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A COMPARISON OF PROCESSES FOR REFORMING MIGRATION LAWS IN TRANSITIONAL STATES: CHINA, KAZAKHSTAN, AND ALBANIA

James A.R. Nafziger*

Most transitions from non-market to market economies have involved substantial changes in national migration policies and law. Generally, non-market economies have been closed societies offering little incentive to prospective immigrants and little hope to prospective emigrants. A more open economy in a high-pace world, however, requires freer movement of persons. Transitional societies generally have accepted the urgency of reforming their migration laws. A haphazard development of comprehensive migration laws (including provisions on nationality), as occurred in the United States during its first century or more, is a luxury that transitional societies realize they cannot afford.

Emerging patterns of migration reform in transitional states have, however, been diverse. This article will focus on three such states in which the author has worked: China, Kazakhstan, and Albania. They have diverged from each other in defining purposes, emphases, processes, and pace of migration reform. The most likely explanation of these differences lies in history and varied threats to national stability as these states have undertaken radical economic and political changes.

Each of the three states faces distinct challenges that have shaped its particular pattern of immigration reform. China is a nominally communist state that aspires to "socialism with Chinese characteristics" and global power. It is guided by the beacon of economic development, an historic fear of disunity, and a preoccupation with national security. Democratic initiatives are secondary, at best, to economic reform. Civil rights and liberties are of minimal importance.¹ Kazakhstan, a republic of the former Soviet Union in gradual transition toward a market economy and democracy, is guided by its proximity to Russia and related ethnic tensions within the country.² It is moving cautiously ahead with reforms

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1. See, e.g., June Teufel Dreyer, *China's Political System: Modernization and Tradition* 232 *passim* (1993).

2. Patrick Conway, *Kazakhstan: Land of Opportunity*, 93 *Current Hist.* 164 (1994).

although the government has maintained firm control in the interest of stability. Albania, once the most closed state in Europe and still the poorest, is animated by a revulsion to nearly 50 years of totalitarianism. It is therefore pursuing a radical approach to economic and political reform. Albania is also concerned that many of its citizens are being lured into destitution in Greece and Western Europe by the prospect of employment that fails to materialize.³ All three countries seek western sources of investment and trade opportunities.⁴

This article will highlight the problems confronting China, Kazakhstan, and Albania as well as the divergent agencies and systems for drafting, enacting and otherwise reforming their migration laws. The institutional processes of reform are particularly noteworthy. A comparison of them among the three countries suggests dominance by political and cultural determinants, along with administrative and economic issues,⁵ in forming migration policy and law within modern legal systems. This insight helps explain the constraints on the efficacy of administrative tinkering in improving the migration laws of the United States and other countries.

I. CHINA⁶

A. *Background*

The origins of Chinese border control and management of aliens can be traced back to ancient China, when the door was generally open.⁷ Foreigners could enter the Middle Kingdom freely so long as they were willing to submit to imperial supervision and pay a tribute;⁸ the Chinese

3. Tina Rosenberg, *Albania: The Habits of the Heart*, 11 *World Pol'y J.* 85, 88 (1994-95).

4. Both Kazakhstan and Albania, for example, have entered into bilateral treaties with the United States in order to stabilize expectations of prospective investors and thereby attract their capital. 72 *Interpreter Releases* 174, 183 (1995).

5. Compare this statement of the United Nations Development Program (UNDP):

Control of international migration is not just an administrative issue. It is primarily an economic issue—requiring a new framework of development cooperation that integrates foreign assistance with trade liberalization, technology transfers, foreign investments, and labor flows.

United Nations Development Program, *Human Development Report* 35 (1994).

6. The author has served since 1984 as Director of the China Program at the Willamette University College of Law.

7. V.K. Wellington Koo, *The Status of Aliens in China* 13 (1912).

8. Fox Butterfield, *China: Alive in the Bitter Sea* 25 (1982):

History gave Chinese [sic] a unique sense of pride, and it also left them with an unusual style of dealing with foreigners. For several millennia foreigners who came to China were fitted into the

were free to leave. During the Qing dynasty (1644–1911), however, the Middle Kingdom began to close its doors to foreigners. Immigration was more strictly controlled by the military, as were the activities of tribute-paying guests within the country.⁹ This tradition of control has persisted despite China's century-long "open door" to foreign merchants and colonizers following the Opium War of 1839–42, or perhaps because of lingering resentment toward an openness coerced by western governments.¹⁰ Another persistent tradition has been a trade-off between hospitality to aliens and expectations of homage from them, even though these gestures are often reduced to tokenism.

Xenophobia was a characteristic of Maoist China as well. Although comrades from the East were generally welcome, Westerners generally were not.¹¹ Migration policy demonstrated the continuity of the Mandarin tradition in implementing the Maoist agenda: "After 185 years of politics we seem to come out not so very far from where we went in."¹² Even today, Chinese migration policy has its deepest roots in Confucian principles that accentuate personal relationships (*guanxi*). Aliens are entitled to hospitality, but not to a substantial participatory role, once they are admitted into the country. Foreigners remain outsiders¹³ even

tribute system—if they recognized China's superiority by bringing presents to the Emperor, they were allowed limited rights to live and trade in one of the ports farthest from Peking.

9. R. Randle Edwards, *Imperial China's Border Control Law*, 1 J. Chinese L. 33, 55–56 (1987):

[Foreigners entering Qing China] were allowed into the "interior" only for specified purposes. Moreover, all entering aliens were subject to documentary controls, civil escort, and military surveillance. . . . Foreigners who accidentally wandered into Chinese territory or were cast upon its shores by storm were cared for and returned home safely.

Any aliens entering Chinese territory without authority were ordinarily deported for sanctioning by their own home authorities. In some cases, the Chinese authorities would direct the foreign king how to punish the offender. . . .

Various categories of aliens were granted entry to China under conditions unilaterally prescribed by the Qing authorities.

10. After defeating the Chinese, western governments gained trade concessions, rights of domicile, extraterritorial application of their laws, relief from Chinese laws, and other entitlements. Chinese resentment of these terms of settlement girded Maoist determination to outwit the Western imperialists. The relevance of the anti-imperialist mindset to post-Mao China was reflected in an official speech commemorating the sesquicentennial in 1990 of the Opium War. The significance of the war, a Politburo member suggested, "was that it showed that opposing imperialism and loving one's country did not preclude learning from foreign countries things that are useful for China." Dreyer, *supra* note 1, at 14 (1993).

11. James C. Hsiung, *Law and Policy in China's Foreign Relations* 135–36 (1972).

12. John King Fairbank, *The Great Chinese Revolution: 1800–1985*, at 364 (1986).

13. Lu Xun, China's pre-eminent modern writer, has observed that "[t]hroughout the ages, the Chinese have had only two ways of looking at foreigners, up to them as superior beings or down on them as wild

though they are becoming a more significant influence in Chinese society.

B. *The Problems*

China's chief problem has been to reconcile these traditional attitudes of cultural superiority and wariness toward foreigners with the exigencies of economic development. Another problem has been to make it easier for citizens to leave the country, in conformity with modern human rights law. A third problem has been to modify a traditional, ideological predisposition against formal law ("fa") so as to stabilize expectations about the entry, treatment and departure of aliens as the door swings open more widely. A fourth, related problem has been to accept a modern rights-based system of law for the benefit of citizens and aliens alike. This last problem underlies a broad range of issues from intellectual property rights to freedom of movement, as China adjusts to a more cooperative role and emerges as a leader in the global community.

Until 1964, four provisional administrative rules¹⁴ governed the entry, departure and terms of residence for foreigners. In 1964, the State Council adopted, and the Standing Committee of the National People's Congress ratified, a merger of these rules into a set of "Regulations Governing the Control of the Entry, Exit, Transit, Residence, and Travel of Foreigners."¹⁵ The composite regulations also eased restrictions, though only slightly, on entry, mobility, residential privileges, and exit procedures.

In 1985, anxious to attract foreign investment and a larger foreign presence in the country, the National People's Congress enacted a "Law

animals. They have never been able to treat them as friends, to consider them as people like themselves." Lu Xun, *quoted in* Butterfield, *supra* note 8, at 24.

14. Waiguo Qiaomin Churu Ji Juliu Zanzing Guize [Provisional Rules Governing the Entry, Exit, and Residence of Foreign Nationals (November 28, 1951)], *cited in* Zhonghua Renmin Gongheguo Fagui Xuanji [*Laws and Regulations of the People's Republic of China* 151 (Kingsway International Publications Ltd., ed. & trans., 1982)] [hereinafter P.R.C. Laws]; Waiguo Qiaomin Juliu Ji Juliu zheng Qianfa Zanzing Banfa [Provisional Measures Governing Registration of Residence and Issuance of Residence Certificates for Foreign Nationals (August 10, 1954)], *id.*; Waiguo Qiaomin Luxing Zanzing Banfa [Provisional Measures Governing Travel of Foreign Nationals (August 10, 1954)], *id.*; Waiguo Qiaomin Chujing Zanzing Banfa [Provisional Measures Governing Exit of Foreign Nationals (August 10, 1954)], *id.*

15. Waiguoren Rujing Chujing Guojing Juliu Luxing Guanli Tiaoli [Regulations Governing the Control of the Entry, Exit, Transit, Residence, and Travel of Foreigners], *id.* at 150.

on the Entry and Exit of Aliens,"¹⁶ which broadly defines immigration controls. The Ministries of Foreign Affairs and Public Security, working together, have implemented the 1985 law with detailed rules that the State Council first approved in 1986 and amended in 1994.¹⁷ These rules provide classifications of aliens and procedures for admission and deportation that are similar to those of many countries. The rules also provide for registration of aliens and residence permits. Several laws, implemented by national and local regulations, define the special treatment of foreign commercial representatives and their interests in China.¹⁸ Chinese immigration law also protects large numbers of ethnic cousins abroad, the "Overseas Chinese." They enjoy special privileges of Chinese nationality, ease of entry and status within the country.¹⁹

A second migration law of 1985, adopted by the Standing Committee of the National People's Congress, established rules and procedures for easing departures (exits) and readmissions (entries) of Chinese citizens,²⁰ thereby making it easier for Chinese nationals to study, conduct business and undertake training abroad.²¹ A clear message of this legislation, in

16. *II The Laws of the People's Republic of China 1983-1986*, at 191 (Legislative Affairs Commission of the Standing Committee of the National People's Congress of China ed. 1987) [hereinafter *Laws of the P.R.C.*].

17. Rules for the Implementation of the Law of the People's Republic of China on the Control of the Entry and Exit of Aliens, *Zhonghua Renmin Gongheguo Shewai Fagui Huibian [Laws and Regulations of the People's Republic of China Governing Foreign-Related Matters 431-39* (The Bureau of Legislative Affairs of the State Council of the P.R.C. 1991)].

18. *Zhonghua Renmin Gongheguo Guowuyuan Guanyu Guanli Waiguo Qiye Changzhu Daibiao Jigou de Zangxing Guiding [Interim Regulations Concerning the Control of Resident Offices of Foreign Enterprises of the State Council of the People's Republic of China* (Oct. 30, 1980), P.R.C. Laws, *supra* note 14, at 154; *Zhonghua Renmin Gongheguo Gongshang Xingzheng Guanli Zongju Guanyu Waiguo Qiye Changzhu Daibiao Jigou Banli Dengji Shixiang de Tonggao [Circular Concerning the Registration Procedures for the Resident Offices of Foreign Enterprises by the General Administration for Industry and Commerce of the People's Republic of China* (Dec. 8, 1980), P.R.C. Laws, *supra* note 14, at 158; *Regulations of Shanghai Municipality Concerning the Control of Resident Representative Offices of Foreign Enterprises*, available in LEXIS, Chinalaw File No. 364 (1986); *Provisional Measures of Guangdong Provincial Registration of Resident Representative Offices Established in Guangdong Province by Foreign Enterprises and Overseas Chinese, Hong Kong and Macao Enterprises*, available in LEXIS, Chinalaw File No. 89 (1981); *Notice of the Beijing Municipal People's Government on Chinese Seeking Employment with Foreign or Overseas Chinese Individuals or Representative Offices in Beijing*, available in LEXIS, Chinalaw File No. 349 (1986).

19. Xianfa (1982) art. 50 [P.R.C. Constitution]; see also James Kraus & Wang Huijun, *A Comparative Study of the Legal Rights and Duties of Lawful Aliens in the United States and the People's Republic of China*, 25 San Diego L. Rev. 327 (1988).

20. Law on the Control of the Exit and Entry of Citizens, in *Laws of the P.R.C.*, *supra* note 16, at 197 (1987).

21. Although Chinese emigration is about 700,000 annually, the majority of these enter foreign territory illegally. 5 *China Info. Bull.*, Feb. 1995, at 4.

the interest of economic development, was to dispel fears that traveling abroad to establish or strengthen a foreign relationship (*guowai guanxi*) would jeopardize a citizen's social or political status. The law establishes procedures for issuance of passports; review of applications for exit by public security organs; grounds for disapproval and denial of exit by frontier inspection offices; reentry after business, study or other travel abroad; and penal sanctions. A provision for the formulation of special rules governing Hong Kong and Macao-related travel by Chinese citizens²² has been implemented by measures drafted in the Ministry of Public Security and approved by the State Council.²³

C. *The Process*

The process of formulating policy and law, such as that on migration, continues to be controlled by the Communist Party despite China's rapid transition to a market economy.²⁴ Foreign expertise has been of little influence. Formally, the Constitution of 1982²⁵ provides that either the National People's Congress or its Standing Committee, if the Congress is not in session, enacts *general* laws such as those governing entry and exit of Chinese territory; the State Council, on the other hand, issues *administrative* laws, regulations, and rules. If the State Council adopts an administrative law or rule, it is always reviewed by the National People's Congress, if it is in session, or otherwise by the Standing Committee. Either body may require the State Council to redraft the law.

Usually, all laws require implementing rules or circulars drafted by the appropriate ministry and approved by either the National People's Congress (general laws) or the State Council (administrative laws). Thus, the 1986 and 1994 administrative regulations to implement the 1985 migration law for aliens were jointly drafted by the Ministries of Foreign Affairs and Public Security, and approved by the State Council. Ministries can also issue circulars, which typically interpret a specific

22. Law on the Control of the Exit and Entry of Citizens, *supra* note 16, art. 17. Nationality issues were particularly difficult during the negotiations between China and the United Kingdom about the status of Hong Kong. Sir Richard Evans, *Deng Xiaoping and the Making of Modern China* 268 (1993).

23. Provisional Measures for the Control of Chinese Citizens Entering and Leaving the Regions of Hong Kong and Macao for Personal Reasons, available in LEXIS, Chinalaw File No. 410 (1986).

24. Perry Keller, *Legislation in the People's Republic of China*, 23 U. Brit. Colum. L. Rev. 654 (1989); See also Ta-Kuang Chang, *The Making of the Chinese Bankruptcy Law: A Study in the Chinese Legislative Process*, 28 Harv. Int'l L.J. 333 (1987).

25. Xianfa [Constitution of the People's Republic of China (1982)] ch. 3 §§ I, III.

provision of the law and its application to an issue. These circulars have substantial regulatory force.²⁶

The legislative drafting process is quite simple. The Commission of Legislative Affairs prepares a first draft of a general law for submission to the Legal Committee of the National People's Congress whereas a Legal Bureau drafts administrative laws and regulations for submission to the State Council.²⁷ After several drafts, the Legal Committee or Legal Bureau, as the case may be, proposes a final version, respectively, to the National People's Congress or State Council. That is generally how China's 1985 migration laws developed. Unlike other transitional states, China's drafting process is hermetic, under close supervision by the Party. There has been little reliance on foreign expertise to fashion a modern regime of migration controls.

II. KAZAKHSTAN²⁸

A. *Background*

Kazakhstan, in the Wild East of the former Soviet Union, adopted a Law on Immigration²⁹ even before its Constitution of 1993.³⁰ This priority symbolizes the importance that the post-communist government has attached to the specific problem of nationality. Since gaining its independence in December 1991, Kazakhstan has been preoccupied with four concerns: reconstructing its economy,³¹ controlling its frontiers, defining a national community, and ensuring the loyalty of a large

26. This status is apparently a matter of general practice and acceptance rather than formal law. According to the Provisional Measures on Handling Official Documents of the State Administrative Organs, adopted by the State Council in 1981, "[a] 'circular' (tongzhi) should be used to transmit instructions from higher to lower organs, between parallel organs with no direct connection, and in approving and transmitting official documents at the lower levels." Tao-tai Hsia & Constance Axinn Johnson, *Law Making in the People's Republic of China: Terms, Procedures, Hierarchy, and Interpretation* 9 (1986).

27. Conita S.C. Leung, *Conceptual and Constitutional Bases for Chinese Administrative Law*, Bull. Austl. Legal Phil. (Sp. ed. 1992).

28. In 1994, the author served as a Consultant on Citizenship Law to the American Legal Consortium (ALC) in Kazakhstan. That project was funded by the United States Agency for International Development.

29. Law on Immigration, June 26, 1992 (Kazakhstan) (unofficial trans. on file with the author).

30. The Constitution of the Republic of Kazakhstan (Zara Dashtamireva & Guinara Bekmukhamedova trans., 1993) (copy on file with the author) [hereinafter Kazakhstan Constitution].

31. Kazakhstanis frequently use a post-war metaphor to describe the challenge of nation-building even though independence represented victory for them. Georgie Anne Geyer, *Waiting for Winter to End: An Extraordinary Journey Through Soviet Central Asia* 81 (1994).

Russian minority while enhancing the position of the Kazakh ethnic population that became a slim majority shortly after independence. The national government has been an ardent supporter of the Commonwealth of Independent States (C.I.S.) and other means of minimizing tensions among former republics of the Soviet Union and containing the Russian bear.³²

Opening provisions of the Kazakhstani Constitution confirm the supremacy of the Kazakh nation and language.³³ Not surprisingly, members of the large but diminishing Russian minority in Kazakhstan despise this provision. Having recently been a majority, they now fear the Kazakhstani government's encouragement, at their expense, of employment and other opportunities for the slightly larger and growing Kazakh population.³⁴ An important explanation for the declining Russian minority and its sense of peril is its lower birth rate than that of the Kazakhs, and the emigration from Kazakhstan of some 250–300,000 persons of Russian background.³⁵ The Kazakhstani government appreciates that this exodus, though it boosts the Kazakh ascendancy, is not necessarily in the national interest. The government has therefore tried to enhance the status of the Russian language.³⁶ By contrast,

32. In early 1995, for example, Kazakhstan and Russia entered into a bilateral agreement to partially integrate their armed forces. Claudio Rosett, *Along Many Borders, the Russian Empire Stirs*, Wall St. J., Feb. 27, 1995, at A8.

33. The following provisions appear under "Bases of the Constitutional System":

First. The Republic of Kazakhstan . . . as a form of statehood *self-determined by the Kazakh nation*, guarantees equal rights to all its citizens. . . .

Eight [sic] The Kazakh language is the state language in the Republic of Kazakhstan. Kazakhstan Constitution, *supra* note 30 (emphasis added).

34. The Russian minority is estimated to be 36% of the population, whereas the Kazakh minority represents an estimated 43%. Conway, *supra* note 2, at 167. National tensions were summarized just five days after Kazakhstan's first post-communist parliamentary election, as follows:

The Russians worry that top jobs are increasingly filled by Kazakhs. It is hard to buy roubles [in Kazakhstan], so travelling to Russia is difficult. . . . Ethnic Russians and Slavs want to be able to be citizens of both Russia and Kazakhstan. They demand that Russian should be declared a national language alongside Kazakh; at present Kazakh is the national language, whereas Russian is defined as the "language of inter-ethnic communication." Some Russians advocate open borders with Russia and a return to the rouble zone.

Russian Rumbblings, The Economist, Mar. 12, 1994, at 42.

35. Conway, *supra* note 2, at 167.

36. *The Shadow of Dictatorship*, The Economist, Mar. 18, 1995, at 40. The dilemma for Kazakhstan is described as follows:

Despite intense political maneuvering by Moscow in the Central Asian capitals, the position of the Russian minority in all the newly independent states of Central Asia is regarded as precarious. The most visible evidence of this widely held belief is that so many well-educated Russians are leaving good jobs and comfortable apartments in the near abroad for uncertain

Kazakhs have been immigrating into the country. In 1993 alone, some 50,000 Kazakhs from Russia and Mongolia resettled in their ethnic motherland.³⁷ It is unclear whether their motivation has been more economic or cultural. In early 1994, during the campaign for Kazakhstan's first post-communist election, relations between ethnic Russians and Kazakhs and between Russia and Kazakhstan deteriorated. Rhetoric proclaiming "Kazakhstan for the Kazakhs" was shrill.

B. *The Problems*

Both the Immigration Law of 1992 and the Constitution of 1993 have been controversial and are under substantial revision by the government.³⁸ Immigration reform is part of a larger effort to resolve Kazakhstan's nationality problems. My principal assignment was to advise the Ministry of Foreign Affairs on a package of four draft documents that addressed issues of citizenship, migration and protection of alien residents. The package included a draft law on the legal status of resident aliens.³⁹ The other three drafts⁴⁰ were bilateral agreements with

lives as refugees in Russia. This is all the more paradoxical because the Central Asian republics are in most cases desperate to retain these Russians, who represent the managerial and technical elite without whom the new societies of Central Asia cannot function effectively through what is proving to be, even for those states blessed with abundant natural resources, a very difficult transition.

Ian Cuthbertson, *The New "Great Game"*, 11 *World Pol'y J.* 31, 37 (1994-95).

37. Conway, *supra* note 2, at 167.

38. The views of Kazakhstani legislators concerning the 1993 Constitution range from perceptions of inadequacy to unacceptability. During my work in Kazakhstan, I met with Salikh Zimanov, Chair of the Constitutional Law Reform and Human Rights Committee of the Parliament, his deputy and another member of his committee; eight Russian parliamentarians, who expressed strong criticism of the Preamble and other provisions of the Constitution; Kalmatayev Murat, Chair of the Legal Reform Committee, and two of his deputies; and Victor Petrovitch Mikhailov, Deputy Chair of the International and Interparliamentary Relations Committee. Although they represented a general consensus in favor of overhauling the 1993 Constitution, specific proposals for reform are often conflicting and contentious. For a discussion of the background and some of the problems, see Stephen Kanter, *Constitution Making in Kazakhstan*, 5 *Int'l Legal Persp.* 65 (1993).

39. Draft Legal Position of Foreign Citizens in the Republic of Kazakhstan, 11th Session of the Supreme Soviet (1993) [hereinafter Draft Legal Position of Foreign Citizens].

40. Draft Agreement between the Republic of Kazakhstan and the Russian Federation on a Simplified Procedure for Acquiring Citizenship for the Citizens of Kazakhstan and Russia Who Have Travelled to the Republic of Kazakhstan or the Russian Federation to Become Permanent Residents (1994);

Draft Agreement between the Republic of Kazakhstan and the Russian Federation on the Legal Status of Citizens of the Republic of Kazakhstan Permanently Residing on the Territory of the Russian Federation and of Citizens of the Russian Federation Permanently Residing on the Territory of the Republic of Kazakhstan (1994);

Russia that would implement a March 28, 1994 Memorandum of Understanding between Russia and Kazakhstan.⁴¹

1. *The Russian Proposal of Dual Citizenship*

The general purpose of this Memorandum of Understanding was to establish bases for resolving issues of citizenship and ensuring mutual protection of citizens of each state in the other's territory. The Memorandum represents a compromise between Russian preference for dual citizenship to protect the Russian minority in Kazakhstan and Kazakhstani opposition to it. Russia's official proposal has been contentious and emotional. The Kazakhstani government flatly rejects dual citizenship, completely open borders, a return to the ruble standard, making Russian an official language, or extravagant privileges for the Russian minority.⁴²

Kazakhstani opposition to dual citizenship is consistent with the general practice of states. Most legal systems abhor dual citizenship because of the inherent mischief it often causes in taxing dual citizens, conducting criminal prosecutions, determining the status of children, establishing the terms of military service and other matters.⁴³ Dual citizenship can also lead to international tensions and even armed conflict.⁴⁴

Draft Agreement between the Government of the Republic of Kazakhstan and the Government of the Russian Federation concerning Cooperation in the Field of Labor Migration and Social Protection of Migrant Workers (1994).

41. Memorandum on the Basic Principles of Resolving Questions Involving Citizenship and the Legal Status of Citizens of the Republic of Kazakhstan Who Permanently Reside on the Territory of the Russian Federation and of Citizens of the Russian Federation Who Permanently Reside on the Territory of the Republic of Kazakhstan (1994) [hereinafter Memorandum of Understanding].

42. On the other hand, it has been observed that all of the Central Asian Republics, including Kazakhstan, generally:

have bent over backward to accommodate both the concerns of Moscow and of their Russian minorities. All began by being much less aggressive than their counterparts to the west in asserting the preeminence of indigenous language and culture; most still barely go beyond token recognition of the leading role of local culture over the imported Russian culture.

Cuthbertson, *supra* note 36, at 37.

43. 4 Charles Gordon & Stanley Mailman, *Immigration Law and Procedure* § 11.3d (1991).

44. The War of 1812, for example, grew out of Great Britain's theory of perpetual allegiance of its subjects and its consequent refusal to withdraw the citizenship of its former subjects in the United States. Between 1804 and 1812, Americans had fumed over British seizure of American ships and impressment into His Majesty's Service of both British deserters and American sailors, whom it claimed were still British subjects. William Miller, *A New History of the United States* 146 (1958).

The Soviet Union vigorously opposed dual citizenship although it sometimes took diplomatic advantage of the phenomenon.⁴⁵ Of the former republics of the Soviet Union, only Turkmenistan appears to have accepted the practice by entering into an agreement with Russia that provides for mutual recognition of dual citizenship.⁴⁶ Since Turkmenistan's Russian minority is small,⁴⁷ its agreement with Russia may be more formal than practical.

Dual citizenship may, however, be unavoidable, given variations in domestic citizenship laws and a limited tolerance of that status in special circumstances. Thus, even agreements denying dual citizenship cannot eliminate its occurrence altogether. The Kazakhstani are understandably concerned that formal provision for dual citizenship, however, would pose a threat to their national security. It would offer a risky bonus to Russian-speaking citizens willing to stay in the country without necessarily offering their patriotism in return. Dual citizenship might also enhance Russian diplomatic leverage over a very large minority population. Ancillary threats of dual citizenship include the creation of a class of citizens who would be viewed as second class; the ambiguities of mixed parentage, military service and voting status; and encouragement of dual citizenship for other Kazakhstani ethnic groups.

2. *The Kazakhstani Pattern of Immigration Reform*

The three draft agreements seek to implement the compromises worked out in the Memorandum of Understanding.⁴⁸ They do not endorse dual citizenship but provide for more expeditious change of citizenship; concede some privileges of establishment for citizens of the two countries on each other's territory; facilitate supervised, contracted labor migration between the two countries; and ease travel restrictions between the two countries that might inhibit the reestablishment of permanent residences. The agreements respond to the problem raised by the Russian minority concerning educational opportunities for Kazakhstani citizens in Russia by facilitating and encouraging educational exchanges.

45. George Ginsburgs, *The Citizenship Law of the USSR* 99 (1983).

46. Interview with Bernebek Umirzakov, Legal Counsel, Foreign Ministry of Kazakhstan, in Almaty, Kazakhstan (June 10, 1994) [hereinafter Umirzakov Interview].

47. In 1989, ethnic Russians numbered slightly more than 330,000 out of a total population of 4.3 million. David Nissman, *Turkmenistan (Un)transformed*, 93 *Current Hist.* 183 (1994).

48. Memorandum of Understanding, *supra* note 41.

The draft agreements reflect seven basic "principles".⁴⁹

1) Kazakhstanis may choose between Kazakhstani and Russian citizenship. (It has been expected that most ethnic Russians still residing in Kazakhstan would choose Kazakhstani over Russian citizenship.)

2) Kazakhstanis who choose Russian citizenship may continue to reside in Kazakhstan or emigrate to Russia.

3) Permanent residents in Kazakhstan have full freedom to acquire Kazakhstani citizenship and thereby to enjoy all rights under the national Constitution.⁵⁰ Russian citizens residing in Kazakhstan enjoy special protection of their individual rights. In accordance with the Memorandum of Understanding, Russian citizens residing in Kazakhstan may serve in the Russian military and are entitled to normal Russian diplomatic protection.

49. Interview with Viatcheslav Kh. Guzzatov, Deputy Foreign Minister, in Almaty, Kazakhstan (June 3, 1994).

50. The constitutional provisions for Kazakhstani citizenship are as follows:

Chapter 2. CITIZENSHIP

Article 1. Each person in the Republic of Kazakhstan has the right to citizenship and its alteration. The basis and order of acquiring, preserving and losing citizenship of the republic are established by the constitutional law. Deprivation of citizenship of the Republic of Kazakhstan, or of the right to change citizenship, as well as exile of a citizen from the republic, is not allowed.

For persons who are citizens of the Republic of Kazakhstan, citizenship of another state is not recognized, except in cases stipulated for by this Constitution and interstate agreements of the Republic of Kazakhstan.

The right to have citizenship of the Republic of Kazakhstan along with citizenship of other states is recognized for all citizens of the republic forced to leave its territory, as well as for Kazakhs residing in other states, if it does not violate the law of the states whose citizens they are.

....

Article 5. The Republic of Kazakhstan protects its citizens located outside the borders of its territory, and defends their rights and freedoms.

A citizen of the Republic of Kazakhstan cannot be extradited to a foreign state, if not otherwise established by international legal acts recognized by the republic, as well as interstate agreements of the Republic of Kazakhstan.

Article 6. Entities located on the territory of the Republic of Kazakhstan who [sic] are not its citizens enjoy all rights and freedoms, and bear all responsibilities established by the Constitution, laws, and interstate agreements of the Republic of Kazakhstan, other than exceptions stipulated for by laws and interstate agreements of the Republic of Kazakhstan.

Article 7. The Republic of Kazakhstan has the right to grant asylum to foreign citizens and stateless persons who are victims of violations of human rights.

Kazakhstan Constitution, *supra* note 30.

4) Kazakhstan encourages Russian technicians and other professionals, for example, at high-technology and military facilities, to remain in the country in order to continue providing necessary skills.

5) The Kazakhstani government will attempt to alleviate the dilemma faced by Russian military personnel still stationed in Kazakhstan, many of whom are highly skilled, and other experts who may wish to return to Russia but have no employment, housing or other opportunities there. Their successful integration into Kazakhstan as permanent residents poses problems of adjustment whose solution necessitates cooperation with Russia.

6) Kazakhstanis wishing to emigrate to Russia must be allowed to acquire Russian citizenship immediately, according to a simplified procedure, without having to go through the normal procedures or abide by the normal time requirements.

7) All rights of Kazakhstani citizens and permanent residents in Russia under Russian law are reciprocally extended to Russian citizens and permanent residents in Kazakhstan.

Thus, the agreements underscore the competence of Kazakhstan's Russian population to choose either Russian or Kazakhstani citizenship, to enjoy constitutional protections there, or to emigrate to Russia according to a simplified procedure.

As a vestige of communist practice, the agreements are to be implemented not by legislation but by administrative "orders" and "instructions," which are to be issued principally by the Ministry of Foreign Affairs to appropriate officials, or by "contracts" with them. These documents are subject to notification to Parliament and compliance with other international agreements and legislation, but not to parliamentary approval. National and international stability is the hallmark.

Provisions for reform of the migration law found in the Draft Legal Position of Foreign Citizens⁵¹ modify general rules in the hastily drafted 1992 immigration law.⁵² Several points about Kazakhstan's emerging regime of migration law are noteworthy. First, general passports would be issued by the Ministry of Internal Affairs, whereas the Ministry of Foreign Affairs would control the classification and issuance of both entry and exit visas. Second, a catch-all provision for issuance of visas

51. Draft Legal Position of Foreign Citizens, *supra* note 39.

52. Law on Immigration, *supra* note 29.

“in certain cases by specially authorized representatives”⁵³ contemplates visa applications from citizens of unrecognized states and of states with whose governments Kazakhstan does not maintain diplomatic relations. This provision might also cover the possible issuance of visas at the border. Third, Kazakhstan is developing its refugee law separate from its general immigration and citizenship laws. Fourth, the primary basis for deporting aliens is their threat to “the interests of national security.”⁵⁴ Fifth, a lack of resources precludes administrative reviewability of deportation and other immigration-related decisions, at least for now. Sixth, although no rules prescribe the destination of deportees, the government is committed to avoiding disguised extradition and otherwise abiding by the requirements of human rights and refugee law.⁵⁵

C. *The Process*

Parliament formally bears the principal responsibility to draft and enact migration laws. In practice, however, the Foreign Ministry has taken the lead because of the centrality of sensitive nationality issues involving Russian interests and relationships. Also, in a fledgling system of government where the separation of powers is indistinct, the President has closely supervised the work of both Parliament and the Foreign Ministry.

Communist-era soviets at the local and national levels were not abolished until December 1993. The first post-communist Parliament, elected March 7, 1994, promptly formed 15 committees and a supervisory commission. In order to discourage executive supervision of legislative activities, the committees were designed so that they do not correspond directly to specific ministries. Migration initiatives seem to fall under the jurisdiction of two committees: (1) International and Interparliamentary Relations, and (2) Constitutional Legislation and Human Rights.

The drafting process, for which foreign consultants may be invited,⁵⁶ straddles the ministries and parliamentary committees. My own work, which reflected the normal process, was based upon draft agreements

53. Draft Legal Position of Foreign Citizens, art. 21, *supra* note 39.

54. *Id.* at art. 27a.

55. Umirzakov Interview, *supra* note 46.

56. In particular, the Kazakhstani government has welcomed foreign expertise on legal draftsmanship. *See, e.g.,* George Moffett, *Cities Dabble in Foreign Affairs*, *Christian Sci. Mon.*, Feb. 8, 1995, at 3.

already prepared by the Foreign Ministry and draft legislation already prepared by a concluding session of the Supreme Soviet in 1993. The review and redrafting involved six overlapping phases: research and analysis, including consideration of translated articles from the Kazakhstani press; preparation of questions and comments on the drafts; conversations with local experts, spokespersons and Kazakhstani officials having responsibilities over citizenship, immigration and relations with Russia and the Commonwealth of Independent States; working sessions with members of a drafting committee in the Ministry of Foreign Affairs; preparation of suggested revisions in the drafts; and submission of final written comments to the Ministry of Foreign Affairs after our working sessions. Concluding negotiations on the agreements, ratification of the agreements, and parliamentary review and adoption of the citizenship law will complete the process.

III. ALBANIA⁵⁷

A. *Background*

Albania's recent emergence from a Stalinist dungeon has been dramatic.⁵⁸ During the early 1990s, a kind of political and economic shock therapy abruptly transformed the Land of the Eagles from one of the world's most closed societies to one of its most open. Immigration controls vanished overnight as civil libertarianism took on new meaning.⁵⁹ Although Albania later reestablished more effective controls along its borders and at various ports of entry, its immigration system remained somewhat haphazard pending enactment of a comprehensive

57. In late 1992, shortly after Albania had installed its first post-communist government, the author worked there as a legal specialist under the American Bar Association's Central and East European Law Initiative (CEELI). My principal assignments were to conduct workshops on immigration law and to assist the Ministry of Labor, Emigration, Social Assistance and Ex-Politically Persecuted, as it was then known, in preparing a first draft of Albania's new migration law. (On my suggestion, the designation "Emigration" was changed to "Migration" in the Ministry's name).

58. Elez Biberaj, *Albania's Road to Democracy*, 92 *Current Hist.* 381 (1993); David B. Ottaway, *Albania Makes the Change from Dark Ages to Chaos*, *Int'l Herald Trib.*, July 24-25, 1993, at 1; Jeri Laber, *Slouching Toward Democracy*, N.Y. *Rev. of Books*, Jan. 14, 1993, at 24.

59. Denise Hamilton, *Serfs Up, Escape*, Summer 1995, at 46, 51:

The new era of civil liberties has yet to bring a civil society to Albania. After a steady diet of dictatorship, Albanians are bingeing on democracy, which they think means the freedom to do whatever they want. Police set up roadblocks on the highways to collect bribes. City dwellers wash their cars in park fountains. Motorists barrel down sidewalks, sending pedestrians running for their lives.

migration law in May 1995.⁶⁰ Gradually, the Albanian government is developing an immigration service but lacks trained personnel to staff it.

Historically, Albanian nationality laws have been a surrogate for immigration controls. They date back to the Turkish Law of Nationality, which was in effect from 1869 until 1929, seventeen years after Albania's independence from the Ottoman Empire.⁶¹ During the communist era (officially, 1944–1992), Albania had no real immigration law. Foreigners were admitted on a discretionary basis, generally for official visits. Since Albania began opening its doors in the early 1990s, however, it has recognized the need to develop a modern regime of migration law.⁶²

B. *The Problems*

Albania's newly opened doors have led more people out of than into the country. Many young, mostly male workers, constituting about one-eighth of the total population, have left the country for employment elsewhere in Europe.⁶³ Most of these so-called "economic refugees" are undocumented workers who reside in Austria, Germany, Greece, and Italy. They began entering those countries, some without proper documentation,⁶⁴ after Albania's communist regime began to deconstruct and the walls tumbled around Europe's most closed state.

The Ministry's interest in drafting a migration law involved the status and protection of these citizens. Like China, Albania seeks to provide constitutional protection of the rights of its citizens in other countries.⁶⁵

60. On Migration, Law No. 7939 (May 25, 1995).

61. For a very good history and translation of these laws see Kemal Aly Vokopola, *The Nationality Law of Albania*, 13 *Osteuropa-Recht* 241 (1967).

62. The political sensitivity and significance of migration affairs was underscored in September 1994 when the government temporarily transferred the responsible office from the Ministry of Labor, Migration, Social Assistance and Ex-Politically Persecuted to a new Migration Committee in the Prime Minister's office. The authority has since been transferred back to the Ministry.

63. David Binder, *Sunshine is Dizzying in Albania's New Dawn*, N.Y. Times, Nov. 13, 1994, at E5. See also Nils Kongshaug, *A Thousand Secret Paths Lead From Albania*, Christian Sci. Mon., Mar. 20, 1995, at 7 (reporting on a University of Tirana poll finding that, in 1992, 82% of Albanians wished to emigrate).

64. In 1990, after large numbers of Albanian "boat people" sought refuge in Italy and others turned to foreign embassies, the Ministry of Public Order began to issue exit documents. Interview with Teuta Veizaj, former Head, Legal Office, Ministry of Labor, Social Assistance, Migration and Ex-Politically Persecuted, in Salem, Or. (Feb. 16, 1995).

65. Article 8 of the Draft Constitution of the Republic of Albania (copy on file with the author) provides as follows:

The principal issues have involved their welfare, taxability of their income, and normalization of their immigration status. The Ministry's initial focus on these problems is apparent from the peculiar designation of "Emigration" in the Ministry's name during the time when I worked there.

Although the Ministry initially planned to address only the problem of protecting and legitimating the status of Albanian workers abroad, our drafting committee gained the Ministry's approval to prepare a comprehensive migration law. We thus decided to include provisions to regulate all movement of persons into and out of Albania. The topics included the orderly emigration and employment abroad of Albanian citizens; immigration controls, including procedures for admission and expulsion; visa issuance; border inspection; asylum for refugees; issuance of residence and work permits; and nationality and naturalization.

The decision to include provisions for asylum was noteworthy. Despite its poverty, the country could become a magnet for ethnic Albanians residing in neighboring Macedonia and the Kosovo region of Serbia. Ministry officials agreed that the existence of a "Greater Albania"⁶⁶ and the Balkan crisis as a whole underscored the need to prepare for the possibility of serious refugee pressures, principally from Macedonia and the Kosovo region. Finally, the Ministry expressed concern about the immigration status of ethnic Albanians in neighboring countries. Although the new immigration law does not specifically address this issue, the government has officially protested Macedonia's act of deporting undocumented aliens of Albanian ethnic background to neighboring Kosovo.⁶⁷

Care for Albanians Living Outside the State

1. The Republic of Albania protects the rights of its citizens who have a temporary or permanent residence outside its borders.
2. It supports the recognition and protection of human and national rights of Albanian population who live outside the state borders of the Republic, in compliance with international acts and agreements.

On the status of the Draft Constitution, see note 74, *infra*.

66. See Yigal Chazan, *Tempering the dream of a "Greater Albania"*, *Christ. Sci. Mon.*, July 20, 1994, at 7.

67. *Tirane Protests Deportations by Macedonia, Illyria*, Jan. 5-7, 1995, at 1.

C. *The Process*

The process of drafting Albania's migration law began with three days of workshops that I conducted to acquaint lawyers and other officials in the Ministry with European and American models of immigration and refugee law. We also discussed applicable regional and international instruments, including European and United Nations agreements on human rights and the status of refugees.⁶⁸ We observed the strengths and weaknesses of alternative provisions, and highlighted decisions that the Albanians would have to make in drafting a comprehensive law. When we focused on American law, we noted that much of it was either irrelevant or too complicated to meet Albania's immediate needs but was nevertheless instructive.

Our drafting committee decided to begin with a simple legal framework that could be refined during subsequent stages in the drafting process. In particular, I recommended consultation with European specialists on the feasibility of including provisions for a European-type system of residence and work permits. We decided to attach administrative regulations to the law, including procedures for entry and residence. We also decided to attach detailed rules and procedures for the orderly emigration of workers seeking authorized training and employment abroad and for their return to Albania. The new law thus includes several basic definitions, concepts and classifications borrowed from American law, and detailed provisions borrowed from European instruments and practice.

We began the drafting process with a fairly clean slate. The government had repudiated all legislation of the *ancien regime*, even nonideological measures.⁶⁹ The only prior post-communist initiatives were an agreement with Germany that sought to protect the rights of

68. For a list of these, see James A.R. Nafziger & Barry C. Bartel, *The Migrant Workers Convention: Its Place in Human Rights Law*, 25 Int'l Migration Rev. 771, 772 n.2 (1991).

69. The government's determination to forget the past sometimes had a humorous side. On one occasion, in the confusion of the post-communist transition, the Ministry could not locate a copy of the Albanian law on nationality and naturalization. I had brought with me an English translation of it (Vokopola, *supra* note 61, at 254), not knowing whether the version I had was still in effect. My colleagues informed me that they had no reason to believe that this version had been superseded or abrogated. Although they wanted to reject it out of hand when I told them it was modeled after Soviet law, I persuaded them that it was nevertheless similar to European and American laws and might well be retained with some modifications. We then revised it and they translated it back into Albanian for incorporation into the draft law.

Albanian guest workers⁷⁰ and a draft law, entitled “On the Employment of Albanian Citizens Abroad,”⁷¹ that was based on a Yugoslav model for implementing guest-worker agreements. Our drafting committee spent two weeks completing a framework draft of a migration law. The committee then undertook several revisions of the draft,⁷² in consultation with European specialists, in order to incorporate standard provisions of European civil law such as a system of residence and work permits. The committee also worked with designated lawyers in the Council of Ministers.⁷³ To the surprise of many, final approval of the law preceded Albania’s adoption of its first post-Marxist Constitution.⁷⁴

Our work is an example of the initial stages of Albania’s elaborate process of legislative reform. The process may be summarized as follows: The ministries take the legislative initiative, relying on newly established legal departments and foreign specialists, under the direction of a ministry’s own drafting commission. After completing a draft law, a ministry submits it to all other ministries for their review and comments. A final draft is then prepared and submitted by the initiating ministry to the Council of Ministers, which may return it for further redrafting. Sometimes this process is repeated. After final acceptance of a draft law, the Council of Ministers submits the proposed legislation to several parliamentary committees, each of which undertakes an independent review and makes a recommendation to approve or reject the law. If these recommendations are all positive, the draft proceeds to a parliamentary vote. Overall, the legislative process is deliberative and thorough but “has a tendency to be horrendously slow.”⁷⁵

70. See, e.g., Agreement regarding the employment of workers for broadening their professional and linguistic knowledge, Ger.-Alb., Sept. 4, 1991 (unofficial trans. on file with the author). It is still the only such agreement between Albania and another state. Kongshaug, *supra* note 63.

71. Project-law: On the employment of the Albanian citizens abroad, Dec. 4, 1992 (unofficial trans. on file with the author).

72. See Ligi-per Migracionin (Projekt), Ne mbeshetjete te nenit 16 to Ligjit Nr. 7491, dt. 29.4.1991 “Per dispozitat kryesore kushtetuese”, me propozim te Keshillit te Ministrave [Law on Migration (Draft) based upon art. 16 of Law No. 7491, Apr. 29, 1991, “on the main constitutional provisions” and the Council of Ministers’ proposal, Jan. 20, 1995] (copies in Albanian and English on file with the author).

73. Interview with Teuta Veizaj, former Head, Legal Office, Ministry of Labor, Social Assistance, Migration and Ex-Politically Persecuted, in Salem, Or. (Jan. 12, 1995). Telephone interview with Silvana Eski, Committee on Migration, Office of the Prime Minister of Albania (Jan. 12, 1995).

74. In a national referendum on Nov. 6, 1994, 60% of Albanian voters rejected a 23-page draft constitution that had been initiated in 1992. Binder, *supra* note 63.

75. Greg Lusitana, *Albanian Parliament Struggles with Democracy*, San Diego Daily Transcript, June 2, 1993, at 6A, 7A (the author was a coordinator of the CEELI Program in Albania).

An explanation for the heavy involvement of foreign specialists in the drafting process lies in Albanian political history. Whether the country was under Ottoman, Italian, German or communist control, legislative drafting was only incidental to political fiat. In Albania's about-face from communism, whatever technical expertise it had was too often replaced by generally inexperienced politicians and bureaucrats.⁷⁶ Drafting skills have therefore been in short supply.

IV. CONCLUSION

The sudden influx of students back from China changed the look of the capital. . . . Not to mention the interesting condition in which some Chinese young women found themselves and of which some Albanian young men were already aware . . . [as with] those who had been students in the sixties in the Soviet Union⁷⁷

Migration and migration laws shape societies. The processes for reforming migration law differ significantly among three transitional states: China, Kazakhstan, and Albania. In China, the requirements of economic development and an acceptance of a more cooperative role in global society have partially overcome a long tradition of excluding and rigidly controlling foreigners as well as denying citizens the right to leave the country. Migration into and out of the country is certainly much freer than it used to be. The Ministries of Foreign Affairs and Public Order have formally directed all stages of developing China's rudimentary body of migration law. Its purpose has been primarily to facilitate international economic relationships and incidental training and study abroad for Chinese citizens. The Party, however, still controls the process, and foreign influence in developing the law has been minimal.

In Kazakhstan, migration law and policy are closely identified with issues of nation-building, ethnic tensions, and citizenship. The specter of a large Russian minority concentrated in geographically and militarily strategic areas helps explain the strong hands of the President and the Foreign Ministry in fashioning migration laws. Kazakhstani nationality law has been definitive and bilateral agreements with Russia have been instrumental. Like China, its migration law is still quite limited. Unlike

76. *Id.* One is reminded of an observation about post-communist Kazakhstan that "what was so utterly draining and exhausting was the fact that there was no one to take charge; they had to do it themselves." Geyer, *supra* note 31, at 81.

77. Ismail Kadare, *The Concert 377* (Jusuf Vrioni & Barbara Bray trans., 1994).

China, however, Kazakhstan has invited foreign advice in the drafting process and in developing expertise in legislative draftsmanship.

Albania's pattern of reform reflects an eagerness to undertake a radical modernization of its political and economic institutions. The fledgling democracy also harbors fundamental concerns for national stability, the welfare of citizens working elsewhere in Europe, employment for returning workers, and the country's potential to become a refuge for ethnic Albanians fleeing unrest elsewhere in the Balkans. In developing a comprehensive migration law, Albania relied on the Ministry of Labor, Migration, Social Assistance, and Ex-Politically Persecuted, in cooperation with the office of the Prime Minister. The country's elaborate legislative process reflects several factors: not only a determination to democratize decision-making and the primacy of participatory values now that the lid is off, but also a cautious recognition of the vast uncertainties that lie in the path of reform. Despite Albania's anxieties about the future, its commitment to sweeping reform is evident in its decision to draft a comprehensive migration law. Foreign expertise has been particularly instrumental as Albania struggles to accomplish radical political and economic transformations.

Particular agencies and methods to implement and reform migration laws are the products of historical, geographical and political conditions more than managerial science. An examination of just three national processes in transitional states suggests the likelihood that national processes for drafting, enacting and otherwise reforming migration laws diverge sharply from each other. Despite the differences, however, China, Kazakhstan, and Albania share a conviction that well-enforced migration laws help promote national development and protect national security during their transitions to market economies and democracy.

