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Contested Constitutions

Legitimacy of Constitution-making and Constitutional Conflict in Central Europe

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What were the effects of constitution-making procedures on the acceptance of the new “rules of the political game” in postcommunist Central Europe? This article sets out to scrutinise the increasingly popular claim among politicians and scholars of democratisation that inclusiveness and popular involvement in constitution-making processes enhance a constitution’s legitimacy. The concept of constitutional conflict, referring to political contestation over the interpretation and application of constitutional relations among state institutions, is introduced as a way to assess constitutional acceptance among politicians. The investigation concentrates on constitutional conflict patterns during the five years following constitution-making in seven Central European countries: Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, and Slovakia. Constitution-making procedures varied substantially among the cases, as did the intensity and timing of constitutional conflict. The article finds that differences in constitution-making procedures do not necessarily determine the legitimacy of constitutions among political elites. Instead, ambiguity on the allocation of formal competencies among political actors and increasing political tensions between pro-reform and anti-reform parties during the early 1990s proved to be more important triggers of constitutional conflict. Accordingly, studies on constitution-making and democratisation should focus less on procedural aspects and take into account the fuzziness of important constitutional provisions and the extent to which constitutions can survive periods of intense political polarisation.

Keywords: *constitution-making; legitimacy; constitutional conflict; Central Europe; democratic consolidation*

Introduction

Why has the consolidation of political institutions been troublesome in some Central European countries, while in others the “rules of the game” were swiftly accepted by political elites and have functioned smoothly since their introduction in

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the first post-communist constitutions? This article seeks to answer these questions by exploring the relation between constitution-making processes and the subsequent institutionalisation of constitutional rules in seven Central European countries: Bulgaria, the Czech Republic, Estonia, Hungary, Poland, Romania, and Slovakia. Each of these formerly state socialist countries adopted new, or radically modified their existing constitutions between 1989 and 1992. Although they share common historical legacies, and simultaneously set out on a radical political and economic transformation, substantial differences show in the ease and pace of this transformation. This article focuses on one such difference: the extent to which political elites have accepted and recognised constitutional provisions on the allocation and exercise of state power. It builds upon a growing body of academic literature and policy documents that emphasise the importance of the constitution-making process in post-authoritarian societies. Rather than the particular institutional choices made during transitions, it is increasingly claimed that procedural aspects of constitution-building are critical for democratic stability, conflict resolution, and constitutional legitimacy.¹ In spite of mounting attention to this notion, it has not often been scrutinised in systematic comparative research.² The one and a half decade that has passed since the breakdown of communism in Central Europe provides a unique opportunity to generate case-based knowledge in order to investigate some of the assumed effects of constitution-making. Specifically, I will analyse whether differences in the “openness” of constitution-making procedures have affected constitutional acceptance by political elites in seven Central European states.

The openness of constitution-making will be determined on the basis of three dimensions: the origin of the document, the arena of deliberation and adoption, and popular involvement through referenda. In case of open constitution-making, a new constitution was deliberated upon and adopted by a specially elected constituent assembly, followed by a popular referendum. Closed constitution-making refers to the amendment of non-democratic constitutions in political arenas that lack electoral legitimacy, such as communist parliaments, and without citizen involvement through a referendum. To gauge elite constitutional acceptance I will introduce the concept of constitutional conflict, which refers to disagreement between political actors or representatives of state organs about the meaning or application of constitutional provisions on the legislative, executive and judiciary branches of government. Building upon theories of democratic consolidation, I will argue that constitutional conflict indicates a lack of willingness among political elites to accept and observe the constitution as a framework for political conflict and compromise.³ The analysis will focus on the period between communist breakdown and 2005, but special emphasis is put on the first five years following constitutional adoption or modification. It is expected that if major dissatisfaction with the constitution exists, it will be voiced during that period.⁴

The study finds, firstly, that political elites in the seven cases did not habituate to their new constitutional frameworks at equal pace. Issues that were particularly often

subject to conflict across Central Europe were prerogatives of presidents, presidential election procedures, provisions on the executive-legislative power balance, and judiciary independence. Constitutional conflicts took the shape of critique of the constitutional status quo, clashing interpretations of specific constitutional procedures, and inter-institutional disputes brought before constitutional courts. The highest levels of constitutional conflict were found in Bulgaria, Slovakia, and Poland, but in the other cases there were intense confrontations about constitutional provisions as well. Overall, constitutional conflict occurred most frequently within the first five years following the adoption of constitutions and faded away afterwards. Annual conflict levels were substantially higher in Bulgaria, Poland, and Slovakia, and it took considerably longer before conflict rates decreased in those cases. Here, politicians were clearly less willing to accept the new rules of the game.

The second finding is that open constitution-making procedures do not necessarily produce legitimate constitutions and that closed constitution-making is no certain cause for contestation. Among countries with both open and closed constitution-making procedures, conflict patterns varied substantially. A clear link between constitution-making and constitutional acceptance can therefore not be established. These findings demonstrate that a purely procedural approach to constitution-making cannot capture variation in constitutional legitimacy in Central Europe. A closer look at conflict patterns in the seven countries indicates that two factors have affected elite behaviour towards new constitutions. First, the “resurrection” of left-wing, anti-reform cabinets in Bulgaria, Poland, Slovakia, and Romania provoked a temporary increase of conflict in the periods 1993-95 and 1997. Discord about economic reforms pitted opposition parties against governments and cabinets against presidents, the latter assuming a more active role in these times of political crisis. Accordingly, struggles about the scope of presidential authority were pertinent in these four cases. Another factor that undermined constitutional acceptance was the ambiguity of constitutional provisions. In all seven cases, ambiguous competency distribution among members of the executive and a lack of clarity about constitutionally permitted degrees of government interference in the judiciary were important sources of conflict. Although such ambiguity constitutes no necessary condition for conflict, it has been seized by political actors as an opportunity to contest the application and interpretation of constitutional rules.

The article continues as follows. In section two, this article’s contribution to the study of democratisation is discussed. The concept of constitutional conflict is theoretically elaborated and linked to the literature on democratic consolidation. Section three maps the pattern of constitutional conflict in seven Central European states following the adoption or first modification of their constitutions. This section gives quantitative information on patterns of conflict and provides illustrative examples of specific cases of contention. Section four continues with a discussion of the effects of constitution-making and gives an overview of such processes in Central Europe. A ranking is derived from these case descriptions, indicating the degree of openness

of constitution-making in the seven cases. Section five analyses the implications of constitution-making for constitutional conflict and discusses important findings. Section six concludes.

Constitutional Acceptance and Democratic Consolidation

According to constitutional theorist Pasquale Pasquino, a democratic constitution ideally fulfils two basic functions.⁵ On the one hand it entails a morally superior set of values, rights and principles that provides generally accepted guidelines for social life and politics. On the other hand, a constitution specifies the allocation and distribution of powers among state institutions and political actors, e.g., between parliaments and governments, as well as certain procedures within these institutions. Stated simply, constitutions define the division of labour among politicians. As Elgie and Zielonka put it, “by clarifying prerogatives of different institutions and spelling out decision-making procedures, constitutions create the stability and predictability necessary for the democratic system.”⁶ For a constitution to successfully perform both of these functions it should be accepted by the citizens and politicians so that the ground rules of the political system are not constantly contested, modified or breached. Although constitutional legitimacy among citizens has received some attention in recent research, the extent to which constitutions are accepted at the level of political elites has remained underexposed so far.⁷ The concept of constitutional conflict can fill this void, both conceptually and empirically. Constitutional conflict indicates that the allocation of competencies and the division of power as prescribed by the constitution is not (fully) accepted by political actors. The particular sources of constitutional conflict may be diverse, but when politicians fight over rules instead of over substantial issues within the framework of these rules there is evidence that these rules lack legitimacy.

The significance of constitutional conflict and compromise for democracy follows from Philippe Schmitter’s definition of democratic consolidation. “In the short run” he argues, “the consolidation of democracy depends on actors’ and citizens’ ability to come up with a solution to their intrinsic conflicts over rules.”⁸ Surely, recent developments in Italy and other established democracies show that such lack of constitutional legitimacy is not limited to democracies-in-the-making.⁹ But the conflict density often associated with new democratic constitutions shows that constitutional conflict is intrinsic to the consolidation of new political regimes, where the rules are of recent making and more susceptible to modification attempts. The idea of “institutions as battleground” is indeed pertinent in the democratisation process in post-communist Central Europe.¹⁰ Following the breakdown of communism, democratic institutions had to be built up largely from scratch, and time would tell whether the agreements made in this highly uncertain transition period would transform into a solid and durable legal framework. In such institutionalisation processes,

much depends on actors' patience, self-control and willingness to abide by the rules, even when these do not serve their interests optimally. Elster, Offe and Pruss term this the "institutional encapsulation of agency," which pertains to the development of a situation where the ground rules are largely accepted and actors justify what they are doing with reference to and respect for these rules.¹¹ Such quasi-automatic acceptance of the political ground rules is typically absent in newly democratising regimes. Political actors may still find it worthwhile to resort to constitutional contestation and meddling with the rules in their pursuit of political gains. One reason for this is that the rules are of recent origin, have yet to sink in and become part of a common legacy. Hence, the constitution typically lacks the legitimacy that guarantees that it will be obeyed and respected even if that implies short-term political loss.¹² Once the political rules have institutionalised, political decisions and rules are clearly separated, implying "that virtually all decisions take place 'under' accepted rules and in accordance with the domains of action assigned through such rules."¹³ In conclusion, it is essential for democratic consolidation that political actors learn to consider the constitution as legitimate and self-binding and refrain from constantly changing or contesting the rules established by it.

The next section empirically investigates the extent to which constitutional provisions in seven Central European countries have been subject to political conflict. Based on the patterns of conflict following constitutional adoption, the willingness of political elites to accept the new rules of the game can be identified. The section establishes regional patterns of constitutional conflict and gives concrete examples. First, however, I will discuss some methodological considerations related to the operationalisation of the concept of constitutional conflict and to data collection.

Patterns of Constitutional Conflict in Central Europe

This study utilises unique data on constitutional conflict in post-communist Central Europe. The empirical focus lies on conflicts about constitutional provisions in the area of executive-legislative relations as well as with regard to the role and competencies of constitutional courts. Such regulations matter for the functioning of a democratic system as they define relations among the different branches of government. With its focus on the inter-institutional distribution of power, this study is thus essentially concerned with conflicts over constitutional checks and balances. Besides disputes about formal relations between the executive and legislature, rule conflicts within these bodies will be taken into account. Requirements for confidence votes in government are examples of rules that organize interaction between the executive and legislature, while rules specifying the right of a president to sit at cabinet meetings relate to intra-executive relations.¹⁴ The right of the parliamentary speaker to call sessions of the assembly and rules on quotas for votes in parliament are examples of intra-legislative relations that may become subject to discussion.¹⁵

Constitutional courts can be a party to constitutional conflict in two ways. On the one hand, they may be called upon as an arbiter in conflicts among executive and legislative institutions. On the other hand, being subject to constitutional provisions and regulations, the courts' own powers and competencies may become a matter of conflict too.

Data collection of constitutional conflict was conducted on the basis of the Country Updates of the *East European Constitutional Review*, the Political Data Yearbooks of the *European Journal of Political Research*, *Keesing's Contemporary Archives*, and rulings and findings by constitutional courts as found on their websites. This information was subsequently checked against secondary literature on political and constitutional development in post-communist Central Europe. Instances of constitutional conflict were included in the dataset in case of explicit disagreement between two or more political actors concerning the existence, interpretation, application or adaptation of constitutional arrangements regarding presidents, governments, parliaments and constitutional courts. Many conflicts evolved around the application or interpretation of specific constitutional provisions, for example, on cabinet reshuffle procedures, conditions for votes of no-confidence and consultation and countersignature requirements. In February 1997, for example, a clash erupted around the latter topic when Bulgarian president Zhelyu Zhelev unilaterally appointed several judges. Zhelev and the ruling Bulgarian Socialist Party subsequently got into a constitutional power struggle around the question whether or not the minister of justice should have countersigned the nominations.¹⁶ Proposals for changing the constitutional distribution of competencies among actors or state organs that encountered criticism were also included as instances of constitutional conflict. Numerous were the attempts by Central European presidents to strengthen their constitutional power base at the expense of cabinets, most notably in the areas of defence and foreign affairs.¹⁷ Some constitutional disputes remained on the political agenda for extensive periods, while others disappeared quickly with or without being resolved and yet others popped up at various moments. In order to distinguish between different instances of conflict, the basic rule was applied that an issue that re-emerged was counted as a new instance of conflict if clearly separated from an earlier conflict in terms of the conflict arena, the actors involved or time.¹⁸ In a number of cases conflicts were brought before the constitutional court, therewith granting this institution an important role in Central European constitutional development. Sometimes, court rulings were contested by parties engaged in conflict, which explains why such issues were dragged along extensively, or reappeared on the political agenda at a later stage. The questioning of constitutional court rulings is a particularly clear indicator of difficult democratic consolidation. It shows that neither the text of the constitution nor the interpretation provided by the constitutional court clears up ambiguity about the formal distribution of competencies. Table 1 shows the evolution of constitutional conflict in the seven countries between 1989 and 2005. The table reports annual amounts of conflict for all countries, from the moment that the

Table 1
Annual Conflict Level in Seven Central European
Countries, following Constitutional Adoption/Modification

Country	89	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	Total
Bulgaria	—	—	2	3	1	1	12	1	3	3	2	0	3	0	0	0	0	31
Czech Rep.	—	—	—	—	4	2	0	0	0	1	0	1	1	0	0	0	1	10
Estonia	—	—	—	0	1	2	2	0	2	1	0	2	0	0	0	0	0	10
Hungary	0	1	3	0	0	0	2	0	2	2	1	1	0	0	0	0	0	12
Poland	—	—	—	—	1	5	2	1	1	2	1	0	0	0	0	0	0	13
Romania	—	—	1	0	1	2	0	1	0	0	2	0	0	0	0	0	0	7
Slovakia	—	—	—	—	2	7	6	1	3	2	2	2	0	0	0	0	0	25
Total	0	1	6	3	10	19	24	5	11	11	8	6	4	0	0	0	1	109

Note: The numbers represent annual instances of conflict in individual countries. Numbers in **bold** are total amounts of conflict in separate countries across the entire time frame (far right column), and total annual amounts of conflict across the region (lower row).

first post-communist constitution was adopted or (in the cases of Hungary and Poland) the communist constitution was radically modified.¹⁹

Some interesting patterns within and between countries appear from Table 1. Overall, the amount of rule conflicts decreased through time, which indicates that a gradual institutionalization of constitutional rules occurred in the region. The most conflict-prone period was 1993-95, and there was a temporary increase of conflicts in 1997-98. The total conflict level subsequently fell, to wither almost completely after 2001. This overall pattern can also be discerned within all individual countries. Counting from the adoption of the first post-communist constitution, or the amendment of the existing fundamental law, the first five years contained most conflicts in all cases. In numerical terms, Bulgaria and Slovakia stand out clearly. Respectively thirty-one and twenty-five conflicts were recorded for these cases, while the others displayed between seven and thirteen instances of constitutional conflict.

Many of the conflicts pitted presidents against cabinets on the issue of presidential involvement in specific policy areas, such as defence, foreign policy, and appointment and dismissal procedures. In October 1995, for example, President Kováč demanded—in line with article 102 (r) of the Slovak constitution—reports on cabinet activities. The Mečiar cabinet declined, interpreting Kováč's request as an attempt to hand out tasks to ministers and thus trample on the power of the prime minister. The issue was brought before the constitutional court, which ruled in favour of the president.²⁰ This type of conflict prevailed in other cases as well, with clashes between presidents and (prime) ministers taking up a majority of conflicts in most countries, except the Czech Republic and Romania. A related matter, presidential election methods, has been a recurring topic of political debate in the Czech and Slovak Republics, Estonia and Hungary. Only in Slovakia this would eventually lead

Table 2
Mean Annual Conflict Levels in Central Europe

Country	Constitution Adopted/ Substantially Amended	Annual Mean in First 5 Years	Annual Mean Post First 5 Years	Annual Mean Overall
Bulgaria	12 July 1991	3.8	1.2	2.1
Czech Rep	16 December 1992	1.2	0.5	0.8
Estonia	28 June 1992	1.0	0.6	0.7
Hungary	23 October 1989	0.8	0.7	0.8
Poland	1 August 1992	2.0	0.4	1.0
Romania	21 November 1991	1.0	0.2	0.5
Slovakia	1 September 1992	3.6	0.8	1.9
All countries		1.9	0.6	1.1

to the introduction of direct presidential elections in 1999.²¹ In Bulgaria and Slovakia, governments have attempted to increase their influence over the judicial branch, notably by budget cuts and raising the threshold for majority decisions. These and other executive-judiciary conflicts followed upon court rulings that were perceived negatively by the governing majority, and they can be seen as clear displays of the intermingling of political disputes and constitutional conflict.

Although the general pattern of a gradually declining level of constitutional conflict pertains to all countries, there are a number of interesting differences between the countries. These especially appear when focusing on the first five years following the new constitution. The mean annual amount of conflicts during the first half decade is particularly high in Bulgaria, Slovakia and Poland. In the first two cases the annual conflict level nears four, and with an annual mean of two conflicts in Poland, the first five years under the “Little Constitution” were also quite troublesome. Table 2 reports mean annual conflict levels in the seven Central European cases, specified into conflict levels during the first five years following constitutional adoption or modification, the remaining period until December 2005, and the entire period.

Bulgaria shows up on top in all categories, with 3.8 conflicts on average from July 1991 until 1996, 1.2 conflicts annually in the remaining nine years, and an average of 2.1 conflicts for the entire period. Slovakia follows with 3.6 conflicts on average between September 1992 and September 1997, but its annual conflict level decreased more rapidly after these initial five years. In terms of the overall level, Slovakia scores almost as high as Bulgaria, with an average of 1.9 conflicts annually. Poland’s first five years after the adoption of the “Little Constitution” in August 1992 were characterised by two conflicts annually on average, but conflict density after 1997 decreased substantially.²² Of the remaining countries Romania displays the lowest overall annual conflict level, followed by, respectively, Estonia, the Czech

Republic and Hungary. The lower scoring countries also confirm the overall pattern in which the most conflict-dense period lies in the first five years of the new constitution. While a general trend in conflict patterns is perceivable, there is variation among the Central European countries with respect to the difficulties they encountered functioning under a newly established constitutional framework. These differences most clearly appear during the first five years following the constitutional adoption, with Bulgaria and Slovakia showing the most difficult rule acceptance and Romania and Estonia the smoothest.

How can these differences be explained? Did the Hungarian amendments of October 1989 introduce an allocation of competencies acceptable to all relevant political parties and actors? Did the Slovak and Bulgarian constitutions lack legitimacy and clarity of formulation, explaining for the many instances of political contestation? In order to answer these questions the constitution-making processes of the seven cases will be analysed. Based on assumptions drawn from the literature on constitution-making, the relation between the openness of this process and the conflict patterns introduced above will be analysed. The following section discusses important findings from this literature and subsequently analyses constitution-making processes in the seven cases.

Openness of Constitution-making

In democratisation studies and among policy makers there is increasing attention and support for the argument that procedural differences in constitution-making and institutional engineering affect subsequent democratisation, regime stability, peace and conflict resolution.²³ Jon Elster is arguably the best-known scholar who has emphasised the relevance of processes of constitution-making in the context of transitions from state socialism to democracy.²⁴ He admits that constitution-makers' goals and preferences are important to understand constitutional choice. But the way these preferences are aggregated into final decisions may transform these initial preferences, thus rendering the process itself at least as important. Philippe Schmitter states it even more boldly: "what is more important and will have a more predictable impact than the specific nature of institutions a particular country chooses is the process whereby it does so."²⁵ This is not to say that institutional choices do not matter for subsequent political developments, but these choices and their legitimacy are to a large extent dependent upon the constitution-making process. More specifically, it is the degree of openness of this process that determines whether institutional choices are acceptable to all parties. The more key stakeholders feel that their preferences have been taken into account in the bargaining process, the more legitimate the final product will be. This is acknowledged by Juan Linz and Alfred Stepan who distinguish between various constitution-making models with different degrees of legitimacy. They refer to their "optimal model" as

one in which decisions about issues of potentially great divisiveness and intensity are arrived at in a consensual rather than a majoritarian manner and in which the work of the constituent assembly gains further legitimacy by being approved in a popular referendum that sets the democratic context in which further changes take place.²⁶

Hence, consensual decision making in a constitutional assembly and approval by the population through a referendum will contribute to the acceptance of the constitution. Actors or groups who feel that their preferences were not taken into account during the constitution-making process may voice their dissatisfaction at a later stage, potentially triggering conflict with the initial constitution makers. Participation, representativeness, and consultation of groups not directly involved in constitutional engineering may thus enhance constitutional legitimacy and reduce the likelihood of constitutional conflict.

In the process of choosing a new constitution, three dimensions can be distinguished, each of which can be “open” to different degrees. The first is the origin of the constitution. Politicians can choose to adopt an entirely new constitution, amend the existing document or re-adopt a previous basic law.²⁷ Arguably, drafting and adopting a new document widens the scope for deliberation, as the entire institutional framework becomes subject to political debate. From the formulation of Basic Rights and Freedoms to the colours of the national flag and the distribution of competencies between state institutions, everything has to be discussed, and choices within each domain are theoretically open. Amending an existing constitution and even more so re-adopting a previous document is less open to deliberation, as the document is partly or in its entirety excluded from deliberation. Verheijen thus stresses that “adapted communist constitutions are bound to create problems for the relations between political institutions because of the ambiguities and contradictions which result from the mix between a communist type constitution and round table agreements.”²⁸ The second dimension to constitution-making is the arena of deliberation and adoption. Students of constitution-making agree that the most desirable and enduring way of choosing a country’s institutions is through a specially elected constitutional assembly.²⁹ Constitutional assemblies carry most legitimacy as they are especially created to “assemble” as many groups as possible for deliberation on the new constitution. Furthermore, their term is often fixed, and elections to the regular parliament take place after the new constitution has been adopted. Constitution drafting in a regular parliament, in a constitutional assembly that is automatically converted into a regular parliament or in an indirectly elected (appointed) constituent assembly is considerably less open. When constitution-making and regular decision-making are not properly disconnected, participants are stimulated to focus on short-term political concerns or to reserve special competencies for themselves in the constitution.³⁰ This potentially creates ground for dissatisfaction among actors not involved in constitution-making or other state organs such as the executive. The third dimension of constitution-making is involvement of the population. This may take place before, during and after the constitution-making process, for example, through consultation rounds and other forms of deliberation.

Constitutional referenda are however the most common instrument to assess popular legitimacy of the new basic law. Popular referenda on constitutions enhance the legitimacy of the constitution and increase the costs for political actors of challenging it. In case citizens were involved in processes of constitution-making, they can be expected to be better capable of checking the behaviour of politicians. This may then be anticipated by leaders, who will subsequently be less likely to violate the rules.³¹

Constitution-making in Central Europe

With the exception of Hungary and Poland, new constitutions were adopted in all countries following the breakdown of communism. In Hungary, the existing communist-era text remained in place and was heavily changed in 1989. Basically all fundamental constitutional provisions were amended, which effectively meant that a new constitution took effect.³² In Poland a heavily fragmented parliament, along with disagreements between the two legislative chambers, prevented a consensus to emerge on various constitutional drafts in the early 1990s. Eventually, an interim constitution was adopted in 1992. This so-called “Little Constitution”³³ aimed to clarify relations between parliament, government and president and was incorporated into the existing constitutional order. A new constitution was adopted in 1997.

With regard to the constitution-making arena, procedures among the seven countries varied substantially. In Romania and Bulgaria, constitutional drafting took place in specially elected constitutional assemblies with fixed two-year terms. With their constitutions adopted in July and December 1991, respectively, Bulgaria and Romania were also the first two countries in the region with a new basic law. Although Elster, Offe and Preuss emphasise that the Bulgarian roundtable talks “took the form of real negotiations,”³⁴ debates and decisions on most constitutional issues were postponed to the constitutional assembly. The Great Bulgarian National Assembly was formed in June 1990 and was comprised of 400 deputies. The Bulgarian Socialist Party (BSP) held 211 seats and was the first communist successor party in Central Europe to win democratic elections.³⁵ The Romanian Constitutional Assembly was composed of all members of parliament and the senate and was elected in May 1990. Here too, a single party was able to secure a majority in the constitutional assembly. The National Salvation Front (NSF), a heterogeneous group of ex-communists and dissidents led by former communist leader Ion Iliescu, won about 70 percent of the seats in both houses.³⁶ In Estonia, a Special Constitutional Assembly was drawn from the two parliaments existing at that time: the democratically elected 499-member Congress of Estonia and the incumbent legislature. After bickering about the number of deputies each was to deliver, both institutions agreed upon a 30-30 ratio in the Constitutional Assembly.³⁷ The assembly started its work in October 1991, and it took until April 1992 before the first complete draft was finalised.³⁸ In Poland, the Czech Republic and Slovakia, constitution-making took place in democratically elected regular parliaments. Both the Czech and Slovak National Councils had started drafting new constitutions before the break-up of Czechoslovakia in November 1992. Some

important reforms had already been introduced between 1990 and 1992, and the assemblies charged with constitution-making were elected in June 1992. The dissolution of Czechoslovakia became inevitable when the Slovak National Council declared Slovakia's sovereignty in July 1992, and constitutional deliberations for the independent states set off in both national councils. The Slovak National Council agreed upon a constitution for an independent Slovakia even before the Federal Council voted on the ending of Czechoslovakia on 25 November 1992. The adoption of the Czech constitution followed in December of that same year.³⁹ After the roundtable talks of 1989, pseudo-democratic elections to the Senate and Sejm (Polish parliament) were held in Poland.⁴⁰ Although the roundtable talks generated a number of significant changes to the communist constitution, the intention remained to enact an entirely new document, especially as the amendments "failed to address the regulation and structure of state institutions [. . .] and the rights and freedoms of citizens."⁴¹ Both houses were involved in constitution drafting, and the deadline for adoption was set for 3 May 1991. This deadline was missed though, partly due to disagreement between the houses on the procedure for drafting and adopting the new constitution.⁴² When the Sejm was dissolved and early elections were held in October 1991, a fully democratically elected but highly fragmented parliament also failed to agree on various drafts. In serious need of clarifying executive-legislative relations, the "Little Constitution" was finally adopted on 17 October 1992, and would serve as an interim constitution until 1997. Hungary is a special case when it comes to the arena of deliberation. The constitutional amendments were discussed and voted upon in 1989, long before constitution-making in the other countries set off. Moreover, the amendments were passed by a communist parliament (elected in 1985), but only after roundtable talks with a wide variety of opposition groups were held. Many of these organisations, such as the Union of Young Democrats (FIDESZ), the Alliance of Free Democrats (SZDSZ) and the Christian Democratic People's Party (KNDP), would later be represented in democratically elected parliaments. Although not intended as such, discussions in the roundtable talks focused mainly on constitutional issues, and the proposed reforms were accepted by parliament almost verbatim. István Szickinger consequently labels the Hungarian roundtable talks a "quasi-constitutional assembly," but others have been critical of its legitimacy as many groups were denied access or veto powers during the negotiations.⁴³

Romania and Estonia are the only two cases where constitutional referenda were held. The Estonian referendum was organised in July 1992, and with a turnout of more than 66 percent and 92 percent voting in favour of the new constitution the result was unequivocal.⁴⁴ The Romanian referendum took place on 8 December 1991 and was accepted by a 77 percent majority of voters (the turnout was 66 percent). In Bulgaria, a referendum was scheduled but later called off, and also in Poland the April 1992 Constitutional Act stipulated in vain that a referendum would be held.⁴⁵ In Hungary, the Free Democrats initiated a referendum in November 1989 following a deadlock situation in the roundtable talks. The referendum contained questions on the method of electing the president and on restricting the Communist

Party's dominance. The results were a victory for the opposition, but the communist-dominated parliament immediately repealed the results.⁴⁶ In no other case was the population directly involved in the constitutional adoption process.

Constitution-making Environments and Patterns of Conflict

As illustrated by the case descriptions in the previous section, constitution-making procedures across Central Europe varied substantially. The descriptions moreover show that constitution-making often developed in ways different than originally planned. This was especially the case where regular parliaments were charged with drafting and adopting new constitutions, making the process more dependent upon political short-term concerns. Based on the different dimensions of constitution-making in the seven cases, a ranking of "constitution-making environments" (CMEs) can be constructed. It is displayed in Table 3. Considering the assumption that an open constitution-making process reduces the probability of constitutional conflict following the enactment of the constitution, the higher ranked countries are expected to be less conflict prone. All three dimensions of constitution-making—origin of the document, arena of deliberation, and popular involvement—were taken into account. Five represents the highest possible score, indicating (i) a new constitution, drafted and adopted by (ii) a specially elected constituent assembly with a fixed term, and followed by (iii) a popular referendum. A score of zero represents the most closed CME, with an amended communist constitution, constitution-making in the incumbent communist parliament and no referendum. More detailed information on the assigning of scores, as well as a per-country overview of each dimension of constitution-making can be found in the appendix.

Table 3 indicates that the lowest levels of constitutional acceptance should be expected in Poland and Hungary (respectively scoring 1 and 0). In both countries the communist constitution was amended. Although the communist-era text in Hungary had changed beyond recognition, it was coded as an amended document as the procedure that was followed in the Hungarian parliament was that of constitutional amendment. The Polish Little Constitution was adopted by a democratically elected parliament, while voting on the 1989 amendments in Hungary took place before the first free elections of 25 March 1990. Neither of these countries held constitutional referenda. On the other end of the spectrum, Romania's constitution should carry most legitimacy. Its specially elected fixed-term constituent assembly adopted an entirely new document that was later endorsed by the population in a referendum (leading to a score of 5). In Estonia, the special constituent assembly was drawn from an elected parliament and the incumbent Supreme Council. This special assembly was thus not directly elected, but it did deliberate on a fully new document, which was later presented to the Estonians in a referendum. Hence Estonia's ranking equals that of Bulgaria, where the new constitution was drafted and adopted by an elected special assembly, but not put to popular vote (both score 4). The Czech and Slovak

Table 3
Openness of Constitution-making Environments (CMEs)

Country	CME	CME Score
Romania	New document, elected constituent assembly, referendum	5
Bulgaria	New document, elected constituent assembly	4
Estonia	New document, appointed constituent assembly, referendum	4
Slovakia	New document, elected regular parliament	2
Czech Republic	New document, elected regular parliament	2
Poland	Amended communist constitution, elected regular parliament	1
Hungary	Amended communist constitution, communist parliament	0

Note: Calculations of CME scores are based on the coding scheme that is included in the appendix. The maximum possible score is 5; the minimum is 0.

constitutions were also newly drafted, but deliberation took place in regular parliaments. No referendums were organised, which explains why these countries end up in the middle category with scores of 2. A medium level of constitutional conflict is subsequently expected for the Czech and Slovak republics.

Assessing the Effects of Constitution-making

When this ranking of constitution-making environments is matched with the patterns of constitutional conflict during the first five years following constitutional adoption or modification, it appears that the assumed relations do not hold across all cases. Table 4 summarises the CME scores for the seven cases as well as absolute and mean annual conflict levels.

Romania and Estonia, with respectively four and five rule conflicts recorded in the five years after constitutional adoption, fit the expected pattern reasonably. In both countries, new constitutions were adopted by special constitutional assemblies (elected in Romania, partly elected in Estonia) and both held constitutional referenda. In Romania the NSF, holding a two-thirds majority in both houses of parliament, heavily dominated the Romanian deliberation and drafting process.⁴⁷ This could have undermined constitutional legitimacy, as a number of opposition parties did not gain access to parliament and the NSF had the power to adopt the constitution unilaterally. Nevertheless, both the constitution-making process and the contents of the document reflected the NSF's "commitment to democracy" and political and public debate.⁴⁸

Table 4
Constitution-making Environment (CME) and Conflict Levels

Country	CME Score	Number Conflicts in First 5 Years	Annual Mean in First 5 Years
Romania	5	5	1.0
Bulgaria	4	19	3.8
Estonia	4	5	1.0
Slovakia	2	18	3.6
Czech Republic	2	6	1.2
Poland	1	10	2.0
Hungary	0	4	0.8

Hungary, Slovakia and Bulgaria, and to some extent Poland, display levels of conflict that are not in line with expectations. In Hungary, the conflict level is low in relation to the nature of its constitution-making process. Possibly, the effects of the roundtable talks should not be underestimated after all. In spite of the limited degree of formal influence that opposition forces could exert, and despite the repealed November 1989 referendum, the most important constitutional issues were dealt with at the roundtables. Moreover, the opposition's presence and informal pressure during the constitutional debates granted the roundtable talks a great deal of symbolic legitimacy which is why they "amounted to much more than a mere side-show."⁴⁹

Slovakia catches the eye with 18 conflicts, while on the basis of its CME it was assumed to end up in the middle category. A closer look at the period of constitution drafting provides some clues as to why so many constitutional conflicts occurred. The Slovak constitution was drafted and adopted in no time; it took the Slovak National Assembly just over three months. This presumably was to maintain national prestige over the Czechs and resulted in a very strong legislature in which any majority could dominate cabinet composition and legislation, a weak system of checks and balances and lack of a clear distinction between exclusive and shared presidential responsibilities.⁵⁰ The velvet but sudden divorce of the Czech and Slovak Republics and the subsequent wish to immediately draft a new constitution may explain why constitution makers in Slovakia were poorly prepared. Rather than structuring politics, the resulting document was responsible for much of the political turmoil in post-communist Slovakia. This is most clearly illustrated by the many conflicts about unclear constitutional provisions on executive-legislative and intra-executive relations. The constitution was especially vague on the competencies of vice speakers of parliament, on the possibility of combining membership of parliament and cabinet posts, and on presidential appointment and dismissal powers.

Such constitutional ambiguities were apparent in other countries as well, particularly with regard to the distribution of executive authority. Poland's 1992 interim

constitution is a good case in point, as it was particularly unclear on the president's competencies in the fields of defence and national security, as well as on the president's appointment and dismissal powers. A clash between president Lech Wałęsa and Prime Minister Pawlak about the nomination of a new commander of state police in August 1994 illustrates this.⁵¹ While Wałęsa referred to his constitutional duties and claimed full discretion in personnel policies, Pawlak stated that the nomination was subject to co-decision between the president and prime minister. According to Krzysztof Jasiewicz, this conflict was part of a larger struggle between the president and the left-wing SLD/PSL coalition about "control over the so-called presidential portfolios: Internal Affairs, National Defence, and Foreign Affairs."⁵² After a bizarre string of events, during which Wałęsa threatened to veto the 1995 state budget, the president managed to convince the SLD to submit a motion of no confidence against Pawlak, which was accepted by the Sejm on 1 March 1995. In the course of events, Wałęsa managed to convince the Sejm of his interpretation of the constitution and to secure control of the presidential portfolios.⁵³ Practically every constitution in this study contained ambiguities of this kind, provoking similar intra-executive confrontations. The majority of these struggles focused, as in Poland, on presidential authority in the fields of defence and foreign policy and on appointment and dismissal powers.

Bulgaria's conflict pattern, with 19 conflicts between July 1991 and July 1996 following constitution-making in a special constituent assembly, is remarkable as well. Especially the high amount of conflicts in 1995, twelve in a single year, begs for further explanation. In fact, in most countries there has been a concentration of conflicts during one or two years of the first half decade. Table 1 shows that especially the period 1993-95 was conflict dense. A closer look shows that in four cases, including Bulgaria, this period was moreover characterised by radical cabinet turnovers. In Bulgaria, Poland, Romania and Slovakia, pro-reform cabinets of the centre or right lost elections and were replaced by left-leaning or nationalistic coalitions. These new cabinets were critical of radical economic reforms and promised strong leadership and protection of national interests. This anti-reform upsurge was possible due to growing discontent among citizens in the region about the difficulties of economic transition.⁵⁴ Fast and unbalanced privatisation and liberalisation instigated a deterioration of peoples' living conditions, many being worse off than under communism. The call for strong government, moderation of reforms, and social protection was answered by ex-communists in Bulgaria,⁵⁵ socialists and nationalists in Slovakia⁵⁶ and Romania⁵⁷ and leftist and agrarian parties in Poland.⁵⁸ Given the contentiousness of the reform issue, and the authoritarian tendencies of some of these cabinets, conflicts with parliamentary opposition and with presidents were abundant. Even though most confrontations focussed on policy matters, constitutional issues increasingly became part of debates. This was the case in Slovakia, for example, where president Kováč assumed a much more active role in an attempt to counterbalance Mečiar's radical and anti-democratic agenda.⁵⁹ In Bulgaria, the Union of Democratic Forces (UDF) President

Zhelyu Zhelev attempted to expand his authority during both of his terms, but the most intense constitutional struggles were those with the 1995-97 BSP-controlled government of Prime Minister Videnov. In Poland, political hostilities caused problematic intra-executive relations as well. Lech Wałęsa, although officially independent still connected to the right-leaning post-Solidarity camp, had an extremely difficult relation with the centre-left coalition of Waldemar Pawlak, leading to intense struggles over the 1995 budget and the presidential portfolios. In Estonia and Hungary on the other hand, the political landscape was much less divided over the reform issue, which in light of the above might explain the absence of similar conflict patterns.

There is thus no evidence for the effects of constitution-making procedures as presumed by the democratisation literature. Although some of the countries do confirm the expected patterns, other factors seem to have played a more important role in the consolidation of new rules of the game. One important cause of constitutional conflict is rooted in the ambiguity of constitutional provisions, leaving much room for different interpretations of the rules among political actors. In that sense, the constitutions of Central Europe could not provide one of their main functions: the durable allocation of competencies among politicians. The second source of conflict is related to a particular political cleavage that was present in Central Europe in the early 1990s. The political struggle between pro-reform and pro-moderation parties was often fought through the constitution instead of in accordance with it. It should be noted that these two factors should not be seen as completely separate. Ambiguities were present in the constitutional order of all countries, but they did not lead to similar types and levels of constitutional conflict in all cases. In a number of cases they were used as a window of opportunity by political actors attempting to prevail in the political struggle over economic reforms. Being aware of the specificity of this rift for post-communist politics, these events show that open constitution-making procedures are neither necessary nor sufficient for durable, legitimate constitutions. Much depends on the framing of the constitution and the intensity of political debates, which may provoke politicians to challenge the rules of the game.

Conclusion and Discussion

In this article I introduced the concept of constitutional conflict and analysed its relation with the character of constitution-making processes in seven post-communist Central European countries. Specific emphasis was put on conflicts about formal executive-legislative relations and the distribution of competencies among the different branches of government—executive, legislative and judiciary. Constitutional conflicts were defined as disputes about the basic rules of the political game, and it was maintained that analysing such conflicts can shed light on the consolidation of new democracies. It was argued that constitutional conflicts are indicative of a lack

of legitimacy of ground rules, which is a prerequisite for democratic consolidation. Building upon a growing body of literature that emphasises the importance of constitution-making for constitutional legitimacy, democratic consolidation and conflict resolution, the relation between the openness of constitution-making procedures and conflict patterns in seven Central European countries was explored.

The comparison of constitution-making processes and patterns of constitutional conflict during the first five years following constitutional adoption or modification indicates that open constitution-making is no guarantee for elite constitutional acceptance. In a similar vein, closed constitution-making does not mean that the legitimacy of constitutions among elites is necessarily low. Instead, ambiguous formulation of important provisions in the constitutions was a significant source of conflict. Especially executive leadership, i.e., presidents and prime ministers, clashed regularly over the interpretation of the range of their competencies. Vagueness of constitutional provisions alone cannot, however, explain high levels of conflict as the relative absence of contestation in Estonia and Hungary illustrates. Rather, conflict over ambiguous constitutional rules was “triggered” in a number of cases by circumstances that motivated political actors to challenge the constitutional status quo. Major electoral turnovers and periods of economic hardship provided such triggers in four cases, including the most conflict-ridden ones (Slovakia and Bulgaria). The return to power of left-wing and nationalist parties ignited intense periods of political and constitutional turmoil. I therefore argued that the contentiousness of the issue of economic reform, deep-rooted differences between left-wing and right-wing parties and antagonism between cabinets and presidents put constitutional legitimacy under pressure.

These findings indicate that the acceptance of constitutional provisions by political elites is not dependent upon the openness of the constitution-making process. Accordingly, the literature on constitution-making places too much emphasis on procedural aspects. Instead, the quality of the constitution in terms of its clarity contributes at least as much to a durable and acceptable constitution. Constitutional ambiguity constitutes a potential risk that constitution-makers should take into account. Such ambiguity may be rooted in difficult compromises reached during constitutional bargaining and should therefore also be added to analyses of constitution-making processes. It is furthermore insufficient to look at the constitution-making process only. The analyses of constitutional development in Central Europe indicate that under certain circumstances politicians are ready to question or breach the constitutional order for political purposes. We therefore need to take into account the development and intensity of political competition within the chosen framework of rules in order to understand why the framework itself becomes subject to conflict. It may be right to stimulate politicians to neglect their short-term political interests during in the drafting of a constitution, but one should not assume that these interests will not resurface at a later stage.

Appendix Table A1

Dimensions of Constitution-making in Seven Central European States

	I. Origin of Document	II. Arena of Deliberation	III. Public Involvement	CME Score
Bulgaria	New constitution, adopted July 91	Elected (June 90) Special Constitutional Assembly with fixed term (May 91, postponed to July 91), double mandate (constitution writing and legislation)	Referendum planned, but called off	4
Czech Rep.	New constitution, adopted December 92	Regular parliament, democratically elected (June 92)	No referendum	2
Estonia	New constitution, adopted July 92	Special Constitutional Assembly drawn (September 91) from communist parliament and elected congress (February 90): 30 members from Congress of Estonia, 30 from incumbent Supreme Council	Referendum in July 92 (66 percent turnout, 92 percent accept)	4
Hungary	Amended communist, but substantially new constitution. Amendments into force October 89	Adopted by non-democratic parliament (85), roundtable talks served as quasi-constitutional assembly.	Referendum on presidential election procedure in November 89, but repealed by communist parliament.	0
Poland	Amended communist constitution (52), October 92: "Little Constitution"	Little Constitution adopted by democratically elected regular parliament (October 91)	No referendum	1
Romania	New constitution, adopted December 91	Special Constitutional Assembly (elected May 90), consisting of senate and parliament, fixed term (2 year), double mandate	Referendum on 8 December (66 percent turnout, 77 percent accept)	5
Slovakia	New constitution, adopted September 92	Democratically elected regular parliament (June 92)	No referendum	2

Sources: Ludwikowski, *Constitution Making*; Elster, Offe and Preuss, *Institutional Design*; Weber, "Constitutionalism as a Vehicle"; Szickinger, "Hungary's Pliable Constitution"; Pettai, "Estonia"; Ganev, "Bulgaria"; Malová, "Slovakia"; Wyrzykowski, "Legitimacy"; Berglund et al., *Handbook of Political Change*.

Note: CME = constitution-making environment. CME scores are author's own calculations.

Table A2
Coding scheme Constitution-Making Environment

I. Origin of Document	II. Arena of Deliberation	III. Public Involvement
New constitution = 1	Fully elected CA with fixed term = 3	Referendum = 1
Amended	Partly elected CA with fixed term = 2	No referendum = 0
Communist = 0	Elected regular parliament = 1	
	Communist parliament = 0	

Note: CA = Constituent assembly

Notes

1. See, for example, Jon Elster, "Forces and Mechanisms in the Constitution-Making Process," *Duke Law Journal* 45 (1995): 364-96; Vivien Hart, "Constitution-making and the Transformation of Conflict," *Peace and Change* 26, no. 2 (April 2001): 153-76; Philippe Schmitter, "Contrasting Approaches to Political Engineering: Constitutionalization and Democratization" (unpublished manuscript, European University Institute Florence, February 2001); Robert Elgie and Jan Zielonka, "Constitutions and Constitution-Building: A Comparative Perspective," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 25-47; Jennifer Widner, "Constitution Writing and Conflict Resolution," *Round Table* 94, no. 381 (September 2005): 503-18. Several national and international organisations in the field of post-conflict state building have recently published reports on the issue. E.g., International Institute for Democracy and Electoral Assistance (IDEA), "Constitution Building Processes and Democratization," http://www.idea.int/publications/cbp_democratization/upload/cbp_democratization_eng.pdf (accessed 8 February 2008); and Vivien Hart, "Democratic Constitution-making," *United States Institute of Peace Special Report 107* (July 2003), <http://www.usip.org/pubs/specialreports/sr107.pdf> (accessed 8 February 2008).

2. Several studies exist on constitution-making in new democracies, all emphasising and some finding evidence for the significance of procedural choices, but they remain limited to single-case studies or are mainly theoretical in nature. Exceptions are Jennifer Widner's project on constitution writing and conflict resolution, which contains data on 194 cases of constitution drafting between 1973 and 2004 (see the project's website, <http://www.princeton.edu/~pewcr/index.html> (accessed 5 February 2008), and John M. Carey's study of 67 constitution-making processes. See John M. Carey, "Does It Matter How a Constitution Is Created?" (paper prepared for the conference Exporting Democracy: What Democracies Can and Cannot Do, University of Texas, 20-21 April 2007).

3. The tendency of Central European politicians to consider constitutional provisions "as policy instruments, and not as relatively fixed frameworks for policy" has been characterised as "the intermingling of la politique politisée and la politique politisante" by Jon Elster in "On Majoritarianism and Rights," *East European Constitutional Review* 1, no. 3 (1992), pages unnumbered.

4. This argument stems from Widner, "Constitution Writing," 6. She refers to it as follows: "if 'process' has an effect at all, we are most likely to observe its impact in the immediate aftermath of ratification, before the incentives built into the substantive terms themselves overwhelm any memory of what transpired." A five-year period is also chosen for reasons of comparability of the seven cases. In Poland, the 1992 Little Constitution was replaced by a new constitution in 1997, hence making an analysis of events in the five years following the adoption of the interim constitution possible.

5. Pasquale Pasquino, "Constitutional Adjudication and Democracy. Comparative Perspectives: USA, France, Italy," *Ratio Juris* 11, no. 1 (March 1998): 45.

6. See Elgie and Zielonka, "Constitutions and Constitution-Building," 28.

7. Randy E. Barnett makes a strong case for studying constitutional legitimacy and its causes and criticises constitutional scholars for omitting to take it into account. He conceptualises it as legitimacy among the citizens though. See Randy E. Barnett, "Constitutional Legitimacy" (working paper series, Public Law and Legal Theory, no. 01-19, Boston University School of Law, 2001).

8. Philippe Schmitter, "Parties Are Not What They Once Were," in *Political Parties and Democracy*, ed. Larry Diamond and Richard Gunther (Baltimore: Johns Hopkins University Press, 2001), 69.

9. During the 1990s intense political debates took place in Italy about changing the electoral system and territorial distribution of power; see Sergio Fabbrini, "Political Change without Institutional Transformation: What Can We Learn from the Italian Crisis of the 1990s," *International Political Science Review* 21, no. 2 (April 2000): 173-96. See further on constitutional conflict in consolidated democracies Gerard Alexander, "Institutions, Path Dependence, and Democratic Consolidation," *Journal of Theoretical Politics* 13, no. 3 (Fall 2001): 249-70.

10. André Krouwel and Bertjan Verbeek, "Institutions as Battleground: Democratic Implications of Initial Institution Building in Post-communist Regimes," in *Democracy in Central Europe 1989-99*, ed. Justyna Miklaszewska (Krakow: Meritum, 1999).

11. Jon Elster, Claus Offe and Ulrich K. Preuss, *Institutional Design in Post-communist Societies: Rebuilding the Ship at Sea* (Cambridge, UK: Cambridge University Press, 1998), 27-31.

12. See Dankwart A. Rustow, "Transitions to Democracy: Toward a Dynamic Model," *Comparative Politics* 2, no. 3 (1970): 359.

13. Elster, Offe and Preuss, *Institutional Design*, 31.

14. The term "intra-executive" to denote relations between cabinets on the one hand and presidents on the other was introduced by Oleh Protsyk, for example, in his "Politics of Intraexecutive Conflict in Semipresidential Regimes in Eastern Europe," *East European Politics and Societies* 19, no. 2 (May 2005): 135-60.

15. The particular content of the seven constitutions in this study differs of course, and sometimes the matters mentioned here are not in the constitution but are part of specific legislation, such as parliamentary standing rules. I applied the rule that conflicts were only coded in case the rules were part of the constitution or when actors referred to the constitutionality of specific legislation.

16. The conflict focused on a particular article in the Bulgarian constitution. Article 102.2 states that "the president's decrees shall be countersigned by the prime minister of the minister concerned." The following paragraph lists a number of exceptions to this rule, and it was unclear whether it was applicable to nominations of judges. In the end, the constitutional court ruled that the nominations were constitutional as otherwise judicial independence would be "imperilled by ministerial discretion." See "Constitution Watch," *East European Constitutional Review* 5, no. 4 (Fall 1996): 7.

17. Various presidents have made formal attempts to strengthen their constitutional powers in specific policy areas, as well as stretched their influence by interpreting their limited constitutional powers in a broad way. See Thomas A. Baylis, "Presidents versus Prime Ministers," *World Politics* 48, no. 3 (April 1996): 297-323; and "Embattled Executives: Prime Ministerial Weakness in East Central Europe," *Communist and Post-Communist Studies* 40 (2007): 81-106. For a regional overview of presidential behaviour see Ray Taras, ed., *Postcommunist Presidents* (Cambridge, UK: Cambridge University Press, 1997).

18. In a majority of the cases it proved rather straightforward to distinguish separate conflicts as they concerned different constitutional topics. A number of issues, e.g., the presidential election procedure in Hungary, the scope of presidential involvement in the so-called "presidential portfolios" in Poland and MP replacement procedures in Slovakia appeared on the political agenda several times. Although substantively these different conflicts were clearly connected, they emerged during different cabinet periods and different presidential terms, emerged among different compositions of parliament and were separated by significant amounts of time. It could be argued that a particular constitutional issue that repeatedly raises much political turmoil makes it all the more relevant for the current analysis.

19. As appears from Table 1, the timeline is not similar for all countries, which is an effect of different constitutional adoption or modification moments. The dates on which the new or modified constitutions

took effect were as follows: Bulgaria, 12 July 1991; Czech Republic, 16 December 1992; Estonia, 28 June 1992; Hungary, 23 October 1989 (Amendment XXI to the 1949 Stalinist Basic Law); Poland, 1 August 1992 (the so-called Little Constitution, or Constitutional Act on the mutual relations between the legislative and executive institutions and on local self-government); Romania, 21 November 1991; and Slovakia, 1 September 1992.

20. Ruling no. 12/96, "The Exercise of Constitutional Powers by the President of the Slovak Republic and Co-operation of the Government," Constitutional Court of the Slovak Republic, http://www.concourt.sk/Zbierka/1996a/12_96a.htm (accessed 5 February 2008).

21. See Darina Malová, "Slovakia: From the Ambiguous Constitution to the Dominance of Informal Rules," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 367.

22. Poland finally adopted a new constitution in 1997, in which some contentious issues such as executive-legislative relations were more clearly laid down.

23. See, for example, Elgie and Zielonka, "Constitutions and Constitution-Building," 34; J. Benomar, "Constitution-making after Conflict: Lessons for Iraq," *Journal of Democracy* 15, no. 2 (2004), 81-95; Widner, "Constitution Writing"; Devra C. Moehler, "Participation and Support for the Constitution in Uganda," *Journal of Modern African Studies* 44, no. 2 (2006), 275-308; Schmitter, "Contrasting Approaches."

24. E.g., Jon Elster, "Constitutionalism in Eastern Europe: An Introduction," *University of Chicago Law Review* 58, no. 2 (Spring 1992): 447-82; Jon Elster, "Transition, Constitution-making and Separation in Czechoslovakia," *European Journal of Sociology* 36, no. 1 (1995): 105-34; Jon Elster, "The Role of Institutional Interest in East European Constitution-Making—Explaining Legislative Dominance," *East European Constitutional Review* 5, no. 6 (1996), 63-65; and Elster, Offe and Preuss, *Institutional Design*.

25. Schmitter, "Contrasting Approaches," 5, emphasis in original.

26. Juan Linz and Alfred Stepan, *Problems of Democratic Transition and Consolidation: Southern Europe, South America, and Post-Communist Europe* (Baltimore and London: Johns Hopkins University Press, 1996), 83.

27. Schmitter, "Contrasting Approaches," 4-5.

28. Tony Verheijen, *Constitutional Pillars for New Democracies: The Cases of Bulgaria and Romania* (Leiden: DSWO University Press, Leiden University), 98.

29. Elster, "Constitutionalism in Eastern Europe"; Schmitter, "Contrasting Approaches"; and Linz and Stepan, *Problems of Democratic Transition*.

30. See, on constitution-making by indirectly elected assemblies, Jon Elster, "Ways of Constitution-Making," in *Democracy's Victory and Crisis*, ed. Axel Hadenius (Cambridge, UK: Cambridge University Press, 1997), 130; and on legislative dominance in constitution-making Elster, "The Role of Institutional Interest".

31. See, on the "monitoring theory," Widner, "Constitution Writing," 4.

32. The 1989 amendments introduced human rights protection, a parliamentary elected president, a democratically elected parliament, and an independent judiciary. Hungary changed its name from the Hungarian People's Republic to the Republic of Hungary, and it was described as "a constitutional state implementing a multi-party system, parliamentary democracy and social market economy". See Istvan Szickinger, "Hungary's Pliable Constitution," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 406-31; and Rett R. Ludwikowski, *Constitution-making in the Region of Former Soviet Dominance* (Durham, NC, and London: Duke University Press, 1996), 180.

33. Officially the "Constitutional Act on the Mutual Relations between the Legislative and Executive Institutions and on Local Self-Government."

34. Elster, Offe and Preuss, *Institutional Design*, 69.

35. Venelin Ganev, "History, Politics, and the Constitution: Ethnic Conflict and Constitutional Adjudication in Postcommunist Bulgaria," *Slavic Review* 63, no. 1 (2004): 70-71.

36. Renate Weber, "Constitutionalism as a Vehicle for Democratic Consolidation in Romania," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 217.

37. Of the sixty members in the constitutional assembly, forty were political newcomers from the Estonian nationalist movement and only thirteen can be labelled part of the old communist elite. Seven were representatives of the Russian-speaking minority. See, on the Estonian Constitutional Assembly, Rein Taagepera, "Estonia's Constitutional Assembly, 1991-1992," *Journal of Baltic Studies* 25, no. 3 (Autumn 1994): 211-32; and Gerald Easter, "Preference for Presidentialism: Postcommunist Regime Change in Russia and the NIS," *World Politics* 49, no. 2 (January 1997): 184-211.

38. Vello Pettai, "Estonia: Positive and Negative Engineering," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 114.

39. For excellent accounts of the Czech and Slovak constitution-making processes see Petr Kopecný, *Parliaments in the Czech and Slovak Republics: Party Competition and Parliamentary Institutionalization* (Aldershot, UK: Ashgate, 2001); and Petr Kopecný, "The Czech Republic: From the Burden of the Old Federal Constitution to the Constitutional Horse Trading among Political Parties," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 319-46.

40. A compromise was reached on the 1989 transition elections during the Polish Roundtable Talks. It was determined that the communists would be guaranteed 60 percent of the 460 seats in the Sejm; 5 percent were reserved for small Catholic parties previously represented in communist parliaments, and 35 percent of the seats would be open to competition. The Senate, however, would be fully democratically elected. See Anna van der Meer Krok-Paszowska, *Shaping the Democratic Order: The Institutionalisation of Parliament in Poland* (Leuven and Apeldoorn: Garant, 2000), 19.

41. Miroslaw Wyrzykowski, "Legitimacy: The Price of a Delayed Constitution in Poland," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001): 437.

42. Wyrzykowski, "Legitimacy," 437-39.

43. Szickinger, "Hungary's Pliable Constitution," 412-13, but for more critical notes see András Sajó, "The Roundtable Talks in Hungary," in *The Roundtable Talks and the Breakdown of Communism*, ed. Jon Elster (Chicago and London: University of Chicago Press, 1996), 92; and Rudolf Tökès, *Hungary's Negotiated Transition: Economic Reform, Social Change and Political Succession* (Cambridge, UK: Cambridge University Press, 1996), 305-309.

44. This cannot be seen separate from the second question on the ballot, which asked whether 5,000 non-citizens who had applied for Estonian citizenship should be allowed to vote in the upcoming presidential and parliamentary elections. This proposal failed with 47 percent of the votes against.

45. Venelin I. Ganev, "Bulgaria: The (Ir)relevance of Post-Communist Constitutionalism," in *Democratic Consolidation in Eastern Europe*. Vol. 1, *Institutional Engineering*, ed. Jan Zielonka (Oxford, UK: Oxford University Press, 2001), 188.

46. The referendum of 16 November 1989 was initiated by the Free Democrats, who were actually against direct presidential elections as these would have probably favoured the popular socialist candidate Imre Pozsgay. The public voted in favour of indirect elections. Parliament did place minor restrictions on the ruling Hungarian Socialist Workers Party (MSZMP) to appease the opposition (see Szickinger, "Hungary's Pliable Constitution," 413).

47. Rett R. Ludwikowski, *Constitution-making*, 124.

48. Weber, "Constitutionalism as a Vehicle," 218.

49. András Bozóki, "Introduction: The Significance of the Roundtable Talks," in *The Roundtable Talks of 1989: The Genesis of Hungarian Democracy, Analysis and Documents*, ed. András Bozóki (Budapest: Central European University Press, 2002), xv.

50. Peter Kopecný, *Parliaments in the Czech and Slovak Republics*, 36; and see, for a similar interpretation, Malová, "Slovakia," 351; and Ludwikowski, *Constitution-making*, 171.

51. "Country Update Poland," *East European Constitutional Review* 7, no. 2 (Spring 1994): 45.

52. Krzysztof Jasiewicz, "Poland," in *Postcommunist Presidents*, ed. Ray Taras (Cambridge, UK: Cambridge University Press, 1997), 152.

53. Jasiewicz, "Poland," 154.

54. Marian Grzybowski and Piotr Mikuli, "Poland," in *Handbook of Political Change in Eastern Europe*, 2d ed., ed. Sten Berglund et al. (Cheltenham and Northampton, UK: Edward Elgar, 2004), 197.

55. The 1994 parliamentary elections resulted in a landslide victory for Bulgarian Socialist Party; they won 43.5 percent of the votes and formed a coalition with the much smaller Bulgarian Agrarian National Union (BZnS). The new government's policies were characterized by delays of reforms.

56. The Mečiar III cabinet (1994-1998) consisted of the Movement for a Democratic Slovakia (HZDS), the Slovak National Party (SNS) and the Association of Workers of Slovakia (ZRS) and "shared a strong common focus on Slovak national identity [. . .] and a willingness to accept leadership by strong hand with little regard for the checks and balances necessary for the endurance of democracy"; Kevin Deegan-Krause, "Slovakia," in *Handbook of Political Change in Eastern Europe*, 2d ed., ed. Sten Berglund et al. (Cheltenham and Northampton, UK: Edward Elgar, 2004), 264.

57. The late 1992 elections saw a victory for the split-off of the National Salvation Front, Ion Iliescu's Democratic National Salvation Front (FDSN), which formed a coalition with the far-left Socialist Labour Party (PSM) and the extreme-nationalist Greater Romania Party (RM).

58. The Alliance of Democratic Left (SLD) and the Polish Peasants' Party (PSL).

59. The growing rift between Kováč and Mečiar, both members of the Movement for a Democratic Slovakia, eventually resulted in Kováč's losing his party membership. See, for a detailed analysis of events surrounding the Kováč-Mečiar period, Tim Haughton, "Facilitator and Impeder: The Institutional Framework of Slovak Politics during the Premiership of Vladimír Mečiar," *Slavonic and East European Review* 81, no. 2 (April 2003): 267-90.