



The wiiw Balkan Observatory

Working Papers | 018 | January  
2002

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Constitutional Quandaries in Southeast Europe





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## *About*

Shortly after the end of the Kosovo war, the last of the Yugoslav dissolution wars, the Balkan Reconstruction Observatory was set up jointly by the Hellenic Observatory, the Centre for the Study of Global Governance, both institutes at the London School of Economics (LSE), and the Vienna Institute for International Economic Studies (wiiw). A brainstorming meeting on Reconstruction and Regional Co-operation in the Balkans was held in Vouliagmeni on 8-10 July 1999, covering the issues of security, democratisation, economic reconstruction and the role of civil society. It was attended by academics and policy makers from all the countries in the region, from a number of EU countries, from the European Commission, the USA and Russia. Based on ideas and discussions generated at this meeting, a policy paper on Balkan Reconstruction and European Integration was the product of a collaborative effort by the two LSE institutes and the wiiw. The paper was presented at a follow-up meeting on Reconstruction and Integration in Southeast Europe in Vienna on 12-13 November 1999, which focused on the economic aspects of the process of reconstruction in the Balkans. It is this policy paper that became the very first Working Paper of the wiiw Balkan Observatory Working Papers series. The Working Papers are published online at [www.balkan-observatory.net](http://www.balkan-observatory.net), the internet portal of the wiiw Balkan Observatory. It is a portal for research and communication in relation to economic developments in Southeast Europe maintained by the wiiw since 1999. Since 2000 it also serves as a forum for the Global Development Network Southeast Europe (GDN-SEE) project, which is based on an initiative by The World Bank with financial support from the Austrian Ministry of Finance and the Oesterreichische Nationalbank. The purpose of the GDN-SEE project is the creation of research networks throughout Southeast Europe in order to enhance the economic research capacity in Southeast Europe, to build new research capacities by mobilising young researchers, to promote knowledge transfer into the region, to facilitate networking between researchers within the region, and to assist in securing knowledge transfer from researchers to policy makers. The wiiw Balkan Observatory Working Papers series is one way to achieve these objectives.



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*This study has been developed in the framework of research networks initiated and monitored by wiiw under the premises of the GDN–SEE partnership.*

The Global Development Network, initiated by The World Bank, is a global network of research and policy institutes working together to address the problems of national and regional development. It promotes the generation of local knowledge in developing and transition countries and aims at building research capacities in the different regions.

The Vienna Institute for International Economic Studies is a GDN Partner Institute and acts as a hub for Southeast Europe. The GDN–wiiw partnership aims to support the enhancement of economic research capacity in Southeast Europe, to promote knowledge transfer to SEE, to facilitate networking among researchers within SEE and to assist in securing knowledge transfer from researchers to policy makers.

The GDN–SEE programme is financed by the Global Development Network, the Austrian Ministry of Finance and the Jubiläumsfonds der Oesterreichischen Nationalbank.

For additional information see [www.balkan-observatory.net](http://www.balkan-observatory.net), [www.wiiw.ac.at](http://www.wiiw.ac.at) and [www.gdnet.org](http://www.gdnet.org)

# Constitutional Quandaries in Southeast Europe

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In several southeast European countries democracy has not been functioning well. There are many possible explanations for this failure – after decades of communist rule, the citizenry is unprepared for democracy; a lack of good potential leaders; the demands and tensions created by transition process overwhelm the democratic process, and so on. Without denying the importance of some of these factors, this paper will suggest that the democratic failures in many countries are a consequence of deficiencies in their constitutional structures. Many Southeast European countries lack good constitutions, or possess constitutions that are weak in some respects. This paper will suggest that a part of the solution to the democratic failures in Southeast Europe should be sought in the creation of good constitutional structures.

Before we can proceed, however, we need to define what we mean by a *good* constitutional structure. This task is not easy and is arguably the most controversial part of the paper. Sections I and II describe key elements of good constitutional structures, and the process by which such constitutions might be obtained. Section III then compares this process and constitutional structure with those followed and implemented in the transition countries of Southeast Europe. In section IV the same exercise is undertaken for Turkey and Greece. The final section draws some

implications regarding the need and procedures for constitutional reforms in Southeast Europe.

The bottom line of the paper is that some constitutional reforms are likely to improve both the democratic and the economic performance of *all* Southeast European countries, and that substantial constitutional reforms would be desirable in *several* countries. We describe both what these constitutional reforms might be and how they can be brought about.

### **I. Writing the Ideal Constitution**

Imagine a group of people living in a state of anarchy in a clearly delineated geographic area, as say on an island or in a large valley. A variety of public goods exist like roads, police and fire protection, whose provision would benefit everyone in this area, but they are not currently provided. Someone proposes forming a polity to provide these public goods. If the group is small enough, all members might attend a meeting to write a constitution for the new polity. If the group is too large to make such a meeting feasible, representatives of the differing views about the optimal structure of the polity could be elected.

A fully representative constitutional assembly might be selected either through a special election in which candidates describe the sorts of institutions that they favor, or by randomly selecting representatives as some countries do when selecting juries.<sup>1</sup> Either way it is important that all groups of people with different sets of preferences be represented, so that the constitution reflects everyone's views. If some community members are not represented at the convention, and their preferences are not reflected

in the constitution, they may feel discriminated against. This in turn may result in their not abiding by the provisions of the constitution. In the limit, those not included in the constitution-drafting process may feel sufficiently alienated that they are thrust back into a state of anarchy with respect to the rest of the community and an important advantage of creating a polity is lost.

Thus, ideally, the preferences of all people living in the clearly delineated geographic area are represented at the constitutional convention, they *unanimously* agree on a set of political institutions for making future collective decisions about public goods quantities and the like, and by employing these institutions they live happily ever after in Pareto optimal bliss.<sup>2</sup>

Although Pareto optimal bliss is a *possible* consequence of establishing a set of democratic institutions, it is of course not the only conceivable outcome. If the preferences of the different subgroups who are potential citizens in the new polity are sufficiently heterogeneous, unanimous agreement at the constitutional convention may not be possible. Indeed, one or more groups may refuse to participate, because their preferences are so askew from those who do, or the groups that do meet may decide to exclude others, because they believe that it would be impossible for them to agree on a constitution. An alternative scenario is thus that some individuals with preferences (values) regarding democratic institutions that differ dramatically from those of the others effectively opt out or are left out of the polity created at the constitutional convention. These left-out groups remain in a state of anarchy with respect to those who form the polity, and the seeds for future conflicts are sewn.<sup>3</sup>

## II. The Ideal Constitution's Content

Those who write the constitution wish to create a set of political institutions that advances their common interests. What should these institutions look like? Space precludes a complete answer to this question. I shall, therefore, only sketch the most relevant features for an analysis of developments in Southeast Europe.

### A. Federalism

There are two essential conditions to justify introducing a federalist system.<sup>4</sup> First, there must exist public goods which provide benefits to only those living in specific parts of the country, i.e., *local* public goods. Second, citizens' preferences for these local public goods in one part of the country differ from those in other parts. The reasons why both of these conditions are necessary are rather obvious. If there are no local public goods, then one only needs political institutions that record citizen preferences across the entire nation for the national public goods. Even with local public goods, there is no need for local political institutions if preferences for local public goods are the same everywhere. A single level of local public good provision will be optimal in all communities and can be decided in the national parliament. Even with different preferences for local public goods across communities, it is conceivable that these preferences could be revealed in national elections. But as the number of local public goods and heterogeneity of preferences across communities grows, the complexity of information required at the national level grows to such a level that local governments become optimal institutions for revealing individual preferences for local public goods. In all but the smallest of countries — Monaco and some of the Caribbean

islands come to mind — federalist institutions are likely to be an optimal way for revealing individual preferences for local public goods.

## **B. Representation**

The constitution framers face a choice between two fundamentally different modes of representation -- multiparty (proportional) representation (PR), and two-party government. Although many variants on each exist, I consider only the ideal polar cases to reveal their quite different underlying logics.

### *1. Multiparty Legislatures*

The ideal assembly for aggregating citizens' preferences would include all citizens. Such an assembly is infeasible and so in the best feasible assembly *all* citizens are *represented*. A representative assembly can duplicate the outcomes from an assembly of all citizens, if different groups of citizens have similar preferences regarding public policies. In this case, an assembly in which each group is represented in proportion to its size mirrors the preferences of all citizens.

#### *i. At large list systems*

When *parties* are the instruments of representation, preferences can be represented proportionally, when each party offers a single list of candidates to all voters. Citizens vote for their most preferred parties, and parties take seats in the legislature in proportion to their votes across the nation.



*ii. At large list systems with an option to express preferences for persons*

An objection often raised against straight party list systems is that voters cannot express their preferences among the different *individual candidates*. Various modifications of PR-list systems allow such expression.<sup>5</sup>

Under the Austrian system, for example, a citizen votes for either a party or a particular member of a party. If she votes for a party member, the vote is also recorded as a vote for that party. The country is divided into geographic districts with a set number of votes needed to win a seat in each district. A party's seats in the national parliament are filled as follows: All party members receiving enough votes in the geographically defined districts to be elected take seats in the legislature. Let us suppose for a given party this number is seven, and that the number of votes this party obtained across the nation entitles it to 12 seats. Then in addition to the seven seats filled through the district elections, five are filled by members of the party as determined by its leaders. Thus, the distribution of seats in the parliament conforms to that obtained under a straight party list system, but the citizens directly choose the occupants of some of these seats.

*iii. At large PR-persons systems*

An alternative to electing parties is to elect candidates who are unaffiliated to parties. Such nonpartisan representation is frequent on city councils and school boards in the United States, and Nebraska's legislature is also nonpartisan. In these nonpartisan representative bodies, a representative gets one vote regardless of the number of votes she received. To have citizen preferences represented in the

legislature in proportion to their number in the population under a PR-persons system, the votes each representative casts in the legislature must be proportional to the votes she received in the election.

*Commentary.* Despite its novelty, PR-persons is an attractive alternative to a PR-parties system. PR-parties is an inherently inefficient mechanism for transmitting information about voter preferences. For it to achieve its objective, considerable party discipline must exist, otherwise voters have difficulty determining what a *party's* position is. But this implies that all 80 members of a party with 80 seats in the parliament typically vote the same way. One representative casting 80 votes conveys the same information as 80 representatives casting one vote each. West European parliaments have anywhere from 200 to 600 members typically drawn from between 5 to 10 parties. A nonpartisan parliament with even only 25 members would thus offer voters as much as 5 times the degree of choice for between a tenth to a 25th of the costs.

#### *iv. Minimum cut-offs*

PR-systems commonly impose minimum percentages of the national vote which parties must secure before claiming any seats. These range up to 5 percent, as in Germany. Such cut-offs deny small parties seats to which they are otherwise entitled. Two justifications are usually given for minimum cut-offs. First, small parties make it more difficult to form the *stable* coalitions needed to govern effectively when the government, i.e. the cabinet, must maintain the support of a majority of the parliament to remain in office. Second, minimum cut-offs increase political stability by keeping

parties from the extreme left and right out of the parliament.

Both arguments have *some* merit, but neither is a compelling reason to undermine the logic and legitimacy of a PR-system by denying some voters representation. (Note that if, say, 4 parties each receive only 4% of the votes, under a 5% cut-off some 16% of the voters are effectively disenfranchised.) As we stress below, the logic underlying PR-systems implies that the legislature's *sole* responsibility should be accurately representing the preferences of the voters. It should *not* be given the additional responsibility of having to form the government, that is to agree on the composition of the cabinet and the identity of the prime minister. If one wishes to merge the executive and legislative functions, then the logical choice of electoral system is a two-party system.

The assumption that a political system is more stable, if the supporters of small parties are disenfranchised, is also questionable. First, it should be emphasized, that small parties do not always gather their support from the far extremes of political preferences. The Free Democratic Party is a *centralist* party, which has been pivotal in most of Germany's coalition governments since World War II.<sup>6</sup> . The 4% cut-off operating in Bulgaria's 1991 parliamentary election denied nearly 25% of the electorate representation in the parliament with most of these voters favoring centralist parties (Bell, 1997, pp. 375-379).

Even when a cut-off rule keeps parties on the far left and right out of the parliament, it is questionable whether this increases stability. Denied the opportunity to express their disenchantment with governmental policies through normal political channels, extremist groups have no alternative but to resort to street protests and

violence. Parliamentary stability is bought at the cost of social instability.

v. *The issue of stability*

The major objection against PR is that it leads to parliamentary instability, and thus to weak and ineffective government. Parliamentary instability under PR can take two forms. First, there is the possibility of *cycling* -- the structure of preferences across the parties may be such that no proposal for, say, the education budget can defeat all other proposals. The parliament gets „hung up“ in an endless cycle. Second, under PR it may be difficult to form a cabinet, as already mentioned. This form of instability is another manifestation of cycling with proposals now being the composition of the cabinet instead of the composition of the education budget.

Although both forms of instability can arise under PR, neither need be a reason to avoid this form of electoral system, if its other characteristics make it superior to two-party systems. Cycling on *issues* can be eliminated by the appropriate choice of voting rule. Some options are discussed below. *Cabinet* instability can be avoided most simply by not requiring that the parliament choose the cabinet. The logic underlying PR fits most comfortably with a government structure in which the legislative and executive branches are *separated*. Even without such a separation, however, cabinet instability need not produce the Italian pattern of continually falling governments and new elections. Norway avoids this syndrom, for example, by simply not having any provision for calling new elections in its constitution. They are held at preset, fixed intervals. If a majority government cannot form, a minority government must carry on. So long as the parliament employs voting procedures that avoid endless cycles, the essential budget

measures pass, and the country survives until the next election.

*vi. Discussion*

The attraction of PR is its inherent fairness. Under a party list system with 200 or more seats in the legislature and *no minimum cut-offs* for taking seats, all but a handful of voters is represented by a party for which they voted, and each party's position on public issues is reasonably close to those its supporters favor. These features of PR stand in stark contrast to those of the so-called two-party systems in the UK, USA and Canada. Under these systems each delegate to the legislature is elected from a different district under a plurality or first-past-the-post rule. The consequence is that some 40 percent of the voters in the United States are "represented" in the House of Representatives by someone for whom they did not vote. This is 40 times the proportion of "wasted votes" that one expects from a PR-system without cut-offs. The 40% or so voter turnouts in Congressional elections in non-Presidential election years further imply that in the two years leading up to a Presidential election only about 15% of US citizens are represented in the House of Representatives by someone for whom they voted. Add to this the fact that the position a representative takes on national issues can be far away from the positions favored by many of the voters in her district — even many who voted for her — and one sees why first-past-the-post systems score much higher than PR-systems when it comes to various measures of alienation like voter turnouts and violent civil disobedience.<sup>7</sup> The opportunity to vote and work for parties that share one's views on public issues ties voters in PR-systems more closely to both their favored parties and to the democratic process.

## 2. *Two-party Legislatures*

The claimed advantage of two-party government is that it produces more *responsible* and *effective* government. In part this claim rests on the assumption that PR-systems are prone to be unstable. Although instability is not a necessary feature of PR as already explained, the institutional arrangements that avoid instabilities often make the democratic process more deliberate and consensual. If one defines effective government as the ability to make quick and bold collective choices, and to introduce radical reforms, then the kinds of PR-systems outlined here can be called less effective, for they are likely to be less capable of implementing bold new programs.

The "Anglo-Saxon two-party systems" of the United Kingdom, United States, Canada, Australia, and until recently New Zealand have two features in common: (1) they employ single-member-district representation (SMDR) with all but Australia using the plurality rule, and (2) they all, more or less, have tended to produce systems in which two parties play dominant roles. Despite these common features, it must be stressed that the *US-presidential* system is quite different from the *parliamentary* systems in the other four countries. Indeed, the US system with its separation of the legislative and executive branches, and checks and balances is even less capable of implementing bold new programs than most European PR-systems, as the terms "gridlock" and "deadlock," now frequent in American political discourse, so tellingly reveal. If what one seeks from a two-party system is *effective* government, then the US version — SMDR in the legislative branch plus a separately elected chief executive with veto powers — is definitely not the way to go. Since SMDR is so obviously inferior to PR as a way of

conveying information about voter preferences into the legislature,<sup>8</sup> the US system comes close to combining the worst features of the PR and two-party alternatives.<sup>9</sup>

Consider instead a parliamentary system in which literally only two parties compete for votes. Party *A* offers one platform, *B* another. Each citizen votes for the party which he believes offers the best platform. Under fairly reasonable assumptions about the parties and voters,<sup>10</sup> one can show that the competition for votes between the two parties results in the selection of a platform that maximizes a social welfare function with positive weights on the welfare of each individual voter. Competition for votes in a two-party system can achieve the same sort of invisible hand theorem result as competition for profits achieves in private goods markets.

Once one takes into account the effects of rational ignorance on the part of voters, rent-seeking by interest groups, and the like, there is reason to doubt whether the outcomes from two-party competition are quite as wonderful as the elegant theorems that establish these results might lead one to believe. Nevertheless, the outcomes should fulfill much of the claims of those who advocate two-party systems. Voters can choose between two sets of policy proposals. Although neither party is likely to offer a program as close to a voter's preferred program as is available under PR, under a two-party system the voter knows that his party will be able to implement the set of policies it has proposed. Under a PR-system a voter cannot make this assumption.

With only two parties competing for votes, one must win a majority of the seats and, if the parliamentary voting rule is the simple majority rule, it is able to implement its program. If radical measures are called for, and one party can convince a majority of voters that its radical proposals would improve the country's situation significantly, it will

be able to implement its measures after the election. *Effective* government in this sense can occur under a two-party system. It is much less likely under PR.

Under the rules used to elect members of the parliament in Anglo-Saxon systems, one representative is elected from each geographically defined district. In the UK and Canada, she is the candidate receiving the most votes in the district. When several parties compete for votes across the country under this electoral rule, two parties emerge as dominant at the national level *only if these same two parties are dominant across most if not all of the individual districts of the nation*. If there are several parties with significantly different levels of popularity in different areas of the country, no single party, let alone a pair of parties, may emerge as dominant. India uses SMDR, and yet the distribution of seats across parties in its parliament looks more like that of a European PR-system than like that of the UK. The distribution of seats across parties in France also looks much like that of other continental European PR-systems, despite France's having had SMDR for much of this century.<sup>11</sup>

In addition to not guaranteeing only two dominant parties, SMDR gives the largest parties significantly larger fractions of the seats in parliament than their fractions of the popular vote.<sup>12</sup> The Labour Party won landslide victories in the last two elections in terms of the number of seats in parliament despite having won roughly only 44 percent of the popular vote — a percentage that is about what the *losing* presidential candidate obtains in a landslide election in the US. With SMDR a majority of the voters might even prefer a second party to the one that wins a majority of the seats, with the winning party's victory entirely due to voter disagreement over which of the other two major parties is most preferred. A dramatic example of SMDR's tendency to



overrepresent the largest parties occurred in the 1996 national election in Albania, where 115 of the assembly's 140 seats were filled using SMDR. The Democratic Party won 87 percent of the assembly's seats, although it won only 55 percent of the popular vote (Pano, 1997, p. 343).

To avoid these disadvantages SMDR should not be used to obtain a two-party system. Instead, all parties should compete for votes across the entire country as under a PR-list system. If one party wins a majority of the votes, then seats in the parliament are allocated as under a PR-list system. This party then has a majority of the seats and can implement its program just as it could, if there were only two parties. If no party obtains more than 50 percent of the votes, a second election is held between the largest two parties. These two parties are then assigned seats in the legislature in proportion to their votes in the second election.

This procedure, which is essentially the one France uses to elect its President, would ensure that some party always occupies a majority of the seats, and that a majority of voters either preferred this party to the second largest party, or preferred it to all other parties. At large elections, coupled with a run-off if no party wins an absolute majority on the first ballot, would both ensure the existence of a majority party and legitimate its election.

### **C. The Parliamentary Voting Rule**

The choice of voting rule for the legislature under a two-party system is simple — the simple majority rule. Under the logic of a two-party system parties compete by offering packages of proposals along with the claim that they are the best party to govern the country. For the system to produce the effective government sought, the

winning party must be able to deliver on its promises. It can do this, if the parliament employs the simple majority rule, since the winning party is assured a majority of the seats under the electoral procedures described above. The issue of which parliamentary voting rule to use in a multiparty-system is a good deal more difficult.

### *1. A Qualified Majority Rule with the Simple Majority as a Special Case*

The state exists to resolve certain market failures. In principle all citizens can be made better off through these collective actions, and the collective decision correcting the market failure could be made using the unanimity rule. The use of this rule in a parliament in which all citizens are represented in proportion to their number would ensure that all were better off from each collective action.

The standard objection to the unanimity rule is that it raises decisionmaking costs to such an extreme as to make government ineffective. To avoid this possibility, some less than unanimity rule is required. As the required majority to pass an issue falls, the likelihood rises that the government undertakes actions that harm some citizens. The optimal majority for a parliamentary voting rule balances the increase in decisionmaking costs, which accompany higher required majorities, against the expected increase in costs borne by those who lose under a lower required majority.<sup>13</sup>

With lower required majorities, the likelihood of cycling increases, and with cycling the time required to reach the *final*, winning proposal increases. If the legislature concentrates on issues that potentially benefit all citizens, however, the probability of a voting cycle falls as the required majority increases reaching zero at a qualified majority of 64 %.<sup>14</sup> Thus, if the parliament is largely concerned with issues

likely to improve the welfare of all citizens, decisionmaking costs actually rise as the required majority falls below 64 %. The optimal majority would be greater than this figure.

The concern is often raised that representative bodies sometimes pass measures in the heat of the moment that are later thought to be ill-conceived. To avoid this danger, parliamentary rules often require that a measure be read before the parliament more than once before it can take effect, and stipulate intervals between each reading. One justification for a second legislative chamber is to delay a bill's passage, thus allowing its advantages and disadvantages to be more thoroughly understood.<sup>15</sup>

If these arguments have merit, then decisionmaking costs, i.e., the time spent debating and reformulating an issue to achieve a particular majority, are not costs at all, or at least are not costs until one reaches very high qualified majorities. Stated alternatively, the same objective as requiring a bicameral legislature, or second and third readings of bills, can be accomplished simply by requiring a large majority of a single chamber to pass any bill. These considerations favor requiring a majority of at least 2/3rds of the legislature to pass a bill.

Other justifications for a second chamber of parliament have been put forward, but we shall not discuss them here.<sup>16</sup> To represent individual preferences adequately on national issues only one legislative chamber is needed.

A single chamber, properly constituted, can adequately represent all citizens. A high qualified majority to pass all tax and expenditure legislation can help ensure that only those goods are provided, that benefit all citizens. A high qualified majority would be a primary constraint against the legislative branch taking harmful actions. Other

constraints might include prohibitions against certain actions being proposed, or still higher majorities to pass those measures that are least likely to benefit all citizens, as measures to interfere with the market.

## 2. *Voting by Veto*

Public choice scholars have invented several other voting procedures with attractive properties for a parliamentary voting rule.<sup>17</sup> I take space to discuss only one of these.

Under voting by veto each member of the legislature proposes one outcome for the collective decision, for example the size and composition of the defense budget. If the legislature has  $n$  members, then the  $n$  proposals plus the status quo form a set of  $n+1$  proposals. The status quo is an unlikely winner under voting by veto, and its content is of little importance. Once a proposal set is formed a random process selects an order in which the  $n$  members eliminate proposals from the set. After all  $n$  members have cast their vetoes, one proposal is left. It is the winning proposal.<sup>18</sup>

Voting by veto has the following attractive properties: (1) Its normative properties resemble those of the simple majority rule.<sup>19</sup> Unlike with the simple majority rule, however, voting by veto *always* determines a winning proposal. Cycling cannot occur. (2) When a stable majority coalition forms in a PR-system, parties not in the coalition are powerless. Their supporters, although fairly represented in the legislature, have no impact on the outcomes. Under voting by veto *all* parties have a chance to influence the outcome. Even a small party's proposal might win, if it is ranked relatively high by all members. (3) The procedure encourages more responsible behavior by extremist

parties. Proposals ranked low by other parties will be vetoed. Rather than simply making wild proposals and having them eliminated, an extremist party can try and get its proposal selected by including in it features that are attractive to the other parties. Voting by veto establishes a competition among the parties to propose the *relatively most popular proposal*. (4) The procedure encourages more responsible behavior on the part of voters. In a normal PR-system, a voter can cast a "protest vote" for a party on the far left or right without running any danger that this party will influence public policy, since such extremist parties do not enter the coalitions that form governments. Under voting by veto, however, the citizen has more incentive to reflect on his party choice, since *all* parties can affect public policy.

#### **D. The Executive Branch**

Two fundamentally different views exist regarding the function of the executive in a republican form of government.<sup>20</sup> One sees it as agent of the legislature, administrators who carry out its policies. The other sees the executive as a balance to the legislature, a separate location of legitimate authority that can check the legislature. In their extreme forms, these views of the proper role of the executive are diametrically opposed. I discuss each in turn.

##### *1. The Chief Executive as Agent of the Legislature*

In a two-party system voters expect the winning party to carry out the mandate they have given it. To secure this end, the winning party's legislation should be implemented. Effective government requires a direct link between the bills passed by the legislature and

their execution. By combining the executive and legislative branches, a two-party parliamentary system forges this link. The party's leadership takes charge of each ministry, and conveys party policy into them.<sup>21</sup>

In a multiparty system each voter is represented by a party that takes a position close to that favored by the voter. The parliamentary voting rule selects the best outcome given this mode of representation. Additional input into *what* should be done is not required. The role of the executive branch should be, as under a two-party system, to see that what was voted to be done gets done. The chief executive must monitor bureaus in the executive branch to ensure that they carry out their tasks efficiently, and do not place their own objectives over those of the legislature. Under this interpretation, the chief executive is an agent of the legislature and logically is chosen by it.

## *2. The Executive Branch as a Check on the Legislative Branch*

The practice of dividing governmental authority between the executive and legislative branches evolved between the 14th and 16th centuries. The monarch was the representative of *all* of the people in Tudor England, and a Member of Parliament represented purely local or corporate interests.<sup>22</sup> Although by the end of the 18th century Europeans were well on their way to replacing this system with one in which governmental authority was vested in a single, parliamentary body, it was the Tudor system of divided authority that the Founding Fathers enshrined in the US Constitution. Its checks and balances reflect deep-seated fears of the potential excesses of an elected legislature,<sup>23</sup> and of a powerful chief executive who might assume the arbitrary authority of a king. This system has admirably prevented the legislative branch from acting rashly, while granting

the president ample war making powers and authority for unilateral action in foreign affairs.<sup>24</sup>

Although a US president has considerable latitude to commit the nation to war, he can implement his domestic program only with the concurrence of both Houses of Congress. Bills that become law are a compromise between the broad national interests represented by the president and the narrow geographic interests represented in Congress. There is no theoretical reason to presume that these compromises are the best outcomes a political system could produce. The US system of checks and balances has produced frequent stalemates preventing either branch from implementing a coherent program.

Where an ambiguous division of authority in the USA produces deadlocks and frustration, in other countries the outcomes have been much worse. The distinguished social scientist, Max Weber, wanted a strong presidency patterned after that of the United States defined in the Weimar Constitution, in the hopes of bringing political stability to post-war Germany. The Weimar Republic's collapse was arguably due to the ambiguous division of authority in its Constitution among the president, the chancellor, and the parliament.<sup>25</sup> Latin American constitutions have also been patterned after that of the United States with strong presidencies. They typically have not included electoral rules that ensure a majority in the parliament for the president's party, however. "The combination of presidentialism and a fractionalized multi-party system seems especially inimical to stable democracy...Chile is the only case in the world of a multi-party presidential democracy that endured for twenty-five years or more...[presidentialism] is inconducive to democratic stability because it easily creates difficulties in the relationship between the president and the congress."<sup>26</sup> Neither can deliver the programs promised during

elections. The ineffectiveness of presidential government in Latin America "has been a precipitating factor in several democratic breakdowns (e.g., Columbia in 1949, Brazil in 1964, Peru in 1968, and Chile in 1973)."<sup>27</sup> The histories of both the Weimar Republic and Latin American presidential systems vividly illustrate the costs of not adopting a logically consistent constitutional structure.

### 3. *Discussion*

The logic supporting a multiparty system is the same as that supporting democracy itself. "The voice of the people" is to be heard, and since the citizenry cannot express their preferences directly, an assembly is formed in which all people are proportionally represented. The decisions of this assembly should reflect the preferences of all citizens.

A voting rule is needed that gives all representatives a voice in the outcome. The unanimity rule is the obvious choice. A qualified majority rule compromises the goal of having all citizens influence the outcome. This compromise is smaller, the higher the majority required to pass legislation. Other rules, like voting by veto, can ensure that *all* representatives not just a half or 2/3rds of them, can influence the outcomes.

If the voting rule leads to outcomes that reflect citizens' preferences, then these outcomes should be implemented. Placing a second chamber or a president with veto powers between a multiparty legislature and the execution of its decisions thwarts its actions, and can induce the kind of "militant, uncompromising, confrontational" style of government that has frequently led to the breakdown of democracy in Latin America.<sup>28</sup>

The form of multiparty government described here differs from typical PR-systems in that the cabinet is not a part of the parliament. The cabinet-form of PR has two serious



disadvantages relative to a PR-system in which the executive is separate from the legislature. First, cycling over the composition of the cabinet can lead to short-lived governments as in Italy since World War II, and the 4th Republic of France. Second, a cabinet-form of PR complicates the voter's choice and thereby distorts the information about voter preferences obtained through elections. A voter who prefers the program of Party C may not vote for Party C, because he thinks it has a small probability of joining the coalition that forms the cabinet, and thus of influencing public policies. Instead of conveying unambiguous information about the policy preferences of voters, elections in cabinet-forms of PR provide mixed signals of voters' policy preferences and their estimates of the probabilities that different parties will join the government. To avoid these disadvantages and to achieve multiparty PR's full potential, the legislative and executive branches should be separated.

The opposite is true in a two-party system. Here the voter *chooses* the government, i.e., the cabinet, directly. The voter knows that the winning party will form the government and can implement its program. The voter need not engage in complicated strategic choices. He votes for the party whose program and administrative competence he prefers.

Under a two-party system the majority party implements its program almost without opposition. A form "tyranny of the majority" exists, since it faces only two real checks on its actions: (1) constitutional restrictions on the issues that can come before the parliament, and (2) the threat of defeat in the next election.

Presidentialism attempts to combine the advantage of the broad diverse representation of a multiparty system with the decisiveness of a strong executive. In practice presidentialism produces governmental "immobilism," which in Latin America has frequently led to the truly strong executive authority of a dictator.

## E. Rights

We think of the constitution as a contract among the citizens creating the state. In entering into this contract, the individual gives up certain freedoms and takes on certain obligations. The individual thus runs the risk that the constraints on freedom and obligations imposed by the community may actually *reduce* her welfare, thus vitiating the sole purpose of government. To reduce this risk, the individual can place certain provisions in the constitutional contract that protect her freedom to act. In their most general form, these protections of freedom fall under the heading of *rights*, and are discussed in Subsection 1. Of particular importance are the provisions that protect the individual's ability to advance her economic welfare (Subsection 2), and ensure that she enjoys a minimum level of economic welfare (Subsection 3).

### *1. The Salient Characteristics of Constitutional Rights*

Most actions, like scratching one's ear, affect only the actor. Thus, implicitly and perhaps better explicitly, the constitution should *allow* all individual actions *unless* they are specifically prohibited. Some actions, as driving 100 km/hr through the center of a city, adversely affect other individuals and the constitution must define the legislative voting rule to constrain or ban such actions. In choosing a voting rule, the likely losses to persons prevented from acting must be weighed against the gains to those harmed by this action.

The higher the majority required to pass an issue, the more protection it affords against legislation that adversely prevents an individual from acting. If the actor's gain

equals the loss imposed on others, the optimal voting rule is the simple majority rule.<sup>29</sup> As the loss imposed on an individual who is prevented from acting grows relative to the gains to the rest of the community from this prohibition, the optimal required majority to prevent the action grows.<sup>30</sup> An example requiring a high qualified majority might be a bill to arrest and detain indefinitely members of a particular ethnic, religious or political group, even though they were accused of no specific crime. At a time when the targeted group is a potential source of violent actions against other members of society, such a measure might reduce the anxiety of a vast majority of citizens. But the costs imposed on innocent members of the targeted group obviously could be enormous. At a constitutional convention, individuals who are uncertain about whether they or their descendants might someday be members of a targeted group would want to protect themselves against the possibility of such legislation passing. Requiring a high qualified majority to pass such legislation would provide such protection. The greatest protection would be provided by the unanimity rule, since it would allow a threatened minority to veto all such legislation.

Since the unanimity rule would be used only for decisions in which minorities stand to suffer great losses, these minorities can be expected in most instances to exercise the veto that the unanimity rule gives them and vote against such proposals.<sup>31</sup> The transaction costs of collective decision making can be reduced, if issues of this type are not voted upon using the unanimity rule, but rather are dealt with by defining unconditional rights.

This logic implies the following criteria when defining rights: First, rights should protect specific actions or perhaps non actions (the right to be remain silent). Second, rights should be defined only where it is thought that some future subset of the

community may attempt to block a particular action. Third, rights should protect only those actions where the gain to the actor is expected to be very large relative to any costs imposed upon second parties.

Although these criteria are fairly specific, it must be stressed that they *do not* define a *unique* set of rights. An action that one community deems worthy of protection may not be deemed so by another. For example, in a country with many religious minorities citizens may fear that a future legislative majority will try to prohibit a religious practice of some minority. If the citizens perceive that the loss to the majority discomforted by the religious practice is likely to be small relative to the loss to the minority from the prohibition, they will choose to protect the minority's freedom to practice its religion by defining a right to that effect in the constitution. On the other hand, in a community where everyone belongs to the same religion, action against the religion may seem inconceivable, and no constitutional protection may be introduced.

*All* definitions of constitutional rights are thus to some extent *relative* to the particular preferences and culture of each community. *Some* attributes of human nature are sufficiently universal, however, that one expects to find certain rights in most if not all constitutions. A brief list of these might read as follows:

- Freedom from involuntary servitude.
- Writs of habeas corpus.
- Freedom of assembly and association.
- Freedom to travel.
- Freedom to read, write and speak what one chooses.

Each of these is an attractive candidate for a constitutional right for three reasons: (1) It defines a fairly specific action or set of actions to be protected. (2) One can imagine or cite historical examples of government efforts to restrain the action. (3)

When one places oneself in the position of the person prevented from acting, say the slave, and the person who benefits from this restriction, the slave owner, one imagines the loss to the individual who is prevented from acting to be very large relative to the gains to the rest of the community.

Many "actions" that are discussed as if they warrant constitutional protection or are sometimes even included in constitutions do not possess the three properties just listed, and thus cannot be defended as constitutional rights under the logic presented here. We present and discuss a few examples from the constitutions of Southeast European countries below.

## *2. Protection of Market Exchange*

Normal market exchange benefits both parties to the transaction, and harms no one. A system of market exchange can provide great benefits to all participants. Yet market exchange systems are vulnerable to the concerted actions of groups which can benefit from restrictions on market freedom.

The constitution has two important roles to play in facilitating the gains from market exchange: (1) establish the basic institutional structure that underlies a market system, and (2) place constraints on the state's ability to intervene in ways that harm the market process. The institutional structure underlying the market system could be defined as a set of basic rights that might look like the following:

1. Each citizen has the right to own and dispose of any and all property which has been obtained by legal means.
2. Each citizen has the right to enter into contracts to buy or sell goods in his possession, or to sell his services, or to buy the services of others. This freedom applies to transactions between citizens of the country, and between any citizen and a citizen of a foreign country.

3. Each citizen has the right to demand any price he chooses for the goods in his possession or for his services.
4. Each citizen has the right to start or terminate a business at a time of his choosing.

These rights *protect* an individual's freedom to advance his economic well-being.

Interest groups often use the state to advance their interests by *interfering* with the market process, however. Price floors for agricultural products, ceilings on rents, and tariffs and quotas are examples. Such interferences with markets do not merely transfer income from one group to another. They distort the competitive process and the allocation of resources it brings about, and thereby lower social welfare.

In certain situations state interference with the market may improve the allocation of resources. A ban against the sale of narcotics, and a price ceiling on a monopoly's electricity are examples. The constitution must therefore allow for the possibility of the state interfering with the market, when such interference is in the public interest. To accomplish this objective the constitution could stipulate that *any* abridgment of the above rights requires the approval of a substantial majority, say 3/4ths, of the legislature. Such a provision would constrain the state's ability to distort the market process for the benefit of a few and at the cost of the many.

### *3. Economic Rights*

Although the allocation of goods and services through market exchange can increase everyone's welfare, market systems do not guarantee that everyone has a minimally acceptable income. Such minimum guarantees can only be provided by the state. A minimum guaranteed income, financed out of a general tax, has the characteristics of a constitutional right described above. The minority receiving the

subsidies obtains a huge benefit, and the larger population suffers a small loss. A person who put herself in the shoes of a middle class taxpayer paying for such subsidies and in those of the poor person receiving them, might well vote for the subsidies. Certain basic redistribution programs to the very poor might thus be written into the constitution as a form of "economic rights" or entitlement.

Treating basic redistribution as a right and placing it into the constitution would take the most divisive issue a democracy faces "off the political agenda." With economic entitlements in the constitution, other forms of *compulsory state provided* redistribution, like unemployment compensation and old age benefits, could be eliminated with, of course, people free to contribute to private insurance programs. To further depoliticize redistribution, it should be administered by a quasi-independent agency and funded by earmarked taxes specified in the constitution.

In addition to a minimum income should each citizen not also be entitled to an education, health care, etc.? Arguments favoring entitlements can be extended in several directions. Where to draw the line? When answering this question, one must keep in mind the basic criteria that warrant defining a constitutional right. The welfare increase of the subsidy recipient should be very large relative to the welfare loss of the taxpayer. In a rich country the fraction of the population requiring subsidies of these types is small as is the burden placed on the average taxpayer. A relatively long list of entitlements might be chosen. In a poor country, each new entitlement increases the burden on the relatively small fraction of middle and high income taxpayers substantially. A short list of entitlements is more likely to be optimal. As is true of all constitutionally defined rights no single set of economic entitlements will fit all countries. The optimal set for a particular country depends on its income level, and the degree of empathy its citizens feel for one another.

### **III. Constitutional Developments in the Former Communist Countries of Southeast Europe**

No nation's constitution has ever been written by all of its citizens, or even by a fully representative assembly. No constitution satisfies all of the criteria that I have listed for „an ideal constitution.“ Some come closer than others, however. Having sketched the main features of such a constitution, we are now in a position to discuss the constitutions of Southeast Europe beginning with those of the former communist countries.

#### **A. Federalism and the Formation of the States**

New constitutions are written in essentially two different ways: (1) a special convention is selected for the sole purpose of writing the constitution, or (2) an existing branch of government, that is either the legislature or the executive, drafts the new constitution. I include in the second category constitutions written by commissions appointed by and reporting to the legislature or the chief executive. When a sitting legislature or chief executive writes or significantly influences the writing of a new constitution the danger arises that it reflects the (often short-run) political interests of the writers rather than the long-run interests of the citizens. Italy's current constitution, for example, was first drafted immediately following World War II by representatives of the political parties that existed prior to Mussolini's rise to power. It has produced an uninterrupted string of short-lived and ineffective governments containing more or less the same group of politicians. Italian voters have repeatedly expressed their frustration with



the constitution, but electoral reform has lain in the hands of the parliament, and it has refused to make radical changes since they would inevitably adversely affect the fortunes of some of the parties.<sup>32</sup>

In contrast, those writing a new German constitution sought — with considerable encouragement from the United States — a complete break with the past, and their constitutional experiment has arguably been more successful. The US Constitution is widely regarded as highly successful in both preserving democracy and advancing the interests of its citizens. Although the motives of those present at the convention in Philadelphia may not have been totally pure,<sup>33</sup> most of them probably did not expect to hold federal office under the new constitution, and thus could choose institutions without concern about their own political futures. A less well-known success story is that of Costa Rica, arguably the most successful democracy in Latin America. It has had two constitutions since 1812, both written at conventions specially elected for this purpose.<sup>34</sup>

Many new constitutions, like those of the United States, Germany and Costa Rica, are written following a war or revolution. A break with the past is desired, and the *long-run future* interests of the polity are in the drafters' minds. The collapse of communism over the 1989-91 period can be regarded as a monumental event on a par with the fall of the Third Reich or America's defeat of the British. It was so quick and peaceful, however, that in most countries it did not immediately lead to efforts to write new constitutions and install new institutions. Indeed, unlike in countries in which new constitutions follow successful revolutions, in most of the communist countries there were no existing political parties or other organizations that could take a lead in establishing new political institutions. Indeed, in most cases the same *nomenklatura* who were in office *before* communism collapse,

continued to perform their duties afterward.<sup>35</sup> The result was that the basic questions regarding the composition of the polity, its goals and its structure were not discussed and resolved. Only one country, Bulgaria, elected a special assembly to write a new constitution shortly after the transition began, and even in this case the assembly also served as the parliament as the constitution was being written (Bell, 1997, pp. 364-65).

As we noted in Section I, one cannot always assume that all of the people living in close proximity to one another have sufficiently congruous interests and values to make the creation of a polity encompassing them all optimal. Soon after communism's fall Slovenia, Croatia and most of the other republics in the former Yugoslav Federation opted out of it. But *within* each state, no further adjustments were made. In Bosnia Herzegovina the existing ethnic differences made natural boundaries for forming political parties and, unfortunately for its citizens, the initial party leaders chose to win votes by aggravating ethnic differences rather than mitigating them with the result being bloodshed and „a case of failed democratization“ (Burg, 1997). Macedonia waited until October of 1995 to introduce a limited sort of federalism to accommodate its ethnic and religious differences. The violence of the summer of 2001 has shown that these reforms were inadequate, however, and Macedonia has paid the price for its delay in violence and bloodshed. Much of this violence *might* have been avoided, if the constitutional issues raised by Macedonia's ethnic composition had been addressed immediately following communism's collapse. A combination of well-defined individual rights plus strong federalist institutions is the natural — perhaps the only — way of accommodating heterogeneities across different groups. An adequate combination of institutions might have been adopted early on in Bosnia Herzegovina and Macedonia, *if* they had directly addressed the question of

how best to represent the preferences of their citizens at, say, a constitutional convention.

Instead, a cumbersome federalist structure was foisted on Bosnia Herzegovina through the Dayton accords and, *hopefully*, a durable set of federalist institutions and constitutional provisions will emerge out of the negotiations that took place during the summer of 2001.

In contrast Bulgaria's constitution, written by a separately elected assembly, does seem to have successfully accommodated the desires of the large Turkish minority without producing either bloodshed or the dissolution of the country (Bell, 1997, pp. 372-73).

## **B. What System of Representation?**

As we discussed above, logically the former communist countries had two alternative systems of representation from which to choose — a proportional representation system in which each citizen is represented by a party or person whose views come reasonably close to those of the citizen, or a two-party system in which the winning party is guaranteed a majority of seats in the parliament, and thus is able to implement its program. The advantage of proportional representation is that all citizens are fairly represented in the parliament. The advantage of a two-party system is the capacity of the government to act, to institute radical reforms and programs if they are needed.

The former communist countries do not, however, appear to have perceived their choice as one between a two-party and a multiparty system, but rather as between a multiparty and a presidential system (Rupnik, 1999, pp. 239-41). Where strong governments came into place, it was through the creation of a strong presidential system.

Croatia is a good case in point. Franjo Tudjman rose to power by promising to create an autonomous Croatian state (Cohen, 1997). He delivered on this promise, and successfully led the subsequent military actions in which Croatia came involved. Alongside

of the shrinking Yugoslav Federation, Croatia became the strongest presidential system in the region, although Albania, Macedonia and Romania can also be characterized as relatively strong presidential systems over the initial year after communism's fall.<sup>36</sup>

Neither Tudjman, Milošević nor any of the other strong presidents used their authority effectively to implement the radical reforms needed to transform their countries into successful capitalist democracies, however. All can thus be characterized as examples of „failed transitions.“<sup>37</sup>

In other transition countries multiparty parliamentary systems have tended to evolve that resemble those of Western Europe. Unfortunately, this development has also often served to impede the transition process.

A good example is Romania.<sup>38</sup> It has adopted a multiparty list system that effectively makes members of the parties unaccountable to the people. Members of parliament shift from one party to another, so that neither the parties nor their members can be held responsible for the government's policies. The country has adopted a bicameral system with a large and unwieldy lower house (350 members). The result is that at any one point in time many bills are hung up somewhere in the parliamentary system, and the government has not been able to implement the reforms needed for a successful transition.

The result is that Romanian citizens hold the parliament in very low esteem. Mungiu-Pippidi and Ionita (2001, p. 89) liken Romania's political system to that of Italy, and that appears to be an apt comparison in terms of both the effectiveness of the elected governments and their popularity with the citizenry.<sup>39</sup>

Romania may be an extreme case among the transition countries, because its political culture following the collapse of communism appears to have been particularly ill-suited for the transplanting of democracy (Mihăilescu, 1999). But it is certainly not alone

in implementing the reforms needed for successful transition at an excruciatingly slow pace. *All* of the transition countries in Southeast Europe have some form of multiparty, proportional representation system, and where it has not been coupled to a presidential office with strong executive powers, policy drift has often been the consequence.

Stephen Holmes (1995) has emphasized the need for a strong state for a successful transition to capitalism, and thus has championed governmental structures with strong executive powers. The examples of Serbia and Croatia reveal, however, that a strong presidency is not a sufficient condition for a successful transition, and carries with it potential dangers and costs. A two-party system of government could, on the other hand, produce a strong state with a responsible government without placing all executive powers in the hands of one person. This option has so far not been tried in any of the transition countries, and does not even seem to have been seriously contemplated.

### **C. Rights**

All of the transition countries' constitutions contain long lists of rights. Often these appear to have been adopted from other constitutions or from the European Union's list of rights. Many of these meet the normative criteria for a constitutional right set out above — they protect a person's freedom to act in a situation in which a constraint on this action would cause considerable harm to the individual relative to the gain to the rest of the community, the nature of the action is clearly defined, *and* it can be relatively easily protected through judicial action. These include free speech and religious rights, rights to privacy and the like. But essentially every one of the transition

countries' constitutions also contains a set of rights that do not meet these criteria. I shall give but a few examples:

#### Bulgaria

Article 55. Citizens shall have the right to a healthy and favorable environment corresponding to the established standards and norms. They shall protect the environment.

#### Croatia

Article 55. (1) Every employed person has the right to remuneration, ensuring for himself and his family a free and decent life.

#### Hungary

Article 70D. (1) Everyone living in the territory of the Republic of Hungary has the right to the highest possible level of physical and mental health.

#### Romania

Article 38. (3) The normal duration of a working day is of maximum eight hours, on the average.

#### Slovenia

Article 78. The State shall create the conditions necessary to enable each citizen to obtain proper housing.

*Commentary.* Each of the above articles can be criticized for being ambiguous, vacuous, unenforceable or all three. Terms like „favorable environment“ and „decent life“ are clearly ambiguous. For example, does Article 55 of the Croatian Constitution give a person the right to sue her employer or the state, if she feels that her remuneration is insufficient for her to live a decent life? If the courts agree, does the employer or the state have to raise her wages? What is „the highest possible level of physical and mental health“ in Hungary — the level that an average Hungarian can

attain, the richest Hungarian, the richest American?

Many articles in the constitutions of the Southeast European countries, like Article 78 of the Slovenian constitution, appear to define economic or social entitlements. Such entitlements can be defended as elements of an ideal constitution using the arguments for constitutional rights offered above. But as typically stated, they are so vague and/or ambitious that they are unenforceable and thus do not belong in a constitution. By not explicitly defining what „proper housing“ is, or creating an agency to provide it, the Slovenian constitution has transformed what might have been a defensible economic entitlement into a vague hope.

Taken at face value Article 38 of the Romanian constitution is totally vacuous. It merely states a fact and has no more place in the constitution than does a statement that the normal temperature in Romania during August is 27°, or that the average height of a Romanian man is 173cm. If it is intended to be more than vacuous, then what does it imply? Can a Romanian worker refuse his boss's request to work an extra two hours on Friday, if he already has worked 40 hours that week? Can he sue the boss, if he fires him for refusing? If the answers to these questions are yes, Article 38 has teeth, but it also places a constraint on employer/employee relationships that a country in Romania's state of development can ill afford. If the answers to these questions are no, then Article 38 has no place being in Romania's constitution.

One might argue that articles like those listed above are not meant to define enforceable rights, but merely represent harmless expressions of values and hopes for what the future might bring. One might then further argue that these articles bring with them negligible costs and possibly some benefits in terms of garnering support for the constitution. I would disagree, however. To the extent that a constitution contains

vacuous statements of goals and platitudes rather than clearly defined enforceable rights, it ceases to be a document which *enables* individuals to achieve their goals. It ceases to be relevant. It ceases to be an institution that binds the polity together and warrants protection. Once the citizens believe that the constitution is irrelevant and need not be protected, the danger arises that they choose not to protect the democratic institutions that it defines.

#### **IV. The Constitutions of Turkey and Greece**

It may seem odd to group Turkey and Greece together given their history of mutual animosity, but within the group of Southeast European countries their similarities far outweigh their differences. The most obvious difference between these two countries and the other Southeast European countries is that Turkey and Greece have never been communist countries. Their histories as democracies do not begin 12 years ago with the collapse of communism. But, as we shall see, these are not the only constitutional similarities between these two countries. We shall apply the same analytical framework to examine the constitutions of Turkey and Greece as we applied to the other Southeast European countries.

##### **A. Federalism and the Formation of the States**

###### *1. Turkey*

Turkey's current constitution was drafted in 1980 following a period of military rule. Many of the ideas imbedded in it can be traced back to the founding of the modern Turkish state in the early 1920s by Kamil Ataturk who led the Turkish army to



victory over Greece following Turkey's defeat in World war I. For example, the preamble of the constitution commands „respect for, and absolute loyalty to, its [the constitution's] letter and spirit.“ The first entry following this command reads as follows:

The direction of the concept of nationalism as outlined by Ataturk, the founder of the Republic of Turkey, its immortal leader and unrivaled hero;

A bit further down in the preamble appears the following:

The determination that no protection shall be afforded to thoughts or opinions contrary to Turkish National interests, the principle of the existence of Turkey as an indivisible entity with its State and territory, Turkish historical and moral values, or the nationalism, principles, reforms and modernism of Ataturk, and that as required by the principle of secularism, there shall be no interference whatsoever of sacred religious feelings in State affairs and politics;

Although religious freedom is explicitly protected in the constitution (Article 24), it also makes clear in the preamble and Article 14 that religious ideas are not allowed to violate „the indivisible integrity of the State.“ Article 3 declares Turkish to be the official language of the state. In Article 26 dealing with freedom of thought and opinion appears to following exception:

No language prohibited by law shall be used in the expression and dissemination of thought.

The target of this provision is, of course, the Kurdish language used by a large minority of the population living mostly in eastern Turkey.

Thus, Turkey's Constitution does not try to accommodate the heterogeneities inherent in its population, but rather seeks to suppress them. The constitution is obviously not the product of a convention at which representatives of the Turkish majority and the Kurdish minority, and representatives of those favoring a secular state and those favoring an Islamic state took part.

By failing to write a constitution that fulfills the aspirations of all of its citizens —

Turks and Kurds, Islamists, Armenians and secularists — Turkey has let itself in for considerable political turmoil and violence. Since the Kurdish minority is geographically concentrated in the east, one possible way to accommodate their desires without harming the interests of the Turkish majority, *might* have been to introduce a strong federalist system with considerable local autonomy. The constitution does not deal with issues of federalism, these are defined by normal parliamentary legislation, but it is clear that this option has not been pursued. Turkey thus stands out as another example, like those of Bosnia Herzegovina, Macedonia and Yugoslavia, of a country whose constitution has failed to deal with the underlying heterogeneities in the population in a way which avoids significant social conflict.

It should also be stressed, however, that there might be *no constitution* that could accomplish this goal. The outcome of a constitutional convention in which Turks, Kurds, Islamists, Armenians and secularists all took part might well be no agreement on any form of democratic constitution. Ataturk might well have been right in assuming that a modern, capitalistic, democratic state must be a secular state, or at least not an Islamic one. Although Turkey's democracy may look weak as compared to that of other OECD countries, it stands way above that of its Islamic neighbors in the Middle East. Nevertheless, one cannot help thinking that Turkey's democracy would perform better, if it had a constitution that accommodated the differences in its heterogeneous population more effectively.

## 2. Greece

Where Turkey's constitution proclaims Turkey to be a secular state and makes

reference to no specific religion, Article 3 of Greece's constitution informs the reader that „the prevailing religion in Greece is that of the Eastern Orthodox Church of Christ,“ and goes on to discuss the structure of the Church. The second line of the title page of the Greek constitution presents the constitution „In the name of the Holy and Consubstantial and Invisible Trinity.“ The relationship between religion and state is clearly quite different in Greece than in Turkey. Greece is ethnically and religiously a much more homogeneous country than Turkey. Nevertheless, it contains a Turkish minority in the north of more than 100,000 persons, and non negligible Macedonian and Albanian minorities. Greece, like Turkey, has not tried to accommodate differences across subgroups of its population through special constitutional provisions or federalist institutions, but rather to downplay their importance. It does have a somewhat weak federalist structure, however.

## **B. Systems of Representation**

Turkey and Greece both have electoral rules that produce proportional representation systems. Their political histories have been characterized by coalition governments that have often been weak and ineffective. Both countries have had poor records in terms of macroeconomic performance — high levels of inflation and budget deficits. In this respect they are again quite similar.

## **C. Rights**

The Turkish and Greek constitutions both contain all of the basic human rights that we have come to expect in a constitution — religious freedom, free speech,

privacy, etc. Both qualify these rights in significant ways, however. As already mentioned, the Turkish constitution allows the state to ban the use of a language. The first line of Article 28 of the Turkish constitution states categorically that „the press is free, and shall not be censored.“ Later on one reads, however, that

periodicals published in Turkey may be temporarily suspended by court sentence if found guilty of publishing material which contravenes the indivisible integrity of the state with its territory and nation, the fundamental principles of the Republic, national security and public morals.

Article 14 of Greece’s constitution allows the state to seize newspapers and other publications „in case of insult against the person of the President of the Republic,“ or „offence against the Christian or any other known religion.“ Thus, both the Greek and the Turkish constitutions qualify the protection given to fundamental rights to ensure that their exercise does not do harm to the state, and in Greece’s case to the Church.

Both constitutions also contain numerous ambiguous and unenforceable rights.

Thus, in the Turkish constitution we find:

Article 50. All workers have the right to rest and leisure.

Article 56. Everyone has the right to live in a healthy, balanced environment.

Not to be outdone, Article 21 of the Greek constitution places the protection of „motherhood and childhood“ under the State.

What these rights imply in concrete terms is anyone’s guess.

#### **D. State Intervention into Markets**

Perhaps not surprisingly given their histories, all of the constitutions of the post-communist countries contain rather explicit protections of private property and market transactions. For example, Article 74 of Slovenia’s constitution boldly states that „free enterprise shall be guaranteed,“ and later explicitly forbids „restrictive trading practices.“

Article 9 of the Hungarian constitution declares its economy to be a „market economy.“

Article 13 states quite simply, „the Republic of Hungary guarantees the right to property.“

The constitutions of Turkey and Greece, in stark contrast, make little reference to protecting property and market competition, and much reference to the rights of the state to intervene in the economy. Article 17, for example, places „property...under the protection of the State,“ but then immediately qualifies this protection by asserting that rights derived from the ownership of property „may not be exercised contrary to the public interest.“ Paragraph 1 of Article 106 defines an explicit role for the state in planning and coordinating economic activity, while paragraph 2 proclaims that

Private economic initiative shall not be permitted to develop at the expense of freedom and human dignity, or to the detriment of the national economy.

Clearly the drafters of this paragraph did not have much faith in the workings of Adam Smith’s invisible hand.

Article 166 of Turkey’s constitution also explicitly defines a role for the state in planning the economy, while Article 167 commits it to regulating foreign trade.

Moreover, several of the provisions related to economic rights imply active intervention by the state in the market. Article 45, for example, asserts that

The State shall assist farmers and livestock breeders in acquiring machinery... [and] take necessary measures to promote the values of crop and livestock products, and to enable producers to be paid their real value.

Article 47 authorizes the state to nationalize private enterprises when it is in the public interest. Thus, both the Turkish and Greek constitutions authorize much greater scope for the state in interfering with the market economy than do the constitutions of the

former communist countries. Perhaps this helps to explain why the economic performance of these two countries trails that of the other OECD countries.

## **V. Conclusions**

I have sometimes been criticized for placing too much weight on the importance of constitutions. I accept this criticism, but I also believe that one can err in placing too little weight on them. For most transition countries, the shift from communism to democracy happened too fast and too easily for them to be prepared for this transition. Had a long struggle against dictatorship preceded the transition, those engaged in the struggle would have had time to contemplate the kind of democratic institutions that should replace the authoritarian ones. The leaders of this struggle would have been in a position to play a leading role in establishing the new democracies. But the sudden collapse of communism meant that there were no plans for its replacement, and often no obvious choices of people to lead the transition. Since the economic needs of the countries seemed paramount, economic transition took precedence. Existing constitutions were largely left in place, and left until later to be rewritten. In some cases, like Hungary, this has turned out reasonably well. In others, like Romania and most parts of the former Yugoslavia, it has turned out badly.

The thesis of this paper is that it takes more to have a well functioning democracy than merely holding free elections. The rules under which these elections are held, the number of houses of parliament, the relationship between the parliament and the executive branch — in short the whole constitutional structure matters. I think that all of the countries of Southeast Europe might benefit from some constitutional reforms. In some cases the reforms needed are large, as are the potential gains from

the reforms. In some cases constitutional reforms are needed to accommodate ethnic and religious differences among different groups in the country, and will have to take the form of creating strong federalist structures and guaranteeing certain rights. Where this is not necessary, there are still potential gains to be had from streamlining government structures to produce more effective and responsible governments. I have suggested abandoning bicameralism where it exists, and perhaps introducing electoral rules that would produce a two-party system of government.

It is worth emphasizing that such fundamental constitutional changes are unlikely to come about, if the task of rewriting the constitution is left to the existing parliament, which in most constitutions has the authority to amend the constitution. If 12 parties hold seats in the parliament today, then 10 party leaders will lose their jobs if the country switches to a two-party system. They are unlikely to support such a change. Replacing a centralized governmental system like that of Turkey with a strong federalist system like that of Switzerland would greatly reduce the power of the central government. Many members of the central government are likely to oppose such a change for exactly that reason, however beneficial for the Turkish people might be the long-run consequences of such a change. To ensure that a new constitution advances the interests of the citizens, and not just of their representatives in parliament, the citizens — all citizens — should be represented at a special assembly constituted for the sole purpose of writing a new constitution.<sup>40</sup>

## Endnotes







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1. . For further discussion see, Mueller, Tollison and Willett (1972) and Mueller (1996, Ch. 21).
  2. Unanimity is desirable at the constitutional stage to avoid the same sense of discrimination and alienation among those who would be outvoted under a less-than-unanimity rule that would arise by their not being represented at the convention at all. On the importance of unanimity at the constitutional stage, see Buchanan and Tullock (1962) and Mueller (1996, Chs. 5 and 21.)
  3. Of course this situation can also be described as Pareto optimal in that the costs of including all groups in the polity are greater than those of excluding one or more groups. The term *Pareto optimal bliss* would not seem appropriate, however.
  4. I shall generally refer only to public goods, but by these I mean also public services, policies to correct for externalities, and so on.
  5. For further discussion see, Lijphart and Grofman (1984), Mueller (1996, Chs. 8, 10), and Reynolds, Reilly and Grofman (1998).
  6. Schofield (1997).
  7. Powell (1982).
  8. This fact is becoming increasingly apparent even in the United States, where the combination of single-member-district representation and the plurality rule have been dominant at all levels of government since the founding. The goal of "fair" and "equal" representation for blacks put forward by Congress in the 1965 Voting Rights Act has proven devilishly difficult to achieve while adhering to single-member-district representation. Some success in meeting the goal was achieved through creative redrawing of district boundaries to produce black majorities, but the courts have recently turned hostile to this approach.
  9. Those, who prefer slow deliberative forms of government -- like the Founding Fathers of the United States -- to *effective* forms capable of making bold new departures from existing policies, will of course regard gridlock as an attractive feature of the US system. For these individuals the US system of government

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can be seen as combining an attractive feature of PR-government with an unattractive and avoidable feature of existing two-party systems.

10. See Mueller (1989, Ch. 11; 1996, Ch. 9).
11. France has not employed the plurality rule, but rather a double ballot majority system. This system would yield two dominant parties in France, if the same two parties were dominant across the different regions of the country. See, Macridis (1978, pp.93-174), Carstairs (1980, pp. 178-86).
12. Lijphart (1984, 1990); Mueller (1996, Ch. 10).
13. Buchanan and Tullock (1962, pp. 63-91).
14. Caplin and Nalebuff (1988).
15. *The Federalist*, No. 63 (1937, pp. 409-10).
16. See, however, Mueller (1996, Ch. 14).
17. See, Mueller (1996, Ch. 11).
18. See, Mueller (1978, 1984); Moulin (1981a,b); Mueller (1996, pp. 161-64).
19. Mueller (1984).
20. Gwyn (1986) lists *five* different theses justifying a separation of powers of which these are two. The other three are compatible with one or both of the two theses discussed in the text. One also encompasses a separate judiciary, which we discussed above.
21. In practice, since ministers frequently rotate they often have limited knowledge of the functions and operations of the ministry which they nominally supervise. A principal/agent problem exists between the minister the ministry's more permanent and knowledgeable staff. The minister's goal is to carry out the program of the governing party, which may involve changes in the ministry that disadvantage its staff. The staff's goal is obviously to resist any such changes.
22. Huntington (1968, ch. 2).
23. This same fear originally led to the Senate's not being popularly elected.
24. See Schlesinger (1989).
25. See Eyck (1962, Ch. 3), Lepsius (1978, pp. 47-50), Carstairs (1980, pp. 165-6), and Mueller (1996, Ch. 5).

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26. Mainwaring (1992, pp. 113-14).
  27. Diamond and Linz (1989, p. 26). See also Sigmund (1990, pp. 208-10), Valenzuela (1990, p. 66), Lamounier (1990, p. 129), and Mueller (1996, Chs. 3, 18).
  28. Diamond and Linz (1989, pp. 14-15).
  29. See, Rae (1969), Mueller (1989, Ch. 6).
  30. See Mueller (1991) or Mueller (1996, Ch. 15).
  31. Most instances but not all. Free speech is an issue that has the characteristics for which unanimity is likely to be the optimal voting rule. The publishers of pornography might be willing to vote for a ban on certain forms of pornography, however, if offered a high enough bribe by the rest of the community.
  32. For further discussion of Italy, see Spotts and Weiser (1986) and Hine (1988). For other examples and references, see Mueller (1996, Ch. 21).
  33. See, Beard (1913), McGuire and Ohsfeldt (1986), and McGuire (1988).
  34. See, Ameringer (1982) and Seligson (1990).
  35. See, Parrott (1997, p. 17), Bell (1997, p. 359), Tismaneanu (1997, p. 403) and Rupnik (1999, pp. 233-35).
  36. See, Pano (1997), Perry (1997) and Tismaneanu (1997).
  37. Miller (1997) uses this term to describe Serbia. Also see again Cohen (1997).
  38. See, Mungiu-Pippidi and Ionita (2001).
  39. Romania's new prime minister, Adrian Nastase, has given rise to a bit more optimism. See, „The End of the Tunnel, Perhaps,” *Economist*, July 28, 2001, p. 33.
  40. Bulgaria's constitution provides for separately elected constitutional assemblies for major constitutional changes.