, unlike our federal Constitution. The Florida Constitution also expressly sets forth the separation-of-powers doctrine as follows: “The powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”<sup>35</sup>

The United States Constitution, with its Bill of Rights, recognizes an individual as a human being who can make his own destiny, be what he wants to be, voice his own opinion, and exercise his choice of religion.<sup>36</sup> Accompanying these rights is the responsibility to understand and participate in the government. The education of all citizens concerning constitutional principles and their rights and obligations is what makes a free society work. The American governmental structure, including the independent judiciary that was established to safeguard the Constitution and protect individual rights, cannot by itself ensure American liberty. A free society requires the support of the people. A constitution does not make the system work; people make the system work, and education of the people concerning the basic principles of human rights is crucial to the maintenance of a free society.

Thomas Jefferson, one of the authors of the Declaration of Independence,<sup>37</sup> said: “If a nation expects to be ignorant and free . . . it expects what never was and never will be.”<sup>38</sup> He also expressed the view that there is no safe deposit for our constitutional rights “but

34. FLA. CONST. art. V, § 1.

35. FLA. CONST. art. II, § 3.

36. “No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .” U.S. CONST. amend. V. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

37. On June 11, 1776, in Philadelphia, Pennsylvania, the Third Continental Congress appointed five men to draft a declaration of independence: Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman and Robert R. Livingston. These five appointed Jefferson to prepare a rough draft, and the others edited and revised it. The final document was proclaimed on July 4, 1776. MILESTONES, *supra* note 10, at 12.

38. Letter from Thomas Jefferson to Col. Charles Yancey (Jan. 6, 1816), in 10 PAUL LEICESTER FORD, *THE WORKS OF THOMAS JEFFERSON, 1904-1905* (on file at the Florida State University, Strozier Library Special Collection, vols. 1-12).

with the people themselves; nor can they be safe with them without information."<sup>39</sup>

James Madison, the principal author of our Constitution, said:

Knowledge will forever govern ignorance; and people who mean to be their own governors must arm themselves with the power that knowledge gives. . . . Learned institutions ought to be favorite objects with every free people. They throw that light over the public mind which is the best security against crafty and dangerous encroachments on the public liberty.<sup>40</sup>

The Supreme Court of the United States, in *Brown v. Board of Education*, said that education is important "to our democratic society. It is required in the performance of our most basic public responsibilities . . . . It is the very foundation of good citizenship."<sup>41</sup>

While the independence of the judiciary is important for the protection of the individual rights and principles contained in a constitution, the education and knowledge of citizens concerning their government's structure and operation is really the single most important factor in maintaining any free society.

### III. EXCERPTS FROM REPORT ON THE SYMPOSIUM ON CONSTITUTIONAL CHANGES AND PROSPECTS IN EASTERN EUROPE BUCHAREST, ROMANIA, NOVEMBER 19-23, 1990<sup>42</sup>

It was extremely important for an American delegation to witness and participate in this symposium. Delegations from seventeen countries<sup>43</sup> and two European entities<sup>44</sup> were in attendance, in addition to the chairman, vice-chairman, and members of the commission drafting the Romanian Constitution.<sup>45</sup> The participants from other countries were either members of their countries' legislative bodies or

39. *Id.*

40. PECK, *supra* note 10, at 133.

41. *Brown*, 347 U.S. at 493.

42. Ben F. Overton, Report on the Symposium on *Constitutional Changes and Prospects In Eastern Europe* (Dec. 1990) (on file with the *Journal of Transnational Law & Policy*) [hereinafter *Report on the Symposium*].

43. *See supra* note 3.

44. The European Parliament, represented by Mr. David Blackman (Head of the East European Countries Department, General Secretariat of the European Parliament) and the Council of Europe, represented by Mr. Andrew Drzemczewski (Human Rights Department of the Council of Europe). List of Participants, Symposium Constitutional Changes and Prospects in Eastern Europe, Bucharest, November 19-23, 1990.

45. Antonie Iorgovan, Chairman; Vasile Gionea, Vice-Chairman; Ion Les, Vice-Chairman; Gyorgy Frunda, Secretary; Ioan Rus, Secretary. *Id.*

academicians. A number of the participants had been observers at the recent spring elections and held influential positions in the European Economic Community.<sup>46</sup>

As the session opened, the Romanians stressed that all views were represented on their Constitutional Drafting Committee and that they desired as much information as possible from all the participants.<sup>47</sup> The American Delegation stressed in the presentations the importance of: an independent judiciary to protect individual rights, separation of powers among the branches of government, and the rights of criminal defendants. We also stressed the importance of presenting the Constitution to the people for debate before its final adoption.<sup>48</sup>

The representative from Germany stressed the importance of human rights and expressed concern about the participation of former communist officials of the Ceausescu regime in the new Romanian constitutional government. The German representative, as well as the representatives from Denmark, suggested that all officials now holding positions in the government who are not willing to support a constitutional government and democratic institutions should be removed from office. They explained that this action is essential in obtaining the public's trust in the government. It was clear that these participants believe that Romania has to do more before it can be received into the European Economic Community.<sup>49</sup>

Representatives of the Western European countries, particularly Germany and the Scandinavian countries, expressed concern about the June, 1990, miners' incident.<sup>50</sup> They spoke pointedly of the need

46. The meeting took place in a conference hall, and translations in four languages were provided. Presentations and discussions commenced each day at 9 a.m. and continued until between 5 and 7 p.m. The participants were received by the Romanian Prime Minister on Monday, by the officers of the legislative bodies on Wednesday, and by the Romanian President on Friday. In addition, this author and the other members of the American delegation met with the Chairman of the Romanian Supreme Justice Court in his chambers on Wednesday and dined with him that evening.

47. The Romanian officials were very gracious and appeared genuinely grateful for the American presence. This author's impression is that the Romanians are a very literate people. Many speak French, and a number speak English. The Romanians also have a strong interest in the arts.

48. Dean Barron's remarks were well received, as illustrated by the number of questions and comments from the other participants. Ms. Cacuci, as part of her remarks, read from the 1923 Romanian Constitution. She compared its individual rights provisions to the American Bill of Rights and, in translating them, explained how they were almost identical. Her comments received close the attention of the members of the Constitutional Committee.

49. In this author's view, the United States embassy staff seemed more willing than the Western European participants to accept the present Romanian government officials.

50. "[I]n June of [1990] . . . the [Romanian] government bussed miners into . . . Bucharest, to put down, bloodily, a prolonged student demonstration. The resulting mayhem was shown on television screens around the world, and resulted in a suspension of western aid which was not restored until the beginning of [1991] . . ." 1991 International Reports, IBC International Country Risk Guide (Aug. 1991).

for a free press and appeared concerned that the present government officials had not fully accepted democratic institutions and principles.

The French and Italian delegations spoke strongly in support of a continental form of government, with the French advocating a dual executive and limited judicial independence. The French, in particular, advocated that Romania adopt a continental governmental structure rather than the American model with three independent branches, since Romania is a European country.

The representative of the European Parliament emphasized that independent staffing of the legislative branch is essential in order to have a strong legislative branch which can resist the control of a strong executive. This is a subject that also could be included in future programs. The second point the representative made was the need to have knowledgeable professional government personnel from the individual states provide advice and assistance in governmental operations. It was his view that state government personnel would be much more knowledgeable than federal officials and could relate better to the type of operations in Romania.

Currently, the Romanians' greatest need is economic. The delegates were advised that food production has increased since last year, however, food is clearly not getting to the public.<sup>51</sup> One of the Fulbright scholars mentioned that obtaining food is a daily problem even for them, noting that it is probably difficult for individual citizens to think much about constitutional principles when they must wait in a bread line for two hours, uncertain that any bread will be left when their turn comes. There is a need for know-how from American businessmen with business sense and business ethics who are not in Romania to make a profit.<sup>52</sup> This might be accomplished by a cooperative program with an organization such as Rotary International. Presently, Romania could use managerial assistance in improving food distribution from a United States supermarket chain.

This author is deeply concerned that, if the United States does not provide the necessary assistance to make the Romanian economy and government work, the delegation's efforts to help them establish a democratic society and a new constitution will be for naught. Technical know-how from people interested in making both the economy and government work is a critical need. From my few days in Romania, my impression remains that people-to-people aid, in law, business, and government, is as important as money.

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51. There are separate lines for bread, eggs, cheese, and meat.

52. An American of Romanian ancestry whom the author met there noted that the United States is again "number one" and that American credibility is extremely high.

This author would conclude that the delegation from the United States was collegial and compatible. Hopefully, we did a credible job representing the United States. A private American attorney originally from Romania, and the Fulbright scholars, added factors not present in the other delegations: youth and knowledge about Romania's present problems. Their participation and presentations were, I am sure, noted by the students who came to observe the proceedings.

As a natural product of the 1990 Bucharest Symposium, formal reports and comments on Romania's three succeeding draft constitutions written by participants and constitutional experts were provided to the Romanian Government by CEELI. This led to the formation of a five-day follow-up workshop held in August of 1991, in Washington, D.C. The workshop was composed of the original United States 1990 symposium delegates, eminent constitutional experts and members of the Constitutional Drafting Committee of the Romanian Parliament.<sup>53</sup> The major subjects covered at the Washington, D.C. meeting were the Romanian draft constitution's treatment of: protection of human rights, powers and functioning of the Constitutional Court, status of international treaties in the domestic legal system, judicial powers, and separation of powers.<sup>54</sup>

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53. American Bar Association, Central and East European Law Initiative (CEELI), Follow-up Technical Assistance Workshop on Romania's Draft Constitution, Washington D.C. (Aug. 19-23, 1991) (on file with the *Journal of Transnational Law & Policy*); *CEELI Participants*: Jerome A. Barron, Professor of Law, National Law Center, George Washington University; Gabriela P. Cacuci, Attorney, Brown, Raysman & Millstein, New York, N.Y.; Michael Davidson, United States Senate Legal Counsel; Neal E. Devins, Associate Professor of Law, Marshall-Wythe School of Law, College of William and Mary; Louis Fisher, Senior Separation of Powers Specialist, Library of Congress, Professor of Law, Catholic University of America and William and Mary law schools; Ruth Bader Ginsburg, United States Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit; A.E. Dick Howard, Professor of Law, University of Virginia; Sheldon Krantz, Professor of Law, Washington College of Law, American University; Rett R. Ludwowski, Professor of Law, Catholic University of America; Benjamin Overton, Justice of the Supreme Court for the State of Florida; Morton H. Sklar, member of the Faculty of Law at the Catholic University Law School; Daniel E. Troy, Attorney, Wiley, Rein & Fielding; Paul R. Verkuil, President of the College of William and Mary and member of the law and government faculties; and William J. Wagner, Professor of Law, Catholic University of America. *Romanian Participants*: Antonie Iorgovan, Chairman of the Constitutional Drafting Commission of the Constituent Assembly; Dan A. Lazarescu, Vice-Chairman of the oppositionist National Liberal Party; Hajdu Gabor, Representative of the Hungarian Democratic Union of Romania; Ioan Deleanu, Professor of Constitutional Law, University of Bucharest; Renata Weber, Representative for the League for Defense of Human Rights; and Lucian Mihai, Associate Professor of Law, University of Bucharest. Summary Report of Proceedings of the CEELI Technical Assistance Workshop on the Draft Romanian Constitution (Aug. 19-23, 1991) (attached to letter from Mark S. Ellis, Executive Director, CEELI to Senator Antonie Iorgovan, President de la Commission Constitutionnelle du Parlement Roumen (Sept. 23, 1991)) (on file with the *Journal of Transnational Law & Policy*) [hereinafter *Washington Workshop Report*].

54. *Id.*

Following are comments made during that workshop concerning an independent judiciary:

IV. EXCERPTS FROM COMMENTS CONCERNING AN INDEPENDENT  
JUDICIARY FOLLOW-UP WORKSHOP ON  
ROMANIA'S DRAFT CONSTITUTION, AUGUST 19-23, 1991,  
WASHINGTON, D.C.<sup>55</sup>

Romania has decided to adopt an independent Constitutional Court which is widely used throughout Europe in various formats.<sup>56</sup> A Constitutional Court "tends to operate on a more independent basis than other courts, in part because it is designed to be a separate body that is not part of the traditional judicial branch."<sup>57</sup> This had been "a major point of controversy for the Parliament [of Romania] and its drafting committee" as many judges prefer the American system which leaves constitutional questions in the regular judicial system with final review certified to the Supreme Court.<sup>58</sup> These judges were concerned that "lessening the [traditional] court's power [would] make it more difficult for them to protect citizens' rights against government encroachments."<sup>59</sup>

Members of the CEELI delegation expressed concern over appointments to the Constitutional Court being made by the President and

55. *Id.*

56. ROM. CONST. title V, art. 144 (1991);

Article 144 Powers

The Constitutional Court shall have the following powers:

- a) to make pronouncements upon the constitutionality of laws, prior to the promulgation thereof upon the notification by the President of Romania, by one of the Speakers of the two Chambers, the Government, the Supreme Court of Justice, at least 50 deputies or at least 25 senators, as well as, ex officio, upon the initiatives to revise the Constitution;
- b) to make pronouncements upon the constitutionality of the Rules of procedure of Parliament, upon notification by the Speaker of either chamber, by a parliamentary group or of at least 50 deputies or at least 25 senators;
- c) to decide on exceptions brought to the Courts of law as to the unconstitutionality of laws and ordinances;
- d) to watch over the observance of the procedure for the election of the President of Romania and to confirm the returns thereof;
- e) to confirm the circumstances to justify the ad-interim exercise of the Presidency of Romania and report its findings to the Parliament and the Government;
- f) to pronounce on the proposal for suspension of the President of Romania from his office;
- g) to watch over the observance of the procedure of organization and holding of a referendum and to confirm its returns;
- h) to check on compliance with the conditions for the exercise of legislative initiative by citizens;
- i) to decide on objections as to the constitutionality of a political party . . .

*Id.*

57. *Washington Workshop Report, supra* note 53, at 6.

58. *Id.* at 7.

59. *Id.*



the Parliament rather than an impartial body of legal experts such as a supreme judicial council.<sup>60</sup> "The Romanian delegation indicated that [this format] was designed to help assure independence and reduce political pressures through a balancing process."<sup>61</sup>

This author indicated at the workshop that a nine-year limit on the term of office of a Constitutional Court member was not long enough to give judges the desired sense of independence, and also made it more likely that judges would be reviewing the decisions of those appointing them.<sup>62</sup> The Romanian delegation responded that the duration was set at nine years as part of an effort to establish a middle ground between the politicized Constitutional Court of the French and the judicially independent result obtained under life appointments to the United States Supreme Court.<sup>63</sup>

Concerning judicial powers, "[s]pecific questions were raised in connection with the principle of independence of the judiciary concerning the removal and sanctioning of judges . . . ."<sup>64</sup> The first draft Constitution established a Supreme Council of the Judiciary to specifically handle nomination of judges and to deal with disciplinary actions. However, the draft's silence apparently left matters of removal of judges from office for cause, and administration in general, to the executive branch where administration of the judicial system was previously handled. It was stressed that moving these functions to the judicial branch itself "would go far to assur[e] greater independence for courts and judges."<sup>65</sup>

60. ROM. CONST. title III, ch. VI, § 1, art. 124 (1991);

Article 124 Status of judges

1) Judges appointed by the President of Romania shall be irremovable, consistent with the law. The President and the other judges of the Supreme Court shall be appointed for a six-year term. They may be reinvested in office. Promotion, transfer and sanctioning of judges may be ruled only by the Superior Council of the Judiciary, as provided for by the law.

2) The office of Judge shall be incompatible with the exercise of any other public or private functions, except for academic teaching offices.

*Id.*

61. *Washington Workshop Report, supra* note 53, at 7. (The adopted Constitution incorporates the Romanian delegation format, ROM. CONST. title V, art. 140 (1991));

Article 140 Structure

1) The Constitutional Court consists of nine judges appointed for a nine-year term of office, that may not be extended or renewed.

2) Three judges shall be appointed by the Chamber of Deputies, three by the Senate, and three by the President of Romania.

3) The judges on the Constitutional Court shall elect, by secret vote, the President thereof, for a term of three years.

4) The members of the Constitutional Court shall be renewed by thirds every three years, in accordance with the provision of the organic law of the Court.

*Id.*

62. *See supra* note 61.

63. *Washington Workshop Report, supra* note 53, at 8.

64. *Id.* at 9. *See also supra* note 60.

65. *Id.* at 10.

The issue of separation of powers was raised in connection with a number of items in the draft Constitution.<sup>66</sup> The greatest concern was that the balance of power may tip to the legislature because of the delegation of power given the legislature to "interpret and give substance to many provisions [of the Romanian Constitution] through implementing legislation."<sup>67</sup> Additional concerns in this area also had to do with the lack of specificity in the document itself and thus leaving the door open to possible unforeseen and unwanted future interpretations of various provisions within the Constitution.<sup>68</sup> However, these concerns would still exist no matter how specific the drafters are; specificity itself brings its own problems.<sup>69</sup>

V. EXCERPTS FROM THE ADOPTED CONSTITUTION EVIDENCING JUDICIAL INDEPENDENCE: THE CONSTITUTION OF ROMANIA ADOPTED NOVEMBER 21, 1991<sup>70</sup>

In addition to adopting an independent Constitutional Court and transferring the administration of the judicial system from the executive branch to the Council of the Judiciary, the Constitutional Drafting Committee acknowledged the benefits of an independent judiciary by the language it used in various portions of the adopted Constitution. Chapter VI of Title III, entitled "The Judiciary," begins by saying in the second sentence that "Judges shall be independent and subject only to the law."<sup>71</sup>

Article 124, entitled "Status of judges," states that "[t]he office of Judge shall be incompatible with the exercise of any other public or private functions, except for academic teaching offices."<sup>72</sup> This same office prohibition extends to members of the Constitutional Court.<sup>73</sup>

66. *Id.*

67. *Id.*

68. *Id.*

69. A legal writer is concerned how his words will be interpreted. Considering the democratic change Romania is making, this author does not see the degree of specificity in the adopted Constitution as problematic. Constitutional interpretation will grow with the country.

70. ROM. CONST. (Translation and Printing: Rompres-National News Agency (1991)).

71. ROM. CONST. title III, ch. VI, § 1, art. 123, cl. 2. (1991);

Article 123 Carrying out of justice

1) Justice shall be carried out in the name of the law.

2) Judges shall be independent and subject only to the law.

*Id.*

72. ROM. CONST. at title III, ch. VI, § 1, art. 124, cl. 2. (1991). *See also supra* note 60.

73. ROM. CONST. title V, art. 142 (1991);

Article 142 Incompatibility

Membership of the Constitutional Court is incompatible with the exercise of any other public or private functions, except for teaching functions in higher law schools.

*Id.*

In addition, Article 143 specifically states that “judges of the Constitutional Court shall be independent and irremovable during their term of office.”<sup>74</sup> Last, Article 145 states that the decisions of the Constitutional Court shall be compulsory.<sup>75</sup>

## VI. CONCLUSION

Living conditions are extremely difficult in Romania at the present time. The Romanian Constitution as adopted does seem to provide some independence for the judiciary, but how that provision and the individual rights provisions will be implemented, and the resultant effects on the quality of life in Romania, is still a significant question that will likely remain unanswered for a number of years. People make a system work and, hopefully, the delegates’ contribution to the new Constitution will motivate the leaders to implement and enforce truly democratic institutions, using their new Constitution as a basic tool. The Constitution that has been adopted is only a first step. Assistance is still necessary and the delegates should be involved to guide the Romanians in how democratic institutions should be operated and maintained under their new Constitution.

Romania’s new Constitution also evidences the policy impact the United States can and does have on shaping international legal affairs. Similar CEELI projects have been used to aid Poland, Albania, and Bulgaria in analyzing their respective draft constitutions.<sup>76</sup> This author hopes the other “new” Central and Eastern European Countries, as well as the countries comprising the new Commonwealth of Independent States (formerly the U.S.S.R.), will seriously look at the rationale behind the recommendations the delegates have already made to Romania, Poland, Albania, and Bulgaria, and adopt the most important

74. ROM. CONST. title V, art. 143 (1991);  
Article 143 Independence and irremovability  
The judges of the Constitutional Court shall be independent and irremovable during their term of office.

*Id.*

75. ROM. CONST. title V, art. 145 (1991);  
Article 145 Decision of the Constitutional Court

(1) If found unconstitutional according to Article 144 paragraphs a and b, the law or rule shall be returned for re-examination. If the law is endorsed in the same form with a majority of at least two thirds of the members of either chamber, the objection of unconstitutionality shall be overruled [sic] and the promulgation shall be compulsory.

(2) The decisions of the Constitutional Court shall be compulsory and shall not have retrospective effect. They shall be published in the Official Gazette of Romania.

*Id.*

76. Memorandum from Mark S. Ellis, Executive Director, CEELI, to Advisory Group on the Draft Romanian Constitution and Other Interested Parties (Sept. 30, 1991) (on file with the *Journal of Transnational Law & Policy*).

of them in their new constitutions in order to ensure future stability to their new democratic governments. Most fundamental to a stable democracy is the necessity of an independent judiciary.

