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**Evaluation of fifteen years of constitutional practice
in Central and Eastern Europe**

**UniDem seminar organised in Warsaw on 19 and 20 November 2004
in cooperation with the Institute for Democracy (Paris)
and the Ius et Lex Foundation (Warsaw)**

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Introduction

The UniDem seminar held in Warsaw on 19 and 20 November 2004 was a privileged moment for the Venice Commission, since it brought together a gathering of both friends and eminent figures. This seminar, organised with support from the Institute for Democracy (Paris) and the Ius et Lex Foundation (Warsaw) – to whom we extend our thanks for their assistance – was the first multilateral activity to take place under the Polish chairmanship of the Committee of Ministers of the Council of Europe.

The Polish chairmanship was particularly significant, since it saw the holding of the Third Summit of Heads of State and Government of the Council of Europe at a time when European Union enlargement was making it necessary to redefine the role of the Council of Europe in a constantly changing Europe.

Poland holds an eminent position among the latest wave of countries to join the European Union, enabling it to observe relations between the Council of Europe and the European Union with new eyes.

In this context we should underscore the characteristic values of the Council of Europe: first and foremost the protection of human rights, the promotion of democracy and the rule of law.

The Venice Commission (European Commission for Democracy through Law) strives to develop and disseminate these principles through its independent opinions on draft constitutions and parliamentary bills. Since its establishment in 1990 the Venice Commission, convinced of the paramount role of constitutions and Institutional Acts in democratic stability in Europe has been working on the definition and dissemination of a European constitutional heritage, a concept dear to the Commission.

Another fact distinguishing this period is that 9 November 2004 marked the elapse of fifteen years since the fall of the Berlin Wall, a symbol of Central and Eastern Europe's transition to democracy. During these fifteen years, constitutional practice in these countries was to undergo unprecedented upheavals, ensuring a stable democracy previously unknown. And fifteen years ago Poland, like many other countries in the region, began its process of democratic transformation, subsequently joining the Council of Europe in 1991, when it also became a member of the newly established Venice Commission.

The subject that brought us together in Warsaw was thus extremely topical with regard to institutional change in Central and Eastern Europe. It may seem ambitious to try to evaluate fifteen years of constitutional practice in Central and Eastern Europe in the course of two days. That is why we chose to concentrate on three basic elements of constitutional practice: the position and role of the executive in institutions, the revision of constitutions, and the influence of electoral systems on the functioning of institutions. The final session explained the assistance provided by European institutions to Central and Eastern European countries.

The executive always consists of a head of state and a government, usually headed by a prime minister. The fact that an executive may have one or two heads was covered by a number of comparative studies during the conference that took into account the situation peculiar to each state, thus demonstrating the protean role of the executive.

Constitutional practice also entails reforms, since revision of the constitution is a necessity in a democracy, a system in which change is usually slow but nevertheless constant.

Electoral systems for their part are another cornerstone in the functioning of institutions, whose operation can be influenced by the voting method chosen and the way in which it is implemented. It is also essential that elections be organised by an impartial body; an entire Venice Commission seminar was in fact devoted to this subject on 24 and 25 June 2005 in Belgrade.

Thus if we had to make a connection between these three cornerstones of constitutional practice, we might say that they all reflect the maturity of democracy: through a moderate and enlightened executive, through harmonious operation and development of institutions as a result of careful changes to the constitution, and lastly through free and fair elections. This seminar thus saw a convergence of two of the Venice Commission's main fields of activity: constitutional assistance on the one hand, or how member states call on the Venice Commission's services to amend their constitutions in accordance with the European constitutional heritage, and electoral expertise on the other, with which the Venice Commission assists states in developing their electoral law.

It would be impossible to conclude these introductory remarks without expressing the Commission's appreciation of the role played in the same fields by a sister institution, the OSCE Office for Democratic Institutions and Human Rights, which has done its utmost to facilitate democratic transition in the countries of the region and with which we enjoy exemplary cooperation.

I wish you a pleasant read.

**THE POLITICAL INFLUENCE OF PRESIDENTS ELECTED BY
UNIVERSAL SUFFRAGE IN POST-COMMUNIST EUROPE**

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Outline of paper

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Abstract

After the fall of the communist systems, and to replace them, the transition players in post-communist Europe had a choice between the classic "parliamentary" model and a "semi-presidential" model. In the context of mutual uncertainty and fear prevalent at the time it was no coincidence that a majority of countries chose the latter model, which allowed the various powers to be "neutralised" so that no one political camp could exercise majority political domination over another. This "instrumentalisation" of the law was established through a characteristic distribution of power within the executive, generating certain institutional logics and political attitudes. Taking a representative sample of six countries, we can see that the political influence of presidents elected by direct universal suffrage is now a reality in the political landscape of post-communist Europe. These presidents have unquestionable powers and use them, and cannot therefore be likened to their counterparts in a traditional parliamentary system. Through their case-law, the Constitutional Courts have amply defined and strengthened these presidential powers, which are further augmented by a stranglehold on certain intelligence services or the chairmanship of bodies such as the National Security Council. However, it would be very difficult for this "democracy engineering" to result in a "presidentialisation" of politics, since combination of different institutional rules is impossible. We here come back to the initial political ambiguity of the transition and the distrust of presidents, who must under no

circumstances become substitutes for Party general secretaries.

From 1989 onwards, the collapse of the communist systems completely changed the political and institutional map of Central Europe. The main players in the transition – former communists and their opponents – often preferred to establish a semi-presidential model¹ rather than a traditional parliamentary model. This was not a guileless choice given the uncertainty and mutual fear prevalent at the time. The main players were haunted by two obsessions: to establish democracy but at the same time ensure their share of power. These obsessions united them and forced them to cooperate even if their intentions were different and their motives conflicting. For the former communists it was a matter of not losing a grip on power or, at worst, not losing power entirely – hence their determination to divide it up sufficiently and to balance the powers conferred so that an inability to pull all the levers of power would at least be compensated for by the opportunity to thwart moves by anyone who held a share of power. For the opposition, on the other hand, it was a matter not so much of gaining power as of guaranteeing that they could not be robbed of any fragment of power that might come their way, the main point being to ensure the survival of the dynamic that was being established.

What both sides feared in the classic parliamentary model was majority rule – in other words, that the executive and legislative branches might fall into the same political hands. With regard to the possibility of a sudden and comprehensive changeover of power, it is understandable that the traditional parliamentary model might not suit either the existing leaders (who would risk losing all power) or the opposition (who would risk losing the advantage of this incredible and fragile “revolution”). We have a paradox here. The more the political actors called, with a single voice, for the political model that they wanted – the Western parliamentary model² – the more they felt compelled to reject it, again with a single voice, in its concrete form.

A majority of post-communist European countries thus chose the semi-presidential option. Consequently, it seems worth considering the political influence of these presidents who are elected not simply to play a walk-on part but to be players in the general political game.

Our subject-matter will be a limited sample of six countries: Bulgaria, Lithuania, Macedonia, Poland, Romania and Slovenia. Other countries which have adopted a semi-presidential model have done so too recently or do not satisfy democratic requirements in their political practices³.

In post-communist Europe a constitution must be regarded as a construction that bears the mark of its origin and purpose. Election of presidents by direct universal suffrage is, above all, an ambiguous method of regulating power during a transition. It is meant less to establish the legitimacy of presidents by a popular vote than to prevent their election from depending on that of Parliament. Similarly, they must be given genuine independence in order to balance competing forces. This being so, the powers conferred on them seem all the more worth

¹ Provided they consent to temper constitutional dogmatics with a study of the actual balance of political power, jurists and political scientists broadly accept the concept of a semi-presidential model. In a nutshell, it will be recalled that in this model, 1) the president is elected by direct universal suffrage for a specific term, and 2) the prime minister and government are accountable to Parliament.

² Which they could not call democratic, since the term had been so debased under the communist system.

³ Croatia, Serbia and Slovakia have also chosen this model. The choice between a parliamentary and a semi-presidential model remains topical, since Estonia, the Czech Republic and Latvia are planning to revise their constitutions with this in view.

studying. For this purpose an analysis of legislation alone, however instructive, is not enough, as it leaves out the essential contribution of implementation; we may here note the interpretations of this legislation by the Constitutional Courts. They are, in fact, two sides of the same coin, since the former can be judged only in the light of the latter.

The mechanics of the semi-presidential model consists in granting the president certain powers within the executive and in relation to parliament. Unlike the classic parliamentary model, the president has special jurisdiction, which can often be exercised without a countersignature. His powers are therefore not purely nominal. Not only is he able to exercise them, but he also has a duty to exercise them should the occasion arise, for this was the intention of the “founding fathers”. Of course we may find some disparity between countries over time, but here again the constitution in itself cannot provide an accurate measure of the importance of certain powers exercised in a general political context. In other words, the institutional aspect cannot be separated from the political aspect. The origin of the constitution is a determining variable in the use made of it, but the latter also depends on political circumstances.

Within the executive some powers – which appear insignificant if taken separately – are often disregarded by Western commentators, since they do not fit into the standard scheme of analysis. Yet these powers may become considerably more important when combined with other powers. Conversely, distrust of the presidential institution is to be found in numerous provisions, especially those dealing with its relations with Parliament. The players in the transition have wanted to prevent presidents from being able to exploit the weapon of dissolution. This power, which runs entirely counter to the principle affirmed under the communist system of the omnipotence of “*parliament, the supreme organ of state power*”, is therefore closely regulated. Nevertheless, presidents have not been disarmed with regard to parliamentary action, since in a majority of countries they have a thoroughly substantive right of veto, which enables them to mitigate any abuses by the majority without interfering with the existence of Parliament and, above all, the parliamentary majority. The same applies to referral of cases to the Constitutional Courts, which a number of presidents can use to temper any excesses.

I. The range of presidential powers

The powers of the six presidents in our sample may be divided into two groups: “decision-making powers” and “joint decision-making or blocking powers”. This initial analysis should provide us with information about the extent of the influence which these presidents may exercise within the institutional system but will not in any way allow a judgment as to their real influence, since other factors must obviously be taken into consideration.

§ 1: Decision-making powers⁴

The presidents’ powers are summarised in the table below, which shows only their legal powers and not their actual importance. However, this comparison suggests a certain overall unity to this group whilst revealing the diversity of its components.

⁴ A president’s decision-making powers are also known as his own special powers. He exercises them himself, with no need for consent or a proposal for legislation from another body. Although he may sometimes be obliged to undertake preliminary consultations, his decision is entirely his own. A decision-making power may nevertheless be regulated by necessary conditions (in fact) or mandatory conditions (in law).

Presidents' powers under the constitution

Country Power	Bulgaria	Lithuania	Macedonia	Poland (Interim Const.)	Poland (1997 Const.)	Romania	Slovenia
Appointment of prime minister	○ Art. 99	● 84.4	○ 84, 90	● 47, 57	● 154	● 85, 102	● 111
Removal of prime minister	NO	○ 84.5	NO	NO	NO	○* 109 NO (2003) 106.1	NO
Dissolution of National Assembly	○ 102.3	● 58, 87	NO	● 4.4, 21.4, 47, 62, 66.5	○ 98.4, 98.5 and 155	○ 89	● 111, 117
Right to initiate legislation	NO	● 68	NO	● 15, 47	● 118, 144.4	NO	NO
Right of veto	● 101, 102	● 71, 72	● 75.3	● 18.3	● 122.5	NO	NO
Request for another reading	–	–	–	–	–	● 77, 113.4	NO
Recourse to referendum	NO	NO	NO	○ 19, 47	○ 125.2	● 90	NO
Referral to Constitutional Court	● 150	● 106 (acts of state only)	NO	● 18.4, 47.6	● 122.3, 144.9	● 144a	● 160 (limited)
Appointment of judges to Constitutional Court	● 147	○ 84.12, 103	○ 84, 109	NO	NO	● 140.2	○ 163
Foreign-policy and defence powers	○ 92, 100	● 84.1, 84.2, 84.3, 84.14, 84.16,	○ 79, 84, 86, 119, 120, 121, 124, 125	● 28, 32, 33, 34, 35	○ 133.5	○ 91, 92, 93	○ 102

Country Power	Bulgaria	Lithuania	Macedonia	Poland (Interim Const.)	Poland (1997 Const.)	Romania	Slovenia
		140					
Appointment powers	●○ 98.2	●○ 84.10, 84.11, 84.15	● 84	● 40, 42, 47 (limited)	● 227.5 (limited)	● 94, 99	○ 107, 131
Power to make regulations	NO	NO	NO	○ 45	● 234 (limited)	○ 92 (limited)	○ 108 (limited)
Can participate in Cabinet meetings	NO	NO	NO	● 38	NO	● 87	NO
Appeal to the people and right to deliver messages to Parliament	● 98	NO	NO	● 39	● 140	● 88	NO
Power to supervise government	NO	NO	NO	● 47.11	● 144.10	NO	NO
Appointment of a caretaker government	● 99.5	● 84.7	NO	● 62	● 155	● 106.2	NO
Total decision-making powers	6	8	2	11	9	8	3
Total joint decision-making or blocking powers	4	3	3	2	3	3	4
Total powers not conferred	6	5	10	2	2	3	9

Note: ● Decision-making power ○ Joint decision-making or blocking power

*The reform of the Romanian Constitution on 19 October 2003 cleared up an ambiguity, since the Constitution now states that *the president cannot remove the prime minister*.

The powers of a head of state under the parliamentary and semi-presidential systems are naturally different, and this difference is fundamental, especially for decisions not subject to

countersignature. A head of state in a parliamentary regime cannot take decisions without the countersignature of the prime minister or a minister. A head of state in the semi-presidential modal can, on the contrary, often act alone without a countersignature. He is obliged to sign only if the constitution stipulates that he must. If a countersignature is not necessary under the constitution, he has unlimited power to take decisions. When an act of state has to be signed by the president, he has a blocking power or, at the very least, a joint decision-making power.

The table can be read either horizontally or vertically. A first horizontal reading affords a certain amount of information about how often decision-making powers are conferred on presidents. We find, for example, that appointment of the prime minister is, generally speaking, a prerogative exercised by a majority of presidents (five) in the seven systems under consideration. Similarly, we find that five of them are able to appoint an interim government. We note that the same proportion has a right of suspensive veto. Presidents who can refer cases to the Constitutional Court and exercise appointment powers are slightly greater in number (six out of seven). But only four can address messages to Parliament or the nation, and only three have the right to initiate legislation.

A vertical reading sheds a different light. Some presidents seem better off than others in terms of decision-making powers. In Lithuania, Poland (although a distinction must be drawn between the system under the Interim Constitution and under the 1997 Constitution) and Romania, the presidents apparently have more powers than their Bulgarian, Macedonian and Slovenian counterparts.

§ 2: Joint decision-making or blocking powers

Joint decision-making or blocking powers are also known as shared powers. For example, when an act of state not initiated by the president has to be signed or approved by him, he has a certain joint-decision or blocking power. This may be attenuated or diminished by the actual wording of the constitution if it provides that the president cannot reject a second nomination, for example. The constitution may also require two institutions to cooperate in order to decide on a measure. In this case, it is the balance of power and negotiating know-how that will prevail.

A few concrete examples may be given by way of illustration. The Macedonian president is entitled to appoint ambassadors (Article 84) but it is the government that *proposes their appointment* (Article 91). Because he has no need of a ministerial countersignature, the president is therefore perfectly at liberty to refuse to sign instruments of appointment. This is what happened when a government decided to recognise Taiwan and dispatch an ambassador. President Gligorov refused to sign the instrument of appointment, and there was never any Macedonian ambassador in Taipei!

The Bulgarian president appoints the most senior members of the judiciary (Article 129.2). However, these appointments can be made only on a motion from the Supreme Judicial Council, and the president cannot reject a second motion. In this case, there is limited scope for blocking but clear scope for joint decision-making, since discreet bargaining usually takes place before the nominations are announced publicly. Similarly, the Polish president must first obtain the consent of the Senate (Article 125.2) if he wishes to call a referendum, and vice versa. He thus has genuine scope for joint decision-making.

The table also shows that a number of presidents simply do not have certain powers. If we read it horizontally again, we will see that the majority of presidents cannot dismiss the prime

minister and that none of them can participate in Cabinet meetings (apart from the Romanian president, in very specific circumstances). Similarly, the majority of them cannot ever call a referendum or exercise supervision over government. A vertical reading is also very instructive. Two countries in particular seem to stand out: Macedonia and Slovenia. Out of the list's sixteen items, the Macedonian president is absent from ten and the Slovenian president from nine.

To sum up, the seven-system sample that we are studying has, generally speaking, over twice as many decision-making powers (48 in all) as joint decision-making or blocking powers (22 in all). This remark must obviously be qualified, since there are disparities from one system to another. But we may note that the constitutions' authors seem to have given presidents' decision-making powers precedence over their joint decision-making and blocking powers. However, if we confined ourselves to this reading of the constitutions, we would be making a mistake, for other and sometimes unforeseen factors must be taken into consideration.

§ 3: Influence of Constitutional Courts: The examples of Bulgaria and Macedonia

Constitutions often set out general principles, yet in their commentaries many observers have disregarded the role and influence of Constitutional Courts. The latter have played – and continue to play – a primordial role. Consequently, it is necessary to emphasise the decisive influence that they have had in defining and protecting presidential powers in order to maintain separation and balance between competing forces. Indeed, a number of their decisions have helped to clarify the role of each side within the system.

The Bulgarian Constitutional Court is one of the few courts in Europe that can deliver mandatory rulings on the constitution. It has managed to use this considerable power with much sensitivity, especially during the great political confrontations that marked the initial years of the transition.

In one of its decisions⁵, the Court pointed out that the president was not *a depoliticised organ of state* and that he could therefore express his opinions, make speeches or take action with major policy repercussions.

This decision of the Court regarding the president's independence and his political influence in general allows us to state beyond doubt that the institution of president in Bulgaria is not merely symbolic. It also runs counter to the traditional model of a president in a parliamentary system. Placing it too hastily in this category is a mistake made by a fair number of observers who are inclined to take the constitution of the Fifth Republic or of the United States as the only legitimate standard in their comparative approach.

Similarly in 1996⁶, relying on the intention of the “founding fathers” and the “logic” with which they had wanted to vest the constitution by developing the principle of separation of powers, the Court confirmed that presidential decrees relating to certain appointments did not need to be countersigned by a representative of the government.

⁵ Decision No. 25 of 21/12/95, A.C. No. 27/95 in *Rechenia i opredelenia na konstitutsioniya sed* (Constitutional Court decisions and judgments - 1995), Marin Drinov, Sofia, 1996: 267-273.

⁶ Decision No. 13 of 25/7/96, A.C. No. 11/96, *Rechenia ...* (1996), op. cit., 1997: 141-154.

In like manner, the Macedonian Constitutional Court held⁷ that the National Defence Act violated the powers of the president, the sole *supreme commander of the armed forces* under the constitution, by forcing him to exercise his command through the Minister of Defence. Since the ruling, the Macedonian president has discharged his office directly with the general staff without going through the Defence Minister. Although this case must be put in perspective, it must be admitted that this is a decision which makes it difficult to put the Macedonian president in the category of presidents holding office under a parliamentary system.

The three examples cited throw a different light on the effectiveness of some presidential powers. Merely reading constitutions, although essential, is not enough to grasp the reality of the political system in place and the president's role within it. The extent of the respective powers of each institution must also be considered in the specific context of the transition that these countries have been undergoing.

II. Presidents' powers within the executive: Beyond parliamentary government but short of presidential government

In practice, presidents are not confined to a purely formal role. As we shall now see, their involvement may, for example, be decisive in the process of appointing heads of government and ministers, since the head of state is often in a position to influence or alter a decision. This is certainly not a sovereign right, for in one way or another he shares this responsibility with Parliament; however, his personal room for manoeuvre is all the greater when the country's internal political situation is complicated. The same is true of his role in foreign relations.

§ 1: The president's role in appointing the prime minister and the government

While in the classic parliamentary model, the president's role in appointing the prime minister and government is above all formal, the same is not true in all the countries having adopted the semi-presidential model, where the roles are usually shared to a much greater extent between president and Parliament. The president may intervene either before or after Parliament has made its choice, or on both occasions.

The countries considered here can be roughly divided into two groups as far as the president's role in choosing and appointing the prime minister is concerned. The first group covers those countries where the president has, constitutionally speaking, an unquestionable margin of discretion in nominating, proposing or appointing the prime minister. This group comprises Lithuania and Poland. In the second the president's room for manoeuvre is relatively limited and he generally contents himself with simply appointing a representative charged with forming a government. This group consists of Bulgaria, Macedonia, Romania and Slovenia.

Establishing the difference between these two groups obviously entails a measure of arbitrariness. However, in the first case, the constitution theoretically allows the president a certain scope for choice, whereas in the second case, the president is virtually obliged to accept the choice of the majority political parties represented in Parliament. It goes without saying that situations may change and that they vary from one country to another depending on the ability of parties to form, become established, form coalitions and, above all, gain recognition.

⁷ U.br. 135, 155/2001 of 18/9/02, Official Gazette, 42/2002.

In Lithuania, *the prime minister shall, with the approval of the Parliament, be appointed or dismissed by the President of the Republic* (Article 92.1). If the government resigns, the president shall appoint the prime minister upon approval of Parliament (Article 84.4). If the president is of the same political persuasion as the majority in Parliament, he has considerable scope for choice, including the choice of ministers. This was the case in 1993 with President Brazauskas and in 1999, when his successor Adamkus actually chose Paskas as prime minister despite opposition from the conservative party. When the opposite is the case, as in the period of “cohabitation” in France, a choice is obviously impossible.

In Poland under the 1997 constitution, the president nominates the prime minister, who must then be approved by the Sejm in a vote of confidence. If the vote is lost, the Sejm may elect a prime minister of its own choosing but must still take a vote of confidence on the programme presented. If this programme is rejected, the president again has, for the second and last time, the right to nominate a prime minister, who, if he cannot win a vote of confidence in the Sejm, will cause its dissolution.

In addition to simplifying and lessening procedures in comparison with the interim constitution, the 1997 constitution has obviously diminished the president’s room for manoeuvre. Yet his role is still of fundamental importance, as has now been demonstrated by the action of President Kwasniewski in replacing Prime Minister Miller.

The second group is that in which the president is supposed to play a minor role. This statement must be qualified.

The Bulgarian president appears to be lacking any room for manoeuvre, since *“following consultations with the parliamentary groups, the President shall appoint the prime minister candidate nominated by the party holding the highest number of seats in the National Assembly to form a government”* (Article 99.1). If one party or coalition has an absolute majority in the National Assembly, the process is therefore relatively quick.

Otherwise, his role becomes essential, for most of the bargaining about the composition of the government (and therefore support in Parliament) occurs during these consultations, on which the constitution imposes no time limit.

In Macedonia the situation seems rather more difficult to analyse. The president has a strict time-limit for conducting any political consultations. Yet the constitution has made no provision for a possible way out of a crisis, since the right of dissolution does not exist. Only political compromise can resolve a crisis. It is to be feared that, as a result of deadlocks inadequately resolved by ill-advised compromises, Macedonia may, from one day to the next, lapse into a total constitutional stalemate.

In Slovenia, *“after consultation with the leaders of parliamentary groups the President of the Republic proposes to the National Assembly a candidate for president of the government”* (Article 111). It is his exclusive right to present a candidate. His freedom of choice, limited by the existence of a structured coalition, becomes considerable if the political landscape is divided, especially as he is not legally restricted in the choice or status of the person whom he may present. For example, the latter need not be a member of the National Assembly. Obviously the president will make his choice on the basis of the candidate’s ability to unite the required majority. But this will not necessarily be the determining criterion if political

forces are equally distributed within the National Assembly, as we saw in 1997, for example, when the prime minister, chosen by President Kucan, was elected by the narrowest of margins with 46 votes out of 90.

§ 2: The president's powers in foreign relations

The powers conferred on presidents in the field of defence and foreign relations are not insignificant, although they may vary considerably from one constitution to another. Two groups of countries may be distinguished in our sample: the first group, in which the president has sizeable responsibilities, consists of Lithuania and Poland. In the second group, he seems to possess only those powers usually conferred on a head of state and therefore to have only a modest influence. However, the latter remark must be qualified for two reasons. On the one hand, the period of transition has sometimes led presidents to play a more important role than might appear to be the case. On the other, the establishment of special bodies, such as National Security Councils, directly under their authority is a new factor whose exact influence has not yet been assessed.

Beyond question, the constitutions of Lithuania and Poland grant the president important foreign-policy powers. The Lithuanian president is to *settle basic foreign policy issues and, together with the government, implement foreign policy* (Article 84.1). The text is unequivocal in its brevity: this is undoubtedly the president who has the broadest scope in the field of foreign affairs. The case of Poland is worth bringing to attention, since a comparison between the interim constitution and the 1997 constitution indicates that the president's powers in this field have been considerably restricted in the latter. In the transitional provisions that ultimately made up the interim constitution, the president was to *exercise general supervision in the field of international relations* (Article 32.1), whereas now he is to *cooperate in respect of foreign policy* (Article 133.3). The difference is not one of degree but one of kind.

The Bulgarian, Macedonian, Romanian and Slovenian presidents apparently have the powers traditionally accorded to heads of state. A cursory inspection of constitutions does not, however, give a true measure of the field of competence and actual powers of a number of presidents during the transition. Of course, it remains to be seen whether certain practices of involvement in this field are perpetuated. Yet, unless certain provisions are amended, the fact that the Macedonian and Slovenian presidents' decrees do not require countersigning by a minister will always leave these presidents some discretion.

In the field of defence and security, we again find the two groups of countries identified above with regard to foreign policy: one comprising Lithuania and Poland and the other Bulgaria, Romania and Slovenia. The situation of Macedonia is harder to assess owing to the above-mentioned ruling by the Constitutional Court.

III. Presidents' powers in relation to Parliament

Where Parliament was concerned there was almost a mental block. Broadly speaking, we may say that these countries still had in mind the theory or fiction of Parliament as the "*supreme organ of state power*". It was legally and politically unthinkable, given their heritage – the burdens and traditions inherited from the past – to put Parliament at the mercy of a "royal dissolution", for example. The right of dissolution, when provision was made for it, was structured, regulated and restricted. The utmost was done to ensure that the president would

never have a superiority complex on account of this formidable weapon and that members of parliament would not suffer a feeling of inferiority associated with the existence of an institutional “sword of Damocles”.

The power granted to presidents in a number of countries to veto legislation passed by Parliament or refer cases to the Constitutional Court nevertheless distinguishes these countries from the classic parliamentary model, providing an implicit indication that the constitutions’ authors were seeking to counterbalance the absolute power of Parliament arising out of the notional parliamentary model of the communist dictatorships.

§ 1: Limited powers to dissolve Parliament

The Macedonian constitution does not provide for dissolution of the Assembly by the executive power. The former can be dissolved only if it takes the decision itself by a vote (Article 63). This power of self-dissolution is also found as a subsidiary concern in Lithuania (Article 58.1) and Poland (Int. Const., Article 4.3; 1997 Const., Article 98.3). Bulgaria, Romania and Slovenia (other than in the very specific circumstances laid down in Article 81.2) do not provide for such a possibility.

Even if the president is able to order dissolution (without a countersignature), the constitution drafters have nevertheless hedged this right with varying restrictions. Unlike their French counterpart, the presidents in our sample are therefore never entitled to decide on the political expediency of calling an election. This difference is sufficiently important to be worth pointing up clearly.

The specific circumstances in which the right of dissolution can be exercised vary from country to country. They mainly relate to formation of the government, adoption of its programme and a vote of confidence in the government.

In Bulgaria the president can dissolve Parliament only *without agreement on the formation of a government* (Article 99.5). Much the same reason is provided in the Romanian constitution (Article 89.1). In Lithuania, provision is made for two situations. In the first, the president decides, alone, to dissolve Parliament if the Seimas fails to approve the government’s programme (Article 58.2.1). In the second, the president can order dissolution only on a government motion *if the Seimas passes a vote of no confidence in the government* (Article 58.2.2). The Slovenian president’s power of dissolution may also be exercised on the same grounds on two occasions, one of them resulting from use of the procedure known as the constructive vote of no confidence.

Strangely enough, provision for consultation prior to dissolution is made only in Romania (Article 89.1), where the president is required to meet not only the speakers of both chambers but also the leaders of the parliamentary groups. In the other countries, the fact that there is no requirement for consultation before dissolution clearly shows that the constitutions’ authors regarded dissolution above all as the logical and inevitable outcome of a failed process. It seems that they did not want to see it as a legal tool for creating a balance between the executive and Parliament which might help to resolve more than just political crises of government. The other limitations on the right of dissolution are the usual ones⁸.

⁸ These comprise certain time limitations and, for the Polish president (Article 228.7) and Romanian president (Article 89.3), a prohibition on dissolution when special measures are in force. The Romanian constitution also prohibits dissolution by an acting president (Article 97.2).

§ 2: Right of suspensive veto and referral to the Constitutional Court

Of the powers conferred on the presidents, two seem particularly important in terms of the absolute legislative power proclaimed by parliaments: the right of suspensive veto concerning legislation and the right of referral to the Constitutional Court (with the exceptions of Romania and Slovenia for the right of veto and Macedonia for the right of referral to the Constitutional Court).

Concerning the right of suspensive veto, a comment must be made on the ambiguous nature of the terms used by the constitution drafters, who have not used the words “suspensive veto” but have preferred expressions such as *further debate* or *reconsideration*⁹. As for the option of referring cases to the Constitutional Court, this is granted to all the presidents (except in Macedonia) to a greater or lesser extent. It often indicates an intention to allow them to exercise legal arbitration in order to be able, if necessary, to oblige the other institutions to respect the constitution.

The presidents in Bulgaria (Articles 101 and 102.3.4), Lithuania (Articles 71 and 72), Macedonia (Article 75) and Poland (Int. Const., Article 18; 1997 Const., Article 122) therefore have a genuine right of suspensive veto. In the case of a politically controversial law, or a weak or divided parliamentary majority, the president could use this procedure to demonstrate publicly his opposition to the government, enlarge his sphere of political influence or simply make his mark with public opinion. The Romanian president is not in the same situation (Article 77), for ordinary laws can be passed *by a simple majority vote of the members present in each Chamber* (Article 74).

Three constitutions require the president to give reasons for his request for reconsideration: the Bulgarian (Article 101.1), the Lithuanian (Article 71.1) and the Polish (Int. Const., Article 18.3; 1997 Const., Article 122.5). This obligation may be regarded as a check upon systematic expressions of opposition from the president.

It seems important to point out here that the Lithuanian president is one of the few presidents not able to send a law for scrutiny by the Constitutional Court. His right of suspensive veto is therefore a way for him to criticise the content of a law or even raise a problem of unconstitutionality.

In Poland in this particular field the president’s powers underwent considerable limitation between the interim constitution and the 1997 constitution. While the principle of the suspensive veto was retained without the requirement for a countersignature (Int. Const., Article 47.5; 1997 Const., Article 144.3.6), the majority needed in the Sejm to resist the veto or re-enact a law has been substantially amended. The constitution’s authors also wanted to prevent the president from relying on various time-limits to delay adoption of a law and thus

⁹ This ambiguity requires us to distinguish between the two ideas. A suspensive veto is not merely a request for further debate. The difference lies in how the law must be enacted if Parliament wishes to override the president’s will. In a request for further debate, the law may be re-enacted by a simple majority, which may thus be relative (as in France). With a suspensive veto, the law must be re-enacted but with an absolute or qualified majority. All the constitutions (apart from the Romanian constitution where ordinary laws are concerned) stipulate that laws sent back to Parliament by the president must be passed by an absolute or qualified majority. The nature of the suspensive veto is strengthened by the fact that this presidential power is exercised without a countersignature. This is important to note, since, in the event of disagreement between president and government, this power could possibly become a tool of political expediency rather than just a simple technical means of adjusting legislation.

obstruct the work of the government. This is another illustration of the significant reduction of the Polish president's powers under the 1997 constitution.

Generally speaking, the Constitutional Courts played a significant role during the transition period. Let us briefly run through the occasions on which presidents, if they have the power, are entitled to refer cases to them. In our sample, we may distinguish three different groups. The first group covers countries whose presidents have little or no power to refer cases to the Court and comprises Macedonia, where the president cannot refer cases, and Slovenia, where this option is limited to seeking an opinion, during the process of ratifying an international treaty, *on the conformity of such treaty with the Constitution* (Article 160.2). It may be pointed out that in these two countries citizens have the right to refer cases to the Court directly.

The second group consists of countries in which the president possesses the power of referral to the Constitutional Court: Lithuania, where, however, the president can challenge before it only *the conformity of an act of the government with the Constitution and the laws* (Article 106.3), Poland (Int. Const., Article 18; 1997 Const., Article 122) and Romania (Article 144), where he can refer all laws.

The missions of the Bulgarian Constitutional Court are extensive (Article 149) and go beyond those usually assigned to its European counterparts, since, in addition to examining the constitutionality of laws, it can also deliver binding interpretations of the constitution. The Bulgarian president may refer cases to it under any of its functions (Article 150). The scope for action that this allows him makes it necessary to classify this country in a third group of its own.

In four of the countries considered the president, as we have seen, has considerable power to curb, moderate, check or even counterbalance the absolute legislative power of Parliament. By partly entrusting this regulatory function to presidents elected by direct universal suffrage, these countries have helped to establish a certain balance.

IV. Peripheral powers available

Commentators forget in their analyses to address the nevertheless essential subject of what we might call the "peripheral" powers available to presidents. By peripheral powers is meant supervision over one or more intelligence services and chairmanship of bodies such as the National Security Council. These peripheral powers are not, strictly speaking, included in the arsenal of powers expressly granted by constitutions, for they are not immediately measurable in terms of scope for influence. Yet it would be a mistake to ignore this phenomenon on the pretext that in the West this type of power is more or less confined to the government alone or does not figure among the powers conferred on presidents in parliamentary systems.

In Western countries, including those where a semi-presidential model has been established, a long experience of democracy has meant that the supervision of the intelligence services is regulated. In the post-communist countries an often concealed – but sometimes violent – struggle has taken place to share or, conversely, monopolise this important resource of power.

As regards chairmanship of bodies such as the National Security Council, it is in the first place, and quite obviously, further proof that the powers drafting the respective constitutions wanted to give the presidents a position within institutions that was not simply symbolic.

Through using this second resource, presidents very soon realised that they could notably extend their powers and area of political influence. Depending on the period, their characters and their political abilities, they have been able to use these levers of power to various effect.

This phenomenon should be pointed out as a special feature which demonstrates that the institutional model in these countries has been gauged to allow presidents a certain degree of political independence and unquestionable powers.

§ 1: Control over some intelligence services

From the very start of the transition, the question of control over the services of the former totalitarian system arose all the more acutely as they were considered to be the armed wing of the Party and had proved their ability to cause trouble. They represented one of the basic tools of dictatorship and therefore a major factor in the power equation.

In the climate of global uncertainty during the early stages of the transition, power was not solely institutional. Real and effective power depended on available information and the ability to anticipate the reactions of the enemy or even manipulate it. In all post-communist countries, reform of these services was on every government's agenda. It was only from the early years of the new century, when membership of NATO became a reality, that democratic reforms supplanted the various attempts to use them in the best interests of successive governments or the institutions controlling them.

In the semi-presidential model, two authorities can lay claim to running and using these services: the presidency and the prime minister. The question to be asked is why most of the presidents were able to have such a tool at their disposal. In a parliamentary system, this lever of power is never in the hands of the president, even partially.

In all the communist systems, the intelligence services were under the control of the Cabinet. During the transition, the presidencies were created by the communist authorities to retain scope for action. It was therefore the Party that decided to transfer control of these services to the president. Presidents Jaruzelski and Mladenov, for example, were thus able to have these means of information and action at their disposal. Once political power began to change hands it was no longer possible to remove this important lever of power from the presidents. Walesa and Jeleu inherited this source of power rather than acquiring it through their own doing.

In short, the transfer of the intelligence services to the presidents is the outcome of an expression of political will by the players in the transition: the presidents were called upon to be a counterbalancing power and had to possess tools of influence and information. The origin of this idea of a president's role and the powers conferred on him takes us a fair way from the idea of a parliamentary institutional model.

§ 2: Chairmanship of bodies such as the National Security Council

Widely ignored by commentators in their political and legal analyses, bodies such as the National Security Council nevertheless have not inconsiderable functions in the apparatus of power. Five countries out of six have them, and they are chaired by the president. We may ask why such bodies have been set up, which responsibilities they have been given and what has been their influence. One remark must be made straight away: if the constitution drafters have

assigned the chairmanship of these institutions to the president, that is because they directly acknowledge his role as a political player¹⁰.

Bulgaria, Lithuania, Macedonia, Poland and Romania all have such bodies. The geographical spread of these countries is sufficiently wide to prevent this institution from being a politically distinct or regional feature, since it is to be found not only in Central European, Balkan and Baltic countries, including countries already independent before the fall of communism, but also in newly independent countries, even including one from inside the former USSR. Inasmuch as the president was to be a player in the transition, he was given the means to play his role. It is interesting to note that in its new 1997 constitution Poland has not felt it necessary to abolish this body, which not only ensures a certain pre-eminence for the president (he chairs it) but also in effect points up his role in internal and external security. It is because he chairs such a body, moreover, that he can require the government to fulfil certain obligations.

These bodies do not all have the same name, and the realities behind them may differ. In Bulgaria, for example, the Council is only *consultative* (Article 100). In Lithuania (Article 140) and Romania (Article 92) it covers only matters of defence, strictly speaking. In Macedonia (Article 86) and Poland (Article 135), on the other hand, it seems to cover a broader field: *the security of the Republic of Macedonia*, and *national security* in Poland. These powers are no less important for being peripheral, and their possession by the president clearly proves that the head of state is not simply there to perform merely formal or symbolic duties.

Beyond the institutional architecture, which is instructive but insufficient in itself, we must identify the features which – given the initial balance of power, political practice and specific constraints – have marked the choice, by the powers drafting the constitution, of a model that grants an unquestionable political influence to presidents.

THE PRESIDENT AND THE COUNCIL OF MINISTERS CONSTITUTIONAL FRAMEWORK AND INTER- RELATIONS IN POLAND

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1. The Polish constitutional model of 2nd April 1997 corresponds – in its most substantial aspects – to the parliamentary government. It is characterised by a dualistic executive, composed of the President of the Republic, chosen in universal and direct elections, and the Council of Ministers in which a parliamentary majority invests its confidence. Each of these bodies has its independent competencies and functions (even if a number of presidential actions require countersigning by the Prime Minister). As Article 144(2) stipulates: “official acts of the President [...] shall require, for their validity, the signature of the Prime Minister, who by such signature, accepts responsibility therefore to the Sejm”.

¹⁰ Such “councils”, it must be pointed out, did not exist in the former people’s democracies.

The requirement for countersignature reflects the parliamentary nature of the system of government (as it serves to control and enforce parliamentary accountability, borne – in this case – by the Prime Minister). Its additional purpose is to limit the discretionary powers of the President, along with requiring co-operation with the Prime Minister and the appropriate minister in respect of foreign policy.

Similar limitations relate to certain aspects of presidential control of the armed forces. In accordance with Article 134(2): “The President of the Republic, in times of peace, shall exercise command over the Armed Forces through the Minister of National Defense”. In a period of war the President of the Republic shall, pursuant to Article 134(4), appoint and dismiss the Commander-in-Chief of the Armed Forces on request of the Prime Minister. The President of the Republic, on request of the Minister of National Defense, confers military ranks as specified by statute. All the above requirements distinctly illustrate the lack of autonomy of the President, even if his function in relation to the armed forces has been defined as the “supreme command”.

2. Provisions of importance for any characterisation of the functions of the President and government are also contained in Article 146(1) of the Constitution of Poland. According to this article, the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland”. The second paragraph of this provision states that “the Council of Ministers shall conduct the affairs of State not reserved to other State organs or local self-government”.

This does not, however, indicate a monopolistic position of the government in shaping and directing the pursuit of internal and foreign policy. Nevertheless, the presumption of competence requires that the jurisdiction of other state bodies, including the President or the Sejm, must ensue from concrete constitutional provisions. The jurisdiction of the Council of Ministers is based on a permanent (constitutional) presumption of competence.

3. Direct election of the President provides a factor which somewhat balances the numerous limitations on the independence of his activities. This also prevents situations in which a new parliamentary majority determining the political profile of government would be confronted with a president whose legitimacy derived from a parliamentary majority present in a previous term of office.

4. The creation of a Council of Ministers completely corresponds with the construction of the parliamentary government. Formally, the initiative of designating the Prime Minister originates from the President of the Republic who, on request of the Prime Minister, appoints a Council of Ministers headed by the Prime Minister, and accepts the oath of office of their members.

The government so appointed submits a programme of activity, together with a motion requiring a vote of confidence. The Sejm passes such vote of confidence by an absolute majority of votes within the constitutional time limit of 14 days. When there is such a majority in the Sejm (as in October 1997 and October 2001), the government receives a required majority during the first round of voting.

In the event that a government has not been appointed in accordance with this procedure, or has failed to obtain a vote of confidence by an absolute majority of votes, a repeat attempt to

appoint the Prime Minister and select the composition of the government will be made by the Sejm. Here, once again, the idea of a parliamentary form of government has prevailed.

If such an attempt has also failed, the initiative returns to the President; however, the requirement for an absolute majority of votes for passing a vote of confidence is replaced by the requirement for a simple majority of votes. Such a solution seems to be realistic, in case an absolute majority of any type is lacking in a given composition of the Sejm. Only in the event of such an attempt failing should the President shorten the term of office of the Sejm (and the Senate) and order a new, early election.

5. It is worth noting that the Constitution does not allow further stages in the formation of a government, including the repeated initiative of the Sejm with a vote of confidence granted by a simple majority of votes and, in particular, does not admit the formula of presidential government, based only on the confidence of the head of state, with a “tested” lack of confidence obtained even from a simple parliamentary majority. This means the strengthening of the parliamentary element and – to a certain degree – departure from semi-presidential models.

6. The requirement of obtaining an absolute or at least a simple majority of votes during a vote of confidence limits the powers of the President of the Republic, both in designation of the Prime Minister and in the course of forming a government. The President must take into account the results of parliamentary election and the position (and preferences) of any Sejm majority, rather than his own political or personal preferences.

7. The existence of many political parties and the dispersion of their parliamentary representation in the Third Republic has led the authors of the Constitutional Act of 17th October 1992, followed by the authors of the Constitution of 2nd April 1997, to introduce provisions securing the stability of a government. In this context, the most important decision seems to be the replacement of a simple vote of no confidence by a constructive vote of no confidence which was, to a large degree, based on the provisions of the Bonn Grundgesetz of 1949.

Nevertheless, this solution did not prove useful in May 1993 when the Sejm succeeded in passing a vote of no confidence in the Government of Hanna Suchocka (and when President Lech Wałęsa responded by refusing to accept the resignation of government, dissolving the Sejm and Senate, and ordering an early election).

Such a situation along with the political significance of the institution of a constructive vote of no confidence in the government (a motion to recall the existing government is tantamount to a motion to appoint a new prime minister) has encouraged the drafters of the Constitution of 1997 to “expand” it by adding several regulations (a motion may be moved by at least one tenth of the constitutional number of Deputies of the Sejm, and put to a vote no sooner than seven days after it has been submitted, a subsequent motion of a like kind may be submitted before the end of three months if such a motion is submitted by at least 115 Deputies, or a fourth of their constitutional number). All these details are aimed at the limitation of a “spontaneous” (politically spontaneous) use of a constructive vote of no confidence and to promote the stability of government.

8. Analogous *ratio legis* justifies impediments to passing a vote of no confidence in individual ministers. Such a motion requires the support of 69 Deputies (that is, 15% of their

constitutional number). However, such a method of enforcement of the accountability of members of government has not been established in the practices of Polish tradition, even if there exist conditions for their use in the circumstances of coalition government and programmatic disparities between parties forming the cabinet.

One factor diminishing the above institution is an alternative form of partial “reconstruction” of government, namely, the dismissal of a government by the President on the request of the Prime Minister. Currently, article 161 of the Constitution which states that “ the President of the Republic, on request of the Prime Minister, shall effect changes in the composition of the Council of Ministers”, is mostly interpreted as a peculiar constitutional obligation dependent on the submission of an appropriate request by the Prime Minister. It also limits the President’s powers to dismiss only to the offices of members of government (*sensu stricto*), excluding the office of the Prime Minister. The change of a prime minister – pursuant to Article 162 – is treated as a change of government and requires compliance with the procedures specified in Articles 154 and 155 of the Constitution.

9. From the point of view of a government’s stability, the provisions of the article, pursuant to which “the Prime Minister may submit to the Sejm a motion requiring a vote of confidence in the Council of Ministers”, are not unequivocal. Such a decision enables the Sejm to initiate and to continue controlling activities in relation to the government, though on the government’s initiative and mostly in its own interest. It is the Prime Minister who may be particularly interested in confirmation of support for his or her government or in manifesting the range of support from a parliamentary majority. The experience of at least two initiatives (of prime ministers Leszek Miller and Marek Belka) seem to confirm such an opinion.

10. One should notice, however, that a motion requiring a vote of confidence in the government is a double-edged weapon. Any failure to pass a vote of confidence in the Council of Ministers (by a simple majority of votes in the presence of at least half of the constitutional number of Deputies) would indicate that the government policy has not won the support of the Sejm majority, which in turn compels the Prime Minister to submit his or her resignation to the President of the Republic. The use of a motion requiring a vote of confidence is therefore accompanied with some risk, both for the government and Prime Minister. Moreover, it is not quite clear whether this is a form of applying for renewed confidence (as it was in the case of Leszek Miller; W. Sokolewicz is of similar opinion), or rather an instrument to exert pressure on Parliament (the Sejm) in order to obtain its support in the course of taking decisions on legislation proposed by the government (as suggested by L. Garlicki).

11. It is a widespread opinion, that the system of government established under the provisions of 1997 Constitution of Poland is characterised by the strengthened position of the Council of Ministers and of the Prime Minister.

First of all, the Constitution distinguishes the act of appointment or election of the Prime Minister from the act of appointment of the other members of the Council of Ministers.

The Prime Minister submits a programme of activity of the Council of Ministers to the Sejm and a motion requiring a vote of confidence (Article 154(2)). The motion requiring a constructive vote of confidence contains the indication of a new prime minister but not a new government. The voting in the Sejm refers directly to the Prime Minister (Article 158). Any change in office of the Prime Minister means a dismissal of the previously existing Council of

Ministers. The Prime Minister, designated by the President of the Republic (or elected by the Sejm) proposes to the President – on the principle of exclusiveness – the appointment of particular persons to concrete positions in the Council of Ministers. The Prime Minister specifies the competence of ministers performing tasks allocated to them by the Prime Minister. The Prime Minister shall ensure the implementation of the policies adopted by the Council of Ministers. The Prime Minister (together with the Minister of Foreign Affairs) is a partner of the President in a constitutionally required co-operation in the conduct of foreign policy. As mentioned, it is also the Prime Minister (and not appropriate ministers) who countersigns those official acts of the President which require the countersignature by a member of the Council of Ministers. He also requests the appointment, in wartime, of the Commander-in-Chief of the Armed Forces (Article 134(4)).

12. The constitutional construction of the system of government attempts to draw a precise distinction between the scope of activity, responsibility and competencies of the President of the Republic and the government (the Council of Ministers). This trend also manifests a praiseworthy and more exacting attitude by the authors of the Constitution when approaching the apportionment of tasks and areas of competence of these organs. In part, this seems to result from the examination and assessment of ambiguous interpretation and application of relevant provisions of the Constitutional Act of 17th October 1992.

13. The Constitution does not expressly envisage the participation of the President of the Republic, or his representative, in the sittings or work of the Council of Ministers. In this situation, the Government appointed in 1997, and its Prime Minister, refused its consent for permanent participation of the President's representative in the sittings of the Council of Ministers. The Cabinet Council introduced – after the example of such an institution known in the years 1921-1935 – pursuant to Article 141 of the Constitution its limitation to “particular matters”. Even if the selection of such matters and, as a consequence, the convening of the Cabinet Council is decided by the President of the Republic, the Constitution clearly attempts to prevent the Cabinet Council from taking over the powers of the Council of Ministers. Pursuant to Article 141(2) of the Constitution, “the Cabinet Council shall not possess the competence of the Council of Ministers”. In practice, even in a more friendly atmosphere between the President and the Council of Ministers (as during Miller's and Belka's terms in office) the Cabinet Council is convened rather occasionally and mostly for a kind of mutual exchange of opinions and information. It may of course serve as a forum for presentation of viewpoints as well as for mutual explanation of reasons for taking particular actions. A kind of prediction seems to be justified, that such a need is clear in a period of “political cohabitation”. In any situation this does not allow the President to take over the direction of administration, or internal or foreign policy. The possible implementation of an agreed initiative or arrangement, provided that it will be affected by use of the government's competence, requires separate decisions taken at a “normal” sitting of the Council of Ministers, presided over by the Prime Minister.

14. The rules of division of competence (and powers) of the President of the Republic and that of government have also been spelt out. The above-mentioned provisions of Article 146(2) of the Constitution, stating that “the Council of Ministers shall conduct the affairs of State not reserved to other State organs” generate a legal situation where the President performs the competence conferred to him or her in respect of matters falling within his jurisdiction on the basis of expressly formulated provisions of the law. The remaining area of executive power exercised on an all – State belongs – as implied competence – to the government (and government administration).

15. The Constitution of 2nd April 1997 departs from regulations applied by the Constitutional Act of 17th October 1992, which allowed for a peculiar coincidence of jurisdiction and accountability between the President and the Council of Ministers. This relates, especially, to provisions of Article 32(4) and Article 51 of the Constitutional Act of 1992. Pursuant to Article 32(4) the President exercised “general supervision in the field of international relations”, while under Article 51 “the Council of Ministers shall conduct the internal affairs and the foreign policy of the Republic”. The provisions of the current Constitution do not contain the presidential function (competence) of “general supervision in the field of international relations”, which is difficult to distinguish from “conduct of foreign policy” falling within the jurisdiction of the Council of Ministers. The provision empowering the President to exercise “general supervision with respect to the external and internal security of the State” was also discontinued because of the difficulty in precise and unequivocal distinction from the jurisdiction of the Council of Ministers in respect of “the conduct of internal and foreign policy of the Republic” and ensuring “the external and internal security of the State”.

16. The requirement of Article 61 of the Constitutional Act of 1992 that any motion to appoint the Ministers of Foreign Affairs, of National Defence and of Internal Affairs should have been presented by the Prime Minister after consultation with the President, was repealed. Hence the President does not currently share the responsibility (whether of a political nature and to the public opinion) for personal appointments to the top offices in these significant government ministries.

In addition, this is no equivalent in the Constitution of 1997 to the provisions of Article 38(1) of the Constitutional Act of 17th October 1992, pursuant to which the Prime Minister was obliged to inform the President about fundamental matters concerning the activity of the Council of Ministers. It does not exclude the possibility of meeting of the head of Government with the President of the Republic, which from time to time takes place in practice; but it means, rather, that these meetings have lost their institutional nature and constitutional basis. The President has also lost the right to summon sittings of the Council of Ministers and preside over them “in matters of particular importance to the State” (provided by Article 38(2) of the Constitutional Act of 1992). Such a provision has its weaker equivalent in the President’s prerogative to convene the Cabinet Council, but without any decision-making attributes (replacing the competencies of the Council of Ministers). It means that the functional autonomy of the government is therefore fully preserved and protected.

17. The Constitution does not determine the substantive scope and the extent of the right to introduce bills of the Deputies, the Senate and, most importantly, the Council of Ministers and the President of the Republic. In these latter instances, there can be alternative sources of legislative initiative originating with two separate, sometimes politically, centres of executive power. A view can be found in the literature according to which “in the context of separation of competencies between the Government and the President of the Republic, the legislative initiative of the President” should be used sparingly, in particular in relation to matters expressly conferred on the government. One should however bear in mind that this postulate has only a doctrinal character and does not follow directly from the literal wording of the constitutional norms. The phrase matters expressly conferred on the Government” has no unequivocal meaning either.

18. The powers to shorten the term of office of the Sejm and Senate (or dissolution thereof before the expiry of their terms) are restricted as compared to the provision of the Constitution of 1952 as amended in 1989 and the Constitutional Act of 17th October 1992. The provisions enabling the dissolution of Parliament as a consequence of the adoption by the Sejm of a resolution “disqualifying the President from performance of his constitutional powers” were removed.

Under the Constitution of 1997 the President may shorten the term of office of the Sejm and Senate only in two relatively specified circumstances: (a) failure of the government to obtain a vote of confidence under the third constitutional variant of forming a government, and (b) failure to adopt the state budget within four months of receipt of its draft by the Sejm. In the former instance, the shortening of the term of office of the Sejm and Senate is obligatory by virtue of the Constitution. In the latter, it is left to the President’s discretion.

One can easily note that both the above conditions are designed by the authors of the Constitution to help in the creation of a government and in adoption of the Budget Act proposed by the government. In the latter case, the President acts as an arbitrator in the relations between the government and the Sejm (parliamentary majority, if it does exist), but it depends on the President whether to engage or not. Nevertheless, in both situations the President exercises his powers to shorten the terms of office of the Sejm and Senate independently, without seeking a countersignature by the Prime Minister.

19. Due to its flexible regulation by the Constitution, the power of the Prime Minister to countersign official acts of the President, in practice, tends to determine the shape of the system of government. The formulation of the Constitution of 2nd April 1997 concerning countersignature demonstrates an attempt to reconcile two tendencies.

On one hand, the general clause contained in paragraph 2 of this chapter introduces a requirement of countersigning by the Prime Minister of official acts of the President, explaining that through such signature he accepts responsibility before the Sejm for the content of the act and its consequences. On the other hand, numerous exceptions from such a requirement, enumerated in paragraph 3 of this chapter, manifest a tendency to make the President (chosen by the nation in universal elections) an independent decision-making institution, freed from the requirement to seek the countersignature of the Prime Minister, and bearing only constitutional (legal) responsibility for the exercise of powers freed from such a requirement, that is, his prerogatives.

20. Presidential prerogatives (enumerated in Article 144(3) of the Constitution) are the substrate of the real power of the President elected by the nation and imply a political responsibility. They also form a class of official activities excluded from the area of current haggling over power, and therefore are, to a certain extent, apolitical. The fact that these prerogatives encompass the appointment of judges, the presidents of the Constitutional Tribunal and the Supreme Court, as well as requesting the Sejm to appoint the President of the National Bank of Poland and three members of the Monetary Policy or of the National Broadcasting Council seems intended to free these bodies from very direct involvement in political divisions and controversies.

In general, the system of government, established by the current Constitution of the Republic of Poland, remains a rationalised parliamentary system based on the strengthened position of the Prime Minister and the government, as well as an active presidency, separately legitimised by universal and direct elections. Its aim is to ensure full legislative powers to the Sejm and the Senate. It is also characterised by the dominant position of the Sejm, as compared to the Senate, both in respect of legislative and controlling functions (especially vs. the government).

Executive power has a dualistic nature. The position of the President has a political legitimisation resulting mainly from universal and direct elections. It is independent and different from that of the government, based on approval by a majority in the Sejm.

The function of the current direction, management and shaping of state policy is conferred on the government directed by the Prime Minister. The President, despite his routine function as head of state, possesses a wide range of constitutional prerogatives. Beyond them, most of the official acts of the President require for their validity the signature of the Prime Minister and they are, however indirectly, subjected to political (parliamentary) control exercised by the Sejm.

EVOLUTION OF THE INSTITUTION OF PRESIDENT FROM 1989 TO 1987

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The institution of the presidency was restored to Poland's political order as one of the consequences of the Roundtable agreements. At this time, I do not intend to engage in any in-depth analysis or evaluation of the Roundtable agreements. Suffice it to say at this point that the introduction of the presidency had resulted less from any precise legal or political needs and chiefly from purely political considerations. An important role in all this was also played by the invocation of certain symbols equated with the traditions of Polish democracy. The dynamics of the Roundtable proceedings required speedy decisions. The prospect of soon-to-be-held parliamentary elections necessitated quick changes to the 1952 Constitution of the Polish People's Republic then in force. That precluded any deeper theoretical reflection on the shape of the future executive power, on the mutual relations between the government and the President and on the form of the future presidency itself.

The new chapter 3a, introduced into the 1952 Constitution as an amendment on 7 April 1989, was extremely laconic, as was the entire set of amendments introduced that April. In basic terms, it was patterned on a parliamentary system. However, the specific circumstances in which those changes to the Constitution took place as a result of the Roundtable agreements made the restoration of a classic parliamentary system impossible. That stemmed mainly from the fact that the April 1989 amendments had been grafted onto an entirely different system.

In April 1989, no basic changes of fundamental principles had been effected. For instance, there was no clear separation of powers which in democratic states serves to regulate mutual

relations among individual state organs and is the cornerstone of a classic parliamentary system. The restored presidency therefore was introduced into a system based on old principles, including the still-binding principle so crucial to the communist system: the communist party's leading role.

It was agreed at that time that the introduction of new institutions could not strike out that principle but, on the contrary, must accommodate itself within its framework. Such an assumption essentially determined the shape of the presidency. When agreement was reached on fully free elections to the Senate, the institution of the presidency was introduced. The President, elected by the Polish National Assembly, was to serve to restrain any unpredictable decisions of Parliament.

The Constitution, amended in April 1989 as a specific kind of "eclectic" act, contained a number of misunderstandings. What is more, from a legal point of view, it contained a number of internal contradictions.

One of those inconsistencies was the scope of the President's prerogatives to dissolve Parliament. Although the regulation defining the Sejm (lower house of Parliament) as the supreme organ of power had been retained, by the amendment of 7 April Article 30, passage 2 was introduced, giving the President the right to dissolve Parliament in the following specified instances: (1) if the Sejm fails to approve a new government within three months' time; (2) if the Sejm fails to pass the annual state budget bill within three months' time; and (3) if the Sejm enacts a law or adopts a resolution making it impossible for the President to perform his constitutional functions. Those are defined by Article 32, passage 2 of the Constitution as overseeing adherence to the Constitution, guarding the state's sovereignty and security as well as the inviolability and indivisibility of its territory and enforcing political and military alliances. Whereas the first two reasons for dissolving Parliament rank amongst those known to classic parliamentarianism, the third is unique. There can be no doubt that it was strictly political in nature. At the same time, it evoked misgivings over its compatibility with other constitutional provisions, particularly Article 20, passage 1, defining the Sejm as the organ with supreme political status. In light of such a clear constitutional formulation, how could an organ lacking such status be able to dissolve one defined as the supreme authority? That provision was clearly political, as its purpose was to guarantee the communist party's dominance.

But the dynamics of that period were unique. From the adoption of the new April 1989 amendments to the election of the first President by the Polish National Assembly in July 1989, events unfolded with exceptional speed. Immediately after a new Parliament had been constituted, that is from July 1989, it became obvious that changes to the Constitution had to go beyond the April amendments. In particular, it became clear that the basic political principles, constituting the foundation of the then binding constitution then in force, had to be changed. That realisation led to the next set of amendments, introduced in December 1989, which ultimately dismantled the political framework within which the Roundtable agreements had been concluded. That pertained mainly to the deletion from the Constitution of a provision upholding the party's leading role and the permanence of concluded alliances. Under those circumstances, when the newly elected Parliament (known as the contractual Sejm, since it had not been elected in fully free elections) enacted key measures changing the Constitution and thereby the political system as a whole, the President, in spite of the prerogatives granted him by Article 32, passage 2 (reasons for dissolving Parliament), for political reasons could not intervene and did not even undertake any such attempt. Having a

clear constitutional basis to act, he did not avail himself of that prerogative. It therefore became obvious that the role assigned to the President by the Roundtable agreements had clearly outlived its usefulness.

That situation produced important consequences of both a political and legal nature. In the political realm, more and more voices were heard calling for a change in the post of the President. From a legal standpoint it became necessary to precisely redefine the role of the President as well as his place within the system of state authority. Practice showed it was easier to achieve the first, political goal than the second legal one.

Soon after the amendments to the Constitution were enacted in December 1989, disputes arose within the Solidarity Parliamentary Citizens' Club, then a key formation in Poland's political scene. In 1990, the Solidarity camp, whose monolithic nature had determined its strength, began to break up and new groupings started to emerge. Disputes on how the transformation process should be conducted in Poland came to the fore. One thing all the Solidarity-rooted factions had in common was their agreement that the presiding head of state (W. Jaruzelski) had to be replaced. But that was the only common ground, because their choice of presidential candidates is what greatly polarised the individual groupings. The two main candidatures were those of Lech Wałęsa and Tadeusz Mazowiecki. The groups supporting the latter seemed to feel that so popular a prime minister as Mazowiecki would be able to defeat Wałęsa only in a popular election. It was within that context that a motion to change presidential election procedures emerged. It would appear that the motion's authors, guided by short-term, pragmatic considerations, did not fully realise all the implications of such a change. Nevertheless, a new presidential election act was passed on 27 September 1990. In effect, that was when the dispute over the shape of the Polish presidency erupted in earnest.

But so major a political change as the manner of electing a president was not accompanied by any changes to the constitutional provisions defining his functions and prerogatives. There is no doubt, however, that the popular election of a president by the general citizenry differently situates and legitimises his office. In essence, it means a departure from the classic parliamentary system.

At the time it appeared that the stage at which a new constitution would be enacted was close at hand and that the new constitution would redefine the presidential office. Unfortunately, following the presidential election, the Solidarity-rooted groupings had become so mutually antagonised that no consensus on basic constitutional issues could be reached.

When the newly elected President Lech Wałęsa took office, he was faced by a highly fragmented Parliament and the lack of a constitution precisely defining the mutual relations between individual organs of state authority in the new situation. Wałęsa himself had his own original vision of the presidency exceeding the framework stipulated by the then binding constitution within which he had to function. That in practice led to new tensions and created an atmosphere in which what could be termed an "factual constitution" began taking shape.

The framework defined in the constitution binding to that point had been proved inadequate for the implementation of Wałęsa's presidential concept. As a result, at the start of the new Parliament's term in office the President submitted (on 3 December 1991) a draft Constitutional Act on Appointing and Recalling the Government and Other Changes Pertaining to the State's Supreme Organs. The draft clearly slanted the country's form of

government towards a semi-presidential system. That was after all a logical consequence of the election by popular ballot. It made the President the supreme head of the executive authority. Only the President could appoint the Prime Minister and, upon the latter's motion, members of the government. The Sejm would retain the right of holding a no-confidence vote in the government, but the final decision in the matter would be taken by the President. It was he who could decide whether to accept the government's resignation or dissolve the Sejm. The draft also authorised the President to independently announce a referendum. Its allusion to the French system was evident. The draft triggered an extensive, nation-wide discussion as President Wałęsa had intended. Some Members of Parliament, however, wanted to use the opportunity to restrict, rather than enlarge, presidential powers. One counter-proposal sought to strengthen the government, specifically the office of prime minister, rather than the presidency. An element of that tendency was the proposal to introduce a constructive no-confidence vote reflecting the German Constitution's chancellorian system. The result was a clash between the two opposing concepts: the chancellorian system and the semi-presidential system. A compromise was hard to come by.¹¹

As a result, the presidential draft got substantially changed in committee. President Wałęsa did not accept those changes, charging that the committee had changed the basic sense of his draft, and called on the Speaker of the Sejm to withdraw the draft.¹² In withdrawing the draft, L. Wałęsa signalled his determination to strive to strengthen the presidency by creating a semi-presidential system in Poland.

The need to redefine mutual relations between the organs of state authority was becoming extremely urgent. Hence, as soon as withdrawal of the presidential draft was approved, a parliamentary draft was prepared. To a large extent, that parliamentary draft incorporated the work of the previous constitutional commission and effectively represented a modified version of the original presidential draft. It should be noted that, through his representative, President Wałęsa took an active part in the work of the committee. He consistently pressed for the strengthening of presidential prerogatives, both in the legislative process as well as in relation to the government on the direction of the aforementioned semi-presidential system. The demand was made for increased presidential prerogatives in the legislative process, the right of legislative initiative, expansion of veto powers to include a selective veto (similar to proposed Senate amendments to bills passed by the Sejm) and fast-track legislation for presidential legislative drafts. The President's demands included a presidential prerogative to call a referendum and not only appoint but also recall the government.

The result of the committee's efforts was the Constitutional Act of 17 October 1992, which formally rescinded the former Constitution of the Polish People's Republic. The essence of an issue that was becoming increasingly crucial to the state's efficient functioning was reflected by the name of the law: Constitutional Act on Mutual relations between the Legislative Authority and Executive Authority and Territorial Self-Government. Because this was a constitutional act rather than a full constitution, it was dubbed the "small constitution". Considering the conditions in which it came into being, the "small constitution" was unable to resolve the conflicts that arose from the previous constitution. On the contrary, it generated new conflicts of competence.¹³

¹ H. Suchocka, 'Political context of the new Polish Constitution', in: *Constitution and Transformation*, Societas, Warsaw, 1995.

² The formal reason given by L. Wałęsa was that the Sejm had failed to approve the concept of granting the government the right to issue decrees with the force of legislation, and that could lead to legislative paralysis when faced by a politically fragmented parliament.

³ Compare M. Kruk, "Transformation of Poland's constitutional order in 1989-1997", in: *Basic Principles of the Polish*

The “small constitution” did, however, systematise certain matters. For instance, unlike the previous constitution, in Article 1 it clearly specified the principle of separation of power. It stated directly that “State organs in the realm of legislative authority are the Sejm and Senate, and in the realm of executive authority – the President of the Republic of Poland and the Council of Ministers; in the realm of judicial authority – independent courts of law.” Like the government, the President was described as an executive power.

The “small constitution” included a number of proposals put forward by the Presidential Chancellery defining the President’s functions, but there was no agreement to changes that would transform the political system into a presidential one. There was agreement on including Article 28, passage 1 stating that “the President of the Republic of Poland is the supreme representative of the Polish State in internal and international relations.” But there was opposition to the formulation describing the President as the head of the executive authority. I believe L. Garlicki accurately described the Polish situation when he wrote that “Polish constitutional tradition has always oscillated between the need for a strong head of state and the fear of dictatorship.”¹⁴ Our entire period of grappling with a new constitution has provided ample evidence thereof. On the one hand there was a yearning for strong presidential authority, and L. Wałęsa consistently attempted to implement that model. On the other hand, the fear that such authority might be abused predominated. Many disputes arising in practice out of interpretations of the Constitution only reaffirmed such fears.

In light of the “small constitution”, the President retained his right to dissolve Parliament. But it was significantly changed and restricted in comparison with the constitution in force until 1992. It was inscribed into the traditional system of checks and balances in accordance with the principle of separation of power. It gave the President (Article 4) the right to dissolve Parliament only in clearly specified circumstances. And so, Article 21, passage 4 stated that the President could dissolve Parliament if the Sejm failed to pass the budget bill within three months of the day it was submitted to the Sejm. In addition, Article 62 gave the President the right to dissolve the Sejm in the event it failed to form a cabinet within a specified time, and Article 66, passage 5 stated that the President had the option of accepting the government’s resignation or dissolving the Sejm if it approved a no-confidence vote in the government without simultaneously electing a new prime minister.

But even the constitutionally-defined three-month deadline for the passage of the budget by the Sejm has given rise to a major conflict, regarding the extent of presidential power. According to the interpretation taken by the President, this was to be the time limit for the completion of the whole budget procedure, including the Senate’s correction, a possible presidential veto (for which he has 30 days), and a renewed vote on the law after the veto. Here, an attempt was made to apply a narrowing interpretation, in glaring contravention of the logic of legislative procedure. This dispute led to an updating of the “small constitution”, in effect of which the time limits were clearly interpreted. Thus, in effect of a dispute between Parliament and the President, that which should be effected only by interpretation was formulated as a constitutional provision. This provides a clear example of interdependencies between real and written constitutions, but in this case this interdependence is negative, affecting the quality of the text of the Constitution.

Constitution, W. Sokolewicz (ed.), Parliamentary Publishers, Warsaw, 1998, p. 61.

⁴ L. Garlicki, “The development of the presidency in Poland: wrong institutions or wrong persons?”, in: Poland in a World of Change, K.W. Thompson (ed.), University of Virginia, 1992, p. 67.

Much more doubt is aroused by detailed powers of the President as regards the appointment of three cabinet ministries: foreign affairs, national defence and internal affairs. The Constitution is very laconic on this subject. It only reads in Article 61 that the motion to appoint ministers of foreign affairs, national defence and internal affairs is presented by the Prime Minister after consulting the President.

It was against these generally-outlined mutual relations between the two principal actors that the dispute took place over the shape of the systemic model. Each party sought to apply different tools reflecting a different understanding of the model of the state system. President Wałęsa, chosen in a general election, claimed the need for a stronger authority. Consequently, he interpreted many prerogatives inscribed into the “small constitution” in the light of the presidential, rather than parliamentary, system. Real tension between the written constitution and the actual state of affairs was then bound to emerge. Through his actions, the President no doubt wanted to pressure the Constitutional Commission and to influence the shape of the future model of state system towards a presidential system. Each constitutional ambiguity was tapped by him as an occasion for broader interpretation of the constitutional powers of the President. The previously mentioned Article 61, concerning three cabinet ministers, is one such example. Its generally-couched provisions led the Presidential Chancellery to an interpretation that there are so-called presidential portfolios, involving a special role for the President in ministerial appointments. In practice, the interpretation of the provision about consulting the President was that it was actually the President who proposed the ministerial candidates. The differences in interpretation led to a long delay in the appointment of the Minister of National Defence, when after the resignation of a former minister, President Wałęsa did not agree on any candidate proposed by the Prime Minister. In effect, the latter yielded and consented to the presidential candidate. A similar situation developed in the case of the Minister of Foreign Affairs.

Significantly, after President Wałęsa’s electoral defeat in 1995, all those ministers tendered their resignations. Through consistent broadening interpretations by the Presidential Chancellery, an attempt was made to treat these ministers as secretaries under the presidential system, which meant that they considered themselves more related, and responsible, to the President than to the cabinet of which they were members. We had here a clear clash, as reflected in an attempt to force a custom characteristic of the presidential system against a constitution which provided for the parliamentary system, even if tilted towards a presidential one.

The political position of the President is also determined by two other institutions belonging to the catalogue of classic instruments restraining, or rather balancing state authority: the institution of countersigning and veto power. In the Polish practice of the early 1990s, the institution of countersigning became one of the most controversial issues. In the constitutional amendments of 1989, it was dealt with in a most laconic manner. At its basis lay the classic principle that in a parliamentary system the President bears no political responsibility, making it necessary for a minister to take responsibility for his acts – something that differentiates those acts from all other acts defining the President’s personal prerogatives.

Article 46 of the “small constitution” reads that acts of the President are valid subject to countersignature of the Prime Minister or the relevant cabinet minister who present a matter to the President. Article 47 explicitly enumerates the acts of the President in respect of which the countersignature requirement does not apply. Such an exclusive notion of

countersignature warrants the conclusion that the lawmakers opted for a narrower extent of presidential powers. It is obvious that an inclusive enumeration, whereby the acts of the President subject to the countersignature requirement are listed, provides a basis for a stronger position of the President, since it is based on the supposition that in doubt an act is not subject to the countersignature requirement.

In parliamentary democracies, the countersignature provides a criterion with which to differentiate between those presidential functions in which he may not take a decision without a minister on the one hand, and his personal prerogatives on the other. Under the “small constitution”, the President is granted a wide range of such personal rights – no doubt a result of the general election of the head of state and a related attempt at forming a semi-presidential system. But in practice, President Wałęsa sought to broaden the extent of these prerogatives. Here again, conflict emerged between the Constitution and an attempt to enforce a different practice: against the Constitution, not within its framework.

Consistently determined to create a presidential system, President Wałęsa strove to expand his scope of prerogatives. That led to conflicts. One of the most significant was the dispute over who was to appoint a member to the National Radio and Television Council. In order to ensure the Council’s independence, it was decided that the Sejm, Senate and President would each appoint three of its members. In light of the “small constitution”, that decision by the President was not exempted from a countersignature. But the President did not send his decision to the Prime Minister. A lengthy dispute ensued.¹⁵ The decision remained in force, even though the “small constitution” directly stated that the President’s legal acts required a countersignature to be valid. The practice of not providing legal acts that required it with countersignatures was quite frequent. The situation did not change until the second half of 1994.¹⁶

The practice of using the institution of countersignatures served the Constitutional Commission as an important argument for including suitable solutions in the new Constitution. The constitutional solution also amounted to something of an attempt to dispel the doubts of scholars as to the nature of countersignatures. Hence Article 144, passage 2 states that “the official acts of the President of the Republic, in order to be valid, require the signature of the President of the Council of Ministers, who by signing such an act assumes responsibility for it before the Sejm.” That means that only the Prime Minister, not individual ministers, may countersign a presidential act. What is more, it was clearly stated that by countersigning an act, responsibility for it is assumed by the President of the Council of Ministers. As in the “small constitution”, the principle of the need for a countersignature was spelt out. The exceptions were explicitly listed in passage 3.

Another institution that evoked a lengthy discussion in the course of work on the Constitution was the President’s role in the legislative process, in particular his veto powers over legislation passed by Parliament. The “small constitution” gave the President that prerogative. Article 18, passage 3 stated that the President may refuse to sign a bill into law and, together with a motion justifying his decision, send it back to the Sejm to be reworked. The President also had the option of sending it to the Constitutional Tribunal with a request that its compatibility with the Constitution be verified (passage 4). Such a set of presidential

⁵ P. Sarnecki, “Countersignatures and their lack in light of the ‘small constitution’ based on the example of the National Radio and Television Council”, *Sejm Review*, 1944, No. 3.

⁶ P. Sarnecki, “Countersigning legal acts”, *op. cit.*, p. 40.

prerogatives gave the President real power and enabled him to block the passage of legislation. President Wałęsa widely availed himself of his veto powers. As a result, during work on the Constitution there were calls to entirely deprive the President of veto powers. That was a reaction to what many Members of Parliament regarded as excessive use of the veto.

Ultimately, such a prerogative was retained (Article 122, passage 5). Likewise retained was the President's right to send a bill to the Constitutional Tribunal to verify its constitutionality. But the Constitution clearly restricted the use of that institution. Without depriving the president of either of those prerogatives, it gave him the possibility of using only one of them in relation to a given piece of legislation.

The institution of president has undergone considerable evolution. The office of president as it now exists differs in its basic framework from that defined by the first set of constitutional amendments adopted in April 1989. In general terms, the President's position was shaped in the years preceding the "small constitution" as well as under its rule. The "small constitution" undoubtedly created a strong presidential office, as I have already indicated, under the influence of President Wałęsa's determination to create at least a semi-presidential system. All the disputes and doubts emerging at that time were reflected in the work of the constitutional commission engaged in drafting a new, full constitution. They also exerted considerable influence on the shape of future constitutional solutions.

The familiar pre-second world war thesis was reaffirmed that writing a constitution, especially that part devoted to presidential prerogatives, hinged upon personalities. During the constitutional debate, one could observe that up until 1996, or the end of Wałęsa's term in office, the concept of the furthest-reaching limitation or weakening of the presidency prevailed within the commission (it should be noted that the parliamentary majority at that time comprised political parties from a camp opposed to President Wałęsa). The situation changed towards the end of 1995 when Aleksander Kwaśniewski, representing the parliamentary majority, was elected President. It was then that the constitutional commission changed its extremely anti-presidential stance and stopped whittling away at the President's prerogatives.

To sum up, it may be stated that, in the course of various constitutional efforts carried out during Poland's transformation period, attempts were made to enshrine the office of president into a parliamentary system.¹⁷ That system seemed somehow closer to Polish tradition. But, as evolutionary developments have shown, that turned out to be not entirely possible. That principle was toppled by the principle of a popularly elected presidency. During work on the Constitution, the dominant tendency in Parliament was to strengthen the position of the government rather than that of the President, in accordance with the German constitutional model. Hence the constitutional solutions, including those pertaining to the office of the President, resulted from an attempt to reconcile different political visions – one leaning towards a strong presidential system and another favouring a chancellorian system with a strong government. The President has been given the right to address Parliament, convene a Cabinet Council, which cannot however perform the function of a government cabinet, and to hold a referendum beyond the control of Parliament, all of which is undoubtedly rooted in a popularly elected presidency.

⁷ As EBRD data have shown, a parliamentary system enables the reform process to be carried out more effectively than a presidential system does.

In general, in the constitutionally accepted division of powers, the President has been defined as an organ of executive authority alongside the Council of Ministers. That approach clearly confirms an attachment to the concept of division of powers enshrined in the Constitution of March 1921. But the actual political function of the President goes beyond that role. The presidency is regarded as an organ of political arbitration, and that accords to it a special position within the political system. The President also performs his traditional representative role. Nevertheless, compared with the “small constitution”, the political position of the President has definitely weakened.¹⁸

THE ROLE OF THE PRESIDENT IN CONTEMPORARY EUROPE

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The countries of modern Europe have a common cultural and historical heritage. They share common ideals and values. Their commitment to principles of freedom, pluralistic democracy, state of law and respect for human rights guarded by the Council of Europe considerably affects the traditions of state and law construction in those countries. The trend towards similarity and compatibility of these traditions in no way questions the existing national differences and diversity. On the contrary they create a collective European experience, enriching it culturally and functionally. This is manifested in how the institution of the president is regulated and used for the highest representation of state domestically and externally and guarantees the stability and continuity of public power.

After the collapse of totalitarian regimes in the 1980s and 1990s the countries of central and eastern Europe chose different ways of organising power and accordingly different ways of instituting the post of the head of state. A number of countries preferred a parliamentary republic, for example Albania, Bulgaria, Hungary, Latvia, Poland, the Czech Republic and Slovakia. A mixed form of government was established in Lithuania, Macedonia, Romania, Slovenia, Croatia and Estonia. However Bulgaria, Poland and Slovakia subsequently introduced the system of directly electing a president, going over to a mixed form of government. Parliamentary models with elements of presidential models, whereby the president is elected by a college of deputies, were promoted in the countries with well-developed party systems such as Hungary, Latvia, Slovakia, the Czech Republic and Estonia. In eastern Europe, where party systems are still in an embryonic state and civil society is not well established enough to entrust parliament with forming a capable single party or coalition government, strong presidential institutions were created in full compliance with the requirements of legitimacy and efficiency. In any case those state and legal systems which were based on a collegial form of the head of state and on an approach involving the cult of personality of the head of the communist party as well as on the rejection of rotation of state authority and of political competition, have gone into oblivion.

⁸ R. Mojak, “The political position of the President of the Republic of Poland in light of the new constitution”, State and Law, 1997, No. 1212-12, p.70.

Unified principles of organising state power taking due account of the current requirements of political development and respect for national interests and traditions have become dominant on the continent.

Legal status of the head of state

The institution of the president is an alienable component of the mechanism of executing power practically in all European countries. By "head of state" we usually understand a person (and in rare cases and mainly in former socialist countries a collegial body) invested with high or supreme presentation of the state within a country and its relations with foreign countries. Depending on the form of government the head of state has different scopes of rights and powers. It is generally accepted that the broadest and most comprehensive competence is given to the head of state in a presidential republic. However this general description is not exactly accurate. A special feature of the presidential republic is that it is the head of state who is invested with supreme power. But at the same time in a classical presidential republic there is a strict division of branches of power and there is a system of checks and balances which does not allow the president of the republic to exceed his powers as envisaged by the constitution and effective legislation in force. Any encroachment by the head of state on the powers of the legislative body and particularly on judicial power is regarded as a grave offence and may entail not only political but also judicial liability. It is the institution of impeachment which is used for these purposes in most countries. A typical and widespread mistake in qualifying the form of government is as follows. The states in which the head of state plays a central role in the system of institutions and is engaged in managing state affairs are counted among the presidential republics without taking into consideration other features. This element of the definition is very important. But when there is no separation of power or division of branches of power and no mechanism of limiting his power this is not a presidential but a monocratic regime, referred to in the literature as a super-presidential republic. Actually, when the president subordinates the judicial and legislative branches of power, the democratic system is replaced by authoritarianism or even totalitarian dictatorship. There are relatively few classical presidential republics in the modern world. One of the typical examples is the United States of America.

In the countries with a mixed form of government the status of the president is a little bit different. Among such states are those countries in which the executive power is shared by the president and the government accountable before the parliament. In this case the president usually is invested with very broad competencies. He is the supreme representative of the country in international relations. He appoints the head and members of the government. He has relatively broad regulating powers. These rather comprehensive competencies can really take place when he has a majority in the parliament. One of the clearest examples of a republic with a mixed form of government is France, in the form of the Fifth Republic. In the years since the establishment of the Fifth Republic in 1958, France has gone through a variety of political models and systems which may exist within the framework of a mixed form of government. During the years of the presidency of Jacques Chirac France has gone through a number of changes in its state and legal model depending on the results not only of presidential, but also to a greater degree of parliamentary elections. In winning the majority in the National Assembly the socialists actually forced the President to appoint a government headed by the leader of the socialist party, Lionel Jospin. The differences in the majority supporting the President and the majority of the National Assembly entailed limitations for the President in the execution of his powers. Quite striking manifestations of such a situation

were meetings of the European Council comprising heads of states or governments of the members of the European Union, attended at the same time by Jacques Chirac as the French President and Lionel Jospin as the Prime Minister of the Republic. Thus in a mixed republican form of government (semi-presidential and semi-parliamentarian) the reality of executing the prerogatives of the president greatly depends on the balance of political forces in the country.

In parliamentary republics the status of the president is considerably different. In such countries the president as a head of state is formally invested with large competencies, has virtually no executive power and no possibility of putting into practice his prerogatives. The president in a parliamentary republic may be described by a phrase usually applied to a monarchy – he reigns but he does not govern. Certainly it doesn't mean that the president of the republic is just an institution of ceremony or protocol. His influence and impact on the functioning of the state mechanism may be very great. And still under normal conditions, that is barring crisis, the president is not active in managing state affairs. We consider that he uses not so much his power but rather his influence. And the degree of the influence depends on the political situation and the alignment of political forces in the country. Very often the degree of his influence depends also on his personal qualities as the head of state.

The eventual creation of the institution of the president in the European Union also deserves our attention. The Treaty establishing a Constitution for Europe envisages the introduction of the post of permanent chairman of the European Council. According to the text of the constitution he will become the highest official of the European Union, representing it in the domestic and foreign life of the European Union. Taking account of the fact that the European Council is to become the institution of the European Union and its highest political instance the importance of this position will be very great. His general powers are described directly in the text of the constitution. Its appropriate provisions mostly deal with co-ordinating and representative functions. But a comprehensive assessment of the role and importance of this institution may be given only when experience and practice of its functioning has have been accumulated. Yet using the current experience of the European Union we can assume that the role of the full time chairman of the EU will be no less important than that of the representative of the country having the rotating chairmanship of the European Union, whose mandate is limited in time and is not accurately defined in legal terms.

Speaking of the variety of forms of governments and differences in the status of the institution of the president we should take into account the fact that in practice legal constitutions and their implementation do not coincide completely. There may be signs of mixed forms of government in different countries. However, in practice the virtual power of the president may go beyond the limits laid down by the constitution. An example of this is the Russian Federation. Formally the president and the government share executive power. But in practice the institution of the president is dominant in the system of state authorities. Appointing and recalling the head of the government depends on the president of the republic, though formally the parliament should support the nomination of the chairman of the government and the candidate proposed by the president should get a vote of confidence. Only then does he become the head of a republican government. A rare exception was the rejection by the Russian Parliament of Mr. Chernomyrdin's candidature for chairmanship as proposed by President Boris Yeltsin. As a result of two rounds of negative votes, to avoid a third negative vote in which case Parliament would have been dissolved and an early election held the President of the Republic preferred to change the candidature for the chairman of the government. He proposed to the State Duma a compromise candidate, Mr. Evgueny Primakov, who was immediately approved by Parliament, though the support of the

parliamentary majority in no way guaranteed stability for the government or a long term of office for its chairman.

In the 1990s, the number of European countries with mixed republican form of governance increased considerably. Formerly this had been the case with only France and, in a way, Finland among the countries of the European Union.

Judging by our analysis classical categorisation of the institution of president is rather relative. In real life the number of elements varies to a large degree. There are many nuances, which are connected to the cultural, historical, and legal development of countries. Here are a number of examples. The Constitution of Bulgaria dated July 12 1991 proclaims the country as a parliamentary republic envisaging concurrently direct election of the president. Assuming that the election of the head of state by the popular vote is one of the features of a mixed republic we can characterise Bulgaria nevertheless as such though Bulgaria counted itself among the states with a parliamentary form of government. In Poland during the period of the “small constitution” of 1992 when Lech Wałęsa was the President, there was a trend towards a presidential form of government while currently it is a country with a typical mixed form of government. At the same time analysis of the relationship of the institution of the president and other executive bodies of power in modern Poland shows that in forming the government the head of state has to be guided by a principle which is typical primarily for the parliamentary republic that consists in following the majority in the Polish Parliament. This gives grounds to some scholars to conclude that a mixed form of government in Poland is functioning according a parliamentary model.

Procedure of forming the institution of the president and its special features

There is a special procedure for electing the head of state in countries with a republican form of governance and it is based on certain common principles, which are regulated by the constitution of the country. These principles are detailed in a special electoral law. Among such principles are those covering the election of the head of state and a fixed term of office. Violation of any of these principles is regarded as a direct encroachment of the foundations of a democratic system, though such things may happen. We can just recall the introduction of the life term for the president in Yugoslavia in the past or the regime of black colonels in Greece as well as some other examples.

The constitutions lay down basic requirements for the candidate to fill the post of the president, the procedure of his election, and terms and conditions for executing the presidential mandate. Thus under the United States Constitution a person may be elected president if he is a citizen of the USA, was born there, if he is 35 years old or more and has lived in the territory of the country not less than fourteen years. The term of office of the president is four years. The same person cannot be elected president for more than two terms, or a total of eight years. Incidentally, experts have calculated the possibility of a ten-year term of office for the president in those situations when the vice-president takes up the post for a term of no more than two years. In this case he is entitled to stand for the presidency two more times. If the vice-president takes office for more than two years this is counted as a term of office. Unfortunately this is not a sleeping rule of law. There are numerous examples of this and despite all security measures taken presidents often become the targets of attempted assassinations. Now we qualify them as terrorist acts. We can recall the assassinations of Abraham Lincoln and John F. Kennedy and other attempts among such historic examples.

The terms of election to the post of the president vary in different countries, including age qualification. For example in Italy, the candidate should not be younger than fifty. There are also different terms of office. The most popular is a four or a five-year term. France used to have a seven-year term of office throughout its history. But this was reviewed and changed by introducing an amendment to the French Constitution and the current President of the French Republic, elected for a second term, will be in office not for seven but for five years. There are also different approaches to the terms of re-election of the president. In a number of countries the president is elected for no more than two terms. This requirement is also laid down in the constitutions of the Russian Federation, Ukraine and some other states. The procedure of electing the head of state is very diverse in various countries as well. In some states the president is elected by popular vote and secret ballot. Formerly a general and direct election by secret ballot was believed to be typical only for presidential republics. However, this type of election is becoming widespread irrespective of the form of governance. It is used in republics with a mixed form of governance (e.g. France) and in republics with a parliamentary form of governance (e.g. Austria).

Yet indirect elections are still relatively frequent in parliamentary republics. These elections are not uniform either. There are different principles for creating the panels of electors. For example, among the countries of the European Union we may cite Germany, Italy and some others. In Germany the Federal Assembly electing the president comprises the Deputies of the Bundestag and the representation of the Länder parliaments, reflecting their party majority. As a result of this, the body having a majority in the Bundestag will not necessarily have a majority in the college of electors, which will elect the president. This is exactly what happened in the recent elections. A similar system, though with significant differences, functions in Italy for creating a college of electors. It is formed taking account of the central, regional, and local representation. And finally there is the option of electing the president of the republic directly by the parliament. All these examples show that the ways of electing the president of the republic are very numerous and diverse. However, their comparison leads to the conclusion that they are linked with the historical development of a country. They must not be regarded as an indication of democratic organisation of state power or of the contrary – that such organisation is lacking and that the democratic traditions of electing the head of state are biased. To make an objective judgment about the mode of election of the president we need to know whether elections themselves are well run. The crucial factor in assessing the procedure of electing the president of the republic in this case is to what degree the election is free and fair.

Under the Treaty establishing a Constitution for Europe a full time European Council President will be elected by this body for two and a half years with possible re-election for another term. Such a procedure of electing the president by heads of states or governments of the member countries is unique for these countries. A similar procedure seems to exist in Malaysia and the United Arab Emirates for electing the head of state. The proposals put forward during the discussion of the project on introducing direct election of the President of the European Council did not get the support of the member countries. One of the few requirements for the post is that the candidate should not be in service in any of the European Union member countries.

There are special election laws laying down a detailed procedure and regulations for election, voter registration, vote-counting and all other things. As a rule these are comprehensive regulatory legal acts containing detailed regulations of the basic and important principles as well as technical details on holding elections, organising vote counting and deciding on the

outcome of the election. The last version of the law on the election of the President of the Russian Federation is a very big document of more than one hundred pages. The most important thing in evaluation of the outcome of the election is whether the president is elected by absolute or relative majority of votes. The second parameter is the minimum turnout, which is required for recognising an election as valid. The third parameter is holding elections in one or two rounds of voting. For example, in Ukraine, where the election of the president has just taken place and evoked an unprecedented interest, the president to be elected requires an absolute majority of votes of the electors in the first round of the election. If there is no such result a second round of voting takes place after two weeks. Only the two candidates with the greatest number of votes in the first round may stand in the second round of the election. Accordingly in Ukraine MM. Yushenko and Yanukovich got about 40% of votes each in the first round. The candidate is considered elected if he has got a relative majority of votes in the second round. It is interesting that a similar procedure takes place in France during the presidential election. Very few people are aware of how legal principles regulating elections compare in these countries. This is a pity. On the whole such a scheme may be regarded as one of the most democratic, and certain violations, in most cases, are related not to the law itself but to the excesses of the political regime in the country.

In the Russian Federation the law envisages the same pattern of general and direct elections as in other European countries. The Russian Constitution strictly limits the term of office of the head of state for the same person to two five-year terms. President Vladimir Putin has, in answering the questions of foreign mass media correspondents, repeatedly confirmed this rule and has been categorical in expressing rejection to proposals to eliminate it. There are no grounds to believe that the position of President Putin may change. This is in full compliance with the principles of democratic state order. Politically the complexity of the situation can be explained by the fact that the current Russian President has become a kind of charismatic leader in the country, and there is no comparable candidate as far as his popularity goes. There are four more years before the next presidential election, however, and we know that life and political life in particular are liable to changes.

As far as terms of office of the president are concerned we should also mention the case of an early termination of power. This may happen because of death or poor health of the president (for example we may recall the case of President Roosevelt) or voluntary resignation for health reasons. In all these cases it is the vice-president who replaces the president. If such an option is not available then an early presidential election is held.

Presidents may also be removed from their positions. In this connection we should dwell upon the institution of presidential responsibility and the legal consequences entailed. The president has a number of powers and privileges, laid down both in national and international law, for example his immunity, the right to special attention, to holding direct negotiation with other heads of states and governments, etc. At the same time there may be cases, which are not excluded in practice, of the head of state committing offences, and naturally these are rare cases, that may entail his prosecution. There is an institution for this, which in many countries is called impeachment, which is a unique form of political and legal responsibility or a liability of the head of state. One of the best-known patterns of its implementation exists in the United States. The American Constitution explicitly sets out the grounds for possible prosecution of the president. Among them there is corruption, for example. It is certainly very difficult to imagine that the US President may take bribes. But when the American Constitution was being written the situation did not seem impossible to its authors. The US House of Representatives has the right to initiate the procedure of impeachment, but the US

Senate takes the decision on the merits of the case. In the past only one vote outweighed the decision not to impeach President Jackson in the Senate. In other circumstances the threat of impeachment may lead to the resignation of the president, like in the case of President Nixon.

Among recent examples of impeachment we can cite one of the states recently accepted into the European Union, namely Lithuania. The President of the Republic was charged with grave state crimes, and in particular with disclosing state secrets, which were used as grounds for his removal. Incidentally in using the impeachment procedure this is the only punishment that can be applied. Quite interesting is the fact that after the impeachment and new presidential election a district court of the country recognised that there were no *corpus delicti* in the actions of the former President and thus actually put into question the legality of the consequences of the procedure employed. This is a question of rather theoretical interest. But we need to mention that nowhere it is envisaged that the lack of legitimacy in the actions taken in the course of the impeachment may result in the restitution of the former President and his rights.

Attempts to use impeachment also were made in the Russian Federation during the presidency of Boris Yeltsin. However, none of them received sufficient support. Accordingly the procedure was never applied. The Constitution of the Russian Federation contains provisions defining the possibility, terms and consequences of impeachment.

Conclusions

A very brief review of the status and role of the president in European countries gives us grounds to state that the institution of president typical for nearly all republican states of Europe is a relatively stable and sustainable instrument of implementing state power. At present we cannot conclude that the dominant trend consists in reinforcing the role and powers of the president or, on the contrary, in certain features of the parliamentary republic.

We can consider a trend from a different perspective. Presidents increasingly play the role of political arbiters. Depending on political weight and influence, this can to a great degree lead and co-ordinate the functioning of various branches of power.

In those cases when the president is elected directly by popular vote he also gets a very high degree of legitimacy. The population lays hopes in him in terms of ensuring a stable and sustainable political regime, continuity and succession of the political course supported by the electors. This empowers the president not only with very special moral and political authority but also with vast possibilities to be used in case of differences in opinion or position among the state bodies appealing directly to the people.

It is unlikely that there are grounds to evaluate certain types of presidential institution in the abstract as democratic or antidemocratic. The legal regulations effective at present in European countries according to a general rule provide for the democratic development and evolution of state institutions. Another such circumstance of decisive importance is the practice of implementing legal provisions, which may vary depending on political system. It is the changes in the latter, even nominally maintaining and preserving legal provisions, that can have a decisive importance for the functioning and evolution of the institution of the president.

INVENTING A NEW REPUBLIC: PROPOSALS FOR CONSTITUTIONAL REFORM IN POLAND COMPARED

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I. Why change? The democratic standards of the 1997 Constitution vs. the reality

Constitutional change has been a subject much discussed in Poland of late. While proposals for partial modifications are being received with an approving nod, blueprints for a full-scale revamp usually meet with stiff opposition – harking back to Plato’s “ill-ordered states, in which the citizens are forbidden under pain of death to alter the constitution.”¹⁹ In such a state, everything needs fixing with the issuance of ever-new regulations, which however fail to remove the root cause of what has gone wrong. So, perhaps, a thought should be given to the idea of, yes, changing the Polish Constitution, in breach of these injunctions.

Constitutional change is a tall order indeed. It requires that many barriers be surmounted, and sometimes it has to be fought for on the battlefield. Constitutions may come and go, but the constitutional idea has remained immutable since its first emergence in European culture. Probably the earliest presentation of the principle that the authority is constrained by law can be found in Homer’s juxtaposition of civilisation and the realm of barbarity whose inhabitants have “no assemblies for the making of laws, not any established legal codes.”²⁰

The reason why we call the basic law now in force a constitution is not only that it lays down the fundamental systemic principles, the line-up of state bodies, the manner of their appointment or the civil rights and duties. It has the status of a constitution because – by declaring that the rights and freedoms spring from man’s dignity, not from the whim of the authorities – it sets the limits that the democratically legitimised authority must not transgress. By embracing the principles of constitutionalism (where the human rights constraint on the power of a majority underpins the democratic system), the rule of law and the separation of powers, the Constitution of 1997 has joined the world of values and ideals that defines the European identity and underlies the systemic constructions that can rightly claim to be called democratic.

Drawing on a useful classification by A. Lijphart, we have in Poland a system that can be described as consensual democracy,²¹ where the majority’s real role in the state is checked. Its pillars include political pluralism and related power sharing among various groups in a formal or informal coalition – both the parties that enjoy genuine support of the electorate, and (owing to proportional representation) parties that actually have suffered a defeat. The consensual nature of such democracy is determined by a widely introduced system of checks and balances: the executive branch is divided between various centres and decentralised, and the legislative branch is divided and checked by the judiciary. Many provisions of the Polish

¹ Plato, *The Republic*, translated by Benjamin Jowett, revised and edited by Michael S. Russo, <http://classics.mit.edu/Plato/republic.5.iv.html>.

² Homer, *The Odyssey*, translated by E. V. Rieu, London, 1999, p.127.

³ Cf. A. Lijphart, *Patterns of Democracy*, New Heaven, London, 1999, pp.31ff.

Constitution thus warrant placing it within the family of consensual democracies, which according to A. Lijphart includes Belgium, the Netherlands, Switzerland and Italy.

And yet many Poles are displeased with the existing systemic arrangements. A comparison of the constitutional provisions with the realities will help identify the case for change.

None of the presented proposals for a constitutional makeover contains a new-system concept of such a scope that would justify calling it an alternative to the existing Constitution. Rather, we can see proposals for minor revisions or suggestions of more serious, yet fragmentary, systemic changes. The most elaborated and concrete proposals come from the Law and Justice (PiS) party.

The proposals under review have been put forward by parties commanding, between them, the confidence of 10% of those queried by the CBOS polling agency,²² which is hardly a compelling recommendation – but this is neither the sole nor the clinching criterion in their evaluation. One reason why the parties present the proposals, after all, is to win over the voters. The same survey puts trust in the Sejm Deputies and senators, who have the power to alter the Constitution, at 9%.

The purpose of this presentation is not a description of the proposals; rather, it is an attempt to identify several of the related dilemmas.

To begin with, it must be recalled that no constitution is a magic wand with which a good ruler could transform the world. This is just a collection of words – even if vested with the highest legal authority – and we should remember that democracies have not been built on words. The system set out in a constitution is just an offer for wise and good people, the people of honour and empathy who comprise the moral infrastructure of the state and the law. The success of democracy is contingent on the capacity for co-operation and self-restraint on the part of the citizens, deriving satisfaction from the fruits of their own work. Deprived of a political infrastructure, in the form of a civic society (which influences its design), the constitution will fail to perform the integrating and stabilising functions, thus losing much of its weight in the state. Such constitutions are often confined to playing ornamental and symbolic roles.

Democracy's chances depend not only on the quality of the civil culture (connected with the spread of education), but also, as noted by G. Sartori, on how many thinking people there are,²³ and also on the level of income. As pointed out by S. Huntington, unless a certain minimum income level is reached, democratic reforms are not at all feasible.²⁴

There is no shortage of indications, predating the present Constitution, that civil society in Poland is in the grip of a crisis.²⁵ A thought should also be given to the chances of a

⁴ Cf. Zaufanie do instytucji publicznych w krajach Europy Środkowej i Wschodniej [Confidence in public institutions in countries of Central and Eastern Europe], release on a survey by CBOS agency, Warsaw, 2004.

⁵ G. Sartori, *Democrazia. Cosa e*, Milan, 1993, p. 327.

⁶ Cf. S. Huntington, *Trzecia fala demokratyzacji* [The Third Wave. Democratization in the Late Twentieth Century], Warsaw, 1995, p. 98.

⁷ Cf. A. Smolar, "Przygody społeczeństwa obywatelskiego" [Adventures of civil society], in: E. Nowicka, M. Chałubiński (ed.), *Idee a zarządzanie świata społecznego* [Ideas and the shaping of the social world], Warsaw, 1999, p. 386.

consensual democracy in a country where 60% of the population earns incomes below the minimum standard of living, and 10% below the biological minimum.

In July 2004, the proportion of respondents refusing to participate in parliamentary elections (43%, according to CBOS) exceeded the share of those convinced they would vote (40%). Never before had the declared electoral turnout been so low – and the actual figure usually tends to be lower still. Those not intending to vote accounted for 70% in the group of low-income earners (no more than 300 zloty per family member).²⁶

And thus we can see deepening disparities and social exclusion on the one hand and, on the other, the ostentatious consumption and abysmal ineffectiveness of the ruling elites, unable to tackle the major social problems for the very solution of which they have been vested with their constitutional powers. These developments, and especially the numerous instances of corruption at various rungs of government, have combined to produce a sense of delegitimisation of authority. It has been building up on an everyday basis, and is, incidentally, a characteristic feature of contemporary democracy and, according to P. Rosenvallon, a factor behind disenchantment, dismay and apathy among citizens in democratic states.

This phenomenon, seen in the United States and Europe, manifests itself in low election turnout, which leads – especially in Poland – to minority rule. The tenets of a rationalised parliamentary system, inscribed into our Constitution, have led to a situation where a minority government of a governing minority, attracting a low level of public support, continues to participate in the exercise of executive power. The Constitution does not let it collapse, prizing governmental stability over its effectiveness.

The way the state functions has been provoking increasing public dissatisfaction, manifestations of which include criticism of the Constitution and demands to either adopt a new one, laying down a new system for the state, or introduce far-reaching changes in the present basic law.

The critics of the Constitution claim that it needs to be changed because citizens no longer identify with the state. The Constitution thus has to be altered in order to re-establish the bond between the citizenry and the authorities. The Poles, this reasoning goes, “reject the political system founded on the 1997 Constitution”, “perceive the political class as corrupted, the officials as ineffective and incompetent, the judiciary as deficient, the police as failing to combat crime, and the fiscal apparatus as suppressing business”, and they are of the opinion that “the state operates poorly and is not a state with which they identify.”²⁷

The advocates of only fragmentary revisions proceed from the assumption that there are no social phenomena justifying overall changes and that all that can be done are amendments, largely resulting from the country’s EU accession.

We thus have a dispute about the advisability, extent and depth of changes, involving on the one side politicians (with the exception of the President), who are calling for either a new constitution or thorough changes in the existing one, and on the other side, experts, whose position can be illustrated by the opinion that the mounting demands and proposals for

⁸ Cf. Nie wierzę politykom – przyczyny deklarowanej absencji wyborczej [I do not trust politicians – causes of declared absence at elections], release from a survey by CBOS agency, Warsaw, 2004.

⁹ As formulated by Sejm Deputy R. Smoleń (SLD) in a discussion at the SLD’s faction Forum for Development and Labour, <http://wiadomości.wp.pl/>.

constitutional changes “have nothing to do with what the constitutional practice so far has demonstrated.”²⁸ What should be changed are the people in authority, not the Constitution.²⁹

II. Prescriptive model of the system of government in Poland – proposals and controversies in the current constitutional debate

1. Let us now look into the major problems involved in the new systemic proposals put forward by various political parties in the present Sejm.

The most frequent demand is probably the one to introduce single-member constituencies in elections to the Sejm. In particular, it is contained in an appeal sent to the Polish President³⁰ and in the Civil Platform (PO) party’s reform package, which it wants to put to vote in a national referendum. But in itself, even a major electoral reform will not guarantee a renewal of the political class, which is unlikely to rid itself of egoism, greed, incompetence and other defects in response to electoral law changes. Rather, the medicine may prove more harmful than the illness. As noted by J. Kaczyński, the majority vote system may prove beneficial, but a “mechanism to react to possible adverse developments” has to be provided, authorising the President to dissolve Parliament and impose an alternative electoral law.³¹ The same can be said, however, about prospects for improvement in the proportional representation system. Possible harm done by the introduction of the majority vote system would deal a severe and hard-to-parry blow to representative democracy in Poland. But equally, it would augur badly for the Polish Parliament if the present system were to stay, a system in which (according to the previously mentioned appeal for a new electoral law) the electorate is incapacitated by political parties that assign parliamentary seats to their own chosen candidates without caring for these people’s integrity or competence. It seems that an attempt could feasibly be made to repair the existing proportional representation law without replacing the Constitution, and the risks involved would be no higher than with the introduction of majority vote.

Worthy of note are the proposals which provide, on the one hand, for a stronger role of the President at the expense of the Cabinet and the Parliament, and on the other, a stronger role for the Cabinet at the expense of the President. Put forward by, respectively, the Law and Justice Party³² and Sejm Deputy R. Smoleń (from the Democratic Left Alliance’s faction Forum for Development and Labour³³), both these initiatives provide for the concentration of the executive branch and for a more specific description in the Constitution of where the power centre lies.

The farthest-reaching proposal, championed by Law and Justice, provides for a continued symmetry between the president-choosing majority and the parliamentary majority, which is to be achieved by authorising the President to dissolve Parliament in the first six months after his election. The presidential position in the state would strengthen considerably. He could refuse to appoint the Prime Minister or a cabinet minister after consulting Sejm and Senate

¹⁰ Cf. K. Działocha, *Podstawowe problemy stosowania Konstytucji Rzeczypospolitej Polskiej. Raport wstępny* [Main problems involved in the application of the Constitution of the Republic of Poland. An initial report], Warsaw, 2004, p. 10.

¹¹ The view has been championed, in particular, by S. Gebethner. Cf. Note 9.

¹² Cf. *Rzeczpospolita*, 2003(63).

¹³ Cf. *Konwencja konstytucyjna Prawa i Sprawiedliwości. Wystąpienie prezesa PiS Jarosława Kaczyńskiego* [PiS Chairman Jarosław Kaczyński’s address to the Constitutional Convention of Law and Justice Party], Warsaw, 2003, p. 29.

¹⁴ *Ibidem*.

¹⁵ R. Smoleń, *op. cit.*, also cf. *Rzeczpospolita* of 8 November 2004 (“SLD kontra konstytucja” [The SLD vs. the Constitution]).

speakers, and could move for the government to be recalled by the Sejm. Also, the constitution would include a provision requiring a three-fifth majority at the Sejm to overrule a presidential veto to a statute, where such a veto is countersigned by the Prime Minister; without the countersignature, absolute majority would suffice. The President could order a referendum, but no more frequently than once a calendar year and thrice during one term. He would be authorised to issue decrees with statutory status, subject to approval by the Sejm, and could request the Sejm to empower him to issue such decrees for a specified period without the previously mentioned proviso. The President would have the right to declare a state of emergency, dismiss the government and appoint a presidential cabinet for up to six months, remove judicial immunity “where the usual procedure fails,” and to return an already-judged case to an extraordinary jury panel, where “in the opinion of the Ombudsman, the judicial system has not performed up to standard.”³⁴

Under the proposals formulated at the SLD’s discussion forum Development and Labour, the Constitution would include the chapter “Exercise of power in the Republic of Poland,” aimed to strengthen the government’s position, with the President to be elected by Parliament.³⁵

The present Constitution, it should be recalled, provides for two major scenarios of state functioning: one based on Parliament and the Cabinet, where the government and the President are linked to different political parties but the government enjoys parliamentary support; and another, based on the President and Parliament, where the President, the Cabinet and the parliamentary majority come from the same political group. The choice of the scenario depends not only on the voters but also on those elected – after all, the functioning of the state depends on their capacity for joint action. The proposals to strengthen the head of state and the executive branch could only be backed if there were a high likelihood that a leader would emerge who epitomised our best hopes.

The proposals related to the structure of Parliament call for halving the number of Sejm Deputies and reducing the number of Senators, or alternatively, for abolishing the upper house. Without the Senate and with a smaller Sejm, Poland will still be a representative democracy – only that its Parliament will have less room for democratic functioning. A smaller Sejm will be greatly constrained in its activities and its potential for committee proceedings. And Sejm Deputies also have various commitments outside Parliament, at their constituencies and political parties. It should be remembered that almost 80% of Senate-introduced revisions get the Sejm’s approval. Shouldn’t we rather seek a stronger legislative role for the upper house, while at the same time devising such electoral law arrangements under which the chamber would comprise senators elected on merit, not on political recommendation?

The desire to leave politics to those with unblemished records and to make politicians more responsible finds reflection in the proposals to strip members of parliament of their immunity. While considerations of parliamentary autonomy call for its continuation, the practice of the past years provides arguments for the removal of formal immunity. A possible solution that could be contemplated, within certain bounds, is the European Parliament’s arrangement whereby the immunity is valid when the MEP concerned wants to take its protection, subject to approval by the European Parliament.

¹⁶ J. Kaczyński, *op. cit.*

¹⁷ R. Smoleń, *op. cit.*

Some proposals for constitutional change are aimed at fighting corruption amidst the authorities by means of a review of privatisation processes and various developments at the juncture of the economy and politics which have taken place in the past and have roused suspicions of a crime having been committed.

On the institutional front, that would require establishing special bodies, vested with powers that transcend a constitutional order based on the separation of powers. These include, in particular, a commission of truth and justice, an independent prosecutor, and an investigating commission headed by a Supreme Court judge. Such departures from the classical separation of powers are nothing unusual in a democracy, and they can also be found in the present Constitution (e.g. the Ombudsman, or the Supreme Chamber of Audit). It should also be borne in mind that in Supreme Court jurisprudence the principle of protection of vested rights has not been regarded as absolutely unrestricted.

Many problems in the Polish system derive from over-regulation: there are too many regulations as compared with the actual societal requirements and with the potential for making use of them. The proposals for constitutional change touch this topic only indirectly. For example, the suggested authorisation for the executive branch to issue decrees with statutory status may help improve the quality of legislation, thus eliminating the need for constant corrections. For many years, calls have been made for restricting the Sejm's role in designing bills, and shifting responsibility for this to the government. This seems to be the direction taken by the proposals to appoint a National Legislative Council (put forward by the Polish Peasants' Party - PSL), or to replace the Senate with a Legislative Commission of Sejm Deputies, who would review a law after its passage by the Sejm, enjoying the rights currently vested in the upper house.³⁶

A separate group are proposals related to Poland's accession to the European Union. These have to do with the consequences that membership of the EU's legal system has for electoral law; the adjustment of extradition procedure to the European arrest warrant; the constitutional aspects of a possible switchover to the euro, which would replace the zloty as legal tender; and, last but not least, the relationship between the Constitution and the EU *acquis*. As far as the latter issue is concerned, it will be important to formulate a constitutional interpretation that will help solve the existing legal problems. The amendments related to Poland's EU membership are among the least controversial of the proposals for constitutional change.

2. Reflections on the proposed constitutional changes gravitate around the major dilemmas, among them the question of the value of consensual democracy in the shape given it in the present Constitution. An argument for the continuation of the present system is provided by Polish society's diversity in terms of fundamental values and ideas. On the other hand, the majority vote system would lead to the emergence of strong political parties, thus paving the way for politicians to be held accountable to the electorate and, consequently, helping to restrict the pathological aspects of the Polish transformation.

It may be noted that the introduction of the majority vote system – on the assumption of a single-round vote, coupled with a lower number of Sejm Deputies, abolition of the Senate, and the Sejm's reduced role due to the formation of a strong executive-branch centre vested with the right to issue decrees with statutory status – would further restrict the weight of the Sejm, already reduced by the EU accession and the consequent primacy of EU law over

¹⁸ Ibidem.

domestic regulation. The EU *acquis*, formed in conditions of a democratic deficit, largely reflect the will of the member states' executive branches of government, but the contribution from national parliaments does add a certain dose of democratic legitimacy. An arrangement restricting the Sejm's room for manoeuvre – by lowering the number of Deputies and curtailing its pluralistic diversity – would also weaken its impact on the shape of future EU law.

A certain protection against excessive uniformity of political life under the majority vote regime could perhaps be provided by holding parliamentary elections in two rounds, along the French lines. At any rate, the majority vote system should include safeguards for the opposition's rights in the Sejm, with regard to appointments to the Sejm's bodies, appointment of the Speaker, and the Sejm's creative function. This means that the thresholds for majorities appointing positions within the Sejm's terms of reference should be raised. Consideration should also be given to raising the thresholds for majorities that pass statutes, at least in respect of the laws of major importance for human rights, and to lower the required number of Sejm Deputies (and, possibly, senators) authorised to propose laws and present motions to the Constitutional Tribunal. The same holds for the appointment of an opposition spokesperson, to partner the leaders of the ruling majority.

And so, as already pointed out by commentators, it is not enough to propose that elections to the Sejm be held under a majority-vote system in single-member constituencies, coupled with the abolition of the Senate. What should also be considered is a possible introduction of the second round, and a thought should be given to, for example, who will be correcting laws in the absence of the Senate. The Sejm's legislative office is no equal partner for the members of parliament. Also needed are constitutional guarantees for the opposition (without which there can be no democratic parliament) and for minority rights. Otherwise the country's basic law would be a Constitution without constitutionalism.

The experiences of contemporary democratic states reveal the importance of another dilemma, which is not without relevance for Poland. A separated and dispersed authority does provide a space for freedom of the individual, but its limited effectiveness (a result of the dispersal) may make this freedom so hard to bear and discouraging as to provide a solid foundation for enslavement. In seeking to resolve this dilemma, a matter of paramount importance is to build a system whereby the authorities are backed by civil society, and especially NGOs and local self-government. In no case should the concentration of executive powers within a single structure or a single body mean abandonment of the separation of powers – assuming that the political system is pluralistic, the rights of the opposition and political rights are inviolable, and the monocratic executive has a partner in the form of a strong and competent legislative branch.

From this viewpoint, the weakening of the Sejm and curtailment of its pluralism (sought by some proposals for constitutional change), coupled with a simultaneous strengthening of the executive branch and its concentration in a single centre (either the President or the Cabinet) poses the threat that the resulting system would move too far from the model where democratic legitimacy rests on the separation of powers.

With the executive branch concentrated in a single entity and smaller parties playing only a limited role in the Sejm, it may turn out that government-backed statutes are not submitted for Constitutional Tribunal assessment. In a system other than that laid down in the present Constitution, it is quite likely that such pieces of legislation as the laws on the Internal

Security Agency and the Intelligence Agency, on tax liability abolition and assets statements, on the National Health Fund and on assemblies would not be presented to the Constitutional Tribunal.

To some extent, the proposals for constitutional change have to do with the major dilemma of sovereignty vs. European integration, one which had to be tackled in the past by the founding member states of the European Community and the European Union. The experiences gathered so far highlight the importance of the human right to build a set of values that are equivalent to state sovereignty, values with which one can identify in search of a European identity, while transcending one's own national distinctiveness.

III. Limits to constitutional engineering: the consequences of the global approach, international agreements, European law, constitutional culture and the condition of the national economy

The discussion of proposed constitutional change and blueprints for a new state system has not been carried out in an abstract space. Constitutional engineering³⁷ is subject to numerous constraints imposed by globalisation, which defines the context of systemic arrangements. Especially in the economic field, these constraints – the rules of the World Trade Organization, the World Bank or the International Monetary Fund – cannot be ignored with impunity. This holds in particular for privatisation and the position of private banks.

The lawmakers' freedom is greatly restricted by Poland's EU membership; by international agreements, especially the European Convention on Human Rights; and by membership of the Council of Europe, which reaffirms its devotion to the "spiritual and moral values" which are the "common heritage" and the "true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracies."³⁸ These values underpin the Polish constitutional culture, closely linked to the country's traditions dating back to the sixteenth century. A major part of these traditions has been the Sejm-centred approach – a feature which can hardly be described as unequivocally positive.

Important limitations for the lawmakers are posed by the condition of the Polish economy and its international commitments. For this reason, everything that serves to improve the operation of the state and its administration, ease the terms of inward foreign investment, and foster efficiency and reason has the effect of positively influencing the country's economic situation. Political destabilisation, on the other hand, entails adverse economic consequences, which is not unimportant for assessment of constitutional engineering projects.

IV. Models of democracy in the contemporary world and the Polish case: cause for hope or disillusion?

Given the diversity of democratic models in the contemporary world, we can only speak about a community of values that define the basic rules of the game, such as constitutionalism, separation of powers, democracy and the rule of law. These principles, however, do not predetermine preferences for any particular system of government or structure of parliament. Over the past half-century, European democracies have gone through such numerous and divergent systemic reforms as to substantiate the opinion expressed by G. Urbani:

¹⁹ Cf. G. Sartori, *Comparative Constitutional Engineering*, London, 1994.

²⁰ Statute of the Council of Europe, <http://conventions.coe.int/treaty/en/treaties/html/001.htm>.

“Democracy is a system of constant institutional transformation”.³⁹ At the same time, these experiences also indicate that there is no such thing as a perfect reform, based on fully effective ideas and producing no adverse side-effects. The success of reformatory endeavours is contingent on the cultural, social and economic context, and also on the benevolence of opponents of reform, and their ability to reject the temptation of seeking the maximisation of the unfavourable side-effects of reforms. The risk that the sum total of a project’s adverse consequences exceeds its welcome effects is always present. And yet, politics is about proposing and launching new systemic arrangements – sometimes in line with this observation by a Sławomir Mrożek character: “We are in a pretty pickle. Democracy has failed and dictatorship is not going to catch on. And yet, something has to be thought up.”⁴⁰

Remembering the experiences of contemporary constitutional engineering – the solutions working, for example, in the US may founder in Latin America – we may assume that what is good and effective in France or Germany will not necessarily pass the test in Poland. There is only one democracy devoid of corruption, “lax laws and impertinent officials.” This is Utopia, an uninhabited island where, as we are told by Wisława Szymborska, “the faint footprints scattered on its beaches turn without exception to the sea.”⁴¹

Calls for constitutional change tend to meet with scepticism on the part of experts, especially when politicians base these calls on the claim that otherwise there is no way of changing the political class.⁴²

Attempts to use constitutional change as a means of reaching short-term political goals and a springboard to win the next elections are reprehensible. Such a change, after all, especially if carried out thoroughly, is bound to weaken the state, by injecting a sense of transience into many of its structures. Work on a new constitution means unending disputes, a reopening of old divisions and the emergence of new ones, new reasons for “war at the top” and de-legitimisation of the authorities. At best, the result will be a new constitution with only some of the key problems solved. At one point in the future, voters will be won over to the idea of new revisions, and the story will have come full circle.

But in a democracy, when politicians see the need for a new opening and for the state to be “reset”, they do have the right to demand that the basic law be amended in part or even in whole.

And voters have the right to hope that this will succeed. The experts’ duty then is to remind them that it is not the political and legal system that makes man good; rather, it is man and his conscience that determine the significance of the constitution.

Poland needs a new constitution that would help solve citizens’ basic problems related to jobs, housing, education, security and health care. Constitutional change will make sense only if and when it proves indispensable for such a solution. And the onus of proof lies with the promoters of the changes.

²¹ Cf. G. Urbani, in: Z. Ciuffoletti, S. Noiret (ed.), *I modelli di democrazia in Europa e il caso italiano*, Florence, 1992, p. 9.

²² S. Mrożek, *Utwory sceniczne [Plays]*, Krakow, 1973, vol. 1, p. 127.

²³ W. Szymborska, “Utopia”, in: *Poems New and Collected 1957-1997*, translated from the Polish by Stanisław Barańczak and Clare Cavanagh, Harcourt Brace & Company, Orlando, 1998.

²⁴ R. Smoleń, *op. cit.*

A total change of the Constitution is no panacea for pathological processes in a capitalist democracy. In the United States, where such a pathology exists, politicians do not call for a new constitution, but propose partial amendments, such as limiting the number of terms during which a single person may hold an office.

What, then, should be an expert's answer? US poet John Robinson Jeffers gives us this advice: "[N]ot be duped by dreams of universal justice or happiness. These dreams will not be fulfilled."²⁵ Can it be that this provides the reason why Plato excluded poets from the Republic?²⁶ The contemporary state is no uniformly rational entity; at any rate, the rationality of constitutionalists and the rationality of politicians differ in that the dreams of the latter may be transformed by voters into the words of the constitution – something which occasionally astonishes constitutionalists and may also come as a surprise to voters.

The task for an expert is thus to answer the question of whether there is any limit not to be transgressed by proposals for constitutional change – even if it is accepted that the constitution has never been an immutable catalogue.

Such a limit does exist. It is defined by the values we share, the books we read, or by John Paul II's appeal "not to cut the roots from which we were born." It is defined by our conscience.

The limit comes as a reflection of human dignity, which delineates the space for freedom, including the freedom to submit proposals for constitutional change. This freedom is circumscribed by the dignity of the Republic of Poland.

And so, an expert should tell politicians: parliamentary democracy will not be built in just seven or fifteen years. Democracy's failures must not be used to justify a departure from democratic principles. Not all blueprints for getting the state right are constitutionally acceptable.

The limit not to be crossed while calling for the state's renewal, it seems, also derives from the programmatic and pragmatic concept of constraints on the activity of political parties. Parties have the right to seek power by democratic means. But this principle is not observed by designs to limit democracy – even if their stated purpose is to mend the state, and even if they stem from justified anger at the impotence of the democratic state. Criticism of the present constitutional provisions should be expressed with moderation. With such criticism providing a major theme in the forthcoming election campaigns, voters should be given an opportunity to make rational assessments of the basic law.

Such is precisely the achievement of Poland's past fifteen years: The designs setting out the shape of the Republic are subject to voters' appraisal, something which politicians cannot trade for claims about an intrinsic correctness of their arguments.

²⁵ J.R. Jeffers, The Answer, <http://plagiarist.com/poetry/3074/>.

²⁶ Cf. A. Gawroński, Dlaczego Platon wykluczył poetów z Państwa? [Why did Plato exclude poets from the Republic?], Warszawa, 1984, pp. 57ff.

EXPEDIENCY OF CONSTITUTIONAL REVISIONS AND SCOPE FOR CIRCUMVENTING THE CONSTITUTION

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To address the subject of revision of Central and Eastern European constitutions is to raise firstly the question of expediency and secondly the question of scope. On the first point, I shall summarise the reasons why I believe that revisions will be necessary. Starting from the acknowledged problems of constitutional revision, I shall go on to suggest how constitutions may be circumvented and a new procedure for constitutional revision established.

Expediency of constitutional revisions

The speakers this morning revealed the special circumstances in which the new constitutions of Central and Eastern Europe came into being. As the fruit of political compromises, these constitutions reflected their authors' concern to prepare for the future by agreeing to share power rather than run the risk of being excluded from it. This has resulted in hybrid regimes which may be called "semi-presidential", a type that is hard to characterise – so great is its variety – other than by saying that such systems are unstable.

It is therefore no coincidence if some countries in *Central and Eastern Europe* are thinking about revising their constitutions. Disoriented, they are nevertheless moving in opposite directions. Some wish to reduce the president's powers while others wish to increase them; some are abandoning proportional representation while others are introducing it. This proves the absence of a reference model. Given this fact, it may be worth putting forward some recommendations in this context. Experience has shown that a democratic system functions better if certain rules are applied.

We have summarised (Table 1) the *separation of powers* that would normally be observed taking into account the checks and balances necessary for the proper functioning of a democratic system. If we cross the four tiers of legal norms that the political order must produce (higher principles of law, political rules, ordinary laws and public policy) with the four types of delegation of authority needed to realise them, we end up with sixteen functions to be described and organised in a constitution. It is necessary to determine these norms, monitor their application, have a *counterbalancing power* in readiness if the process is failing (this must not be a joint decision-making or blocking power) and, lastly, allow the citizens, the holders of sovereignty, to approve these norms in the last instance. If we attempt to trace the movement of "power", that mysterious force emanating from the citizens, we observe that it runs through the legal dimension from the summit of the state downwards in an order that must guide the drafting of the constitution (Table 2).

This is work for experts, as is the prior finalisation of the statement of the higher principles of law, universal in value, designed to safeguard the system's democratic nature in the preamble to the constitution. These two texts should ideally be unaffected by the balance of power between politicians at the time of drafting. Their approval by referendum will determine the legal norms for the first two tiers of the political system and facilitate the emergence of a consensus on the rules of society.

In this constitutional architecture the executive, the legislature and the judiciary are not on the same plane. The first two are decision-making authorities which cancel each other out in the balance of power: the National Assembly's power to pass a vote of no confidence in the government is counterbalanced by the prime minister's right to dissolve it. Most of the constitutions in Eastern Europe have not properly established this power or have surrounded it with conditions that make it hard to exercise. Justice, the third branch of power dear to Montesquieu, does not consist in determining the norms: it enforces them through the ordinary laws. It clarifies and interprets them in specific cases, since laws can never make provision for everything and always contain ambiguities.

The role of President of the Republic

Under democracy, the function of the head of state is different from the role of the head of government. Contrary to widely-held belief, a system does not work better if the head of state has his say in government policy. Quite the opposite.

A *democratic* state governed by the rule of law is recognisable by the *primacy of law over politics*. It differs in particular from the divine right of kings, in which power flows from the head of state and is derived from a transcendental principle, of which he claims to be the human representative. Under democracy *supernatural* law becomes *natural* law, rooted in human conscience. The higher principles of law, universal in value, are put under the protection of the head of state in the last instance. He is a *deus ex machina* guaranteeing the legal order. It is not his business to manage government *policy*, a role that falls to the head of the executive at the next level down.

In powerful former kingdoms such as France, there is a marked tendency of the popular conscience to confuse the two roles. If they have not been introduced to the niceties of democracy and its implications for the institutional order, people tend to think, if not properly informed, that it is democratic for the President of the Republic to be elected by universal suffrage. In reality, only the head of government should be designated through a general election, and he must be changed as often as necessary. Conversely, the head of state, the symbol of the country's unity and continuity, should ideally enjoy a long term of office.

The President of the Republic is not entitled, on the pretext that he embodies the nation, to concern himself with foreign relations or national defence – tasks indissociable from the government's responsibilities. Any confusion of the two roles will introduce a permanent risk of conflict at the summit of the state. The president must be a *man of consensus*, in charge of the rules – which unite the citizens – rather than public-policy choices – which divide them. This is why constitutional monarchy, when this solution is available, leads to good results. A president must avoid entering the electoral arena, where he would seem to be the candidate of only half the citizens. In his role as guarantor of the democratic nature of institutions he must be able to refer cases to the Constitutional Court and initiate any revision of the political rules through it.

In Russia, we have the opposite situation. It is the head of the executive who plays the role of head of state. Although posing as a presidential system, the system is parliamentary. The effective head of government actually derives his power from a parliamentary majority which he brought about with his accession to the presidency, the ultimate sanction. The executive is strengthened by the presidential aura in a traditionally autocratic country, which in part

explains the Russian president's popularity. But the claim to combine the two functions may become a liability. Once the majorities part company, as shown by French experience after General de Gaulle's departure, the head of state cannot hold the reins of power at the same time as a prime minister in the opposite camp, especially if the latter is supported by a majority in Parliament. The government is then paralysed.

In short, a good constitution will ideally differentiate the roles of prime minister and President of the Republic. The head of state must focus on the question of political rules, their enforcement and any improvements they may require. In the United Kingdom, where the system has been working for 300 years, it has not been necessary to formalise it in writing. The Queen, who nevertheless meets the prime minister every week, is able simply to ratify his decisions. A closer inspection reveals that this parliamentary system, born in the islands of the North Sea, has been run in for over a millennium.

I now come to the problem of constitutional revision in countries affected by the transitional nature of their constitutions.

The difficulty of constitutional revisions

Another common feature of East European constitutions lies in the complexity of the clauses relating to their revision. Their authors have delighted in erecting numerous hurdles and setting requirements in terms of qualified parliamentary majorities so that the rules that they have established cannot be changed (cf. Table 3). A number of countries wishing to revise their constitutions have found themselves unable to do so. This is the case for Poland and almost half the countries in the region, which have had to look for a way round this legal dead-end.

This is the question: How can a constitution be changed if the formal requirements for revising it cannot all be met? The following answer is given by an expert in *democratic engineering*: a means must be sought of relying on the *legal authority of greater legitimacy*. When institutions have been established as a matter of urgency following negotiations between parties and by assemblies that were not constituent assemblies (only four out of some twenty countries in the region adopted their constitutions by referendum), there is a window of opportunity. This consists in passing a law allowing the government to consult the public by means of a referendum on the constitution's problematic aspects. Constitutions seldom prohibit this expressly.

If there is a genuine problem, a political party may even find an advantage in making an electoral issue of it. Having won the election, it will have a binding mandate to consult the public, simply giving them back the authority to make the decisions which rest with them. It is hard to see how constitutional judges could subsequently claim that doubtful legal authority should override the express will of the majority of citizens, provided that will respects the higher principles of law.

If such initiatives are taken, should the same problem be avoided in future by changing future procedure for revising the constitution? Logic demands that we seek a method of giving constitutional power back to the citizens on this occasion. The solution would be to establish an *institutional ballot*, every twenty years for example. This is in fact the only ballot warranted at national level, apart from general elections.

Since a modern democracy cannot be other than *representative*, citizens must determine the rules for conferring authority on their delegates. While they cannot pass “their” constitution all the time, they must ensure that it is *maintained*, since proper upkeep of a mechanism, albeit institutional, entails regular “overhaul”. It would also be a means of vitalising the relationship between citizens and their governors, who tend to forget that they are never more than temporary delegates of the *governed*. A renewed vote on the constitution could stimulate democratic processes and usefully replace the presidential ballot where it exists.

How can we get experts and citizens round the same table if we want to avoid interference by the politicians in a matter where they are judges in their own case? These periodic revisions might conceivably be prepared by an *open committee* of several hundred members drawn by lots from among volunteers, in legal circles for example. In conclave for six months, immersed in information, they would select draft amendments after having heard oral presentations on both sides of the question from experts and witnesses.

In conclusion, the problem of revising the constitution would be a chance to derive good from evil. The countries of Central and Eastern Europe could take the review of their first fifteen or twenty years of experience as an opportunity to return constitutional power to the citizens. The new members of the European Union would gain a lead on older members in terms of political engineering. Learning from past mistakes, they could adopt the only legitimate approach, proceeding strictly in the common interest whilst seeking the most favourable rules for the proper functioning of democracy.

Table 1: Revising the Constitution

Country	Procedure
Albania	<ul style="list-style-type: none"> • Proposal for legislation: One-fifth of deputies. • Two-thirds majority of Assembly (option of referendum if Assembly adopts the proposal by a two-thirds majority).
Armenia	<ul style="list-style-type: none"> • Proposal for legislation: President, National Assembly. • Approval by referendum
Azerbaijan	<ul style="list-style-type: none"> • Proposal for legislation: President, Parliament. • Approval by referendum
Bulgaria	<ul style="list-style-type: none"> • Proposal for legislation: President, group of deputies. • Three-quarters majority in three ballots. If this is not achieved and if the amendment has received the support of two-thirds of deputies, reconsideration and approval by two-thirds majority
Croatia	<ul style="list-style-type: none"> • Proposal for legislation: President, government, one-fifth of deputies. • Two-thirds majority
Czech Republic	<ul style="list-style-type: none"> • Three-fifths majority in both chambers
Estonia	<ul style="list-style-type: none"> • Proposal for legislation: One-fifth of deputies, President. • Approval by referendum (after majority vote of three-fifths of deputies) or vote by two successive parliaments (qualified majority in three readings), or emergency procedure (two-thirds majority) if passed by four-fifths of deputies
Georgia	<ul style="list-style-type: none"> • Proposal for legislation: President, absolute majority of deputies, 200 000 voters.

	<ul style="list-style-type: none"> • Two-thirds majority
Hungary	<ul style="list-style-type: none"> • Two-thirds majority to amend the constitution. • Four-fifths majority to prepare a new constitution
Latvia	<ul style="list-style-type: none"> • Proposal for legislation: One-tenth of electorate (referendum if Parliament passes an amended version), or deputies. • Two-thirds majority in three readings. Referendum for general provisions (and elections).
Lithuania	<ul style="list-style-type: none"> • Three-fifths majority
Macedonia	<ul style="list-style-type: none"> • Proposal for legislation: President, government, deputies, 50 000 citizens. • Two-thirds majority
Moldova	<ul style="list-style-type: none"> • Proposal for legislation: Deputies, president, government, 200 000 citizens. • Vote by Constitutional Court, then vote by two-thirds of Parliament. Referendum on nature of state
Poland	<ul style="list-style-type: none"> • Proposal for legislation: One-fifth of deputies, the Senate, the President. • Two-thirds majority of deputies and absolute majority of senators. Confirmatory referendum for amendments concerning general provisions and citizens' rights
Romania	<ul style="list-style-type: none"> • Proposal for legislation: President, government, one quarter of senators and deputies, 500 000 citizens. • Majority of two-thirds of both chambers and a referendum.
Russia	<ul style="list-style-type: none"> • Proposal for legislation: President of the Federation, both chambers, government. • Approved if passed by three-quarters of the Federation Council and two-thirds of the Duma. • Referendum on fundamentals and citizens' rights
Serbia	<ul style="list-style-type: none"> • Proposal for legislation: Petition from 100 000 voters, motion from 50 deputies, President or government. • Two-thirds majority in Parliament and a referendum
Slovakia	<ul style="list-style-type: none"> • Three-fifths majority to approve or amend the constitution
Slovenia	<ul style="list-style-type: none"> • Two-thirds majority or referendum at request of deputies

Table 2: Organs of state and the public dimension

<p><u>State</u></p> <p>Through a state formed of public institutions, citizens, acting in a body, acquire the means to regulate society through law.</p>

Founding ↓ instrument

The Constitution

The constitution is the political contract testifying to the existence of a state, in which the nature of the political regime is specified (by an inevitably imperfect transcription of the unwritten laws of democracy in a *preamble to the Constitution*) and the rules are determined concerning delegation of sovereignty by the citizens for public decision-making and for the enforcement of these decisions.

Higher supervisory organs

The Supreme Court

The Supreme Court is responsible for enforcing political rules and higher-order legal norms.

The Head of State

The head of state embodies the political community and ensures its unity, which is based on peace through justice, and to this end guarantees the democratic nature of institutions (hence his power to initiate a referendum to improve political rules).

Public decision-making chain under citizens' control

<u>The legislature</u>	<u>The executive</u>
Responsible for passing laws, the legislature consists of members of parliament directly delegated by the citizens. These two organs	The prime minister, who comes from the parliamentary majority, heads the government. Interact

↓ Organs responsible for enforcing public choices ↓

<u>Ordinary courts</u>	<u>Civil service</u>
The ordinary courts are responsible for enforcing laws.	The civil service is responsible for implementing public policy.

Table 3: Balance of powers in a democratic order

Legal norm	Decision-making power	State organ	Supervisory organ	Counterbalancing power	Power of revision
Higher principles of law	Natural law (emanating from human conscience)	Preamble to the Constitution (statement of fundamental rights)	Supreme Court	Supreme Court (power to request a referendum)	Citizens, through revision of constitution
Political rules	Citizens acting as a body	Constitution	Constitutional Court	Chief of state (power to request a referendum)	Citizens, consulted in a referendum
Ordinary laws	Parliamentary majority	Parliament	Ordinary courts	Parliamentary opposition	Citizens, at general elections
Public policies	Government	Civil service	Administrative courts	Parliamentary majority	Citizens, at general elections or after dissolution (on prime minister's proposal)

**GOOD GOVERNANCE: ESTABLISHING A PARTY SYSTEM
IN COUNTRIES UNDERGOING DEMOCRATIC CHANGE**

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The value of a political system depends on its effectiveness and the balance that it can strike between progress and the overturning of established structures; a parliament is elected, while a government is appointed to ensure proper dynamic management of the country, and the balance in question is not easy to find. We must also take account of another factor: public opinion and the media, with the latter taking up the former and exaggerating or even anticipating it. The public's positive or negative impression of how the government or the president (since his role is often overrated in terms of his constitutional rights) is dealing with the nation's problems, within a Greater Europe, will reflect an adjustment to an entirely new social and economic situation. In all four corners of the world, public opinion reacts very negatively to unstable government; it compares fine words in Parliament with the inability of politicians to agree sufficiently in order to work together throughout the lifetime of a parliament. In the areas of Western Europe with an electoral system based on proportional representation, we have cases worse than government instability. The Netherlands, for example, can remain without a government for six months; thus a government can lose a vote of confidence and remain in place as a caretaker government. The Netherlands can more readily sustain this kind of institutional situation in that it has had local democracy since at least the seventeenth century and exists in an environment of international democracy; but it is hard to imagine a country in the midst of democratic change during a period when accountable parties are being established finding itself in such a situation! The case of the Netherlands is not the only one, and it is even more serious inasmuch as it has had numerous periods with no government; for example, from 1945 to 2004, adding together all the periods during which the parties were unable to agree on forming a coalition government, we obtain a total of four years for the Netherlands, Belgium and Finland. The political community in these countries is brought into disrepute, although the situation is caused by the party system rather than elected politicians, who are themselves victims of the electoral institutions.

We must be aware that an electoral system, whether proportional or majoritarian, plays on the perception of what is at stake in the election and that the way in which a citizen votes will vary. If there is a change to the electoral system, the mathematical effect of the translation of votes into seats is immediate, but the psychological impact will occur gradually.

The effects of simultaneous elections are customarily overlooked; simultaneity of elections has advantages in that the timing of general elections separately from regional, municipal or other elections means that participation is structurally different. Elections that are not politically essential become so in the eyes of the media and commentators, and participation is skewed towards opponents of national government power; this gives a distorted idea of public opinion with regard to national politics. Furthermore, genuine national unity between regions and municipalities appears clearly in simultaneous elections, strengthening the party system by giving parties local and not purely national foundations.

The new Europe

The first elections in the new Greater Europe were essentially referendums for or against communism. Other factors may have played a role, such as independence in the Baltic countries.

The choice of electoral system emerged from round tables in which, initially, the new democrats endeavoured to have proportional representation introduced while the new socialist

party was content with the former majoritarian systems; this led in some cases to mixed systems (Hungary and Russia) and in others to fully proportional systems when the new socialist parties saw that they were losing elections in other countries. Albania, coming last, realised that the electoral system would not favour either side and adopted a mixed system balanced by a measure of proportional representation. Bulgaria is interesting as an illustration of the electoral system's effect. The Bulgarian system is intended to be very much proportional through the allocation of seats not on the basis of broad constituencies but centrally in Sofia. However, a minimum of 4% of the national vote must be obtained in order to participate in the distribution of seats; Bulgaria has a Muslim minority which easily exceeds this threshold (the Pomaks of Slav origin, and the Muslims of Turkish origin) and is concentrated in three areas, but other Muslims are scattered across the country. One of their leaders has described their tactics in the 1991 elections, which used this electoral system for the first time. If the seats had not been allocated at national level, the Muslims, who lived outside the densely populated areas, would have voted for the UDF (the new democrats), since they would have had no chance of winning a seat in a constituency. However, since the votes were counted all together in Sofia, the Muslims voted for their own party, thus adding to all the votes cast throughout the country.

To follow the effects of electoral systems on a nation's political life we may take the case of Poland, which chose proportional representation and found itself, initially, with over twenty parties in parliament, and which is currently having considerable difficulties in forming a government. Poland in the pre-war years, before the disappearance of democracy, encountered the same problems, as did the countries of Western Europe with similar proportional systems. Without running through all the countries using proportional representation, we must stress the disastrous impact of these systems on a public opinion aspiring to the blessings of democracy and faced with shifting alliances, haggling and also a wait of several weeks before the formation of a coalition which in many cases will be of only short duration.

Hungary, for its part, has retained a mixed system, which increases the bias in seats in favour of the winning political force (not by very much if we consider the result of the decisive round in the two-round run-off) and results in a stable government for the life of a parliament and in changeover of political power, as provided for in all the countries adapting to entirely new living conditions.

The mixed majority proportional system

The electoral system in Russia, which elects half its deputies by a 'one-member constituency by plurality' ballot and the other half by proportional representation from nationwide lists, entails two separate elections, which increases the bias in seats in favour of the winner.

The voting system in Germany today is also mixed: half the deputies are elected in large single-winner constituencies (of 200 000 voters), while the other half are elected by proportional representation from regional lists; the result of the majority ballot is then balanced by cumulatively allocating seats from the proportional list system to the different parties in order that the final result is almost proportional. It is only the main parties that win seats in the majority ballot, apart from two seats that went to the new socialist party in the former GDR; the Liberals and the Greens get seats only through the proportional list. The German system has worked well since the war with one exception, which is worth noting since the aim of good governance is to ensure democratic continuity. A neo-Nazi party (the

NPD) stood at the 1965 elections and won 2.1% of the vote; meanwhile the third party (the Liberals), which had won seats on the proportional list system, did not wish to ally itself with either of the main parties, which had been the rule up until then. The CDU-CSU (Christian Democrat right) and SPD (social democrats), which opposed each other, formed a grand-coalition government; but whatever the merit of a government there is always part of the electorate prepared to vote against it. From 1965 until 1969 the only option available to the “anti” vote was the Liberal Party or the NPD, and the regional elections saw the NPD vote shoot up disturbingly:

Hamburg	March 1966	3.9%
Bavaria	April 1966	7.4%
Essen	Nov. 1966	7.9%
Baden-Württemberg	April 1968	9.8%

The Germans then feared that the NPD would reach the vote threshold and win seats on the proportional list system. Fortunately, the NPD obtained only 4.6% of the vote and no seats in the ‘one-member constituency by plurality’ ballot. Since then, Germany has had no grand-coalition governments, but the risk remains. The Russian mixed system, which does not balance the two parts of the electoral system, is decidedly better, since it avoids this drawback by the bias in seats in favour of the winner.

The importance of the party system for credibility of presidential candidates

If we compare the establishment of democracy in countries in the wider Eastern Europe to the changes over two centuries in Western Europe generally and Belgium in particular, we cannot but be favourably impressed; the possibility of changeover of political power has been acknowledged, a possibility that has been accepted only with great difficulty and reluctance in the course of history. The handover of presidential power in Russia, on 31 December 1999, by President Yeltsin to his prime minister Vladimir Putin, at a time when the latter was popular because of what was happening in Chechnya, is an example of successful changeover of power outside the ballot box and was very opportune; this should be emphasised, since there is a frequent tendency to cling on to power. Similarly, in Ukraine, a changeover of political power took place, this time through the ballot box in 1994, and the current elections clearly show a balance between two distinct tendencies.

In a presidential election, the important factor is not only to have one party which in the eyes of the electorate is the only one offering a “suitable” candidate – an electable one – and an effective manifesto reflecting progress that is accepted by a majority of the population, but also to have another party appealing to a different electorate and presenting a candidate who can also be taken seriously and is also able, as well as any another, to win a future election. A changeover of power does not have to take place, but the possibility of changeover must exist in the electorate’s eyes. For this to occur there must be two opposing tendencies in some degree of equilibrium, which is the sign of a sound democracy.

Minorities

Where minorities are concerned, the electoral system must be chosen according to the aim pursued. This entails deciding whether integration or segregation is being sought. It must be ascertained in which situation minority rights would be better respected.

In Western Europe the arrival in the Belgian parliament of the Flemish party, which gradually radicalised into the Flemish Block (Vlaams Blok), has monopolised Parliament's work on the language question up to the present. In Spain the representation of a Basque separatist party in regional and general elections has not in any way prevented terrorist attacks: 50 during the Franco period and 800 between 1972 and 2004.

Proportional representation, which will favour the presence in Parliament of parties representing minorities, has the drawback of reproducing in Parliament the same segregation that already exists in the country. Moreover, a party representing members of a minority will basically have as its programme the difference between the minority and the rest of the population, which will eventually lead to a more extreme line that will most probably not be to the advantage of the minorities.

Another important point: the representation in Parliament of minorities as such warps political opinion within these minorities, since a minority group that does not feel under threat is not homogenous, some of its members being progressive and others conservative; these differences mean that in majority ballots the minority vote will be divided between the main parties of Right and Left, enabling both tendencies within those minorities to become integrated in the nation's political life. The cause of the minorities will then be defended by the party (or, sometimes, parties) for which they voted, a vote needed by the main parties to win elections.

Nicolas Saripolos considered the United States to be a country with proportional representation inasmuch as the number of representatives for each state in the House of Representatives was strictly proportional.

The Americans have begun using the Sainte-Laguë method, but they have found that illogical differences sometimes occur. For example, a state may lose a seat although its population is growing. The Americans have therefore developed a system which reduces this local effect. Of course for election to the House of Representatives the United States uses first-past-the-post single-winner constituencies. Russia could therefore make provision for a mechanism ensuring constituencies of a similar size by taking registered voters, for example, rather than population.

**ELECTORAL SYSTEMS AND PARTY SYSTEMS IN
CENTRAL AND EASTERN EUROPE. A CONTEXTUALISED
COMPARISON**

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Introduction

Being asked to summarise the multiple experiences of fifteen years of competitive elections in central and eastern Europe (CEE), one might say: it has been an extraordinary process of mutual learning. First of all, post-socialist governments and administrations were to implement new electoral laws and to organise democratic polls from scratch, and political

parties as well as citizens had to get accustomed to unusually complicated and frequently changing electoral procedures. The importance of “external support” provided by various European institutions within these processes is as well-known as the preliminary political balance sheet: while the democratic consolidation of central European and Baltic countries served as a precondition for their EU accession, most countries in the Commonwealth of Independent States (CIS) have remained in a grey zone between democracy and autocracy or, such as Belarus, returned to open dictatorship.⁴⁵

Central and east Europeans, however, have not been the only ones affected by the breakdown of communist regimes. An inconspicuous, but rather fundamental learning process also took place in the academic community occupied with “comparative constitutional engineering” (Sartori 1996). In view of the post-socialist experiences, western scholars had to reconsider the conventional wisdom about the effects of electoral systems and their reforms. To cut a long story short, the main challenge here consisted in the need for a bounded “contextualisation” of theoretical knowledge.

The present article attempts to summarise such lessons learnt about CEE electoral systems and their political consequences. This topic is not only of academic interest, but also has significant impact on providing further expertise on electoral reform. The argumentation is divided into five parts. The first section gives an overview of the technical features of post-socialist electoral systems, making clear that their functioning must be analysed far beyond the ideal-type differentiation between majority rule and proportional representation (PR). The second part shows how the performance of electoral systems in some CEE states challenged the conventional theoretical wisdom, leading scholars to include contextual conditions such as the structure of the party system into their analytical approaches. The third part deals with reforms of electoral systems that could be observed in CEE much more often than in other world regions. Here, the analysis reveals how strongly both functional demands and related political interests have varied not only between relevant states, but also within national contexts. The fourth section tries to assess the significance of post-socialist electoral systems for democratic consolidation, highlighting at the same time the limits of “electoral engineering”. The paper concludes with an appeal to compare CEE electoral systems in a contextualised manner.

I. The structure of electoral systems in central and eastern Europe: basic types and national adaptations

Electoral systems can be differentiated according to two principles of representation: whether they aim at building parliamentary majorities (majority rule) or the proportional translation of votes into seats (proportional representation; Nohlen 2004). In the real world, these ideal types more or less correspond to the British plurality system in single-member constituencies (SMC) on the one hand and “pure PR” applied in the Netherlands or Israel on the other. In most states, however, electoral systems are more complex, as they include a variety of heterogeneous technical elements (decision rules, constituency sizes, thresholds, modes of allocation, etc.), each exerting specific effects on the election outcome. Theoretically, there exists an indefinite number of such combinations. In order to cope with this huge variety of institutional settings, it is sensible to classify given electoral systems according to the main technical features that are considered to have an impact on the proportionality between votes and seats as well as the concentration of the party system.

¹ In the following, the development and effects of electoral systems in post-Yugoslavian states will not be analysed in detail.

Following these considerations, Table 1 presents the current electoral systems in central and eastern Europe within a framework of ten types. Based on the main technical elements of most parliamentary electoral systems worldwide, these types are arranged according to their theoretical effects on the majority-PR axis (for details see Nohlen, Grotz, Krenmerich & Thibaut 2000). Without going into detail, the overall picture seems to be clear. Most CEE cases either use PR in multi-member constituencies (mostly with a national threshold) or a segmented system of “parallel” majority and PR parts. The only exceptions are Belarus, which has retained the Soviet absolute majority system, and Albania and Hungary, which employ combined systems with “compensatory mechanisms”.

**Table 1: Types of electoral systems in central and eastern Europe
(Autumn 2004)**

Principles of representation	MAJORITY					
Types of electoral systems^a	Plurality system in SMC	Absolute majority in SMC	Single non-transferable vote	Bi-nomial system	Seg-mented system	
Examples outside CEE	United Kingdom	France	Japan (before 1996)	Chile	Mexico Japan	
Electoral systems within CEE^b	—	Belarus	—	—	Armenia Azerbaijan Georgia Lithuania Russia Ukraine	
Principles of representation	PROPORTIONAL REPRESENTATION					
Types of electoral systems^a	Compensatory system	PR in sub-national MMC (with threshold)	PR in one national MMC (with threshold)	Mixed-member PR	Pure PR	
Examples outside CEE	Italy	Spain, Portugal		Germany New Zealand	Netherlands, Israel	
Electoral systems within	Albania Hungary	Bosnia ^c Estonia Croatia	Bulgaria Moldavia	—	—	

CEE^b		Czech Rep. Latvia Macedonia ^c Poland Romania Slovenia	Slovakia		
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Source: author's compilation based on Nohlen, Grotz, Krennerich & Thibaut, 2000.

Abbreviations: MMC = multi-member constituencies; SMC = single-member constituencies.

Notes: ^a for reasons of clarity, some further types of electoral systems are not included, such as the single transferable vote (STV), applied in Ireland, or the alternative vote system being used in Australia. ^b Serbia and Montenegro is not listed here, as the State Union Assembly currently consists of members delegated by the two national parliaments. This Constitutional Order is to be reviewed in 2006. ^c Bosnia is a special case, as each of the two republics forms one multi-member constituency in which pure PR (without threshold) is applied. Similarly, the Macedonian electoral system introduced in 2002 does not have any legal threshold; however, the six sub-national MMC in which the d'Hondt method is applied, theoretically cause a modest deviation from "pure PR".

Given these structural similarities of CEE electoral systems, three aspects deserve attention. First, none of the "classical" types – be it of British, French or German provenance – was really "imported" by post-socialist countries. Although the German mixed-member proportional system played a particularly important role as model in some processes of post-socialist "electoral engineering" (Poland, Georgia, etc.), national decision-makers finally combined features of different institutional settings and adapted them to their own contexts. Some elements, such as differentiated thresholds for parties and electoral coalitions, were even "creative inventions", having never been applied elsewhere (Nohlen & Kasapovic 1996). Secondly, according to conventional academic knowledge, post-socialist electoral systems would display effects in-between large majority bonuses and complete proportionality. This hypothesis primarily applies to segmented systems with their parallel technical structure, but also to those PR systems with "moderately concentrating" elements (medium constituency sizes, national thresholds, divisor allocation methods). Consequently, in order to explore the performance of CEE electoral systems, more refined analytical approaches seemed to be appropriate. This recommendation has been, thirdly, reinforced by the fact that even electoral systems of the same type have shown considerable variance in their technical details.

Table 2: Technical structure of current segmented systems in CEE

Country	Last election	Relation SMC/PR-seats	Decision rule in SMC	No. of PR constituencies/formula	National threshold for PR
Armenia	2003	75:56	Plurality	1/Hare-Niemeyer	5%
Azerbaijan	2000	100:25	Plurality	1/Hare quota	6%
Georgia	2004	85:150	Qualified	1/Hare	7%

			(33.3%)	quota	
Lithuania	2004	71:70	Absolute majority	1/Hare quota	5%/7%
Russia	1999	225:225	Plurality	1/Hare quota	5%
Ukraine	2002	225:225	Plurality	1/Hare quota	4%

Sources: Nohlen, Grotz, Krennerich & Thibaut, 2000; Nohlen, Grotz & Hartmann, 2001; Ziemer 2003.

Table 2 illustrates this aspect for the segmented systems of six countries with regard to the relation of PR and majority seats, the decision rules in SMC as well as the allocation modes of PR seats. In sum, the given structures of CEE electoral systems have suggested comparative analyses going far beyond the general distinction between majority rule and proportional representation that had dominated the theoretical debate on “institutional choices for new democracies” before (Lijphart 1991).

II. The effects of post-socialist electoral systems: challenging conventional wisdom

Another interesting lesson for western experts was that post-socialist electoral systems produced “unexpected outcomes” (Moser 2001), sometimes even contradicting conventional theoretical assumptions. This applied not only to Hungary, whose electoral system turned out to be so complex that nobody was able to forecast its performance in the 1990 founding elections (Tóka 1995; Grotz 1998). Less spectacular electoral systems exerted surprising effects on post-socialist party systems, too. For illustrating such particular influences, two examples may suffice.

Table 3: The effects of the 5% threshold in four CEE States (1992-2002)

Country	Election years	Percentages of “wasted votes”	No. of parliamentary parties (PR-part)
Czech Republic ^a	1992	19.1%	8
	1996	11.2%	6
	1998	11.5%	5
	2002	12.6%	4
Poland	1993	34.5%	7
	1997	12.2%	6
	2001	9.3%	7
Russia ^b	1993	8.8%	8
	1995	49.5%	4
	1999	13.6%	6
Slovakia ^a	1992	23.8%	5
	1994	13.0%	7
	1998	5.8%	6
	2002	16.1%	7

Source: author’s compilation.

Notes: ^adata for the Czech Republic and Slovakia before 1993 are based on the election results for the relevant National Council (i.e. not the Federal Assembly). ^bData provided for Russia refer to the PR part of the segmented system only.

Firstly, in some post-socialist elections legal thresholds produced extreme amounts of “wasted votes”. As Table 3 indicates, a 5% hurdle – that in Germany has usually “filtered” between 0.5% and 5.0% of the total vote (Nohlen 2004: 316ff.) – incidentally excluded over 20% of valid ballots from seat allocation (e.g. in Slovakia 1992 and in Poland 1993). In the 1995 Russian Duma elections, the votes for parties failing to meet the 5% level amounted to almost 50%, thus the proportional system generated substantial majority bonuses for the strongest parties. The main reason for this counterintuitive performance was the fragmentation and “fluidity” of the relevant party systems. With their ensuing institutionalisation and concentration, the mechanical effects of legal thresholds have tapered off. Therefore, incidental demands by some experts and politicians to lower or even abolish the hurdles being applied in almost all CEE electoral systems proved to be premature. What is more, the same thresholds displaying short-term negative effects turned out to be highly functional in the medium term: having experienced extreme “filtering” in the 1993 polls, Polish right-wing parties reunited before the 1997 general elections. Similarly, the anti-Mečiar coalition in Slovakia reacted to a change of the differentiated threshold by fostering its organisational coherence before the 1998 parliamentary polls – and prevailed. In both cases, the mentioned psychological impacts of the 5% threshold led not only to a more concentrated party system, but also to an increased proportionality between votes and seats. Experiences of this kind reminded academic observers to assess options for electoral reform not only by one outcome, but to put them in a medium-term perspective.

Secondly, unexpected consequences of CEE electoral systems could be observed in national contexts with “fluid” party systems. In those states where not all political elites have organised themselves as nation-wide parties, the so-called Duverger’s Law – that a “first-past-the-post system” in SMC generates a two-party system (Duverger 1958) – obviously did not work. On the contrary, within some segmented systems, the plurality part produced a significantly higher fragmented party system than the relevant PR tier. This has been the case in Russia (since 1993) and Ukraine (since 1998): in both states, local “notables” without formal party affiliation run as independents and won up to 50% of the SMC-seats, whereas the strongest parties – as explained above – mainly profited from the national threshold of the PR part. Apart from normative and functional disputes on how to evaluate this “perverse” performance, the mentioned cases make clear that the structural effects of electoral systems are not exclusively determined by their technical elements, but at the same time depend on the national contexts in which they operate.

III. Electoral reforms in central and eastern Europe: between functional demands and political self-interest

Compared to other world regions, electoral systems in CEE have been reformed very often since 1989-1990. Although there is an unambiguous trend from Soviet-type absolute majority systems towards segmented systems and, finally, PR arrangements,⁴⁶ the reasons for and

² This step-by-step “proportionalisation” of CEE electoral systems can be found in Croatia and Macedonia, which successively underwent all three stages of development. Bulgaria changed its segmented system into PR in MMC in 1991. Finally, several post-Soviet states replaced their “traditional” absolute majority systems by parallel arrangements (Armenia, Azerbaijan, Georgia, Lithuania, Russia, and Ukraine).

modes of reforming electoral systems have widely differed among post-socialist states (Nohlen & Kasapovic 1996; Grotz 2005).

Interestingly enough, functional demands as well as political interests for institutional reform have even shifted within national contexts, where the structural effects of electoral systems remained basically unchanged. For instance, the Hungarian compensatory system producing considerable bonuses for the strongest parties was initially praised by many scholars for its positive impact on democratic consolidation (e.g. Merkel 1999). In the meantime, however, the deepening conflict between the two major “camps” is widely interpreted as key problem of Hungarian politics. It might, therefore, be sensible from both normative and functional perspectives to change the compensatory electoral system into a simpler, PR list system – not due to its over-complexity, but rather because the races in SMC have contributed to the structural bipolarisation of the party system since the mid-1990s. Domestic political interests, however, point in the opposite direction: a few years ago, the major rival parties, MSZP and Fidesz, launched a common initiative for a “pure” majority system in SMC and were only stopped by their smaller allies. Similar developments could be observed in the Czech Republic, where a new election law drafted by ODS and ČSSD would have significantly narrowed the constituency sizes and, as a consequence, produced considerable majority bonuses. This law, however, was rejected by the Constitutional Court, which stated that it violated the principle of proportional representation enshrined in the Czech Constitution (Birch, Millard, Popescu & Williams 2002). Another very recent example of changing institutional preferences on electoral reform is Russia. From the mid-1990s onwards, President Yeltsin made several attempts at altering the segmented system in favour of its plurality part, because the political forces profiting from the PR list system were more or less in opposition to the Kremlin; for the same reason, this initiative did not find the required majority in the Russian Parliament. In September 2004, on the other hand, Yeltsin’s successor Putin announced the introduction of a PR system (with a national threshold) for the upcoming Duma elections, because this would obviously benefit his predominant party “Yedinnaya Rossiya” vis-à-vis local “notables” not affiliated to the major parties.

While more examples could be provided, the main conclusion already stands firm: re-examining the performance of electoral systems in CEE is not only an academic topic, but also remains on the political agenda in many states. Therefore, relevant expertise continues to be needed in order to marry political interests with normative and functional demands. For providing meaningful options, a sound knowledge of contextual conditions and their mutual relationship with given institutional effects seems as indispensable as theoretical insight.

IV. Electoral systems and democratic development: the contextual limits of “institutional engineering”

Which electoral system is most suitable for democratising states? This question has always been controversial amongst both academics and practitioners. Since the advocates of majority rule and PR have provided equally convincing theoretical arguments and empirical evidence, the general debate has remained undecided. This is for obvious reasons: the basic decision for an electoral system is grounded on a value-oriented choice between two incompatible principles of representation that can be balanced at the “technical” level, but not in normative theory. From the perspective of comparative empirical analysis, it has become clear that there is no particular electoral system suited to every place and time. Especially in the “fluid” contexts of transition processes, specific effects of electoral systems depend heavily on relevant actor constellations, that is the fragmentation, polarisation and institutionalisation of

the party system. Examples from CEE include the aforementioned “perverse” repercussions of national thresholds and SMC in some states’ elections (Poland, Russia), while both institutional settings have displayed quite “normal” outcomes elsewhere (Hungary, Lithuania).

Furthermore, the immediate consequences of an electoral system may be evaluated differently from its medium-term impact. While, for instance, the majority system for the 1989 semi-competitive elections in Poland reinforced the landslide victory of Solidarność (“S”), sealing the end of communist rule, the very same election outcome strengthened the “S” leadership’s belief that they were the only relevant political force. In the following transition process, this conviction substantially contributed to the extraordinary polarisation and fragmentation within the anti-communist umbrella organisation, culminating in the “atomised” Polish Parliament of 1991 (Grotz 2000: 102ff).

From a theoretical perspective, the potential impact of political institutions on democratic consolidation basically varies according to three contexts (Dahl 1996):

In states with highly favourable socio-economic, political and socio-cultural conditions, institutional arrangements exert formal effects on the governmental system, but usually are of secondary significance for stabilising democratic rule. A good example for this is Hungary: the “early consolidation” of its multi-party system (Ágh 1998) was not caused by the particular structure of the compensatory electoral system, but rather by political developments, that is the early formation of a “proto-party system” from the late Kádár era. Given these contextual conditions, a “concentrating” PR system as applied in Poland (1993-1997) would have produced more or less the same structural effects on the party system (Grotz 2000: 277ff);

On the other hand, the impact of political institutions tends to be highly important in national contexts with “ambiguous” legacies and/or specific problems in establishing a representative democracy. By channelling the behaviour of political elites and citizens in particular ways and means, institutional arrangements may significantly promote or obstruct democratic consolidation. In this category, positive instances within CEE include the (very) proportional electoral system in Slovakia: if the Polish PR system (with smaller MMC) had been applied in the 1994 Slovak elections, the Mečiar coalition government would have gained a qualified parliamentary majority for changing the constitution – a scenario with incalculable consequences for democratic development (Grotz 2000: 422ff);

Under highly unfavourable conditions – such as socio-economic crises, a lack of Rechtsstaat traditions, weak civil societies, etc. – political institutions cannot be expected to significantly foster democratic rule, let alone guarantee its survival. This does not mean that there is no need for institutional engineering in those cases, but that contextual factors strictly limit the potential impact of alternative legal provisions. It is obvious that lowering or increasing thresholds and constituency sizes may not really matter, if elections have not been held in a fully free and fair manner. Therefore, provisions for electoral systems ought to be “embedded” in a precise regulatory framework on electoral administration, campaigning, the role of the media, and judicial review procedures.⁴⁷ But even the most sophisticated law may not improve the democratic quality of elections. Sometimes there is even the danger of doing

³ See the Administration and Cost of Elections (ACE) Project (www.aceproject.org), and, for the practical application, the various Opinions on Electoral Laws by the Venice Commission.

“too much”, if legal standards on electoral organisation are continuously refined – the law becoming more and more voluminous – while political practice is apparently not changing. This kind of “electoral engineering” might not only be rather “cosmetic”, but also counterproductive, as public respect for the rule of law tends to decrease further if the gap between legal norms and political reality widens.

In sum, the heterogeneous experiences with elections and electoral systems in the former Eastern bloc over the last fifteen years document successes as well as the limits of “constitutional design”. Relevant electoral outcomes have not primarily been determined by institutional choices per se, but rather by their “embeddedness” into given historical-political contexts.

V. Analysing electoral systems in the “New Europe”: an appeal for contextualised comparisons

The history of post-socialist elections is still relatively young. Nevertheless, it has helped academic experts to correct their theoretical beliefs on “best” institutional choices for new democracies. Although the formal structure of electoral systems in central and eastern Europe proved to be relatively uniform, their effects on the party systems have differed immensely both among and within national environments. Therefore, adjusting the conventional wisdom about the impacts of electoral systems seems to be the need of the moment.

Following the arguments outlined above, the main answer to this challenge consists in the contextualisation of institutional analysis. This must not be identified with “contextualist” approaches, categorically negating the significance of institutional choices and/or restricting historical investigation to single cases. Contextualised institutionalism rather relies on three analytical principles:

To assess the concrete effects of an electoral system, its technical structure has to be linked with given contextual conditions. Conventional assumptions, such as Duverger’s Law, are valid only for highly institutionalised and nationally organised party systems. In “fluid” contexts, the impact of the same electoral system may differ immensely, even leading to “perverse” outcomes;

Electoral expertise should, therefore, be based on contextualised comparisons. Admittedly, some benchmarks may be found by systematically exploring the electoral provisions throughout the region, revealing that the medium threshold is set at 5% or the (normatively problematic) procedure of negative voting (“against all parties”) still exists in some states. However, for identifying viable reform options it is sensible to refer not only to abstract institutional settings, but also to those operating in comparable contexts. Mutual learning in this sense seems to be rewarding for both academic analysis and political consultation;

Finally, experts involved in electoral reforms ought to be aware not only of the virtues, but also of the limits of institutional engineering. Preconditions and/or standards that are unlikely to be fulfilled in certain contexts might de-legitimise the electoral procedure as well as the rule of law. This is all but saying that there should be no attentive monitoring of electoral legislation in “difficult” environments. But it is not always sensible to answer obvious shortcomings of democratic procedures by even higher and more detailed formal requirements. Sometimes it is exclusively the political practice, not the legal framework that ought to be criticised. In other words: what has always been needed for sound reforms of

electoral systems is a conscious self-restraint of “institutional designers”. The positive impact of European institutions on democratic development in CEE over the last fifteen years has been based on this insight.

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THE EUROPEAN UNION AND THE POLITICAL INSTITUTIONS OF MEMBER STATES

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In endeavouring to determine how membership of the European Union could or should benefit the quality of political institutions in each of its member states, I shall start from three obvious axioms, from which I shall derive two more or less obvious theorems.

The first axiom posits that “good” institutions are better than “bad” ones, provided that we begin by defining which are good. Let us take it for granted that the question had to be asked once it had been acknowledged that the institutions must be those of a democratic regime understood as one where any relationship of power is anchored in those who obey and where any position of power is occupied on a temporary, limited and reversible basis by a delegate of those who obey, who have decided that, by relying on his competence and agreeing to follow his instructions, they have a better chance of succeeding in a collective undertaking. Good democratic institutions must meet a number of objective tests. They must be both stable and flexible: stable because the rule of law is not consonant with unstable rules of the game, and flexible because political societies are constantly changing. The ideal would be the Republic of Venice, whose institutions never ceased to evolve over a thousand years whilst unflinchingly respecting the same spirit. To attain flexible stability or stable flexibility, we can at least lay down a negative rule. It is advisable not to confuse the overall rules of the game with the individual games that may be played out within their framework and to reject any clause that might or might not appear in a political programme consistent with the rules of the game. Institutions must also be efficient and allow managers delegated by citizens to decide and act for the common good. If by “representativeness” we mean an arithmetical reflection, in political positions, of the electorate’s composition, it is questionable whether this can serve efficiency. An election is not an opinion poll but a technical operation to hoist into power a team with a legitimate interpretation of the common good and provide it with the means of demonstrating its abilities. These means include the emergence of a political majority amplified in relation to the distribution of opinions and positions among the citizens. Lastly, institutions must be resilient to all the corruption and iniquity that affects human affairs. Institutions requiring all politicians to be statesmen and all citizens to be virtuous would be bad institutions, for in normal circumstances politicians in a democracy are mostly very mediocre and the citizens are, at best, not corrupt rather than virtuous. It would similarly be unreasonable to establish an army on the assumption that the commanders would all be Alexanders and the men Achilles.

The second obvious axiom posits that Europe and Europeans will be all the better off, the better the institutions of member states. This axiom comes with two perhaps less obvious corollaries, one of which posits that, consequently, all Europeans have an interest in the quality of institutions in each of the states, and the other that, by the same consequence, good institutions in each state pertain to the common good of all Europeans. We have only to think of the relations between the Swiss Confederation and the cantons or between the US federal government and the states: the former cannot succeed and prosper if the latter fail in the tasks incumbent on them. “Common” is to be understood in its specific meaning of a good or

interest forming part of the good or interest of each of the elements of the group. It is in each citizen's interest that the rules of the game should be defined and observed and that external security should be guaranteed as far as possible: law and defence are public goods. Similarly, it is in the interest of every European in the European Union that the institutions of each member state should be sound in terms of the criteria adopted. It follows that institutions in Britain, France and Italy – or Estonia, Poland and Slovenia – matter not to each state individually but to the European Union and Europeans as such. While it goes without saying that France or Slovenia has no business interfering in the definition of institutions in Poland or Austria, it is even more obvious that the European Union cannot remain unconcerned about possible defects in the institutions of any member state. To gauge the full import of this axiom, it is enough to imagine the consequences for Europe of Nazi or communist subversion in a member state: either the other states would successfully intervene, which would solve the problem, or else they would fail or do nothing, and that would be the end of the European Union.

The third and last obvious axiom states that good institutions cannot occur in member states by either of the paths that we might be tempted to take. Intervention by European institutions is out of the question because they do not exist or are of dubious quality, but above all, and more conclusively, because they would impose uniform institutions on political situations rendered infinitely diverse in Europe by extremely long and tangled histories. The path of imitating institutions which have long met the criteria of excellence elsewhere, for example in Switzerland, the United Kingdom, the Netherlands and Scandinavia, is also closed, for, as products of a very complex and very subtle historical process, these institutions simply cannot be imitated. Transfer of the result to a different historical context would have every chance of encouraging the development of defects in these institutions. For example, the United Kingdom is distinguished by a glaring lack of institutional checks and balances, the Netherlands by a proliferation of parties and extreme difficulty in putting together a majority capable of governing, and the Scandinavian countries by a keen sense of equality. What presents no problems in these countries – owing to traditions, practices and a feeling for what is done and what is not done – could easily develop elsewhere into arbitrariness of the executive, a risk of paralysis and powerlessness, or a craving for state control.

From these three axioms I shall derive two conclusions in the shape of theorems. The first theorem is obvious, namely that it is up to every member state itself to acquire the best institutions possible. The obviousness concerns one of the two sides of this undertaking. It is obvious that only the citizens of a polity, as a body or, more plausibly, through their delegates, are able and entitled to define the institutions of their country. The other aspect is less obvious, namely how to do this successfully. If we accept the proposition that there is no algorithm for calculating precisely what might be the best institutions, the work must be left to people and history. The lessons of the latter nevertheless suggest a few words of caution. Institutions must match as closely as possible the traditions, experience and practice of the people for whom they are created. That is why the best political institutions are born of history rather than the minds of thinkers, as already emphasised by Cicero when he compared Rome to Athens and rightly extolled the former over the latter. For the time being, whilst awaiting the verdict of history, it would be sensible to invite some historians to constitutional discussions, since historians might have developed a keener intuition than jurists. It would then be advisable to enable institutions to be rectified in the light of experience, without placing in the way of modifications to the constitution obstacles such as make it necessary to envisage a takeover by force. Furthermore, we should quite obviously be guided by experience in Europe – rather than in the United States or elsewhere, since there are more

similarities of historical background and experience between European countries than outside Europe – but with the precaution of paying attention less to what works, which may be due to local circumstances that cannot be reproduced, and more to what may go wrong after transplant. When all is said and done, the only convincing example of the possible success of a presidential regime is the United States. The solitary nature of this success is due probably to the fact that the system demands scrupulous application and observance of the subtle and delicate logic of checks and balances and that the American tabula rasa made such a wonderful experiment possible. It would be unreasonable to expect a similar success elsewhere and criminal to adopt a presidential system in a country with a tenuous experience of democracy, since the system is ideally suited to providing a veneer of democracy for an authoritarian regime. Similarly, it would be unwise to draw the conclusion from the success of the Netherlands that a proportional electoral system is appropriate to every context and could assist good governance in a country with little consensus, considerable heterogeneity and a passive civil society. Lastly, there is no reason why application should not be made to think-tanks, independent experts, consultants and European institutions such as the Venice Commission.

The second theorem is less obvious and posits that the European Union's distinctive contribution to improving member states' institutions lies in the strong constraints that it imposes upon them. From this point of view, Europe functions as an action system, distributing rewards to good institutional pupils and severely punishing bad ones. In this type of system with strong constraints imposed on its members, we find that punishments are usually more important than rewards, since the former are painful whereas the latter tend to be regarded as a due. It is even more important to stress that this theorem will remain true whatever the future developments in political Europe. It is easy to prove it taking the three most plausible scenarios.

Firstly, Europe could form itself into a polity, acquiring mechanisms and procedures enabling it to take decisions and action despite its multiplicity and divergence of opinions and interests. Whatever the institutions of this putative polity, it is hard to imagine that its structure can be other than federal in nature – or perhaps “fractal” would be a more appropriate epithet – where each tier of identity, integration, discussion, decision-making and action will be fully autonomous and responsible in its powers without compromising the balance and efficiency of the whole. However light and unobtrusive the federal level may be, the mere fact that it exists and that its existence underlies the polity means that each subordinate tier must develop the institutions best suited to federal interaction, which is based on the tension between the three or four tiers making up the whole. The rewards promised to the best are, amongst other things, prosperity, influence, appeal and imitation by others. The punishments include pressure from the tier above, impatience from the tier below, boycotts by partners in the same tier, brain drain and a spiral of decline. With the current collapse in transaction costs and the consequent speeding-up of historical developments, the awkward consequences can make themselves felt more and more quickly and more and more bitterly.

Secondly, Europe could return to the complete political fragmentation of old. This situation would be even more limiting, for not only would it mean generalised competition between the states but it would also add to European competition at the global level. The rewards would come to those countries which are currently proving the best competitors: the United States globally, Switzerland in Europe, and Taiwan and South Korea in Asia. The punishments would be varying degrees of decline at all levels – local, regional and continental – as has already happened in the Mezzogiorno, the Arab world and the continent of Africa.

Thirdly, Europe could find itself in an intermediate situation and perpetuate its current status, which is neither that of a polity nor that of political break-up. This would probably be the most restrictive situation, since Europe would find itself subject to global constraints without being able to use any means of control. The punishments for all might well be very sharp and painful. Initially, the more efficient would exercise pressure on the less efficient, reflecting the first scenario. Subsequently, the former would abandon the latter to their fate, which takes us back to the second scenario.

Altogether, the Europeans, taken either as a whole or separately in circles of affiliation inherited from a thousand-year-old common history, are at a crossroads in history, brought about by irreversible global developments and defined, as always, in primarily political terms: namely, what kind of European polity, active in what kind of global cross-polity and with what kind of political institutions? Whatever the answers to this formidable question, member states must each strive to find the best and most efficient political institutions.