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How Important Is a Radical Break with the Past

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CONSTITUTIONAL CHANGE AND DEMOCRACY IN POST-COMMUNIST CENTRAL EUROPE:

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ALLISON K. STANGER

Executive Summary

Through a structured comparison of constitution-drafting processes in post-communist Hungary, Poland, and the former Czechoslovakia, this paper demonstrates that ethnic conflict need not serve only as a spoiler of democratic development. Political scientists have typically focused on the way in which ethnic cleavages in a given country can be ameliorated by institutional design.² The case of the former Czechoslovakia, viewed in comparative perspective, provides a curious example of ethnic differences fueling the resuscitation of constitutionalism.³ The constitutional deadlock that ensued at the federal level after the Velvet Revolution had the positive effect of recreating opportunities to secure a clean legal break with the past in each of the member republics. In this sense, both Czechs and Slovaks were granted a chance to learn from their early mistakes which was not available to their Polish and Hungarian counterparts, facilitating, rather than undermining progress toward the rule of law. By redefining the state, constitutional democracy was given a second chance in the Czech and Slovak Republics.

Aspiring democratizers in post-communist Europe could follow three basic paths to constitutional reconstruction. First, the custodians of the transition could restore pre-communist constitutions, where they existed. Second, post-communist elites had the option of pursuing a strategy of "radical continuity," whereby the communist constitution would be accepted as the law of the land only to be amended beyond recognition following its own amendment rules. Third, proponents of change could renounce the constitution of the *ancien régime* and concentrate their efforts on drafting a brand new charter, which once ratified in some democratic fashion, could then function as a sacralized constitution of the Western model, one treated with some degree of reverence, and consequently one not easy to amend.

The third option is the one most familiar to citizens of the West, especially Americans, yet the transition to democracy in Poland, Hungary, and the former Czechoslovakia followed the second path. Each of these countries embraced the method of radical continuity as a stopgap measure until a

² For prominent examples, see Arend Lijphart, The Politics of Accommodation (Berkeley: University of California Press, 1975), and Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries (New Haven: Yale University Press, 1984). See, also, G. Bingham Powell Jr., Conflict Resolution in Divided Societies (Stanford: Stanford University Press, 1970).

³ In contrast to a constitution, which is a written document, constitutionalism refers to societal acceptance of a set of legal rules and norms through which stable democracy can function that cannot easily be changed.

new constitution could be drafted and ratified. Each found the task of agreeing on a new constitutional framework to be more rather than less difficult as the initial revolutionary euphoria evaporated. Thus, more than six years after the official collapse of communism in Europe, democratic Hungary continues to be governed by a heavily amended version of its former communist constitution, while Poland is ruled by what was first promulgated as an interim agreement, the so-called "Little Constitution." As a result, both countries have yet to move into the realm of ordinary politics, where the constitution successfully provides the framework for political action, rather than being a tool in the hands of competing political parties. In contrast, while Czechoslovakia did not succeed in its quest for a new federal constitution, both the Czech and Slovak Republics have symbolically and legally renounced the constitutional framework bequeathed to them by the communist experiment, successfully ratifying brand new constitutions in the latter half of 1992. Without partitioning the country, in all likelihood, this breakthrough would never have taken place.

Bruce Ackerman of Yale University has argued that the immediate aftermath of revolution provides liberal democrats with a unique opportunity, what he calls "the constitutional moment," where circumstances are optimal for laying the legal foundations for a democratic order and mobilizing the requisite broad popular support for the constitutional initiative. Timing is critical in tackling major constitutional controversies, for the opposition to authoritarian rule will only remain united for a finite amount of time after it has become clear that a new order is in the making. If the constitutional moment passes in vain, therefore, it is very difficult to recreate it.⁴

The cases examined in detail in my paper support Ackerman's theoretical claim. In Poland, Hungary, and the former Czechoslovakia, the decision to follow the letter of communist constitutions never designed to function in conditions of genuine liberty facilitated the bracketing of the more difficult constitutional questions for resolution at a later date. While postponing these hard tasks allowed democratizing elites to focus on other pressing problems, it also meant that fundamental constitutional questions would have to be confronted after the salient cleavages dividing post-communist societies had fully crystallized into rival political groupings, which proved to be a recipe for stalemate.

If we consider the relationship of these three revolutions in time, the outcome of the initial negotiations between government and opposition on constitutional matters presents a paradox. The Hungarian and Polish Round Table Talks took place under the shadow of Soviet power, yet the Polish negotiations revived an old institution, the Senate, and the Hungarian discussions produced a heavily amended constitution. In contrast, the meetings between the regime and dissidents in the former Czechoslovakia took place after the fall of the Berlin Wall and resulted in only symbolic

⁴ Bruce Ackerman, The Future of Liberal Revolution (New Haven: Yale University Press, 1992), especially pp. 46-50.

legal change. What might have been the most radical Round Table was instead the most conservative, from a constitutional perspective. We can explain the Czecho-Slovak early lack of interest in legal questions by the extraordinarily rapid pace of the revolution in Prague, the still vivid memory of the hard-line *ancien régime*, Vaclav Havel's belief that laws in and of themselves can guarantee nothing, and the dissident political strategy of demanding that the laws be upheld, which carried over into an era when the previously powerless had suddenly become powerful.

A sacralized constitution, of course, guarantees neither democratic consolidation nor the development of constitutionalism. Obviously, there are a range of other factors that are of importance here.⁵ Yet in the post-communist context, the method of radical continuity does pose potential hazards for democratic development. To begin with, it is difficult to get on to the business of ordinary politics when the rules of the democratic game are seen by a majority of the players to be in some way flawed or as having been forged in less than democratic fashion. Furthermore, when the new order is forged as a bargain between democrats and non-democrats, the distinction between authoritarian and democratic politics can all too easily be blurred in the eyes of the regime's newborn citizens. Finally, it is easier for old elites to retain or regain their positions under the cover of the rule of law when the rules that they created are presupposed to be legitimate until proven otherwise. If a principal objective is to keep the individuals who staffed the apparatus of the communist regime away from the democratic levers of power, the method of radical continuity -- especially if it spills over into other policy areas, attitudes toward lustration being a prominent example -- is likely to impede the attainment of this goal.

Pointing this out is not to diminish the extraordinary accomplishments of Polish, Hungarian, Czech and Slovak democrats to date, the greatest of which is that all of these transitions have been achieved without violence. All attempts to break radically with the past, be they sacralized constitutions or lustration policies, are more likely to unleash violent opposition. Yet students of democratic transitions must also acknowledge that strategies that minimize the risk of violence may have their own unintended and enduring consequences.

⁵ For a superb analysis of the relationship between democracy and constitutionalism, see Walter F. Murphy, "Constitutions, Constitutionalism and Democracy," Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Stephen C. Wheatley, eds., Constitutionalism and Democracy: Transitions in the Contemporary World (New York: Oxford University Press, 1993), pp. 3-25.

CONSTITUTIONAL CHANGE AND DEMOCRACY IN POST-COMMUNIST CENTRAL EUROPE: HOW IMPORTANT IS A RADICAL BREAK WITH THE PAST?

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I. INTRODUCTION

The opponents of communism in power all faced a common and immediate problem once it became clear that the existing order in their respective countries could no longer lurch on: What was to be done with the abundant legal inheritance from the totalitarian era, especially the fictional constitutions that allegedly laid out the foundational rules of political life in the people's paradise?

While the actual choices faced were all circumscribed by the realm of the possible in each state, aspiring democratizers could follow three basic paths to constitutional reconstruction. First, the custodians of the transition could restore pre-communist constitutions, where they existed. Second, post-communist elites had the option of pursuing a strategy of "radical continuity," whereby the communist constitution would be accepted as the law of the land only to be amended beyond recognition following its own amendment rules, in this way pursuing a "revolution by constitutional tinkering."⁶ Third, proponents of change could renounce the constitution of the *ancien régime* and concentrate their efforts on drafting a brand new charter, which once ratified in some democratic fashion, could then function as a sacralized constitution of the Western model, one treated with some degree of reverence and consequently, one not easy to amend.

The third option is the one most familiar to citizens of the West, especially Americans, yet the transition to democracy in Poland, Hungary, and the former Czechoslovakia followed the second path. Each of these countries embraced the method of radical continuity as a stopgap measure until a new constitution could be drafted and ratified. Each found the task of agreeing on a new constitutional framework to be more rather than less difficult as the initial revolutionary euphoria evaporated. Thus, more than six years after the official collapse of communism in Europe, democratic Hungary continues to be governed by a heavily amended version of its former communist constitution, while Poland is ruled by what was first promulgated as an interim agreement, the so-called "Little Constitution." Both countries are still attempting to draft and ratify constitutions that are more than an unsystematic product of the less savory aspects of transition politics. In contrast, while the federal government of Czechoslovakia did not succeed in its quest for a sacralized constitution, both the Czech and Slovak Republics have symbolically and legally renounced the constitutional framework bequeathed to them by the communist experiment, successfully ratifying

⁶ The former phrase is Andrew Arato's, the latter, Stephen Holmes and Cass Sunstein's. See, respectively, Andrew Arato, "Constitution and Continuity in the East European Transitions," Journal of Constitutional Law in Eastern and Central Europe, vol. 1, no. 1, p. 110 (footnote 25), and Stephen Holmes and Cass Sunstein, "The Politics of Constitutional Revision in Eastern Europe," in Sanford Levinson, ed., Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Princeton: Princeton University Press, 1995).

brand new constitutions in the latter half of 1992. This paper seeks to shed light on how and why the Czechs and Slovaks managed to succeed in securing a radical constitutional break with the past where their Visegrad neighbors have not.

A sacralized constitution, of course, guarantees neither democratic consolidation nor the development of constitutionalism. Obviously, there are a range of other factors that are of importance here.⁷ Yet in the post-communist context, the method of radical continuity does pose potential hazards for democratic development that must be confronted. To begin with, it is difficult to get on to the business of ordinary politics when the rules of the democratic game are seen by a majority of the players to be in some way flawed or as having been forged in less than democratic fashion. Furthermore, when the new order is forged as a bargain between democrats and non-democrats, the distinction between authoritarian and democratic politics can all too easily be blurred in the eyes of the regime's newborn citizens. Finally, it is easier for old elites to retain or regain their positions under the cover of the rule of law when the rules that they created are presupposed to be legitimate until proven otherwise.⁸

What do I have in mind when I speak of the development of constitutionalism? In contrast to a constitution, which is a written document, constitutionalism refers to societal acceptance of a set of legal rules and norms through which stable democracy can function that cannot easily be changed. In this sense, as Jon Elster has pointed out, constitutions can exist without constitutionalism, and constitutionalism can exist without a constitution.⁹ An example of the former would be the Stalinist constitutions of Cold War Central Europe, where rights guaranteed on paper were trampled upon in practice. An example of the latter would be contemporary Britain, where a set of basic laws serves as the functional equivalent of a formal constitution.

The discussion that follows is divided into two sections. In the first, I compare the circumstances that led to the method of radical continuity being chosen in Poland, Hungary, and the former Czechoslovakia. I argue that Czechoslovakia was headed down the same constitutional path as Poland and Hungary, albeit for different reasons, until the Czech-Slovak conflict intervened. In the second section, I explain how adopting the communist constitution as a stop-gap measure in the Czecho-Slovak context exacerbated rather than ameliorated tensions between the federation's two members. The experience of constitutional deadlock at the federal level, however, actually facilitated

⁷ For a superb analysis of the relationship between democracy and constitutionalism, see Walter F. Murphy, "Constitutions, Constitutionalism and Democracy," Douglas Greenberg, Stanley N. Katz, Melanie Beth Oliviero, and Stephen C. Wheatley, eds., Constitutionalism and Democracy: Transitions in the Contemporary World (New York: Oxford University Press, 1993), pp. 3-25.

⁸ All of these are arguments that have appeared in the ongoing Hungarian debate. See Andrew Arato, "Constitution and Continuity in the East European Transitions," *op. cit.*, pp. 121-22.

⁹ Jon Elster, "Constitutionalism in Eastern Europe: An Introduction," The University of Chicago Law Review, vol. 58, Spring 1991, p. 465.

constitution-drafting at the republic level, making it possible for the successor states to learn from the mistakes of their parent. I conclude by exploring the implications of early legal choices in these four countries for their subsequent political development.

II. CONSTITUTION-DRAFTING PATTERNS IN POLAND, HUNGARY, AND THE FORMER CZECHOSLOVAKIA

In Poland, Hungary and the former Czechoslovakia, the transition to democracy was negotiated through Round Table Talks between the outgoing communist order and the opposition. In each country, the transfer of power transpired in complete legality; that is to say, through a negotiated settlement consistent with existing law, rather than radical renunciation of the *ancien régime* and its legal apparatus.¹⁰ The precise reasons why this particular path was chosen, however, were different in each country.

Poland

Democratic Poland is presently governed by a patchwork collection of remnants of the heavily amended 1952 Stalinist constitution, with those unsystematic modifications supplemented by a constitutional law, the so-called "Little Constitution," which was ratified by the *Sejm* in October 1992.¹¹ The Little Constitution attempted to clarify the legal relationship between executive and legislative power in post-communist Poland. Meant to serve only as an interim document until the separation of powers it delineated could be properly codified in a full-fledged new constitution, the Little Constitution was understandably handicapped in its efforts by the things it left unsaid.¹²

The Round Table Talks in the Spring of 1989 between the leaders of Solidarity and the communist regime resulted in a compromise agreement on the future political structure of the country and the rules that would govern the first partially free elections. Convinced of the permanence of their power, the Communists agreed to restore the upper chamber of the Polish Parliament, the Senate, which they had abolished after World War Two. All 100 seats in that body would be contested, but 65% of the seats in the lower chamber, the *Sejm*, were to be reserved for representatives of the regime and its allies.¹³ Both parties to these negotiations believed that the compromise gave the Communists effective control of the political system. The June 4, 1989

¹⁰ Jon Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in an Open Sea," Public Administration, vol. 72, Spring/Summer 1993, p. 190.

¹¹ Jakub Karpinski, "The Constitutional Mosaic," Transitions, vol. 1, no. 14, 11 August 1995, pp. 4-7.

¹² On the content of the Little Constitution, see Louisa Vinton, "Poland's 'Little Constitution' Clarifies Walesa's Powers," RFE/RL Research Report, vol. 1, no. 35, pp. 19-26, and EECR, fall 1992, pp. 12ff.

¹³ The representative of the communist regime responsible for suggesting this innovation at the Round Table Talks was Poland's present president, Alexander Kwasniewski. See Wiktor Osiatynski, "The Round Table Negotiations in Poland," unpublished manuscript, Archives of the Center for the Study of Constitutionalism in Eastern Europe, pp. 44-45. A revised version will appear in Jon Elster, ed., The Round Table Talks (Chicago: University of Chicago Press, forthcoming).

elections, of course, proved otherwise. Solidarity candidates swept 99% of the seats in the Senate and all of the contested seats in the *Sejm*, often by embarrassingly overwhelming majorities. Solidarity's resounding victory gave the opposition the upper hand in shaping the country's constitutional direction.¹⁴

After the elections, the new Solidarity-led government proposed a series of constitutional amendments designed to modify the Stalinist constitution for democratic governance. From the start, however, these amendments were regarded as stop-gap measures intended to smooth the transition to new constitutional forms. In early 1990, the *Sejm* appointed a special Constitutional Committee and assigned it the task of preparing a new constitution. The original plan was for the Constitutional Committee to submit its finished product to both houses of parliament for approval, followed by a national referendum to ratify the document as the law of the land. Although this plan was never formally renounced, the described sequence of events would never take place as envisioned.¹⁵

Andrzej Rapaczinski, a Columbia University Law School Professor who served as an expert advisor to the Constitutional Committee of the Polish Parliament, cites four reasons why the plans for Polish constitutional renewal were initially derailed. First, the Round Table *Sejm* charged with drafting the new document was not the product of fully free elections; remember, 65% of the seats had been reserved for representatives of the outgoing order. Hence, the *Sejm*'s Constitutional Committee did not have full democratic legitimacy; in contrast, the Senate did. Perhaps not surprisingly, the Senate quickly convened a rival Constitutional Committee and began work on a draft of its own, even though the 1952 constitution that was ostensibly governing Poland in the interim period delegated the matter of constitutional change to the *Sejm*.¹⁶

Second, the composition of the *Sejm*'s Constitutional Committee caused some concern. Solidarity members on the Committee had little interest in the question of institutional design. Consequently, supporters of the undemocratic past dominated the sub-Committee on Institutions, which had been charged with drafting the mechanics of government in the new document.¹⁷

Third, the rift in Solidarity that divided Walesa's Gdansk group and that of the Warsaw intellectuals further undermined the prospects for a new constitution. That the rival Warsaw group dominated Solidarity's leadership in the *Sejm* led Walesa to denigrate the *Sejm* committee as an organization unfit to orchestrate the transition to a new order. From their perspective, the Warsaw

¹⁴ Andrzej Rapaczinski, "Constitutional Politics in Poland: A Report on the Constitutional Committee of the Polish Parliament," The University of Chicago Law Review, vol. 58, Spring 1991, pp. 598-601; Jon Elster, "Constitution-Making in Eastern Europe: Rebuilding the Boat in an Open Sea," Public Administration, vol. 72, Spring/Summer 1993, pp. 203-204; See, also, Timothy Garton Ash, The Magic Lantern (New York: Random House, 1990), pp. 25-39.

¹⁵ Andrzej Rapaczinski, op. cit., pp. 601-602.

¹⁶Ibid., p.602.

¹⁷ Ibid., pp. 602-603.

group saw its work on constitution-drafting as a vehicle for checking Walesa's perceived power lust.¹⁸

Finally, Walesa's easy victory in the December 1990 Presidential elections over the Warsaw intellectuals' candidate for President, Tadeuz Mazowiecki, only served to delegitimize irreparably the work of the *Sejm's* Constitutional Committee. The Polish people had elected as their President one of the main critics of the Round Table *Sejm's* efforts to devise the new rules of the game.¹⁹ While no one could have been able to foresee that the national consensus forged in the revolutionary events of 1989 would so quickly unravel, the window of opportunity for drafting and ratifying a brand new constitution was no longer open for Poland by the close of 1990, the process inevitably becoming all the more politicized.²⁰

Potentially complicating matters still further, post-communist Poland's main supervisory and judicial review bodies were and are institutions that the communist regime had founded in the 1980s as concessions to the Solidarity movement. The Constitutional Tribunal, Poland's Constitutional Court, established in 1982, was first "elected" in 1985. The State Tribunal, a body that rules on potential legal violations by public officials, was created in March 1982. As these organs were designed to operate in a completely different context, it is not surprising that both their structure and their jurisdiction turned out to be less than fully adequate for democratic conditions. To make matters worse, each of these institutions was and is staffed by the *Sejm*.²¹ Yet since the *Sejm* was not a fully democratic body until the October 1991 parliamentary elections, these important structures continued to be dominated by representatives of the old order well after the revolutionary events of 1989.²² In this sense, Poland's early democratic development was monitored and reviewed by the enemies of democracy.

Poland's evolutionary approach to constitutional renewal has ultimately had profound consequences for Polish politics. Wiktor Osiatynski, who has identified Solidarity's greatest failure as its "inability to translate its victories into law," has described the situation in which Poland presently finds itself in the following stark terms:

¹⁸Ibid., pp. 604-606.

¹⁹Ibid., pp. 606-607.

²⁰Bronislaw Geremek, the chair of the *Sejm* Constitutional Commission has identified two moments when a new constitution might have been successfully adopted in Poland, the first being in the immediate aftermath of Solidarity's triumph in the June 1989 elections, the second being in 1992, the only year since when elections have not been held. This happens to be the year when the "little Constitution" was ratified, though Geremek sees this interim solution as having only been a "modest success." See "Bronislaw Geremek on Constitution-Making in Poland," East European Constitutional Review, Winter 1995, pp. 42-43.

²¹Karpinski, op. cit., pp. 6-7.

²²On the Polish Constitutional Tribunal, see Mark F. Brzezinski, "Constitutionalism Within Limits," East European Constitutional Review, vol. 2, no. 2, spring 1993, pp. 38-43.

...the new post-communist capitalist elite, which has democratically won control of all structures of power, now seems to face no limitations. They can virtually rule by statute. At present, they can change all laws by a majority vote. If they violate the rights of an individual, the victim has no remedy and no way to protect himself. If the Constitutional Tribunal says that a law violates the Constitution, the Statute will be returned to the Parliament, which can uphold it against the Court. In short, there are no institutional mechanisms in place which can protect the Poles from a return to autocratic rule."²³

All these difficulties notwithstanding, the Poles have not given up on their quest for a new constitution.²⁴ Alexander Kwasniewski campaigned on getting things done, and one of the things he hopes to accomplish is the ratification of a new constitution.²⁵ Since 1993, Kwasniewski served as Chair of the Parliament's Constitutional Committee, the body charged with drafting a new constitution. While Walesa would surely have vetoed any constitution generated by the Kwasniewski commission, prolonging the constitutional stalemate, the reconstructed communist Kwasniewski's election to the presidency raises the probability that Poland will one day have a sacralized constitution. Polish democracy, ironically, would then be sanctified by its former opponents, rather than the courageous individuals who brought the old order crashing down.²⁶

Hungary

In contrast to the situation in Poland, where the communist regime was negotiating with Solidarity *at* a Round Table, the Hungarian Communists were negotiating *at* a Round Table *with* a Round Table (hereafter designated by its Hungarian acronym EKA to minimize confusion), an umbrella organization that brought together the most important groupings in the opposition.²⁷ The circumstances in which constitutional issues were addressed, moreover, were very different in Hungary than they were in Poland. In Hungary, the issue of reforming the 1949 constitution was first raised by the Communist Party. It began a process of legal reform in the 1980s that culminated in a draft constitution in 1988. As a result, EKA was in a difficult position vis-à-vis constitutional matters from the start of its negotiations with the communist regime. With a draft constitution in hand, they had already devoted considerable time and energy to devising a legal strategy that would enable the regime to claim credit for democratic development, while preserving the Party's privileged position in the reformed political order.

²³Wiktór Osiatynski, "After Walesa," East European Constitutional Review, vol. 4, no. 4, fall 1995, pp. 44-45.

²⁴For an analysis of the obstacles to adopting a new constitution, see "Bronislaw Geremek on Constitution-Making in Poland," East European Constitutional Review, Winter 1995, pp. 42-45.

²⁵"Poland's Communist Makeover," The Economist, 25 November 1995, pp. 31-32.

²⁶Wiktór Osiatynski, "After Walesa," *op. cit.*, p. 44.

²⁷Timothy Garton Ash, The Magic Lantern (New York: Random House, 1990), p. 56.

This history was reflected in the dynamics of the negotiations on matters of constitutional import at the Round Table Talks. Since the regime presented themselves to the opposition as resident experts on legal matters, every time a specific problem was not considered to be politically important by EKA, they would simply defer to the judgment of the Ministry of Justice. In instances where EKA was less than fully compliant, the Party's negotiators would threaten the opposition with their power to rush new legislation through parliament, with or without their approval. In this way, the government was able to drive the amending process, while at the same time being able to claim that the legal products of their negotiations with the coalition of opposition forces had been endorsed by the opponents of communist legality.²⁸

The Round Table Talks produced a radically amended constitution - approximately 95% of the words were new - which sailed through the pre-free elections Parliament without any discussion. These changes were packaged, despite their radical nature, as an amendment to the existing Stalinist constitution, rather than as a brand new document, since the 1989 law on referendum stipulated that a new constitution had to be put to the Hungarian people in the form of a referendum, and there was neither time for nor interest in traveling this road.²⁹ The task of drafting a new constitution for post-communist Hungary was delegated to the first democratically elected parliament. The amended constitution, meanwhile, was ceremoniously instituted on 23 October 1989, the 33rd anniversary of the 1956 revolution.³⁰ The document itself explicitly states that it is meant to serve as the basic law of the land only until a new constitution can be enacted.³¹

Despite the resounding defeat of the newly named Hungarian Socialist Party in the March and April 1990 elections³², the freshly elected Hungarian parliament continued on the road to democracy through constitutional reform, rather than changing course and pursuing a radical break with the legality of the communist system. The idea of writing a new constitution was placed on the back burner, and the amendment process continued throughout 1990 until approximately 95% of the clauses had again been rewritten.³³ In this sense, the true framers of Hungary's present constitution are both the parties to the Round Table Talks of 1989 and two post-communist political parties, the Hungarian Democratic Forum (HDF) and the Alliance of Free Democrats [AFD].³⁴

²⁸Andras Sajo, "Round Tables in Hungary," Working Paper #2, Center for the Study of Constitutionalism in Eastern Europe, August 1991, pp. 16-17, 32, 42-43.

²⁹Ibid., p. 38.

³⁰Peter Paczoly, "The New Hungarian Constitutional State: Challenges and Perspectives," in A. E. Dick Howard, ed., Constitution Making in Eastern Europe (Baltimore: Johns Hopkins University Press, 1993), p. 24.

³¹István Kukorelli, "Constitutional Changes in Hungary," Notes et Documents, janvier-août 1992, p. 41.

³²László Brudt and David Stark, "Remaking the Political Field in Hungary: From the Politics of Confrontation to the Politics of Competition," in Ivo Banac, ed., Eastern Europe in Revolution (Ithaca: Cornell University Press, 1992), p. 51.

³³Andras Sajo, "The Arrogance of Power," East European Reporter, vol. 5, May/June 1992.

³⁴Andrew Arato, "Elections, Coalitions and Constitutionalism in Hungary," East European Constitutional Review, vol. 3, nos. 3/4, Summer/Fall 1994, pp. 27-8.

At one level, the newly elected Parliament's decision to work with the constitutional status quo rather than overturning it conferred a degree of "backward legitimacy" on those portions of the evolving document that had been forged by less than democratic means. In accepting the constitution bequeathed to them by the *ancien régime*, the new Parliament legitimized that document, but at the same time missed the moment when it could have made a radical break with the past by adopting an entirely new constitution.³⁵

On another level, however, even the ostensibly democratic constitutional actions that were taken by the freely elected Parliament were tainted by the extreme disproportionality generated by the 1989 electoral law. For example, in the 1990 elections, the HDF and AFD together received 46% of the popular vote - i.e. less than a majority of the voting population. That performance, however, given the 4% threshold for entry into parliament, gave the two parties the requisite 2/3 majority in parliament that they needed to pass constitutional amendments at will, rendering the constitution a tool wielded by particular political parties.³⁶ While the old Stalinist constitution through its perpetual amendment has now been transformed beyond recognition, problems of democratic legitimacy persist to this day. As one native expert on Hungarian legal issues put it in 1992, "the trouble stems from the fact that the document in its present form expresses a compromise forged among elite groups consciously excluding mass participation."³⁷ Small wonder, then, that on the eve of the 1994 elections, which would bring reconstituted communists back into power, a majority of the political parties viewed the framing of a new constitution to be a top priority for Hungarian democracy.³⁸ The issue of constitution-making continues to be alive to this day.³⁹

The former Czechoslovakia

The governing coalition that emerged from the Czecho-Slovak Round Table differed from its Polish and Hungarian counterparts in one critical respect: when the dust cleared, the opposition had effective control of both domestic and foreign policy. While the interim government of national understanding formed by Marián Čalfa on December 10, 1989 looked like a power-sharing arrangement on paper, because of Communist Premier Ladislav Adamec's prior attempt to stack the

³⁵Peter Paczoly, "The New Hungarian Constitutional State: Challenges and Perspectives," in A. E. Dick Howard, ed., Constitution Making in Eastern Europe (Baltimore: Johns Hopkins University Press, 1993), p. 31.

³⁶The threshold was raised from 4% to 5% in 1993. Andrew Arato, "Elections, Coalitions and Constitutionalism in Hungary," *op. cit.*, p. 27.

³⁷Andras Sajo, "The Arrogance of Power," East European Reporter, vol. 5, May/June 1992.

³⁸Andrew Arato, "Elections, Coalitions and Constitutionalism in Hungary," East European Constitutional Review, vol. 3, nos. 3/4, Summer/Fall 1994, p. 28.

³⁹See, for example, Andrew Arato, "Parliamentary Constitution Making in Hungary," East European Constitutional Review, vol. 4, no. 4, pp. 45-51.

first interim government (which forced his resignation), in practice, it was not.⁴⁰ With respect to matters of constitutional import, therefore, the makers of the Velvet Revolution had unprecedented potential power to remake the institutions of the communist regime. That they chose the same path of radical continuity under these very different initial conditions is a matter that merits exploration.

Even though the Czechoslovak communist regime was of the hard-line variety when compared with its reforming Warsaw Pact allies (the Czechoslovak Communist Party's initial reaction to glasnost in the Soviet Union, for example, was to stop selling *Pravda* in Prague), its minions had nonetheless been hard at work on a new constitution that might incorporate the Gorbachev agenda. The Communist Party member who was to eventually lead the government of National Understanding, Marián Čalfa, had served the old regime since 1988 in the position of Federal Minister for legislation. In that capacity, he had been head of the Committee in charge of drafting a new constitution, which had been scheduled to go into force in 1990.⁴¹ By Čalfa's own account, the Party's new draft mentioned neither the leading role of the Communist Party nor Marxism-Leninism. Consequently, Civic Forum's request early on in the round table talks for the removal of the Party's leading role from the constitution was immediately acceptable to the government in principle, so long as the changes were implemented according to existing legal procedures.⁴²

Although it was potentially part of its arsenal, the Czechoslovak government did not deploy constitutional reform as a strategic weapon for preserving the Party's power in its negotiations with the opposition over the future of the country. Nor did they adopt the Hungarian strategy of attempting to outflank their opponents by posing as the real agent of democratization. The marked difference between the character of the Polish, Hungarian and Czechoslovak Round Table Talks is the extent to which constitutional change was not a prominent topic for discussion in Prague.

Indeed, on several occasions, the opposition seemed to treat the existing constitution with greater reverence than did its actual creators; for example, it was future Prime Minister Václav Klaus, not a member of the government negotiating team, who urged that President Gustav Husák appoint the members of the interim government before resigning, so as to adhere to the letter of the law.⁴³ Although in December 1989 the Party's representatives proposed holding immediate direct

⁴⁰Michael Kraus, "Settling Accounts: Post-Communist Czechoslovakia," paper delivered at the APSA Annual Meetings, Chicago, September 3-6, 1992, pp. 3-6. That the Czecho-Slovak Communists had minimal actual power in the interim government is one of the reasons they did not find it necessary to immediately rename their party, as their counterparts in Poland and Hungary, whose role in shaping the transition was more substantive, were compelled to do.

⁴¹Milos Calda, "Roundtable Talks in Czechoslovakia," unpublished revised manuscript, June/July 1994. Archives of the Center for the Study of Constitutionalism in Eastern Europe, pp., 20. The paper will be published in Jon Elster, ed., *The Round Table Talks* (Chicago: University of Chicago Press, forthcoming).

⁴²Vladimir Hanzel, *Zrychlený Tep Dejin* (Prague: OK Centrum 1991), pp. 62ff. This text provides edited transcripts for nine meetings between the government and opposition from 26 November to 9 December 1989.

⁴³Ibid., pp. 323-324.

elections to the Presidency, which would have enabled the opposition to appeal directly to the Czech and Slovak people over the heads of the Federal Assembly that had been "elected" in 1986. Civic Forum insisted that Czechoslovakia's new caretaker President be appointed by the Parliament, as specified in the old regime's constitution.⁴⁴

The conciliatory approach of Civic Forum negotiators on constitutional issues in part explains why the outgoing order in Czechoslovakia never had to maneuver to co-opt the process of constitutional change; largely, they were not forced to do so. Both opposition and government were in surprising tacit agreement that the existing point of departure for the transfer of power would be the communist constitution, albeit for different reasons.⁴⁵ Given that their demands for constitutional amendments were all accepted with little resistance, and that the balance of power was in their favor, why did the makers of the Velvet Revolution from the outset embrace a conservative approach to the necessary transformation of the country's basic law?

In framing an answer to this question, there are three factors that are of critical importance. First, the hard-line nature of the Czechoslovak communist regime certainly must be taken into account. It was difficult, at the time, to imagine that the apparatus would accept substantive change without a fight. While the fear level at the Polish and Hungarian Round Table Talks was also palpable, given that both sets of negotiations took place before the fall of the Berlin Wall, this must be weighed against the mitigating factor that the price of a crackdown was higher for reform communists than it was for unreconstructed party members of the Czech and Slovak variety.

Second, in many respects, Civic Forum was understandably wholly unprepared for the breathtaking pace of possible change. In Timothy Garton Ash's oft-cited phrase, it took ten years to make the revolution in Poland, 10 months in Hungary, and 10 days in Czechoslovakia.⁴⁶ Czechs and Slovaks did not have the luxury of self-consciously reflecting on the course that the revolution was taking while they were negotiating; there simply was not enough time in the day. Viewed in this context, it is perhaps unsurprising that when in round two of the negotiations Ladislav Adamec unexpectedly asked the opposition to propose candidates for ministerial positions, Civic Forum first refused to do so, only presenting the regime with a list of names a full week later.⁴⁷

Finally, and perhaps most importantly, rightly or wrongly, Civic Forum's indisputable leader does not seem to have believed that a new constitution belonged at the very top of the democracy

⁴⁴For an elaboration of Civic Forum's position on this issue, see "The Position of the Coordinating Center of Civic Forum, 14 December 1989," and "Václav Havel's speech, 16 December 1989", both documents from the Archives of the Center for the Study of Constitutionalism in Eastern Europe.

⁴⁵Calda, *op. cit.*, p. 48.

⁴⁶Timothy Garton Ash, *The Magic Lantern* [New York: Random House, 1990], p. 78.

⁴⁷Hanzel, *op. cit.*, pp. 70-72; pp. 158 ff. Interestingly, no Slovaks were present at round four of the negotiations, which was the meeting where Havel first proposed candidates for cabinet positions, initiating the negotiations over the composition of the federal government. There, Adamec paternalistically cautioned Civic Forum that Slovaks were underrepresented in its first proposed government. See Hanzel, pp. 161 ff.

movement's list of priorities. In his dissident writings and early Presidential speeches, Havel repeatedly stressed that laws or systems, in and of themselves, can really guarantee nothing of value at all. Good laws alone can never create the quality of life on which human dignity relies for democracy is more than a collection of formal rules. A system formed with truth rather than lies as its point of departure, according to Havel, cannot be mandated from on high.⁴⁸ With these long-held beliefs surely shaping Havel's initial approach to politics in practice, the old dissident strategy of demanding that the laws be upheld, "an act of living within the truth that threatens the whole mendacious structure at its point of maximum mendacity," carried the day.⁴⁹

Civic Forum's insistence that the transfer of power be consistent with the letter of existing law had additional strategic benefits. Since the old constitution gave the President extraordinary powers, as Havel himself has put it, Czech and Slovak democrats were able to use against them "what they had invented against us."⁵⁰ Yet Havel's political thought and strategy may also be seen as a reflection of the damage done to the very spirit of constitutionalism by the communist manipulation of language and legality to legitimate totalitarian power.

III. THE CZECH-SLOVAK CONFLICT AND CONSTITUTIONAL REVOLUTION

Three parliaments (the Federal Assembly and the Czech and Slovak National Assemblies, respectively) were elected in the first free elections on 8-9 June 1990. Each body was elected for two years, half the normal term, with a mandate to adopt a new constitution.⁵¹ Instead of taking decisive and immediate action to institutionalize the revolution in the form of a new federal constitution, the newly elected Federal Assembly wound up continuing to accept the legitimacy of the communist constitution as an interim document, one that would be amended to be suitable until a replacement could be negotiated.⁵² The symbolic and substantive value of a legal break with the communist era for the cause of democracy was perhaps squandered at a time when there was a high degree of cooperation between Czech and Slovak political leaders. That cooperation was all too

⁴⁸See, for example, Václav Havel, "The Power of the Powerless" (1978) and "Politics and Conscience" (1984) in Václav Havel, Living in Truth (London: Faber and Faber, 1989), especially pp. 95-100 and 153-57, respectively. See, also, President Havel's speech to the first freely elected Federal Assembly, 29 June 1990 in Václav Havel, Projevy: leden - červen 1990 (Prague: Vysehrad, 1990), pp. 151-183.

⁴⁹Václav Havel, "The Power of the Powerless," in Václav Havel, Living in Truth (London: Faber and Faber, 1989), p. 98.

⁵⁰See Havel's speech to the first freely elected Federal Assembly, 29 June 1990 in Václav Havel, Projevy: leden - červen 1990 (Prague: Vysehrad, 1990), p. 179.

⁵¹Katerina Mathernova, "Czecho?Slovakia: Constitutional Disappointments," in A. E. Dick Howard, ed., Constitution Making in Eastern Europe (Washington: Woodrow Wilson Center Press, 1993), p. 63.

⁵²This is a decision that merits explanation, given that the dissidents around Václav Havel had worked on constitution drafting prior to November 1989, and had actually prepared a draft of a new federal constitution. See "Obcanske Forum, predklada ceskoslovenske verejnosti a ustavnim organum republiky, prvni navrh nove ustavy," 5 December 1989. Document in author's possession.

quickly to degenerate into confrontation, in large part facilitated by the institutional inheritance from the totalitarian system.

While the Czecho-Slovak Federal Assembly was successful in passing a series of amendments to the federal constitution in 1990-91, its efforts to draft a new constitution, ironically, were undermined by voting rules that had been originally devised to generate the appearance of democratic procedure in the one party state. The 1968 Law on the Federation, an amendment to the 1960 constitution that transformed Czechoslovakia from a unitary state to a federal one, provided for a Federal Assembly with two chambers. Representatives were elected to the upper chamber (the Chamber of the People) by the entire population on a proportional basis. In contrast, the lower chamber (the Chamber of the Nations) was comprised of 75 representatives elected in the Czech Lands and 75 representatives elected in Slovakia. In voting on any bill, both houses were governed by the anti-majority principle (*zákaz majorizácie*), which translates literally as the prohibition of majoritarian rule.⁵³ Ostensibly designed to protect the rights of the Slovak minority, it stipulated that the ratification of any extraordinary legislation - constitutional amendments, laws on the President and the election of the President - required a 3/5 majority (super majority) of both Czechs and Slovaks in the lower chamber.⁵⁴ What this meant, in practice, was that a mere 31 Slovak deputies in the Chamber of Nations could block any proposed constitutional amendment, even if the bill had the unanimous support of all the other deputies in both chambers.⁵⁵ There was, while it existed, no democratic government anywhere else in the world "in which comparable minorities of legislative bodies have as much blocking power."⁵⁶

To complicate matters still further, Czechoslovakia's communist constitution was a curiosity even among other federal systems of the Soviet variety. It proclaimed a federal state that presupposed the existence of republic level constitutions, yet the charade had stopped short of actually promulgating these documents for the constituent states. Thus, Czechoslovakia's democratic forces inherited republican parliaments -- the Czech and Slovak National Councils -- whose precise mandate had never been formally codified. Upholding the communist constitution, consequently, required the immediate drafting of republican constitutions, yet this aim had to be pursued at the same time that the Federal Assembly was laboring to retire the old constitution. Put another way,

⁵³See "Ustavni zakon o ceskoslovenske federaci, z 27. rijna 1968, c. 143 Sb.," especially articles 41 and 42. This Act can be found in the Archives of the Center for the Study of Constitutionalism in Eastern Europe and in Jiri Grospic, *Ceskoslovenska Federace* (Prague: Orbis, 1972), pp. 139-263.

⁵⁴Katerina Mathernova, "Czecho?Slovakia: Constitutional Disappointments," in A. E. Dick Howard, ed., *Constitution Making in Eastern Europe* (Washington: Woodrow Wilson Center Press, 1993), pp. 64-65.

⁵⁵Vojtech Cepl, "Constitutional Reform in the Czech Republic," *University of San Francisco Law Review*, vol. 28, Fall 1993, p. 30.

⁵⁶Lloyd Cutler and Herman Schwartz: "Constitutional Reform in Czechoslovakia: E Duobus Unum?," *The University of Chicago Law Review*, Vol. 58, Spring 1991, p.549.

demanding that the laws be upheld meant in practice that no less than three new constitutions had to be worked on simultaneously.

Who was to tackle the task of refounding the federation initially seemed relatively straightforward. The Federal Assembly would work on drafting a new Federal constitution, yet it was to coordinate its endeavors closely with the efforts of deputies in the Czech and Slovak National Councils, who were charged with the simultaneous creation of the Czech and Slovak Republics' first constitutions.⁵⁷ That the Slovaks immediately after the revolution began work on their own constitution, having a first draft ready in April 1990, should be read as evidence of a budding Slovak quest for independence, but it might also be seen as their effort to uphold the basic law of the land.⁵⁸ National governments were also quite understandably "more afraid of preserving unsuitable structures" than the Government of National Understanding, since they were more intimately acquainted with the dysfunctionality of existing federal arrangements.⁵⁹

The notion that the federation derived its legitimacy from the republics was already technically enshrined in law, as Article 1 of the 1968 law on the federation explicitly stated such.⁶⁰ That premise was further institutionalized, however, in a power-sharing agreement between federal and republican institutions, which after lengthy negotiations was passed in the form of a constitutional amendment by the Federal Assembly in December 1990. The power-sharing agreement devolved most economic powers to the republics, with the federation retaining control of foreign policy and financial strategy. It also tacitly implied that the ratification of a new federal constitution for Czechoslovakia would of necessity require the approval of both the Czech and Slovak National Councils; any ratification procedure that circumvented these structures could hardly produce a born-again federation that was perceived by all parties to be founded on a consensus between its two members.

Despite his initial disinterest in immediately replacing the communist constitution, with the June 1990 elections behind him, President Havel placed the adoption of a new federal constitution at the top of his list of priorities. For the majority of Slovak politicians in early 1991, however, this now amounted to putting the cart before the horse. If the Czech-Slovak relationship was to be placed on a new footing, and the common goal was to build a federation from the bottom up, then a state treaty between the two republics, consistent with international law, must first be forged. Once this

⁵⁷President Havel's speech to the first freely elected Federal Assembly, 29 June 1990 in Václav Havel, *Projev: leden - červen 1990* (Prague: Vysehrad, 1990), pp. 155-157.

⁵⁸"Navrh Ustavy Slovenskej Republiky (1. pracovna verzia)," Komisia Slovenskej narodnej rady pre pripravu Ustavy Slovenskej republiky pod vedenim Prof. JUDr. Karola Planka, predsedu Najvyššieho sudu Slovenskej republiky, Bratislava, April 1990. Archives of the Center for the Study of Constitutionalism in Eastern Europe.

⁵⁹President Havel's speech to the first freely elected Federal Assembly, 29 June 1990 in Václav Havel, *Projev: leden - červen 1990* (Prague: Vysehrad, 1990), p. 162.

⁶⁰"Ustavni zakon o ceskoslovenske federaci, z 27. rijna 1968, c. 143 Sb.," cl. 1.

treaty was established and Czech-Slovak equality was therefore officially inscribed in law, the task of adopting a new federal constitution could only then be tackled.⁶¹

While Czechs expressed exasperation at the peerless Slovak notion that citizens of the same country could forge something akin to an international agreement, at another level, Slovak demands followed logically from the spirit of the power-sharing constitutional amendment, that is from the supposition that it was not for the federation to devolve powers to the republics, but rather, that it was only the republics who could delegate authority to the federal government. Whenever Slovak politicians felt that this basic principle had been compromised, they threatened to declare the supremacy of Slovak laws over federal ones, a move that their Czech counterparts almost uniformly interpreted as tantamount to treason. Discussions of constitutional matters foundered on the question of the desired state treaty's meaning and significance, increasingly taking the form of a dialogue of the deaf. For most Czech politicians, the locus of refounding was a new federal constitution, for Slovaks, it was a state treaty. The federation's President was forced to assume the role of mediator between two ethnically defined factions.⁶²

With the prospects for attaining a new constitution before the June 1992 parliamentary election all but nil, in early 1992, President Havel attempted to break the constitutional deadlock by proposing several constitutional amendments for reform of both the anti-majority principle and the Federal Assembly structure.⁶³ All of them were blocked by the Slovak opposition. Though a good portion of Slovak deputies seemed to vote against the proposals simply because they were President Havel's, their voting behavior can also be explained by simple self-interest: Why should a minority with extraordinary power voluntarily vote it away, particularly when that power might be used as a bargaining chip in unrelated negotiations?⁶⁴ This dynamic reached its logical point of culmination in June 1992, when the Slovak minority blocked the reelection of Havel as President, symbolizing the insurmountable impasse that had been reached. In a very real sense, then, the prospects for Czecho-Slovak democracy were undermined by the initial adoption of legal procedures that were never designed to govern a liberal democracy.

After the June 1992 elections, which brought two political parties - The Movement for a Democratic Slovakia (HZDS) and the Civic Democratic Party (ODS) - that shared very little

⁶¹David Franklin, Interview with Pavel Rychetsky, May 1991. Rychetsky provided written answers to questions that Franklin had submitted. Archives of the Center for the Study of Constitutionalism in Eastern Europe.

⁶²Ibid. See, also, the interview with Václav Havel, October 17, 1991, BBC Summary of World Broadcasts (1991, October 19). Available: NEXIS Library: Europe File: All Europe, and "Polocas rozpadu: Prepis Stenografickeho zaznamu ze setkani nejvyssich ustavnich cinitelu u prezidenta Vaclava Havla na Hradecku dne 3. listopad 1991," *Slovenske Listy*, 1994.

⁶³Cutler and Schwarz, *op. cit.*, pp. 549-551.

⁶⁴Katerina Mathernova, "Czecho?Slovakia: Constitutional Disappointments," in A. E. Dick Howard, ed., *Constitution Making in Eastern Europe* (Washington: Woodrow Wilson Center Press, 1993), pp. 73-75

common ground to power in the Czech Republic and Slovakia, the task of federal constitution-drafting was formally abandoned, and efforts to recast the political order were reconcentrated at the republic level.⁶⁵ Czech Premier Václav Klaus and Slovak Prime Minister Vladimir Meciar were successful in forming a caretaker federal government that would eventually supervise its own retirement. The decision to create two independent states on January 1, 1993 was taken at the sixth meeting between HZDS and ODS on August 26.⁶⁶ Less than a week later, Slovakia made the split official when it promulgated Slovakia's first democratic constitution, to go into effect October 1. That document was written in such a way that it could theoretically function as both a charter for an entity that was part of a larger federal structure or as the basic law for a sovereign state, but its opening lines "We, the Slovak nation" and its definition of a citizen as a citizen of Slovakia signaled the official end of the Czechoslovak era.⁶⁷ The document was ratified by the Slovak National Council, and was to be presented to the Slovak people for final approval in the form of a referendum, though this never took place.⁶⁸

With the formal date for the division of the country set, and the Slovak constitution already drafted and ratified, the Czech National Council faced an urgent task. They needed to draft and ratify a new constitution by the close of the year to avoid becoming the world's first democratic state without a body of basic laws to underpin its political order. The constitution drafting process was highly politicized; at this point in the game, different political parties had developed competing notions of what best served the republic's interest.⁶⁹ On the actual day the constitution was ratified, December 16, 1992, no fewer than 90 amendments to the evolving text were proposed, with twelve changes actually accepted. One of the amendments accepted on the floor was no less than the inclusion of a bill of rights.⁷⁰ Nevertheless, the Czech constitution was ultimately ratified by an overwhelming majority (172 out of 200 deputies). Interestingly, the entire divorce process took place

⁶⁵"Constitution Watch: Czechoslovakia," *East European Constitutional Review*, vol. 1, no. 2, Summer 1992, p. 3.

⁶⁶"Chronology of Discussions of Division of Czechoslovakia," CTK National News Wire (1992, November 27). Available: NEXIS Library: Europe File: All Europe.

⁶⁷*Ustava Slovenskej Republiky* (Bratislava: NVK International, 1992), Preamble and Article 52. Article 156 lists the sections that did not come into force on the day of the Constitution's actual promulgation; the activation of these bracketed passages rendered the document a charter for a sovereign state.

⁶⁸"Constitution Watch: Slovakia," *East European Constitutional Review*, vol. 1, no. 3, Fall 1992, p. 10.

⁶⁹See, for example, "Vladni navrh Ustava Ceske Republiky," 4 November 1992, "Navrh ODA Ustava Ceske Republiky," 1992 (Daniel Kroupa Draft), and "Navrh KDS," 18 August 1992. See also, Vaclav Havel, "Nekolik poznamek na tema ceske ustavy," 7 August 1992. All party drafts and Havel's memorandum from the Archives of the Center for the Study of Constitutionalism in Eastern Europe.

⁷⁰"Czech Republic Adopts Constitution," United Press International (1992, December 16). Available: NEXIS Library: Europe File: All Europe.

legally, with the Federal Assembly narrowly passing a constitutional amendment in late November 1992 abolishing the Federal Republic as of January 1, 1993.⁷¹

The method of radical continuity, therefore, had the largest unintended consequences in the former Czechoslovakia. Abiding by the communist legal rules of the game, even against the backdrop of an ongoing series of significant amendments to the old constitution, had the unfortunate byproduct of underscoring and encouraging what divided rather than united citizens of the common state. Attempting to draft and agree on ratification procedures for the basic charter for three new political orders -- Czech, Slovak, and Czechoslovak -- with the *zakaz majorizace* in full force was an invitation to constitutional deadlock even had all three legislative bodies been comprised of angels. Ironically, the experience of interwar democracy notwithstanding, thanks in large measure to communism's legal legacy, Czechoslovakia in reality had less of a usable past, constitutionally speaking, than did its Polish and Hungarian neighbors.⁷² The ultimate price of pursuing full legality under these initial conditions was the division of the country. Yet the silver lining in this tale is that both successor states are today governed by constitutions that were entirely the creation of freely elected assemblies.

IV. CONCLUSION

Bruce Ackerman has argued that the immediate aftermath of revolution provides liberal democrats with a unique opportunity, what he calls "the constitutional moment," where circumstances are optimal for laying the legal foundations for a democratic order and mobilizing the requisite broad popular support for the constitutional initiative. Timing in tackling major constitutional controversies is critical, for the opposition to authoritarian rule will only remain united for a finite amount of time after it has become clear that a new order is in the making. If the constitutional moment passes in vain, therefore, it is very difficult to recreate it.⁷³

The cases considered in this paper support Ackerman's theoretical claim. In Poland, Hungary, and the former Czechoslovakia, the decision to follow the letter of communist constitutions never designed to function in conditions of genuine liberty facilitated the bracketing of the more difficult constitutional questions for resolution at a later date. While postponing these hard tasks allowed democratizing elites to focus on other pressing problems, it also meant that fundamental

⁷¹"Constitution Watch: Czech Republic," East European Constitutional Review, vol. 2, no. 1, Winter 1993, pp. 4-5.

⁷²Restoring the interwar constitution of 1920 was never an option that was seriously entertained, perhaps because it was based on the notion of Czechoslovakism (its opening lines, for example, read "We the Czechoslovak people"), which in 1989 was for some Slovaks a euphemism for Czech chauvinism. See "Sbirka zakonu a narizeni statu ceskoslovenskeho," 6. brezna 1920, Archives of the Center for the Study of Constitutionalism in Eastern Europe.

⁷³Bruce Ackerman, The Future of Liberal Revolution (New Haven: Yale University Press, 1992), especially pp. 46-50.

constitutional questions would have to be confronted after the salient cleavages dividing post-communist societies had fully crystallized into rival political groupings. As a result, Poland and Hungary have yet to move into the realm of ordinary politics, where the constitution successfully provides the framework for political action, rather than being a tool in the hands of competing political parties.⁷⁴ Czechoslovakia's dissolution was in part a consequence of accepting an irrational legal apparatus that enshrined communist tactics of divide and rule, yet which the leaders of the Velvet Revolution volunteered to inherit.

If we consider the relationship of these three revolutions in time, the outcome of the initial negotiations between government and opposition presents a paradox. The Hungarian and Polish Round Table Talks took place under the shadow of Soviet power, yet the Polish negotiations revived an old institution, the Senate, and the Hungarian discussions produced a heavily amended constitution. In contrast, the meetings between the regime and dissidents in the former Czechoslovakia took place after the fall of the Berlin Wall and resulted in only symbolic legal change. What might have been the most radical Round Table was instead the most conservative, from a constitutional perspective. To summarize what I have argued above, we can explain the Czecho-Slovak early lack of interest in legal questions by the extraordinarily rapid pace of the revolution in Prague, the still vivid memory of the hard-line *ancien régime*, Havel's belief that laws in and of themselves can guarantee nothing, and the dissident political strategy of demanding that the laws be upheld, which carried over into an era when the previously powerless had suddenly become powerful.

The comparison delineated in this paper also demonstrates that ethnic conflict need not always serve as a spoiler of democratic development. Political scientists have typically focused on the way in which ethnic cleavages in a given country can be ameliorated by institutional design.⁷⁵ The case of the former Czechoslovakia, viewed in comparative perspective, provides a curious example of ethnic differences fueling the resuscitation of constitutionalism. Constitutional deadlock at the federal level served as a catalyst for constitutional revolution at the republic level. Ackerman's constitutional moment may have passed for Czechoslovakia, but this had the effect of recreating opportunities for securing a clean legal break with the past in each of the member republics. In this sense, both Czechs and Slovaks were granted a chance to learn from their past mistakes that was not available to

⁷⁴Stephen Holmes and Cass Sunstein have maintained that parliamentary constitution-making and easy amendability may be optimal for post-communist transitions. While their argument is persuasive, in this author's view, it does not adequately acknowledge the extent to which the collapse of constitution-making into ordinary politics can, over time, undermine the development of constitutionalism itself. See Stephen Holmes and Cass Sunstein, "The Politics of Constitutional Revision in Eastern Europe," *op. cit.*

⁷⁵For prominent examples, see Arend Lijphart, The Politics of Accommodation (Berkeley: University of California Press, 1975), and Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries (New Haven: Yale University Press, 1984). See, also, G. Bingham Powell Jr., Conflict Resolution in Divided Societies (Stanford: Stanford University Press, 1970).

their Polish and Hungarian counterparts, facilitating, rather than undermining progress toward the rule of law. By redefining the state, constitutional democracy was given a second chance in the Czech and Slovak Republics.

Though a systematic comparison of the content of the new Czech and Slovak constitutions is beyond the scope of this analysis, a few points do bear mention here. The Slovak constitution, when compared with its Czech counterpart, provides a less than stable foundation for parliamentary democracy, in that it is riddled with extra-constitutional legal references.⁷⁶ Thus, significant legal change in Slovakia may be all too easily tantamount to constitutional change. While the Slovak constitution is among the most easily amended democratic constitution in the world -- a three-fifth majority of the single chamber parliament is all that is required -- the document's repeated references to a body of law yet to be devised make it easier to affect constitutional change through ordinary legislation. The content of the Slovak constitution helps to explain why many observers of Slovak politics are concerned about legal developments in the country, even though the constitution has yet to be amended once. In short, the case of Slovakia demonstrates that a sacralized constitution is not a sufficient condition for democratic consolidation. That said, if a principal objective is to keep the individuals who staffed the apparatus of the communist regime away from the democratic levers of power, the method of radical continuity -- especially if it spills over into other policy areas, attitudes toward lustration being a prominent example -- is likely to impede the attainment of this goal. Regardless of their content, sacralized constitutions play an important symbolic role in regime transition. They signify that the authoritarian practices of the past are no longer acceptable, discrediting the *ancien régime's* executors. Their ratification by assemblies elected in free and fair elections distinguishes them from the fictional constitutions previously manipulated by communist elites. In closing the regime question, they provide a firmer foundation for consolidating democracy. Pointing this out is not to diminish the extraordinary accomplishments of Polish, Hungarian, Czech and Slovak democrats to date, the greatest of which is that all of these transitions have been achieved without violence. All attempts to break radically with the past, be they sacralized constitutions or lustration policies, are more likely to unleash violent opposition. Yet students of democratic transitions must also acknowledge that strategies that minimize the risk of violence may have their own unintended and enduring consequences.

⁷⁶See, for example, Articles 25, 26, 34, 38, 39, 41, 46, 53, 63, 64, 71, 74, 87, 100, 130, 140, 143, and 148 of the Slovak Constitution.