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CONSTITUTION-MAKING IN EASTERN EUROPE: REBUILDING THE BOAT IN THE OPEN SEA

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CONSTITUTION-MAKING IN EASTERN EUROPE: REBUILDING THE BOAT IN THE OPEN SEA

JON ELSTER

I INTRODUCTION

The present report has two purposes. On the one hand, it aims at enhancing our understanding of the momentous political transitions that are currently taking place in six core countries of Eastern Europe: Bulgaria, The Czech Republic, Hungary, Poland, Romania and Slovakia. (All general references to 'Eastern Europe' are restricted to these countries and to the former Czechoslovakia.) On the other hand, it offers a first step towards the construction of a framework for the analysis of the constitution-making process. I begin with the latter, more general task, and then proceed towards more particular analyses, first of Eastern Europe taken as a whole, and then in some more detail of the Polish case. Although the main topic is constitution-making, I shall inevitably have to touch on various related matters, notably decisions by the Constitutional Courts, party formation, government formation, and electoral laws, which, in most countries, are not enshrined in the constitution. Also, I shall have to discuss the Round Table Talks that were an important pre-constitutional or quasi-constitutional stage in several countries.

I approach these matters neither as a constitutional lawyer nor as a historian, but as a political scientist. The emerging constitutions are well worth studying from the legal point of view. Often, they were put together in a hurry, and contain technical flaws or inconsistencies that call for juridical analysis for which I have no competence. Historians have already started to retrace the process of the downfall of Communism in the various East European countries. As I have only a superficial historical knowledge of the region and do not read any of its

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languages, I could not think of emulating their efforts. However, my focus, just as theirs, is on *process*. I want to understand the mechanisms of constitution-making at a more abstract level, at which general patterns might emerge. Here, the many simultaneous transitions in Eastern Europe offer a gigantic natural experiment. The countries have a number of similar features, and they share both a pre-Communist history and the recent Communist past. (The best survey of the region I know of is Bogdan (1990). He shows compellingly how the histories of the countries in the region have been intertwined with each other for a thousand years or more, creating deep-seated shared memories – especially of conflict and strife.) At the same time, they differ in level of economic development, form of religion, the prevalence of ethnic conflict and many intangible but palpable aspects. This mix of similarities and differences suggests that it might be possible to tease out some causal hypotheses.

Many countries have had their moments of constitution-making. I survey some of them in Part II, with special emphasis on the Federal Convention in Philadelphia 1787 and the *Assemblée Constituante* in Paris 1789–91. However, the situation in Eastern Europe is unique. The countries in the region have to make the transition to constitutional democracy at the same time as they are engaged in three other tasks of daunting difficulty. First, they are committed to a transition to a market economy. Second, they often have to engage in a process of state building or, as it has turned out in several places, of state dismantling. In countries ridden with ethnic conflicts that were artificially restrained by the harsh rule of the Communist Party, the initial hope of integrating different ethnic groups and nationalities has proved to be spurious. Instead, there has been either violent conflict (in the former Yugoslavia) or a peaceful dissolution (in the former Czechoslovakia). Third, many of the countries have found themselves in the throes of violence as they tried to come to terms with the Communist past. Demands for retribution, ‘lustration’ (publicizing the names of collaborators with the former regime) and restitution have taken up much energy that could have been devoted to other, more forward-looking tasks.

The constitution-making process has both influenced and been influenced by each of these tasks. I shall consider them in reverse order, and begin with the interaction between constitutionalism and backward-looking justice. To some extent the constitution itself may have been influenced by the fear of the founders – many of whom have been former Communist officials – of being targeted for retribution. Thus art.41.7 of the Romanian constitution says that ‘Property is presumed to have been acquired legally’, which is an unusual sort of provision. To make sense of it, we might look to a decision made by the Czechoslovak government on 26 September 1991, that in the future successful bidders for state-owned business would have to prove where their money comes from. The measure was intended to block the use of ‘dirty money’ that had been illegally accumulated by members of the former *nomenklatura* or black marketers. There is a presumption of guilt: the government is under no obligation to show that the funds have an illegal pedigree. Instead, citizens will

have to prove that their money is clean. The Romanian clause may have been intended to pre-empt similar measures.

This is, admittedly, a speculative claim for which I have no direct evidence. The influence of constitutional thought on the processes of restitution and retribution is much more important and indisputable. In Hungary, the Constitutional Court has several times struck down laws on restitution and retribution voted by Parliament. In Czechoslovakia, the controversial 'lustration law' was in part struck down by the Federal Constitutional Court in a decision made immediately before the country's break-up. In these cases, the Court has invalidated decisions based on retroactive legislation, collective guilt, or inverse burden of proof. The decisive factor has not been this or that clause of the constitution, but rather the willingness of the courts to take the spirit of constitutionalism seriously.

Consider next the interaction between constitution-making and conflicts between ethnic groups and nationalities. With the exception of Hungary and Poland, such conflicts exist throughout the region. But this statement needs to be qualified. Although Hungary has very few internal minorities, about three million people with Hungarian as their first language live outside the borders of the country. (For a discussion of such 'external minorities' and their impact on the politics of the 'home country' see Elster 1991.) The constitutional expression of these conflicts has been an extended debate over the rights of ethnic minorities and national groupings. In Bulgaria and Romania, the presence of respectively Turkish-Muslim and Hungarian minorities has been a major hurdle in the constitution-making process. The first draft of the Romanian constitution contained an outright ban on ethnically based parties, aimed directly at the Hungarian opposition. In the final version, this provision was eliminated. A clause of this kind was, however, incorporated in the Bulgarian constitution (art.11.4).

In the former Czechoslovakia, the main issue was the organization of the federation rather than individual rights. I have more to say about this question in Part II below. Here, I shall only observe that the pre-existing constitutional set-up, inherited from the Communist period, gave the Slovaks a veto in the making of the new constitution. With the exception of Romania, this reflects a general feature of constitution-making in the region. The process took place within the framework of the existing Communist constitutions, thus effectively giving them a life after death – in fact *only* after death, since they never mattered before the fall of Communism. It is in this sense that the countries in Eastern Europe have been rebuilding their boats in the open sea, to use Otto Neurath's metaphor. They have not been able to seek refuge in a dry dock in which the new constitution could be built with entirely new timber. As we shall see below, the metaphor is also apt in another sense: the constitution-making has been entrusted to the very bodies that are to be regulated by the constitution.

The relation between the political transition to constitutional democracy and the economic transition to a market system is much more intimate and complex. Economic reform and political reform in the formerly Communist countries have

two components each. On the economic side, both price reform and ownership reform are needed. On the political side, both democracy and constitutional guarantees for individual rights are strong desiderata, both in themselves and as prerequisites for economic reform. In a deliberately stark set of propositions, one might argue that the following relations obtain.

(i) To be efficient, ownership reform presupposes price reform. To allow private entrepreneurs in an economy with administered prices would encourage arbitrage, at the expense of productive activities. Also, profit could not be used as an index of efficiency. Since bankruptcies would not necessarily reflect inefficiency, support measures would be introduced and, inevitably, extended to inefficient firms.

(ii) Conversely, to set prices free while relying on bureaucracy-cum-bargaining for the allocation of capital and labour, would blunt the impact of market forces. Prices would not reflect the scarcity of resources but, ultimately, the distribution of political clout.

(iii) Political democracy excludes price reforms, because they make the worst-off very badly off. Free price setting will certainly lead to inflation; if combined with ownership reforms free prices will also create bankruptcies and unemployment; in some countries there might even be starvation. If workers have political influence, through parties or trade unions, they will use it to stop or reverse the process. Even more commonly, populist and sometimes violent mass action may be used for this purpose. The argument that hardships are necessary only during the transition and will be no part of the steady-state system that finally emerges, may carry some weight, but perhaps not much, and for not very long.

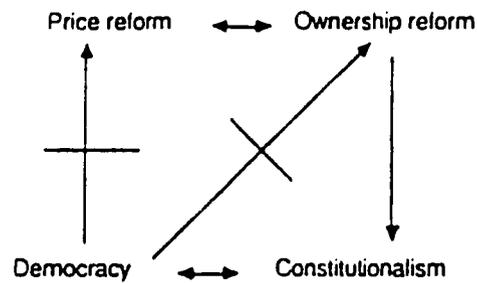
(iv) Ownership reforms are also incompatible with political democracy, because they lead to the best-off being very well off. Private ownership leads to income inequalities that are unacceptable to large segments of the population. In these societies, economic emulation easily degenerates into envy, because of the lack of non-political channels of upwards mobility. By a twist of history, the workers of Eastern Europe now brandish the egalitarian ideology as a weapon against the regime itself. In doing so, they find natural allies among the conservative bureaucratic forces who want nothing more than the failure of the reforms.

(v) Ownership reforms demand legal stability and constitutional guarantees. To ensure that the economic agents are willing to make investments that take time before coming to fruition, property rights must be respected, and retroactive legislation – notably retroactive taxation – made impossible. The absence of a stable legal system will induce a very short time horizon in the economic agents. Foreign investments will be hard to attract unless there are credible guarantees against confiscation and nationalization.

(vi) Credible constitutional rights presuppose democracy. This proposition might appear to be vulnerable. Constitutional monarchy, after all, worked in a fashion; why not a constitutional dictatorship? The difficulty is that the strength

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FIGURE 1



of the dictator is also his weakness: he is *unable to make himself unable* to interfere with the legal system whenever it seems expedient (Elster 1989, pp. 199–200). Constitutional monarchies were kept in line by strong intermediary bodies, whereas in modern dictatorships the society is largely atomistic. Power must be divided to ensure that the constitution will be respected.

(vii) Conversely, democracy without constitutional constraints is ultimately impotent: it can make decisions, but not make itself stick to them. Even if individual preferences do not change, turnover among citizens and their representatives makes simple majority rule vulnerable to unstable oscillations between 51 per cent and 49 per cent. Also, preferences often do change for no good reason, in the heat of passion or under the influence of demagoguery. (See Part II below).

These relationships can be summarized in a diagram. Here an arrow from x to y means that x , to be effective, requires y . A blocked arrow means that x is an obstacle to y .

If these premises are true, full scale reform is impossible. Given the direction of the causal arrows, political reform without a transition to competitive markets might appear to be possible. In the long run, however, democracy will be undermined if it cannot deliver the goods in the economic sphere. Calls for an authoritarian regime will be made, and ultimately heard.

To be sure, all of these propositions (except perhaps the first) might be questioned. Concerning proposition (ii), South Korea might be cited as a counter example. Concerning proposition (iii), we might ask whether economic and institutional mechanisms might not be capable of extending the period by encouraging and 'subsidizing patience', or trust in the future. Western credit, a well-designed safety net of social security arrangements, and the emergence of charismatic leaders offer alternative solutions to this problem. Concerning proposition (iv), Hirschman's (1973) 'tunnel effect' might seem to provide a way out. Concerning proposition (v), Taiwan has been said to provide a counter example. Concerning proposition (vi), Pinochet's Chile is sometimes cited as a counter example. Concerning proposition (vii), the danger of populist demagoguery may to some extent be checked by strong 'intermediary' institutions, such as the church, trade unions, political parties and local governments. The purpose of the argument, therefore, is not to make a strong case for the impossibility

of the transition, but to identify critical connections that must be broken if the dual process of transition is to succeed.

As I have tried to indicate, the stakes are high in the constitution-making process in Eastern Europe. To be sure, even the best-designed constitution cannot by itself ensure a constructive, forward-looking attitude, ethnic peace and economic prosperity. Constitutional remedies cannot by themselves eliminate destructive feelings of revenge, ethnic hatred and social envy. Some countries do not need constitutions because they govern themselves by tradition: Great Britain is an example. Other countries do not need them because they are so conflict-ridden or corrupt that a scrap of paper will not be respected by anyone. Some of the countries in Eastern Europe may fall in this category. In my opinion, however, most countries in the region can benefit from a good constitution. In some of them, it might even make a difference between failure and success. However, I am not about to make any predictions in this respect. The dismal record of the social sciences in anticipating recent events ought to induce considerable modesty. Both the fall of Communism and the eruption of ethnic violence came as surprises to the scholarly community. Hence the report is very much an analysis of what has happened, and only marginally an attempt to say what will or may happen.

II: THE STUDY OF CONSTITUTION-MAKING: A GENERAL FRAMEWORK

In Eastern Europe we are witnessing a wave of constitution-making. It is by no means the first such wave. At the end of the eighteenth century, new constitutions were written in the United States, France and Poland. Other such waves have occurred in the wake of the revolutionary movement of 1848 (Tocqueville's *Recollections* contains a penetrating study of the French constitutional assembly of that year), the creation of new states after World War I, the collapse of fascist regimes after World War II (Merkl 1963), the liberation of African and Asian states from colonial rule, and the fall of the South European dictatorships in the mid-1970s (Bonime-Blanc 1987). In addition, of course, numerous countries have adopted their constitutions in a less synchronized manner. Nevertheless, the comparative study of constitution-making is virtually non-existent. Comparative constitutional law is, needless to say, an established discipline. The comparative study of ordinary law making is a central field of political science. The comparative study of revolutions has a long history. But to my knowledge there is not a single book or even article discussing the process of constitution-making in a general comparative perspective. The gap is puzzling, but it appears to be undeniable. In Part II, I shall propose some distinctions and suggest some causal mechanisms that may serve to impose a little bit of structure on this uncharted terrain.

1. Elements of the constitution

Although my main concern is with the process of constitution-making, analysis of that issue requires a brief preliminary discussion of constitutional substance.

Although the issues covered in constitutional documents vary widely, all include three main topics: individual rights, the machinery of government, and procedures for amending the constitution. I begin with the latter, because without such procedures the constitution would not differ from statutory legislation. (This is not wholly correct. In New Zealand, 'only ordinary legislative efforts are required to supplement, modify or repeal the Constitution' (Eule 1987, p. 394).) It is supposed to be a constant or slowly evolving framework for the day-to-day enactment of ordinary laws. There are two main reasons why this stability is required. If it is more difficult to pass constitutional amendments than ordinary legislation, citizens can count on the basic institutional framework remaining in place over reasonably long periods. At the very least, a change from 49 per cent to 51 per cent in favour of a given proposal will not suffice to bring it about. This certainty enables the citizens to form long-term plans, which are a condition both for economic growth and for personal security. This is a main reason why many constitutions require qualified majorities for amendments. Often, a two-thirds majority is required. It is a striking fact that under certain, reasonably weak conditions this requirement will also prevent voting cycles from arising (Caplin and Nalebuff 1988).

There is another way, with a different rationale, of making the amendment process more difficult. Instead of (or in addition to) requiring qualified majorities, one can demand that the amendment be passed by two successive Parliaments or adopt some other delaying device. If the founders fear that they or their successors might yield to impulse and passion in a crisis, they might, like Ulysses binding himself to the mast, take their precautions to reduce their opportunities for such behaviour. 'Constitutions are chains with which men bind themselves in their sane moments that they may not die by a suicidal hand in the day of their frenzy' (John Potter Stockton in debates over the Ku Klux Klan Act of 1871, as cited in Finn 1991, p. 5; Elster 1984, ch. II; Holmes 1988; Elster 1988; Suber 1990.) Or in Friedrich Hayek's phrase, constitutions reflect the idea that Peter when sober can act to bind Peter when drunk. At the Federal Convention, for instance, a ban on paper money was constitutionalized, to prevent the states from resorting to this tempting expedient.

A majority may indeed take precautions against its own tendency to act on unwise momentary impulses. It is less realistic to expect it to protect itself against its tendency to act on *standing* passions. Prejudiced founders will not regard their views as biased, but as wise. On the one hand, Cass Sunstein may well be right in observing that 'Constitutional provisions should be designed to work against precisely those aspects of a country's culture and tradition that are likely to produce most harm through that country's ordinary political processes' (Sunstein 1991, pp. 385). In societies with strong ethnic or religious conflicts, for instance, the constitution should offer strong protections to ethnic and religious minorities. On the other hand, it is precisely in the societies that most need such clauses that it may be most difficult to get them adopted. An ethnic or ideological majority in the constituent assembly may be more inclined to impose its own language or ideology than to pull its punches in the name of toleration.

The process that led up to the adoption of the 1931 Spanish constitution, for instance, was dominated by leftists and liberals who could and did write their hostile attitude towards the Catholic Church into the document (Bonime-Blanc 1987, pp. 114–15).

The problem can be overcome in three ways. First, if the founders are animated by toleration, they might refrain from using their majority power. As in the adoption of the German constitution of 1949, they might search for a high degree of consensus on the main provisions (Merkl 1963, p. 81). Second, if the majority in the constituent assembly represents a minority in the nation, as was the case in the two eighteenth-century assemblies, it can try to bind the popular majority. The late Norwegian historian Jens Arup Seip, with whom I had many discussions of these issues, often said that people never try to bind themselves: rather, politics is about binding others. Although I do not accept the claim in this stark form, it offers a salutary counterweight to more idealized or idyllicizing accounts. One may, for instance, detect an element of hypocrisy (Wood 1969, p. 562) in assertions like Madison's statement (*Records of the Federal Convention* 1966, p. 430) that 'Democratic communities may be unsteady, and be led to action by the impulse of the moment. – Like individuals they may be sensible of their own weakness, and may desire the counsels and checks of *friends* to guard them against the turbulence and violence of unruly passion' (my italics). It seems at least as plausible to say that the Senate embodied the desire of the upper class to protect itself against the lower class – not the desire of the people to protect itself against itself. However, the two views are not incompatible. On similar grounds it has been argued that 'A majority group, say the workers, who control the policy might rationally choose to have a constitution which limits their power, say, to expropriate the wealth of the capitalist class' (Kyland and Prescott 1977, p. 486). Third, if the constitution is made under foreign tutelage, as in Germany and Japan after World War II, the foreign powers can try to contain 'those aspects of a country's culture and tradition that are likely to produce most harm'. For example, the French Foreign Minister spoke out against what he saw as a dangerous centralizing tendency in the third draft of the 1949 West German constitution (Merkl 1963, p. 120). In general, nevertheless, constitutions are more likely to reflect flaws in national character than to counteract them.

Constitutions regulate the machinery of government: elections and the relation between the powers of state. Traditionally, the latter have been conceived as a trio, consisting of the executive, the legislative and the judiciary. The relations among them have been summarized in two phrases: 'separation of powers' and 'checks and balances'. The separation of powers has both a positive and a negative purpose. As with any division of labour, the allocation of different tasks to different state organs enhances efficiency. For instance, Parliament is not an efficient organ for the day-to-day conduct of war operations. Also, insulating each organ from the encroachment of others reduces the dangers of bribery, corruption and undue interference. The independence of the judiciary, for instance, is promoted by long tenure and fixed salaries of judges, as well as

by random assignment of judges to cases. Checks and balances prevent any institution from usurping power, a system that has reached its highest development in the American constitution, in which the pivotal mechanisms are executive veto, judicial review, presidential appointment of Supreme Court judges and congressional power to impeach the President. Other constitutions use different devices, such as the power of the President to bypass the legislature by calling a referendum or the right of Parliament to overrule the Constitutional Court.

The traditional trio offers a very incomplete idea, however. In the two eighteenth-century assemblies, the three institutions that were supposed to control each other were the executive and the two houses of Parliament. Judicial review played only a minimal role (see Elster forthcoming (1)). In modern constitutions, the bifurcation of the legislature is less common. In its place, we often see a dual executive, in which both President and government have substantial powers, thus competing both with Parliament and with each other. Exceptionally, as in the case of Poland, more fully discussed in Part IV, we observe both a split legislature and a split executive. Adding the Constitutional Court to the cast, we get five players rather than the traditional three.

The idea of powers of state, separate from each other and mutually checking each other, can be taken further. In many countries, the independence of the Central Bank is almost as important as the independence of the judiciary. Although rarely enshrined in the constitution, the independent status of the Bank is protected by the high political costs of interference. Within the executive, the Ministry of Foreign Affairs sometimes achieves a *de facto* independence, 'above' politics, as it were. The idea in both cases is that certain matters have to be conducted in a long-term perspective that requires insulation from day-to-day politics. A similar 'quasi-constitutional' status sometimes obtains for state-owned mass media. On the BBC model, for instance, the government cannot use state television for propaganda or interfere to stifle criticism of its policies. Even private media may, in a still broader sense, be seen as part of the system of checks and balances ('the fourth power of state').

The interval between elections and the right to dissolve Parliament and call for new elections are usually matters for constitutional regulation. However, as I said, the electoral law, including rules for redistricting or changes in the number of deputies, is usually not made part of the constitution. When electoral laws or electoral districts can be changed by a simple majority in Parliament, the incumbent government has an incentive to modify them to its advantage. The argument can be made, therefore, that electoral laws have such a fundamental impact on politics that they ought to be constitutionalized. More generally, the constitution can try to deny the government all unfair means to maintain itself in power. These include discretionary control over the timing of the elections, control of electoral laws and electoral districts, registration requirement for voters, and control over the state-owned media. And even when the constitution does not contain explicit provisions to this effect, judicial review, where it exists, may regulate these issues by appealing to more general constitutional principles.

The protection of rights has been a central constitutional concern from the eighteenth-century beginnings. True, at the Federal Convention the framers decided against including a bill of rights in the constitution, but mainly because they were afraid that an enumeration of specific rights might provide a justification for governmental violation of unenumerated rights. Few years afterwards, the first nine amendments were enacted to fill the gap. At the *Assemblée Constituante*, too, voices were heard against adopting the *Déclaration des droits de l'homme*, but for the opposite, more ominous reason that it might give the people exaggerated ideas about their rights. These arguments were, as we know, not heeded. In virtually all later constitutions, rights have been included as a matter of course.

There is no canonical way of classifying constitutional rights. They have been distinguished as political, civil, social and economic; as pertaining to individuals or to groups, as offering protection against the state or against individuals; as legally enforceable or merely programmatic; or, by a more obscure criterion, as negative or positive. Historically, the core rights were those protecting the rule of law, liberty of conscience, freedom of expression and of association, property, and personal security. In this century rights have expanded in two main directions. On the one hand, constitutions have offered protection to members of ethnic and linguistic minorities, by allowing them the right to use and be educated in their own language and ensuring them a measure of political autonomy or at least representation. On the other hand, they have offered a guarantee of material welfare, through right-to-work provisions and related measures. As we shall see in Part III, both extensions are important in Eastern Europe.

2 The constitution-making process

The remainder of this section is concerned with constitutional process rather than substance. I shall address the following questions:

- how are the constituent assemblies called into being?
- how do they regulate their own internal procedures?
- how do individual interest, group interest or institutional interest shape the final document?
- what is the importance of extra-constitutional force in shaping the constitutional text?
- how are the constitutions ratified?

The common concern underlying these issues is that of legitimacy. First, there is a problem of *upstream legitimacy*: the document produced by a constituent assembly can only enjoy legitimacy if that assembly has come into being in a legitimate way. An assembly whose members have simply been appointed by the ruler, as was the case with the body of 66 men convened in China by Yuan Shikai in 1914 to give his rule a semblance of legality through a 'constitutional compact', does not pass this hurdle. Second, there is a problem of *process legitimacy*. If the internal decision-making procedure of the assembly is perceived

as undemocratic, the document may be lacking in democratic legitimacy. Constituent assemblies for federally organized countries face the choice between 'one state, one vote' and proportional voting power. The Federal Convention in 1787 chose the former method, whereas the assembly that voted the West German constitution of 1949 used the latter. I conjecture that in our century, the principle of equality among the states would be seen as deficient in democratic legitimacy. Also, a constitution will lack legitimacy to the extent that it is perceived to be a mere bargain among interest groups rather than the outcome of rational argument about the common good. Moreover, a constitution that is visibly shaped by military force or threat of such force may suffer a lack of legitimacy. Finally, there is the issue of *downstream legitimacy*: a constitution that is ratified by popular vote will have much stronger claims to embody the popular will.

Consider first the creation of the constituent assembly. First, the assembly has to be convoked. Next, the delegates have to be elected or selected. Typically, these two decisions stem from different sources. In France in 1789, the decision to call the Estates General was made by the King, with delegates elected by and from the three orders. The Federal Convention was called into being by the Continental Congress, with delegates sent from the individual states. The assembly that wrote the West German constitution of 1948 was called into being by the occupying powers, with delegates elected by the *Länder*. Now, we may regard it as axiomatic that any creator will try to control his creature. With two creators of the constituent assembly, each will try to shape the final document. In France, defenders of the King argued that as the convener of the Estates General, he should have an absolute veto *over* the constitution and *in* the constitution. The assemblies that had selected delegates from the three orders often sent them with bound mandates on specific points. In both cases, the creature won out over the creator (Harris 1986; Egret 1950).

The victory over the convoking authority should not surprise us. Almost by definition, the old regime is part of the problem that a constituent assembly has to solve. But if the regime is flawed, why should the assembly respect its instructions? At the Federal Convention, too, the delegates decided to go beyond their mandate; to provide a wholly new constitution rather than simply a revision of the Articles of Confederation. By contrast, the decision of the French delegates to ignore the instructions from their constituencies had no parallel in Philadelphia. The delegates that came to the Federal Convention with bound mandates, such as the Delaware instructions to insist on equal representation for all the states in the Senate, did not feel free to ignore them. The American delegates did not go as far as the French in substituting process legitimacy for upstream (and downstream) legitimacy.

Consider next the internal organization of the assembly. The most urgent issues arise when the delegates come from 'natural' sub-units of the nation. The smaller of these will then tend to claim equal voting power in the assembly, whereas the larger will insist on a voting system that reflects the numerical strength of their constituencies. I have already mentioned how the Americans

in 1787 and the Germans in 1948–9 adopted different solutions to the problem of territorial sub-units of different sizes. The French framers of 1789 faced a different problem: the division of the Estates General in three orders of different size (300 delegates for each of the Nobility and Clergy, 600 for the Third Estate). When the Estates first met in May, they spent six weeks debating whether they should vote by order or by head. These debates, which transformed the Estates General into a National Assembly, provide a striking illustration of the bootstrapping character of many constituent assemblies (*Procès-verbal des conférences sur la vérification des pouvoirs*, Paris 1789). In the end, the advocates of voting per head won out.

The principles of voting adopted by the assembly may survive in the document that it produces. The American case, for instance, involves three stages. In the first stage we have the convocation of the assembly by Congress. In the second stage we have the adoption of a voting procedure to be used at the convention. In the third stage we have the adoption of a voting procedure for the future Senate. *In all three stages, the principle 'one state, one vote' was followed.* It is tempting to read a causal connection into this fact. The convention adopted the principle for its own proceedings because it was used by the institution that had called it into being. And it proposed the principle for the future because the smaller states at the Convention benefited from the disproportionate strength which they derived from its use at that stage. However, the German case does not show the same continuity. Although the assembly voted along proportional lines, the representation of the *Länder* in the Bundesrat (the upper house) falls somewhere between equal and proportional representation.

Procedure can also matter in a number of other ways. In the *Assemblée Constituante*, it soon became clear that the radicals benefited from roll-call votes, which enabled them to note the names of those who voted against radical measures and to circulate lists of their names in Paris (Egret 1950, p. 132). (A similar phenomenon was observed in the debates of the Polish *Sejm* over the electoral laws in July 1991. The *Sejm* failed to overrule Waïesa's veto because, in an excess of self-confidence, the caucus leader of the Democratic Left called for a roll-call vote. However, 'deputies preferred to be anonymous when voting against the President' (McQuaid 1991, p. 17).) For related reasons, the radicals demanded and obtained more publicity around the proceedings than the moderates wanted. Mounier, leader of the moderates, preferred committee debates, which favoured 'cool reason and experience' and detached the members from everything that could stimulate their vanity and fear of disapproval. For the patriot Bouche, committees tended to weaken the revolutionary fervour. He preferred the large assemblies open to the public, where 'souls become strong and electrified, and where names, ranks and distinctions count for nothing'. On his proposal, it was decided that the assembly would sit in plenum each morning and meet in committee in the afternoon. Soon there were only plenary sessions. At the Federal Convention, by contrast, there was no publicity. The delegates were sworn to secrecy and kept it.

The choice of open versus closed proceedings has two consequences, more fully discussed below (see also Elster forthcoming (2)). On the one hand, a public setting makes it less likely that the delegates will resort to open logrolling and horsetrading. Instead, they have to argue in terms of the common good (Macey 1986). Although many such arguments are little more than disguised self-interest, the need to pay at least lip-service to the public interest will usually have some restraining influence. On the other hand, publicity encourages the delegates to adopt rigid, inflexible positions as a precommitment device. It is also more difficult to back down from publicly stated views than from those expressed in a smaller circle. This was, in fact, Madison's main argument for keeping the Convention closed. As he said later,

had the members committed themselves publicly at first, they would have afterwards supposed consistency required them to maintain their ground, whereas by secret discussion no man felt himself obliged to retain his opinions any longer than he was satisfied of their propriety and truth, and was open to the force of argument (*Records*, vol. III, p. 479).

However, Madison did not consider the first effect of secrecy – that of pushing the debates away from rational argument and towards self-interested bargaining. Nor did he consider that secrecy may lead to a loss of legitimacy. During the Meech Lake talks on the revision of the Canadian constitution in 1987, Prime Minister Mulroney, who had convened the Premiers of the ten provinces, deliberately kept them insulated from their advisers. 'Without advisers, there would be less posturing and grandstanding; it would be easier to get a deal. But, as a consequence, this lakeside conclave took on an aura of secretiveness that would afterwards undermine its public legitimacy' (A. Cohen 1990, p. 13). Thomas Jefferson made a similar comment about the secrecy adopted at the Federal Convention.

The role of *interest* in constituent assemblies may be considered from four perspectives. First, there is the purely personal interest of the founders in a constitution that favours them economically or otherwise. In Charles Beard's 'economic' interpretation of the American constitution, this element assumes the main explanatory burden. In more recent analyses it appears that the founders' economic interest did count for something, but that the interest of their constituents does more to explain the voting patterns at the convention (McGuire 1988). Crudely put: it mattered more whether a delegate came from a slave holding or trading state than whether he had slaves or was a trader himself. However, the correlation between interest and votes does not prove that the delegates voted solely in order to promote that interest. Even the most impartial framer had to take account of the need for the final document to be ratified in the respective states, and that a text strongly against the interest of their constituents stood no chance of being adopted. If the interests of constituencies act as constraints rather than maximands, they will leave less of an imprint on the constitution. The constituencies will tend to act as satisficers, because of the cost of going back to a new assembly and the uncertainty whether

they could strike a better deal if they did. This being said, it may also be in the personal interest of delegates to promote the interest of their constituencies to the hilt, for instance if their political future depends on how well they do so.

In modern constitution-making, two other phenomena come to the forefront: the interest of political parties and of political institutions. The former interest is especially evident in the design of electoral laws, whether these are part of the constitution or not. Small parties tend to be in favour of proportional representation, preferably with a low threshold (if any), whereas large parties argue for majority voting in single-member districts. Cutting across this distinction, the power oligopolies of *all* parties have an interest in proportional representation, which allows for greater control over the candidates (Merkl 1963, pp. 87–8). A party that has a strong presidential candidate will push for a strong presidency in the constitution, whereas others will want to limit his powers. A classical case is the 1921 Polish constitution, in which the fear of Pilsudski as President inspired a strongly parliamentary constitution; as a result, Pilsudski decided not to stand for office (Garlicki 1992, pp. 68–71). The converse case is the constitution of the Fifth French Republic, which de Gaulle essentially wrote (or had written) with himself in mind (Dwerfler 1983, ch.9).

The interest of political institutions appears most clearly when the institutions to be regulated by the constitution also take part in the constitution-making process. At the Federal Convention, for example, the states were both creators and creatures – regulators and regulated. As already mentioned, the conflict over the upper house faithfully mirrored the nature of the actors, with the small states arguing for equal and the larger for proportional representation of the states in the Senate (Rakove 1987). This conflict was largely spurious. To the argument that the large states might come to dominate the small, Madison gave a compelling answer: 'Was a Combination to be apprehended from the mere circumstance of equality of size?' (*Records*, vol. I, pp. 447–8). Yet the notion of equality provided a convenient vehicle for the self-interest of the small states (see below).

Unlike the Federal Convention, the *Assemblée Constituante* functioned also as an ordinary legislature. That arrangement, however, may be undesirable. A main task of a constituent assembly is to strike the proper balance of power between the legislative and the executive branches of government. To assign that task to an assembly that also serves as a legislative body would be to ask it to act as judge in its own cause. A constitution written by a legislative assembly may be expected to give large, perhaps excessive powers to the legislature. In the abstract, this problem could be solved by means similar to the ones used in legislative bodies, by checks and balances. A royal veto over the constitution might, for instance, have kept the legislative tendency to self-aggrandizement in check. The *Assemblée Constituante* adopted another solution, by voting its members ineligible to the first ordinary legislature. It was Robespierre in his first great speech (16 May 1791) who won the assembly for this 'self-denying ordinance' (Thomson 1988, p. 134 ff.). Although sometimes

redistributive, the assembly's interest bias was a clear and strong force to add weight to the

viewed by posterity as a disastrous piece of populist overkill (Furet 1988, p. 104), Robespierre's solution did correspond to a genuine problem. Similarly, if the constituent assembly is bicameral, it can hardly be expected to adopt a unicameral system. If the King or the President has a veto over the constitution, it is likely to have a bias towards the executive, or at least to be more balanced than if Parliament is the only constituent power.

I need to add a caveat to the preceding considerations. Although interest may be an important motivation in most constituent assemblies, it will not always dare to speak its name. Especially when the process is under strong scrutiny from the public, the parties will feel constrained to present their argument in terms of the common good or the public interest. Self-interest, in other words, may induce the speakers to adopt non-self-interested language (Elster forthcoming (2)). At the Federal Convention, both small and large states used the language of abstract justice and efficiency to argue their claims for, respectively, equal and proportional representation in the Senate. Similarly, small parties, when arguing for proportional voting, appeal to democratic values rather than to the interest of small parties. Conversely, large parties tend to rest their case for majority voting on the claim that it is more likely to produce a stable government. Equity in the former case, efficiency in the latter, are put forward as impartial disguises for partiality. Similarly, when deputies argue for a strong legislative, they appeal to the need to respect and embody the popular will and not to their institutional interest. Conversely, when the executive power is involved in the constitution-making process, its representatives will argue for a strong executive on the seemingly non-self-serving grounds of stability and efficiency.

As I said, the pressure to disguise self-interest as public interest will be stronger when the process is under public scrutiny. One might wonder whether the disguise matters. Given the large pantheon of plausible-sounding impartial values, it might seem that any actor would be able to find a public-interest justification that coincides with his private interest. Three considerations tend to mitigate this conclusion. First, some private interests probably do not have *any* plausible impartial equivalent. Second, a *perfect* match between an obvious private interest and an impartial equivalent will often be perceived as too crude to be taken seriously. Third, even if an actor could find an impartial argument that might advance his interest in a given situation, he may be prevented from using it by the stand he has taken on previous occasions. These arguments suggest the idea of the *civilizing force of hypocrisy*: when discussing under public scrutiny, actors may be forced or induced to pull their punches and refrain from the most blatant expressions of self-interest. Against this positive effect of publicity, we must balance a number of negative effects: the opportunity for strategic precommitment, vanity-induced reluctance to back down; as well as the irreversibility of publicly stated positions. Here are three examples of the irreversibility effect.

(i) The announcement of the radical measures taken on the night of 4 August

1789 made it impossible to go back. In a wonderful contemporary phrase: 'The people are penetrated by the benefits they have been promised: they will not let themselves be de-penetrated' (A. Mathiez 1898, p. 265, n.4).

(ii) Before the insurrection of June 1848, and apprehensive of its coming, Tocqueville felt that 'what was needed was not so much a good constitution as some constitution or other' (1986, p. 826). (The sentence is inexplicably omitted in the English translation (1990).) Acting under time pressure, he was 'much more concerned with putting a powerful leader quickly at the head of the Republic than with drafting a perfect republican constitution' (1990, p. 178). After the June days he stood by his proposal, but now for the reason that 'having announced to the nation that this ardently desired right would be granted, it was no longer possible to refuse it' (ibid.).

(iii) In the Lake Meech talks, Gil Rémillard, Quebec's Minister for Intergovernmental Affairs, 'did not want to negotiate in public. Whatever became public would become the bottom line. Quebec was accommodating in private talks but worried it would have less latitude if its proposals got out. The Parti Québécois would make them an absolute minimum, limiting the government's ability to negotiate' (Cohen 1990, p. 87).

The main way in which self-interest plays itself out is by the process of small-group *logrolling*, in the assembly as a whole if it is sufficiently small, in subcommittees, or outside the assembly. The Federal Convention was marked by a number of such bargains, the best-known being the logrolling between the trading and the slave holding states (Finkelman 1987, pp. 188–225). In the *Assemblée Constituante*, a famous piece of attempted logrolling took place in the last days of August 1789, when the assembly was about to debate the basic institutions of the state (Mounier 1989; Mathiez 1898, p. 266 ff.; Egret 1950, p. 139 ff.). In three meetings between Mounier on the one hand and the 'triumvirate' Barnave, Duport and Alexandre Lameth on the other, the three came up with the following proposal. They would offer Mounier both an absolute veto for the King and bicameralism, if he in return would accept (i) that the King gave up his right to dissolve the assembly, (ii) that the upper chamber would have a suspensive veto only; and (iii) that there would be periodical conventions for the revision of the constitution. Mounier refused outright. According to his own account, he did not think it right to make concessions on a matter of principle; also he may have been in doubt about the ability of the three to deliver on their promise. According to Albert Mathiez, he refused because he was so confident that the assembly was on his side that no concessions were needed.

Logrolling in the constituent assembly usually differs from that in a legislative assembly in two respects. First, there is no indefinitely continuing interaction that can force the parties to stick to their promises through fear of losing their reputation (North 1990, pp. 190–91). Second, voting on the separate issues that are being traded off against each other is not really separate and successive, because the assembly usually concludes its task by adopting the constitution as a whole. In theory the two differences should offset each other, but in practice

they may not. As the assembly and its committees work their way through the issues, compromises may be reached that are hard to undo later even should one of the parties renege on their promises. Diamond 1981, summarizes the process as follows: 'complex political struggles often come down to a single issue in which all the passions, all the forces find their focus. When that single issue is settled it is as if all the passions and forces are spent. Both sides seem somehow obliged fully to accept the outcome and matters move quickly thereafter.' This emotional dynamic will be an obstacle to going back to an issue if some more or less clearly stated promise fails to be kept. One party may act on the calculation that the other will be unwilling to be seen as responsible for breaking off negotiations, or that the other has more to lose by having to start all over again. In the West German assembly of 1948, 'the Minister President of Bavaria . . . persuaded the SPD to vote for [the institution of] a *Bundesrat* in exchange for a momentary advantage and concessions which were subsequently all but abandoned' (Merkl 1963, p. 69). During the debates over the Spanish constitution in 1978, the Union of the Democratic Center was accused 'of breaking a painstakingly negotiated set of compromises', leading to the withdrawal of the Socialist member on the subcommittee (Bonime-Blanc, 1987, p. 56). Tadeusz Mazowiecki (personal communication) tells about an episode in the making of the Polish 'little constitution', in which a logrolling promise was broken by one side when the proposal for which it had enlisted the support of the other side failed to be adopted, even though the other side had voted for it.

Constitutions are often written in times of crisis and turbulence. In such circumstances, armies, crowds and foreign powers can become potent influences on the work of the constituent assembly. We may distinguish between two kinds of mechanisms by which these influences play themselves out, *threats* and *warnings*. The terminology on this point is not settled. Greenawalt 1989, p. 251 ff. refers to 'warning threats', as if an utterance could be both a threat and a warning. T.C. Schelling (1960, p. 123, n.5) and R. Nozick (1969) use the distinction between warning and threat to differentiate between cases in which the actor has an incentive to carry out the announced action and those in which he does not. To tell a burglar that I will call the police unless he goes away is to warn him; to tell a girl that I will commit suicide if she does not consent to marry me is to make a threat. In the present essay, the distinction is used to contrast the outcomes that are within the control of the agent and those that are not. On the one hand, a member of the constituent assembly or some other actor may threaten to mobilize extra-constitutional forces unless a certain provision is written into the constitution. On the other hand, he may issue a warning that intervention by such forces is likely unless the provision is adopted. Explicit instances of the former strategy are rare, because of the obvious de-legitimizing effect of any resort to force. Implicit threats, disguised as warnings, are more common. In Philadelphia in 1787, delegates from both the large and the small states emitted statements that were close to threats, only to retreat and restate them as warnings when challenged. Bedford, a delegate from Delaware, suggested that if the small states did not get their way over

the Senate, they might appeal to foreign powers for help. Later, he retracted by saying that he had only meant to say that the foreign powers, faced with a divided America, would find it in their interest to intervene (*Records*, vol. I, pp. 492, 531). Similar tactics were employed by delegates from the large states.

In Paris, the threats and warnings were based on the King's armies and the crowds in Paris. In the first days of July 1789 the King reinforced the presence of troops near Versailles. The implied threat to the assembly escaped nobody. In his replies to the King's challenge, Mirabeau played on the threat-warning ambiguity. In his first speech on the subject he limited himself to a warning: 'How could the people not become upset when their only remaining hope [viz. the Assembly] is in danger?' (*Archives Parlementaires. Série I: 1789-1799*, Paris 1875-1888, vol. 8, p. 209.) In his second speech he became more specific. The troops 'may forget that they are soldiers by contract, and remember that by nature they are men' (ibid., p. 213). The implied threat to help nature along by stirring fermentation among the troops is clear. We may note at this point the possibility of *self-fulfilling warnings*, which are, in this respect, intermediate between ordinary warnings and threats. By publicly telling the King that his troops were unreliable, Mirabeau may in fact have ensured the truth of that statement. Furthermore, the assembly cannot even trust itself to act responsibly: 'Passionate movements are contagious: we are only men (*nous ne sommes que des hommes*) our fear of appearing to be weak may carry us too far in the opposite direction' (op. cit., p. 213). In this argument, Mirabeau presents himself and his fellow delegates as subject to a psychic causality not within their own control. If the King provokes them, they might respond irrationally and violently. Formally, this is a mere warning. In reality, nobody could ignore that it was a threat.

Finally, I turn to the main source of downstream legitimacy: the process of ratification. Often, those who have called the constituent assembly into being want to arrogate for themselves the power to ratify the final document. The assembly frequently reacts by questioning the legitimacy of its conveners and either dispensing with any further ratification or choosing itself the procedure for ratifying the constitution. The Federal Convention took the latter course. Instead of taking the constitution to the state legislatures which had selected them, the delegates decided to have the constitution ratified by specially called conventions in the states. In that way, of course, they were much less constrained by the need to give the state legislatures a prominent place in the new system. In Germany in 1949, the procedures were modified in the opposite direction. The occupying powers had stipulated that the constitution, to be valid, had to be approved by referendum in two thirds of the *Länder*. The framers, however, managed to change the procedure so that approval by two-thirds of the state legislatures would be sufficient. In the *Assemblée Constituante*, by contrast, the deputies essentially decided to dispense with all ratification procedures. They viewed themselves as the incarnation of the nation, with no need for further approval.

III: CONSTITUTION-MAKING IN EASTERN EUROPE: AN OVERVIEW*

In Part III and the following I shall develop some of the ideas stated above by applying them to the constitution-making processes in post-1989 Central and Eastern Europe. The present section is a broad overview both of the processes and their outcomes in the whole region, with more emphasis, perhaps, on the latter. In Part IV, on the constitutional developments in Poland, the priority is reversed, with a focus on process rather than outcomes. For purposes of comparative analysis, there are also brief references to Poland in the present section.

The constitution-making process in Central and Eastern Europe has two stages. The first was the Round Table Talks (RTT) that brought about the transition from Communism in Poland, Hungary, Bulgaria, and Czechoslovakia. Such talks also took place in the former East Germany (see U.K. Preuss; U. Thaysen 1990). Among the countries studied here, only Romania, with its totalitarian oppression and violent transition, did not have RTT. In all the talks, the agreement between the regime and the opposition included changes to the constitution – changes which were then rapidly implemented by the Communist Parliaments. The second stage is the regular constitution-making process by wholly or partially post-Communist Parliaments and, in some cases, other powers of state. Although the RTT lacked some of the normal features of a constituent assembly, they are included here *qua* constitution-making bodies based on adversarial discussion and compromise. In any case, they would have to be discussed because of their great influence on the second stage.

A brief chronological survey may be useful. In Hungary, the constitution was amended piecemeal over the autumn of 1989 and the spring of 1990. The first free elections took place in March and April 1990. Similar *ad hoc* adjustments were made in the other constitutions in the region, in the interval between the fall of Communism and the adoption of wholly new constitutions. In Romania, the downfall of Ceausescu led to the election of a constituent assembly in May 1990 and the adoption of the constitution by referendum in December 1991. In Bulgaria, the elections to the Grand National Assembly were held in June 1990, and the constitution adopted in July 1991. In Poland, partially free elections were held in June 1989. The first fully free elections were held in October 1991. In November 1992, Parliament passed the so-called 'little constitution' that regulates elections and the basic machinery of government; at the same time, the 1952 Stalinist constitution was solemnly abolished. In Czechoslovakia the first free elections took place in June 1990. The new federal legislature passed a bill of rights for the Federal Republic, but no constitution was adopted. With the breakup of the country, Slovakia adopted its new constitution in September

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1992, with the Czech Republic following suit in December. Thus with the partial exception of Poland, the constitution-making process has come to a halt, or at least a pause, in all the countries under study. Thus now seems to be a good time to take stock.

1 The Round Table Talks

The RTT were an integral part of the events that destroyed the Communist regimes in Eastern Europe. Roughly speaking, the order in which the dominoes fell corresponds to the degree of oppression under Communism: Poland, Hungary, East Germany, Czechoslovakia, Bulgaria, Romania. In Poland, Hungary and Bulgaria, the RTT involved genuine bargaining, which was instrumental in shaping the new regime that emerged. In Czechoslovakia and especially in East Germany, they mainly amounted to a unilateral imposition of the opposition's demands on a demoralized regime.

The Polish and Hungarian RTT were roughly simultaneous (February–April and March–September 1989, respectively) and roughly independent of each other. The underlying causes were, in both cases, the disastrous economic performance of the regime, and the need to introduce a modicum of democracy in exchange for social peace and foreign aid. Yet the pace and the details of events differed. Lagging somewhat behind the Poles, the Hungarian opposition were able to learn from events in Poland. In particular, the Polish June elections, with disastrous results for the Communist candidates, had a profoundly demoralizing effect on the Communist Parties throughout the region. Hence one reason why the Hungarian opposition got a better agreement than Solidarity may have been that its bargaining power had been much enhanced by the surprising victory of Solidarity. (But there may have been other, perhaps more important reasons as well. See Bruszt and Stark 1991, p. 34 ff.) Also, the fact that the Polish RTT and elections took place without any interference or threat of interference by the Soviet Union, must have strengthened the will of the Hungarian opposition. Conversely, Poland may have suffered 'the penalty for taking the lead'. Because they were the first to achieve a compromise with the Communist regime, they were saddled with a stronger and more enduring Communist element in the post-RTT political structure.

These snowball effects became even more important in the autumn, as the revolution spread to other countries. The triggering event may have been Gorbachev's statement on 7 October, during the celebrations of the fortieth anniversary of the German Democratic Republic, that 'Whoever comes late will be punished by life itself.' Then, subsequent weeks saw ever larger rallies in the streets of Leipzig and other cities, until the regime caved in on 19 November. (For a stylized account of the dynamics of such 'intra-country snowballing', see Elster 1993, pp. 15–24. The dynamics of 'inter-country snowballing' is rather different. In Eastern Europe in 1989, the most important mechanism was probably the process of Bayesian learning by which observed non-intervention by the Soviet Union in one country changed the subjective belief that it would intervene in the next.) The RTT began on 7 December. On 17 November there were

demonstrations in Prague, inspired by events in East Germany, which brought down *that* regime a week later. Here, the RTT began almost immediately, on 26 November. In Bulgaria, the opening of the Berlin wall triggered action by the Politburo to dismiss General Secretary Todor Zivkov on 9 November. His resignation set in motion a chain of events, culminating with the beginning of RTT on 3 January 1990. In the meantime, the violent fall of Communism in Romania had taken place, thus further weakening the position of the regime.

In Poland, Hungary and Bulgaria, the compromises of the RTT included an agreement on wholly or partially free elections. As further explained in Part IV, the Polish agreement was that 65 per cent of the seats for the lower house would be left uncontested for the Communists, whereas there would be free, competitive elections for the remaining 35 per cent and for all seats in the newly created Senate. In Hungary and Bulgaria, the regime and the opposition had opposed preferences on the issue of proportional versus majoritarian elections. The Communists believed they would do better with majoritarian elections, as they had the more visible candidates. Conversely, the opposition thought they would benefit more from running on a party list. In both countries, the outcome was a compromise: roughly half of the deputies would be elected by the proportional method and half by the majoritarian system. Bulgaria chose a simple system: each voter cast two votes, one for a party list and one for a single district candidate. The more complicated system adopted in Hungary is described in Hibbing and Patterson 1990. The Bulgarian elections showed that the Communists had been right in their calculations. In Hungary, however, they were saved by their opponents' insistence on proportionality. Having 75 per cent of the seats filled in single-member districts, as they had originally proposed, would have hurt them badly (Lijphart 1992, p. 215). Here, as in Poland, both the Communists and the opposition vastly underestimated the lack of electoral support for the regime.

The RTT in these three countries also included a compromise on the Presidency. In Poland, the Communists obtained a strong Presidency, on the understanding that it would be filled by their candidate. After the elections, the opposition kept its side of the bargain, helping Jaruzelski to get elected (in a joint session of the upper and lower house) with the embarrassingly small majority of one vote. In Bulgaria, the opposition obtained a weak Presidency, on the assumption that it would be filled by the Communist candidate. However, President Mladenov had to resign soon after taking power, when it turned out that during the demonstrations in Sofia on 16 December he had said, on camera, 'Let the tanks come'. He was replaced by the leading politician in the opposition, Z. Zhelev. In Hungary, it was also believed that the Communists had the most plausible presidential candidate. The Communists obtained that he be chosen in popular elections before the elections to Parliament, whereas the opposition obtained that he be given relatively few powers. However, some parties in the opposition refused to sign the agreement, and insisted on a referendum on the presidential package. By a narrow margin they obtained that the President be elected after Parliament. When a later referendum (called by the ex-Communists)

for direct elections of the President failed to get the necessary quorum, the final result was the very opposite of the RTT agreement viz. a politician from the opposition elected President by Parliament.

The RTT in Czechoslovakia turned on two main issues: the formation of a coalition government and the renewal of Parliament by recall of the most offensive Communist deputies and their replacement by co-opted members of the opposition (Caldá). In contrast to the other RTT, electoral laws and changes in the constitution were not discussed. Here, too, the opposition underestimated the weakness of the regime, and made several unnecessary concessions with far-reaching consequences. The most important was to give the Communists the Minister of the Interior in the new government, and hence the opportunity to take possession of the secret files. Also, the renewal of Parliament was far from complete, leaving the Communists with substantial power to obstruct the efforts to adopt a new constitution. However, the main obstacle to constitution-making in Czechoslovakia turned out to be the conflict between the two republics. Veto, brinkmanship and escalation by the Slovaks eventually led to the break-up of the country.

The transition in Czechoslovakia illustrates the consequences of a common feature of all the RTT countries, viz. the fact that the transition took place in full legality. As I observed in the Introduction, the post-Communist constitutions were (with the exception of Romania) created in strict conformity with the Communist constitutions – despite the fact that the latter had not been respected by anyone while Communism was in place. In Czechoslovakia, the 1968 Constitution had introduced, for the first time in the history of the country, a federal structure with separate assemblies (National Councils) for the Czech and Slovak lands and with far-reaching powers for the Republics in the Federal Assembly. The amendment rested a dead letter and the National Councils were not even convened. In the post-Communist constitutional debates, however, the strong Slovak autonomy became a major obstacle to constitutional reform. An amendment to the constitution required a 3/5 majority both in the proportionally elected lower house (200 seats) and in each of the two equal-sized Czech and Slovak sections of the upper house (150 seats). Thus, 31 Slovak deputies in the upper house could block any change.

Arendt Lijphart argues that the political dynamics in Eastern Europe can be explained by a generalization of the 'Rokkan hypothesis'. Rokkan had argued that countries in the transition to democracy will adopt a system of proportional representation

through a convergence of pressures from below and from above. The rising working class wanted to lower the threshold of representation in order to gain access to the legislatures, and the most threatened of the old-established parties demanded PR to protect their position against the new waves of mobilized voters created by universal suffrage (Rokkan, cited in Lijphart 1992, p. 108).

Extending this reasoning, Lijphart suggests that three of the arrangements from the RTT were intended to guarantee a political presence for the Communist

nomenklatura as well as for the new opposition. First, as we have seen, there were compromises over the electoral system. Second, because the Communists feared that they would be in a minority in Parliament, they demanded and got the Presidency for their candidate. Third, the bicameral system can be engineered so that the old regime will do well in elections to one house and the new forces in elections to the other. These arguments work quite well for Hungary, Poland and Bulgaria. In Czechoslovakia, however, there was no attempt to create an institutional compromise, only the inherently unstable compromise of the coalition government.

Romania did not have RTT between the regime and the opposition that could set the agenda for the constitution-making process. Instead, the inheritors of the Communist Party, the National Salvation Front, unilaterally laid down the procedures for the election of the constituent assembly. Some debates took place, however, between the Front and the emerging opposition, notably with regard to the timing of the elections (here, as in Bulgaria, the ex-Communist forces wanted early elections so as to take advantage of the lack of organization of the opposition), and the access to television during the electoral campaign. Together with Poland, Romania was the only country that chose to have a bicameral constituent assembly. However, whereas that fact was profoundly important in Poland, it had little significance in Romania – except for ensuring that the Parliament written into the constitution by the assembly would also be bicameral (Hylland).

2 Causal forces in the constitution-making process

The new constitutions in Eastern Europe are the product of the framework created by the RTT (or, in Romania, by the National Salvation Front) and the subsequent elections, together with a number of forces that I shall now go on to discuss.

(i) There is no reason to doubt that many framers have tried hard, and in good faith, to create constitutions that will serve the public interest and protect individual rights. Even though, for the reasons given in Part II, arguments based on private interest will also present themselves in this form, it would be excessively cynical to assume that all impartial arguments are hypocritical. In Part IV below, for instance, I give examples of clearly non-self-interested reasoning in the Polish debates over electoral laws. More generally, if *all* use of rational argument was strategic, there would be nothing to gain from disguising one's interest as being in the public weal. In this sense, strategic uses of argument are parasitic upon non-strategic uses (Elster forthcoming (2)).

(ii) The personal interest of legislators has not, to my knowledge, been a major factor. One possible exception, concerning the presumption in the Romanian constitution that money has been legally acquired, was mentioned in the Introduction. The main case in which such interest has played a major role was in the creation of a Senate in the Czech constitution. It seems that the major function of this body was to provide jobs for the Czech deputies in the dissolved Federal Assembly.

(iii) The interest of the political parties and groupings have played a major role throughout, restricted mainly by the need to offer public-regarding justifications. It has not simply been a question of constitutional logrolling, as at the Federal Convention. Because the constituent assemblies have also served as ordinary legislatures, a party could offer its support for a constitutional provision in exchange for support on an ordinary statute. For obvious reasons, direct evidence of such tractations is hard to come by.

(iv) The interests of institutions have also been a major force. Most obviously and importantly, the fact that Parliament has also served as constituent assembly has ensured a strong role for Parliament in many of the constitutions, notably in Hungary and Bulgaria. Also, as mentioned above, bicameral constituent assemblies tend to create bicameral constitutions. Finally, if the President can exercise constitutional initiative or veto over the constitution, there is more likely to be a strong Presidency.

(v) Extra-parliamentary threats and pressure have been relatively unimportant. To my knowledge, street demonstrations or threats of intervention by police forces or the military have not played any role. These forces mattered during the RTT, but not during the constitution-making process proper. One major exception concerns the Slovak threat of secession that was repeatedly branded during the constitutional talks in 1991. Formally, as we would expect, the Slovaks merely emitted a warning that unless their demands were granted, popular pressure for secession would become irresistible. As a trade union negotiator might say, 'I will not be able to control my members if you reject our demands', forgetting to mention that he was instrumental in creating high expectations among the members in the first place. Another exception is the role of international bodies, which have ensured better protection of human rights than would otherwise have been the case. As many countries desire affiliation with the European Community, pressure exercised by the Council of Europe has been quite effective. The deletion of a provision in the first draft of the Romanian constitution that prohibited ethnically based parties can probably be traced to this influence.

(vi) A different kind of foreign influence was that exercised by experts from abroad. The American Bar Association has organized a number of conferences to offer technical advice on how to write constitutions. A number of individuals and groups have also worked in this capacity (see Stein 1992 and Rapaczynski 1991). Even if well-meant and sound, such advice could obstruct rather than facilitate the constitution-making process. It is interesting in this connection to note that the constituent committee of the Spanish assembly in 1977 deliberately chose not to create an advisory group of experts (Pérez-Llorca 1988, p. 272). It is widely agreed that the document they produced is deficient from a technical point of view, with a number of verbose and ambiguous clauses (Bonime-Blanc 1987; Rubio Llorente 1988, pp. 259, 263). Had lawyers been more involved, the document would probably have been straightened out. It is not obvious, however, that this would have been a good thing. Sometimes, ambiguity and vagueness are essential for reaching agreement, as anyone who has taken part in collective wage bargaining knows. It may be better to dump a problem on

the future, or more specifically on the Constitutional Court, than to try to resolve it immediately.

(vii) Still another source of foreign influence stems from the use of other constitutions as models. However, the countries in the region rarely look to each other, and mainly to the West. An illustration of this ignorance (or arrogance?) is that a leading constitution-making actor in one of the Central European countries did not know whether a neighbouring country had adopted a unicameral or a bicameral Parliament. While the Constitution of the United States has been marginal, several West European constitutions have exercised a strong influence. The device of the constructive vote of no confidence (Parliament cannot vote down government unless it simultaneously names a new Prime Minister), invented by C.J. Friedrich for the German constitution of 1949, has been adopted in Hungary and in Poland. The German idea of a strong Constitutional Court has also had a widespread if more diffuse impact (Schwartz 1992). The French model of semi-presidentialism bears some relation to, and may have been a source of inspiration for, the Romanian and Polish constitutions. The constitution of the Fifth French Republic also contains a frequently used provision (art.49.3) that assures the government some independence *vis-à-vis* Parliament, by enabling the government to propose a bill that automatically becomes law unless the Parliament passes a vote of no confidence within 24 hours (Burdeau, Hamon and Troper 1991, pp. 635–36). The provision may be seen as an alternative to the constructive vote of no confidence. A similar device for 'legislation by government' is found (but rarely used so far) in the Romanian constitution (art.113). Constitution-makers in both Bulgaria and Romania also claim to be influenced by the Belgian constitution of 1923, perhaps mainly by its impact on the pre-Communist constitutions in these countries.

(viii) More generally, in the process of making new constitutions many countries turn to their pre-Communist past. All the countries under study had more or less democratic constitutions for much of the period between the two wars. With the exception of Hungary, all of these continue to exercise some influence today. (Kálmán Kulcsar (1990), Hungarian Minister of Justice during the transition from Communism, nevertheless finds a long constitutional tradition in Hungarian history.) More accurately, they belong to the repertoire of arguments that can be used, sincerely or not, in favour of a given proposal. It seems that sometimes the pre-Communist constitution is invoked in defence of an idea that has no good substantive justification; sometimes it serves as a convenient focal point among a plethora of possible arrangements; and sometimes it is harnessed to a genuine need to assert the continuity of the nation's life and the parenthetical character of the Communist regime. In Poland and Romania, for instance, arguments for having a Senate regularly cite the presence of that institution in, respectively, the 1921 and 1923 constitutions. However, the pre-Communist past can also serve as a negative model, as providing examples of what is to be avoided rather than imitated. The 1921 Constitution in Poland is often cited to illustrate the dangers of an assembly that is so afraid of a strong president that it creates a fragmented and powerless Parliament

which, in turn, invites an authoritarian *coup d'état* by the very person whom it feared.

There is a certain paradox in the positions both the Sejm and the President have taken on the election law. By supporting a version that favoured small parties, notes [Senate] Speaker Stelmachowski, the Sejm was energetically 'sawing off its own branch', since a weak Sejm and weak governments were the prime ingredient in the recipe for Pilsudski's authoritarian coup in 1926. By provoking a conflict with the Sejm, on the other hand, Walesa was ostensibly seeking to strengthen its future (McQuaid '1991 election law', p. 26).

(ix) The influence of the Communist constitutions is similarly ambiguous. Sometimes, we observe the general phenomenon that constitution-makers seek to minimize the most dangerous effects of the previous regime. (They tend, perhaps, to see the sins of the fathers and the virtues of the grandfathers.) As Merkl (1963) noted

'Like the framers of the United States Constitution, the Council distrusted the masses and their sudden passions, Zinn [an SPD delegate] looked at the Weimar era in the same light in which the fifty-five men at Philadelphia regarded the years following the War of Independence: as a period of anarchy during which the governmental institutions had fallen too much under the sway of popular whim and fancy (p. 81.).

The general arbitrariness that prevailed under Communist rule may be part of the explanation for the central role allotted to the Constitutional Courts in the new constitutions. But we can also observe a tendency to carry over questionable elements from the Communist constitutions. Under all the Stalinist constitutions of Central and Eastern Europe, Parliament was the final arbiter in issues of the constitutionality of laws. In Poland, this arrangement still lingers on, allowing Parliament to overrule decisions by the Constitutional Court. More surprisingly, in the brand new Romanian constitution Parliament also reserved for itself the right to overrule the Constitutional Court by a two-thirds majority. Also, the pervasive presence of social and economic rights – often strikingly absurdly formulated – in most of the new constitutions is a direct heritage from Communism.

Now, a list of causal factors such as the above does not by itself produce a causal theory. In fact, I do not think we will ever be able to formulate a law-like theory of constitution-making, whether general or limited to certain space-time parameters. Rather, we must use the elements enumerated above as raw material for the specification of *mechanisms* – frequently occurring patterns of causal interaction (Elster 1993). Thus even if we cannot identify the exact mix of arguing and bargaining, we can describe main patterns of constitutional bargaining. The distinction between threats and warnings certainly does not amount to a theory, but we can use it to tell a more plausible story than if the two phenomena are conflated with each other (Sutton 1986).

3 The new constitutions

In this section, I survey the new constitutions in Central and Eastern Europe with regard to three aspects mentioned in Part II: amendment procedures, the machinery of government, and human rights.

If stringent amendment requirements are a test of constitutionalism, the new East European constitutions fare badly. They usually require qualified majorities, but rarely any form of cooling-down delay procedure. In Slovakia, only a three-fifths majority is needed, making this constitution one of the most easily amendable in the world. In the Czech Republic, amendments require a three-fifths majority in both houses of Parliament. In Poland and Hungary, the constitution can be changed by a two-thirds majority in Parliament. The Hungarian constitution provides some additional protection by specifying that statutory legislation in a number of specific domains (e.g. electoral laws) also requires a two-thirds majority. In Romania, there must either be a two-thirds majority in each chamber or a three-quarters majority in a joint session of the two chambers, followed by approval in a referendum. (The constitution says nothing about the quorum or majority required in the referendum.) In addition, Parliament can amend the constitution by a backdoor procedure, viz. by overruling decisions by the Constitutional Court. In Bulgaria, the procedure is more complicated: a simplified description follows. 'A minor' constitutional change can be adopted by Parliament in one of two ways: by three quarters of the deputies voting for it in three ballots on three different days, or by two-thirds voting in favour on two occasions with an interval of no less than two and no more than five months. Fundamental changes have to be approved by a two-thirds majority of a special constituent assembly, elections to which will take place if two-thirds of the deputies call for them. The most important 'fundamental' changes are those which 'resolve on any changes in the form of state structure or form of government', or which call for a change in article 57.1 of the constitution asserting that 'The fundamental civil rights shall be irrevocable'. A similar provision exists in the Romanian constitution (art.148.2). One may ask whether those provisions themselves are unamendable. The answer must be positive, 'because an incomplete entrenchment clause that is not self-entrenched is virtually pointless' (Suber 1990, p. 101). Finally, most constitutions contain provisions that ban amendments of the constitution during martial law or a state of emergency. This is perhaps the only way in which they reflect the idea that constitutions must be able to resist temporary fits of passion.

The machinery of government in the six countries does not lend itself easily to brief summary. Only Poland, as I said, combines a dual legislative with a dual executive: a lower house; an upper house that is both endowed with real powers and substantially different from the lower house; a government; and a president endowed with more than ceremonial powers. The emergence and evolution of this system is further discussed in Part IV below. Romania also has a bicameral system, in which the upper house is essentially similar to the lower house. Although it may serve the function of slowing down legislation which George Washington attributed to the American Senate, that end could have

been achieved without creating a second chamber. (When Thomas Jefferson asked George Washington why the Convention had established a Senate, Washington replied by asking, 'Why do you pour your coffee into your saucer?' 'To cool it', Jefferson replied. 'Even so', Washington said, 'We pour legislation into the Senatorial saucer to cool it.') The Czechoslovak constitution, because of its federal structure, was bicameral. For essentially trivial reasons, as mentioned above, this is also the case in the new Czech constitution.

The extent to which the constitutions set up a dual executive remains somewhat unclear. Generally speaking, the strength of the presidency *vis-à-vis* government and Parliament would seem to depend on two factors. First, a President chosen in direct popular elections has more legitimacy, and thus more clout, than one chosen indirectly, by Parliament. Second, and more obviously, the more powers attributed to the President in the constitution, the stronger the presidency. Specifically, the strength of the Presidency depends on the ability of the President to

- conduct national defence and foreign policy
- call a state of emergency or introduce martial law
- call a referendum
- exercise legislative initiative
- exercise legislative veto
- appoint the government
- remove the government
- appoint and remove individual ministers
- dissolve Parliament
- appoint state officials without the countersignature of government

Using these criteria, a reading of the constitutions suggests the following two-by-two table:

Table 1 Constitutional comparisons

	<i>President chosen in direct elections</i>	<i>President elected by Parliament</i>
<i>Strong powers of the presidency</i>	Poland Romania	Slovakia
<i>Weak powers of the presidency</i>	Bulgaria (?)	The Czech Republic Hungary (?)

The question marks must be taken seriously. In fact, perhaps all entries in the cells with the exception of Poland should have been supplied with this modifier. In many of the constitutions, the wording is so vague that it is hard to say what the powers of the Presidency are. In Hungary, for instance, the ongoing

power struggle between President Gonz and Prime Minister Antall over the appointment powers of the President turns only in part on the articles spelling out these powers, and more centrally on the general provision (art.29.1) which asserts that the President 'safeguards the democratic operation of the State organization'. It was by virtue of this clause that the President refused to appoint the government's candidates for posts in the state-owned Hungarian Television and Radio. The issue was referred to the Constitutional Court, which essentially refused to take a stand, thus perpetuating the deadlock and the uncertainty.

Also, some of the constitutions are poorly drafted and internally inconsistent. In one respect, for instance, the Slovakian Presidency is very weak. The President can be dismissed by Parliament by a three-fifths majority on political grounds, without any formal impeachment procedure. At the same time, he is the supreme commander of the armed forces, appoints and promotes top military officers without the countersignature of a minister, has the right to chair sessions of the cabinet, enjoys legislative initiative and the right to call a referendum. Obviously, strength and weakness are not simple dichotomous categories, but located on a continuum, which may even be multidimensional.

In spite of these conceptual difficulties, I think it is fair to say that Central and Eastern Europe is somewhat anomalous with respect to the usual way of thinking about the Presidency. In the table given above, the upper right hand and the lower left-hand cells are usually supposed to be empty (Linz 1990; Lijphart 1992). To choose a mainly ceremonial President by popular election or to endow a President chosen by the assembly with strong executive powers is to go against the grain of constitutional thinking. The latter, Slovakian procedure is especially strange, as it obliges Parliament to elect or approve two executives with real powers.

I conclude the section with a survey of rights, and the protection of enforcement of rights, in the East and Central European constitutions. I shall consider two rights-protecting devices: constitutionalism and judicial review (Elster forthcoming (3)).

Constitutionalism. For our purposes there are two relevant questions to be asked. What rights are included in the constitution? How well does the constitution protect them? Concerning the first question, limitations of space prevent me from offering a full answer. Instead, I shall simply point to some anomalies or other salient features, limiting myself to the countries that have completed the constitution-making process.

Although all countries have constitutional provisions guaranteeing the rights of ethnic minorities, the force of this protection differs widely. The Bulgarian constitution offers by far the weakest protection. For one thing, it contains a ban on political parties formed along 'ethnic, racial or religious lines' (art. 11.4). For another, the Bulgarian constitution is special in that it offers to ethnic minorities only the right to study their own language (art. 36.2), and not the right to study (all subjects) in their own language. It has a general ban on reverse discrimination, on grounds of race, nationality, ethnic self-identity, sex, origin, religion, education, opinion, political affiliation, personal or social status, property

status (art. 6.2). The Romanian constitution contains a limited ban in art. 6.2, which requires the protection of national minorities to 'conform to the principles of equality and non-discrimination in relation to the other Romanian citizens'. Presumably this excludes affirmative action for the purpose, say, of promoting the situation of Gypsies. The Slovakian constitution contains both a general ban on reverse discrimination (art. 12) and a specific ban on affirmative action in favour of ethnic minorities (art. 34.3). In Hungary and Romania, the political rights of the minorities are protected by clauses ensuring their representation in Parliament. (One might wonder, though, if this does not contradict art. 6.2 of the Romanian constitution and indeed the more general principle of political equality.)

Social and economic rights have a strong presence in the new constitutions. They range from the potentially useful through the empty and absurd to the positively harmful. In fact, empty and absurd provisions are also harmful. By introducing rights that are obviously unenforceable, there is a risk of devaluing the other rights in the constitution. The right to free health care and to social assistance, including unemployment benefits, may well be useful under the turbulent economic conditions of the region. Other provisions hover between the meaningless and the ridiculous. For instance, the Hungarian provision that 'People living within the territory of the Republic of Hungary have the right to the highest possible level of physical health' (art. 70.1) would, if taken literally, imply that the whole national product should be devoted to health care. The frequently proclaimed right to a clean environment falls in the same category. A potentially more serious problem is offered by rights that *are* enforceable, but which would, if enforced, interfere seriously with the transition to a market economy. Thus art. 70.B.1 of the Hungarian constitution says that 'Everyone who works has the right to emolument that corresponds to the amount and quality of the work performed'. This is an obvious legacy of the 'principle of Socialist distribution': to each according to his contribution. It leaves little room for the operation of market forces.

The protection of rights is undermined by the fact that the relevant constitutional clauses are often circumscribed by clauses that render their import somewhat uncertain. On the one hand, there are many references to further regulation by statute (Cutler and Schwartz 1991, p. 536). For instance, art. 30.2 of the Bulgarian constitution says that 'No one shall be detained or subjected to inspection, search or any other infringement of his personal inviolability, except on the conditions and in a manner established by a law.' Similarly, art. 30.8 of the Romanian constitution says that 'Indictable offenses of the press shall be established by law.' Although the Hungarian constitution contains similar clauses, their sting is drawn by art. 8.2 which asserts that statutes 'shall not limit the essential content of fundamental rights', leaving Parliament free to expand the scope of rights but not to shrink them. E. Klingsberg (1992) concludes that this clause was intended not only to protect rights from being limited by statute, but 'to entrench fundamental rights in the Constitution beyond the reach of the amendment process'. On the other hand, many rights

are limited by public or even private interests. To take a typical example, art. 37.2 of the Bulgarian constitution says that 'The freedom of conscience and religion shall not be practiced to the detriment of national security, public order, public health and morals.' To see the potentially illiberal implications of this clause, the following characterization of Communist Bulgarian practices may be useful:

there are ... public campaigns directed at two religious practices which, though phrased in terms of their public health implications, could easily be seen as connecting the campaign against Turkish names with an anti-Islam campaign. The government has directly called for an end to the Ramadan feast and ritual circumcision, calling the former 'A Means of Crippling the Individual', while describing the latter as 'Criminal interference with Children's Health' (McIntyre 1988, p. 73.)

Whereas many constitutions assert that rights can be limited by the rights of others, art. 57.2 of the Bulgarian constitution asserts that they shall not be exercised to the detriment of the 'legitimate interests' of others. To have rights limited by the public interest is no doubt inevitable. However, the trump-like character of rights disappears entirely if they can also be overridden by private interests.

Judicial review. All countries in the region practice *ex ante* or *ex post* reviews of legislation by constitutional courts (Schwartz 1992). The Hungarian court has been by far the most active one. In the last few years it has emerged as a major political force (Klingsberg 1992). In fact it has been characterized as the most powerful constitutional court in the world. Two sets of decisions that have been especially important concern legal reactions to acts committed under the Communist regime. In three cases the court was asked to assess the constitutionality of laws regarding restitution of nationalized land to its pre-Communist owners. (Constitutional Court Decisions No.21/1990, No.16/1991 and No.28/1991; Klingsberg 1992; Paczolay 1992.) The court decided that the only reason for discriminating between former landowners and owners of other confiscated property or, more crucially, between former owners and 'non-former owners', would be a forward-looking one. If such discrimination would facilitate the transition to a market economy or otherwise have good social results, it was allowable; if not, not. In particular, the pattern of former property holdings was irrelevant. In a recent decision (Constitutional Court Decision No.11/1992) the court struck down as unconstitutional a law extending the statute of limitations for crimes committed during the old regime that, 'for political reasons', had not been prosecuted. In the first set of decisions, the court let utilitarian considerations take precedence over backward-looking considerations of abstract justice, on the grounds that the latter did not give rise to any subjective rights to restitution. In the more recent decision, the basic premise of the court was the principle of legal certainty, which was violated both by the element of retroactivity inherent in the law and by the vagueness of the phrase 'for political reasons'.

The Bulgarian Constitutional Court has emerged as a (weak) defender of minority rights against the illiberal provisions in the constitution. On the basis

of art. 11.4 and art. 44.2 of the constitution; deputies of the former Communist Party asked that the Movement for Rights and Freedom – the *de facto* party for the Turkish and Moslem minorities – be declared unconstitutional. Although six out of twelve judges found in favour of the petition and only five were against (one was sick), the petition was rejected on the basis of art. 151.1 in the constitution which requires ‘a majority of more than half of all justices’ for a binding decision. (Decision rendered on 22 April 1992.) The reasoning of the five judges was too tenuous and fragile, however, to provide a very solid guarantee. We should note, for instance, that the party that was created to serve the interests of the Bulgarian Gypsies has been declared unconstitutional (Troxel 1992; Troebst forthcoming).

IV: CONSTITUTION-MAKING IN POLAND: A CASE STUDY*

Poland is unique among the East European countries in having a long constitutional tradition. Although it is difficult to indicate specific events or provisions that owe their explanation to that history, the frequent reference to the past in Polish constitutional debates justifies a brief summary of the pre-1989 history. Next, I discuss the dynamics and the achievements of the RTT. I then consider the fruitless constitutional efforts by the ‘contractual’ *Sejm* (lower house of Parliament) that was elected by the compromise arrangement in the RTT. Finally, I survey the debates and deals that led up to the adoption of the ‘little constitution’ in November 1992, and the current efforts to prepare a ‘big constitution’.

1 Elements of Polish constitutional history

Poland’s constitutional history (Biskupski and Pula 1990) before 1989 can be divided into five stages.

First, there is the tradition of the ‘gentry democracy’ that goes back to the fourteenth and fifteenth centuries. The decree that consolidated this tradition, ‘Nihil Novi’, was promulgated in 1505. In this hodge-podge document, the most important provision is the provision stipulating that ‘nothing new’ was henceforward to be enacted without the concurrence of the three estates in the *Sejm* – the King, the Senators and the representatives of the lower gentry. All decisions had to be made unanimously: it was required not only that all estates had to agree, but that each individual member had to give his consent (the *liberum veto*). To this unique feature of early Polish constitutionalism we must add another: the tradition that the monarchy was elective (by unanimity) rather than hereditary. It is no wonder that the chaotic and anarchic proceedings of the assembly became proverbial, whatever the original intentions may have been

* This section owes a great deal to the tireless efforts of Wiktor Osiatynski to orient me in the complexities of constitutional politics in Poland. I also rely on interviews with Jerzy Cierniewski, Lech Falandyz, Leszek Lech Garlicki, Bronislaw Geremek, Jerzy Jaskiernia, Lena Kolarska, Jan Majchrowski, Tadeusz Mazowiecki, Adam Michnik, Andrzej Rzeplinski, Piotr Winczorek and Janina Zakrzewska.

In theory, and originally in practice, the principle of unanimity had not been intended to block all change, merely to allow further discussion until a compromise was reached. As such it was a highly democratic principle. The problems emerged because of the procedural limitations imposed upon the *Sejm*; there simply was not enough time available to accommodate government business alongside the mass of private and local concerns . . . Increasingly, however, and especially in the light of constant royal attempts to widen monarchical authority, the principle of unanimity was used in a negative sense (Frost 1990, p. 48).

It is tempting, but probably invalid, to see a survival of the anarchy in some of the current parliamentary practices. A deeper continuity lies in the fact that the Polish intelligentsia, which even today dominates much of political life, descends from the gentry and has inherited many of its attitudes, notably a marked paternalistic tendency (Leslie 1980, p. 144).

Second, there is the constitution of 3 May 1791 – the oldest democratic constitution in Europe – that was adopted in a desperate attempt to reverse the slide into anarchy. By substituting majority rule for unanimity and introducing a constitutional, hereditary monarchy, it was intended to improve efficacy rather than democracy (Stone 1990, p. 65). However, the change came too late. In 1792 the 3 May government was overthrown by Russian military forces, setting in motion a process of partition that destroyed Poland as an independent state for 125 years. Although short-lived, the 3 May 1791 constitution remains a live force in recent debates. In the contractual *Sejm*, for instance, one reason for the accelerated work on a new constitution was a desire to have it adopted on the bi-centennial of the 3 May 1791 constitution. As a curiosum, one may note that at a meeting of the Central Committee of the Polish Communist Party on 18 January 1989, Prime Minister Rakowski proposed the date of 3 May 1991 for the eventual legalization of Solidarity (*Radio Free Europe Research* 20 January 1989.)

Third, there is the constitution of 1921. After the accession to independence in 1918, an initial step was taken in the adoption of a 'little constitution' in 1919, a brief document spelling out the division of powers between the *Sejm*, the government and the Chief of State. This step inaugurated a tradition: similar 'mini-constitutions' were passed in 1947 and then again in 1992. The little constitution was then superseded by the full-blown constitution of March 1921. Although the constitution gave strong powers to the legislative, the proportional system of elections also ensured that this branch would be too weak and fragmented to use those powers for a constructive purpose. As mentioned in Part II above, the attempt to prevent the emergence of a strong executive led to the very opposite result, as the obvious inability of the *Sejm* to govern effectively paved the way for Pilsudski's coup of May 1926. Over the next decade, the country was nominally ruled by the March 1921 constitution, supplemented by the August 1926 amendments that strengthened the power of the executive. In reality, Pilsudski, although he mainly remained behind the scenes, had the final say in all matters. To cite Norman Davis, 'The arbitrary acts of the [Pilsudski] regime were no more edifying than the political squabbles

which preceded them: The May Coup, in the words of one bold spirit, must be likened to "an attack by bandits on a lunatic asylum" (Davis 1982, p. 425).

Fourth, the constitution of April 1935 codified the strong executive. In the words of Leszek Garlicki, it 'was centered around one institution, the President, and was written for one man, Jozef Pilsudski . . . It was an irony of history that Pilsudski died on 13 May 1935, ten days before the new constitution became the supreme law of the land' (Garlicki 1992, p. 73). Except for this twist, the document is of scant interest today.

Finally, the constitution of 1952, modeled on the 1936 Soviet constitution, reintroduced the form of parliamentary supremacy while simultaneously robbing it of all content. The Soviet concept of the unity of state power is incompatible with any notion of separation of powers among different organs of state. All power is concentrated in Parliament, including the power to offer binding interpretations of the constitution. In reality, of course, all power was vested in the Communist Party, and Parliament was as much a sham as the other parts of the constitutional machinery. Towards the end of Communist rule, however, the *Sejm* adopted amendments to the constitution that introduced two elements of the rule of law in an otherwise arbitrary system, the Office of the Ombudsman and the Constitutional Court (Majchrowski and Winczorek 1992, pp. 14–28).

2 The Polish Round Table Talks

The following relies mainly on W. Osiatynski, ('The roundtable negotiations in Poland', Working paper # 1 from the Center for the Study of Constitutionalism in Eastern Europe, University of Chicago Law School), articles in *Radio Free Europe Research*, January–April 1989, and interviews with participants in the RTT.

The RTT, which opened formally on 6 February 1989 after several months of jockeying for position, began as a simple bargain between the Communist Party and Solidarity. Confronting a desperate economic situation, the regime needed the support of the opposition. On the one hand, social peace and consensus were needed to implement harsh but necessary economic reforms. At the very least, the opposition had to abstain from calling for continued strikes, and preferably to call for an abstention from strikes. On the other hand, the regime needed political legitimacy, both as an element of the social consensus and as a condition for foreign aid. If the opposition called for an abstention in the forthcoming elections, as it had threatened to do, this condition would be destroyed. In return, the opposition asked for a legalization of Solidarity. Initially, this demand was put forward as a prerequisite for holding talks at all, the main topic of the latter being the package of economic reforms. When the government refused, Walesa agreed to let the recognition of Solidarity be an item for bargaining together with the economic reforms. Consequently, the RTT included separate sub-tables on 'Union pluralism' and 'Social and economic policy and systemic reforms'. In addition, a sub-table on 'Political reforms' was set up to negotiate the conditions under which Solidarity could participate in the elections. This sub-table, which turned out to be the most important, was headed by Bronislaw Geremek on Solidarity's side.

In addition to union pluralism, Solidarity demanded political pluralism and free elections. The Communist Party, on its side, did not want to give up its control over Parliament. Early on, the idea was launched to reserve a number of 'safe' seats for the Communists and to have free, competitive elections for the remaining. On 26 January, an establishment intellectual (Arthur Bodnar) was quoted as suggesting that 55 per cent of the seats was enough for the Communist Party and its coalition partners to retain a 'leading role' (*Radio Free Europe Research* 6 February 1989). Although the government would have preferred to yield some safe seats to the opposition, it eventually made a concession on the principle of competitive elections for some of the seats. The proportion of safe seats, first set at 60 per cent, was raised to 65 per cent when the government negotiators claimed to need an additional 5 per cent for 'our Catholics'. With 65 per cent of the seats, the government would have control over ordinary legislation and over the formation of government.

In exchange for conceding free elections for some of the seats, the government negotiators demanded the introduction of the Office of the President to replace the Council of State, a sort of collective presidency created by the 1952 constitution. The President would be vested with large powers, and be elected by the *Sejm* together with various other bodies that could be counted on to vote with the Communists. In this way, any democratic procedures initiated by the new *Sejm* could be thwarted, if necessary. At this time (early March), the focus of the negotiations had shifted from the official and highly publicized RTT to smaller, more informal meetings at the luxury resort Magdalenka. Among the top leaders present were Walesa and Geremek from Solidarity and two ministers, Czeslav Kiszczak and Aleksander Kwasniewski from the government.

The following description of the events set in motion by the proposal of the government negotiators is taken from Wiktor Osiatynski:

Geremek's answer was that they could agree to see democracy raped once, but not two or more times. This silent deadlock was interrupted by Kwasniewski's extemporaneous thought: 'How about electing the president by the *Sejm* and the Senate, which, in turn, would be elected freely.' 'This is worth thinking about', said Geremek. The opposition did not care about the Senate, but was attracted by the idea of free elections in general. The party went along, seeing in Kwasniewski's proposal a road to electing their own candidate with some measure of legitimacy. Thus, through mutual self-interest, a compromise was reached and there occurred one of the most significant decisions of the Round Table, i.e. free elections to the Senate (p. 43).

It remained to fix the role of the Senate in the machinery of government. Whereas the government negotiators had successfully bargained for a large proportion of safe seats in the lower house, they fought a losing battle to reduce the powers of the upper house. First, they wanted it to serve as a merely advisory body. Next, when they did grant the Senate the right to veto legislation passed by the *Sejm*, they wanted the *Sejm* to be able to override the veto by a majority of 11/20, a quaint proportion that was taken from (and justified by) the March 1921 constitution. The Solidarity negotiators, however, insisted on and obtained

that a two-thirds majority would be needed to override a veto by the Senate. (According to some participants, there was also an intermediate proposal of a 3/5 majority.) Agreement on this point was reached only fifteen minutes before the agreement was to be signed, an instance of the 'deadline effect' that has often been observed in negotiations (Roth 1987, pp. 36–38).

To see the significance of these controversies we need to look at some numbers. The *Sejm* had 460 members. The new Senate would have 100 members. The guarantee of 65 per cent of the seats in the *Sejm* would ensure the party at least 299 votes in the *Sejm*, more than half of the seats of the joint session of the *Sejm* and the Senate that was to elect the President by an absolute majority. If the *Sejm* could override a veto of the Senate by 11/20 or even 3/5 of the votes, their 299 seats would be more than enough. To muster a two-thirds majority, they would need 307 votes, 8 more than what they would be certain to have. (Hence the two bargaining issues -- the proportion of safe seats and the majority needed to override a Senate veto -- were obviously connected. The government's victory over the first issue was empty, given its defeat over the second.) The same two-thirds majority would be needed for revisions of the constitution. Virtually nobody seems to have doubted that they would indeed obtain the eight additional votes. The following comment by the well-informed Louisa Winton, writing on 20 March, is representative:

In the final days of the talks, the Solidarity side won an expansion of the margin required in the *Sejm* to override a Senate veto to two-thirds from the three-fifths the government had originally proposed. As the communist party and its allies have assured themselves of 65 per cent of the seats in the *Sejm*, this provision would require the authorities to win over a modest number of deputies from outside the official camp in order to override a veto. *This is likely to be more important in principle than in practice*, as the authorities have indicated that they intend to run candidates for the 35 per cent of *Sejm* seats to be filled through competitive elections (*Radio Free Europe Research* 7 April 1989, italics added.)

It came as a surprise to all, and as a shock to the Communists, when Solidarity swept the elections, winning all contested seats in the *Sejm* and all but one seat in the Senate. Soon thereafter the rats left the sinking ship, in the form of a massive defection of two small parties (the Peasant Party and the Democratic Party) that had been allied with the Communists in the old *Sejm*. Together with the 161 seats obtained by Solidarity, they formed the parliamentary majority for the first non-Communist government, appointed in September 1989 and headed by Tadeusz Mazowiecki.

In spite of the massive defeat of the Communists, General Jaruzelski, their candidate for the Presidency, was duly elected in accordance with the RTT agreement. He chose, however, to abstain from using his extensive powers. (During the December 1989 round of constitutional amendments, his only demands were for a mention of social justice and for some words about the army. Both were satisfied.) The powers became more important with the election of Walesa to the Presidency in December 1990. It then became clear

that the powers were not only extensive, but vaguely defined. According to one commentator, they had been 'left deliberately vague on the assumption, current early in 1989, that a Communist President would use whatever prerogatives he saw fit, since he could rely on the backing of the army, security forces and his Soviet sponsors' (Sabbat-Swidlicka 1992, p. 26). According to another, it was the other way around: 'Opposition negotiators have since admitted also to having deliberately designed the 'presidential clauses' of the round-table agreement to be as confusing as possible, with an eye to reduce Jaruzelski's room for maneuver' (Krol cited in Winton 1992, p. 19). According to a centrally placed participant in the RTT, however, the powers of the presidency have a different origin. Stanislaw Ciosek (Politburo Member, one of the two main party negotiators, and currently Polish ambassador to Russia) is reported to have said that 'The Politburo will never accept anything short of a strong Presidency, designed for Jaruzelski. But without a President it will not be possible to destroy the Party.'

The RTT also made two decisions about the Senate that turned out to have important consequences. The first concerned the mode of election of the senators. 'While Solidarity preferred proportional elections, the government suggested "an American model", i.e. two senators from each of 49 *voivodships* in Poland (three from the biggest cities, 100 in all). The government's rationale was the hope that industry-based Solidarity might lose in smaller, predominantly rural *voivodships*' (Osiatynski, p. 34). While that hope was frustrated, the Senate did acquire a definite rural bias. The second decision concerns a failure to translate a provision in the RTT agreement into the constitutional amendments adopted by the *Sejm* on 7 April. According to the deal that was struck, the Senate was to participate 'on the same basis as the *Sejm*' in the amendments and adoption of the Constitution (ibid, p. 46). However, the 7 April amendments left unchanged the clause in the constitution that amendments require a two-thirds majority in the *Sejm*. Below I conjecture that the fate of the 'little constitution' might have been different had the participation of the Senate in the amending power been fully recognized. At the time, however, nobody expected these details of the constitutional machinery to matter.

The Polish RTT can be used to highlight the influence of threats and warnings in constitutional bargaining. Threats are vulnerable to problems of credibility: even if the threatener is able to do what he threatens to do, his threat may not carry much weight if it will manifestly be against his interest to execute it. Although there are ways to get around this problem (Dixit and Nalebuff 1991, pp. 161-84; Schelling 1960), the risk of having one's bluff called is often a powerful deterrent against making the threat in the first place. Could the Solidarity leaders credibly threaten to call for mass strikes if their demands were not satisfied? Could the government negotiators credibly threaten to call for Soviet intervention unless Solidarity backed off?

As a foreign observer, and a relatively ignorant one, I do not know the answer to these questions. However, it seems to me that they may not be very relevant, because the parties were in a position to use warnings rather than threats.

Typically, threats are made when each of the two bargaining parties is a unitary actor, whereas warnings are more likely to be made when the actors are internally divided, so that the negotiators can say, with some (always uncertain) credibility that 'I cannot control my members' or 'I cannot control my left' (or right, as the case may be). It can also be shown that a party will obtain a bargaining advantage if it can credibly claim, e.g. by virtue of geographical distance or its internal by-laws, that it needs some time before it can respond to the opponent's offer (Barth 1990). Here again, weakness is strength. The RTT distribution of forces was very much of the latter kind, with softliners in the two camps negotiating with each other and using hardliners in their own camp as bargaining chips (Przeworski 1992, ch.2). In the case of Solidarity, the inability of the leaders to control the impatient, young elements among the workers was a reality rather than an appearance created for bargaining purposes, at least sufficiently so to make the warning credible. Similarly, Janusez Reykowski, the government co-chairman of the Political Reforms sub-table, recalls that

his most serious argument was a warning rather than a threat. This argument, which emphasized the commonality of interests, was as follows: 'If we do not come to an agreement, then all we who negotiate at the Round Table will be the losers. Others will come, they will try to use force to solve Poland's problems. It is not important if they win or lose, for in both cases Poland will lose and we, the Round Table negotiators, will lose. It does not concern only us, on this side of the table, for you will be wiped out by the more radical forces, too' (Osiatynski, p. 40).

3 Constitution-making efforts in the contractual *Sejm*

The following draws on Majchrowski and Winczorek 1992; Rapaczynski 1991; Morawska 1992; and Kallas 1992.

The *Sejm* elected in June 1989, and in session until the elections of October 1991, had a dubious democratic pedigree. It contained a large contingent of ex-Communists, who had not been chosen in free elections but nominated by the Party. For this reason many members of Solidarity, notably Mazowiecki during his period as Prime Minister, were opposed to the idea of having the new constitution adopted by this body. Geremek, on the other hand, argued that the adoption of a new constitution was a vital practical matter, because of the lack of clarity in the relations among the main organs of the state. Also, he thought, the circumstances were uniquely propitious. Up to the summer of 1990, the Communists were still so demoralized, and Solidarity still so unified, that a new constitution could easily have been passed. The occasion was missed, however. At Geremek's request, a draft was prepared by two independent drafters, one of whom served in the Mazowiecki government. He felt obliged to pass it on to the Prime Minister, who shelved it.

In December 1989, both the *Sejm* and the Senate appointed committees to draft a new constitution. The *Sejm* draft might have stood a chance of being adopted, had it not been for the election of Walesa to the Presidency in December 1990. Walesa was chosen in direct elections, following a constitutional amendment supported by the 'Warsaw' group of intellectuals who believed it

would favour their candidate for President (Mazowiecki). According to Rapaczynski 1991, p. 605, note 22, the real preferences of the Warsaw group was for indirect elections. Because they miscalculated the popular support for Mazowiecki, they would have been better off had they stuck to this principle. According to Geremek, constitutions can be adopted in one of two ways: by consensus or by surprise (Interview with Geremek 21 January 1993.) By late 1990 and early 1991, the chance for consensus was gone, but surprise might still have worked. However, because of the opposition of Walesa to the *Sejm* draft, the process lost its momentum. That opposition was due both to the lack of legitimacy of the contractual *Sejm* and to the fact that the draft prepared by the constitutional committee of the Senate gave much wider powers to the President. In fact, Walesa at this time claimed that the contractual *Sejm* was dominated by 'an alliance between the compromised ex-Communists and the "leftist" intellectuals in the government' (Rapaczynski, p. 604). His chief of staff at the time, Jaroslaw Kaczynski, was probably a main influence on Walesa in this respect. Later, Kaczynski quit the office of chief of staff and became the influential leader of the Center Alliance. He and his followers now claim that Walesa himself, or at least his new staff, is also tainted by a Communist past. To capture Kaczynski's attitude, one might say that he is anti-anti-anti-Communist rather than simply anti-Communist, being more contemptuous of those who want to forget the crimes committed by the Communists than of those who committed them. The final drafts of the *Sejm* and the Senate were presented in, respectively, August and October 1991. According to some observers, the only reason why the drafters managed to reach agreement was that they knew that their drafts had no chance of being adopted.

Andrzej Rapaczynski, who served as expert advisor to the subcommittee on institutions of the constitutional committee of the *Sejm*, has offered some glimpses of the proceedings of that body. Perhaps the most interesting observations concern the debates on the electoral laws, which were delegated to this committee. Although some deputies called for the constitutionalization of electoral laws,

the move to include the basic choice of an electoral system in the constitution lost most of its support. Among the common arguments against it was the unconvincing (and factually inaccurate) claim that few countries have such constitutional provisions. The more convincing argument was that the Round Table Parliament, containing the Communist epigones committed to proportional representation, would oppose any constitutional provision mandating a majoritarian system. And since most people who took the idea seriously favored some form of the majoritarian system, attempts to include such a provision were discontinued (p. 622).

Rapaczynski also provides an antidote to the view that the position of a party on the choice of electoral system is always and everywhere a function only of its electoral interests and prospects. He claims that many groups supported proportional representation, 'despite a potential party interest to the contrary', because they had 'a certain vision of democracy or, more precisely, of the idea

of representation' (ibid, p. 617). In this vision, proportionality is needed to ensure that Parliament is a microcosm of society, a faithful reflection of all social forces. The values of governability and stability are not perceived as similarly important. In the current debates over the new electoral law, the liberal (or libertarian) party UPR has taken a similarly counter-interested stance, by favouring a majoritarian system by which it would be certain to do badly. They would seem to favour efficiency over self-interest, whereas the groups referred to by Rapaczynski let democratic values take precedence over self-interest.

4 The little constitution and beyond

The following draws on Winton 1992; Morawska 1992 and on interviews with participants in the making of the little constitution.

On 17 November 1992, President Walesa ratified the 'small constitution' barely one hour after the Constitutional Tribunal had ruled that the new parliamentary rules according to which it had been passed were constitutional. This act was the conclusion to one of two tracks of constitution-making undertaken by the Parliament elected in October 1991. The other track may eventually lead to the adoption of a 'big constitution', which will supersede the little one.

As mentioned earlier, the idea of adopting a small, almost minimal constitution has several precedents in Polish history. This time, the initiative was taken by President Walesa. In November 1991, he asked his legal staff to prepare a brief document that would bring some order and regularity to the confused relations between the Parliament, the government and the President. The draft, prepared in about four hours, replaced the parliamentary supremacy enshrined in art. 20 of the RTT constitution ('The Sejm of the Republic of Poland shall be the supreme organ of the Republic of Poland') with the supremacy of the Presidency. Two main issues were resolved in the draft. First, the dual authority over foreign affairs and security matters was removed. Under the RTT constitution, the President and the Defence Minister both had (ill-distinguished) powers in this domain. The Presidential draft resolves any ambiguity by asserting in article 9.1 that the Council of National Security has competence in all matters related to defence and security, and in article 9.2 that the President is Chairman of the Council of National Security.

Second, and more important, the draft clarified the mode of appointment of the Prime Minister. On this matter, the RTT constitution says only that the PM is appointed and recalled by the President, whereas the *Sejm* appoints and dismisses individual ministers as well as the Council of Ministers as a whole. (At one point, Mazowiecki had to tell one of his ministers, whom the *Sejm* refused to dismiss, to take an extended holiday.) Indirectly, it also implies that the presidential nominee needs the approval of the *Sejm*. The system contains a number of flaws and ambiguities, which became evident in the protracted struggle between Walesa and Parliament over the appointment of Jan Olszewski as Prime Minister after the elections in October 1991. Although it was clear that Olszewski had the support of a majority in the new *Sejm*, the President

dragged his feet over the appointment, while simultaneously preparing a draft for the little constitution that gave the President strong powers in the formation of the government (see below). It is possible that the presentation of his draft for the little constitution was intended as a *quid pro quo* – I'll appoint your candidate for Prime Minister if you'll approve my constitution. If that was the case, the deal was not consummated. It is more likely that the draft was simply intended as an opening bid – an extremely Presidency-centred proposal that could be bargained into the eventual adoption of a semi-presidential system.

Walesa's draft for the little constitution was sent to the *Sejm*, only to be withdrawn when the commission discarded the points he most cherished. The idea of a little constitution was not dead, however. In April, the Democratic Union (the party of the 'Warsaw' intellectuals' faction of the former Solidarity) submitted a draft of the little constitution to the *Sejm*. The extraordinary constitutional committee set up to examine the draft was chaired by Mazowiecki, who was also the head of the Democratic Union. The reason why the Democratic Union draft was nevertheless modified on a number of points was that the three drafters were not present to defend it: two of them had entered the government and the third was in hospital.

The two main compromises that were made relate to the mode of formation of the government and the role of the Senate. Another compromise was the inclusion of proportional elections as a specific clause in the constitution. This provision, which was granted as a concession to the Peasant's Party in exchange for its approval of the document as a whole, is compatible with the use of thresholds to prevent party proliferation and fragmentation. Before I proceed to the details, I need to explain two key terms in the debates. A *simple majority* for a proposal means that there are more positive votes than negative, the number of abstentions being irrelevant. An *absolute majority* means that more than half of the votes cast are for the proposal, with the abstentions being effectively counted with the negative votes. Given the frequent abstentions in the *Sejm*, caused by the presence of many small parties, these two majority requirements can differ considerably. In the little constitution, and even more so in the draft of the Democratic Union, the relations between the *Sejm* and the other organs of state are based on the principle of an absolute majority, thus lending the document a coherence which it lacked before.

In the presidential draft, the key articles relating to the appointment and dismissal of the government were the following:

Art. 1. The President appoints the Prime Minister and, on his motion, the other members of the cabinet.

Art. 2.1. The Prime Minister presents the programme of the government and asks for a vote of confidence. The *Sejm* adopts the vote of confidence with a simple majority, in the presence of half of the deputies.

Art. 2.2. If the cabinet does not get a vote of confidence, the Prime Minister offers his resignation to the President, who accepts it.

Art. 2.3. If the *Sejm* makes no decision in the matter of the vote of confidence within 30 days, it is assumed that the cabinet has received the vote of confidence.

Art. 3.1. The *Sejm* can vote a lack of confidence in the government with an absolute majority, in the presence of half of the deputies. (In the first version of the draft, this article also allowed the President to oppose a veto to the vote of no confidence, in which case the vote of confidence had to be adopted with a 2/3 majority. When the proposal containing this provision was published, the President himself struck it out, saying 'This goes too far'.)

The draft of the Democratic Union was somewhat less 'presidential'. Here, a four-step procedure was envisaged. First, the President proposes a candidate for the post of Prime Minister, who must be approved by an absolute majority of the *Sejm*. If his candidate fails to pass this hurdle, the *Sejm* can appoint its own candidate, if it can muster an absolute majority for him. In case the *Sejm* fails to do so within a specified period, it is the President's turn to propose again, but this time only a simple majority is needed for the *Sejm*'s approval. If that majority is not forthcoming, Parliament shall be dissolved.

Jaroslaw Kaczynski, leader of the Center Alliance (a centre-right split-off from Solidarity) and member of the extraordinary commission of the *Sejm* to examine the little constitution, had a consistently anti-presidential attitude. In principle, he was for a strong Presidency – as long as it was not occupied by Walesa, towards whom he had developed violently hostile feelings after they broke their alliance in late 1991. In the constitution-making process, therefore, he pushed for a predominant role for the *Sejm* in the formation of the government. The ex-Communist Party SLD was close to his position, but more willing to compromise. In fact, the SLD deputy Jerzy Jaskiernia was the engineer of the proposal that was finally adopted. In a procedure that is probably unrivaled in its complexity, the formation of the government now involves five steps. After the first three steps in the Democratic Union draft, a fourth step is added in which Parliament can choose a candidate for Prime Minister by simple majority. This step makes it more likely (compared to the draft of the Democratic Union) that the government will be formed through parliamentary initiative.

In the RTT constitution, the *Sejm* needed a two-thirds majority to overrule a veto by the Senate. In its own by-laws, the *Sejm* also adopted the principle that a simple majority was needed to accept the amendments for ordinary legislation and a two-thirds majority for constitutional laws. This meant that an amended bill that received less than 50 per cent (67 per cent for constitutional laws) but more than 33 per cent of the votes in the *Sejm* was killed – neither the amended nor the unamended version was passed.

To overcome this problem, two solutions were attempted. In July 1992, the *Sejm* changed its by-laws so that an amended bill was automatically passed unless there was a two-thirds majority against the amendments in the *Sejm*. This solution eliminated the indeterminacy that was inherent in the earlier system, but at the cost of giving decisive legislative power to the Senate. Half of the Senate, together with one-third of the *Sejm*, could now decide the fate of any law, including changes in the constitution. The second solution was that adopted

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by the small constitution. Here, amendments by the Senate are accepted unless they are rejected by an absolute majority in the *Sejm*. To get the small constitution, including this provision, passed, the *Sejm* first amended its by-laws again. On 16 October, the deputies reintroduced the original procedure for ordinary statutes, but decided that in the case of constitutional amendments there would only be a vote on whether to adopt the *Sejm's* amendment. If the amendment failed to get two-thirds of the votes, it was rejected, whereas before there had to be two-thirds against if for rejection. Next, the *Sejm* went ahead and voted down the Senate amendments to the little constitution.

Perhaps surprisingly, the new rules do not necessarily weaken the Senate. The recent debates on the regulation of television and abortion can be used to illustrate the ambiguity. On both issues, the Senate tends to be more conservative, because of the rural overrepresentation; hence its propensity to add restrictive amendments to the *Sejm's* bills. Concerning television, the Senate added the requirement that TV has to respect 'Christian values' and '*raison d'état*'. Under the little constitution, the *Sejm* needs an absolute majority to stop the amendment, against the two-thirds majority that would have been needed under the RTT constitution. The power of the *Sejm* to kill the whole bill by simple majority would have been irrelevant, given the obvious need for some kind of bill to regulate television. The Senate, then, is definitely weaker than under the old system. Consider, however, abortion. The *Sejm* has voted a law that is only slightly more restrictive than the existing legislation. If the Senate had introduced more stringent clauses, the *Sejm* would have needed an absolute majority to block the amendments, whereas before a simple majority could kill the whole bill, and would in fact do so *if it preferred the existing law to the amended bill*. In such cases, the Senate has stronger powers under the little constitution.

In the words of one constitutional judge, the *Sejm* changing its by-laws for the mere purpose of being able to override the Senate amendments to the constitution was 'not a very elegant' procedure. However, when a number of deputies brought the case before the Constitutional Court, it was found to be wholly constitutional. The decision was made on the basis of article 106 of the constitution, which asserts that changes in the constitution need only a two-thirds majority in the *Sejm*, with no mention of the Senate. The outcome might have been different if the provision in the RTT agreement that the Senate should participate 'on the same basis as the *Sejm*' in the revision of the constitution had been incorporated in the 7 April amendments.

There is one provision in the little constitution that definitely limits the power of the Senate, viz. art.17.3 to the effect that 'Any amendment by the Senate, imposing a burden upon the State Budget, shall be required to indicate a source of finance thereof'. In the draft presented by the Democratic Union, similar provisions applied to individual deputies and committees in the *Sejm*. However, during the work in the extraordinary commission of the *Sejm*, these were eliminated, and only the restrictions aimed at the Senate were retained. The deputies wanted for themselves the right to behave irresponsibly which they

denied the Senators. (This episode is a textbook example of the idea already mentioned: people never try to bind themselves: rather, politics is about binding others.) When a Senate amendment proposed to eliminate the offending article, the *Sejm* predictably voted it down. A centrally placed participant claims, however, that the Senate would have succeeded if it had proposed instead to reintroduce the budgetary restrictions on the *Sejm* that were part of the Democratic Union's draft.

I conclude with a few words about the second constitution-making track of Parliament. In April 1992, the *Sejm* passed a constitutional bill that regulated the procedure to be used for the adoption of a new constitution (*East European Constitutional Review* 1992). The draft will be elaborated by a joint constitutional committee of the *Sejm* and the Senate, with 46 members from the former body and 10 from the latter. In addition, the President, the government and the Constitutional Court will have non-voting representatives on the committee. To be adopted, the constitution will need a two-thirds majority in a joint session of both houses of Parliament and then popular approval in a referendum. After amendments by the Senate, which the *Sejm* then rejected on formal grounds, the bill was passed in July 1992, more or less simultaneously with the final hammering-out of the details and compromises in the little constitution. This somewhat schizophrenic behaviour does not, however, seem to have worried anyone.

It is far from clear that a 'big constitution' will ever be passed. There are two main gaps that need to be filled: a bill of rights and the organization of the judiciary. In November 1992, President Walesa submitted a bill of rights to Parliament, which is now being considered in the joint constitutional committee. If it is passed, as seems quite likely, it will be as a separate body of legislation and not as part of the big constitution. Concerning the judiciary, the main defect in the existing constitution is the ability of Parliament to overrule decisions of the Constitutional Court. Although most legal scholars are strongly against this provision, it may be more difficult to get the consent of Parliament to its abolition.

It is hard to predict what changes the big constitution might bring in the machinery of government. Although nobody really seems to think there is a need for a Senate, the fact that the Senate will vote on the new constitution makes it virtually certain that it will remain in existence. The situation is somewhat analogous to the influence of the small states at the Federal Convention when the representation of the states in the Senate was discussed. Although the small states did not by themselves have a majority for equal representation, they could obtain a majority by logrolling. Similarly, the Polish Senate will almost certainly be able to muster 87 *Sejm* deputies to vote against the abolition of the Senate, in exchange for support of their favourite proposals. Hence, one observes a curious process of backward reasoning, from the conclusion to suitable premises. Some claim that the Senate is needed as the 'guardian of the laws', although it is hard to see why the Presidential veto and

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the Constitutional Court do not suffice in this regard. Others claim that the Senate is needed to refine legislation or to delay and slow down the legislative process, although these ends could certainly have been realized without a second chamber. Still others refer to the tradition for a Senate in Polish history, or to the presence of a Senate in the assemblies of all large European countries, without even trying to explain why these facts provide an *argument* for having an upper house.

With regard to the Presidency, there are some indications that we may observe a replay of the adoption of the small constitution: a strongly presidential draft as an opening bid by the President, in the expectation that a semi-presidential compromise will be worked out further down the line. An alternative to this 'split-the-difference' model of constitutional bargaining could be a moderate opening bid by the President, coupled with a stated expression of unwillingness to make concessions and compromises. The President's bill of rights was offered somewhat in this spirit. Although its adoption seems to be favoured by the general surprise it caused, consistently with Geremek's hypothesis cited above, it may be difficult to play the card of surprise more than once.

5 Conclusion

In brief conclusion, I suggest that the main force behind the Polish process of constitution-making has been *institutional self-interest*. All the main actors – the Presidency, the *Sejm* and the Senate – have been concerned with preserving and expanding their powers with respect to legislation and the formation of the government. In the *Assemblée Constituante*, Clermont-Tonnerre observed that the 'three-headed hydra' – king, first chamber and second chamber – which the constitution should create could not itself have created a constitution (*Archives Parlementaires*, vol.8, p. 574.) The constituent assembly had to be a single body. Now, the experience from Bulgaria suggests that if that body serves as an ordinary legislature, it may write excessively great powers for itself into the constitution. To ensure a proper system of checks and balances in the *constitution*, one might in fact wish for an element of checks and balances in the *constitution-making process*. However, there is no reason to believe that the bargaining power of the constitution-making bodies will correspond to their normatively desirable influence in the machinery of government. The role of the Senate offers the best illustration of this point. Its impact *on* the constitution is arguably much greater than its normatively desirable role *in* the constitution.

The second most important force has been the perceived *electoral interests* of the political parties and groupings. The RTT agreement owed much to this factor. ~~Party interest also shaped the electoral laws, which in turn have been an important influence on the political geography of Parliament and hence on the constitution-making process.~~

Third in order of importance I would rank the *continued presence of former Communists* and the dynamics created by their survival. Although one might have thought that the ex-Communists would end up as 'constitution-wreckers', somewhat analogously to the diehard fraction of the aristocracy in the Assemblée Constituante, this does not seem to have been the case. In fact, they have probably mattered less for what they have done than for what they have caused others to do. Political life in all post-Communist societies has become highly polarized over the way to treat collaborators with and agents of the former regime. Enmities and alliances formed on this basis may carry over to the constitution-making arena. The best example is Kaczynski's opposition to Walesa that was translated into an opposition to a strong Presidency.

Finally, there has been a not inconsiderable amount of sheer *sound and fury*: bad timing, miscalculation of electoral prospects, unintended side effects of hastily written provisions, and the clash of personalities. Except for the unforeseen consequences of the creation of a Senate in the RTT, such *accidents de parcours* do not seem to have had a decisive influence. Most of the time, the actors seem to have known what they were doing and to have gotten what they thought they were getting.

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