

Constitution Making in Eastern Europe

Edited by A. E. Dick Howard

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Published by The Woodrow Wilson Center Press

Distributed by The Johns Hopkins University Press

Woodrow Wilson Center Special Studies

The Woodrow Wilson Center Press
Editorial Offices
370 L'Enfant Promenade, S.W.
Suite 704
Washington, D.C. 20024-2518 U.S.A.
telephone 202-287-3000, ext. 218

Distributed by
The Johns Hopkins University Press
Hampden Station
Baltimore, Maryland 21211
order department telephone 1-800-537-5487

© 1993 by the Woodrow Wilson International Center for Scholars

Printed in the United States of America

⊗ Printed on acid-free paper.

9 8 7 6 5 4 3 2 1

Library of Congress Cataloging-in-Publication Data

Constitution making in Eastern Europe / edited by A.E. Dick Howard.

p. cm.—(Woodrow Wilson Center special studies)

Includes bibliographical references and index.

ISBN 0-943875-48-X (paper : acid-free paper)

1. Europe, Eastern—Constitutional law. I. Howard, A. E. Dick.

II. Series

KJC4445.C66 1993

342.47' 02—dc20

[344.7022]

93-4044
CIP

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Acknowledgments

This book had its origins in a core seminar series on “East European Constitutions,” held in the fall of 1991 and spring of 1992. The sessions were organized by East European Studies of the Woodrow Wilson International Center for Scholars in Washington, D.C. Funds supporting these seminars and the publication of this book came from a grant awarded to the Woodrow Wilson Center’s East European Studies program by Congress under the terms of the Soviet and East European Research and Training Act of 1983.

The editor gratefully acknowledges Paula Bailey Smith, East European Studies program associate, and Traci Nagle, editorial assistant, who prepared the manuscript for publication, with help from East European Studies program assistant Kristin Hunter and program interns Sandra W. Smith, Steve Langmuir, and B. Susan White.

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Introduction

A. E. Dick Howard

Writing a constitution is a symbolic event in the life of a people or country. A few countries, such as the United Kingdom and Israel, do without a written constitution. Most, however, see a constitution as a document in which the fundamentals of a polity are set down.

Constitutions serve many purposes. They ordain the uses of power by creating such institutions of government as a parliament, an executive, and courts. They channel government's power, for example, in specifying how a bill becomes a law. They put limits on power, for example, in bills of rights declaring fundamental rights.

Some constitutions live a long time. The United States Constitution was drafted in 1787 and, with its amendments, remains in force today. Other constitutions are short-lived; since 1789, the start of the French Revolution, France has had seventeen constitutions.

Great crises—revolution, civil war, political upheaval, fundamental changes in regime—tend to trigger the making of a constitution. The Belgian Constitution of 1830 and the constitution of France's Fifth Republic are examples.

The collapse of the Soviet Empire has brought just such a time of constitution making to the countries of Central and Eastern Europe. The dawn of a new era requires constitutions that reflect

the premises of a democratic society in which the rule of law replaces the rule of the party.

As the process of constitution making unfolds, it is fitting that the Woodrow Wilson International Center for Scholars should undertake to assess the lessons of that experience. Woodrow Wilson, himself a great student of constitutional government, took a personal interest in the kind of regimes that would emerge in Central and Eastern Europe after World War I. Indeed, on a recent trip to Albania, I was told by that country's president of the large number of Albanian children who have been named Wilson in honor of an American whose principles are still remembered there. I am sure that, were he to read these essays, Wilson would be pleased to see his namesake institution inquiring into the metes and bounds of constitutionalism in Central and Eastern Europe.

The Wilson Center's East European Studies program invited six scholars to its 1992-93 core seminar on constitution making in the countries of Central and Eastern Europe. The chapters that compose this volume are the fruits of those scholars' thinking. Anyone who reads these essays is bound to be struck by the difficulties that face the countries of the region as they attempt to write new constitutions. The euphoria that characterized Czechoslovakia's "velvet revolution" and similar events in neighboring countries has given way to a sober assessment of the hard political and economic decisions that must be made. As these authors make clear, it was easier to agree on ousting the ancien régime than it has been to chart a course for the future.

Andrzej Rapaczynski, who here writes about constitutional politics in Poland, points to the most fundamental problem facing the region's constitution makers—"the fact that the new constitution must be prepared at a time of profound and rapid changes in the political and economic structure of the country." Politics, of course, rears its head, and short-term goals are given greater attention. Rapaczynski paints a vivid picture of the way in which, after Solidarity's split into two factions, intellectuals of the "Warsaw" faction began to view the draft constitution as a means to prevent Lech Wałęsa, backed by the "Gdańsk" faction, from dominating Parliament and the government.

Similarly, Katarina Mathernova, who in her essay surveys the efforts to write a constitution for the Czech and Slovak Federal Republic, comments on the fact that, even while Slovak leaders in the Federal Assembly propelled the country toward separation

by creating deadlock, public opinion polls had consistently shown that a majority of the population in both the Czech and Slovak republics wanted to remain in a common state. She concludes that the struggle has been, in good part, a power struggle.

In these struggles, history and nationality play their part. Americans and other Western observers sometimes tend to lump the countries of Central and Eastern Europe together, as if the same generalizations might apply to all of them. Those countries do indeed have certain things in common, the most obvious their being brought within the sphere of Soviet domination after World War II.

Many factors, however, make each country distinctive. In ethnic terms, Poland and Hungary are more homogeneous than is Romania, with its large Hungarian minority, or Bulgaria, with its people of Turkish heritage. Even the Czechs and Slovaks are, as the term is used in Central Europe, two separate "nations" (the Slovaks especially view themselves that way). Bohemia, at one time an independent kingdom, was the most prosperous part of the Austro-Hungarian Empire, whereas until 1918 Slovakia, poorer than the Czech lands, was under Hungarian rule. It is small wonder that Mathernova comments on the "backpack full of history" that the peoples of Central Europe carry on their shoulders.

Custom and tradition have their effect on constitutional development. Even the repressions of the Communist years, during which party leaders sought to mold the local equivalent of the "Soviet man," could not wipe out centuries of traditional ideas about constitutionalism. Péter Paczolay, chief counselor to Hungary's Constitutional Court, stresses in his chapter the importance of customary law in Hungarian constitutional history.

The Hungarian notion of a "constitutional revolution" emphasizes the place of law, not only in mapping out a future political arrangement, but also in justifying the manner and mode of transition. Paczolay remarks on the similarities between the revolution of 1848 in Hungary and the way in which constitutional change unfolded beginning in 1989. Thus Hungary achieved a peaceful transition to a multiparty system without resorting to force or other extraconstitutional means.

Ideas, as well as politics, history, and custom, play their part when new constitutions are written (ideas, of course, are intertwined with those forces). The notion of popular sovereignty, intertwined with Jean-Jacques Rousseau's notion of the general

will, is a powerful force in French political thought. Rapaczynski remarks on the strength of this view in Poland; it presents "the people" as the true sovereign, "endowed with a will of their own from which all legitimate political authority stems." A tendency to "take certain democratic clichés too literally," however, complicates any effort to create a viable balance between parliament, the government, and the president.

Bureaucratic habits—these will be familiar to students of government in the West—can make reforms tenuous. Joanna Regul-ska considers the prospects for local government in the constitutions of Central and Eastern Europe. She sees major barriers to establishing autonomous local self-government in the region. There are, to be sure, conceptual problems in laying the foundation for authentic local government, yet the problems extend beyond those of concept.

Whatever the relevant constitution and laws may say about the status and powers of local government, Regul-ska notes the tendency of central government's ministries to establish their own branch offices rather than allow self-government to emerge from the bottom up. Local governments often find themselves denied sufficient financial resources. Constitutional proclamations of local autonomy clash with tendencies of those at the center to retain power.

Existing governmental structures, especially those established at an earlier time when circumstances were different, can be important factors in the shape of constitutional revision. For example, a key element in the compromise hammered out during Poland's 1989 roundtable talks was the restoration of the Senate, which the Communists had abolished after World War II. The opposition could compete freely with the Communists for seats (65 percent of the seats in the lower house were assigned to the Communists and their allies). The 1989 elections dealt such a blow to the Communists, however, that Solidarity was able to form a government.

Under these circumstances the Senate had lost the essential reason for its having been reinstated. Yet the drafters of the new constitution were confronted with a dilemma. If the lower house was on its way to being a truly democratic institution, they could not leave the Senate as it was. Yet they could not move to abolish the Senate; it had to vote on a new constitution. A subcommittee of the constitutional drafting commission sought to resolve this problem by providing for the indirect election of senators and having the senators represent units of local government.

Structure can indeed be critical to the success or failure of constitutional drafting. Mathernova believes that one of the chief reasons for the failure of the effort to agree on a new constitution for the Czech and Slovak Federal Republic lay in the institutional structure created by a 1968 amendment to the Constitution. That document created a Federal Assembly with two houses: a Chamber of People, elected by Czechs and Slovaks on the basis of population, and a Chamber of Nations, with equal numbers of deputies from the Czech and Slovak lands. On important bills the 1968 amendment required the concurrence of a majority of the deputies from each of the two republics in the Chamber of Nations. During the efforts to write a new constitution, Slovak opposition party members were able to exercise a veto in what turned out to be, in effect, a Federal Assembly made up of three chambers.

In the face of such obstacles, one can begin to understand why the road to constitutional reform in Central and Eastern Europe has been so difficult. In the early months after the overthrow of the old order, it was natural to suppose that Poland, Hungary, and Czechoslovakia would be the first of the former Warsaw Pact countries to adopt new constitutions. It was Poland that had galvanized the forces of change with the emergence of Solidarity, and Poles had high hopes of having a new constitution in place in time to celebrate the bicentennial of the great constitution of 3 May 1791.

Czechoslovakia, too, gave cause for optimism. It cherished the legacy of a vibrant, functioning democracy in the years between the world wars. The “velvet revolution” had produced the most admired figure in all of the countries of the region, Václav Havel, a leader of great moral stature. Hungary also had made an auspicious start, having been the region’s innovator in economic change. Who would have predicted, in 1990, that the first two countries in the region to adopt new constitutions would be Bulgaria and Romania?

It would be a mistake, however, to measure progress simply by the yardstick of the formal adoption of brand-new constitutions. Problems notwithstanding, there has been progress on important fronts. One should take note, in particular, of the establishment of constitutional courts and the decisions being handed down by those courts to enforce constitutional principles.

Judicial review—the power of a court to declare a legislative act invalid on the grounds of its unconstitutionality—is a familiar feature of the American constitutional landscape. It is a relative

newcomer, however, to the European scene. After World War II, constitutional courts were established in various countries of Western Europe. But in the Communist countries, the idea of independent courts, like that of the rule of law, was antithetical to ideas of state and party. With the demise of Communist rule in Central and Eastern Europe, constitutional courts have appeared on the landscape of that region as well.

Herman Schwartz, a seasoned practitioner of human rights and constitutional law, writes about the constitutional courts of Central and Eastern Europe. The civil law tradition of judging, as Schwartz points out, produces "career judges" who see their job as simply carrying out the will of their country's parliament. Against this civil law background, and the regional legacy of courts as ciphers during the Communist period, Schwartz notes how the newly created constitutional courts of Central and Eastern Europe have operated "with surprising independence." Those who don a judge's robes in those countries "can become courageous and vigorous defenders of constitutional principles and human rights."

Will the countries of Central and Eastern Europe have their "constitutional moments"? Americans had such a moment with the adoption, in the 1780s, of their federal Constitution. Despite the opposition of the Anti-Federalists to ratification, and the close vote in some of the ratifying conventions, the Constitution became, in time, the nearest thing the United States has to an ark of the covenant. In the gropings of constitution makers in Central and Eastern Europe, it appears that such a "moment" has not occurred there yet.

One should recall, however, that before James Madison and his colleagues arrived at Philadelphia in 1787, Americans had lived through a decade of trial and error in establishing the foundations of an enduring constitutionalism. The first state constitutions, beginning with those adopted in 1776, were hardly flawless. They gave legislatures too much power, they tolerated a limited franchise and legislative malapportionment, and sometimes they were challenged as lacking authentic legitimacy. At the federal level, the Articles of Confederation were even more flawed; they created a central government so dependent on the states as to be unable to deal with economic problems at home and largely impotent in the face of foreign challenges abroad. From such unsteady beginnings came much of the insight that produced the 1787 Constitution.

Americans weathered the 1770s and 1780s, charting a course for their future. Two centuries later, citizens of the older democracies can hope that the peoples of Central and Eastern Europe will find a sure foundation for their constitutional aspirations. The problems are daunting: the raging fires of nationality and ethnicity, the dislocations of rebuilding enfeebled economies, the malaise and cynicism that accompany hard times, the need to inculcate civic values that will make democratic ideals part of the people's moral fiber. In their effort to build constitutional democracies, the peoples of Central and Eastern Europe have the affection and encouragement of all who search for the blessings of ordered liberty.

Chapter 1

How Ideas Travel: Rights at Home and Abroad

A. E. Dick Howard

Neither time nor place can cabin ideas. In 1987 United States citizens celebrated the two hundredth anniversary of their Constitution, and in 1991 they marked the bicentennial of their Bill of Rights. At just the same time—as if history were a creative choreographer—the peoples of Central and Eastern Europe were proving the resilience of old ideas about freedom, human dignity, and democracy. After living for so many years under oppressive one-party regimes, people in Central and Eastern Europe and the Soviet sphere now find themselves questing for choices long denied them.

New times require new constitutions. Nearly every country, even the most repressive, has a “constitution.” We are all too familiar with constitutions, such as the Soviet Union’s 1936 Constitution, whose glowing promises of justice and human dignity have little relation to reality. Such documents must be discarded, and authentic constitutionalism planted in their place.

Thus, as the United States reflected on the two hundred-year odyssey of its Bill of Rights, Russians, Poles, Bulgarians, and others began to write new constitutions. At the core of each of these new documents lies a bill of rights. Indeed, in January 1991 the national assembly of the Czech and Slovak Federal Republic gave priority to the adoption of a new bill of rights; meanwhile debate continued on other constitutional provisions—in partic-

ular, those effecting a division of powers between the federal government and the two republics.

Those who draft a bill of rights must understand the history and traditions of the country for which the document is being created. One who sought to write a bill of rights for Hungary, for example, would need to know about the great Golden Bull of 1222 (which is to Hungarian history what Magna Carta is to that of England), the impact of Enlightenment thought on eighteenth-century Hungary, and the reformist thrust of the 1848 revolution. Likewise, a Polish drafter would wish to recall the legacy of Polish Constitutionalism, including the notable Constitution of 3 May 1791—the world's second national constitution (after the Philadelphia Constitution of 1787).

Stating a people's rights is not, however, a parochial exercise. Drafters of bills of rights look not only to their own country's experience but also to that of other countries. Professors and scholars who work with constitutional commissions in Central and Eastern Europe are well read; they know the Federalist Papers and the writings of Western theorists such as John Locke and Montesquieu. Drafting commissions invite experts from other countries to pore over drafts and offer comments and advice.

Traffic is heavy between the United States and the emerging democracies, as well as between those countries and the capitals of Western Europe. Americans who travel to consult on new constitutions are sometimes dubbed "constitutional Johnny Appleseeds." West European experts are equally in demand. The president of France's Conseil Constitutionnel, Robert Badinter, and Heidelberg professor Helmut Steinberger (formerly a justice of the West German Supreme Court) have been frequent guests in Prague and Bucharest.

This international traffic in discourse about rights and constitutions is nothing new. Drafters of the early American constitutions, like their modern counterparts in Central and Eastern Europe, looked to both homegrown and imported ideas for inspiration. Indeed, the colonies' original charters linked rights in the Old World to those in the New. Each charter had a provision like that of the Virginia Company's charter of 1606 guaranteeing settlers "all liberties, franchises, and immunities . . . as if they had been abiding and born within this our Realm of England."

America's heritage from the British Constitution traces back for centuries. Magna Carta (1215) carried a guarantee of proceedings according to the "law of the land"—the forerunner of the principle of due process of law. Magna Carta's assurance that there should be no sale, denial, or delay of justice anticipated modern constitutional guarantees of equality before the law.

The struggles between Parliament and the Stuart kings in seventeenth-century England produced other "liberty documents" that influenced American views on constitutional rights. Sometimes the precedents are exact. England's Bill of Rights (1689) includes the precise counterpart of the First Amendment's guarantee of the right to petition for redress of grievances, the Second Amendment's assurance of the right to bear arms, and the Eighth Amendment's ban on excessive bail, excessive fines, and cruel and unusual punishment.

The framers of early American documents were also influenced by the writings of the great European political theorists. James Madison drew upon Montesquieu in declaring, in the *Federalist* No. 47, that allowing legislative, executive, and judicial powers to fall into the same hands "may justly be pronounced the very definition of tyranny." From Locke the American founders gleaned notions of a social compact and citizens' retention in civil society of the inherent rights of life, liberty, and property.

American drafters during the colonial period also introduced the fruits of their own deliberations on rights. Responding to complaints about the lack of an established body of laws protecting rights in Massachusetts Bay, the colony's magistrates adopted, in 1648, the Laws and Liberties of Massachusetts. Pennsylvania's founder, William Penn, drafted that colony's Frame of Government (1682), containing such guarantees as open courts, jury trial, and moderate fines.

The year 1776 brought revolution, independence, and the opportunity for Americans to declare those rights they deemed fundamental to a free society. In May 1776 a convention, meeting in Williamsburg, instructed Virginia's delegates in Congress to move to declare the United Colonies free and independent states. At the same time, the convention appointed a committee to prepare a declaration of rights and a frame of government for Virginia.

The first state constitutions differed from each other in some specific provisions. For example, some states provided for a bi-