

COMPARATIVE CONSTITUTIONALISM  
IN CENTRAL EUROPE

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*The book series has been established and is published in cooperation with the Budapest-based Ferenc Mádl Institute of Comparative Law.*



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# COMPARATIVE CONSTITUTIONALISM IN CENTRAL EUROPE

*Analysis on Certain Central and  
Eastern European Countries*

*Edited by*  
Lóránt CSINK and László TRÓCSÁNYI



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## | PREFACE |

Is there anything special in the constitutionalism of Central-Eastern Europe? This might be the key question of the volume. The legal and constitutional histories of the region date back to many centuries. While one of the earliest sources of constitutionalism, the Golden Bull from 1222 originated in Hungary, the first constitution of Europe is said to be the 1791 Polish Constitution. However, largely due to geopolitical reasons, the Central and Eastern European countries have faced trials and tribulations. Many times throughout history, these countries have lost their self-determination. However, the past couple of decades turn out to be an exceptional period that has allowed them to control their own destinies once again.

One may observe that after the collapse of communism, post socialist countries made steps towards the “West” and made strong efforts to walk on the path of human rights, rule of law and capitalism. The path seems to be a rocky one; it is hard to walk on but, as we believe, this is the way to the goal. The suggestion could be nothing else but ‘keep walking’.

Thirty years after the transition, when it might be pointless to differentiate “old” and “new” democracies, it is still worth analysing the peculiarities of the constitutionalism of the region.

The volume analyses eight countries: Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia. Seeking for peculiarities of constitutionalism one must consider constitutional identity. And for identity, we need to analyse history and culture. Therefore, Part I describes the countries’ constitutional history and Part II makes institutional comparison.

The mission was to make an “About Us To Everyone” volume. Scholars from the specific countries introduce their own constitutionalism in Part I, while Part II invited Hungarian scholars to make comparisons on certain aspects. Yet we hope that the volume is not only for our region but to everyone who wish to have a better understanding of the countries in question.

We are grateful for the support of the Ferenc Mádl Institute and the Central European Association for Comparative Law who launched and supported the project. We are also grateful to Orsolya KÁLMÁN, Eszter BENKŐ and Gabriella ÉRDI for their contribution.

Laus viventi Deo.

June 2022

The editors



## | FOREWORD |

László TRÓCSÁNYI

Attila József, a well-respected Hungarian poet from the early twentieth century, wrote the following renowned lines: “in vain you bathe your own face in yourself, it can be cleansed only in that of others”.<sup>1</sup> We live in a world with so many different colours and shapes in terms of tradition, culture, religion, language and philosophy, and ways of interacting, doing business, nurturing art or creating societies, as well as economies and governmental arrangements. Thus, one important eternal lesson of this short passage is that the way to better understand ourselves is to know others in our vicinity. Similarly to many areas of life, this is also true with regards to the law. The way to better understand our own legal system and legal culture or certain institutions is to carefully and systematically compare them with those of other countries.

This type of legal comparison has opened a window to foreign legal cultures and approaches that help us be aware of both the fundamental characteristics of our legal system and legal culture and the existing differences throughout the world. The method of comparative science of law has a long-standing tradition in the fields of law and political sciences. Its modern theoretical history dates back to René David, the French professor of law who classified the legal systems into five legal families – Western, Muslim, Hindu, Chinese, Jewish and Soviet –according to their ideological, theoretical and cultural background. Based on his famous discoveries, tens of thousands of law students around the world learn the difference between the role of judges in the common law and in the Romano-Germanic system, whereby common law judges find the law and their counterparts only apply it. While in one part of the world the objective of the legal procedure is to provide avenues to enforce rights, in other cultures, its reconciliatory function is more dominant. To bear and keep arms is considered a fundamental right and an ultimate guarantee of freedom in one legal culture, but it is seen as illegal and a source of potential threat in others. In one form of governmental arrangement, impeachment serves as a counterbalance against the executive power, while in others, the establishment of a no confidence vote provides a much lower threshold; this list, of course, can go on. However, the practical usage of legal comparison goes back much further. One notable example is the Philadelphia

1 “Hiába fürösztyöd önmagadban, Csak másban moshatod meg arcodat”. English translation by Zsuzsanna Ozsváth.

Convention held in the summer of 1787, during which British and French constitutional experiences had been taken into consideration when various constitutional visions were discussed by Alexander Hamilton, George Mason, and James Madison, among others. The result of this hard-fought summer was what Benjamin Franklin famously called, in response to a bystander's question, "a republic if you can keep it". A couple of decades later, the French political philosopher Alexis de Tocqueville set out on an American journey to explore how the American system was implemented, and subsequently published the book *On Democracy in America*. One of the major objectives of this influential book was to help France shape its governmental arrangement by opening a window of comparison with the American system.

The method of comparative law is necessary to evaluate legal cultures and attitudes, legal systems, or their legal institutions. It does not and should not only include the comparison of the specific legal rules themselves. As Konrad Zweigert famously argued, "the basic methodological principle of all comparative law is that of functionality". Accordingly, legal provisions shall be analysed and compared within the social and economic context in which they prevail, and the process of comparison shall answer the question of how this legal provision works. Legal rules and systems cannot be separated from their underlying cultural and social reality; comparing ours with others' does not only help position and evaluate each other's legal landscape, but it also provides a potential tool to remedy weaknesses or make improvements. Alternatively, the comparison can highlight the differences that eventually define what constitutes separate identities. For various reasons, applying the method of comparative science of law has increasingly become a standard practice in theoretical legal research as well as in the practice of law. With the astonishing rise of globalisation and the spread of cutting-edge communication technologies, the world has become much smaller, and its various regions and cultures are well within our reach. Studying and comprehending them can thus be accomplished much faster and more easily than in any earlier periods of human history. Comparative legal research is thus committed to satisfying a natural, intellectual curiosity about distant and less distant legal cultures and legal systems. However, this intellectual curiosity is not self-serving. In an age of globalisation, legal systems also compete with each other in most areas of economic and societal life; e.g. they compete to attract the largest or most efficient investments or to provide their citizens with smooth and timely dispute resolutions, their undertakings with efficient commercial regulations, or their consumers with strong customer protection and responsive antitrust regulation. This list ranges from labour law to family law and to constitutional guarantees. Sometimes, the ultimate goal is to adopt the best possible rule, and sometimes, it is to mitigate some of the underlying weaknesses; other times, the goal is to be aware of the unique domestic regulation and conceive it as part of the identity of a particular constitutional system. Regardless of the concrete political objectives, the comparative method is an essential instrument to conduct profound analyses in today's environment.

Comparative law can serve the interests of both the legislation and the process of applying the law by courts or other institutions such as the antitrust authority.



The comparative method can facilitate and help the legislator with their aspiration to develop some specific areas or provisions of the law by providing information on the design and functioning of these areas in other countries or cultures. In this case, comparative legal research answers the questions of what the experience of other countries is and how it can be applied. On the other hand, a comparative legal analysis can be also useful for courts or other institutions that apply the law. Even though courts cannot base their judgements on the case law of other countries' courts –since the legality of their decisions must be based on their own law – other countries' relevant landmark decisions or a tendency of case law can serve as an argument to support a certain decision.<sup>2</sup> As they are often called 'negative legislators', constitutional courts or other high courts with equivalent competences have a somewhat larger room to take into consideration the comparative method. As a former Justice of the Hungarian Constitutional Court, I have first-hand experience with the Court being committed to explore the case law of other influential courts when deliberating on major constitutional questions, such as freedom of speech in public debates or the essence of constitutional identity. Furthermore, due to the increasingly fragmented nature of international law, courts established by various international treaties have also increasingly used the comparative method to consider each other's conceptions of specific questions. As shown by the example of the Inter-American and European Courts of Human Rights, this has led to quite a significant number of fruitful interactions, which have resulted in legal development. However, the example of the European Court of Human Rights and the Court of Justice of the European Union is sometimes quite the opposite as they often signal that they are walking on separate paths even when assessing the same legal question.

One of the reasons why this research book is highly valuable and relevant is that the comparative legal method has gained remarkable significance within the European region. The legislation process of the European Union – through the joint exercise of competences – must take into consideration the constitutional systems and cultures of the various member states. Furthermore, the keystone of the European Union's legal order is based on a judicial dialogue among courts of the member states and the Court of Justice of the European Union, while the system of the European human rights protection is also built on the principle of subsidiarity and on an atmosphere of dialogue among the European Court of Human Rights and constitutional or other high courts of the member states. Therefore, the efficient application of the comparative legal method is key to providing mutual understanding during this dialogue, which is of utmost importance for a successful and harmonious European cooperation. The memorable words of Attila József are especially true in Europe, where comparative interactions are unavoidable, even though they should not lead to unification or homogenisation.

2 Csink, L. (2017) 'Pragmatikus összehasonlítás: az összehasonlító módszer gyakorlatias megközelítése' in Schanda, B., Csink, L. (eds.) *Összehasonlító módszer az alkotmányjogban*. Budapest: Pázmány Press, pp. 21–22.

This research book intends to guide readers through an uncharted European territory, that is, the comparative analyses of the constitutional intuitions and attitudes of the Central European and Western Balkan countries. Even though this region is quite diverse in terms of culture, tradition, religion, and language, its countries have much in common due to their geopolitical location and shared history. As Soviet satellite states, they all underwent the forced and failed attempts of communism and of a centrally planned control and command economy. Around three decades ago, they were all liberated from the Soviet military occupation and subsequently changed their regimes to establish free constitutional democracies, introducing fundamental constitutional institutions and a certain attitude of economic regulation in hopes of being able to soon join the European integration. Nevertheless, they are all committed to preserving their own unique cultures, languages and historical traditions, which are well reflected in their constitutional developmental paths. In light of this background, this research book attempts to present the fundamental elements of their constitutional systems through a comparative lens. In this spirit, the chapters include comparative discussions on a wide variety of questions, such as this region's constitutional identity and values, theory of separation of powers, legislative, executive and judicial powers, governmental arrangements, institution of the head of state, electoral systems, protection of the constitutions, fundamental rights' adjudication, national minorities and unique historical accounts. This research book provides a truly unique, rich, and insightful journey into comparative legal analyses of the Central European and Western Balkan states' public law institutions. I wish you a joyful read and a rich journey in this fascinating region!

# | PART I |



# The Legacy of the Habsburg Empire in the Constitutional Traditions of Successor States

István SZABÓ

## ABSTRACT

The states established in the territory of the former Austro-Hungarian Monarchy after World War I opened a new chapter in the history of the region. However, the problems arising from the heterogeneous ethnic composition remained the same as before 1918. The question was: can a state organization be formed in which all nations can preserve their own identity? This was also the main goal of the Habsburg Empire after the “spring of the peoples” of 1848. The study reviews the reform efforts of these 70 years, and what particular steps and reform plans were taken after 1848 to resolve ethnic tensions.

The most important issue was to establish the internal division of the empire, along historical or ethnic boundaries. The starting point was how historical boundaries could be transformed into ethnic ones. The nations of the empire may agree with each other, but if they do not, the ruler must make that decision. This formed the second essential question: is the reform of the empire based on popular sovereignty or monarchical legitimacy? The third problem was the model of state organization formed by the interior of the empire. They should either form a loose federation of states, or a federal state with a closer relationship.

The most significant reform implemented was the 1867 Compromise, which followed historical boundaries, rested on the principle of popular sovereignty, and created a loose state union. However, many nations of the empire were dissatisfied with this. Subsequent internal reforms (the Croatian compromise on the Hungarian side and the Moravian or Galician compromise on the Austrian side) could not solve this properly either.

## KEYWORDS

historical boundaries, ethnic boundaries, popular sovereignty, monarchical legitimacy, federal states, federation of states, compromise.

## 1. Introduction

The emergence of newly independent states following World War I and the collapse of Austria-Hungary marked a new chapter in the history of Central Europe, although the difficulties stemming from the region’s ethnic heterogeneity did not disappear after 1918. The most pressing question was whether a constitutional design respecting the national aspirations of all ethnicities was conceivable. This was also the aim of the Habsburg empire since the ‘spring of nations’, a series of revolutions in 1848.

The national movements intertwined with these revolutions had made it apparent that if an ethnic group was unsatisfied with its prospects within the empire, it would seek separation. Thus, the inability to reconcile the ethnic tensions could lead to the collapse of the empire – as was the case in 1918. Nevertheless, the solutions proposed before 1918 to overcome this threat still deserve to be examined.

This chapter summarises the reforms and unimplemented reform plans developed in the seven decades between 1848 and 1918, which attempted to ease ethnic tensions and to hold the empire together. The most notable is the 1867 Austro-Hungarian Compromise and the subsequent inner reforms it entailed in the two constituent states of the dual monarchy. In Austria, these were the compromises in Moravia, Bukovina and Galicia, and in Hungary, the compromise with Croatia in 1868. Additionally, since the Austro-Hungarian Compromise left most nationalities disgruntled, this chapter delineates alternative reform proposals to replace the Compromise, although, since Austria-Hungary lasted until the collapse of the Habsburg empire, these suggestions never materialised.

Two terminological issues require clarification. First, the term ‘compromise’ refers to several constitutional reforms, as illustrated in the previous paragraph, and it was also invoked in several unrealised reform ideas. Likewise, the German term ‘*Ausgleich*’ is used in Austrian literature. Notwithstanding, this notion does not have a uniform legal definition; e.g. while the 1867 Austro-Hungarian Compromise established a new confederation of states, the Hungarian-Croatian Compromise only granted territorial autonomy to Croatia. Thus, since all these so-called ‘compromises’ aimed to resolve ethnic tensions, the notion carries sociological connotations. The second terminological issue concerns the meaning of ‘Habsburg empire’ or ‘empire’ without adjective: whether the empire was a state, a confederation, or merely a personal union remains contested. In the present chapter, these terms apply to territories and provinces under the rule of the Habsburg dynasty in a geographical rather than constitutional sense – in other words, they describe a geographical area, not a state.

## 2. Historical background

The idea to consider nations as the constituent elements of states appeared in the eighteenth century. Earlier, statehood had been connected to dynasties, with the cohesive force being the sovereign, and state territory was determined by the area that the ruling dynasty could acquire through occupation, strategic marriages, and inheritance. By the nineteenth century, the Habsburg empire was the only dynastic state (see Section 6), although the desire for nationhood – and consequently, statehood – was growing among its peoples. Ethnic groups differed in how developed their claim for an independent nation state was. Some nationalities had previously existed as states and thus already had some constitutional traditions. The difference in how nations became parts of the empire also set them apart; the inner borders of the empire had been determined and preserved since the dynastic age, preceding

nationalist considerations (see Section 3.1), and the region had seen significant inner migration, contributing to its ethnic heterogeneity.

Parts of the empire with pre-existing constitutional traditions were striving to reestablish their statehood. These states, existing since the Middle Ages, were not predicated on the idea of the nation state. Nevertheless, by the nineteenth century, the intention to uphold constitutional traditions also included the wish for a homogeneous nation state. Consequently, nationalities with previous constitutional frameworks were in a more advantageous position to achieve national independence. The most successful was Hungary with the Austro-Hungarian Compromise in 1867, which recognised the country's historical constitution and restored the state's territorial integrity (which had been disrupted since the sixteenth century) within a new nation state framework. The Czechs harboured similar – albeit unsuccessful – ambitions as the idea to create a tripartite monarchy remained unrealised. Other nationalities, lacking historical precedents of statehood, were falling behind in the struggle for national independence while also cherishing nationalist ambitions.

After the 1848 revolutions, attempts of centralisation appeared in the 1849 constitution, issued by the emperor, and later, in the 1860 and 1861 constitutions, which established a central parliament with the power to introduce universally binding legislation in subjects falling within its competence, while the remaining issues were to be addressed in regional parliaments. The emperor – especially with the division of Hungary – sought to create separate provinces for the nations of the empire; however, due to the numerous ethnically heterogeneous areas, this goal could not be fully implemented. In these regions, the aim was to prevent a majority-minority dynamic between ethnic groups instead (i.e. to not allow the dominance of one nationality over the others) as this incentivised the separatist tendencies of national minorities.

The Austro-Hungarian Compromise of 1867 superseded this model of state building with regards to Hungary, and the country became a nation state. Conversely, the Austrian Empire remained a dynastic monarchy. The reform plans examined in this chapter were born within this framework: some accepted the Compromise of 1867, while others aimed to revise it – albeit, as mentioned, without success.

### **3. The main pillars of the reforms**

#### ***3.1. Internal borders within the empire: Historic precedent vs. ethnic composition***

The Habsburg empire had always consisted of multiple states (provinces), and thus, a multi-state framework was the starting point of each reform proposal. Within this framework, the most important questions were the number of constituent states and whether their borders should respect historical precedent or ethnic composition. These were the primary factors to determine the ethnic homogeneity of the regions. As mentioned in the introduction, all suggested reforms aimed to reconcile ethnic tensions and restrain separatist intentions by permitting ethnic groups to further their national identity within the empire.

The idea to redraw borders along ethnic lines carried the advantage of allowing most ethnic groups to establish their own nation state, and it appeared to be a more efficient solution to interethnic peace than ensuring minority rights in multinational states. Nevertheless, forming borders along ethnic lines entailed the empire's transformation into a federation of nation states. According to Aurel Popovici, the best-known proponent of this reform,

the two most important principles are the need for federal state structure and the importance of the regional division of different ethnic groups. In other words, nationalities shall be emancipated in the Monarchy, by creating separate nation states on the territories populated by them.<sup>1</sup>

Popovici's reform plans will be reviewed later (see Section 4.2).

While this concept might have been tempting in theory, it could have hardly been implemented without resistance. Even after the collapse of Austria-Hungary, unceasing struggles to determine borders in the region persisted throughout the twentieth century. The Polish-Ruthenian border in Galicia, the Ruthenian-Romanian border in Bukovina and the Serbian-Croatian borders in the Western Balkans all illustrate the difficulties of separating territories based on ethnic composition.

In Hungary, autonomy could have only been granted to ethnic groups by tearing apart the territory of the state. It was a particularly delicate issue as Hungarian territorial integrity had just been achieved by the 1867 Compromise, after more than three centuries of fragmentation. Consequently, in the case of each suggested reform plan, it was a watershed issue whether the concept concerned the empire as a whole or only the territory of Austria, and the idea of a tripartite monarchy primarily based on historically crystallised borders had both versions (see Section 4.1). Popovici's concept concerned the whole empire, including Hungary. The Manifest issued by Emperor Karls I (King Charles IV of Hungary) on 16 October 1918 also proposed national borders – but only with regards to Austria.<sup>2</sup>

The question of historical vs. ethnic borders was also addressed by the peace negotiations of World War I, although quite inconsequently. The prevailing principle was determined by the power of the concerned parties in each instance; e.g. the new Republic of Austria wished to establish its borders according to ethnic composition. While its claim was unsuccessful against the newly established Czechoslovakia, it could assert this principle against Hungary. Therefore, on the one hand, the Austro-Czechoslovak border was drawn in line with the historical provincial borders (the Bohemian Kingdom, the Margraviate of Moravia); on the other hand, the predominantly German northwestern regions of Hungary became part of Austria.

1 Popovici, 1906, p. 304.

2 Völkermanifest, 1918, Wiener-Zeitung.



### 3.2. State structure

The models of state structure can usually be defined by the relationship between the federal/central and state/regional levels, how competences are shared among them, and more importantly, which body is empowered to determine how these competences will be shared.<sup>3</sup> This latter power is the competence of competences (*Kompetenz-Kompetenz*).

Three combinations can be deduced with regards to who is endowed with this power: (i) *Kompetenze-Kompetenz* solely belongs to the federal/central level; (ii) the federal state and the member states exercise this power jointly; and (iii) member states have the competence of competences. The first model is a decentralised unitary state, the second creates a federal state, and the third constitutes a confederation. In the last case, the statehood of the higher level is uncertain since the relationship of the member states and their agreements to share competences are governed by international law.

When examining the possibility to transform the structure of the empire, another angle to consider is the level empowered to make constitutional changes. Can reforms be initiated by the federal/central level exclusively, or should the consent of the member states/provinces be obtained? Alternatively, is it merely an international agreement between member states? Unlike the former two, this latter version does not attribute statehood to the higher federal level.

In the case of the Habsburg empire, the issue of ethnic vs. historical borders must also be re-examined when debating models of state structure. The constituent states of the empire had historically set borders; therefore, establishing new territorial units based on ethnicity could have only been imagined at the federal/central level, which presupposes the model of the decentralised unitary state. In any other model, redrawing borders according to the principle of ethnicity – and consequently dividing already existing states – would have required the consent of said states. This was, of course, highly improbable.

Nevertheless, the idea of structural reforms led by constituent states was destined to fail for another reason, namely because it was uncertain which provinces should be considered constituent states. Following the 1867 Compromise, these were Austria and Hungary, while other nationalities in the empire did not accept this status quo.

### 3.3. The source of legitimacy for reforms: Popular sovereignty vs. monarchy

Apart from the structure of the empire, the source of constituent power implementing the reforms was also a point of contention. The question was whether it should stem from monarchic traditions or popular sovereignty; the first presupposes a sovereign monarch, while the latter is predicated on the existence of an elected body.

As previously discussed, proposing a reform plan both acceptable for every nationality and bearing the consent of constituent states was practically impossible. Thus, the only viable option for structural reform was through a decision at the

3 Meyer and Anschütz, 1919, pp. 45–54.

central level. The question of popular sovereignty or the monarchy was concerned with whether this central body should be an imperial constituent assembly or the emperor.

Since it is tempting to associate the former institution with democracy and the latter with dictatorship, this question might seem redundant, and it might appear to inquire whether reforms should have been realised by democratic or dictatorial means. From this perspective, the answer seems to be self-evident. However, considering the unique political and constitutional structure of the Habsburg empire, the answer was opaque because it was far from clear that its peoples could reach a unanimous consensus on reforms.

Concerning the realisation of his reform plans, Aurel Popovici suggested the following:

The question arises whether the Austrian and Hungarian Parliaments would ever vote for such a constitutional reform. It seems certain that such a transformation cannot be achieved this way. Even if Austria and Hungary had the fairest franchise laws, and even if these statutes were conscientiously enforced in all respect, it is still uncertain whether a just constitution respecting every well-founded ambition of all nations was adopted.<sup>4</sup>

Therefore, Popovici proposes another solution: “The age-old discord among the nations of the empire can only be resolved – justly and equitably for all parties – by an impartial arbiter. This arbiter shall be, must be the Emperor”.<sup>5</sup>

Consequently, the leading role of the emperor was necessary for structural transformation, and not only because of the absence of a legislative body properly representing every nationality of the empire. According to Popovici, whether nationalities – all with well-founded claims for nationhood – could reach a satisfying agreement was also uncertain.

Having reservations about the viability of structural reforms through national legislatures cast a new light on the legitimacy of the monarch. Nationalities who did not achieve their desired status by the 1867 Compromise regarded the power of the emperor as the best means to fulfil and protect national aspirations.

As to the previous point, as the only model where federal transformation can be realised at the central level, monarchic legitimacy presupposed a unitary state. In practice, this model was not in line with the constitutional framework of the 1867 Austro-Hungarian Compromise adopted by the parliaments of the two constituent states.

4 Popovici, 1906, p. 304.

5 Popovici, 1906, p. 328.

## 4. Unrealised reforms

The previous three points were the most important pillars for resolving the challenges of the Habsburg empire, which stemmed from its ethnic heterogeneity. They were also at the foundation of the reforms introduced by the Austro-Hungarian Compromise. However, before embarking on the examination of accomplished reforms, a few unrealised reform proposals deserve to be mentioned.

### 4.1. *'Tripartite' instead of 'bipartite' monarchy*

Multiple concepts were introduced on transforming the 'dual' monarchy (consisting of Austria and Hungary) to a 'trial' one (trialism). One plan, propagated by the Czech territorial diets since 1871, separated three hereditary lands of the Habsburg dynasty (*Erblandes*) – the Kingdom of Bohemia, the Margraviate of Moravia and the Duchy of Silesia – from the Austrian Empire to form the third state of the monarchy. At the beginning of the twentieth century, another idea came to light, supported by Archduke Ferdinand, to form the third part of the 'trialist' model from the South Slav region of the empire.<sup>6</sup>

The Czech concept would have followed historical borders. Dividing the region along ethnicity required the division of Bohemia and Moravia and was thus fervently opposed by the Czechs. Conversely, German nationals in the territory opposed the 'trialist' model since it threatened to cast them in a minority role in the newly established state. For them, living in the Austrian monarchy, with its heterogeneous ethnic composition, was favourable to being the minority in an otherwise homogenous nation state. The Czech 'trialist' model respected the framework of the Austro-Hungarian Compromise, transforming the empire into the personal union of three independent states, and rendering the problems of ethnic minorities to the internal affairs of each state. As for the source of legitimacy of the proposed changes, parliamentary reforms were unlikely as they would have required the consent of the Imperial Council in Vienna, the Hungarian Diet in Budapest and the diets of the three *Erblandes*. Hungary did not support the trialist transformation, and the similarly averse German minority also had substantial influence in the Moravian diet; consequently, the concerned parties had their hopes in the emperor. Franz Josef was in the crossfire of the Czechs, who wanted an independent statehood, and the Germans, who wanted to remain a part of the empire.

The two best-known concepts of South Slavic trialism are the maps of Heinrich von Hanau from 1909 and Nikola Zvonimir Bjelovučić from 1910,<sup>7</sup> which envisioned roughly the same territory as the possible third constituent state of the empire. Both maps were to set out ethnic borders between Austria and the new south-eastern state

6 Brauner, 2003, p. 163.

7 Brauner, 2003, p. 163.

instead of the existing borders of the Erblandes; moreover, they both included the annexation of Croatia, affecting the territory of the Kingdom of Hungary.

Neither version of the trialist model could create ethnically homogenous states. While the Southeast European version would have created a state inhabited for 90% by Croats, Slovenes, Serbs and Bosnians, this did not solve the issue of ethnic heterogeneity in the remaining two constituent states. In the Czech/Bohemian version, the problem persisted in all three states; consequently, whether the delicate issue of national minorities fell within the power of the constituent states or the empire remained a pressing question in both solutions. In the Czech version, this issue fell under the competence of the states. In the case of the South Slavic versions, on the map made by Bjelovučić, an autonomous Italian territory was indicated. This solution necessarily presupposed the power of the monarch to create such a territory. Hanau's plan also set out 21 autonomous provinces within the tripartite empire, mostly along ethnic lines. This latter plan evidently excluded the possibility of a confederate structure since it bestowed the power to create these provinces upon the monarch rather than the legislative bodies of the constituent states. The likelihood of its parliamentary acceptance was correspondingly small.

#### ***4.2. The subdivision of the empire along ethnic lines (Grand-Austrian United States)***

Apart from the plans of a tripartite empire, Aurel Popovici's proposed reforms are also worth examining. As presented earlier, he envisioned the future empire as a federation of states created along ethnic, rather than historically crystallised, borders. He considered the realisation of this plan via the emperor and not the national legislatures. Nevertheless, while he recognised 11 constituent nationalities in the empire, he envisioned 15 member states, with Germans living in three, and Magyars and Italians living in two separate states each. Therefore, his reform proposal did not aim to unite every member of a particular nationality into one independent nation state, but rather, it gave statehood to every ethnically homogenous territory. In this framework, a nationality living in more than one part of the empire would have had more than one state. This concept also required nationalities with existing nation states outside the empire, (Serbs, Rumanians, Italians and Germans) to abandon the ambition to unite their people into one country.

Popovici's concept allowed for a more centralised and bureaucratic administration than the Austro-Hungarian Compromise, positing the emperor as head of state in both the empire and in the member states. Competences between the federal and state levels were to be shared by an imperial parliament and the national diets/parliaments. The federal level had wider competences than the foreign, defence and financial policies set out in the Austro-Hungarian Compromise,<sup>8</sup> and it resembled the 1849 constitutions issued by the emperor. In sum, this reform proposal would have restored the pre-1867 constitutional framework while creating new, autonomous nation states.

| 8 Popovici, 1906, pp. 317–327. |

## **5. The constitutional framework of the Austro-Hungarian Compromise of 1867**

Focusing on the realised reforms when examining the Compromise of 1867 reveals the following characteristics within the dimensions outlined in Section 3: (a) the empire comprised two constituent states with historical borders; (b) the two states formed a personal union where the monarchy itself did not have statehood; and (c) the constitutional framework rested on parliamentary legitimacy, which was confirmed by the legislative bodies of both constituent states.

These characteristics lead to the following conclusions: (a) due to the historically determined borders, the two constituent states remained ethnically heterogeneous; (b) due to the confederal constitutional framework, the issue of nationalities (and the possibility to create autonomous provinces for them) remained within the competence of each state, without the possibility of central intervention; and (c) due to the parliamentary foundations, the emperor did not have the power to decide on the nationality question.

As previously delineated, the unrealised reform proposals sought to change these three pillars: achieving ethnic borders, giving the competence of determining these borders to the central level, and entrusting the monarch with the power to make the decisions pertaining to nationalities. In fact, the dissatisfaction following the Compromise sparked the subsequent – fruitless – reform plans, and these three elements formed the constitutional pillars of these concepts.

## **6. Typological analysis of the constituent state**

As mentioned, the issue of nationalities fell within the competence of each state. These two parts had different structures: Austria with a federal structure and Hungary a unitary state one. Furthermore, Austria was a dynastic state, while Hungary had the characteristics of nation states.

As delineated, the stability of dynastic states did not rest on the homogeneity of the nation but on the nimbus of the dynasty; therefore, achieving ethnic homogeneity was less of a priority. Accordingly, no nation in the Austrian Empire represented a ‘majority’ casting the other nations in a minority role. Tensions arising from ethnic heterogeneity were more salient at the provincial level, and consequently, their resolution required regional compromises rather than holistic solutions.

Since Hungary was a unitary state, ethnic questions concerned the central, rather than the regional, level. The most this state structure could have offered to nationalities was some degree of territorial autonomy. Otherwise, minority protection only amounted to linguistic rights – a significantly weaker means to protect national identity.

## 7. Compromises within the Austrian Empire

### 7.1. General characteristics

The Austro-Hungarian Compromise merely suspended the effect of previous constitutions with regards to Hungary. Nevertheless, they remained in force in Austria, although with certain amendments. Similarly, the '*Landesordnung*' (Provincial Regime) of 1861, issued by the emperor, remained in effect in every region as the Provincial Constitution, and subsequent provincial compromises were implemented by their amendments. In substance, these compromises aimed to reach an agreement between nationalities living in the same area, to ensure the mutual protection of their national culture. They reflected the dynastic characteristics of the Austrian Empire: there was no central movement to create a nation state, which threatened the national identity of ethnic minorities and compelled them to strive for autonomy. On the contrary, in Hungary, the main initiative of the Croatian-Hungarian negotiations was Croatia's desire for autonomy.

Since the provincial constitutions of 1861 were created by the emperor and not the provincial diets, they were, in large part, uniform; the provincial diets were all similarly organised, with representatives elected in three '*Curias*'<sup>9</sup> and with a limited franchise, and the nationality of the elected representatives often did not reflect the ethnic composition of the people they represented. Therefore, the most common element of regional compromises was to create ethnic parity in the provincial diets, which was usually achieved by setting a quota for each nationality in the diet and establishing separate voting lists for all ethnic groups, allowing them to vote their own representatives. In this way, while the possibility of multiple parties was maintained, it did not disrupt the proportionate participation of nationalities.

### 7.2. The Moravian Compromise

The Moravian Compromise of 1905 granted half of the seats in the diet to German representatives and the other half to Czech ones.<sup>10</sup> Correspondingly, the provincial Election Act<sup>11</sup> created an equal number of constituencies similarly divided between the two nationalities. While most of the population was Czech (72% in the early twentieth century), the previous election system favoured German nationals, allowing them to take control of the first curia, comprising of landowners, and to have the majority in the second curia as well. In time, more and more Czech representatives gained seats in the second chamber, and the 1905 Compromise also largely assisted in appeasing ethnic disagreements. In addition to ensuring ethnic parity in the diet, the Compromise guaranteed linguistic rights, i.e. the equality of the Czech and German

9 The three curias encompassed the representatives of the great landowners, the chamber of commerce and designated towns, and the rural communities.

10 LGVBI. für die Markgrafschaft Mähren 1906/1.

11 LGVBI. für die Markgrafschaft Mähren 1906/2.

languages<sup>12</sup> and equal opportunity to national education for both ethnic groups.<sup>13</sup> In practice, the Moravian Compromise was created by four acts of the Moravian diet (equal allocation of parliamentary seats, new election procedure, linguistic rights and right to education).

The linguistic rights act recognised two official languages in Moravia; this had the most palpable effect in public administration, where two parallel bureaucratic systems operated, allowing everyone to participate in proceedings in their native language. The right to national education also resulted in separate educational systems for the two nationalities.

### ***7.3. The Compromise in Bukovina***

The Bukovinan Compromise in 1910–1911 also created ethnic parity in the legislative body, although it required balance among four nationalities: Ruthenian, Rumanian, German and Polish.<sup>14</sup> The solution was to create four separate systems of electoral districts by a new Election Act.<sup>15</sup>

### ***7.4. The Galician Compromise***

In Galicia, the Compromise was brokered by Poles and Ruthenians only weeks before the start of World War I. Similar to the Germans in Moravia, the past centuries in Galicia had allowed Poles to enjoy an advantageous position, having almost total control in the province. Consequently, the first order of the Compromise was to rearrange the ethnic composition of the diet, allocating 166 seats to Polish and 62 to Ruthenian nationals.<sup>16</sup> The proportion of 73% to 27% still did not reflect the ethnic composition of the region, which comprised 58% of Polish and 40% of Ruthenian nationals. Nevertheless, this allocation was a major advancement in representation, although it also meant that this advancement was slow and organic rather than abrupt and radical. Apart from the allocation of seats in the diet, the Compromise included educational reforms, by providing for the creation of a Ruthenian university, and a system of Ruthenian secondary education.<sup>17</sup>

## **8. The Hungarian Kingdom**

### ***8.1. The Croatian-Hungarian Compromise***

Croatia became a part of the Kingdom of Hungary in the eleventh century, with the Hungarian king as its sovereign; nevertheless, it always maintained a certain degree of autonomy, the framework of which was finalised by the Croatian-Hungarian

12 LGVBl. für die Markgrafschaft Mähren 1906/3.

13 LGVBl. für die Markgrafschaft Mähren 1906/4.

14 Landes-Ordnung für das Herzogthum Bukowina, RGBI 98/1861, 3.§.

15 Landtags-Wahlordnung für das Herzogtum Bukowina erlassen wird, GVBl. 24/1909.

16 Kuzmany, 2013, p. 130.

17 Kuzmany, 2013, p. 125.

Compromise in 1868. The Compromise set out the subjects of legislation reserved to the Hungarian Parliament and left the power to legislate any further subjects to the Croatian National Assembly. In Hungary, Croat members of the Hungarian Parliament only took part in legislation that had force in Croatia, while refraining from the debate on proposals that did not affect the region.

Religion and education, justice, and internal affairs were the most important issues in which Croatia had autonomy. Moreover, the Compromise recognised the Croats as an independent political nation, Croatian as the official language of the region, and the equal use of Croatian and Hungarian national symbols. In practice, autonomy in education allowed the independent organisation of the Croatian education system. Autonomy in justice and home affairs included the possibility to determine Croatia's public administration (territorial units, status of local government), establish an independent police force, and maintain a separate justice system; moreover, it also allowed significant legislative autonomy since many pieces of Hungarian legislation (such as the criminal code) were no longer in force in Croatia.

Croatia exercised its autonomy through its own government and legislative body, the *Sabor*. The head of government was the *banus* (the traditional name of the head of Croatia-Slavonia), appointed by the king and accountable to the *Sabor*. However, as the *banus* was nominated by the Hungarian prime minister, the Hungarian government had significant influence over this position.

### **8.2. Other nationalities within the Kingdom of Hungary**

Similar to the Austro-Hungarian Compromise, the Hungarian-Croatian Compromise of 1868 had a historical foundation as Croatia had maintained a special status within Hungary since the Middle Ages. This traditional status proved to be a significant advantage to its nationalist endeavours.

Other nationalities in the Kingdom of Hungary did not have similar historical privileges and thus could not achieve autonomy; they were only guaranteed linguistic rights, which was far from a satisfying solution.

In time, the inclination to grant autonomy to other nationalities strengthened as well. For example, a proposal to create a Ruthenian autonomous territory in the north-east of Hungary was considered, although it was only implemented in the weeks following the empire's 1918 defeat in World War I.<sup>18</sup>

## **9. Conclusions**

The last part of the chapter compares the lessons learned from reforms and reform proposals in the last decades of the Habsburg empire to the post-World War I solutions. The problem remained the same: respecting the language, culture and identity of each nationality in the region.

18 People's Act No. X. of 1918: On the autonomy of Ruthenians living in Hungary.



### ***9.1. The impossibility to create contiguous nation states for each nationality***

The most pressing problem of the Central European region was the impossibility to grant every nationality a contiguous territory since most nationalities lived in separate areas throughout the region; therefore, when one ethnic group attempted to create a single nation state, it simultaneously enclosed areas with predominantly different ethnic groups. Moreover, creating state borders along ethnic lines was not a uniformly accepted solution as some nationalities wished to respect historical borders.

This problem reappeared in the last decade of the twentieth century, after the Yugoslav Wars, when the newly emerging states in the territory of the former Yugoslavia were established. Previously, member states of Yugoslavia had been created along historical borders. The international community did not support their reinvention after the wars as it threatened to lead to endless, unresolvable disputes. It was nearly impossible to determine where to draw the borders in the multi-ethnic regions of Croatia and Bosnia and Herzegovina, and maintaining the status quo was more convenient.

The problem appeared earlier as well, during the peace negotiations of World War I. The Compromise of 1867 favoured Magyars in Hungary, allowing the Magyar ethnicity to live in its own state after 300 years of division. Other nationalities pursued the same goal during the peace negotiations, which separated many Magyars from the territory of Hungary.

Aurel Popovici's above-examined solution (see Section 4.2) proposed another approach: instead of uniting ethnic groups in one nation state, if an ethnic group lived in more than one geographically separate territory, each of them should be granted independent statehood. While the fate of certain multi-ethnic regions remained problematic, this proposal seemed to be the closest to a just solution. Nevertheless, as this concept was always supported by nationalities in a disadvantageous minority role within another nation state, it always remained the hope of the weaker side.

### ***9.2. Can nationalities in the region reach compromises?***

In the early twentieth century, Aurel Popovici's answer to this question was determinedly negative. According to him, the only appropriate arbiter in ethnic disputes was the emperor (see Section 4.2). On one hand, the compromises reached in the Austrian Empire (see Section 7) contradicted this scepticism as these were all reached on a local level by the nationalities concerned. On the other hand, reaching a similar compromise that was applicable to the entire empire seemed unlikely, which justified Popovici's doubts.

The prospect of compromise did not improve after 1918. While local agreements between nations were possible, a compromise suitable for the whole region was not. The almost uniformly negative evaluation of the Habsburg monarchy by historians from successor states is also noteworthy. The dynasty is overwhelmingly described as a restrictive force, impeding nationalities on the road to nationhood. In reality, the monarchy did not seek to favour one nationality over the others. Since allowing

one ethnic group to further its nationalist goals was simultaneously discerned as prejudice by the others, the grievances perceived by one nation were gains granted to the others. Even if the parties were able to settle certain issues by finding the middle ground, a compromise was also easily perceived as harmful to the efforts to sustain national culture and identity. The inability to reach balance indicated the absence of a universal compromise.

### ***9.3. How to act in the absence of multinational consensus?***

In the Habsburg empire, the emperor served as an evident answer to this question, as confirmed by Popovici's proposal. Endowing the emperor with the power to adjudicate the issue appeared to be the only way to reach a just – albeit probably dissatisfying – resolution.

After the collapse of the empire, this ceased to be a viable option. The function of the sovereign monarch was replaced by international law, and the Entente powers attempted to resolve the situation of national minorities by international peace treaties. Nonetheless, these instruments were constructed on the premise of multi-ethnic states comprising an ethnic majority group and several ethnic minorities; they did not intend to minimise the number of minorities within the new states but only to ensure certain rights for these groups. Consequently, the decisions made at the international level did not permit territorial autonomy or independent nation states in most cases.

### ***9.4. The number of states and the appropriate state structure in the region***

While some concepts were proposed to create a federal state without the Habsburg dynasty, these were all extremely unlikely since, for most nationalities, the desire for separation was stronger than the desire for unity. The second half of the nineteenth century showed that in the absence of compromise, the nations of the region did not have incentives to remain united without external force, and these external incentives only existed before the collapse of the empire. Following World War I, independent states were formed in Central Europe, and organising them into federation was not a realistic possibility.

The number of new states was also a point of contention. At the time of the empire's collapse, most nationalities attempted to form independent states; however, it mostly ended in conflict. The new states created by the peace treaties were also volatile, and later, both Czechoslovakia and the Serb-Croat-Slovenian Republic (Yugoslavia) collapsed. In the case of Yugoslavia, the number of successor states has not yet been settled.

### ***9.5. Ethnic vs. historical borders***

The empire's collapse did not solve the dilemma of ethnic vs. historical borders either as each nation applied the principle that benefitted them in the given situation. For example, the borders of Yugoslavia were historical, and the Czech territory also had historical borders to preserve the integrity of the Bohemian Provinces. On the

contrary, Hungary did not have the power to protect its historical borders and lost territories even to Austria – a likewise losing party in the war.

Consequently, the new territory of Hungary was determined along ethnic lines. The neighbouring states attempted to incorporate every territory from the former Kingdom of Hungary, where members of their ethnic group lived, even if it involved the annexation of predominantly Hungarian areas. Due to these attempts, many Magyars became national minorities in other states.

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People's Act No. X. of 1918: On the autonomy of Ruthenians living in Hungary

# Croatian Constitutionalism from Autonomy to the State

Dalibor ČEPULO

## ABSTRACT

Croatian regions in Austro-Hungary, among which the autonomous kingdoms of Croatia and Slavonia, had a special significance, entered the newly created unitary Yugoslav kingdom in 1918. The initial enthusiasm for the unification was replaced by the dissatisfaction of Croats, whose interests were then satisfied within the autonomous Banate of Croatia formed in 1939. After the break-up of the Yugoslav kingdom, the short-lasting puppet state Independent State of Croatia was established in 1941, while the foundations of the Yugoslav communist federation with federal Croatia were laid down in 1943 and transformed into constitutional form in 1946 and 1947. For a long time, the federal centre dominated the formally sovereign republics, but the wide decentralisation in 1974 enabled Croatia to establish constitutional and legislative framework that later became the basis of its transition to independence. Only a few elements from that period are retained in the Constitution of the Republic of Croatia of 1990, which was set on a completely new basis modelled on Western constitutionality. The core line of Croatian constitutional development is grounded upon its autonomy in the decentralised and multi-cultural frameworks and building-up of independence.

## KEYWORDS

Croatian constitutional development, Croatian constitution, Croatian autonomy, self-determination of peoples, right to secession, dissolution of Yugoslavia.

## 1. Introduction

Croatian ‘proto-constitutionality’ developed in the autonomous kingdoms of Croatia and Slavonia in the Hungarian part of Austro-Hungary. Only few institutional relics from that period remained in the newly formed unitary Yugoslav state, but in 1939 Croatia gained autonomy at the quarter of territory of Yugoslavia. From 1941 to 1945, Croatia existed as the fascist puppet state that encompassed the whole of Bosnia and Herzegovina. From 1943/1944 and 1946/1947, Croatia was established as a republic within the Yugoslav communist federation in the current Croatian borders. The federal constitutional arrangement partly determined the process of achieving Croatian independence and affected the building-up of institutions of the new state.

We will set up our presentation of Croatia’s constitutional development following this historical scheme. We will first present institutions of the Kingdoms of Croatia and Slavonia, continue with description of the Croatian institutional and territorial frameworks in the period after 1918 and through the twentieth century and pay

special attention to the position of Croatia in the last phase of Yugoslavia as well as to the process of making and revising the contemporary Croatian constitution.

## 2. The Kingdoms of Croatia and Slavonia and the Croatian regions in Austro-Hungary

Until 1918, all the regions that make up the present-day Republic of Croatia laid within the borders of Austro-Hungary. The autonomous position of Croatia-Slavonia in the Hungarian half of the monarchy was a residue of the medieval Croatian Kingdom that had joined the Hungarian Kingdom through the coronation of Coloman Árpád as Croatian King in 1102. From the feudal period, Croatia-Slavonia inherited institution of the *ban* as the king's deputy, its own diet and counties with extensive local autonomy. These institutions operated in complementary manner with the central Hungarian institutions, but the strengthening of Hungarian and Croatian nationalism in the nineteenth century challenged the common Hungarian-Croatian institutional framework.

Croatian-Hungarian relations were finally settled by the sub-dual Croatian-Hungarian Compromise in 1868, which guaranteed extensive Croatian autonomy but also provided the Hungarian government with control mechanisms. Croatia-Slavonia thus had its own diet, the *ban* and the Supreme Court, with presumptive jurisdiction in all matters not defined as 'common' Hungarian-Croatian affairs. The central figure was the *ban* who presided over 'the autonomous government', which consisted of administrative departments with all executive powers concentrated in the *ban*'s hands.<sup>1</sup>

The inconsistent text of the Croatian-Hungarian Compromise gave ground to Croatian, Hungarian, Austrian as well as European public lawyers to interpret the position of Croatia-Slavonia in the range from extended provincial autonomy to state.<sup>2</sup> However, public finances were exclusively 'common' (i.e. Hungarian) competence, the Hungarian government participated in the nomination of the *ban*, and it also indirectly influenced autonomous legislation; thus, Croatia-Slavonia enjoyed only an extended autonomy, even though unique in the monarchy. The Hungarian government effectively blocked Croatian attempts to provide for more independent and 'state-like' forms of autonomy in the 1870s.<sup>3</sup>

The main Croatian national goal in the nineteenth century was the national unification into an autonomous or independent unit that would encompass lands – primarily Croatia-Slavonia and Dalmatia, which, according to their ethnic composition or historical affiliation with the medieval Croatian Kingdom, were considered Croatian. Since this goal could not be achieved in the union with Hungary, Croatian political parties looked for other options. Two main concepts that emerged were the trialism

1 Čepulo, 2015, pp. 61 et seq.

2 See Heka, 2019, pp. 136–147.

3 Čepulo, 2006, pp. 70–80.

i.e. establishment of the third unit of the monarchy, which would encompass South Slavic parts of the monarchy and had its capital in Zagreb, and the unification of the South Slavic parts of the monarchy with the kingdoms of Serbia and Montenegro into the new Yugoslav state. The Croatian national unification was thus perceived in the context of the South Slavic unification. The third idea of establishing the Croatian nation state did not fully correspond to the real conditions and had a weaker influence than the previous two ideas.<sup>4</sup>

The turbulent end of World War I saw the establishment of the State of Slovenes, Croats and Serbs (State of SCS) that was formed at the intersection of the first two ideas on 29 October 1918. This highly decentralised state provisorium with the capital in Zagreb encompassed the South Slavic parts of Austro-Hungary; the state was not internationally recognised, and it was burdened with serious internal and external problems. These conditions dramatically accelerated the intended unification of that state with Serbia and Montenegro into a new Yugoslav state, which was projected at the Versailles Conference. The delegation of the State of SCS, burdened with the problems and confronted with the pressure of the Serbian side at the negotiations in Belgrade, gave up decentralisation as the main precondition for unification. The Kingdom of Serbs, Croats and Slovenes was then proclaimed by the Serbian regent Alexander on 1 December 1918.<sup>5</sup>

Such a way of formation of the Yugoslav kingdom did not provide for the persuasive legitimacy of the new state, but it only had to be built *a posteriori*, through the practice of state institutions.

### 3. The Yugoslav state and Croatian–Serbian tensions

The new state was based on the idea of the single ‘three-tribal Serbo-Croatian-Slovene people’ with a single ‘Serbo-Croatian-Slovene’ language, which was to be effectively united as against the previous historical divisions, with Macedonians and Montenegrins presumably absorbed by Serbs. It was the basis of the unitary structure of the state grounded in the undemocratically passed Vidovdan Constitution of 1921. The administrative division of the country into 33 circuits was conducted according to natural and social conditions with the intention of deconstructing previous historical, ethnic and cultural identities.<sup>6</sup> The circuits were subordinated to the government in accordance with the Serbian administrative tradition, lacking an intermediate level of self-governing districts characteristic of the Croatian administration.

However, the inherited legal heterogeneity of the country prevented a faster legal unification; thus, contrary to strict administrative centralization, there remained six so-called ‘legal regions’ with inherited different forms of judicial organisation,

4 Survey of the Croatian national ideologies seen in Banac, 1984, pp. 70–115.

5 Goldstein, 2011, pp. 111–112.

6 Lampe, 2000, p. 133.

including their own supreme courts as well as inherited private and criminal law. Among these regions were ‘the Croatian-Slavonian region’, with the judiciary and the law inherited from the Kingdom of Croatia and Slavonia, and ‘the Slovenian-Dalmatian region’, with the inherited Austrian judiciary and law. The Table of Seven in Zagreb, organised in two sub-sections, acted as the Supreme Court for both these regions.

Yet, the new order generally followed traditions of the Serbian nation state based on a single (Serbian) language and cultural identity, centralised administration and Serbian military tradition. The Serbian political elite considered Serbs the ‘war winners’ and ‘liberators’ with tradition of its own state that suffered great casualties in the war and due to such role deserved to have dominant position in the new state.<sup>7</sup> Such a posture contradicted the Croatian expectations of equal position of ‘the tribes’ with their particular self-governments. These expectations stemmed from the long Croatian tradition of life in decentralised and multi-cultural constitutional frameworks with their own autonomy – i.e. differences between Croatian and Serbian political cultures were significant.<sup>8</sup> The projected merge of the ‘three tribes’ met the resistance and, from the very beginning, resulted in the division of political parties in Yugoslavia into a dominant centralist-unitarian bloc and opposing federalist bloc, with unstable governments led by Serbian parties.

Among the federalist parties, Stjepan Radić’s Croatian Peasant Party was in the lead, advocating decentralisation and the establishment of an autonomous Croatian unit. The party evolved into the mass Croatian national movement, yet without serious prospects of changing the country’s political direction. Instead, this direction changed with Radić’s coalition with Svetozar Pribičević, a disappointed leader of Serbs from the former Austro-Hungarian territories who replaced his radical Yugoslav-Unitarian views with support for Radić’s federalism. Pribičević advocated the cooperation of Croats and Serbs in the former Austro-Hungarian regions, believing that their conflicts were encouraged and exploited by the ruling Serbian elite.<sup>9</sup>

Political tensions caused by the new constellation culminated in the assassination of Radić and two Croatian Peasant Party’s deputies in the parliament by a member of the (Serbian) National Radical Party. The assassination provoked mass demonstrations in Croatian regions and the fall of the government. The king took political destabilisation as an excuse for a *coup d’état*, which he used to concentrate all power in his hands and impose a policy of radical Yugoslav integralism. The state was renamed Kingdom of Yugoslavia, and the use of ethnic denominations in political life was banned or severely restricted. The state was divided into nine *banovinas* designed to provide for their multi-ethnic composition, with Serbs included in as

7 Goldstein, 2011, pp. 112–113.

8 See Banac, 1984, pp. 141 et seq.

9 On Svetozar Pribičević see Banac, 1984, pp. 170 et seq.



many units as possible.<sup>10</sup> Such situation remained unchanged after the Constitution of 1931 imposed by the king as well as after assassination of King Alexander in 1934, which was organised by the Croatian radical nationalist *Ustasha* movement and the Macedonian nationalists. However, the fear of a possible disintegration of the state in the case of war or serious international crisis prompted the Royal Regency to search for a solution to the ‘Croatian Question’ in 1939.

#### 4. The Banate of Croatia (1939–1941)

Prime Minister Dragiša Cvetković and Vladko Maček, leader of the Croatian Peasants’ Party, reached a political agreement in 1939, the content of which was turned into the Decree on the Banate (*Banovina*) of Croatia passed by the Royal Regency. The decree established the new autonomous unit of the Banate of Croatia based on ethnic criteria and covering a quarter of the territory of the state, including a large part of Bosnia and Herzegovina.<sup>11</sup>

The decree was based on the constitutional provision on the state of emergency that gave the Royal Regency legislative powers with an obligation to submit such decrees for parliament approval, but the parliament was dissolved on the same formal ground. Thus, the decretal establishment of the autonomous Banate of Croatia was not only a constitutional *provisorium* but also the *de facto* revision of the unitary 1931 constitution; it was the way by which the Royal Regency avoided the lengthy procedure of regular revision and possible obstruction by military circles and Serbian deputies in the parliament.<sup>12</sup> Nevertheless, Maček accepted such *provisorium* as a good basis for the Croatian interests, believing that reversal to previous conditions was not possible.

The Banate of Croatia had a complete structure of power, with its own public finances and the king as the only superior power. The Banate’s organisation resembled to the former Kingdoms of Croatia and Slavonia with the *ban* as the head of the administration and focus of all executive powers. Yet, its autonomy was wider and better protected from external influences than former Croatia-Slavonia, and the Banate encompassed a much wider territory than its predecessor. The Banate’s government began to introduce new institutions partly modelled upon the institutions of the Kingdom of Croatia and Slavonia yet tending to strengthen position of the *ban*, but the process was not completed due to the breakdown of Yugoslavia in the short war of 1941.<sup>13</sup>

10 On King Alexander’s dictatorship, see Lampe, 2000, pp. 163–176.

11 On the territory and ethnic composition of the Banate of Croatia, see Šlabek, 1997, pp. 60–61.

12 Opinions of constitutional experts in regard to the Banate of Croatia, see Šlabek, 1997, pp. 94–112.

13 On the organization of the Banate of Croatia, see Šlabek, 1997, pp. 62–66.

## 5. Independent State of Croatia (1941–1945)

The German plan of breaking up Yugoslavia provided for the establishment of the Croatian state, but Vladko Maček turned down the German offer to be its leader, which opened space for Italy to put the *Ustashes* and their leader Ante Pavelić – whom Italy had supported since foundation of that movement – into power.<sup>14</sup> The Independent State of Croatia (ISC) that was soon established was based on a typical totalitarian concept with all powers embodied by ‘the Head’ (*Poglavnik*) as an incarnation of the nation, with a merging of the state and party apparatus and the *Ustasha* as the only allowed political party. Both Germany and Italy had a decisive influence on the politics of the ISC and stationed their troops there.

As early as 1941, racial laws modelled upon the Nuremberg Laws were enacted, and a policy of extermination of Jews, Serbs and Roma was executed. The territory of the ISC encompassed the whole of Bosnia and Herzegovina, but Italian patronage was paid for by ceding to Italy large parts of Dalmatia and the coastal areas. The Roma Agreements between the ISC and the Kingdom of Italy from 1941 would allow the ISC to become the Kingdom of Croatia. These agreements were soon implemented by the legislation of the ISC, but the Italian Duke of Spoleto withdrew his acceptance to become the Croatian king; thus, the ISC formally remained a kingdom but practically without any traces of the monarchy.<sup>15</sup>

## 6. The beginnings of the communist federation and federal Croatia in 1943

Although the establishment of the Banate of Croatia announced a possible federalist reorganisation of Yugoslavia, the building up of the communist federation that begun in 1943 was not a continuation of these tendencies but a part of the communist approach to the national question. From 1924, the Communist Party of Yugoslavia (CPY) abandoned its previous unitary concept of the nation and state and criticised Yugoslavia as an artificial, imperialistic product based on Serbian hegemony, advocating its dissolution into independent states that would form the Balkan socialist federation.<sup>16</sup> Such a solution reflected Lenin’s solution of the national question in Russia, and at the same time aimed at breaking up Yugoslavia as a part of the *cordon sanitaire* around Soviet Russia. This plan was replaced with the more realistic policy of transformation of Yugoslavia into a federation in 1937, when the communist parties of Croatia and Slovenia were founded within the CPY.<sup>17</sup>

14 Goldstein, 2011, pp. 126 et seq.

15 On Independent State of Croatia, see Goldstein, 2011, pp. 131–140.

16 Vujošević, 1985, pp. 98–99.

17 Vujošević, 1985, pp. 144, 150–151.

Shortly after the breakdown of Yugoslavia, the CPY organised an uprising, and in addition to military organisation, it also established a civilian government. In 1942, the Anti-Fascist Council of the People's Liberation of Yugoslavia (ACPLY) was formed as a political representative body of the Yugoslav countries, which at its 1943 session proclaimed itself a parliament and passed some fundamental decisions. The most important were that the final decision on the form of government of Yugoslavia would be made by the people after the war and that a new democratic Yugoslavia would be built as a federation of the peoples of Yugoslavia – Croats, Montenegrins, Macedonians, Serbs and Slovenes – united in Yugoslavia based on the right to self-determination and secession of each people. The following year, the Land's Anti-Fascist Council of the People's Liberation of Croatia proclaimed itself the parliament of Croatia and, based on the right of the Croatian people to self-determination and secession, proclaimed the unification into federal Yugoslavia.<sup>18</sup> Thus, federal Yugoslavia was built top-bottom and upon the fictional narrative that representatives appointed within the partisan movement were legitimate representatives of the respective lands. Again, the legitimacy for that construction was to be searched *a posteriori*.

## **7. Sovereignty of the republics and right of the peoples to self-determination and secession**

The actual control of the communist authorities on the ground eliminated the effective presence of a political alternative, and the Communist Party members or communist sympathisers were the predominant majority of the Constitutional Assembly that in 1946 accepted the Constitution of the Federal People's Republic of Yugoslavia based on the Soviet model; only afterwards did the individual republics pass their own constitutions. The Constitution of the People's Republic of Croatia from 1947 constituted Croatia on the basis of the right of the Croatian people to self-determination as a state that formed the Yugoslav federation together with other republics. The new Croatian internal borders with other Yugoslav republics, which are still present, were set in 1945 and 1947 by the Yugoslav communist and state leadership through a combination of historical and ethnic as well as pragmatic criteria.<sup>19</sup> The Croatian borders with Italy and Hungary are the inherited international borders of Yugoslavia.

The Yugoslav federation was set upon the concept of shared sovereignty with republics as the bearers of the original sovereignty, which was partly delegated to the federal state and partly remained in the republics. In reality, especially in the first period, the broad federal jurisdiction and political power concentrated in the Communist Party made republican sovereignties half-empty institutional shells. Yet, the individual republican identities were emerging, and their importance was gradually

18 Stefanović, 1950, pp. 174–181, 208–213.

19 Radelić, 2006, pp. 134–151.

growing. The split of Yugoslavia with the Soviet Union in 1948 led to introduction of the concept of self-management with elements of a market economy as well as to the constant search of the communist leadership for balanced constitutional solutions. In these debates, the Croatian and Slovene communist leadership continuously advocated political and economic decentralisation, while the centralist views were represented by the Serbian leadership.<sup>20</sup>

An important legitimising basis of the federal system and theoretical fundament of the federal structure was the right to self-determination and secession of the peoples, which was included in all federal and republican constitutions. That right was rooted in Lenin's doctrine as a guarantee of the freedom of small nations against the hegemony of big nations. The Constitution of the USSR from 1936 formulated that right in its 'normative' part (Art. 17) as an explicit right of every republic to secede.<sup>21</sup> Conversely, the Yugoslav federal constitutions formulated it (only) in their preambles as the right of the peoples to self-determination, which included the right to secession and the right to associate with other peoples and states. Republican constitutions then proclaimed the right to self-determination and secession of 'their' own nations, except 'mixed' Bosnia and Herzegovina.<sup>22</sup> Of course, both in the Soviet and the Yugoslav reality, the right to secession only had a 'semantic' meaning, it was not seen as a real right, and no particular attention was paid to it in constitutional theory; yet, it still had symbolic significance.

Some Yugoslav constitutional theorists have disputed the existence of republican sovereignty as well as of the right to self-determination and secession of the peoples. They have denied their actual meaning as being 'consumed' at the moment of the formation of the federal state or as conceptually inexistent due to exclusivity of state sovereignty.<sup>23</sup> Slovenian and Croatian constitutional experts have opposed this thesis, warning that the right to self-determination is permanent by its nature.<sup>24</sup> Nevertheless, a general consensus has been reached on the right to self-determination and secession belonging to 'the peoples' listed in the federal constitution, i.e. Croats, Macedonians, Montenegrins, Serbs and Slovenes.<sup>25</sup> Yet, there is no disagreement about whether the right to self-determination could be claimed by these 'peoples' as ethno-national groups, regardless of republican borders, or whether it can be claimed

20 Radelić, 2006, pp. 340 et seq.

21 1936 constitution of the USSR.

22 On the right of self-determination and secession in Yugoslavia, see Čepulo, 2021, pp. 366–369.

23 Stefanović, 1956, p. 415.

24 Šnuderl, 1950, pp. 178 et seq.

25 The Yugoslav federal constitutions explicitly listed these five 'peoples' that enjoyed the right to self-determination and secession upon which they formed the federation – the constitutional doctrine called them 'the constituent peoples'. Other ethnicities were considered national minorities that did not enjoy these rights. The term 'national minorities' was replaced with '*nationalities*' in the federal and republican constitutions of 1974. See Stefanović, 1950, p. 177.

only by the particular ‘constituent people’ of its own particular republic with a reference to that republic, similar to the Soviet constitution.<sup>26</sup>

## 8. Yugoslav and Croatian constitutions of 1974

The search for an optimal constitutional solution in Yugoslavia was reflected in the constitutional experimentation through four periods in which new federal and republican constitutions or constitutional acts were adopted (1946, 1953, 1963 and 1974). The position of the republics evolved from strictly reduced autonomy in 1946 to a strengthened position in the 1974 constitutional arrangement.

The Constitution of the SFRY of 1974 introduced much broader competences for the republics, their equal representation in all collegial bodies of the federation, and compulsory consensus of all republics and autonomous provinces in the adoption of the most important federal laws. Challenges of such a complex decision-making system were reduced by the integrative function of the League of Communists of Yugoslavia (LCY) and the charismatic role of Josip Broz Tito.<sup>27</sup>

The decentralisation of 1974 was reflected in the Constitution of the Socialist Republic of Croatia of 1974, which emphasised the republic’s state attributions. The Croatian constitution provided for new definition of Croatia in Article 1 stating that Croatia was “the nation state of the Croatian people, the state of the Serbian people in Croatia and the state of other peoples and nationalities living in it”.<sup>28</sup> For the first time, the constitution provided the national anthem, and it was the only such case in Yugoslavia. The transfer of federal jurisdiction to the republican level was used in Croatia to create its own legal system more independently, especially in the areas of family law, criminal law, public administration and organisation of courts. Thus, Croatia was the only republic to establish, in 1977, a special administrative court that remained part of the Croatian legal system up to today. The same goes with the Constitutional Court that was introduced in the federation and all republics in 1963. The Croatian Constitution of 1974 also paid considerable attention to the Territorial Defence – a sort of national guard in each of the republics with its own organisation, command and weaponry, which was soon set under the control of the Yugoslav People’s Army (YPA) and disarmed in early 1990. Together with Slovenia, Croatia took advantage of the possibility of international cooperation within the framework of the federal

26 The first federal constitutions mentioned only ‘the peoples’ as the constituent element of the federation; yet, the 1971 amendments incorporated into the 1974 Constitution of SFRY declared for the first time that the federation was constituted by the peoples and *their* republics, which supported the latter interpretation. Even without this provision, the understanding of individual republics as the federal states of particular nations (except Bosnia and Herzegovina) was built in the logic of the system; thus, in 1950 Stefanović stated that “each constituent people of Yugoslavia got its own particular unit” Čepulo, 2021, pp. 357, 368; Stefanović, 1950, p. 177.

27 Čepulo, 2021, pp. 359–363.

28 Art. 1 of the Constitution of SFRY, see Ustav Socijalističke Federativne Republike Jugoslavije.

foreign policy provided by the federal constitution, and together with several Italian, Austrian and German provinces, it established the Alps-Adriatic Working Community in the fields of transport, agriculture, ecology and culture, arousing suspicion and discrete objections by other republics. Thus, the constitutional framework of 1974 strengthened the constitutional and political identity of Croatia without challenging the federal arrangement.<sup>29</sup>

## 9. Disintegration of Yugoslavia and multi-party elections in Croatia

The death of Josip Broz Tito in 1980 opened up the possibility for disintegrative processes in Yugoslavia and increased tensions between the republics and the autonomous provinces. By far, the most important role was played by the Serbian mass nationalist movement led by the Serbian communist and populist leader Slobodan Milošević. At the same time, new political movements emerged in Slovenia and Croatia demanding democratic elections. A political decision on multi-party elections in Croatia was made in December 1989 by the Croatian communist leadership not only due to the political pressure in Croatia but also due to the estimation that Milošević's Greater Serbian policy was leading to the break-up of Yugoslavia and endangered Croatia's territorial integrity.<sup>30</sup> Thus, the transition to a multi-party system was partly motivated by the necessity to provide democratic legitimacy to the republican authorities in future challenges.

In January 1990, the League of Communists of Yugoslavia disappeared from the political scene after Slovenian and Croatian delegations left its extraordinary Congress in Belgrade, and the communist parties in the republics reconstituted themselves into independent social democratic parties.

The League of Communists of Croatia changed its name to the Party of Democratic Changes, but instead of its expected victory on the ground of d'Hondt's electoral model, the nationalist Croatian Democratic Union won the absolute parliamentary majority. Soon, the constitutional amendments removed the ideological features from the Croatian constitution, introduced new national symbols and re-designed the government's organisation into a more state-like look. Franjo Tuđman was elected President of the Republic but also retained the position of president of the Croatian Democratic Union.<sup>31</sup>

29 On the institutional individuality of Croatia after 1974, see Čepulo, 2021, pp. 365–366.

30 Bilandžić, 1999, pp. 767–768; Radelić, 2006, pp. 590–591.

31 Goldstein, 2011, p. 218.

## 10. Constitution of the Republic of Croatia 1990

The new Constitution of the Republic of Croatia, proclaimed on 22 December 1990, was in a principle based on the Western model of constitutionality. The committee that prepared the constitution explicitly stated that it should be grounded on “the positive Croatian constitutional tradition” and on “the return to the European tradition with consideration of the North-American tradition”.<sup>32</sup> As it regards the Croatian tradition, the committee explicitly stated that the stress should be on the nineteenth and twentieth centuries, including constitutional heritage based on the Land’s Anti-fascist Council of the Peoples Liberation of Croatia and the Anti-fascist Council of the Peoples Liberation of Yugoslavia up to contemporary times,<sup>33</sup> which included all constitutional acts from 1943 up to the last Constitution of 1974. In reality, history was present only in the debates about the extensive, predominantly ‘historical’ preamble that reconstructed all main events of the Croatian constitutional development from the ninth century to 1990<sup>34</sup>; thus, the proclaimed inspiration from tradition was not reflected in practice.

The core position at the constitution had the French semi-presidential model with strong powers of the president of the republic elected in direct elections. The main reason for the implementation of that model was that it reconciled democracy and concentration of powers in one person, necessary in the turbulent conditions of the time.<sup>35</sup> ‘Supportive’ arguments were that the semi-presidential model was already accepted in some other post-communist states as well as that it corresponded to the Croatian tradition.<sup>36</sup> Other constitutional provisions were also based on comparative constitutional legislation and common juridical sense without inspiration from tradition. Thus, despite definition of Croatia as a unitary state and contrary to the tradition of a single-chambered Croatian parliament (except during the communist era), this was established as bicameral, consisting of the House of Representatives and the County House with suspensive veto power. The latter chamber was introduced upon strict insistence of President Tudjman, who followed advice of his American adviser

32 Šarin, 1997, p. 10. The term ‘positive’ should be taken as value-oriented and neglecting the heritage of the Independent State of Croatia as well as the ideological and authoritarian dimensions of the regulation during a period of the communist federation.

33 Šarin, 1997, p. 11.

34 Interesting enough, most of the experts consulted when drafting the constitution criticised such preamble as overly historical and too long, and they pleaded for a shorter and more apprehensive one. It was obviously due to President Tudjman’s conviction that such preamble was necessary at the course of the time that it remained in the constitution. See Šarin, 1997, pp. 90–91, 96–97, 119, 173–174.

35 Šarin, 1997, pp. 93, 97. Semi-presidential model definitely proved itself as the rational solution at that time; yet it is also true that such concentration of power corresponded well with the authoritarian style of President Tudjman. In addition, it is interesting that Professor Smiljko Sokol, the main constitutional adviser of President Tudjman, was specialised in French constitutional law.

36 That argument probably referred to the position of the *ban* in the Kingdom of Croatia and Slavonia and in the Banate of Croatia.

– yet, it was the Spanish and Italian bicameralism with much weaker competences of the upper house, rather than the US Senate, that served as the final model.<sup>37</sup> The State Judicial Council, which appointed and relieved judges of their duties, was also rooted in the Italian model.<sup>38</sup>

An important provision that was extensively discussed was the definition of Croatia as the Croatian nation state. The Constitution of 1990 proclaimed in the preamble that

Republic of Croatia is established as the nation state of the Croatian people and the state of other peoples and minorities who are its citizens: Serbs, Muslims, Slovenes, Czechs, Slovaks, Italians, Hungarians, Jews and others, who are guaranteed equality with citizens of Croatian nationality and exercise national rights in accordance with the democratic norms of the OUN and countries of the free world.<sup>39</sup>

The list of minorities was significantly extended in 2010. Apart from such a definition, in the preamble, the constitution proclaimed people's sovereignty and the equal rights of citizens as the fundament of the Republic of Croatia in its Art. 1.

The definition of the nation state was obviously adapted from the Croatian Constitution of 1974; yet, unlike the original version, the 1990 definition did not mention Serbs in Croatia separately and as a collective unit ('the Serbian people in Croatia') but as (individual) Croatian citizens equated with members of other peoples and minorities. Representatives of Serbs in Croatia as well as leadership of Serbia protested against such definition on the ground that it deprived Serbs of the status of 'constituent people' in Croatia granted with the previous definition.<sup>40</sup> This difficult-to-accept objection<sup>41</sup> was one of principal declared reasons for the armed rebellion of the Serbian population in Croatia and their secession proclaimed on the basis of the historical sovereignty of the Serbian people and its right to self-determination.<sup>42</sup>

37 Constitutional experts unanimously opposed the idea of bicameralism with various arguments – tradition being among important ones – but could not persuade Tudjman, who had the final word in everything. Šarin, 1997, p. 128. Replacing the US model with Spanish and Italian bicameralism was in fact the damage control, yet this peculiar provision lasted only until 2001.

38 Uzelac, 2000, pp. 31 (n. 21), 35.

39 See the Constitution of the Republic of Croatia.

40 Rudolf, 2017, p. 52.

41 The intention of the 1974 Croatian Constitution makers was to stress the particular importance of Serbian people in Croatia and not to provide them with the status of 'constituent people' that would imply their respective right to self-determination and secession. Neither semantic nor contextual or historical approaches support this interpretation, even though the definition sounds ambiguous.

42 Brekalo, 1991, p. 556; Martinović, 2018, p. 381. The Serbian rebellion in Croatia, effectively supported by Serbia and the Yugoslav People's Army, turned into a real war in 1991–1992 and then into the lower-scale conflict that lasted until the Croatian offensives in 1995. Yet, neither the state of war nor the state of emergency was proclaimed in Croatia since it was estimated that it would be counterproductive to shift the activity of all institutions – and life in general – towards such a regime.



The Constitution of 1990 defined Croatia as a sovereign state but did not proclaim its independence; instead, it proclaimed that Croatia would remain within the SFRY until it was reorganised on the basis of agreement of the republics or until another decision of the Croatian Parliament – the latter part of the sentence announcing the possibility of a full independence. The constitution also contained provisions on the Croatian armed forces and foreign policy, which were suspended for the time by the constitution itself; the army and foreign policy were vital parts of the federal constitution, and their enforcement in the Croatian constitution could provoke the intervention of the Yugoslav army.<sup>43</sup> The Croatian leadership was still advocating the transformation of Yugoslavia into a confederation of sovereign states at that time, but it was ready to declare secession from Yugoslavia in the case of radical aggravation or of secession of Slovenia.<sup>44</sup>

## 11. Independence of Croatia

Since it was obvious that Serbia and Montenegro would not accept a confederal solution, a referendum was held in Croatia in May 1991 under international supervision. Almost a plebiscite support (93.24% of 83.56% of all voters) was given to the possible accession of Croatia to the Yugoslav confederation, and independence was proposed as an alternative if the confederal solution could not be achieved.<sup>45</sup> The Croatian Parliament then set 30 June as the deadline for agreement on confederation, and it was Slovenia's definite decision to proclaim independence that urged Croatia to follow.

Shortly before the expiration of the pronounced deadline, on 25 June 1991, the Croatian Parliament passed the Constitutional Decision on the Proclamation of the Sovereignty and Independence of the Republic of Croatia. Significantly, the decision referred to the “right of the Croatian people to self-determination, including the right to dissociate, and to associate with other peoples and states” and not to the right to secession guaranteed by the 1974 SFRY constitution and the 1990 Croatian Constitution. Reasons given for the decision on independence were that the SFRY did not act as a constitutionally regulated state and that it grossly violated human and minority rights and the rights of federal units, while the federal regulation did not provide for solution of the crisis, and the establishment of confederation had not taken place.<sup>46</sup>

43 Čepulo, 2021, p. 376.

44 Goldstein, 2011, p. 226.

45 The referendum question was a complex ‘umbrella question’ that did not mention independence explicitly but only implied it – yet, in the circumstances of the time, it was clear that it was the referendum for independence. The referendum question also noted that “the Republic of Croatia as a sovereign and independent state (...) grants cultural autonomy and all rights of citizens to Serbs and members of other nationalities in Croatia” (Goldstein, 2011, p. 222; Rudolf, 2017, pp. 498 et seq.).

46 Constitutional Decision on the Proclamation of the Sovereignty and Independence of the Republic of Croatia.

Such reasoning corresponded to the arguments commonly cited in international law as a justification for remedial secession on the basis of the right to self-determination that cannot be exercised within the existing state.<sup>47</sup>

However, although the Constitutional Decision on the Sovereignty and Independence stipulated that it would enter into force when proclaimed by the Croatian Parliament, the parliament did not do so, and the decision did not formally enter into force. This was a pragmatic move of the Croatian government to avoid escalation of the conflict with the YPA and condemnation by the international community. Yet, such formally non-existent decision still produced legal effects considering Croatia's reciprocal recognition with Slovenia and Lithuania, and the enforcement of the hitherto suspended constitutional provisions on the Croatian armed forces and foreign policy.<sup>48</sup>

The proclamation of independence has been interpreted by the Croatian side as the beginning of a multilateral process of 'dissociation' and not as a unilateral secession. 'Dissociation' was perceived as the process of resolving rights and obligations between the republics and the federation and at the same time as the process in which the new states are created and the existing state disappears. This projected outcome did not seem quite likely at that time, but the proclamations of independence of Macedonia and then of Bosnia and Herzegovina that followed provided a different perspective that would lead to the acceptance of 'dissolution' as the basis for the emergence of the new states and the disappearance of the SFRY.

On 8 July 1991, Croatia and Slovenia, the federal presidency, the federal government with YPA, and Serbia accepted the EEC's initiative for negotiations and a 3-month *moratorium* on further activities related to the independence of the two republics. Since no progress was made, the Croatian Parliament passed a decision on 8 October 1991, terminating all constitutional bonds with the SFRY. The decision proclaimed that the SFRY no longer existed and that the Republic of Croatia did not recognise legal acts on behalf of the federation, but it recognised the independence and sovereignty of other republics and continued the process of determining mutual rights and obligations.<sup>49</sup>

The majority of Croatian constitutional lawyers as well as part of international lawyers agree that Croatia gained independence with the decisions of 8 October 1991, which completed the process of dissociation that had begun on 25 June 1991, and that the Constitutional Decision on the Sovereignty and Independence of June 25 entered into force and began to produce legal effects on 8 October. A similar attitude was taken by the Croatian Supreme Court in 2010 and the Constitutional Court in 2015, which became the basis for the respective judicial and administrative practice.<sup>50</sup> However,

47 Thürer and Burri, 2008, p. 10; Thürer and Burri, 2009, p. 5.

48 Čepulo, 2021, p. 359.

49 Decision on the Sovereignty and Independence of the Republic of Croatia.

50 Omejec, 2015, pp. 49–71.

some experts believe that Croatia gained independence on 25 June 1991, when it had all attributes of a state and acted effectively as an independent state.<sup>51</sup>

## 12. International recognition of Croatia and constitutional guarantees

The process of establishment of Croatia's independence continued in the field of international law, with the important role of the International Conference on Yugoslavia and its Arbitration Committee, which consisted of the presidents of the constitutional courts from five EEC countries.<sup>52</sup> EEC set substantial preconditions for the recognition of new Eastern European states – protection of human rights, rule of law, democracy and protection of minorities – that necessarily affected the constitutions of former Yugoslav republics searching for recognition. In its opinion on the Croatian application for recognition, this committee pointed out that the country met these requirements but with the need to amend the Constitutional Law on Human Rights and Freedoms and the Rights of Ethnic and National Communities or Minorities, which Croatia did shortly after its recognition in January 1992.<sup>53</sup>

The committee further provided that the declarations of independence of individual republics were not 'secessions' (as claimed by Serbia) but part of the process of 'dissolution' of the federal state, which disappeared while each of the five proclaimed states<sup>54</sup> was to be considered a new state and an equal successor to the missing SFRY (as claimed by the four republics).<sup>55</sup> The commission also proclaimed that under international law, the right to self-determination did not include the right to secession of the Serbian people in Croatia and Bosnia and Herzegovina as one of 'the constituent peoples' of Yugoslavia, as claimed by Serbia. Instead, the Arbitration Committee found that the right of self-determination granted by international law provided each citizen of these two republics, including Serbs, a right to be recognised as a member of certain ethnic and other group and enjoy other human and minority rights in these republics. The committee also proclaimed that the borders between the republics cannot be unilaterally changed and that they turn into the international borders on

51 Rudolf, 2015, pp. 5–19; Šeks, 2015, pp. 21–48.

52 See Ragazzi, 1992, pp. 1488–1489.

53 See Ragazzi, 1992, p. 1492. Amendments of the respective Croatian Constitutional Law referred to the extended local autonomy of two special districts with the Serbian majority (Knin and Glina) and to the rights of national minorities making up over 8% of the population (only Serbs matched that criteria) as well as to establishment of the Provisional Court of Human Rights comprising five members, three of whom were to be appointed by the European Community and two by Croatia. Degan, 2002, pp. 247, 250–252.

54 I.e. Bosnia and Herzegovina, Croatia, Macedonia, Slovenia and the Federal Republic of Yugoslavia.

55 See Ragazzi, 1992, pp. 1490–1491.

the basis of the principle of *uti possidetis iuris*, as claimed by Croatia and Bosnia and Herzegovina.<sup>56</sup>

In fact, the successful self-determination of Yugoslav republics was primarily the product of rearrangements of power, and these formally non-binding opinions of the Arbitration Committee were not implemented immediately but only with time.<sup>57</sup> Yet, they gained a prominent place in international law, and together with the persuasive influence of rules and political expectations set by EEC, they were indirectly reflected in the constitutional law of the four new countries ‘tested’ before the Arbitration Committee.

However, the largest part of the occupied Croatian territory was reintegrated by force in 1995, after the rebel Serbian leadership definitively rejected the international plan for peaceful reintegration into the Republic of Croatia. At the same time, almost the entire remaining Serbian population from those areas permanently fled to Serbia, which reflected the respective special constitutional guarantees.<sup>58</sup> The remaining part of the occupied territory was peacefully reintegrated into Croatia under international supervision in 1998; thus, Croatia gained control over its entire territory and gradually moved from actual semi-war conditions to normality.

### 13. Constitutional revisions of 1997–2013

Stabilisation in the country affected the gradual turn of political activity towards international relations, as reflected in the constitutional amendments of December 1997, which provided the procedure for Croatia’s association with other countries and prohibited any association that might lead to the renewal of a South Slavic state union or any form of the Balkan state.<sup>59</sup> The latter provision reflected Croatian concerns with plans for the establishment of a post-Yugoslav association from Croatia

56 Ragazzi, 1992, p. 1491. The principle of *uti possidetis iuris* determines the borders on the land in principle, but the detailed and concrete determination of these borders requires the formal consent of the respective countries. Croatia reached such an agreement only with Bosnia and Herzegovina, although it still has not been ratified by either of the two parliaments and is thus applied in practice as provisional. In addition, the principle of *uti possidetis iuris* does not refer to the borders at the sea that were not previously determined and are still a matter of dispute in principle between Croatia and other neighboring former republics. It is the same with almost every other border between former Yugoslav republics.

57 Thürer and Burri, 2008, p. 9.

58 On the events in summer 1995, see Goldstein, 2011, pp. 252–254. The provisions on two special autonomous districts were suspended in September 1995 as inapplicable regarding the demographic changes, together with the Provisional Court of Human Rights. These issues are currently regulated by the Constitutional Act on the Rights of National Minorities, which, since 2010, guarantees national minorities that make up more than 1.5% of the total population (only Serbs) one to three seats in Parliament, while other minorities are organised in ‘clusters’, each of which is represented by one deputy (Degan, 2002, pp. 252–253. See also the Constitutional Act Amending the Constitutional National Minority Rights Act).

59 See the Constitution of the Republic of Croatia.

to Albania. However, despite internal stabilisation, the President of the Republic Franjo Tudjman continued to influence the legislature and the executive in a way that significant part of the professional and general public perceived as inconsistent with the spirit of separation of powers. This was an important reason for the turnover of the 2000 parliamentary and presidential elections that followed Tudjman's death in 1999. The same year, the new left-liberal majority significantly amended the constitution, reducing the president's powers and banning his membership in a political party, yet leaving him competences in foreign relations and in the control of secret services as well as direct elections for that position.<sup>60</sup> With these amendments, Croatia moved from a semi-presidential to a parliamentary system of government, but the popular legitimacy of the president of the republic as well as his 'residual' competences resulted in a system of political cohabitation and constant tensions between the president and the government. Informal initiatives for the replacement of such system with the president of the state elected by a two-third parliamentary majority did not get popular support.<sup>61</sup> The amendments of 2000 also extended the range of guarantees for human and minority rights. Further significant changes included the already mentioned abolition of the County House in 2001 due to its dysfunctionality, which made the Croatian Parliament unicameral, amendments related to NATO and European Union in 2010 and the inclusion of the definition of marriage as a union of a man and a woman, which followed the 2013 civil referendum<sup>62</sup>; this was only the third referendum in contemporary Croatian history, following the referendums on independence and on the accession to the EU.

## 14. Conclusion

The main distinctive factors of the Croatian constitutional development in the twentieth and twenty-first centuries was the break of the Croatian autonomous institutional particularity in 1918 and the establishment of Croatia as a state only in 1991 (apart from the excessive appearance of the ISC in 1941). The Yugoslav kingdom, with its unitary institutions that basically neglected Croatian identity and institutional particularity, has never been considered part of the Croatian tradition, and the provisory Banate of Croatia could not influence further development, less so the ISC. In fact, both the constitutional individuality and the territory of the Republic of Croatia at the time of independence in 1991 were directly determined by the Croatian federal constitutionality from 1943 to 1974, which was in principle accepted by the makers

60 Cf. the Constitution of the Republic of Croatia.

61 One of the first proposals for the introduction of this German-type chancellor system came from Professor Smiljko Sokol, the main author of the semi-presidential system in the Constitution of 1990. Sokol criticised the 2000 constitutional revision as an introduction of a 'quarter-presidential system' that generated tensions between two presidents. See Inicijativa Smiljka Sokola.

62 Smerdel, 2014, pp. 197–201.

of the Constitution of the Republic of Croatia as part of the Croatian constitutional tradition.

Yet, the new Constitution of 1990 was set on a new paradigm based principally on comparative constitutional legislation with the French semi-presidential model at its core. Even though this model was supported with the argument that it complied with the Croatian tradition, it was soon replaced by the parliamentary government as more adequate for the Croatian conditions.

The Constitution of the Republic of Croatia is not based on the return to tradition, yet the influence of tradition can still be seen in certain important provisions. It is present in the dominantly 'historical' preamble, in the adopted definition of Croatia as the nation state as well as in the continuity of the Constitutional Court. As it regards deeper institutional and political layers of Croatian constitutionality, of the utmost importance is its principle of self-determination. It served as a political fundament for the formation of the State of Slovenes, Croats and Serbs and the Banate of Croatia and was explicitly and continuously present as part of the Croatian constitutions since 1943 as well as in the formation of the Republic of Croatia. The Croatian political experience in the nineteenth and twentieth centuries embodied two in a way 'opposing' characteristics – one is the long experience of participation, with its own constitutional identity, in the broader multi-cultural structures, and the other is the tendency to constitute its own independent state. Deeper cultural and mental layers that might have influenced modern and recent Croatian development might be searched for upon this basis.

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## From Monarchy to the Independent Czechoslovakia

Jiří JIRÁSEK

### ABSTRACT

During the First World War, the attitude of Czech politicians to the idea of the existence of an independent state changed fundamentally.

T. G. Masaryk, who became the main representative and agent of the efforts for independence, formed, together with his associates the Czech Foreign Committee, later transformed into the Czechoslovak National Council, which sought to win over the representatives of the Entente to the idea of an independent Czech state. The Czechoslovak National Council was gradually recognized in 1918 by the individual powers of the Entente as a provisional government.

The fundamental document of the domestic policy was the Declaration of the Czech Deputies of the Imperial Council and Provincial Assemblies, also called the Epiphany Declaration, adopted on 6th January 1918, demanding the independence for its nation.

T. G. Masaryk responded to the manifesto of Emperor Charles I on the federalization of the Austrian part of the monarchy, an attempt to save the empire, by solemnly declaring the Czechoslovak independence, which is also known as the Washington Declaration. It already presented the form of the Czechoslovak state – republic.

Czechoslovakia was established as an independent state by a revolutionary act of the Czechoslovak National Committee on 28th October 1918, which on this day declared itself the government of the new state, the executor of state power and at the same time a legislative body.

Already on 13th November 1918, the National Committee promulgated a Provisional Constitution.

Given its provisional nature, the Revolutionary National Assembly had the most important role, to draft and approve the fundamental law of the state. The constitutional basis of the first pre-Munich republic became the Constitutional Charter of 1920. The approval of the constitution represents the culmination of the formation of the Czechoslovak state.

The adoption of the Constitutional Charter of the Czechoslovak Republic in February 1920 meant the definitive break-up of the new republic with the constitutional-legal continuity and the tradition of Austrian constitutionality.

### KEYWORDS

World War I, T. G. Masaryk, idea of an independent, the Washington Declaration, the Revolutionary National Assembly, the Provisional Constitution, the Constitutional Charter of the Czechoslovak Republic 1920.

During the First World War, the attitude of Czech politicians towards the idea of the existence of an independent state changed fundamentally. Until the outbreak of the war, the secession from Austria and the creation of an independent Czech state had not been a real option. Most of the Czech political representatives were convinced that Austria-Hungary would be preserved regardless of the outcome of

the war it had provoked. Austria-Hungary was considered, with reservations, to be the most appropriate form of constitutional existence. However, the war marked a significant turning point – representing not only the end of national and social conveniences but also the end of the pre-war concepts aimed at the democratisation and federative organisation of the Habsburg confederation of states. In the Czech lands and in the whole of Cisleithania, the demand for a solution resulting in the Czech-German settlement arose, becoming a fundamental existential issue of the entire Habsburg Empire from the end of the nineteenth century. The emperor, together with the Austrian government, were under pressure from the German nationalists of Bohemia, who were protected by the force of the neighbouring Wilhelmine Germany; although the Czechs insisted on a settlement, the Germans refused to negotiate with them, and they were ready to agree on a settlement only with the government. However, the war changed everything. Due to their resistance to the war efforts, the Czechs were considered unreliable by the military circles, many of them were persecuted, and the leaders of the National Liberal Party were sentenced to death for alleged high treason.<sup>1</sup> One of the manifestations of resistance against the war was the formation of Czechoslovak military units – legions fighting on the side of the Entente Powers against the Austro-Hungarian Monarchy. In 1916, the Austrian Germans came to an agreement on the principles of Czech-German settlement, which were imposed to significantly strengthen centralism, create a customs union with Germany and divide Czech lands into Czech (with the official German and Czech languages) and German (with the official German language). The historical state law of the Czech lands was to be definitively denied, and the Czech lands were to be gradually Germanised.

T. G. Masaryk, who became the main representative and agent of the efforts for independence, formed, together with his associates E. Beneš and M. R. Štefánik, the Czech Foreign Committee; later, this committee transformed into the Czechoslovak National Council, which sought to sell the representatives of the Entente on the idea of an independent Czech state.<sup>2</sup> The Czechoslovak National Council was gradually recognised in 1918 by the individual powers of the Entente as a provisional government. The ideas of an independent Czech state also won recognition at home, in the Czech lands, where two bodies – the Czech Union and the National Committee – were established, aiming to coordinate the efforts of the Czech politics leading to independence.

The fundamental document of the domestic policy was the Declaration of the Czech Deputies of the Imperial Council and Provincial Assemblies, also called the

1 Later on, their sentence was reduced, and after the death of the Emperor Francis Joseph I, they were granted amnesty by the new Emperor Charles.

2 The lands of the Czech Crown were legally established by Charles IV by a bill issued on 7 April 1348. At that time, in addition to Moravia, which was connected to the Czech Kingdom as a margraviate from about 1035, the lands of the Czech Crown also included Silesia (since 1327), Upper and Lower Lusatia, and (temporarily) Brandenburg Margraviate and Luxembourg. The conception of the Czech Crown as a distinctive and independent state played a key role in the nineteenth century in the formation of Czech historical state law.

Epiphany Declaration, adopted on 6 January 1918, which demanded the independence for its nation “in its sovereign, democratic state enjoying full rights and guaranteeing social justice and equal treatment of all its citizens, within the historic frontiers of the Bohemian lands and of Slovakia”.<sup>3</sup>

The Czechoslovak National Committee was reorganised in July 1918 and declared itself the highest body of domestic resistance movement in Bohemia. The representation of individual political parties was based on the results of the last elections to the Imperial Council in 1911.

T. G. Masaryk responded to the manifesto of Emperor Charles I on the federalisation of the Austrian part of the monarchy – an attempt to save the empire – by solemnly declaring the Czechoslovak independence, which is also known as the Washington Declaration. It already presented the form of the Czechoslovak state, with its author defining it as “a republic that will guarantee full freedom of conscience, religion and science, literature and art, speech, press and the right of assembly and petition... The government will be parliamentary and will recognise the principles of initiative and referendum”. The Declaration rejected the possibility of autonomy within Austria, citing the historical rights of the Czechs and the Slovaks’ right to self-determination; the goal of creating a common state with the Slovaks was thus clearly declared. The Slovak National Council, which declared itself the only body authorised to act on behalf of the Slovak nation, adopted, at its foundation meeting on 30 October 1918, the so-called Martin Declaration, which, together with the Act on the Establishment of the Czechoslovak State adopted on 28 October 1918 by the National Council and later promulgated in the Collection of Laws and Decrees as Act No. 11/1918 Sb., became the second fundamental constitutional document. With the Martin Declaration, the Slovaks claimed allegiance to the common, historically united “Czech-Slovak nation”. They proclaimed the right to independence and self-determination of the Czech-Slovak nation unified in language and culture and manifested their support to the formation of a common state.<sup>4</sup>

The separate notes of Germany and Austria-Hungary on the armistice sent to the US President W. Wilson and, based on his Fourteen Points, were rejected by the United States, which stated that only the nations of the monarchy could decide which actions of the Austro-Hungarian government they would consider eligible for negotiations. The armistice was signed on 3 November 1918, and subsequently, on 11 November Emperor Charles abdicated, and Austria-Hungary ceased to exist. The next day, German Austria was declared a republic.

Czechoslovakia was established as an independent state by a revolutionary act of the Czechoslovak National Committee on 28 October 1918, which on this day declared

3 Cf. The declaration of the Czech Deputies at the Imperial Council and Provincial Assemblies against the course of action of Austria-Hungary during the Brest-Lithuanian Peace Negotiations – the so-called ‘Epiphany Declaration’ (Galandauer, 1988, p. 296).

4 Cf. Grónský, 2005, p. 41.

itself the government of the new state, the executor of state power, and at the same time, a legislative body.<sup>5</sup>

The Act on the Establishment of an Independent Czechoslovak State in its five articles did not yet stipulate the form of a newly established independent state,<sup>6</sup> which was to be decided by the National Assembly in agreement with the Czechoslovak National Council in Paris.<sup>7</sup> In the work *New Europe*, written during the war, T. G. Masaryk expressed his conviction that “the Czechoslovak state will undoubtedly be a republic”<sup>8</sup> and added that “the Czech and Slovak nations are mature for the republic”.<sup>9</sup> The National Committee declared itself a body of unanimous will of the nation and an executor of state sovereignty and at the same time, the highest body in the state. In Art. 2, the law defined the principles of reception of the still valid law, especially in an effort to prevent possible chaos; however, their implementation caused a very complicated legal situation. It created Czech-Slovak dualism – Austrian law remaining in force in the Czech lands and Hungarian law remaining in force in Slovakia, and later in Subcarpathian Russia – as well as the dualism of the adopted old law and the new Czechoslovak law, with the need to address the provisions based on the existence of the monarchy. The unification of law and the creation of new regulations of civil, criminal and other branches of law were one of the fundamental tasks of the new power.<sup>10</sup> Formal discontinuity with the legal order was expressed by the Act on the Protection of the Czechoslovak Republic, where, in all legal norms, the terms reflecting the existence of Austria-Hungary were replaced retroactively with the words ‘Czechoslovak’ or ‘Czechoslovak Republic’.<sup>11</sup>

On 13 November 1918, the National Committee promulgated a provisional constitution,<sup>12</sup> and 40 representatives of Slovakia were co-opted to establish the Czechoslovak National Assembly, which subsequently set up a republican system with the form of a parliamentary government and declared the Habsburg-Lorraine dynasty deposed<sup>13</sup> and Tomáš Garrigue Masaryk president of the new state. With the

5 Cf. Proclamation of the Czechoslovak National Committee on the independence of the Czechoslovak state of 28 October 1918 in Collection of Laws and Decrees as Act No. 11 Sb. z. a n. of 28 October 1918.

6 Vojáček, 2018, p. 145.

7 Karel Kramář, later the first Prime Minister, who led a delegation of the National Committee at the Geneva talks with the representatives of the Czechoslovak foreign government, has long advocated the monarchist establishment, i.e. the Czech Kingdom, to be headed by a prince of the Romanov family. Both delegations agreed while still in Geneva on the republican form of the state and on the fact that prof. T. G. Masaryk would become the president of the republic.

8 Masaryk, 1994, p. 159.

9 Masaryk, 1994, p. 159.

10 Ráth, 1920, pp. 12 et seq. To unification see Fritz, 1926, pp. 411–431 and Vaverka, 1937, pp. 337–365; newer Gábriš, 2006, pp. 232–252 and Gábriš, 2007, pp. 193–208.

11 Act No. 449/1919 Sb. z. a n.

12 Act No. 37/1918 Sb. z. a n. on the Provisional Constitution.

13 Proclamation on the dethroning of the Habsburg-Lorraine dynasty at the first session of the Czechoslovak National Assembly. Joint Czech-Slovak digital parliamentary library, first session of the National Assembly on 14 November 1918.

approval of the constitution, the current Czech, Moravian, and Silesian Provincial Assemblies also formally ceased to exist. The president's constitutional position was rather representative and virtually without effective competencies *vis-à-vis* the parliament and government. This was changed by an amendment in May 1919,<sup>14</sup> which significantly strengthened the president's position, authorising him to appoint the government as a whole as well as individual ministers, to dissolve the government, to preside over the government, to get reports from the government, to name university professors, and to appoint and receive ambassadors. He became a *de facto* head of the executive, which in general was strengthened. To become valid, each governmental act of the president required the countersignature of the relevant responsible member of the government. Once in history, the session of the National Assembly elected the government that was responsible to it; later, the government would always be appointed by the president of the republic. However, the unicameral National Assembly, sometimes referred to as the Revolutionary National Assembly, was constituted not by election but by the decision of the presiding committees of political parties and the subsequent appointment of individual deputies.<sup>15</sup> The key to it was the already mentioned proportional representation of individual political parties according to the results of the elections to the Imperial Council in 1911. Co-optation as a way of constituting representative bodies has then been used several times in emergency situations in Czechoslovak constitutional history.<sup>16</sup> The National Assembly was a body of the Czechoslovak nation, precisely in the sense of the wording of Act No. 11/1918 Sb. z. a n. on the Establishment of an Independent State, understood as a state nation. Hungarians and Germans were not represented in the National Assembly; they later rejected the invitation to participate in the newly constituted state bodies for their disagreement with the recognition of Czechoslovakia within the existing borders and were considered a national minority.

Adhering to the war period conception of a nation, Masaryk understood it as a political category, in the sense of a political, civic nation free from all ethnic features. According to this perception, the 'Czechoslovak' Germans and Hungarians were to be assimilated gradually – politically, not linguistically or culturally – into the Czechoslovak nation.<sup>17</sup> According to the first Czechoslovak census conducted in 1921, the republic had 13,613,172 inhabitants, of which 8,760,937 were Czechs and Slovaks reported as members of the Czechoslovak nation, 3,123,568 Germans, 745,431 Hungarians, 461,849 Ruthenians and 75,853 Poles.<sup>18</sup>

14 Act No. 271/1919 Sb. z. a n., amending the Act on the Provisional Constitution.

15 Slovak deputies, due to the impossibility of using the same key as Czech political parties, were appointed by the minister with a power of attorney for the administration of Slovakia.

16 Cf. e.g. Kudrna, 2009, p. 235; Jirásková, 2014, pp. 132–144; Roubal, 2013.

17 Cf. Kosatík, 2010, p. 28.

18 Cf. Rychlík, 2018, p. 144.

The newly constituted state faced several tasks. It was necessary to solve not only the issues of the final constitution, own currency,<sup>19</sup> flag<sup>20</sup> and anthem but also of state borders,<sup>21</sup> the cleansing and building up of state administration,<sup>22</sup> status of minorities, regulation of relations between the state and the church, approach of the state towards nobility,<sup>23</sup> the already mentioned unification of legal order, building of the political system, implementation of land reforms<sup>24</sup> as well as a range of social and other measures of the young republic.<sup>25</sup> Lastly, it was necessary to ensure the defence and security of the state and the republic's accession to the international community.

In addition to national constitutional regulations, the norms of international law were also extremely important for the legal status of an independent Czechoslovakia. The most important international treaty was the Treaty between the Allied and Associated Powers and Czechoslovakia, signed in September 1919 in Saint Germain en Laye (the Treaty of Saint Germain),<sup>26</sup> which guaranteed Czechoslovakia security within its borders and recognition of historical countries as the territorial base of the new state. The treaty meant a definitive international recognition of Czechoslovakia,<sup>27</sup> and it confirmed the termination of its union with the former Austro-Hungarian monarchy. In Art. 53 of the Treaty, Austria recognised the complete independence of the Czechoslovak state, including the autonomous territory of the Ruthenians south of the Carpathian Mountains. Similarly, the independence of Czechoslovakia was recognised by the peace treaty between the Allied powers and Germany of June 1919 (Treaty of Versailles) and between the powers and Hungary of June 1920 (Treaty of Trianon).

Given its provisional nature, the Revolutionary National Assembly had the most important role – albeit with a lack of time – to draft and approve the fundamental law of the state, which, together with regular elections to the legislature and the

19 Monetary Act No. 187/1919 Sb. z. a. n., provided for the requisites of the new currency, including the name 'koruna', which evoked reminiscences of the common Austro-Hungarian crown. Monetary separation from Austria was conducted in February 1919 and created a quality and stable state currency. All Austro-Hungarian coins expired in the country in December 1924.

20 Act No. 252/1920 Sb. z. a. n., providing for the national flag, national emblems and seals.

21 E.g. Slovak borders were not recognised until the Treaty of Trianon in June 1920. This was preceded by a war with Hungary over Slovakia, which lasted almost 2 months and during which a military dictatorship and martial law were declared in Slovakia. The armistice was declared in June 1919 under pressure from the Entente.

22 Cf. Act No. 2/1918 Sb. z. a. n., on the Establishment of Supreme Administrative Authorities in the Czechoslovak state, Act No. 126/1920 Sb. z. a. n. on the Establishment of Provincial and District Authorities and Act No. 286/1924 Sb. z. a. n. (Restriction Act).

23 Cf. Act No. 61/1918 Sb. z. a. n., Abolishing Nobility, Orders and Titles. For the abolishment of nobility, see Gábriš, 2019.

24 Cf. Act No. 215/1920 Sb. z. a. n. o, Annexation Act, Act No. 81/1920 Sb. z. a. n., Allotment Act, Act No. 339/1920 Sb. z. a. n., Compensation Act. For land reforms, see Horák, 2016, pp. 640–648.

25 Cf. e.g. Act No. 63/1918 Sb. z. a. n. on Subsidising the Unemployed, Act No. 91/1918 Sb. z. a. n. on an Eight-hour Week, Act No. 199/1919 Sb. z. a. n. o on Organising Care for War Veterans.

26 The treaty was published under No. 507/1921 Sb. z. a. n.

27 Cf. Pavlíček, 2002, p. 44.

government, was to end the revolutionary period of the establishment of an independent Czechoslovakia. The constitutional basis of the first pre-Munich republic became the Constitutional Charter of 1920,<sup>28</sup> adopted by an unelected parliament, which also fulfilled the role of a constitutional assembly. The approval of the constitution represents the culmination of the formation of the Czechoslovak state.

The Washington Declaration of October 1918, written by T. G. Masaryk and signed on behalf of the Provisional Government of Czechoslovakia by Edvard Beneš and M. R. Štefánik, already contained the main principles of the future constitution of the Czechoslovak nation; in addition to rejecting the Austrian government's proposals for the federalisation of Austria. Above all, it determined the form of the state, namely the republic, ensuring complete freedom of conscience, religion and science, literature and art, speech, press and the right of assembly and petition. It clearly set out the requirement of the separation of church and state as well as the political, social and cultural equality of men and women, who would be granted universal suffrage.<sup>29</sup> Minority rights were then to be safeguarded by proportional representation, and national minorities were to enjoy equal rights. The government was to be parliamentary in form. The standing army was to be replaced by militia in defence of the state. Social and economic reforms were to be far-reaching. It also had a requirement for the expropriation of large estates and the abolition of aristocratic privileges as well as a commitment to the future assumption of part of the Austro-Hungarian, pre-war public debt, which would be passed on to the Czechoslovak nation. At the same time, liability for war debts was denied; however, the Washington Declaration left the final decision on the constitution to the duly elected representatives of the liberated and united nation.<sup>30</sup>

The Constitutional Committee of the National Assembly began discussing the draft constitution at the end of 1919. It was not clear for a long time whether the final constitution would be approved by the unelected Revolutionary National Assembly or whether this role would fall within the prerogatives of the constituent body, the elected Constitutional Assembly. The governmental programme of the Tusar's red-green coalition of June 1919 assumed that the National Assembly would become a constituent body and thus adopt a new definitive constitution.<sup>31</sup> The task of drafting the constitution was undertaken by the government, requiring that negotiations on the draft constitution, including draft laws related to the constitution, be confidential, expeditious and without the involvement of the general and professional public.<sup>32</sup>

The author of the original government draft constitutional charter was prof. Jiří Hoetzel, the negotiations with the political parties were led by the Minister of the Interior Antonín Švehla, and the President, T. G. Masaryk, also had a significant role in the preparation of the document.

28 Act No. 121/1920 Sb. z. a n.

29 Men have had universal and equal voting rights since 1907.

30 Declaration of Czechoslovak independence by the foreign Provisional Government, the so-called Washington Declaration of 16 October 1918 (see Galandauer, 1988, pp. 311–314).

31 By the end of 1919, parliamentary elections had taken place in all European countries.

32 Constitutional Charter (1920). See Kuklík, 2020.

The Constitutional Charter of the Czechoslovak Republic of 29 February 1920 is considered, despite its shortcomings, a legal document which has played and still plays a significant role in constitutional history and influenced both the 1948 Constitution and the 1992 Czech constitution.

It was undoubtedly a democratic constitution, and as such, in the 1920s and 1930s, it survived as the basis for the democratic existence of Czechoslovakia and the functioning of its constitutional system until the Munich Agreement in 1938, despite the growing danger of the fascist threat to Central Europe and the existence of totalitarian or authoritarian regimes in its immediate vicinity. Its models of inspiration were, in particular, the American Constitution (preamble to the Constitution), the French Constitution of the Third Republic (parliamentary form of government), and despite clear efforts in society demanding consistent 'de-austrianisation', the Austrian Constitution of December 1867 (civil rights and freedoms). At the same time, it was a rigid constitution, as passing an amendment or supplement required a form of constitutional act approved by a three-fifths majority of all members in each of the two chambers. The system of designating laws governing constitutional relations as 'constitutional acts' has become a Czechoslovak constitutional custom, and over the years, the constitution has become a polylegal constitution, consisting of the constitutional charter itself, which has never been directly amended during its term, of the laws that the constitutional charter declared a part of it, acts referred to as constitutional, and the constitutional laws by which the National Assembly gave its consent to international treaties on the regulation of state borders, such as the state territory of the Czechoslovak Republic. This group also includes the constitutional decrees of the president of the republic from the period of the Provisional State Establishment of 1940–1945, which were declared by the Provisional National Assembly to be constitutional laws and passed additionally, together with some regulations of the Slovak National Council from 1944–1948 and the constitutional laws of the Provisional National Assembly and the Constituent National Assembly of 1945–1948.

At the same time, the constitution was a document corresponding, at the time of preparation and its passing, to the specific existing balance of power. Its distinctive feature was a compromise between the bourgeois and socialist forces in the National Assembly, between clericals and the supporters of a strict separation of church and state,<sup>33</sup> and between political parties that had a decisive influence but were not mentioned in any of the constitutional provisions. K. Laco states that the compromise was one of the main sources of the constitution.<sup>34</sup> It is not without interest that the constitutional charter served as a basis for the constitutional foundations of the state organisation in the preparation of the constitution of the Czech Republic (Constitutional Act No. 1/1993 Sb.) and that during the drafting of the constitutional charter, materials of the National Assembly were thoroughly studied.<sup>35</sup>

33 The separation of the church from the state, as defined in Section 121 of the government's draft Constitutional Charter, was not included in the approved text of the constitution due to the opposition of the Catholic Church and especially the deputies from Slovakia.

34 For further details, cf. Laco, 1966, p. 404.

35 Cf. Filip, 2002, p. 295.



On Sunday, 29 February 1920,<sup>36</sup> the Revolutionary National Assembly approved the Constitutional Charter of the Czechoslovak Republic together with Act No. 121/1920 Sb. z. a n., which introduces the Constitutional Charter of the Czechoslovak Republic. Art. X of the Introductory Act provided for its entering into force together with the Constitutional Charter. Both the Charter and the Introductory Act were promulgated by publication in the Collection of Laws and Regulations on 6 March 1920. Simultaneously with these constitutional documents, Act No. 122/1920 Sb. z. a n., pursuant to Section 129 of the Constitutional Charter, which lays down the principles of language law in the Czechoslovak Republic; Act No. 123/1920 Sb. z. a n., which issues the rules of election to the Chamber of Deputies; Act No. 124/1920 Sb. z. a n., on the Composition and Powers of the Senate; Act No. 125/1920 Sb. z. a n., on the Electoral Court; and Act No. 126/1920 Sb. z. a n., on the Establishment of County and District Offices in the Czechoslovak Republic were approved. The approval of the constitutional charter and the first parliamentary elections in the new state, which took place on 18 April 1920, *de facto* and *de jure* ended the year-and-a-half revolutionary period of building the new state and consolidated the foundations of 'state building'.

Following an intensive discussion in January and February 1920, the Constitutional Committee submitted to the plenary session of the Revolutionary National Assembly on 25 February 1920 a draft constitutional charter together with the introductory law and the Constitutional Committee's explanatory memorandum to the Constitutional Charter of the Czechoslovak Republic. It also included an explanatory memorandum to the government bill introducing the Constitutional Charter. The original intention of the government was to include all constitutional norms in the Constitutional Charter; however, despite initial efforts, the constitution has become polylegal. In addition to the actual text of the Constitutional Charter, Art. I (2), which introduces the Constitutional Charter of the Czechoslovak Republic, assumes other laws explicitly marked as parts of the Constitutional Charter as well as laws amending or supplementing the Constitutional Charter, if they are explicitly declared constitutional. Furthermore, the provisions of Section 64 (1) of the Constitutional Charter required that the consent of the National Assembly to a treaty changing the state territory should take the form of a constitutional act. All regulations, the Constitutional Charter, the laws promulgated as part of it and the laws that amended and supplemented the Constitutional Charter were of the same (highest) legal force.

The presumed systematics of this basic law thus consisted of the basic articles embodied in the Introductory Act and marked by Roman numerals, some of which became part of the Constitutional Charter (Art. I, II, III [1] and Art. VI), which, not designated as an act but bearing the title of Charter with a historical justification and without legal, normative significance,<sup>37</sup> was divided into six chapters and 134 sections.

36 The 126<sup>th</sup> session of the National Assembly began on Saturday, 28 February 1920 at 8:30 a.m. and ended on Sunday at 3:35 a.m.

37 Cf. Weyr and Neubauer, 1931, p. 9.

Neither the original governmental proposal nor the proposal submitted by the Constitutional Committee to the National Assembly as a legislative initiative contained any traditional ceremonial introductory text, introduction, preamble, or statement summarising developments to date, giving the characteristics of the state, or defining the basic programme objectives.

The constitution finally got an introduction. It happened under somewhat strange circumstances, which to some extent illustrate the overall situation in the Constituent Assembly. During the discussion over the Language Act (Act No. 122/1920 Sb. z. n., laying down the principles of language law in the Czechoslovak Republic), the debate became considerably tense and emotional, especially with regards to the anchoring of the Czechoslovak language as a state language. Some deputies tried to diffuse the aggravated situation, which threatened even the already reached compromises or the pre-negotiated approval of the Constitutional Charter by appealing to the extraordinary significance of the moment of the constitution's approval "as an act that will be memorable in our history for many centuries".<sup>38</sup>

A proposal was made to supplement the introduction of the constitutional text. First, it was clear in advance that the constitution of the nation, which gave the world Hus, Comenius, Havlíček, and other thinkers, could not be other than thoroughly democratic. It could thus be argued that at the head of our constitution there may also be words that contain a historical declaration of the United States' independence: "The legitimate governments derive their just powers from the consent of the governed".<sup>39</sup>

Member of Parliament Jan Herben proposed a broader and more elaborate text of the introduction to the National Assembly, justifying his proposal with the following words:

I would wish, dear National Assembly, to conclude the constitutional work in a chivalrous way I have spoken of. That is why I intended to submit a proposal to the Constitutional Committee through the National Assembly. I would like us to write a slogan at the head of the constitution that we will adopt. Such slogans at the head of the constitution are nothing new; after all, you know that the United States of North America has such a slogan in the declaration of so-called human rights. I also found in our old constitutions that at the beginning they invoke the Holy Trinity, God, etc., and that the Czech constitution begins and ends with verses which reflect some long-standing experience or state wisdom.

I thought it would be appropriate, now that we appear, after 420 years, before Europe and the whole world with a constitution, that we should put this slogan at the head of that constitution: 'We, the Czechoslovak nation, desiring to consolidate the perfect unity of our nation, to establish the reign of justice in the

38 Stenographic record of the 126th session of the National Assembly of 28 February 1920. <http://www.psp.cz/eknih/1918ns/ps/stenprot/126schuz/s126001.htm>.

39 Stenographic record of the 125th session of the National Assembly of 27 February 1920. <http://www.psp.cz/eknih/1918ns/ps/stenprot/125schuz/s125019.htm>.

Republic, to assure the peaceful development of our Czechoslovak homeland, to contribute to the common welfare of all citizens of this state and to secure the blessings of freedom to coming generations, have in our National Assembly on 29<sup>th</sup> February 1920 adopted the following Constitution for the Czechoslovak Republic. In doing so, we, the Czechoslovak nation, declare that we will endeavour to carry out this constitution as well as all the laws of our country in the spirit of our history as well as in the spirit of the modern principles embodied in the slogan of self-determination; for we want to take our place in the community of nations as a cultivated, peace-loving, democratic and progressive member.’ Due to the huge tensions and, in part, the fury of the parties, I did not commit myself to this proposal. But if any party or any member of this National Assembly would accept this proposal as its own, so that we can really let the world know about us in this way, I would be happy, because I could think that I have convinced you that today we can end the next vote, which is to happen in a few hours, with a chord of conciliation and also a chord of true joy that the Czech nation, after 420 years, was free to work on its own independent constitution again. And even if it were imperfect, it could pass it on to descendants who would be wiser to correct and improve it.

In his memoirs from 1935, J. Herben does not deny that he was inspired by the American Constitution; however, he rejects the opinion of Dr. Spiegel, the Senator and professor at the German University in Prague, who claimed that the formulation referred to as Herben’s formula was wished for by President Masaryk, and Herben only fulfilled the president’s wishes.

The solemn proclamation approved at the head of the constitution became the subject of criticism, especially for its pomp and the absence of a binding force. It was claimed that as such, it could only provide guidance on the interpretation of the Constitutional Charter and it indicated only the ultimate political purpose to be achieved by the issuance of the constitution.<sup>40</sup> The introduction, as if placed outside the parentheses, was not considered part of the constitutional text, but it stood separately and was completely irrelevant for the assessment of the normative content of the Constitutional Charter.

Another subject of criticism was the reference to the Czechoslovak nation as the constituent entity in the introduction to the preamble. Professor F. Weyr, the main representative of normative theory in Czechoslovakia – but also one of the authors of the Constitutional Charter – considered this designation to be incorrect because the normative entity was the National Assembly rather than the Czechoslovak nation. It was indisputable, however, that this statement only emphasised the fiction of the Czechoslovak nation on which the entire constitutional system was built and also the fact that the Constitutional Charter was approved only by “representatives of the

40 Weyr, 1937, p. 89.

Czechoslovak nation (in the national-political sense), i.e. excluding all other nations inhabiting the territory of the Czechoslovak state”.<sup>41</sup>

The Constitutional Charter confirmed the form of state bodies and their system, competence and powers, including the regulation of their mutual relations, and it enshrined the traditional rights and freedoms of citizens. On its basis, Czechoslovakia was to be built as a democratic republic, with the people being the source of all power in the state.

The constitutional bodies included the bicameral National Assembly, composed of the Chamber of Deputies, which consisted of 300 deputies, and the Senate, with 150 senators. Both chambers were elected in general and direct elections by a proportional electoral system, and the Chamber of Deputies had a stronger position. They also differed in their passive and active suffrage and in the length of their mandate. The government was accountable to the Chamber of Deputies – the only body that could hold a vote of no confidence to the government.

According to the constitution, the second highest constitutional body was the president of the republic electable by the National Assembly, whose constitutional status was inspired by the French constitutional regulation of the head of state. To become valid, each of his acts of governmental or executive power required the countersignature of a member of the government, who, by attaching his signature to the act of the president of the republic, assumed responsibility for an irresponsible president before the parliament. The constitution contained an enumerative list of the usual powers of the head of state, such as representing the state externally, negotiating and ratifying international treaties, and having the right to dissolve parliament, veto its laws, appoint and remove ministers, declare amnesty and grant pardons.

Unlike the enumerative definition of the powers of the president of the republic, the constitutional charter entrusted the government with universal competence with respect to the principle of the division of power. The government decided on governmental bills, governmental regulations – all matters of a political nature – as well as the appointment of judges and some government officials.

Territorially, the state was divided into countries (Czech, Moravian-Silesian, Slovak and Subcarpathian Russia), which were further divided into political administration districts that differed in their territorial circuits, e.g. from judicial districts. The performance of administration in territorial units was characterised by a duality of self-governing bodies in addition to bodies subject to central power.

The constitution also regulated the exercise of judicial power. Judges were independent in the performance of their duties and bound only by law. The system of courts included district, regional and high courts and the Supreme Court based in Brno. The only administrative court was the Supreme Administrative Court, which reviewed the legality of decisions of administrative bodies and decided on jurisdictional disputes. In addition to the electoral court deciding on electoral matters, a constitutional court was also established to rule on the constitutionality of laws.

41 Weyr, 1937, p. 89.

The constitution ensured basic civil and political rights to all citizens without distinction, and the rights of minorities established by the constitution were an expression of the obligations of the Czechoslovak state arising from international peace treaties. Minorities were guaranteed the right to use their mother tongue in daily life, in schools, and in cultural institutions set up for persons belonging to minorities. In districts where the minority made up more than 20% of the population, it could also use its mother tongue when contacting authorities, including courts.

Art. IX of the Act of 29 February, which introduced the Constitutional Charter of the Czechoslovak Republic,<sup>42</sup> contained a general derogation clause. The legislator thus avoided the danger that the list of repealed legal norms may be incomplete. This derogation clause repealed, on the one hand, all provisions contrary to the content of the Constitutional Charter and the republican form of the state, which would be repealed or would become obsolete even without an explicit derogating provision, and on the other hand, all constitutional laws regardless of their content. That is, even those whose content would withstand in confrontation with the Constitutional Charter and the republican form of the state. This also applied, for example, to the Austrian State Basic Act No. 142 on the General Rights of Citizens of 1867.

Provisions contrary to the Constitutional Charter were understood to regulate the same matter as the Constitutional Charter, but in a different way. Provisions contrary to the republican form of the state had always ceased to be valid, regardless of the Constitutional Charter.<sup>43</sup>

The Introductory Act and the Constitutional Charter, together with other constitutional laws, were promulgated in March 1920, and immediately after, the first regular parliamentary elections in the Czechoslovak Republic were called in April. Holding the elections ended the revolutionary period in which Czechoslovakia was devoid of an elected parliament. The reasons for such an approach were justifiable, precisely due to that revolutionary, exceptional situation in which the Czechoslovak state arose, and especially due to the efforts to eliminate possible centrifugal and irredentist forces.

The creation of a constitution and some other laws was considered a task that still had to be performed by the revolutionary corps, because it was not believed that there could be an agreement with the disgraced Germans; the Czechoslovak nation created a state against the will of the Germans, so it must also lay its foundations itself...<sup>44</sup>

The adoption of the Constitutional Charter of the Czechoslovak Republic in February 1920 meant the definitive breakup of the new republic with the constitutional-legal continuity and the tradition of Austrian constitutionality.<sup>45</sup>

42 Act No. 121/1920 Sb. z. a n.

43 Peška, 1935, p. 165.

44 Peroutka, 1991, p. 1076.

45 Cf. Malý, 2011, pp. 9 et seq.

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# The Constitutional Development of Hungary After 1918

István SZABÓ

## ABSTRACT

Before 1918, Hungary had a “historical constitution”. The structure of the constitutional system was not included in a single constitutional chart, instead it was determined by separate laws passed over the centuries in addition to customary law. However, the military collapse of 1918 started a revolutionary wave in Hungary, which caused a significant break in the development of the organic constitution. The revolution radicalized, followed by foreign military occupation. The National Assembly, convened in January 1920, restored the pre-1918 constitutional order, making the country a kingdom again. However, the constitutional system contained a number of unique features. The king, crowned before 1918, did not return to the throne, but was replaced by a governor. The second chamber of the parliament was also significantly reorganized, but the most controversial point in the whole system was the right to vote. Although it has been significantly widened, it still had shortcomings compared to the expectations of the age. The most striking was the re-introduction of open voting.

After 1945, with the introduction of the republican form of government, a democratic experiment took place. However, the Soviet occupation made it impossible to build a democratic state. In 1949, a Soviet-style constitution was issued, which meant the establishment of a dictatorship. This state order did not adopt the basic institutions of the rule of law, nor did it provide the minimum requirements of legal certainty for its citizens.

In 1989/90, constitutionality was restored, which had already taken on the expectations of the age. However, this was still achieved by amending the 1949 constitution. Although it did not mean a significant change in its content, in 2011 the Parliament passed a new Fundamental Law, which permanently broke with the pre-1989 constitutional order.

## KEYWORDS

governor, upper chamber, open voting, kingdom, republic, dictatorship, restoration of constitutionalism, Fundamental Law.

## 1. Introduction

Until 1918, Hungary had a historical constitution. The constitutional order was determined by customary law and certain organic laws, adopted over centuries, rather than being incorporated in a charter. However, the defeat in World War I sparked a series of uprisings in the country, disrupting this organic development. In the 1918 Aster Revolution, the state was transformed from a monarchy to a people’s republic, and the creation of a new constitution began; however, this process was interrupted by the far-left Hungarian Communist Party’s coup in March 1919. The short-lived Hungarian

Soviet Republic provoked foreign intervention, leading to the alien occupation of a large territory of the state. These events resulted in widespread dissatisfaction and disillusionment with revolutionary solutions among Hungarians. Therefore, when a new Constitutional Assembly was established in 1920, it had opted to restore the historical constitution and the monarchy as the form of state. This new monarchic era ended in the months before the defeat in World War II, when the fascist Arrow Cross Party seized power and instituted absolute dictatorship. After the war, the Soviet Army occupied Hungary, inhibiting democratic institutions and reforms. Following a few years of democratic attempts in the shadow of the Soviet Union and often hindered by the Hungarian Communist Party (the Hungarian Workers' Party), four decades of communist (or 'socialist') dictatorship began in 1949. Then, the regime change in 1989–90 signalled the dawn of the constitutional democracy currently established in the country.

Therefore, the Hungarian constitutional development in the twentieth century is marked by four periods: 1920–1945, 1945–1949, 1949–1989, and from 1989 to this day. The focus of the present chapter is largely on the first two periods. In the socialist state (between 1949 and 1989), the state was above the law; as it was not bound by legal regulation, examining this era from a legal point of view has a limited advantage, and a sociological approach is more warranted. As regards the fourth era (1989 and onwards), while the constitutional background of the regime change is relevant, the constitutional system established in 1989/90 is almost similar to that of the 2011 Fundamental Law. The parliament, government and other bodies are regulated almost uniformly by the Fundamental Law and the constitution of 1989 and thus do not merit separate examination in legal history.

## 2. The period of 1920–1945

### 2.1. *Constitutional continuity*

In the case of historical constitutions, existing links between different periods of development are indispensable as their historical nature presupposes these connections. These links can be present formally – i.e. when political and legal power is acquired legally, according to the rules of the previous era – or in substance. To determine the presence of the latter, the question is whether changes in constitutional institutions in a new historical era take into account the models of the previous period or establish institutions without connection to previous ones. The legal literature refers to these two forms of continuity as formal and substantial continuity.<sup>1</sup> Which type is necessary to the integrity of a historical constitution is debated. The answer is evident: when both exist or do not exist simultaneously, but when only one form of continuity is detectable, it sparks debate.

1 Formal and substantial continuity is analyzed in depth by Gábor Schweitzer, see Schweitzer, 2017.

Nevertheless, this latter scenario was the situation between the two world wars in Hungary. While the National Assembly reinstated the pre-1918 constitutional system,<sup>2</sup> the assembly itself was not formed according to prior election laws. Although the previous parliament could have been convened, a new constitutional assembly was elected instead, whose election was regulated by a governmental decree. The underlying reasons for this solution will be delineated later in the chapter. Notwithstanding, this disrupted formal continuity while upholding substantial continuity. Could the historical constitution continue to be in force? In practice, the answer was yes as the state continued to function according to previous constitutional traditions.

### ***2.2. The dilemma of the status of the king***

The entente strongly opposed the reinstatement of the Habsburg dynasty in Hungary. The return to monarchy as the form of state necessarily entailed the dynasty's claim to the throne as they had been the monarchs in Hungary before 1918. However, while the monarchic form of state was supported by most political actors, the return of the Habsburg dynasty was significantly less propagated. Two sides formed in this debate: the 'free electors' propagating the election of other than a Habsburg king, and the so-called 'legitimist' party, wishing to see the Habsburgs on the throne again.

The answer to this question need not be analysed further as it always remained theoretical. The return of Charles IV (Emperor Charles I in Austria) was opposed by the entente, and the debate in domestic politics reached a deadlock.<sup>3</sup> Although King Charles IV attempted to seize the throne twice in 1921, these attempts were destined to fail due to the circumstances. However, other dynasties did not have a more supported claim to the throne either, and thus, the vacation of the throne, which was expected to be temporary in the early 1920s, became permanent. The role of head of state was entrusted to a regent until the end of the era.

### ***2.3. The head of state (the regent)***

Regency had been present in Hungarian public law since the Middle Ages as the substitution of the king; therefore, the political-constitutional framework of 1920 might appear to be in line with the historical constitution. Nevertheless, the solution found was a false analogy. Earlier, regents substituted the king in the case he was unable to govern the country (mostly due to his infancy); thus, the throne was not empty, and the king remained head of state. Contrarily, after 1920, the regent himself was the head of state (*sui generis*), and his duties resembled more that of a president than a king. While monarchy was the official form of state, the system of government had decisively republican features in practice.<sup>4</sup>

While the status of head of state is inherited in a monarchy, the regent of Hungary was elected by the National Assembly. Although his appointment was to last "until

2 Act No. I of 1920. Annulled all laws of the People's Republic and the Hungarian Soviet Republic.

3 Szabó, 2006, pp. 171–189.

4 Merkl, 1925, pp. 33–35.

the end of the special circumstances,” no precise term of office was determined. This was also unprecedented as the mandate of the regent had been always issued until a certain date, for example until the king was of legal age. The ‘special circumstance’ in 1920 was the uncertainty of the status of head of state, and the regent had a mandate until the resolution of this problem.<sup>5</sup> Although it was expected to take one or two years, this question reached a deadlock, prolonging the regent’s term of office for decades. Consequently, the next constitutional reform of 1937 had considered the throne to remain empty even after the death of the regent and laid down more sophisticated rules of election to the regency, in case it was necessary.<sup>6</sup> The new act created a lifetime appointment, similarly to that of a monarch.

The power of the National Assembly to impeach the head of state for a breach of law or the constitution was another republican characteristic.<sup>7</sup> In a monarchy, the head of state has no responsibility and cannot be impeached. Although this power of the National Assembly was rescinded in 1937,<sup>8</sup> it did not change the status of the regent as resembling that of a king. It did not annul his responsibility to the National Assembly, and only the National Assembly autonomously decided not to exercise this power. Therefore, it was a procedural rather than a material change, and it was more influenced by autocratic developments in other republics than by monarchic aspirations.<sup>9</sup>

The competences of the head of state were determined in line with the historical constitution. The regent mainly inherited the powers of the monarch, with the act listing the excluded competences.<sup>10</sup> In Hungarian public law, the coronation had been an important constitutional guarantee; while the new king assumed the throne by the death of his predecessor, he could not exercise certain competences until the coronation. Since the regent could not be crowned, he could not exercise these powers either. These competences were the prerogative to ratify bills, the right to award peerage, and the *ius supremi patronatus* – the right to exercise governance over the Catholic Church. The latter included the power to determine dioceses and to nominate bishops. The right to award peerage encompassed the right grant titles of nobility, such as baron and earl, although these titles did not bear considerable prerogatives since 1848. Nevertheless, the prerogative to validate a bill represented absolute veto power as no statute could be promulgated without the king’s consent. Contrarily, the regent could only return the bill to the National Assembly for reconsideration, and if the National Assembly voted to uphold it, he was obliged to promulgate the act. This

5 “Until the National Assembly does not decide on the exercise of executive power, and the new Head of State does not take office, a Hungarian citizen shall be elected by secret ballot as regent by the National Assembly” (Act No. I. of 1920, Section 12).

6 Act No. XIX of 1937, Sections 3–5.

7 Act No. I of 1920, Section 14 (2).

8 Act No. XIX of 1937, Section 7.

9 The ministerial report on the bill expressly mentioned the 1935 Polish Constitution.

10 Act No. I of 1920, Section 13.

was the third republican characteristic of the form of government:<sup>11</sup> while the king is equal in power to the parliament, the head of state of a republic does not have the same status.

The restriction of other executive competences was at the discretion of the National Assembly and was quite wide in the beginning. For example, the king had a significant influence on the operation of the parliament, with the power to adjourn and to pronounce the end of each parliamentary session and the annual session. He also had the power to dissolve the parliament. These powers were mostly excluded from the competency of the regent. Moreover, he could only grant pardons but not amnesties, and the consent of the National Assembly was also necessary to declare war and to broker peace.

Nevertheless, the extension of competences already began in the August of 1920. In two steps, the constraints on the regent's competence over the National Assembly were removed, and he also attained the right to grant amnesties. Moreover, in 1937 the regent also received stronger veto power. While in 1920 he could exercise a one-time within 60 days, in 1937 the term limit was expanded to 6 months, with the ability to veto a bill twice. Therefore, the regent could prolong the promulgation of an act even by a year.

#### **2.4. Franchise**

The House of Representatives was a key institution of the Hungarian public sphere between the two World Wars. The members of parliament were the source of sovereignty in Hungary; consequently, whether the constitutional system had autocratic characteristics can be best determined by examining the laws of the election of the House of Representatives. Although the competences and composition of the House of Peers and the powers of the regent are also indicative, the most significant marker was the franchise. The will of the people could be distorted through election laws by gerrymandering, limiting the franchise and allowing the possibility to influence voters. Election laws were indeed the Achilles' heel of the Hungarian constitutional system of the era.

A new act on the franchise was adopted after the Aster revolution of 1918<sup>12</sup>; however, due to the far-left coup, it was never implemented. After the fall of the Soviet Republic, the government (and not the parliament) created a new election regulation in 1919, and the election of January 1920 was held according to this.<sup>13</sup> Additionally, new rules were adopted in 1922,<sup>14</sup> 1925<sup>15</sup> and 1938.<sup>16</sup> The first two (in 1919 and 1922) were issued in governmental decrees, while the latter ones were adopted as acts, more in line with constitutional requirements. The reason that the rules on election

11 It was also expressly recognised in the ministerial report on the bill.

12 People's Act No. I of 1918.

13 PM Decree No. 5985/1919.

14 PM Decree No. 2200/1922.

15 Act No. XXVI of 1925.

16 Act No. XIC of 1938.

were issued in the form of a decree in 1919 was that the election law adopted in 1918 had been deemed outdated. Since the former parliament was elected according to the 1918 rules, it was not convened either, and thus, the only institution left with the authority to issue binding regulation on the subject was the government. Although the National Assembly, formed in 1920, was elected for 2 years, it did not adopt a new Election Act either. The government re-regulated the issue, quite unfittingly, in a prime ministerial decree in 1922. In 1925, the National Assembly adopted the decree as an act, with minor changes. Therefore, with regards to elections, three different legal norms can be distinguished in the era: the regulations of 1919, 1922/25 and 1938.

The election laws of the 1918 Aster Revolution instituted reforms on three grounds: they broadened franchise significantly and instituted secret voting and a proportional instead of a majority voting system. The regulation of 1919 upheld the first two changes but reinstated majority voting.

The reform of 1922 limited franchise by introducing the requirement of primary education. The 1919 decree only required literacy for women, which decreased franchise to 58% percent from 75% in the adult population. In the case of universal suffrage, the rate should be nearly 100%. Moreover, open voting was reinstated, allowing significant influence over voters from vulnerable groups.

In conclusion, the regulation of elections placed Hungary on the verge of democratic and autocratic regimes. The reinstatement of open voting was a substantial backslide, although it was partly due to the lack of control over political parties. The desire to control voters' behaviour stemmed from the fact that candidates of parties were able to run with starkly opposite ideologies than that of the ruling party of the time. As the communist regime after World War II demonstrated, even if universal franchise and secret voting are ensured, the exercise of these important rights is still moot if only one party is allowed to run.

### ***2.5. The House of Peers***

The Hungarian Parliament had had two chambers since the early seventeenth century. Members of the lower chamber were the lower ranks of nobility and the representatives of free royal cities, while the upper chamber consisted of the higher-ranking aristocracy and clergy. In 1848, during the revolution against the Habsburg dynasty, the lower chamber was converted into the House of Representatives, with popular representation.<sup>17</sup> The composition of the Upper House did not change, but it was renamed to House of Peers, better reflecting the status of its members. Although its reform was attempted in 1885, it did not result in significant changes<sup>18</sup> as the proposed reform needed the consent of the House itself, which only allowed limited changes. As it was discussed, the legal/constitutional continuity with the era before 1918 was substantial rather than formal, and thus, the parliament operating before

17 Act No. V of 1848.

18 Act No. VII of 1885.

1918 was not convened. The National Assembly elected in 1920 had only a chamber of representatives – first, because the previous parliament had been elected with a more limited franchise, and second, because the House of Peers refused to revise its original composition. Consequently, the act reinstating the second chamber in 1926 was adopted solely by the National Assembly with the exclusion of the House of Peers. It was the Act on the Upper House<sup>19</sup> that divided the Hungarian parliament into two chambers again.

Theoretically, the reform of the second chamber had two possible directions: to change its composition or to limit its competences. The House of Peers had previously had veto power in legislation as all bills required its consent. This had been the main obstacle to the success of the 1885 reform, the aim of which was to change the composition of the House. The example of the 1911 British reform of the House of Lords of the British Parliament offered another alternative, where the composition of the other house remained untouched, while its competences were limited.

After 1926, the composition of the second chamber reflected both adherence to traditions and innovation. The new Upper House was composed of members by all the former titles, while new members were introduced. This was the primary reason for changing the name of the chamber from “House of Peers” to “Upper House” as the number of peers among the members declined from 66% to less than 16%; this represented the starkest change in the chamber’s composition. It was the direct consequence of the adjustment of the legislative framework as the nobilities who participated personally in the work of the House before 1918 were represented by only 38 members elected from among themselves under the new regulation. In addition, the number of seats of the highest-ranking peers and clergymen remained unchanged (52 members), with 40 members appointed by the head of state. Nevertheless, the largest section comprised of the representatives of the governing councils of counties (76 members) – a new category created by the act. Although in some European states, the parliamentary reform of the upper house involved the introduction of popular representation, this was intentionally avoided in 1926 as this solution was deemed to unnecessarily duplicate the House of Representatives.

Apart from its composition, the reforms also transformed the competence of the new chamber. Although the initial proposal had left it unchanged, allowing a ‘prerogative of consent’ to the Upper House, it was nevertheless constrained by the 1926 Reform Act. Similar to the 1911 British Parliamentary reforms, the veto power of the Upper House had been limited to a two-time suspensive veto. If the House of Representatives repeatedly voted on a bill after the second veto of the Upper House, it was sent to the regent for promulgation. Notwithstanding, in 1937 the pre-1918 competences of the second chamber were reinstated.<sup>20</sup>

19 Act No. XXII of 1926.

20 Act No. XXVII of 1937.

### **2.6. *The impact of traditions (the clash of traditionalism and dogmatism)***

Legal dogmatism aims to integrate the body of existing legal norms into one logical structure. By the twentieth century, legal dogmatism was the underlying principle of the legal systems of most European states. However, the Hungarian legal system between the two world wars contained elements that were irreconcilable in one logical structure. The most evident example was the state form of ‘monarchy without a king’ with an almost republican governmental system. These elements were nevertheless able to coexist due to the strong traditionalism that shaped Hungarian constitutional history, along with dogmatism.

### **2.7. *The dictatorship of the Arrow Cross Party (October 1944–March 1945)***

In the face of certain defeat in World War II, Hungary attempted to broker a ceasefire with the Soviet Union. To prevent this, the far-right Arrow Cross Party seized power with Germany’s assistance. The party derived its name from its symbol: an isosceles cross with arrows as ends, invoking the swastika, to express their ideological identification with the Nazi party.

Following the Arrow Cross *coup d’état*, the system of government had the characteristics of every totalitarian system: the activity of political parties was severely limited, and a single-party parliamentary system was introduced. The Arrow Cross Party became intertwined with state institutions, the offices of the party had direct control over ministries, and by appointing their officials, they seized control over the lower levels of state administration – the so-called ‘Armed Party Guards’. A paramilitary unit was organised, which committed horrendous massacres. The use of government decrees instead of laws had increased during the war and peaked under the Arrow Cross Rule. Judicial independence was also significantly limited, completely abolishing the separation of powers.

## **3. The era of 1945–1949**

### **3.1. *The resumption of the state***

The frontline in Hungary created two powers in each part of the country during the war. The western part remained under the Arrow Cross Rule, while in the eastern part, a new state structure began to form. On 21 December 1944, a so-called Interim National Assembly was formed in Debrecen, the largest city of East Hungary. The members of the Assembly were delegated by various political and municipal governmental bodies, formed in an ad-hoc manner on the territories occupied by the Soviets. Consequently, it could hardly be regarded as a real institution of parliamentary democracy. Nevertheless, this body created the Interim National Government and later created the National High Council to fulfil the role of the head of state. The main task of the Provisional National Assembly had been to create a new election act, setting out the conditions of a new parliamentary election and thus allowing state administration to resume its ordinary functions. The law was adopted in the



autumn of 1945, after a prolonged legislative process, and the election was held on 4 November 1945.

### ***3.2. Republic as form of state and the president of the republic***

Why the determination of the country's new state form required more than a year is still uncertain. While, during the 1918 Aster Revolution, Hungary was declared to be a people's republic within days, in 1945, the issue was not addressed for a long time, even in the electoral campaigns. Surprisingly, the running parties did not consider this to be an important subject. The Act on the Republican State Form was eventually adopted on 1 February 1946,<sup>21</sup> having the direct consequence of establishing the status of president of the republic.

The legislation on this status was created with a compromise between the three most influential parties of the time (the Small Holders, the Communists and the Social Democrats). Each of them presented drafts,<sup>22</sup> and the final text of the act reflected various aspects of all three. The relation of the President of the Republic to the executive power was the most contentious issue. While the Small Holders wanted a presidential system in line with constitutional traditions, the other parties would have preferred a parliamentary system. The most controversial questions were the nomination of the President of the Republic and his competences over the National Assembly. The first concerned the dilemmas of whether forming a government should require confirmation by the National Assembly or nomination by the president of the republic, and whether both the National Assembly and the president of the republic, or only the former, should be granted the power to dissolve the government. In the case of the competences of the head of state over the National Assembly, the Small Holders' Party wished to grant the former royal prerogatives to the president of the republic (dissolution, adjournment), while the other parties wanted to limit these powers.

Eventually, the Small Holders' ambitions gained traction as the National Assembly obtained advisory rather than confirmatory power in the formation of the government, and the president of the republic acquired the power to dismiss the cabinet exclusively. Nevertheless, the dissolution of the National Assembly required the consent of the government or the petition of two-fifths of the representatives. Although the latter allowed the dissolution even against the vote of the government majority, these rights bore small relevance due to the informal powers delineated below.

Additionally, it must be highlighted that Act No. I of 1946 did not create a Constitutional Charter either, and thus, the transformation of state form happened within the framework of the historical constitution.

### ***3.3. The effect of Soviet occupation***

As mentioned in the introduction, the attempt to establish a democratic state between 1945 and 1949 was unsuccessful. The most important cause was the impact of the

<sup>21</sup> Act No. I. of 1946.

<sup>22</sup> Vida, 1982, pp. 951–969.

Soviet occupation, which did not support democratic aspirations. The informal pressure of SU-friendly political groups was present in the country since 1945 as the ministry of the interior was controlled entirely by the Communist Party, without any oversight of the government. The circumstances of the resignation of Prime Minister Ferenc Nagy in July 1947 illustrate this situation. During his vacation abroad, the prime minister's secretary was arrested in the ministry. Since his safety was also threatened by the Minister of the Interior – formally his subordinate – he chose to resign and left Hungary.

In 1945 whether a party was allowed to run in the upcoming election had been decided by the occupying forces. In 1947, a new parliamentary election was held, where the Communist Party could safely commit thinly veiled instances of electoral fraud. In the following years, they forced the social democrats into a union and gradually ousted the other parties from political power. During the next election in 1949, the only option on the voting list was the Hungarian Workers' Party, and the single-party system was completed. In August, the newly elected National Assembly adopted the Act XX of 1949 as the Constitution of the Hungarian People's Republic, and 40 years of communist rule began.

## **4. The socialist state (1949–1989)**

### ***4.1. The absence of the rule of law***

The cornerstone of rule of law is legal certainty. The objective of the democratic state is to make legal norms known to its citizens and incentivise law-abiding behaviour, and coercion is used only in case of a breach of previously published laws. On the contrary, the totalitarian state aims to raise uncertainty among people, and state retaliation without clear cause induces civilians to refrain from public criticism and active participation in public decision-making. In the new Hungarian political system, the constitution could not function as a firm foundation either as power was exercised through informal means. The constitution adopted in 1949 did not even attempt to comprehensively regulate the functioning of the state; for example, it did not even mention, let alone regulate, the police. The operation of law enforcement agencies was generally opaque (see Section 4.3.), increasing people's fear and uncertainty.

The operation of totalitarian states regardless of their ideologies is largely similar; therefore, many institutional features of the Arrow Cross Party's rule were also present under the communist dictatorship.

### ***4.2. The relationship of state and law***

In the socialist system (and in fact in all totalitarian systems), the connection of law and state was tainted. While in a democracy the operation of the state is determined, and the political will of state actors is constrained by law, in the totalitarian state, the law is simply a tool of the state power (i.e. the political will of those in power). As the state was the master of the law in Hungary as well, textual legal analysis cannot

inform us about the actual functioning of the Hungarian communist/socialist state; its characteristics can be more aptly determined on a factual basis in a sociological dimension rather than by analysing legal norms.

#### **4.3. The characteristics of the socialist state**

*The single-party political system.* The most important element of the encroachment on democratic aspirations between 1945 and 1949 was the obstruction of political parties. Consequently, in the election of 1949, voters could only vote the candidates of the Hungarian Workers' Party (the communist/socialist party), rendering the aim of elections (i.e. to allow the choice of different alternatives to voters) itself moot. A single-party political system can only serve to strengthen the power of the ruling party, not to facilitate democratic self-organisation. This was the case not only in the Hungarian communist regime after 1949 but also in the Arrow Cross Party's rule in 1945 and in Nazi Germany.

*The fusion of state and party organisation.* Another characteristic of all totalitarian states (the socialist regime as well as the rule of the Arrow Cross Party) is the fusion of party and state structure; similarly, in Nazi Germany, political leadership belonged to the party, with state organisation playing only an administrative role.<sup>23</sup> The political leadership of the socialist party was also declared by the 1949 constitution.<sup>24</sup> This fusion was most salient from a functional aspect: the organisation of the Hungarian Workers' Party was parallel to ministries, all branches of public administration having a separate party committee or other body; even 'personal unions' were not uncommon, with one person having both a ministerial position and an overlapping position within the party.

*The heightened role of state security agencies (the political police).* As previously discussed, the role of the police is different in totalitarian systems than in democracies. An important characteristic of the totalitarian police force is the absence of a legal framework that regulates law enforcement agencies and thus protects citizens from abuse. Another attribute is the establishment of a separate political police allowing the prioritisation of state security, a crucial subject in dictatorships. Due to the Soviet influence, the ministry of the interior had been under the influence of the Communist Party since the end of World War II. Consequently, the 'Department of Political Security' had been established in 1945 and renamed the 'Department of State Protection' (DSP) in 1946. For many Hungarians, this acronym and that of its successor, the State Protection Authority (SPA), are still all too familiar. The SPA was established in 1948 and further strengthened the Hungarian political police by removing its ministerial control. The SPA was one of the most feared institutions of the socialist regime until 1956, when it was reintegrated into the ministry of the interior after the revolution.

23 Kluge and Krüger, 1939, p. 93.

24 "The Marxist-Leninist party of the working class is the leading force in society" (Act I. of 1972 on the amendment of Act XX. of 1949 and the single text of the Hungarian People's Republic, Section 3.).

Due to the paramount role of state security agencies in enforcing terror, institutions similar to the SPA were established in other communist states as well, such as the KGB in the Soviet Union, the Securitate in Romania or the Stasi in East Germany. The Gestapo (its official name, *Geheime Staatspolizei*, which translates to ‘Secret State Police’) of the Nazi party played a similar role.

*The paramilitary unit of the state party.* Apart from the security forces, the state party also established a new paramilitary unit to strengthen its position. The unit, called the Workers’ Guards, was established in 1957; functionally, it was similar to the SS in Nazi Germany or the Armed Party Guards of the Arrow Cross regime.

*The elimination of the separation of powers.* The separation of powers was not expressly recognised in the constitution of 1949, and the state organisation it set out did not adhere to this principle either. In fact, the parliament was exclusively empowered to exercise state sovereignty,<sup>25</sup> and this provision in itself eliminated the separation of powers between separate branches of government. Additionally, another organ of the new people’s republic, the Presidential Council, was granted the power to substitute parliamentary legislation by so-called ‘legislative decrees’<sup>26</sup>. This resulted in a practice where only 10–20% of legislative sources were acts adopted by the parliament, while most questions were regulated by legislative decrees issued by the Presidential Council. Although the constitution provided for judicial independence, judges could be party members – in fact, this was often the precondition of a successful career.

*The abolishment of local governments.* While it is largely connected to the elimination of separation of powers, the elimination of municipal governments also merits delineation. At the local level, executive committees were organised with the power to substitute the representative bodies of local councils, similarly to the Presidential Council. These executive committees were under the government’s control.

#### **4.4. The most important elements of the eradication of legal certainty**

Totalitarian regimes aim to erode legal certainty and the rule of law as these allow retaliation against its opponents without clear legal boundaries. Since in a totalitarian regime, the law is merely an instrument of the state party’s political will, it cannot function as an effective constrain of state/political power. Moreover, the characteristics examined in the previous points allowed the total elimination of legal certainty, which had the most salience in the areas of administrative law and criminal law.

Administrative law was removed from judicial control in 1949, and therefore, the strictly hierarchical state administration was no longer forced to abide legal norms. On the contrary, administrative exceptions had been easily granted for a higher political purpose. Nevertheless, the most detrimental was the absence of any legal regulation in many areas of life. As previously discussed, the constitution of 1949, while covering various subjects, forgot to regulate law enforcement agencies, and

25 “Parliament shall exercise all powers stemming from of popular sovereignty” (Constitution of the Hungarian People’s Republic of 1949., Section 10.2.).

26 Constitution of the Hungarian People’s Republic, 1949, Section 20. 4–5.

there was hardly any regulation at the lower level either; consequently, in the case of police actions, an ordinary citizen could not know whether the measures were in fact legal. Although the police had a strict code of conduct, it was unknown to ordinary citizens. The police's official manual of conduct was only made public in January 1990,<sup>27</sup> and only its provisions of annulment revealed that the entire body of the police was regulated by an order of the Minister of Interior until that point.<sup>28</sup>

As regards the body of criminal law, secret legislation existed in this branch of law as well, facilitating grave abuses of justice.<sup>29</sup> Moreover, in politically sensitive areas, criminal law provisions were often worded superficially and ambiguously, granting a wide margin of discretion to judges and law enforcement agencies. One such area was the crimes against the state or the crimes against the economic order, and criminal law was also used to enforce irrational administrative provisions. One example of crimes against the state is the protection of constitutional order. While the previous criminal code of 1878 described it as “the crime of high treason is also committed by any act aiming to (...) forcibly amend (...) the constitution of the state of Hungary”,<sup>30</sup> the wording of the criminal code of 1978 demanded that “a person who participates in, or supports a conspiracy, directly aimed to overthrow or weaken the constitutional, social or economic order of the Hungarian People's Republic is guilty of a felony”.<sup>31</sup> In the latter, the social and economic order is also subject of protection, and the *actus reus* encompasses both overthrowing and weakening. Moreover, the latter provision does not require the direct link between the sanctioned act and the subject of protection and does not only refer to violent acts.

#### 4.5. The intensity of coercion (from terror to consolidation)

The idea that a state's constitution is a realistic picture of state organisation, and the ordinary functioning of the state is rooted in the concept of rule of law; therefore, it is less applicable in a totalitarian state, where the system of government can be better examined through sociological factors. In these states, the subjective will of those wielding political power influences the system of government rather than legal norms.

The communist state was nevertheless consolidated in Hungary over the decades. By the 1980s, ordinary people were generally not threatened by arbitrary state actions. However, it was not a complete change in means, as the previously employed instruments of dictatorship were still at disposal, but a change in the attitude of the political leaders. The single-party system, the fusion of the state and the party, the

27 1/1990 MI Decree.

28 24/1998 MI Order.

29 One such legal norm was the legislative decree No. 26. of 1950, which threatened certain instances of border crossing with the death penalty. Although this legislative decree was never published in the Hungarian Gazette, the official journal, it was actually invoked as the legal basis of several realised death sentences.

30 Act No. V of 1878, Section 127. (2).

31 Act No. IV of 1978, Section 139. (1).

secret police within the ministry of the interior and the paramilitary units of the party all existed until 1989/90. The independence of local governments was restored in the autumn of 1990 as well, after the first free elections. The law reconciling crimes against the state with the requirements of the rule of law was adopted in the summer of 1989, and the police's manual of conduct became public in January 1990; therefore, the rule of law was permanently absent until the fall of the regime.

## 5. The reinstatement of constitutional democracy

After 1989/90 the former socialist countries of Central and Eastern Europe re-established a constitutional democracy either by returning to the pre-communist constitutional framework or by creating a new constitution. The first option was chosen only in Latvia,<sup>32</sup> while in the other states, a new constitution was adopted. This latter option raised another challenge, namely to create the normative framework of constitutional transition. The foundations of a democratic state had to be laid down before the new democratic elections, which required a new election act, the establishment of new parties, independent judicial oversight and constitutional adjudication. However, such a transitional constitution had to have been adopted by the parliament of the old regime. Moreover, after the democratic elections, the creation of a new constitution, with all the political and legal disputes that it entailed, was a tedious and uncertain process.

In Hungary, the democratic transition was ensured by the amendments of the 1949 constitution promulgated on 23 October 1989. After the regime change, several attempts to adopt a new constitution were introduced in parliament; however, no draft could gain the required two-thirds majority of votes until 2010, when the Fundamental Law was adopted.

The Fundamental Law aimed to reinstate continuity with the historical constitution. While the amended constitution of 1989 did not provide for such continuity, Art. R (3) of the Fundamental Law established the “achievements of the historical constitution” as a supplementary means to its interpretation.

32 The constitution adopted in 1922 came into force again.

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## (Im)permanence of Polish Constitutionalism: in Search of an Optimal Vision of the State

Marek DOBROWOLSKI – Dorota LIS-STARANOWICZ

### ABSTRACT

Poland is a state where the elites' strong attachment to the idea of a written constitution prevails, as evidenced by the special place held by the Government Act of 3 May 1791 in political and academic discourse. The constitutional awareness of the citizens is also growing year after year as they are increasingly reliant on the provisions of the current Constitution of 2 April 1997, seeking the protection of their rights and freedoms before the courts. However, the period between 1791 and 1997 is not a constitutional vacuum. At that time, although as many as eight Basic Laws<sup>1</sup> were applicable on Polish lands, some of them were imposed on Poles against their will. In total, the 'mathematical' balance of constitutional experience, simplified to some extent, is as follows: 10 constitutional acts are attributable to a period of 206 years (counting from the adoption of the oldest until the adoption of the youngest Constitution); thus, the average lifespan of each of them is 20 years and 7 months. If we change the frame of reference and consider the period between 1791 and 2021, the average validity of the constitution on Polish lands increases to 23 years. If only the validity of individual Basic Laws is taken as a reference, the average decreases to approximately 12 years. In political practice, as discussed below, Polish constitutions were created slowly but quickly collapsed.

### KEYWORDS

constitutionalism, constitutional history, transition, independence.

### 1. Government Act of May 3, 1791

In 1795, the third partition of Poland took place,<sup>2</sup> and the First Republic of Poland ceased to exist. Earlier, however, Polish elites sought to conduct political reforms, the most prominent expression of which was the adoption of a constitution redefining the fundamental principles of the state (Government Act of 3 May 1791).

1 Constitution of the Duchy of Warsaw of 1807 granted by Emperor Bonaparte, Constitution of the Kingdom of Poland of 1930 granted by Tsar Alexander I, Small Constitution of 1919, Constitution of 17 March 1921, Constitution of 23 April 1935, Small Constitution of 1947, Constitution of the People's Republic of Poland of 22 July 1952, Small Constitution of 1992.

2 In 1772, Russia, Prussia and Austria conducted the first partial partition of the territory of the Republic of Poland, and in 1793, Russia and Prussia conducted the second partition of Poland.

The Constitution of 3 May built on the political models developed over centuries – albeit with major adjustments. In a direct declaration indicating that “all the power of human society has its origin in the will of the people”,<sup>3</sup> one can easily identify traces of previous political solutions based on the “authority of the nobles’ nation”, which were creatively refined in the Constitution under the influence of the then modern ideas of J.J. Rousseau.<sup>4</sup> Consequently, the Chamber of Deputies became “the image and composition of national omnipotence” and the Deputies “representatives of the entire nation”; the *liberum veto*<sup>5</sup> and the instructions of regional parliaments binding on Deputies were abolished; henceforth, they were primarily to decide on general matters (wherein the influence of J.J. Rousseau may also be detected). The Sejm continued to be a representative body of the nobility, although it was composed of the so-called landed nobility (i.e. landowners); in addition, plenipotentiaries of cities (elected from among the landed burghers) with limited powers were introduced to the Chamber of Deputies.<sup>6</sup> In turn, the king was perceived in the constitution as “the father and head of the nation,” reigning “by the grace of God and by the will of the nation”,<sup>7</sup> and finally as a representative of the nation (alongside the Sejm). The solution placed the Polish government act among those constitutions that sought a particular ‘golden mean’ between the ‘pure’ form of legitimisation of monarchical power (a king by God’s grace) and ideas allocating the source of power to the nation.<sup>8</sup> The tradition of electing kings greatly facilitated that task.<sup>9</sup>

The constitution referred to the concept of the eighteenth century supremacy of the nation (people), relating to the monarchy, as well as to the principle of census and indirect elections, which was then a solution commonly applied and primarily limited to the nobility (the nobles’ nation). Concurrently, the law on cities,<sup>10</sup> which formed an integral part of the Constitution,<sup>11</sup> initiated – as it might be assumed – a transformation in the perception of the ‘citizen’ category (up to that point identified with the nobility). Burghers were recognised as free citizens who were guaranteed a hereditary right of ownership, and the nobility was allowed the burgher status. In addition, personal rights of the nobility (which originated in the *neminem captivabimus nisi iure victum* document of 1425) were extended to ‘persons settled in cities,’ and burghers obtained the right to acquire landed estates. The law on cities also provided

3 Constitution of 3 May 1791, Art. V.

4 Cf. Bardach, 1993, p. 87.

5 The constitutional principle of the First Republic of Poland, granting each of the deputies taking part in the proceedings of the Sejm the right to disband it and invalidate the adopted resolutions.

6 The task of city representatives was only presenting the postulates of those cities.

7 Constitution of 3 May 1791, Art. VII.

8 Dobrowolski, 2014, pp. 56–57.

9 In the First Republic, from 1573, kings were elected by the nobility during the so-called free election. Henryk Walezy was the first king elected in this way, and Stanisław August Poniatowski was the last (1764).

10 Law on Cities of 18 April 1791. Our royal cities free in the countries of the Republic.

11 Constitution of 3 May 1791, Art. III.

for several cases in which a procedure of ennoblement of burghers could be launched. Therefore, the constitution initiated the process of expanding the composition of the political nation and thus a departure from the narrowly construed category of the 'nobles' nation' towards the nation as the total population of the state.<sup>12</sup>

## 2. Constitutions of the Second Republic of Poland (1918–1939)

On the eve of the outbreak of World War I, two strategies for regaining statehood were formed among the elites of Polish society. Each was based on the anticipated conflict between the occupying states, but their hopes and political calculations were placed elsewhere. The first one, authored by Józef Piłsudski, assumed the creation of a Polish state from the lands of the Russian partition based on the Central Powers (Germany and Austria-Hungary). The second concept sought to unite Polish lands under the auspices of Russia, which would create such a great (population, economic, cultural, and political) potential that independence would have to be regained eventually – a concept authored by Roman Dmowski. The implementation of the former resulted in, *inter alia*, the creation (on 16 August 1914) of a Polish military formation (the Legions) as part of the Austro-Hungarian Army – the latter in the establishment of a Polish association (1906–1917) in the Parliament of the Russian Empire (the so-called Duma). Those programmes were then revised under the influence of current events; ultimately, each of them contributed to the revival of Polish statehood.

The consequence of the Triple Entente states' involvement was, on the one hand, the 'Polish cause' being listed in the peace programme of the US President (W. Wilson),<sup>13</sup> and on the other, the presence of Poland's representatives (R. Dmowski and I. Paderewski) on the side of the victors at the Peace Conference in Versailles. In turn, the involvement on the part of the Central Powers led to the creation – under the Act of 5 November 1916<sup>14</sup> – of the bedrock of Polish statehood: the formation of state authorities (Temporary Council of State, Regency Council),<sup>15</sup> the development of state administration (the foundations of the Polish foreign service and the organisation of the Polish Army), the development of Polish local self-government, education and the

12 As posited in the context of statements about the uniform and centralised structure of the state, Uruszczak, 2011, p. 35.

13 The peace programme consisted of 14 items. Item 13 read: "An independent Polish state should be erected which should include the territories inhabited by indisputably Polish populations, which should be assured a free and secure access to the sea, and whose political and economic independence and territorial integrity should be guaranteed by international covenant".

14 The Act of 5 November 1916 was promulgated on behalf of two emperors (Wilhelm II and Franz Joseph) after the occupation of Warsaw by German troops and proclaimed the creation of the Kingdom of Poland "from the lands torn from Russian rule".

15 On 6 December 1916, the occupation authorities created the Provisional Council of State in Warsaw, which established the Regency Council that in turn established (on 13 December 1917) the first Polish government (of Jan Kucharzewski).

judiciary as well as the issuance of a number of legal acts, which were then assimilated by the resurgent Polish state.<sup>16</sup>

On 13 February 1918, the Regency Council announced that it would henceforth exercise supreme powers based on the will of the people, and a few months later (on 7 October 1918) it proclaimed Poland's independence, announcing the holding of parliamentary elections under democratic principles. In making that decision, the Council referred to W. Wilson's peace programme, which had been accepted a few days earlier by the Central Powers as the basis for peace negotiations. Subsequently, the Regency Council handed over the general command over the Polish army to J. Piłsudski (on 11 November), and a little later (on 14 November), it handed over all the supreme powers to him.<sup>17</sup>

The construction of legal foundations of the state commenced immediately following the end of hostilities. On 22 November 1918, Interim Chief of State J. Piłsudski issued a Decree on the Supreme Representative Power of the Republic of Poland,<sup>18</sup> pursuant to which the supreme authority was to be exercised by the chief of state through the government until the parliament was elected. That decree initiated a departure from the original concept of the revival of Polish statehood as a monarchy in favour of a republic. Subsequently (on 28 November 1918), a decree on electoral law was issued to the Legislative Sejm; thereunder, elections based on the principles of immediacy, secrecy, universality, proportionality and equality could be held.<sup>19</sup> The act granted the rights to vote and to be elected to women, which should be seen as an expression of respect for them "as equal citizens, giving prominence to their status in the renascent Poland. Thereby, the attitude of Polish women who were involved in national affairs on an equal footing with men during the partitions was acknowledged".<sup>20</sup> The first parliamentary elections after regaining independence were held on 26 January 1919; however, due to hostilities,<sup>21</sup> not all districts could hold elections, and the composition of the Legislative Sejm continued to be supplemented until 24 March 1922.<sup>22</sup>

16 Cf. Górski, 2018, p. 10.

17 Under the Regency Council's decision, J. Piłsudski held power until 29 November 1918 (when a decree on the supreme representative authority of the Republic of Poland was proclaimed, Journal of Laws of the Polish State, hereinafter: Dz. Pr. P.P., No. 17, item 41) [https://pl.wikipedia.org/wiki/Rada\\_Regencyjna](https://pl.wikipedia.org/wiki/Rada_Regencyjna) – cite\_note-14.

18 O.J. of 1918, No. 17, item 41.

19 Dz. Pr. P.P. No. 18, item 46.

20 Lis-Staranowicz, 2018, p. 31.

21 E.g.: the Polish-Ukrainian conflict over Lviv lasted from 1 November 1918 until 22 May 1919.

22 In the elections on 26 January 1919, 291 deputies were elected. At later dates, elections were held: in the Suwałki district – postponed due to German occupation (16 February 1919); in the Cieszyn district – postponed due to the Polish-Czechoslovak conflict (14 March 1919); 42 deputies were elected in Wielkopolska (1 June 1919); in Białystok districts – 11 deputies (15 June 1919); in Pomerania – 20 deputies (2 May 1920). In addition, 20 deputies were elected (24 March 1922) by the Seimas of Central Lithuania (Vilnius). Pursuant to the decree of 7 February 1919 (Journal of Laws of 1919, No. 14, item 193.), the seats of Poles sitting in 1918 in the parliament of the German Reich (16 deputies) and in the Austrian parliament from Eastern Galicia (28 deputies) were recognised; 442 was the final number of deputies of the Legislative Sejm.

Regaining independence was a continued pursuit of many generations of Poles sacrificing their lives to fight for freedom. The renascent Poland first had to face external threats, strengthening its borders,<sup>23</sup> but an equally important challenge was to unite the lands that had so far remained in the structures of foreign states and thus had separate law, administration, official language or even communication networks built for the purposes of the partitioning states. The renascent Poland also had to face extensive illiteracy as well as high unemployment and poverty (particularly severe after the period of World War I, which was fought mainly on our lands).

The Legislative Sejm quickly proceeded to prepare the constitution of the renascent state<sup>24</sup>; however, those works were prolonged due to a complex international situation (including, primarily, the Polish-Bolshevik war) and a significant political and ideological diversity of the Sejm, which lacked the dominant political force, and most deputies had no parliamentary experience. Nevertheless, the constitutional debate was open to all political parties and intellectual centres.<sup>25</sup> Hence, the Constitution of 17 March 1921<sup>26</sup> (the so-called March Constitution) resulted from a political compromise.<sup>27</sup> Following its adoption, the Marshal of the Legislative Sejm stated that “[a]s of today, the Republic of Poland is entering the path of legal development. The State is an organised nation, and the Constitution is the foundation of organisation” and expressed hope that “after laying the foundation for the edifice of the State” its further expansion would continue in the same spirit, so that “we always remember that the State is the certainty of life, freedom, property, the rule of law and justice”.<sup>28</sup>

23 “According to Iwo C. Pogonowski’s Historical Atlas of Poland, there were six concurrent wars on the borders of Poland from 1918 to 1922, between Poland and: Ukraine, Germany (over Poznań), Germany (over Silesia), Lithuania, Czechoslovakia, and the Soviet Union. Add to this the end of the First World War, the Russian Civil War, Allied Intervention in that war, and the Paris Peace Conference, and the reader can see just how confusing and unstable the European political situation was” (Drobnicki, 1997, pp. 95–104); started by the Bolsheviks taking advantage of the difficult economic and social situation of the country, it was of vital importance for maintaining national sovereignty (see Davies, 2020).

24 Already in 1918, Prime Minister J. Moraczewski pointed out that the development of a new constitution was a priority of the Polish authorities. In January 1919, the Constitutional Office was established under the Prime Minister to prepare draft constitutions that took into account the diversity of constitutional thought (Krukowski, 1977, pp. 13–22). However, prior to adoption of a full constitution on 20 February 1919 the Legislative Sejm adopted a resolution to entrust Józef Piłsudski with the continued office of the Chief of State (Dz.Pr.P.P. of 1919, No. 19, item 226). That act, popularly known as the Small Constitution, defined the legal basis of the state system for a transitional period.

25 On 25 January 1919, the then Prime Minister (I. Paderewski) appointed a team from the group of ‘men of science’ to evaluate the drafts, known as a Survey on the draft Constitution of the Republic of Poland; however, the Survey was not limited to evaluation, but it developed its own draft, in which it based the system on the republican system and the American model (based on the US Constitution). The government did not accept that draft as its own but forwarded it to the Legislative Sejm (see more in Kruk, 2021, p. 8).

26 Journal of Laws of 1921 No. 44, item 267.

27 Krukowski, 1977, pp. 107–108.

28 For a shorthand report of the 221<sup>st</sup> session of the Legislative Sejm on 17 March 1921 see Pietrzak, 2001, p. 10.

The March Constitution opens with a preamble that contains an invocation to Almighty God and clarifies the purpose of its enactment, i.e. to provide the nation with a social, moral, and material order based on “eternal principles of law and freedom”. The task of the state authorities was to respect the law and care for the citizens. The introduction also emphasised the relationship of the state with the constitutional tradition, as it referred to “the great tradition of the memorable Constitution of 3 May”. However, that reference was symbolic since, first, the Constitution of 1791 did not provide a permanent basis for the Polish system (it was repealed in 1793), but rather, it created intellectual national heritage carefully protected in the collective memory of Poles during the partitions. Second, the loss of statehood in 1795 resulted in ‘suspending’ Polish constitutionalism, which lacked conditions for development and evolution; thus, the March Constitution did not stem from native constitutional thought and was not a simple continuation of the Constitution of 3 May. It originated in the knowledge and experience of the Polish elite, who were educated, obtained academic titles abroad or represented Poles in the parliaments of the partitioning countries. The content of the constitution was strongly influenced by the French concepts of the Third Republic.<sup>29</sup>

The constitution comprised 126 articles contained in seven chapters.<sup>30</sup> The system of government was based on the principles of national sovereignty, separation of powers, parliamentary-cabinet form of government, bicameral parliament, independence of the courts, decentralisation of public authority, judicial control of the administration and the principle of equality before the law. The constitution guaranteed an extensive catalogue of rights and freedoms, including social rights. Notwithstanding the adopted principle of separation of powers, the Sejm in the bicameral structure of legislative power took the lead.

From the point of view of Polish statehood and its identity, confirmation by the constitution of the nation’s sovereign rights (Art. 2) was of greatest importance. The Basic Law did not define the concept of nation, but it primarily had a legal meaning and encompassed all Polish citizens.<sup>31</sup> The constitution did not explicitly emphasise the multinational social structure nor the dominant position of Polish nationality in the State (the right to vote was vested in citizens of the Republic of Poland irrespective of their nationality). Citizenship and the rights of the individual, thanks to which the inhabitants “could manifest all the activity provided for in the

29 The Constitutional Commission, having a choice between two systems of government: the American and the Anglo-French model, i.e. the presidential and parliamentary system, opted for the parliamentary one, as a model known and proven in Europe, and the system of the French Third Republic was regarded as such (see Kruk, 2021, p. 9).

30 The first chapter was entitled ‘The Republic,’ and the subsequent ones were as follows: Legislative power (II), Executive power (III), Judicial power (IV), Universal obligations and civil rights (V), General provisions (VI), Transitional provisions (VII).

31 The ethnic structure in Poland in 1921 (census) was as follows: 69% Poles, 14.3% Ukrainians, 7.8% Jews, 3.8% Belarusians, 3.3% Germans.

constitutional provisions” were therefore “a clear bond uniting members of the national community”.<sup>32</sup> It was only the preamble of the constitution that referred to Poles, as only they

can ‘give thanks to Providence’ for liberation from captivity, since only in the Polish soul can there be full awareness of the tradition of the State, which ended its political existence at the end of the 18<sup>th</sup> century, since only in the Polish memory can there be a grateful recollection of ‘the bravery and perseverance of the sacrificial struggle of the generations who continuously devoted their best efforts to the cause of independence’.<sup>33</sup>

It was the nation thus construed that fought for its own state and created its identity.<sup>34</sup> Concurrently, the constitution guaranteed all citizens of the Republic of Poland equality before the law and special protection of the State, while abolishing class privileges and family titles. The constitution also contained several provisions addressed to minorities. For example, every citizen had the right to preserve their nationality and to cultivate their language and national specificity. National, religious and linguistic minorities had the right to form unions and associations, charitable, religious and social institutions, schools and other educational institutions as well as to use their language freely and to observe the rules of their religion. The issue of the nation is similarly perceived by the provisions of the current Constitution of 1997, the preamble of which clearly identifies the Polish nation with all citizens but also expresses gratitude to “ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values”; it also indicates “ties of community with our compatriots dispersed throughout the world”, and in the articulated part, it refers to “the culture that is the source of the Nation’s identity” and to “Poles living abroad” and their relations “with the national-cultural heritage” (Art. 6). At the same time, the constitution in force guarantees national and ethnic minorities “the right to create their own educational, cultural and religious institutions and to participate in the resolution of matters concerning their cultural identity” (Art. 35[2]).

An extensive catalogue of rights and freedoms was a characteristic feature of the March Constitution,<sup>35</sup> which provided for universal suffrage, the right of access to the courts, freedom of speech and religion, personal liberty, the right to property, freedom of assembly and the right to petition, among other things. The constitutional regulation of social rights deserves to be emphasised. Struggling with illiteracy, Poland guaranteed universal and compulsory education to all its citizens; education in state and local government schools was free of charge, and

32 Wołpiuk, 2014, pp. 374 et seq.

33 Cf. Paszkudzki, 1926, p. 1.

34 Cf. Komarnicki, 1923, p. 16.

35 Fitkus, 2010, pp. 77–98.

material assistance for continuing education at secondary and higher education institutions was guaranteed “to exceptionally gifted and impoverished students”. Employment remained under the special protection of the state, and paid work of children under the age of 15 years as well as night work of women and juvenile workers in industries, which was detrimental to their health, was prohibited. In the event of unemployment, illness, accident and infirmity, every citizen had the right to social security. The state also protected children not receiving sufficient parental care and experiencing neglect.

The March Constitution was the so-called ‘rigid act’. Its amendment required a majority of two-thirds of votes both in the Sejm and in the Senate. Achieving such a majority in the political realities of the Second Republic of Poland proved extremely difficult. Despite the provisions protecting the identity of the Basic Law, the ‘fathers of the Constitution’ were open to dialogue with future generations as they made it possible to revise its provisions every 25 years by a simple majority of votes of the National Assembly (the combined Sejm and Senate). That procedure made the constitution open to changes that resulted from the evolution of the social and political system; it was also an expression of concern for the continuation of the constitution as the legal basis of the state.

However, the permanence and stability of the state system failed to become, contrary to the assumptions of the creators of the constitution, its characteristic feature. It failed to lay the foundations for the government’s stable operation, which resulted in the “chronic impermanence” of subsequent cabinets.<sup>36</sup> The constitution ‘explicitly favouring’ the parliament did not provide mechanisms to protect the government when the parliament was politically fractured. In turn, the imbalance between the executive and the parliament was the cause of political crises, which concluded with the so-called ‘May coup’ and the revision of the constitution adopted on 2 August 1926.<sup>37</sup> As a result, the executive strengthened its position by exercising power “outside the provisions of the Constitution”.<sup>38</sup> However, from a contemporary perspective, it should be noted that the singular permanence of the March Constitution was manifested in the appropriation of some of its solutions by the Constitution of 1997, including the parliamentary-cabinet system, but already rationalised by the experience of 1921–1926.

The shortcomings of the March Constitution and the political transformations of Europe in the 1930s towards authoritarian rule left their mark on the Polish political system and ended the Constitution of 1921. In turn, the Constitution of

36 In the period between the fall of 1922 and May 1926, the government changed five times, and counting from November 1918, that number would have to be tripled (Kawalec, 2009, pp. 103–134).

37 Act of 2 August 1926 amending and supplementing the Constitution of the Republic of Poland of 17 March 1921, Journal of Laws of 1926, No. 78, item 442.

38 Before May 1926, political power was concentrated in the hands of the Sejm; after May, in the hands of Marshal Piłsudski, who politically decided on the composition of the government and its duration (Cybichowski, 1933, p. 17).



April 1935 (hereinafter: the April Constitution)<sup>39</sup> was adopted under a defective procedure, and its validity and legality were challenged. It rejected the assumptions of its predecessor, including the principle of national sovereignty fundamental in democracy, and the parliament lost its status of political representative. Instead, that constitution adopted the uniformity of state power and the division of state functions; the president became the most important centre of power. The responsibility before God and history for the destinies of the state rested thereon, and one and indivisible authority of the state was vested therein (Art. 2). The president personified the state and its continuity. The bodies of the state, under the authority of the President of the Republic, included the Government, the Sejm, the Senate, the armed forces, the Courts and the State Control. The constitution entrusted the president with the task of “harmonising the activities of the supreme authorities of the State, providing him with the right to appoint and dismiss members of the Government and with the right to dissolve the chambers, thus making him an arbitrator of political conflicts”.<sup>40</sup>

The Constitution of 1935 established the principles of separation of the state and society and of cooperation between citizens and the state for the pursuit of the common good, subject to the supreme role of the state in relation to society (Art. 4 and 5); the principle of the rule of the civic elite, formed on the basis of “criteria of efforts and merits for the common good” (Art. 7); and the principle of social solidarity (Art. 9).<sup>41</sup>

The Constitution of 1935 consisted of 82 articles included in 14 chapters,<sup>42</sup> of which the longest chapter was devoted to the president’s office (Chapter II). The constitution did not contain a preamble clarifying the purpose of its adoption, but in Chapter I, entitled “The Republic of Poland,” it formulated the assumptions of the new system. The function of the preamble was assumed by Art. 1 of the Constitution, which stated that the Polish State was the common good of all citizens, and “the Polish State resurrected by the efforts and sacrifices of its worthiest sons it is to be bequeathed as a historic heritage from generation to generation”; hence, it was an obligation of “each generation” to “increase the power and authority of the State by its own efforts”. Thereby, the creators of the constitution expressed the obligation to maintain the permanence and continuity of Poland.

It is noted in legal literature that the “April Constitution created an entirely new, highly original model of a social state, with a developed concept of solidarity

39 Journal of Laws of 1935, No. 30, item 227.

40 Starzewski, 1937, p. 370.

41 Kulesza, 2017, p. 37.

42 Chapter I is entitled ‘The Republic of Poland’ and the subsequent ones ‘The President’ (II); ‘The Government’ (III), ‘The Sejm’ (IV), ‘The Senate’ (V), ‘Legislation’ (VI), ‘The Budget’ (VII), ‘The Armed Forces’ (VIII), ‘The Administration of Justice’ (IX), ‘The State Administration’ (X), ‘The State Control’ (XI), ‘State of Emergency’ (XII), ‘Amendment to the Constitution’ (XIII) and ‘Final Provisions’ (XIV).

referring to the thought of L. Duguit and developed on Polish soil by L. Caro”.<sup>43</sup> From this vantage point, it may be deemed “one of the most significant products of the original Polish legal thought” and “a unique contribution in the history of Poland to the development of world constitutionalism in the 20<sup>th</sup> century”.<sup>44</sup>

The idea of solidarity, which emerges from Art. 4 and 5 of the Constitution, does not allow the April Constitution to be placed alongside the constitutions of authoritarian states that were created in the 1920s and 1930s. According to legal historians, the constitution rejected “the idea of integrating the state and society into one whole under the model of principles and experiences of totalitarianisms neighbouring Poland”.<sup>45</sup> Its provisions emphasise, on the one hand, the role of society, including local and economic self-government (to which the state ensures the freedom of development), and on the other, the creativity of the individual that is the “lever of collective existence”. Nevertheless, the constitution did not contain extensive guarantees of rights and freedoms but merely stipulated that “the State assures its citizens the possibility of developing their personal capabilities, as also liberty of conscience, speech and assembly”, making the common good the limit of those freedoms.<sup>46</sup>

The eminent Polish constitutionalist of that period, Waclaw Komarnicki, claimed that “the principle of concentration of power in the hands of the Head of State found its fullest embodiment in the new Polish system” enabling “the operation of the state’s organisation while eliminating the parliament’s participation”, but at the same time “the structure of the state was formed in such a manner as to enable constitutional cooperation between the president and the parliament”. Thereby, the constitution creates, in his opinion, a “singular systemic dualism, which opens up the possibility of further evolution either in an authoritative or a democratic direction”. In conclusion, he pointed out that “the evolution of the political system (...) and its permanence” are not contingent “on the wording of constitutional articles, but on the development of socio-political relations in Poland”.<sup>47</sup>

The Constitution of 1935 is one of the ‘least’ and ‘most’ permanent Polish Basic Laws. Two circumstances are the source of this paradox. On the one hand, the outbreak of World War II caused Poland (divided into German and Soviet occupation parts) to lose independence; thus, territorially, the state shaped by that constitution ceased to exist. On the other hand, however, the Constitution of 1935 was still applied as it authorised the president to independently appoint his successor in a situation of war, thus securing the continuity of state power. The said competence, combined with the freedom to form the government of the Council of Ministers, was the legal basis for the operation of the Polish government in exile in London (until 1990) and taking action

43 Leopold Caro (1864–1939) was a lawyer and lecturer at the Jan Kazimierz University in Lviv. The concept of social solidarity was the backbone of his scholarly thought (see Caro, 1931; 1937).

44 Górski, 2003, p. 211.

45 Kulesza, 2005, p. 44.

46 Kulesza, 2005, p. 44.

47 Komarnicki, 1937, p. 194.

to gain full sovereignty of Poland both until 1945 and later.<sup>48</sup> Such was the value of the (im)permanent Constitution of 1935. Moreover, that constitution was never formally repealed – neither by the communist governments established after 1945 nor by the democratic parliament of the Third Republic of Poland revived in 1989.

The communist authorities in Poland challenged the value of political thought of the March Constitution and the April Constitution because of the “bourgeois” nature of the former and the authoritarian nature of the latter<sup>49</sup>; however, they were the subject of research of theoreticians of constitutional law and historians of the system. The experience of their application set the direction of work on a new constitution for a democratic and sovereign Poland in the 1990s. This is the merit that should be credited to the “impermanent” constitutions of the interwar period.

### 3. Constitutions of the Third Republic of Poland

The process of breaking away from communism and thus regaining independence, began in 1989. It was initiated by an agreement between representatives of the communist state and the democratic opposition concluded at a round table (the so-called ‘roundtable agreement’).<sup>50</sup> The most important provisions of that agreement included enabling the legal activity of the Independent Self-Governing Trade Union “Solidarity” after its ban during the period of martial law<sup>51</sup> and the establishment of three new authorities – the President, the Senate<sup>52</sup> and the National Council of the Judiciary<sup>53</sup> – as well as conducting the so-called contractual elections to the Sejm and fully free elections to the 100-member Senate. The contractual nature of those elections consisted in the fact that 65% of parliamentary seats were guaranteed to the parties of the

48 “The highest authorities of the Republic of Poland in exile (in France, and then in Great Britain) and the structures of the Polish Underground State established in the country operated under the provisions of the April Constitution. The Constitution laid the foundations for the continuation, with all the characteristics of lawfulness, of the activities of Polish state authorities, both internationally and internally, and to an extent incomparable with the situation of any country occupied during World War II” (Górski, 2003, pp. 212–213).

49 The communist authorities adopted two constitutions. The first was one adopted in 1947 (the so-called Small Constitution) and the second one in 1952. The latter was formally repealed on 29 December 1989, but some of its provisions were applied until the entry into force of the Constitution of 2 April 1997.

50 Discussions lasted from 6 February until 5 April 1989. The strikes of 1988 were an immediate cause of their commencement, yet major reasons also included (a) the growing economic crisis and the necessity for the opposition to authorise reforms, and (b) plans to fundamentally change the role of the USSR in the bloc of communist states.

51 Martial law was introduced by the communist General W. Jaruzelski on 13 December 1981 to proscribe the trade union NSZZ ‘Solidarność’ established following the strikes in August 1980.

52 After the end of World War II, the Senate was not restored; communists regarded it as a symbol of the ‘bourgeois’ Polish system.

53 The National Council of the Judiciary was to safeguard judicial independence and participate in the procedure of appointing judges.

communist regime,<sup>54</sup> and the remaining ones (35%) were intended to be filled in free elections. The elections were held on 4 (first round) and 18 (second round) June 1989.<sup>55</sup>

When assessing the nature and significance of the agreement, it should be noted that the roundtable was not a debate on the end of communism or on breaking away from it, and even less so on the Communists giving up power. It was only an unprecedented success of the then-opposition in the elections of June 1989,<sup>56</sup> which was surprising for both parties to the agreement and triggered a significant acceleration of political changes. In other words, of crucial importance for the pace of regaining an independent state is for it to be attributed to the will of the sovereign nation created in those elections, regaining its subjectivity and rejecting communism.

Concurrently, the agreements included several solutions that secured the political position and even more so the interests of the “representatives of the old system” already in the “new political reality”. Those safeguards (in addition to the aforementioned guarantees of retaining political influence in the Sejm) included maintaining legal dominance of the Sejm in the political system of the state,<sup>57</sup> which even made it possible to undermine the position of the Senate as the second chamber of parliament,<sup>58</sup> and above all, the manner in which the office of the President of the People’s Republic of Poland was designed (elected by the National Assembly). That office was to be held by the communist General Wojciech Jaruzelski, which was also a subject of political arrangements. In that manner, “a shift of the centre of power from the Polish United Workers’ Party (PZPR) to the office of president” was planned. That task was facilitated by both the length of the presidential term of office (6 years, i.e. 2 years longer than that of the parliament, subject to re-election) and by the president’s competences (legislative veto, the right to dissolve the parliament if it infringes the Constitution of the People’s Republic of Poland or interstate political and military alliances).<sup>59</sup> Those

54 The parties of the communist regime included the Polish United Workers’ Party (PZPR), the United People’s Party (ZSL) and the Democratic Alliance (SD).

55 To implement the agreement, 108 constituencies (from two to five seats) were created, in which at least one seat was to be filled by free elections, and the candidates of the regime parties were to run for the remaining seats.

56 Already in the first election round (on 4 June), the anti-communist opposition introduced 160 candidates to the Sejm and 92 candidates to the Senate (for the sake of comparison, out of 264 parliamentary ‘coalition seats’ in the first round, only three were filled); ultimately, the representatives of the opposition filled all available seats in the Sejm (35%, i.e. 161) and 99 in the Senate.

57 The legal position of the Sejm was formed by the provisions upheld in the constitution, stating that the Sejm was the supreme authority of the state and that only the Sejm (and not the Sejm and the Senate) adopted laws.

58 The opposition Senate could also be marginalised by more political means. The Senate’s amendments were rejected in the Sejm by a majority of two-thirds of the votes (66.6% of the composition of the Sejm, i.e. by 307 deputies), and the regime party was guaranteed 65% of seats in the Sejm (299 parliamentary seats). To obtain a two-third majority in the Sejm, only eight seats had to be filled (1.6%) in the free part of the election (out of 35%). Filling them would result in the Senate’s incapacitation.

59 As the legislative veto was rejected in the Sejm by a majority of two-thirds of votes (i.e. 66.6%), to block its rejection, the regime party had to fill eight seats (1.6 %) from the pool by free elections (see footnote 76).

solutions allowed to continue a transitional period for up to 12 years (two presidential terms) as well as to reverse the process of democratisation of political life.

However, the way in which W. Jaruzelski held his office was undoubtedly influenced by the events related to his election (on 19 July 1989). It was in fact decided by the representatives of the democratic opposition,<sup>60</sup> and the scale was tipped by one vote.<sup>61</sup> It was a 'typical Pyrrhic victory' since its costs were so great that they weakened the presidency and failed to play the role planned at the roundtable.

As can be seen from the characteristics of the 'transition period' presented above, the 'fuses of the old system' established at the round table did not serve their purpose, but they ensured a 'soft landing' for the political apparatus of the outgoing system already 'in new political realities', and more importantly, they made it possible to retain their political and economic influence, thus devising the manner in which the Third Republic of Poland functioned.

The period of roundtable negotiations also gave rise to a practice of political decision-making behind the scenes ('over the heads of voters'). The best example thereof was a singular resuscitation of the so-called national list, i.e. the opposition's consent to retrieve 33 parliamentary seats<sup>62</sup> vacant in the elections for the Communist Party, which contradicted both the then-applicable law and the unequivocal rejection of communism by voters in 1989. This "negotiating" model of conduct later resulted in the so-called Rywin Affair,<sup>63</sup> which exposed the fact that the content of acts adopted by the Sejm could be devised "behind the scenes."

60 One of the opposition senators voted for W. Jaruzelski, and seven deputies and senators cast invalid votes, which reduced the majority required for election. However, some members of the regime parties voted against W. Jaruzelski (six deputies from the ZSL, four from the SD and one from the PZPR).

61 In the vote on the candidacy of W. Jaruzelski, 537 valid (seven invalid) votes were cast, including 270 votes 'for', 233 'against', and 34 members of the National Assembly abstained from voting. A controversy arose about whether the absolute majority required for election amounted to 269 or 270 votes. Ultimately, the National Assembly determined that the required majority was 269.

62 The national list contained the names of 35 representatives of the government (the opposition was unable to submit its list). The parliamentary mandate was obtained by a candidate who received an absolute majority of votes nationwide. In the first round, only two candidates obtained such a result, while there was no legal basis to conduct the second round (the electoral law contained a legal loophole). As a result, pursuant to a decree of the Council of State (Journal of Laws of 1989, No. 36, item 198), seats not filled in the first round were transferred to the constituencies. Thereby, between the first and the second round of the elections, the number of seats in the constituencies was increased and the candidates absent in the first round were listed.

63 In July 2001, film producer L. Rywin made an offer to the editor-in-chief of the *Gazeta Wyborcza* (A. Michnik) that for USD 17.5 million he would 'arrange' solutions in the Broadcasting Act that were beneficial for the publisher of the *Gazeta Wyborcza*. He referred to the 'group holding power' and the then Prime Minister L. Miller. After disclosure of the proposal (publications in the 'Wprost' weekly and the 'Rzeczpospolita' daily), the Sejm appointed a committee of inquiry (on 10 January 2003), which determined that during the government's work on the draft act, the content of the said draft has been unlawfully amended in unexplained circumstances. L. Rywin was sentenced (in 2004) to two years in prison and a PLN 100,000 fine for assistance in influence peddling. The Rywin affair demonstrated that a law could be 'bought' at that time.

In general, the state system planned at the roundtable for the transitional period assumed the continuation of executive power by the communist regime parties (the government and the presidency were to remain in their hands) with a decisive, previously planned advantage in the Sejm. Political aspirations of the then-opposition were to find an outlet merely in the Senate. It was only the electoral defeat of the Communist Party that disturbed the system thus designed; there were perturbations with the election of the regime president (as a result of which he failed to exercise his extensive powers), and the system of power to date (i.e. close dependence of the regime parties on the PZPR) became destabilised, which in turn opened the way for a government with the first non-communist Prime Minister (Tadeusz Mazowiecki) and therefore for the collapse of the roundtable arrangements. It should be remembered, however, that the so-called ministries of force were staffed by representatives of the PZPR,<sup>64</sup> which had its long-term consequences (at that time, files of the communist secret police were being destroyed on a large scale).<sup>65</sup>

Political acceleration resulted in an amendment to the then-current Constitution of 1952 on 9 December 1989.<sup>66</sup> Thereunder, (a) the name of the state was changed (the Polish People's Republic was replaced by the Republic of Poland) and the traditional emblem of the Polish state restored (i.e. the image of a crowned white eagle against a red field); (b) the principle of a democratic state governed by the rule of law, the principle of sovereignty of the Nation (in place of the principle of sovereignty of the working people of towns and villages), the principle of freedom to form and operate political parties, the principle of freedom of economic activity and the protection of property (which replaced the principle of planned economy with the principle of economic freedom) were established; (c) the provisions on the leading role of the Communist Party and the alliance with the USSR were removed from the Constitution.

Ordering and holding the first free elections to the newly created local government (27 May 1990)<sup>67</sup> was another major step in the 'recovery of the state', followed by the first general and direct presidential elections in the history of Poland (first round held on 25 November, second round on 9 December) upon W. Jaruzelski's resignation<sup>68</sup> concluded with the election of L. Wałęsa (leader of the NSZZ

64 The government led by T. Mazowiecki included 12 ministers from the former opposition, one independent, four ministers each from the PZPR and the ZSL and three ministers from the SD. Communist generals, F. Siwicki and Cz. Kiszczak, became ministers of National Defence and Internal Affairs.

65 Mass destruction of the Security Service files began in the second half of 1989 and lasted continuously until 31 December 1990.

66 Journal of Laws of 1989, No. 75, item 444.

67 On 8 March 1990, the Parliament passed an Act amending the Constitution (Journal of Laws, No. 16, item 94), an Act on Local Government (Journal of Laws, No. 16, item 95) and an Electoral Act for Municipal Councils (Journal of Laws, No. 16, item 96).

68 On taking office by the newly elected president-elect, pursuant to the Act of 27 September 1990 amending the Constitution of the Republic of Poland (Journal of Laws, No. 67, item 397), the term of office of President W. Jaruzelski expired.

‘Solidarity’). In turn, the first fully free parliamentary elections were held only on 27 October 1991.<sup>69</sup>

On the day of the swearing-in of President L. Wałęsa (22 December 1990), the activities of the Polish authorities in exile also came to a symbolic end. At the Royal Castle in Warsaw, the last President of the Republic of Poland in exile (Ryszard Kaczorowski) handed over the insignia of presidential power of the Second Republic of Poland to the newly sworn-in President.<sup>70</sup>

The structure of the state bodies formed during the period of political transformations survived the transitional period and was incorporated – albeit with certain adjustments – into the so-called Small Constitution of 1992<sup>71</sup> and then into the Constitution of the Republic of Poland of 2 April 1997.

The long-term perspective that separated the beginning of political changes (1989) from the adoption of the full Basic Law impacted the form of the Constitution of 2 April 1997, which became, as it were, the aggregate of Polish experiences during the period of political transformation.<sup>72</sup> The greatest relative number of changes during that period concerned the Council of Ministers. The most important of those included the establishment of the so-called constructive vote of no confidence, according to which the Sejm was able to dismiss the prime minister (and thus the government) only by simultaneously appointing a new prime minister (Art. 158). Nevertheless, the changes in the formation of the presidential office introduced in subsequent acts of constitutional rank did not infringe the basic systemic concept thereof. Even the amendment in 1990 to the way in which the head of state was elected cannot call such an assessment into question. His basic political tasks remained virtually unchanged. In practice, there were also no fundamental changes with respect to the legislative power, especially in relation to the dominant role of the Sejm in the bicameral system.

The Constitution of 1997 is not only a simple summary of the experiences of the political transformation period (1989–1997), but it is also based on the political experience of the Second Republic of Poland and abolishes communist rule based on the subordination of the individual to the state; therefore, it contains an extensive catalogue of constitutional rights and freedoms.<sup>73</sup> That catalogue forms a singular

69 As a result of the elections, 29 committees entered the Sejm, of which 11 had only one deputy.

70 Those included the original jack of the President of the Republic of Poland and the seal of the Office of the President included in the Constitution of 1935.

71 Constitutional Act of 17 October 1992 on mutual relations between the legislative and executive authorities and on local self-government (Journal of Laws of 1992, No. 84, item 426).

72 The Constitution expanded the catalogue of constitutional principles of the state (Chapter I), and other principles were established alongside the principles already existing in the Polish legal system (principles of the rule of law, national sovereignty, and separation of powers): the protection of human dignity and constitutional rights, the common good and subsidiarity and the principle of statehood, extrapolated from the content of the Constitution by the Constitutional Tribunal.

73 Chapter II of the Constitution is the most extensive one and consists of 56 articles structured in a general part, a catalogue of personal, political and social rights, and freedoms and obligations towards the homeland. That chapter also contains measures to protect constitutional rights and freedoms.

“constitution within the constitution”, and the core of the regulation is the principle of inherent and inalienable human dignity (Art. 30).<sup>74</sup> As Mirosław Granat notes:

The Tribunal deems human dignity a value ‘of central importance for constructing an axiology of current constitutional solutions.’ It is ‘an axiological basis and premise of the entire constitutional order.’ It is of paramount importance for the interpretation and application of ‘all other provisions on the rights, freedoms and obligations of the individual’ (...). The Constitutional Tribunal calls it a ‘transcendent value,’ which would suggest that it derives from outside the legal order. It is an ‘absolute’ value. The Tribunal also refers to the ‘importance’ of human dignity, which is evidenced by the fact that dignity ‘is the link between the natural law and statutory law.’ To recapitulate, it should be noted that human dignity has a significant impact on human rights, but it itself remains outside or above the law. It is a primordial value that need not be ‘acquired.’ It is universal and serves everyone (it is not selective).<sup>75</sup>

The protection of human dignity is therefore a central task of the state and of the rule of law.

Under the influence of European constitutionalism, the Constitution of 1997 defined the limits of the legislator’s interference with constitutional rights and freedoms. Their boundaries may only be established by law and solely if they are necessary in a democratic state for its security or public order or for the protection of the environment, public health and morals, or the freedoms and rights of others. Those restrictions must not affect the substance of freedoms and rights (Art. 31[3]). This solution refers to the so-called proportionality test of restrictions on the rights and freedoms developed in the jurisprudence of the Constitutional Tribunal.<sup>76</sup>

A horizontal effect attributed to constitutional rights and freedoms is an interesting phenomenon that emerged at the beginning of the twenty-first century in Poland. The horizontal effect entails that constitutional norms modify or shape not only the domains of public law (the state and its authorities) but also the content of private law relations.<sup>77</sup> As a result, the courts, by referring to constitutional norms when resolving individual disputes, reinforce and develop the normative nature of the Constitution of 1997.

A separate chapter in the constitution devoted to the sources of law (Chapter III) is an original and unique solution. It was a response to the ‘instability’ of the sources of

74 Cf. Granat and Granat, 2019, pp. 195–206.

75 Granat, 2014, p.13.

76 The proportionality test has been present in the case law of the Constitutional Tribunal since the 1990s (e.g. decision of the Constitutional Tribunal of 26 April 1995, file ref. no. K 11/95) and is based in particular on the acknowledgment of the inviolable core of a given right or freedom, which should remain free from the interference of the legislator, even when it acts to protect the values indicated in Art. 31(3) of the Polish Constitution (e.g. the judgement of the Constitutional Tribunal of 12 January 1999, file ref. no. P 2/98).

77 See Florczak-Wątor, 2014.



law in communist states, in which various authorities of government administration enjoyed unlimited regulatory discretion at the expense of the parliament's legislative power. As a result, the constitutional regulation of the sources of law is based on a division into the so-called system of generally applicable law (subjectively and objectively finite) and the system of internally binding law (they may not constitute the legal basis for a decision in an individual case.)

Developing provisions anticipating Polish membership in the EU is an important novelty of the Constitution of the Republic of Poland. An integration clause was introduced into the Constitution, giving authorisation to delegate the competences of state authorities in certain matters to an international organisation or body (Art. 90[1]) and setting out a specific ratification procedure for an international agreement under which those competences are transferred (Art. 90[2]-[4]). The constitution also determined the place of acts of law adopted by that international organisation in the system of sources of law (Art. 91[3]), which is consistent with the primacy assigned to the constitution (Art/ 8).

The Republic of Poland may therefore delegate the powers of its authorities 'in certain matters' to the European Union, which means that transferring 'all the powers of a given authority' or 'the totality of matters in a given area' or competences that essentially determine the nature of a given state authority is prohibited. State authorities must not be accorded only the competences 'in a few matters' preserved 'even for the sake of appearances,' as it would violate the so-called 'core' of their powers and undermine 'the purpose of existence or operation of any of the authorities of the Republic of Poland'. Therefore, it could not function as a sovereign and democratic state. The constitution also provides grounds for concluding that there exist competences excluded 'from transfer', comprising the 'hard core' of the powers of state authorities, 'fundamental to the system of a given state', i.e. those 'whose transfer would not be possible under Article 90 of the Constitution'.<sup>78</sup> Thus, the constitutional legislator expressed its will to guarantee the statehood of the Republic of Poland.<sup>79</sup> In this context, the Constitutional Tribunal also identified the principle of statehood (with its detailed aspect created by the principle of preserving sovereignty in the process of European integration). Among constitutionally protected goods, the preamble to the constitution gives priority to 'regaining sovereignty construed as the possibility of deciding the fate of Poland', and the sovereignty of the state may thus be deemed a national value. Therefore, the preamble determines the interpretation of the provisions of the Constitution of the Republic of Poland concerning the sovereignty of the Nation (Art. 4), the independence, inviolability and indivisibility of the territory of the State, its sovereignty and security (Art. 5 and Art. 104[1], Art. 126[2] and Art. 130), and at the same time, the provisions applicable to membership in the European Union (Art. 9, 90 and 91). This, in turn, allowed the Constitutional Tribunal to

78 Judgement of the Constitutional Tribunal of 11 May 2005, file ref. no. K 18/04, item 4.1 and 8.4; Judgement of the Constitutional Tribunal of 24 November 2010, file ref. no. K 32/09, item 2.1.

79 Wojtyczek, 2007, p. 162.

infer the said principle of statehood from the provisions of the Constitution.<sup>80</sup> As held by the Constitutional Tribunal, its main function is precisely to shape the boundaries of the transfer of competences of public authorities of the Republic of Poland to the EU. Consequently, according to the Constitutional Tribunal, the ‘matter covered by a complete prohibition on transfer’ should include

the provisions defining the guiding principles of the Constitution and the provisions on individual rights determining the identity of the state, including in particular the requirement to ensure the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of the rule of law, the principle of social justice, the principle of subsidiarity, as well as the requirement to ensure better implementation of constitutional values and the prohibition of transferring constitutional authority and competences to create competences.<sup>81</sup>

#### 4. Conclusions

The Government Act of 3 May 1791 – one of the icons in the history of world constitutionalism – lasted several months and was formally repealed in November 1793. In turn, the Constitution of 1921, which was supposed to be a permanent social contract and constitute a strong basis for a resurgent state, collapsed after 14 years of validity. Another Constitutional Law of 1935 was an act aimed at strengthening the executive power as well as at maintaining the permanence and continuity of the Polish state, which already lost its independence on 1 September 1939. That date marks the end of the ‘actual’ validity of that constitution on Polish lands; this was never formally repealed, and the Polish government in exile operated thereunder (1990). After the collapse of communist rule, reforms of the political, social and economic system (1989–1992) commenced, resulting in subsequent amendments to the communist Constitution of 1952. However, the legal solutions of the period of political transformations, which were intended to be of a temporary nature, became a permanent component of constitutionalism in Poland and formed the cornerstone of the Constitution of 1997, which is the most enduring Polish Basic Law, soon to celebrate its 25th anniversary.<sup>82</sup>

80 Judgement of the Constitutional Tribunal of 24 November 2010, file ref. no. K 32/09, item 2.2.

81 Judgement of the Constitutional Tribunal of 24 November 2010, file ref. no. K 32/09, item 2.1.

82 “Our data show that most constitutions die young, and only a handful last longer than fifty years. At the extreme, the island of Hispaniola, home to the Dominican Republic and Haiti, has been the setting for nearly 7 percent of the world’s constitutions and perennial governmental instability. Indeed, the life expectancy of a national constitution in our data is 19 years, precisely the period Jefferson thought optimal” (see Ginsburg, Melton and Elkins, 2010, pp. 1–2).

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# Romanian Constitutional Identity in Historical Context

Manuel GUȚAN

## ABSTRACT

This paper is approaching the Romanian constitutional identity as a tendential constitutional identity. This concept emphasizes a perpetual competition between two historical Romanian identity poles: a eurocentric and an ethnocentric one. From the nineteenth century, the Romanians constantly desired to obtain a full European constitutional identity but they always feared to give in their constitutional ethnocentric identity. This is why the Romanian constitutional identity was and still is nothing but a never-ending tendency towards constitutional Europeanization. Due to its dynamic character, the Romanian constitutional identity was closer either to its eurocentric pole or its ethnocentric one. Sometime it had a democratic-liberal European look, some other time it had a strong illiberal look.

## KEYWORDS

Romanian constitutionalism, tendential constitutional identity, bipolar constitutional identity, eurocentric constitutional identity, ethnocentric constitutional identity.

## 1. Introduction

The Romanian modern and contemporary constitutional identities are intimately linked to the social, economic, religious, political and ideological Romanian contexts of the last two centuries, and the geopolitical context of Southeastern Europe has decisively influenced Romanians' perception about their constitutional self.

At the international level, the Romanian agenda was dominated by the birth of the unitary nation state, the unification of all territories inhabited by the Romanian ethnics and by the hope to gain and protect the integrity of the nation state's territory as well as its autonomy and independence. At the beginning of the nineteenth century, Romanians were politically organised in two autonomous principalities, Wallachia and Moldova, under Ottoman suzerainty. From 1711 until 1821, Phanariot (Greek) princes were installed on the Romanian thrones by the Ottomans with the clear purpose of containing the centrifugal tendencies of the autochthonous political elites (the boyars). Despite the efforts undertaken by some enlightened princes to implement social, economic and political reforms, the Phanariotes not only succeeded in building an oriental-like absolutism but also transformed the huge state bureaucratic apparatus in the epitome of administrative inefficacy and endemic corruption. These

inevitably triggered the reaction of the Romanian boyars, who, after an intense diplomatic pressure and numerous reform proposals sent to the Ottomans, Russians and even the French, obtained the return of princes of Romanian origin on the thrones. Against this backdrop, a national party developed in the Romanian principalities, which aimed at expanding and reinforcing their autonomy against the suzerain power. More or less unexpectedly, the Russians, who initially had seemed to be an ally against the Ottomans and Austrians, proved to be interested in expanding their own influence and even to annex the principalities. Self-proclaiming ‘the protecting power’, Russia succeeded to negotiate with the Ottomans and directly impose in each principality an Organic Regulation (1831/1832–1858). Made according to Russian instructions and reflecting some political and economic demands of the Romanian upper, middle and lower aristocracy, the Organic Regulations were designed as legal tools of Russian control. Although the absolutist ruling they gave birth sparked the Romanian revolutionary movements of 1848, the Regulations were repealed only in 1858, when the European Great Powers established the Paris Convention of August 1858 as the constitution of ‘the United Principalities of Wallachia and Moldova’.

This official state structure was the outcome of the harsh diplomatic bargaining between the European powers (especially France and Great Britain) and reflected only partially the Romanian expectations. From 1848, the Romanian national agenda gradually focused on the building of the unitary Romanian nation state, and the unification of Wallachia and Moldova under the ruling of a foreign Western European prince was at the very top of the Romanian political demands. Despite an increasing national self-perception on pure ethnic grounds, under the influence of the German Romanticism, the Romanian elites considered the foreign prince the ultimate guarantee of the future-to-be Romanian nation state. The birth of the unitary Romanian nation state occurred at the beginning of 1862, backed by the intense diplomatic efforts of the Romanian-origin prince Al. I. Cuza, elected in January 1859 as the monarch of both Romanian states. Soon after, in May 1866, Carol of Hohenzollern-Sigmaringen replaced the authoritarian prince Cuza and became the first foreign prince (king from 1881) of the united Romania. Under his ruling, Romania won its state independence (1878) and expanded its territory (the great Dobrogea in 1878 and the small Dobrogea in 1913).

Nevertheless, the Romanian national agenda was far from being fully fulfilled. The ethnic perception of the nation inevitably emphasised the objective elements of the Romanian nation, i.e. language, religion and territory. The intimate linkage between the ethnic nation and its territory maintained the process of national unification at stake. Especially Transylvania, a historic part of the Hungarian nation state inhabited by a majoritarian Romanian population and considered the birthplace of the Romanian nation centuries ago, was targeted by the Romanian nationalist discourse. In 1918, in a favourable diplomatic conjuncture, Transylvania, along with Bucovina and Bessarabia, joined the Romanian Old Kingdom and gave birth to what was proudly labelled ‘Great Romania’. Unfortunately, this dream became a nightmare after successive international events, i.e. the Second Vienna Award, which was perceived by

the Romanians as ‘the Vienna Dictate of August 1940’, the Russian ultimatum of June 1940 and the Craiova Treaty of September 1940, occurred. Romania lost Bessarabia, a part of Transylvania inhabited by the Hungarian minority, and the small Dobrogea, and perpetual frustration arose after 1945, when Bessarabia, north of Bucovina and small Dobrogea were definitively lost.

The communist regime installed after 1948 with the help of the Red Army had no national(ist) agenda until the mid-1960s. After Nicolae Ceaușescu became Secretary General of the Romanian Communist Party (1965), and especially after becoming the President of the Socialist Republic (1974), his desire to cut the strings with the USSR and his interest in consolidating the cult of his personality gave birth to an unprecedented xenophobic, exclusivist and repressive nationalist discourse. Somehow, its spirit survived the fall of communism (1989) but was heavily tamed by the Euro-Atlantic process of integration. All these evolutions explain (partially) not only the choice of the Romanian elites for the ethnic nationalism and ethnocentric national identity but also the preference for West European (not Central or Eastern European) political and constitutional models.

The Romanian national agenda was backed by a relative ethnic and religious homogeneity of the population during the nineteenth century and the beginning of the twentieth century. Until 1918, the number of ethnic minorities was constantly low, even after important groups of Jews coming from the Austrian and Russian empires started to immigrate to Romania in the second half of the nineteenth century (in 1899, 92.15% were ethnic Romanians). The ethnic homogeneity was doubled by a remarkable religious one, with almost all Romanian citizens belonging to the Christian Orthodox Church (in 1912, 93.10%). At the same time, the autocephalic organisation of the Christian Orthodoxy made the fusion between the Romanian state and the Romanian Orthodox Church even stronger and a serious cleavage between the State and Church did not occur until communism. However, the ethnic and religious composition of the population dramatically changed after 1918, when large groups of ethnic minorities (especially Hungarians and Germans) came under the Romanian state’s authority (the percentage of ethnic Romanian fell to 71.9). The high religious heterogeneity was even more problematic as an important part of the Transylvanian Romanians had belonged to the Greek-Catholic Church since the beginning of the eighteenth century. During communism, the Jews and the German minority drastically diminished, and the Hungarians and Roma were the most numerous ethnic minorities. This evolution from ethnical and religious relative homogeneity to heterogeneity explains both the magnitude and substance of the Romanian ethnocentric constitutionalism and the elements of the Romanian projected<sup>1</sup> national /constitutional identity.

1 In terms of L. Greenfeld, any national identity is a matter of self-perception and projection, even if it is linked to ethnic nationalism. Consequently, the so-called ‘objective elements of ethnicity’ are not automatically captured in the national identity and may not have the same weight. See Greenfeld, 1993, pp. 12–13. In the Romanian case, religious identity, in addition to linguistic identity, lies at the very core of national identity.

From the social point of view, the Romanian society had known, for decades, a binary structure comprising a small group of aristocratic elites (the boyars) and a huge mass of poor and illiterate peasants. The bourgeoisie started to significantly develop later in the nineteenth century and the beginning of the twentieth century. In addition to other economic factors,<sup>2</sup> this reality explains both the difficult economic development until 1948 and the constant economic backwardness compared with Western and Central Europe. Despite the forced process of industrialisation during the communism and intense economic planning, the Romanian society hardly became an urbanised one. These economic and social contexts not only backed the interest in a Western European-like economic and social modernisation (excepting the communist period) but also, as a contrarian approach, kept the traditional values at stake. The perpetual tension between modernity (urban) and traditional (rural) in the Romanian society also explains the never accomplished Romanian modernisation.

At the level of ideas, a considerable change occurred at the beginning of the nineteenth century, when the Romanian (aristocratic) elites discovered the Western Europe.<sup>3</sup> The Greek-Phanariot culture soon lost its impetus, and a process of cultural modernisation started. At the political level, the idea of a post-Phanariot medieval restoration endorsed by the upper aristocracy gradually met the liberal constitutionalism endorsed especially by the elements coming from the lower aristocracy and the growing urban middle class. Both perspectives tried to answer two core questions: which was the best system of government to disempower the monarch? Which was the best system of government to empower the political elites? From 1848, the modern constitutionalism claimed victory; however, the liberal constitutionalism met a serious competition in the conservative-ethnocentric one.

This competition should be understood against the backdrop of ‘the fight’ between modernity and conservatism during the second half of the nineteenth century and the beginning of the twentieth century in Romania. On a general scale, many members of the Romanian intelligentsia of the mid-nineteenth century were convinced that Romania, a peripheral and backward agricultural country with underdeveloped public services and corrupt public officers, no modern infrastructure or a decent educational system, and a huge mass of illiterate peasants living in misery, had no chance to perform at the social, economic, cultural and political levels without heavily borrowing the Western European modern civilisation. The Western European culture and civilization – especially the French one – arrived in the Romanian principalities via multiple direct or indirect channels of acculturation. Highly transferable, Western European law – especially the French and Belgian ones – shaped the Romanian modern legal system. The Romanian state and society knew that it was an important change in only a few decades. Many Romanian politicians believed that a massive formal change of legal norms would magically produce a deep change of legal and social practices and mentalities overnight, which obviously did not happen.

2 Murgescu, 2010.

3 Drace-Francis, 2016.



From the 1850s, this ‘skip-foreword’ kind of modernisation gradually met a strong intellectual critique coming from those seeing in it a chimera. Especially the members of the conservative cultural cercles – many influenced by the German Historical School and the organicism of Herbert Spencer – accused this civilisational and institutional endeavour as being merely a ‘form without substance’.<sup>4</sup> The law, especially the Constitution of 1866, was considered the epitome of cultural inadequacy of the whole process of modernisation. This critique opened an unprecedented public discussion in the Romanian society among a wide range of specialists: lawyers, historians, sociologist, economist, ethnologists, philosophers, theologists etc. The debate was still vivid in the period between the World Wars and tried to answer a core question: which was the most suited road to modernisation? The pioneers of the fast cultural imitation and adaptation of the Western European civilisation faced the adepts of slow organic evolution. The main concern of the critique was not only the denationalisation of the Romanian culture but the perish of the Romanians themselves as a distinct ethnic group. As a consequence, the process of modernisation had an ontological dimension.

In this context, a long and intense discussion about the Romanian self/character/way of being/essence/identity occurred before and especially between the World Wars.<sup>5</sup> Following the paradigm of ethnic nationalism, the objective elements of the Romanian national identity (biologic origin, religion, language, traditions) were explored, and diverse strategies of cultural self-identification were constructed. The quest for the true and unique Romanian led many intellectual to the Romanian peasant, the keeper of the Romanian true spirit and the symbol of the Romanian perennity.<sup>6</sup> Christian Orthodoxy, on the other hand, became the symbol of Romanian soul in the eyes of the extremist movements between the World Wars.<sup>7</sup>

Legal scholars did not ignore this topic; however, the problem of Romanian national identity in the legal field was much more delicate. It was obvious to many – especially the pioneers of public law – that the Romanian legal/constitutional traditions had poor resources to provide on the road towards political modernisation. At the same time, nobody had time to wait for an organic growth of Romanian constitutionalism, whatever it could have been. The building of a strong, unitary Romanian nation state was a matter of urgency, which is why legal/constitutional massive borrowing from the foreign legal/constitutional models was a necessity. Nevertheless, the problem of national legal/constitutional identity was not forgotten, and many tried to answer a difficult question: how to modernise the Romanian (constitutional) law via massive legal/constitutional borrowing from external legal/constitutional models and preserve, at the same time, the Romanian national/constitutional identity? Different

4 Guţan, 2015, pp. 481–530.

5 Verdery, 1995, pp. 103 et seq.

6 Verdery, 1995, pp. 115 et seq.

7 Hitchins, 1995, pp. 135 et seq.

intellectual strategies were discussed,<sup>8</sup> among which was the idea of an original re-creation or adaptation of the foreign legal institutions.

Regardless of how tightly foreign constitutional institutions were wrapped in Romanian-looking clothes, the Western European constitutionalism remained (excepting the period of the right and left dictatorial regimes between 1938 and 1989) the benchmark of Romanian constitutional modernisation. As Vintilă Mihăilescu puts it,

(...) the fear produced by the [Romanian] backwardness comparing with the Occident was replaced by the fear of sliding towards the Occident – but the Occident only remained the mirror of our [Romanian] identity. We may say that, somehow, even our nationalisms were ... occidentalist.<sup>9</sup>

Against this backdrop, the Romanian constitutional identity was not built concomitantly at the European and Romanian levels but between them. In V. Mihăilescu's words, Romanians permanently needed Western Europe as a mirror of their own identity, and this perpetually produced a fear of becoming too European. In other words, Romanians accepted the Western European constitutional identity only as long as they were sure it would not destroy their national ethnocentric identity. On this ground, I shall try to build a dynamic concept of Romanian constitutional identity as a tendential<sup>10</sup> constitutional identity. By this I mean a particular balance between eurocentric and ethnocentric identity poles, where the former perpetually tried and constantly failed to replace the latter as the core of the Romanian constitutional identity. This is why the Romanian constitutional identity was and still is nothing but a neverending tendency towards constitutional Europeanization.

## 2. Liberal and ethnocentric constitutionalism before WWI

The foundations of the Romanian constitutional identity were laid in the first half of the nineteenth century, when the Romanian political elites started looking for modern political and legal tools to contain the monarchical power. The Phanariot absolutism was followed by the absolutism of the princes ruling under the Organic Regulations, and the necessity to have the monarchical power constrained by legal strings became an upmost priority. The constitution and, gradually, liberal constitutionalism became the perfect solutions. A plethora of Romanian constitutional projects have incapsulated the monarchy in a modern constitutional design. Step by step, principles, values, concepts and institutions such as national/popular sovereignty,

<sup>8</sup> Guțan, 2017, pp. 62–99.

<sup>9</sup> Mihăilescu, 2017, p. 58.

<sup>10</sup> I built my theory of tendential constitutional identity on Romanian sociologist Constantin Schifirneț's concept of 'tendential modernity'. See: Schifirneț, 2012.

representative government, rule of law, separation of powers, veto power, parliamentary government, governmental accountability, human rights, liberty, equality, democracy, citizenship etc. entered the Romanian political and constitutional language and Romanian constitutional thinking. Moreover, in 1857, when Wallachian and Moldavian ad-hoc assemblies were convened by the Great Powers to express the Romanian perspective with regards to their future political organisations, representative government, the unicameral parliament, ministerial accountability, separation of powers, independence of judiciary, the principle of equality before the law, personal liberty, the inviolability of the domicile, the suspensive veto of the monarch were mentioned as defining the Romanian constitutional thinking, in stark contrast with the constitutional experiments done by the Ottomans and Russians in the recent past in the Romanian principalities. All these values were constantly preached during Al. I. Cuza's authoritarian rule (1859–1866), and many were enshrined in the first official constitutional project of the Romanians, prepared by the Central Commission of Focșani (1859).

Featuring conservative characteristics (even if in 1858 the aristocratic titles were abolished, the Romanian politics remained in the hands of the reach landowners), the Romanian liberal constitutionalism was perpetually influenced by the Western European (especially French and Belgian) one. Although a historicist approach tried to capture the flow of West European wisdom in the imagined Romanian constitutional tradition, the sources of Romanian constitutional thinking could not be hidden. Eventually, the Romanian elites had no interest in doing that. On the one hand, they truly believed in the superiority of the Western European constitutional values and, on the other hand, they had to prove that the Romanian state was on the road to political modernisation. If constitutional modernisation meant Europeanisation, then constitutional borrowing and imitation became the most natural approach. The French constitutions of 1830 and 1848 and the Belgian Constitution of 1831 became the benchmarks of Romanian constitutional change. The former was the iconic model for the constitutional project of 1859 and the best institutional platform to build the parliamentary government when the first Romanian constitution was made (1866). Heavily assuming the French and Belgian liberal constitutionalism, the Romanian political elites acknowledged a Western European constitutional identity.

However, it is not that simple to equate the Romanian constitutional identity of the nineteenth century and the beginning of the twentieth century with the Western European one. Gradually, after 1848, the national agenda intermingled not only with the values, principles and institutions of liberal constitutionalism but also with the considerable influence coming from German Romanticism. After a phase of 'pre-nationalist civic patriotism rooted in a strong Christian morality' in the first decades of the nineteenth century<sup>11</sup> and a sincere moment of civic nationalism in 1848 (especially in Wallachia), the Romanian public discourse was irremediably captured by ethnic nationalism. The nation, as a concrete historical ethnic group, became the

11 Rusu, 2015, pp. 90 et seq.

very subject of the Romanian national agenda. Inevitably, the national self-consciousness focused on perennial objective elements of the Romanian national identity: common biological origin (Latin or/and Dacian), common language (Romanian as a Latin-origin language) and common religion (Christian Orthodoxy), common cultural traditions and common territory. In terms of U. Preuss, building a unitary nation state was not a ‘constitutive’ moment but a righteous political and legal achievement of a pre-existing ethnic community.<sup>12</sup> This is why the Romanian constitution had to play an expressivist function: it was expected to reflect the Romanian ethnic national identity, in addition to the Romanian constitutional values and hopes.

Not accidentally, the Romanian constitutional debates of 1857, 1859 and 1866 focused primarily on issues intimately related to the Romanian national identity, such as the definition of citizenship, freedom of religion, the place of the Romanian Orthodox Church in the constitutional architecture, and the Romanian constitutional traditions. As long as the Christian Orthodoxy epitomised the very essence of Romanian national identity in the Romanian imaginary, it was placed at the very core of Romanian citizenship. A strong understanding was initially discussed in 1857, equating Romanian citizenship, Romanian ethnicity and Christian Orthodoxy, while a soft understanding of Romanian citizenship was enshrined in the Romanian Constitution of 1866. Its famous Art. 7 para. 2 strictly linked the naturalisation of foreigners to the quality of being Christian (not Orthodox Christian). The provision was not less ethnocentric as in addition to its expressivist function, it had an exclusive-protective one: it was meant to prevent the alteration of the Romanian ethnic unity on the Romanian soil by its imagined enemies, i.e. the Muslims and the Jews. Inevitably, the sense of distinctiveness and the presence of the (ethnic) other forged the Romanian national identity.<sup>13</sup> The increasing antisemitism,<sup>14</sup> especially, succeeded to intertwine the obsession for preserving the Romanian national soul with the social and economic frustrations of Romanians. The tendency of the immigrant Jews to position themselves as the bourgeoisie layer was seen as a new form of imperialism by a Romanian society dominated by poor and illiterate peasants. Not directly related to the Jews, Art. 3 of the 1866 Constitution fortified even more the Romanian ethnic nation against the external perils: “The Romanian territory cannot be colonised with population of foreign race (*ginta*)”. At the end, the Constitution of 1866 succeeded in making the Romanian constitutional identity rely on the Romanian national ethnocentric identity.

From this process of constitution-making, it should not be assumed that ethnocentric constitutional identity overrode the declared Eurocentric constitutional identity. The Constitution of 1866 answered two urgent problems of the Romanian political elites: on the one hand, to limit the power of the Romanian head of state, which constantly manifested itself unconstrained; on the other hand, to express

12 Preuss, 2008, pp. 211 et seq.

13 Cinpoș, 2010, pp. 41–43; Boia, 2010, pp. 301 et seq.

14 For details, see Iordachi, 2019, pp. 265 et seq.

and protect the Romanian national identity at the constitutional level. The first issue was answered with the help of liberal constitutionalism and the massive borrowing of values, principles and institutions from the Belgian Constitution of 1831. The mechanisms of parliamentary government, the rule of law, representative democracy and human rights, as far as the conservative spirit of that epoch allowed, were sincerely accepted as pillars of the constitutional modernisation. The second issue was answered by incapsulating illiberal elements, and overall, the ethos of the constitution was ethnocentric.

From my point of view, the Constitution of 1866 had two poles of constitutional identity: a Eurocentric (liberal) one and an ethnocentric (illiberal)<sup>15</sup> one; they were neither necessarily mutually exclusive nor out of any conflictual pattern. On the contrary, when the Congress of Berlin (1878) conditioned the international recognition of Romanian state independence by the amendment of Art. 7 in a more inclusive (liberal) sense, the negative reactions of the Romanian elites were firm. At the end, the article was amended, but this episode marked a clear limit of the Romanian appetite for Europeanisation: the preservation of the national ethnic identity. In other words, Romanians were interested in being European in their Romanian way, which forged a dynamic concept of Romanian constitutional identity – a tendential one. Romanians assumed the Western European constitutional (liberal) identity and enshrined its constitutional elements only as far as it made room for the Romanian national (ethnocentric) identity. Western European and ethnic national were the two poles of the Romanian tendential constitutional identity and situated in a delicate constitutional balance in 1866.

### **3. Liberal constitutionalism and ethnocratic state between the World Wars (1918–1944)**

The concept of ‘tendential constitutional identity’ has the advantage of capturing the real dynamic of the Romanian constitutional thinking over decades. Depending on specific political, geopolitical, ideological, economic and social contexts, the tendency towards the European constitutional identity was more active, leaving little room for the ethnocentric constitutional identity; vice versa, in different conditions, the European constitutional identity was overwhelmed – or even overridden – by the ethnocentric constitutional identity.

The Constitution of 1923 (the constitution of all Romanians or of the Great Romania) seemed to perpetuate, at first sight, the equilibrium between the two Romanian identity poles established in 1866. More than 60% of the first Romanian Constitution’s articles were preserved in 1923, including the architecture of the

15 In this paper I understand ‘illiberal’ as a constitutional architecture and ethos favouring communitarianism over individualism, the rights of a majoritarian ethnic group over the constitutional rights of the citizens, and the ethnocentric constitutionalism over civic constitutionalism.

parliamentary government. New constitutional provisions backed the Western-like liberal democratic constitutionalism, e.g. the universal manhood suffrage and the constitutional review entrusted to the Romanian Supreme Court; however, the ethnocentric constitutional identity not only was still active, but its constitutional markers were considerably amplified.

Although Romanians had fully fulfilled their national agenda, and almost all ethnic Romanians were living in the boundaries of the Romanian nation state, the Romanian political elites had to face an unexpected challenge. On 9 December 1919, Romania had to sign the Treaty with regards to the ethnic minorities, which were endowed with pretty generous rights: full protection of their life and liberty, liberty of religion and expression, the right to Romanian citizenship, the liberty to use their mother tongue – including before of the courts, the right to establish private confessional schools, and – especially for the Transylvanian Hungarians (*secui*) and Germans (*sași*) – the right to local autonomy with regards to their religious and educational issues. The fathers of the 1923 Constitution not only approached the constitution-making process in the same ethnocentric spirit, but they preserved and multiplied the constitutional markers of the Romanian national and constitutional identity: Romania was proclaimed a ‘national state’ (Art. 1); no populations of foreign race could have been colonised on the Romanian territory (Art. 3); the Romanian Orthodox Church was proclaimed ‘the dominant church’, and the Greek-Catholic Church received full priority amidst the religious cults (Art. 22); and the Romanian language was proclaimed the official language of the state (Art. 126). The only concessions made to the Treaty of 1919 was Romanian citizenship, which was accorded to all inhabitants of the new Romanian provinces regardless of their religion (Jews included) and the recognition of political and civil rights “regardless the ethnic origin, language or religion.”<sup>16</sup> Instead of opening the constitutional text for ethnic minorities’ rights, all these highlighted constitutional limits<sup>17</sup> that Romanians were not ready to trespass.

Any demands of the ethnic minorities favouring the integrative character of the constitution were rejected during the constitutional debates. The conceptual confusion between ‘the Romanians’ and ‘the Romanian citizens’ was perpetuated, and the recognition of group rights to the ethnic minorities was firmly condemned. Overall, the Constitution of 1923 was perceived as a ‘national constitutional cathedral’ of the Romanian majoritarian ethnic group, where the individual members of the ethnic minorities were accepted as humble visitors. They had the full rights of a Romanian citizen but were actually only shadow citizens. This constitutional approach expressed

16 For comparison, the Polish Constitution of 1921, Section V not only recognized the ethnic minorities as a constitutional subject, but it also enshrined important provisions of the Minority Treaty signed by Poland with the Principal Allies on 28 of June 1919. The Czechoslovak Constitution of 1920 reserved a full section (VI) to The protection of National, Religious and Racial Minorities, enshrining provisions of the Minority Treaty signed with the Principal Allies on 10 September 1919. See also: Theodoresco, 1926, p. 337.

17 Focșeneanu, 1992, p. 63.

the Romanian dream to build an ethnically pure nation state on the Romanian historical territory,<sup>18</sup> and this was nothing but an ethnocracy backed by an obvious illiberal ethos that was inherently authoritarian.

This kind of approach was the beginning of an identity dynamic favouring the national ethnic identity and the diminishing interest in the Western European liberal one. From the cultural point of view, the era was not one of joy and celebration but one of anxiety: considering the cultural diversity of Romanian groups living in the historical Romanian provinces, Romanian national identity was uncertain and prone to dissolution. This ‘fragmented [cultural] nature of the Romanian unitary state’<sup>19</sup> needed public cultural-educational policies meant to override regional identities and build a clearer and unified concept of national identity.<sup>20</sup> The obsession for national ethnic identity was boosted by the perpetual anxiety of the Romanian elites with regards to the external and internal perils threatening the unitary character of the Romanian nation state. The syndrome of the city under siege linked the traditional Romanian ethnocentric nationalism with new ideological and political extremisms (Orthodoxism, legionarism, fascism) that glorified the Romanian (Christian) national identity and preached the submission of the state and its law to the fight for the unity and purity<sup>21</sup> of the Romanian ethnic nation. Especially the Oriental-Orthodox essence of the Romanian national identity, which was favoured and preached by many Romanian intellectuals, created a public discourse that undermined Western values and endorsed authoritarian public policies of the Romanian state.<sup>22</sup> Against the backdrop of a political and constitutional practice that merely mimicked constitutional democracy, of the increasing political and administrative corruption, of the incapacity of the political parties to adhere to a democratic game of power, of the increasing authoritarian behaviour of the king and of an inefficient parliamentary life, the tendency towards a Western European liberal constitutional identity gradually decreased until it perished after 1938.

In 1938, when the authoritarian constitution of King Carol II was made and ratified by plebiscite, the choice for a full ethnocentric constitutional identity was already made. The nationalist discourse was inevitably coupled with an illiberal constitutional architecture considerably empowering the executive and the king. Principles, values and institutions such as the central place of the Saviour King proclaimed both Chief and Head of the state, the priority and unaccountability of the executive power, the primacy of the execution over deliberation, the corporatism and the political monism and the primacy of the Nation State (*Patria*) over individual rights replaced the liberal

18 Of high significance was the banner welcoming the visitors of the Romanian national pavilion at the New York Universal Exposition of 1939: ‘Romania has more than 20 million people fully united in language, tradition and culture’. See Livezeanu, 1998, p. 9.

19 Livezeanu, 1998, p. 347.

20 See: Rusu, 2015, pp. 197 et seq.; Verdery, 1995, pp. 126 et seq.; Momoc, 2012.

21 Not accidentally, the interest in eugenics studies reached an unprecedented level in Romania. See Turda, 2014, pp. 122–131; Turda, 2017, pp. 108–125.

22 Maner, 2004, pp. 303 et seq.

democratic constitutionalism. The constitutional identity markers enshrined in the Constitution of 1923 were preserved, but the intimate linkage between authoritarianism/ethnocracy, law and nationalist ideology was fully disclosed in the subsequent legislation. A *Decree-Law with regard the legal status of the Romanian Jews* (9 August 1940) expressly outlined the bottom principles of the Romanian constitutional architecture: the law of the blood, the Romanian (ethnic) nation as founder of the nation state, and the legal distinction between biologic Romanian and the Romanian citizens.

All these principles turned into a ferocious racial policy after September 1940, when King Carol II abdicated, his son Mihai I become the Romanian (puppet) king, and power was seized by Marshall Ion Antonescu. The Constitution of 1938 was suspended, and inspired by the Nazis' *Führerprinzip*, Antonescu launched a military dictatorship. Ideologically, the intimate linkage between the (ethnic) nation, the state and the Marshall (proclaimed the 'ruler of the state') had both palingenetic and protective aims.<sup>23</sup> Politically, the full accent on the Romanian national and ethnocentric constitutional identities in a dictatorial pro-Nazi context added Romania to the list of the countries participating in the Holocaust.

#### 4. Communism and ethnocentric nationalism (1948–1989)

The gradual instalment of the communist regime after 1945, the forced abdication of Mihai I, the proclamation of the Romanian Republic of People (December 1947) and the making of the first communist constitution (1948) did not follow the paradigm of the tendential constitutional identity. The Marxist-Leninist constitutionalism replaced the liberal democratic one, and the French and Belgian constitutional models were replaced by the Soviet one. The old Romanian constitutional aims of the nineteenth century – i.e. to disempower the head of state and to express the Romanian national identity – seemed to be outdated. On the one hand, Marxism-Leninism was interested in the principle of collective ruling, and on the other hand, it was not interested in the ethnic unity of the nation. Consequently, the *topoi* of the Romanian communist constitutions (1948, 1952, 1965) were completely different: the working class, collectivist property, the cult of labour, the leading role of the Communist Party, the centralisation of power and administration, the planned economy and popular democracy.

Against this backdrop, all traditional constitutional identity markers (the national state, the primacy of the Romanian Orthodox and Greek-Catholic Churches, the Romanian language as official language) disappeared. Moreover, with regards to the ethnic minorities, officially rebranded as 'co-habiting nationalities' (naționalitățile conlocuitoare), all communist constitutions had a much more inclusive approach; not only any racial or nationalist hate speech was forbidden, but the ethnic minorities received rights that they could have only dreamed of before. They had the right to use their language in administration and justice (1948) or 'in all organs and institutions'

23 Cercel, 2020, pp. 313 et seq.



(1952, 1965) and to have schools and universities, as well as newspapers and theatres, in their language. Moreover, in the administrative units inhabited by ethnic minorities, public officers had to be recruited also amongst these minorities. The climax of this change of constitutional pattern in new ideological and geopolitical contexts was the birth (under the pressure of Stalin) of the Hungarian Autonomous Region (Constitution of 1952) in the Eastern part of Transylvania, which was inhabited by a compact population of Szekler.

However, this constitutional architecture was far from capturing the whole and true political and constitutional spirit of the Romanian communist era. Behind the constitutional texts, and in addition to the Marxist-Leninist orthodoxy, an official political nationalistic discourse developed, and political decisions bearing clear antiethnic overtones were made. After 1956, the Hungarian minority was catalogued by the Romanian elite of the Soviet-style dictatorship as a potential source of danger, and the dismantling of minority institutions created by the same regime began (e.g. the abolition of the autonomy of Bolyai University in 1959, the reorganisation [1960] and, finally, the dissolution of the Hungarian Autonomous Region [1968]). Nicolae Ceaușescu's seizure of power in 1965 gave a new magnitude and peculiar goals to the Romanian communist nationalism. His complete control over the Communist Party and the State apparatus, followed by an increasing megalomaniac cult of personality, were paralleled by an autonomous (from the USSR) international agenda. At the same time, the cultural inadequacy and lack of sincere popular support for Marxism-Leninism led Ceaușescu to recover and adapt the old, pre-communist, Romanian discourse on ethnocentric nationalism. The unity of the people on premises of common origins, territory, language and culture<sup>24</sup> created a much more reliable and efficient adhesive capable of gathering the entire nation (not only the proletariat) around the party, its official politics and its 'glorious' leader. Stripped of its religious/Christian Orthodox element, Romanian national identity was reinforced on the grounds of a glorious, mystified national past. A Romanian nationalistic exceptionalism measured in aggressive photochromism not only positioned Romanians in the great history of humankind but also gave them the chance to override the traditional Romanian complex of inferiority. In this context, historical resentments inevitably arose. The traditional Romanian xenophobia was now targeting the Hungarian ethnic community and neighbouring Hungarian state, who were considered their internal and external enemies. Unfortunately, the communist nationalism had not only a protective function but also an integrative-repressive one,<sup>25</sup> making the reconciliation between the majoritarian and minoritarian ethnic groups a difficult task. The politics of social homogenisation aiming at 'building the unified working people'<sup>26</sup> brought interethnic tensions to an unprecedented level.

24 Cinpoș 2010, pp. 59 et seq.

25 Copilaș, 2015, p. 156.

26 Copilaș 2015, pp. 211 et seq.

## 5. Democratic-liberal or ethnocentric constitutionalism after the fall of the communism?

After the fall of the communist regime in Romania (December 1989), Romanians had to decide the political and constitutional paths to be followed. Inevitably, Romania recovered its pre-communist Western European sources of inspiration. Liberal democratic constitutionalism once again became the benchmark of the Romanian constitutional modernisation, and the French Constitution of 1958 the main constitutional model of the future Constitution of 1991. An ‘aversive constitutionalism’<sup>27</sup> recovered an old Romanian constitutional aim: disempowering the head of state. This is why the French-origin semi-presidentialism had a strong Romanian touch: because the dictator, Ceaușescu, was indirectly elected by the Great National Assembly, the future Romanian president had to be directly elected via universal and popular vote; because the Constitution of 1965 (modified in 1974) endowed President Ceaușescu with exorbitant powers, the future Romanian president had to have limited constitutional powers.<sup>28</sup> At the end, the Romanian Constitution of 1991 regulated a Romanian presidential benefitting of a very high political legitimacy but endowed with limited powers.

The same post-communist constitution was very sensitive in acquiring the standards of liberal democratic constitutionalism. The distribution of powers, human rights, rule of law, independence of judiciary, free elections, multi-party democracy and decentralisation became the supreme constitutional values of Romanians. Pursuing a process of ‘constitutional gardening’,<sup>29</sup> new constitutional institutions, such as the Constitutional Court, the ombudsman and the Supreme Council of Magistrature, were planted on the Romanian constitutional soil. The European integration became the new national agenda, and the Romanian political elites were ready to follow the necessary legal steps to fulfil it.

This evolution should not suggest that the Romanians had finally fully embraced the European (Western) constitutional identity. An identity crisis took place at the beginning of 1990s, and recalling the pre-communist constitutional past, it gave an important part of the expected answers. Cherished as the supreme expression of the Romanian liberal democracy, the Constitution of 1923 was largely considered by the fathers of the post-communist constitution, who, however, managed to recover not only some of its liberal elements but also its illiberal ethnocentric ethos and the constitutional markers of the Romanian national identity.

As many Romanian and foreign scholars have already emphasised,<sup>30</sup> the interest of the Romanian communist regime in ethno-nationalism considerably marked the Romanian political and constitutional cultures after 1989. From my point of view, it

27 I borrowed this concept from Scheppele, 2003.

28 See Guțan, 2012.

29 Ludwikowski, 1998, p. 64.

30 Șuteu, 2017, p. 417; Chen, 2003.

considerably helped to keep the Romanian national identity at the core of the Romanian constitutional identity. If one were interested in comparing the constitutional debates of 1866, 1923 and 1991,<sup>31</sup> they would be shocked to notice the similarity of the problems and values at stake: the same eagerness to affirm the Romanian character of the state, the need to express the Romanian national identity, the imagined domestic enemies and the protective mission of the constitution. Consequently, the constitutional markers of the Romanian constitutional identity present in 1923 were enshrined in the Constitution of 1991: the national character of the Romanian state (Art. 1 para. 1); the interdiction to colonise foreign populations on Romanian territory (Art. 3 para. 4); and the Romanian language as official language. The Christian Orthodoxy disappeared as a Romanian identity marker, but others were included, e.g. ‘the unity of Romanian people’ was proclaimed the true foundation of the state (Art. 4 para. 4); in other words, the access to justice for ethnic minorities is possible only with the help of a translator and not directly in their mother tongue. Moreover, while an eternity clause was enshrined for the first time in a Romanian constitution (Art. 148 para. 1; Art. 152 para. 1 after the constitutional amendment of 2003), the majority of the values that cannot be amended are markers of the Romanian national identity and constitutive of an ‘exclusionary Romanian constitutional identity’<sup>32</sup>: the national, independent, unitary and indivisible characters of the Romanian state, the integrity of the Romanian territory and the Romanian official language. During the debates of 1991, the constitutional status and rights of ethnic minorities were intensively disputed with the true purpose of eliminating any inner perils to the unity and indivisibility of the Romanian state.

Undoubtedly, ethnic minorities have received large and consistent rights but only as individuals. Any discussions about the minority group rights were firmly rejected in 1991 and the following years. Compared to 1923, individuals belonging to ethnic minorities were visible and equally protected citizens. According to Art. 6 para. 1, they had the right to preserve, develop and express their ethnic, cultural, linguistic and religious identity; Art. 32 paras. 2 and 3 granted them the right to learn their mother tongue and to be taught in this language; Art. 62 granted the parliamentary representation by one deputy to minorities that failed to reach the electoral threshold; Art. 120 and 128 granted the right to use their minority language in administration and before the courts. However, this did not change the illiberal ethnocentric and potentially authoritarian ethos of the Romanian Constitution of 1991, which was built again as a national constitutional cathedral of the Romanian ethnic majority and as a protective rather than integrative fundamental legal act. No intention to eliminate the unamendable syntagm ‘national state’ from Art. 1 occurred in the last 30 years, although the Hungarian minority constantly requested it for integrative purposes.<sup>33</sup>

31 Guțan, 2018(a).

32 Șuteu, 2021, pp. 110–111.

33 See: Salat and Novak, 2017, pp. 98 et seq.; Bakk, 2010, pp. 87–126.

## 6. Conclusions

The Romanian constitutional identity may be defined, from a historical perspective, as a tendential constitutional identity. It reflects the strong desire of the Romanians to acquire constitutional modernisation in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity. In other words, it reflects a permanent need of constitutional modernisation and change tamed by the anxiety to lose the national and constitutional self. This does not mean to be European and Romanian at the same time, but to be European only as long as the Romanian character is preserved. Romania did not have multiple constitutional identities, but rather, it was – and still is – between constitutional identities. This is why the Romanian (ethnic) identity permanently stood at the core of the Romanian constitutional identity, while gaining the European (Western) civic constitutional identity was always a tendency. The perpetual obsession of the Romanian elites with the Romanian way of being, soul or character and the ontological perception of the national identity made and still makes of Europeanisation a perpetually unfulfilled project, even after the EU integration. As far as the full Europeanisation meant the death of the ethnocentric national identity, it was out of question, and quitting the Western European road of constitutional modernisation was equally and regularly out of question. As a consequence, the greatest challenge of the Romanian elites and fathers of the constitution was to discover the line between being European and Romanian.

This path imprinted a predominantly liberal institutional architecture and a strong illiberal ethos to the constitutions of 1866, 1923 and 1991. The dosage was different between epochs depending on specific internal and external contexts. Serious disbalance occurred, with negative and positive effects. In the period of 1938–1989, the Western European liberal democracy was compromised and rejected for diverse reasons (the disappointing Romanian political and constitutional practice, the influence of fascism/Nazism, WWII or the Soviet imperialism), and the Romanian national identity was preferentially cherished by authoritarian/dictatorial/totalitarian regimes. Unfortunately, in these periods the Romanian ethnocentric nationalism powered the public discourse of autocratic leaders. After 1991, in the context of European integration, the interest in acquiring a European constitutional identity was unprecedented. Romanian constitutional scholars, at least, have gradually succeeded to approach the constitutional markers of the Romanian identity in a more liberal manner through the lens of European civic constitutionalism<sup>34</sup>; however, nobody can predict a future full

34 A single example would be sufficient. The first edition of the popular *Constituția României. Comentariu pe articole* edited by I. Muraru and E.S. Tănăsescu (2008) defined the [Romanian] nation on ethnic-cultural grounds, as “expressing the history, continuity and, especially, the spiritual and material unity linking the members of a community, [unity] based on specific cohesive and solidarity elements like origin or common past, language and/or common culture, customs, ideas, and equally shared sentiments” (p.3). In the second edition (2019), the *concept* of ‘national’ is merely linked to an historical process of nation-state building (accepting its ethnocentric impetus), while the legal concept of ‘*popor* (people)’ used by the Constitution has a civic meaning, as *demos*, and

adherence of the Romanians to the European civic constitutional identity to the detriment of the ethnocentric communitarian Romanian constitutional identity.<sup>35</sup> Romanian ethnocentric nationalism and constitutionalism still have their strong adherents,<sup>36</sup> which is why the paradigm of tendential constitutional identity is still at stake.

To a superficial observer, the constant back-and-forth dynamic of the Romanian tendential constitutional identity may be deceiving. Having the European (constitutional) integration as their declared aim, Romanians may give the false impression of a sincere and full interest in the European constitutional values. This increasing appetite for Europeanisation is backed by an official pro-European discourse and by normative (constitutional) support. Moreover, a certain degree of civic constitutionalism may be noticed. As long as the Romanian national ethnocentric identity is not endangered, an outsider may perceive a fully accepted European (constitutional) identity. However, the recent (September 2021) rejection in the Romanian parliament of any form of legal recognition for same-sex relationships is just one but significant example of the tendential character of the Romanian constitutional identity. At the same time, to other observers, the Romanian constitutional identity may seem fully attached to the Romanian national ethnic identity. The constitutional ‘referendum for the traditional family’ (October 2018) may look, despite its unexpected failure,<sup>37</sup> like an exclusive attachment to the Romanian national ethnic values; however, perceiving a full ethnocentric and anti-European Romanian constitutional identity is again a false impression. Romanians are interested in the European constitutional identity but not interested in becoming fully European; they perpetually want to be European in their Romanian way. The official statement made by the Romanian Academy in February 2017 with the occasion of the massive anti-governmental and pro-European street protests is relevant for this particular approach to Europeanisation:

Let’s cherish our heroes, let’s be worthy of their greatness by letting to the next generations, to all inhabitants of Romania a united and sovereign country, marked by love to its past and culture, with self-respect, master of its land, educated and prosper, a country belonging to United Europe but having its own identity, a Romanian one.<sup>38</sup>

not an ethnical one (pp. 3–4). The ethos of the Constitution is blurred, but this approach could be interpreted as an intention to imprint a much more liberal meaning to the constitutional text. 35 Guţan, 2018(b).

36 Neumann, 2013, pp. 41–67.

37 The referendum of 7 October 2018 was the only constitutional referendum organised after 2003. At stake was the amendment of Art. 48 of the Romanian Constitution (1991); the constitutional definition of the family, i.e. ‘the family is founded on the freely consented marriage of the spouses (...)’ was amended in a Christian spirit: ‘the family is founded on the freely consented marriage between a man and a woman (...)’. However, its failure was rather caused by political considerations than by a significant switch in the Romanian national identity.

38 Excerpt from the Romanian Academy’s call to the Romanian People and the institutions of the Romanian state labelled ‘Identity, Sovereignty and National Unity’ from 8 February 2017 – signed by 84 out of 203 members.

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# **The Influence of Serbia's Historical Constitutions on its Modern Constitutional Identity**

**– 30 Years Since the Return of Liberal Democratic Constitutionality –**

**Vladan PETROV – Miroslav ĐORĐEVIĆ**

## **ABSTRACT**

Any kind of future constitutional development of one country is in large part bound by the constitutional tradition and ever-lasting constitutional development of the country in question. Determining the right milestones, long term historical trends and traces of surviving constitutional identity markers presents a daring quest for a constitutional law scholar, especially when a country that is subjected to such analysis has a rich, but quite diverse constitutional history, as the Republic of Serbia. In this chapter authors strive to discover distinctive periods of the Serbian constitutionality, examine their characteristics and establish a possible connection of historical constitutions to the present Serbian constitutional identity

## **KEYWORDS**

Serbian Constitution, Constitutional Identity, Historical Constitutions, Legal History, Constitutional Law, Liberal Democracy.

## **1. Introduction**

This paper analyses the basic features of Serbian historical constitutions with special reference to the Constitution of 1990, which was a milestone and a starting point for the return of liberal democratic constitutionality in Serbia. The literature dealing with the concept of constitutional identity has established that one of the main sources of constitutional identity is national constitutional history. In our opinion, four of the 'old' (historical) Serbian constitutions – those of 1835, 1869, 1888 and 1990 – could be perceived as relevant factors for the establishment of the constitutional identity of modern Serbia. After explaining key features of these constitutions (especially the Constitution of Serbia of 1990), we suggest a new periodisation of Serbian constitutional history according to the criterion of relevance to the definition of contemporary constitutional identity.

First, we would like to mention that the period of constitutionality of the First and Second Yugoslavia will not be our focus. The Kingdom of Serbs, Croats and Slovenes was constituted on 1 December 1918 and later changed its name into ‘Kingdom of Yugoslavia’ (in 1929). It had two constitutions – that of 1921 (the so-called ‘Vidovdan Constitution’)<sup>1</sup> and that of 1931 (‘September Constitution’). Their features – especially those of the Vidovdan Constitution (because the September Constitution was essentially a typical example of the authoritarian constitutionality) – were deeply rooted in Serbian constitutionality from before 1914, though within all the circumstances of the newly formed First Yugoslav state.

As for the constitutionality of the Second Yugoslav state (the Socialist Federal Republic of Yugoslavia), which lasted for almost half a century, it undoubtedly had some impact on the post-socialist constitutionality of all its member states, namely the former Yugoslav republics that had emerged as sovereign states after the collapse of the Second Yugoslavia. However, if we exclude the institution of the constitutional judiciary, which was introduced by the federal Yugoslav Constitution of 1963, that influence was rather to be felt at the level of legal and political consciousness and culture in general in comparison to some specific constitutional solutions that rarely outlived the demise of socialism.

At the time of the First and the Second Yugoslavia, Serbia did not exist as a sovereign state. It began to regain elements of its statehood only with the break-up of the Second Yugoslavia and the enactment of the 1990 constitution.

In this context, the current Constitution of 2006 is only important because it fully reconstituted Serbia as an independent and sovereign state; however, it is not substantially a new constitution *per se*, but content-wise, it is more of a somewhat revised Constitution of 1990 (though not considerably). Some changes, such as the expansion of the human rights’ list or the introduction of constitutional complaint, certainly do not present innovations significant enough and hence do not suffice to conclude that, content-wise, this constitution is to be treated as considerably different compared to its predecessor of 1990. In essence, the enactment of this constitution presents a missed opportunity to enact a true ‘identity milestone’, which is evident by a list of constitution makers’ responses to key issues, including the fundamental one when it comes to Serbian constitutionalism: the status of Kosovo and Metohija and the introduction of the ostensible notion of ‘essential autonomy’ for the southern Serbian province. For these reasons, the Constitution of 2006 (which remains active) is also not the primary focus of this paper.<sup>2</sup>

1 Vidovdan Constitution was named after the date of its enacting, 28 June – Vidovdan (St. Vitus day), which is an important national and religious holiday in the Serbian tradition. Apart from Serbia, the same holiday is revered and celebrated in Bulgaria as well (*Vidov den*).

2 Serbian constitutional history is long and complex. If only those constitutions which were enacted at times when Serbia was fully independent and sovereign were taken into account, much of the Serbian nineteenth-century constitutionality would have to be left out (e.g. everything before the Congress of Berlin in 1878). Some of the most influential constitutions emerged in periods of Serbian quasi or semi-independence. The Constitution of 1990 was, likewise, still

## 2. Several periodisations of Serbia's modern constitutional history

Modern Serbian constitutional history can be divided into several periods according to many different criteria. This paper considers four different criteria and accordingly presents four periodisations. The beginning of Serbia's modern constitutional history is set to its first constitution, which at least declaratively proclaimed the division of powers and protection of some human rights (*Sretenje* Constitution of 1835).

### 2.1. The periodisation according to distinctive periods of modern world constitutionality

The first periodisation follows the development of modern world constitutionality, which starts with the adoption of the first written formal constitutions. In essence, the development of modern written constitutionalism has undergone three great 'waves' which brought significant qualitative changes. Ideologically, normatively and practically, it influenced and led to the redefinition of the constitutional order of nation states in the period starting at the end of the eighteenth century and up to the first decades of the twenty-first century.<sup>3</sup>

enacted during the formal existence of SFRY, but it was practically written for an independent country and with the clear anticipation of future disintegration of the federal Yugoslavia. In addition, state union of Serbia and Montenegro was more of a union of states than the independent, sovereign state *per se*. This issue remains debatable (and complex), but undoubtedly, the Constitution of 2006 cannot be considered a milestone as it presents a more or less 'bad copy' of the 1990 constitution.

3 i) The beginning of the first 'wave' of modern constitutionalism is linked to the US Constitution of 1787, which is based on the principle of separation of powers and introduced a presidential system and modern federalism, while in nineteenth-century Europe, parliamentarism and a unitary state became the constitutional standard. What remained common for both these variations is their foundation on the formal division of powers as well as the constitutional proclamation of a relatively narrow circle of personal and political rights.

ii) The second 'wave' is the liberal-democratic constitutionality sprung from the civil revolutions and national struggles for liberation beginning in 1848/1849. The principle of people's sovereignty was added to that of the separation of powers. Suffrage was evolving from limited and unequal to universal and equal. A necessary link between constitutionalism and democracy was starting to be established, and it later became the guiding idea of modern constitutionality. Hence, in the second 'wave', democracy and people's sovereignty as fundamental constitutional principles took precedence over the supremacy of the constitution. However, in the 1920s, the crisis of parliamentary democracy began. In the 1930s, in most European states, liberal democracy was replaced with authoritarian constitutionality.

iii) The third 'wave' of modern constitutionalism rose on the 'ruins' of totalitarian regimes. Peace, freedom, equality and justice as universal values were to be defended from the position of a universal legal order created under the auspices of the United Nations and based on the UN Charter from 1945 and the Universal Declaration of Rights from 1948; the internationalisation of human rights thus began. The post-war constitutionality – firstly in the Western Europe states – was also marked by the establishment of a constitutional judiciary, which, in various modalities, is a confirmation that the supremacy of the constitution is an essential principle of a modern constitutional state. The era of the new constitutionalism, i.e. constitutional democracy, had started.

The idea of constitutionality was not unknown to medieval Serbia at the time of its greatest power. The provisions of Emperor Dušan's Code of 1349 (amended in 1354) on the independence of the judiciary were a kind of Serbian 'pre-constitution'.

The so-called 'Sretenje constitution' of 1835 (also named after the date of its enacting – Candlemas, the 15th of February) had, in terms of its content, all the features of a true constitution. The division of power was not yet clearly and unambiguously set, but its contours were undoubtedly present. The intention of Dimitrije Davidović, the creator of this constitution, is already quite clear from the very title of the act – 'the constitution' (*Ustav*), a term that in Serbian language derives from the words 'to stop, limit, put boundaries' (to the power of the state 'against' the individuals).<sup>4</sup> This intention could have been achieved primarily through the institution of the State Council, whose members were though appointed by the prince himself. The National Assembly also existed as a representative body, but its function did not include legislative competences; its primary duty was to regulate taxes and other duties following the principle of 'no taxation without representation'.<sup>5</sup> The Sretenje Constitution was, however, short-lived and almost immediately put out of force under the severe pressure of the great powers of the time. Its destiny served in a way a sort of prediction of the future constitutional life of Serbia, and one would not be wrong to say that all the constitutions of Serbia were more 'stillborn' than 'real' or 'living' constitutions. This also applies to the constitution of the Kingdom of Serbia from 1888 (the so-called 'Radical's Constitution', after the Radical political party), which is usually regarded as 'the best Serbian constitution,' *inter alia* because of the introduction of the parliamentarism and a proportional electoral system<sup>6</sup> – political mechanisms that were completely new and practically unknown in Europe of the time. Still, this constitution was a 'bud' of liberal democratic constitutionality that could not 'flourish' in neither the first (1888–1894) nor the second period of being active (1903–1914).

The third big 'wave' of constitutionality, after World War II, in which the constitutional judiciary became the 'supporting pillar' of the rule of law, unexpectedly quickly 'flooded' the Socialist Federal Republic of Yugoslavia and its republics. The constitutional judiciary within the system of unity of power and the one-party system could not have the role and significance that it had in the Western European states of the time (Italy, Germany). Its very existence, however, clearly influenced the concept of constitutional judiciary three decades later, in the period of post-socialist

4 Savić, 2010, p. 84.

5 Đorđević, 2012, p. 278.

6 "With the proportional system, which was introduced by the Constitution of 1888, the biggest change was introduced. The proportional system was a new, theoretical, unproven experience in Europe. Except for Denmark and some Swiss cantons, the system was not introduced or implemented anywhere else at the time" (Pavlović, 2010, p. 111).

constitutionalism.<sup>7</sup> This came to full expression and comprehension in the 1990 constitution of Serbia.

## ***2.2. The periodisation of the constitutional history of Serbia in the works of Serbian eminent constitutional scholars***

The second periodisation of the modern constitutional history of Serbia was partly created by probably the greatest constitutional lawyer that Serbia had in the first half of the twentieth century, professor Slobodan Jovanović. The other part is the work of perhaps the greatest constitutional scholar of the second half of the twentieth century, professor Ratko Marković. Both authors gave periodisations of constitutional history according to the two criteria mixed – the normative features of the constitutions and constitutional reality. The first criterion was, however, more dominant.

Slobodan Jovanović offered the periodisation of the constitutional history of the Principality and the Kingdom of Serbia, which existed in the nineteenth century and the beginning of the twentieth century (1808–1914). According to Jovanović, constitutional history had seven distinctive periods: (i) the age of creation of state power (1808–1838); (ii) the age of the bureaucratic oligarchy (1838–1860); (iii) the age of the police state (1860–1869);<sup>8</sup> (iv) the age of constitutionality (the ‘Regent’s Constitution’ from 1869); (v) the age of parliamentarism (the first period of the ‘Radical’s’ constitution of 1888 being active); (vi) the age of reaction (1894–1903 – the second period, ‘the return’ of the Regent’s Constitution); and (vii) the age of the restored parliamentarism (from the entry into force of the Constitution of the Kingdom of Serbia of 1903 until 1914, namely the beginning of World War I).

The periodisation offered by professor Ratko Marković covers the period of two Yugoslavian states (from 1918 until the creation of the two member states federation – Federal Republic of Yugoslavia in 1992). He divided the constitutionality of the first Yugoslav state into four periods: (i) the age of temporary constitutionality (from 1918 until 1921 – the Vidovdan Constitution’s entry into force); (ii) the age of monarchical parliamentarism (1921–1929, ending with the suspension of the Vidovdan Constitution); (iii) the age of absolute monarchy (1929–, until the entry of the September Constitution of 1931 into force); (iv) the age of indirect parliamentarism (1931–1939); (V) the age of the executive (non-representative) government (on the eve of World War II). Ratko Marković divided the constitutionality of the Second Yugoslavia into two periods: (i) the period of state socialism (1946–1953), which was characterised by the copying of the

7 The institute of constitutional judiciary was not alone in this sense. Socialist Yugoslavia also had other institutions (unlike most of other countries of the Eastern Bloc) reminiscent of the ones of the Western democracies – e.g. the ‘social self-management protector’ as an independent body closely resembling the Western *Ombudsman* institution. Some authors argue that while being professedly communist in philosophy, Yugoslavia was increasingly “democratic in practice, as it recognised that the agreed state interests did not necessarily mean a lack of attention to the individual rights” (Gellhorn, 1967, p. 256. See also: Đorđević et al., 2013, pp. 21–23).

8 The second and the third periods cover the time when the ‘Turkish’ Constitution of 1838 was active.

1936 constitution of the USSR – Stalin Constitution; and (ii) the period of self-governing (socialist self-managing) constitutionality (1953–1992, until the dissolution of the Socialist Federative Republic of Yugoslavia [SFRY]).<sup>9</sup> The self-governing constitutionality was in a way a unique Yugoslav experiment – in essence, it implies the socialist constitutionality with some modified features of the liberal Western constitutionality. The dissolution of the socialist Second Yugoslavia represents, in fact, the beginning of the new, practically sovereign state of Serbia (though still within the ‘smaller’ Federative Republic of Yugoslavia, together with Montenegro) that started its life with the constitution of 1990 (the so-called ‘Milošević Constitution’ – after the first president of Serbia following the dissolution of the Socialist Yugoslavia, Slobodan Milošević).

### ***2.3. The periodisation from the standpoint of state sovereignty***

From the standpoint of state sovereignty, it is possible to classify four distinctive periods. The first covers the constitutionality of Serbia as an autonomous province in the Ottoman Empire. It begins with the first acts of constitutional character enacted at the time of the first Serbian uprising (1808, 1811) and ends with the full international recognition of the state independence in 1878. This period has two essential characteristics: the struggle for national liberation and the establishment of a functional state organisation. Thus, the constitutional acts and constitutions adopted in this period had primarily three basic functions: to constitute the state and state power (*constitutive function*), to establish a system relatively independent from the Turkish administration (*organisational function*) and to clearly express the ultimate goal – full completion (regaining) of the Serbian statehood (*symbolic function*). Therefore, in that period, constitutionalism, in the sense of separation of powers and the protection of human rights, was a mere proclamation. The constitutionality of the sovereign Kingdom of Serbia is to be considered as the second period. Perhaps, if the kingdom's Constitution of 1888 (as aforementioned, later reinstated in 1903) had lasted longer, a true parliamentary democracy would have been established. However, World War I extinguished the independent Serbian constitutionality. After the war, it evolved into the constitutionality of the first Yugoslav state. The third period of the Serbian constitutionality, therefore, lies within the Yugoslav constitutional framework. Three distinct phases can be distinguished: (i) the ‘drowning’ of the authentic Serbian constitutionality within the centralist-unitary system of the first Yugoslav state (until the beginning of World War II); (ii) the constitutionality of Serbia as one of the six republics, i.e. federal units in the Second Yugoslavia (SFRJ); (iii) the revival of the authentic features of Serbian constitutionality in the quasi-federal framework of ‘small’ Yugoslavia (FRY 1992–2003, later State union of Serbia and Montenegro 2003–2006).

Finally, the current period of constitutionality begins with the departure of Montenegro from the state union and the enactment of the Constitution of Serbia in 2006, which is still active. This last period can be considered as the Republic of Serbia's age of sovereign constitutionality.

9 Marković, 2014, p. 139.

The aforementioned periodisations may be useful to readers to become more familiar with the modern Serbian constitutional history. However, from the standpoint of the topic of this paper, we find it most suitable to create the periodisation according to its very title – the criterion of the influence of Serbia's historical constitutions on its modern constitutionality. Previous periodisations of Serbian constitutional history either have originated from other authors or have presented the result of combining several different criteria while trying to find common denominators to serve as support for such an approach. No one in the Serbian constitutional doctrine has even offered the periodisation from the standpoint of constitutional identity, as the one that we provide here. This periodisation arose as a result of several of our papers, in which we analysed the impact of reference national constitutions on the creation of a modern constitutional identity.<sup>10</sup>

Before subjecting the particular historical constitutions of Serbia to analysis, one must first address the very concept of constitutional identity to establish which of the principles, values and concrete solutions from these constitutions still remain relevant for defining Serbia's modern constitutional identity.

### **3. Some characteristics of the concept of constitutional identity**

At the end of the twentieth century, constitutional identity was primarily being written about in political philosophy and constitutional theory; consequently, it has been constituted more as a philosophical-legal than normative-legal concept. Its primary characteristics are uncertainty and vagueness, and no agreement has been reached about the normative 'minimum' that it should encompass.<sup>11</sup>

The concept has two basic sources. The first one is the European integration. For several decades, persistent attempts have been made to define the European Union as a community that is more than a loose (political) union of the member states and less than a state itself. These attempts resulted in a difference – or even conflict or contradiction – between the two types of constitutional identity, namely European constitutional identity and national constitutional identity. At first glance, new questions arose that the traditional theory of the constitutional law could not answer, such as redefining the sovereignty concept and transferring jurisdiction from member states to EU institutions, creating European constitutional law, building a particular type of European federalism, etc. However, the old Western democracies were not ready to renounce the substantial features of their national constitutionality for the sake of supranational creation of the member states. Therein lays the second source of constitutional identity: in an effort to preserve the core of the national constitution, the constitutional principles and values that have been created for decades and even centuries. As for the former real socialist countries, they had even a more complex

10 Đorđević, 2021, pp. 27–42; Đorđević, 2013, pp. 293–308; Đorđević, 2012, pp. 275–288.

11 See Rosenfeld, 2012, pp. 756–757.

task, namely to reconcile the European and national constitutional identity when enacting new constitutions. In the first decades after the break of real socialism, they did it more in favour of European identity and to the detriment of the national one. In the last couple of years, some of the countries have done a lot to strengthen the national constitutional values, even when those constitutional solutions were not completely in accordance with the sometimes only virtually constructed European values (Poland, Hungary). In some cases, the interventions of the national constitution makers did not necessarily weaken the European constitutional identity, but they favoured the harmony of relations and even the unity of identity. Generally, it happened in states with a strong and relatively developed national constitutional tradition (Poland, Hungary), proving the thesis that there should be harmony – not concurrence – between two set of values and principles (European and national).

The vagueness of the concept is by the rule its weakness.<sup>12</sup> For the purposes of this paper, we use one of a variety of possible meanings of constitutional identity, that is, the set of constitutional principles and values that are the foundation and essence of every constitution. The concept of (national) constitutional identity emerged from the jurisprudence of European Constitutional Courts (first in Germany, France, Italy and Spain and then in Poland and Hungary). At first, it seemed that its goal was to preserve national state sovereignty threatened by the process of the European integration. However, its substantial purpose is different. Constitutional identity is the ‘heart’ of the constitution, its essence, which cannot be changed or is hard to change. As Dieter Grimm explains,

Constitutions entrench the principles of the political and societal order and shield them from rapidly changing majorities and situations. Rather, they provide the lasting structures and guidelines under which an adaptation of the legal system to new challenges or altered preferences can take place.<sup>13</sup>

12 The concept that is clearly and precisely defined has higher chances to succeed in practice; otherwise, it remains on the level of abstract theoretical reasoning. However, in law and politics, the vagueness of terms and concepts sometimes serves a purpose. Here are two examples: one is about constitutional customs and (or) constitutional conventions, while the other is about constitutional principles. Both types of rules are known to be part of what is called an un-codified constitutional law in theory. What exactly these rules are, where their source is, how they are formulated and whether their violation results in some legal or similar sanctions – those are all questions that cannot be given reliable answers. Nevertheless, their meaning and role in the life of the constitutional order is not questioned. The constitutional customs in stable constitutional democracies allow the codified constitution to function better and last, to ‘live’ longer and to not be formally changed too often. Certainly, these rules apply also to interpreting the constitution. Constitutional principles give basic criteria and guidelines for interpreting the constitution, for understanding the constitutional norms that are general and insufficiently clear – sometimes even mutually contradictory – better and correctly. Therefore, the vagueness of the constitutional identity concept does not need to be endangering the interpretation and application of the constitution, but it can contribute to constitutional stability as one of the core values of a modern constitutional democracy. See more in Fabbrini and Sajó, 2019, pp. 457–473.

13 Grimm, 2010, p. 33.



Undoubtedly, constitutional identity is an amalgam of the highest achievements of European legal civilisation and of the most valuable national features. This concept should reflect unity of common principles and values, that is, the European principles and values interpreted and implemented in 'the national way', namely in accordance with national legal and political culture and circumstances.

If we consider the substance of European identity, this could be summarised in the expression 'unity in diversity',<sup>14</sup> which means that European standards and European values are neither in advance 'given solutions' nor the abstract categories that could be implemented without taking the legal and political culture of a national-political community into account.

In substance, no concurrence should exist between national and European constitutional identity. National constitutional identity should be the European constitutional identity that takes into account specific national values and circumstances, those which define the title of sovereignty (nation, people or citizens), state organisation (simple or compounded state), forms of government (monarchy or republic), types of government (parliamentary system with a strong or weak head of state), territorial organisation (one or more levels of a local government as well as potential existence of territorial autonomy) etc. In other words, the division or even tension between the European and national constitutional identity is opposed to the very nature of constitutional identity. If identity is the essence of the constitution, then a state cannot have two essences in the form of two identities.

The above statement is supported by Art. 1 of the Constitution of Serbia from 2006:

*Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values.*

Based on this article, Serbia is bound to respect European values and principles and make them an integral part of its own constitutional identity (it provides the widest possible legal framework for the future eventual provision on the primacy of EU law over national law – when and if Serbia joins the EU.) Therefore, European identity is

14 The introductory articles of the European Union Treaty of 2009 state, "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail (Art. 2). In accordance with Art. 5, competences not conferred upon the Union in the Treaties remain with the Member States (Art. 4, para. 1). The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State (Art. 4, para. 2)."

legally rooted in the core of the modern Serbian constitutionality, even though Serbia is not an EU member state.<sup>15</sup>

Despite the concept's vagueness, certain sources of constitutional identity could be identified with certainty. The first one is national and European constitutional history (national and European constitutional heritage), and the second is the interpretation of the constitution by national constitutional courts and the 'dialogue' between them and supranational courts such as the European Court of Human Rights (ECHR) and the European Court of Justice (for the EU member states). Respect for and reference to the European Convention for the Protection of Human Rights and Freedoms is also noticeable in the practice of the Constitutional Court of Serbia. In its reasoning, the Constitutional Court often refers to the case law of the European Court of Human Rights and hence somewhat directs the whole development of the Serbian constitutional and legal system in general towards values that the ECHR presents and promotes. The third source is the internationalisation of constitutional law – particularly the crucial role of the Venice Commission in that process. The constitutional doctrine can be added (although not everywhere and not equally) as an 'additional source' as a tool for joining the action of all the above sources into a single unity.

#### **4. Four constitutions – four 'milestones' in Serbian constitutional history**

According to Ratko Marković,

"Serbia is a country that has its own constitutional identity, nothing less important for its overall national identity than other European countries with the greatest constitutional traditions, such as France and Germany", while "in Serbian constitutions, especially those from the 19<sup>th</sup> century, the certain provisions are to be found that remain 'de facto in power' even though they are nowadays strictly speaking no longer binding for anyone, because the constitutions that they were part of ceased to be in force a long time ago".<sup>16</sup>

Therefore, to the question of where constitutional identity lies, Marković answers that it is to be found in exemplary provisions of the old Serbian constitutions from the nineteenth century, the same ones that are 'binding' – even nowadays – due to the extraordinary solutions they offer rather than by their legal force.

The search for the roots of Serbia's modern constitutionality should focus especially on four historical constitutions that have at least two common denominators – particular normative quality and, above all, a certain degree of authenticity. We give a brief overview of the three major milestone constitutions that were active in

15 The extent to which the constitution of Serbia from 2006 implemented this concept into most of its provisions is a different matter.

16 Marković, 2011, p. 14.

nineteenth century and then focus more on the last constitution of 'the big four' – the Constitution of Serbia of 1990.

#### 4.1. Three 'milestones' in the nineteenth century

The first constitution that could be characterised as a 'milestone' of Serbian constitutional history was its first 'real' constitution (rather than the 'act of a constitutional character') – the Constitution of 1835 – '*Sretenje Constitution*'. In the history of modern Serbia, it had marked the beginning of true modern, written constitutionality. Enacted at the Great Assembly in the city of Kragujevac on 2 February 1835 (Julian calendar), the Sretenje Constitution was the first complete Serbian constitution, although it was not the work of a sovereign constitutional authority because Serbia was still not an independent state at that time but an autonomous province of the Ottoman Empire.

The Sretenje Constitution was more of a symbol than a sincere normative expression of the effort to lay the foundations of constitutionality based on the division of power and guarantees of personal and political rights. However, "whether they called it the first Serbian constitution or not, there is no doubt that the Sretenje document established the Serbian constitutionality".<sup>17</sup>

In practice, the Sretenje Constitution was a 'stillborn'<sup>18</sup>; it was written in 2 weeks and suspended after only 6 weeks from its entry into force. One of the reasons (though to a lesser extent) for its short life should be sought in the fact that it did not correspond to the sociopolitical reality of Serbia at that time, but it was more of a 'constitutional imagination' of its main author, the great scholar Dimitrije Davidović. As aforementioned, this will become the 'fate' of most Serbian constitutions, some of which were linguistically and stylistically very well groomed but all without real contact with social reality. However, "the real cause of the suspension of the Constitution should be sought exclusively in international relations and the interests of the great powers".<sup>19</sup>

The second 'milestone' of the Serbian constitutional history is the Constitution of 1869 – the so-called 'Regent's Constitution'. According to its Art. 1, the Principality of Serbia is a 'hereditary constitutional monarchy' with people's representation. In this way, not only is there a certain form of government – constitutional monarchy – but it has already been clearly stated that the prince will share state power with the representative body. No matter how prosaic in practice it might have been, this provision had, bearing in mind the circumstances at the time, exceptional importance for the development of a constitutionality based on the limitation of monarchical power. The prince was the holder of the executive power and shared the legislative power with the National Assembly. The right of the legislative initiative was, however, only in the hands of the prince, and he also had the right to appoint some of the MPs. Conversely, the proclamation of the free mandate of MPs was a significant achievement at the

17 Avramović, 2010, p. 40.

18 Milovanović, 1997, p. 282.

19 See Avramović, 2010, p. 48.

time and well as the regular holding of parliamentary sessions. The independence of the judiciary was guaranteed and expressed in a manner that may serve as an inspiration even for a modern constitution maker: “Justice is pronounced in the name of the Prince. In the administration of justice, the courts are independent and do not stand under any authority other than the law” (Art. 109); “No state power, neither legislative nor administrative, can exercise judicial functions, nor can courts again exercise legislative or administrative power” (Art. 110).

The Constitution of 1869 also contained, in addition to some controversial provisions from the perspective of modern constitutionalism, a whole series of solutions that could still stand almost unchanged, essentially and stylistically, in some contemporary Serbian constitution.<sup>20</sup>

The Constitution of the Kingdom of Serbia from 1888 (‘the Radical’s Constitution’), often qualified as ‘the best Serbian constitution ever’, was the first constitutional act of the sovereign state of Serbia after gaining full independence at the Berlin Congress in 1878. It had formally introduced parliamentarism, broad local self-government, a proportional electoral system and a relatively rich list of human rights and freedoms. According to its normative characteristics, it is a fine representative example of liberal democratic constitutionality.

However, the constitution from 1888 failed at finding and establishing the right balance between striving for modern, advanced solutions and the real needs of the Serbian society of the time. On one hand, the provisions in this constitution incorporated the highest achievements of constitutional law theory, but on the other hand, it also represented constitutional discontinuity, constitutionality based on experiment and constitutional misconceptions, and in some parts, even delusions. Even though this constitution failed at the main task of modern constitutionality, which is finding and keeping constitutional balance, its content is still full of ‘traces’ necessary for conceptualising the modern constitutional identity of Serbia. They can be found in the provisions related to the position of the parliament; the free mandate of parliament members; judicial independence; strong and developed local governments etc. More than 130 years later, those fundamental constitutional questions remain for the Serbian constitution maker to answer: (i) how to properly empower the position and the role of a body representing the electorate; (ii) what the best type of government is – especially in the light of the role of a head of state; (iii) how to find the right balance between the freedom of thought of MPs and their inevitable connection to the political party to which they practically ‘owe’ their representative mandate to; in other words, how to properly ‘empower’ the still very much needed principle of a free mandate of MPs; (iv) how to define a judicial independence in order for it to truly serve justice as well as how to increase its reputation among citizens and in society; and (v) what the right measure for a territorial decentralisation of Serbia, the right scope of local government autonomy etc are.

20 For more on the constitution of 1869, see Petrov, 2019, pp. 551–564.

#### **4.2. The fourth 'milestone': the Constitution of 1990 – one missed opportunity to resolve some important identity issues**

The major features of the 1990 constitution were the following ones: (i) disputed democratic legitimacy, given the procedure for its adoption; (ii) democratic definition of the state based on the rule of law; (iii) determination of citizens as bearers of sovereignty; (iv) acceptance of the organic concept of state functions; (v) proclamation of the standard catalogue of human rights and freedoms; (vi) proclamation of free economy; (vii) a parliamentary system with the president of the republic, whose constitutional powers have been interpreted differently; (viii) proclamation of the independence of the judiciary and the permanence of the judicial function; (ix) enhanced centralisation, with two autonomous provinces without the essential features of territorial autonomy and legislative power; (x) positioning of the Constitutional Court in the system of division of power; (xi) an extremely firm and complex revision procedure that was neither rational nor justified; and (xii) an ambivalent attitude towards the SFRY (federal) Constitution.<sup>21</sup>

This constitution was adopted by the socialist, one-party assembly on 28 September 1990. In the debate that took place before the adoption, two major objections were made. First, the break-up with the previous constitutional and political system required the constitution to be adopted by a constitutional assembly elected by the people. Second, a constitution enacted by a one-party assembly would have no democratic legitimacy to establish the foundations of a new society. That is why, before the constitution, the first democratic, multi-party elections had to be held. The Constitution of Serbia from 1990 was adopted by the assembly of the system, which was dying out. The SFRY was falling apart.

According to Art. 1, Serbia was a (i) democratic; (ii) civil state ('state of all citizens living in it'); (iii) based on the rule of law; (iv) and on social justice. Therefore, the constitutional definition of Serbia itself already represented a clear break-up with the socialist order. This constitution, at least declaratively, belonged to the type of democratic-social constitutionality, and Art. 9 regulated the division of power into legislative, executive and judicial (although without explicitly naming it). According to the Constitution of 1990, Serbia had become a civil parliamentary democracy.

The creators of the constitution opted for the concept of civil – rather than national or people's – sovereignty. Civic sovereignty is theoretically more suited for multinational societies: "sovereignty belongs to all citizens of Serbia. – Citizens exercise sovereignty through a referendum, a popular initiative and through their freely elected representatives".<sup>22</sup>

The catalogue of human rights ('Freedoms, rights and duties of man and citizen') included internationally recognised personal and political rights as well as basic economic and social rights; instead of the state planned economy, the constitution proclaimed a free market.

21 See more in Petrov, 2020, pp. 11–35.

22 Art. 2, Constitution of the Republic of Serbia of 1990.

The system of government was basically parliamentary – a system based on a soft division of power and characterised by two basic mechanisms: (i) the right of the executive to dissolve parliament; (ii) political responsibility of the government before the parliament with the ultimate political sanction, namely the possibility for a vote of no confidence for the parliament. According to the constitution, the president of the republic could dissolve the National Assembly only on the government's reasoned proposal. The collective and individual responsibility of the government and its ministers (before the National Assembly) was established ("The Government and each of its members are accountable to the National Assembly for their work.")<sup>23</sup>

The position and role of the president of the republic caused significant controversy. While most scholars claimed that the president of the republic was too strong and that their constitutional powers were the basis for establishing of an authoritarian regime, other pointed out to the exaggeration and political motives of such assessments and conclusions. In fact, the weakest point of their constitutional position was the constitutional regulation of their responsibility, at least for two reasons: (i) 'violation of the constitution' is an extremely vague basis, which indicates political rather than constitutional (legal) responsibility; (ii) the procedure for the enforcement of the president of the republic's responsibility by the system of 'recall by the citizens' was regulated in the way that the president was made practically irremovable.

The constitution proclaimed the independence and autonomy of the judiciary. In a comprehensive manner, it defined the role of courts in terms of content: "Courts protect the freedoms and rights of citizens, the rights and interests of legal entities established by law and ensure constitutionality and legality" (Art. 95). The permanent tenure of the judicial function was absolute. The grounds for the termination of the judicial office, as well as for the dismissal against one's will, were determined by the constitution itself.

The provisions on territorial autonomy, along with the norms regulating the position and powers of the president of the republic, were the most criticised. With the enactment of the constitution, the autonomous provinces lost their features of quasi-federal units that they had according to the SFRY Constitution of 1974. It was a (political) step backwards, which could not (and did not) lead to a positive result. After the test of time, it now seems that the positive outcome might have been achieved had the process of reintegration of the Albanian national minority in Kosovo and Metohija and their inclusion in the institutional life at the republican and provincial levels been more supported (though some constant opposition to active participation was also present among some Albanians, even before the dissolution of SFRY).

The Constitution of 1990 moved the Constitutional Court out from the system of unity of power – to which, by the nature of things, it does not belong – to the system

23 Art. 91 para. 1, Constitution of the Republic of Serbia of 1990.

of division of power. Constitutional judges were elected to a permanent tenure. The constitution did not stipulate special conditions for the election of judges of the Constitutional Court; however, the incompatibility of the function of a judge of the Constitutional Court with other functions and professional activities was absolute. All the judges of the Constitutional Court were elected by the National Assembly on the proposal of the president of the republic.

As for the revision procedure, the constitution was formally extremely firm, and an extremely complex procedure for its change was envisaged: (i) two votes in the assembly and a two-thirds majority of the total number of deputies for the change of each constitutional provision; (ii) the mandatory constitutional referendum in which a majority of all the registered voters opted 'yes' was necessary for the change of constitution to be successful. Theoretically, the reason for such extreme rigidity of the constitution could be found in the need to consolidate the emerging democratic political institutions. Practically, the 'protective function' of the constitution within the revision procedure was definitely inappropriately complex.<sup>24</sup>

The Constitution of Serbia from 1990 was adopted with a definite tendency to finally solve the question of identity. Professor Miodrag Jovičić wrote that through the entire constitutional history,

Serbian citizens had to express and prove their identity by creating and defending their own country, as well as by conquering and exercising rights of organising the system on their own. None of the fights were easy because they happened under the hardest historical circumstances.<sup>25</sup>

Such circumstances were also present at the time when the Constitution of Serbia of 1990 was adopted. This constitution was created in discrepancies between a tendency for a complete rupture with the old socio-political system and establishing the grounds of a new socio-democratic order on one hand, while maintaining some kind of a relationship with the federal state (SFRY) on the other. It strived for something that was incompatible – choosing statehood to protect its territorial integrity and constitutional dignity damaged by the resolutions of the SFRY Constitution from 1974, while maintaining the common state that was created more than 70 years ago thanks to the military merits of the Kingdom of Serbia. Therefore, the constitution from 1990 had to tackle certain questions related to identity and open and address them in the content itself, but it could not answer almost any of them from an objective standpoint. It is not the fault of neither the constitution writer nor of the formal constitution maker but of political and historical circumstances that could not provide the right constitutional moment. However, this constitution undoubtedly contains 'traces' of the modern constitutional identity of Serbia.

24 Petrov, 2017, pp. 16–18.

25 Jovičić, 1989, p. 562.

First, it was a completely new constitution content-wise. Second, the constitution from 1990 defined fundamental principles and values correctly – the basic elements of constitutional identity: the rule of law, civil democracy and the social role of a state. Unlike the current constitution (of 2006), this one better understood the multinational character of Serbia as a country, which was defined as ‘a civil state’ and not a ‘state of Serbian people and other citizens’, even though this difference can be perceived as a more formal and symbolic than fundamental and real. Third, the constitution from 1990 remained more as a constitutional declaration of constitutional principles and values than as a clear and credible strategic plan for accomplishing and protecting them. It might be the most obvious in the provisions related to territorial autonomy that were ‘lifeless’ as they represented an attempt to return to the state that must have been known to be irreversible. Tending to complete its protective role, the constitution was too narrow and rigid – and thereby almost unchangeable – in a period when it had to be exactly extensive, flexible and easy to change because of the changes in content and structure that the Serbian society had had to endure. Finally, the Constitution of Serbia from 1990, as well as that from 1888, were written with a fine use of Serbian normative language and a clear style. This should also be the quality of Serbia’s modern constitutional identity.<sup>26</sup>

Although the constitutional history of Serbia can be considered substantial and rich, there were few real constitutional moments in which the most favourable objective and subjective conditions for the success of constitutional construction are present. Internal circumstances as well as external influences seem never to have been supportive or suitable for our constitution makers. On the contrary, almost all the constitutions of Serbia were somewhat ‘forced’ – failed to be enacted at the right constitutional moment.

This review of the constitutional history of Serbia, with an emphasis on reference points in the construction of a modern national constitutional identity, purposely did not include the period of Yugoslav constitutionalism. The first Yugoslavia, in which the Serbian constitutionalism and statehood ‘drowned’, is completely uninteresting from the standpoint of potential influence on the constitutional identity of modern Serbia. In the Second Yugoslavia, real socialist constitutionalism was the polar opposite of classical, liberal democratic constitutionality and is hence not applicable. One of the few exceptions could be the institute of the constitutional judiciary (introduced within the system of unity of power), which could not be really functional or effective, but the very fact of its existence did somewhat influence the concept of the constitutional judiciary in the post-socialist period.

26 No foreign influences, globalisation and ‘internationalisation’ can be considered legitimate reasons for the national constitution maker to ‘spoil’ the Serbian language with the use of foreign words and formulations. Serbia has enough ‘treasure’ in its previous constitutions in this sense (as well as in the constitution from 1990); thus, it does not have the need to damage its constitutional identity with the use of ready-made sentences and phrases from international legal acts, regardless of how important and exemplary these acts are. See more about the historical constitutions as the sources of national constitutional identity in Petrov, 2020, pp. 27–32.



## 5. Concluding remarks – a periodisation of Serbian constitutional history from the perspective of national constitutional identity

The ‘bumpy road’ of Serbian constitutional development did not prevent the creation of a constitutional tradition. It is, however, somewhat incoherent, full of beautiful constitutional ‘pearls’ but also of some worthless, failed attempts, on which the idea of liberal and democratic constitutionalism stumbled. However, in that indisputable wealth of constitutional development, there are elements for the creation of Serbia’s modern constitutional identity.<sup>27</sup>

If we start from the ‘milestones’ of Serbian constitutionalism – the four constitutions, whose key features have been presented in this text – and take into consideration both their normative value and their lasting ‘reach’ (in one wider sense), the periodisation should be as follows: (i) the era of laying constitutional foundations (from the Sretenje Constitution of 1835 to the Regent’s Constitution of 1869); (ii) the era of authentic constitutionalism (Regent’s Constitution of 1869); (iii) the era of declarative parliamentarism (from the Radical’s Constitution of 1888 to World War I, with a break between 1894 and 1903); (iv) the era of non-independent constitutionalism of the authoritarian type (constitutionality of the First Yugoslav State); (v) the era of non-independent constitutionalism of the specific socialist type (Second Yugoslav State); and finally (vi) the era of finding a new authentic constitutionality on the heritage of the European constitutional heritage (from the Constitution of Serbia of 1990 until today).

This periodisation leads to conclusion that in order for Serbia to resolve its constitutional issue more permanently, it is necessary to (i) find a system of balanced division of power; (ii) determine realistic scope of protection of human rights and freedoms, according to European standards; (iii) determine the right meeting point (‘sweet spot’) between parliamentarism and presidentialism; and (iv) to strategically resolve the Kosovo and Metohija political issue by organising a *sui generis* system of its ‘sovereign rights’ on the principle of territorial decentralisation (in which territoriality as a classic component of sovereignty is placed in the background in relation to human rights protection as basic prerequisite for the rule of law).

27 See more: Petrov, Simović and Radojević, 2021.

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## The Constitutional Development of Slovakia

Andrea ERDŐSOVÁ

### ABSTRACT

This chapter covers the history of the constitutions of previous state forms of what we recognise today as the Slovak Republic from the end of World War I and also mentions the antecedents of the present country.

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. (Declaration of Independence)

Jefferson's words remain as true today as they were 250 years ago. The guiding principle of this experiment in a representative democracy is that the government derives its powers from those it governs, but nothing is guaranteed, and people are promised nothing if they do not stand up and force the government to uphold that principle.

It seems to be extremely difficult to pinpoint all the essential details of the constitutional development of Slovakia<sup>1</sup> because, after the First World War, this development was accompanied by many different turbulences. We must imagine the whole history threat from the great economic crisis through World War II, the era of communism, the development after the Velvet Revolution in 1989 as well as many changes in governments and thus changes in the country's orientation and in the system of constitutional changes.

In the following text, we therefore focus on those moments of constitutional development and constitutional changes that we consider to have had an impact on the current form of the constitution of Slovakia and the constitutional acts and the findings of the Constitutional Court of the Slovak Republic.<sup>2</sup>

Law and justice are not available to the legislator. The idea that the legislator can arrange everything according to his will would mean a return to the spiritual position of worthless legal positivism, which has long been obsolete in legal science and practice.<sup>3</sup>

### KEYWORDS

constitutional development, the Velvet Revolution, the Constitution of the Slovak republic, abortion finding, the material core of the constitution, Mečiar's amnesty.

1 See more in Erdősová, Garayová and Potásch, 2019, p. 175.

2 Hereinafter referred to as 'CC of Slovakia'.

3 Decision of the Federal Constitutional Court of Germany, BverfGE 3, 225 (323)] cited in Alexy, 2009, p. 28.

## 1. Common state of Czechs and Slovaks (1918)

One of the main milestones was 28 October 1918, when the Czech-Slovak National Committee declared an independent, common state of Czechs and Slovaks in Prague. The first law adopted was no. 11/1918 Coll. on the establishment of an independent Czech-Slovak state. This law is also called the First Constitutional Provisional.

Act No. 11/1918 Coll. also served as a reception norm as it established legal continuity with the former Austro-Hungarian monarchy, meaning that the previous legislation would remain in force. This caused considerable problems as the Austrian and Hungarian legal systems had significant differences.

The provisional constitution of the Czech-Slovak Republic, which was subsequently adopted as Act No. 37/1918 approved by the National Assembly (formerly the National Committee) on 13 November 1918 was also referred to as the Second Constitutional Provision and definitively established a parliamentary form of government.

However, the constitutional basis of the Czechoslovak Republic was formed only by law no. 121/1920 Coll. of 29 February 1920, which lists the Czech-Slovak Constitutional Charter and the Constitutional Charter of the Czechoslovak Republic itself. This constitution was inspired mainly by the constitutions of Western democracies, finding a model in the American and French constitutions as well as in that of the Weimar Republic. It was based on the theory of the three-part division of state power and the theory of natural rights of the citizen, but also of the mentioned parliamentary democracy as well as the system of protection of fundamental rights. It included history as a controversial topic – the theory of a unified Czechoslovak nation.

Some parts of it were also borrowed from the peace treaties.

The Constitutional Charter consisted of an introductory declaration, an introductory law, 10 articles, six titles and 134 paragraphs. It was quite natural that after Hitler came to power in Germany, the ever-increasing demands of the Sudeten Germans concerning the annexation to Germany – the empire of all Germans – came to the fore in Czechoslovakia as well.

During its period of effectiveness, i.e. practically until 1938, the Constitutional Charter was supplemented by eight constitutional laws, among which some regulated the state borders with Germany, Austria, Hungary and Romania.

Among other important laws adopted in this period are e.g. Act No. 449/1919 Coll. on the protection of the Czechoslovak Republic or Act No. 162/1920 Coll. on the Constitutional Court.

The Constitutional Charter was applied until 10 September 1938, when the Munich Agreement was signed.<sup>4</sup>

4 The Munich Agreement (also sometimes referred to as the Munich Betrayal) is an international treaty signed on 30 September 1938 between Germany, the United Kingdom, France and Italy. At a conference in Munich, on the basis of which Czechoslovakia ceded a border area inhabited mainly by Germans (Sudetenland) to Germany. In world politics, the adoption of this treaty has so far been the greatest manifestation of the policy of appeasement (i.e. the policy of

## 2. Slovak State (1939)

Formally, it worked in a substantially amended form until the adoption of the Act on the Independent Slovak State of 14 March 1939. (No. 1/1939 Coll.).

It can be stated that at the end of the 1930s, the state law development took place within the framework of Adolf Hitler's plans to control the rest of the Czech territories, by deepening the differences between the Czechs and Slovaks and using Hungary's interest in reintegrating the former Hungary (as a part of Austro-Hungarian monarchy) into Hungary.

The Constitution of the Slovak Republic was promulgated as a constitutional law under number 185 in the Slovak Code on 31 July 1939. Formally, it consisted of two parts: declarations (preambles) and 13 titles, which contained 103 paragraphs. The elaboration of the Constitution of the Slovak Republic in 1939 served as the model for the fascist systems in Italy, Portugal, and the former Austria.

The statement emphasised the retention of the Slovak nation in the space designated by God as well as the divine origin of power and law. The Slovak state was built on the principles of the Christian state, enshrining the republican form of government headed by President ThDr. Joseph Tiso, who went down in history as a collaborator of fascist Germany and war criminal, despite parts of society repeatedly seeking to rehabilitate his personality and advocate this by virtue of i.a. the presidential exemptions he granted in a couple of cases of deportations to concentration camps. However, it must be noted that these exemptions were also a profitable 'trade' and not aimed to protect the citizens' lives.

In addition to the state party (HSLŠ), two other political parties of national minorities were allowed in the Slovak state – the German and Hungarian minorities. It is interesting that during the entire existence of the Slovak Republic, no elections to the parliament were held.

Towards the end of the war, the SNP (Slovak National Uprising) broke out in Slovakia, which placed the Slovak state on the side of the anti-fascist struggle and, subsequently, on the side of the victorious powers. It followed up on these events and managed to implement the idea of state coexistence of both nations in a common Czech-Slovak state on a federal principle.

During the SNP, the Slovak National Council took over all state power in the insurgent territory as a revolutionary representative of the Slovak nation, but also, at the same time a representative of the Czechoslovak Republic in part of its liberated territory of Slovakia. In the insurgent territory, the Czechoslovak Republic was again not only legally but also in fact renewed. This important constitutional aspect

concessions). Germany concluded it as part of the preparation of the aggression against Czechoslovakia, i.e. it was an intentional fraudulent act. The Czechoslovak government subsequently distanced itself from the agreement, calling consent to the change of borders an act of coercion. As a result of the Munich Agreement, the then-Czech-Slovak President Edvard Beneš resigned in October 1938 and later emigrated from the country.

is enshrined in the Declaration of the Slovak National Council of 1 September 1944, whereby the Slovak National Council took over the legislative and executive power in Slovakia as well as the defence control of Slovakia.

These facts meant a clear rejection of the clerical-fascist regime of the Slovak state but also a renewal of the ideology of Czechoslovakism.

### **3. The constitutionalism after WWII**

In March 1945, a meeting was held in Moscow between the Czech-Slovak exile president Edvard Beneš and representatives of the communist centre led by Klemem Gotwald, whose negotiations discussed the formation of a new government in April 1945 and where the so-called Košice government programme was adopted.

The aim of this document was to recognise the originality of the Slovak nation and the Slovak National Council as a representative of the sovereignty of the Slovak nation; in fact, however, the relationship between this institution and the Czech-Slovak authorities regulated the so-called Prague agreements. The first Prague agreement of June 1945 still secured wide autonomous rights for Slovakia, especially in the area of executive power, but the second Prague agreement a year later restricted the Slovak authorities and strengthened the powers of the president and government of Czechoslovakia. The third Prague agreement of the same year then marked the definitive beginning of the process of centralising and subordinating the Slovak authorities to the central one.

Subsequently, the Constitution of 9 May 1948 was adopted, which already declared the 'victory of the working class' in February 1948 and defined the Czech-Slovak Republic as a 'people's democratic state' and ensured the laying of the foundations of socialism in all areas of social life. It enshrined an asymmetric constitutional order, i.e. apart from the Czech-Slovak authorities, only the existence of Slovak authorities with limited autonomy and no Czech authorities. It allowed the existence of companies with up to 50 employees and the possession of land up to 50 ha (this principle has been violated in practice.)

This period was marked by ongoing processes of the most brutal action of what was called 'the sword of the Party' or the 'the sword of working class'. It more or less ended in 1953 or faded out in the course of 1954, and state security was thus entering another stage of its existence. Its task as a tool of repression was preserved, although in a less brutal form than in the preceding period, and its mission as a tool of general and targeted control of society was new. This stage of double mission of state security practically survived until the fall of the communist regime in Czechoslovakia by the end of 1989.<sup>5</sup>

The second Constitution of Czechoslovakia was adopted as Constitutional Act No. 100/1960 Coll – the Constitution of the Czechoslovak Socialist Republic, where the

5 Pešek, 2000, p. 232.



monopoly of the Communist Party had already been incorporated in the interest of building socialism.

The Constitution of the Czechoslovak Socialist Republic brought many changes in the sign of the transition of the state from people's democracy to socialism and with the vision of building communism as a higher form of socialist establishment with the legalised position of the Communist Party as the leading force in society and the state. Among the important symbolic changes, the change of the state's name (to the Czechoslovak Socialist Republic) and of state symbols – especially the state emblem – ought to be mentioned. The constitution consisted of a declaration and eight titles.

The declaration stated the victory of socialism in Czechoslovakia with a strong focus on the Soviet Union, which was a model that postulated the principles of socialism ('Everyone according to his abilities, everyone according to his work!') and communism ('Everyone according to his abilities, everyone according to his needs!').

In this constitution, two equal nations of Czechs and Slovaks were mentioned, the position of the National Front of Czechs and Slovaks was constitutionalised, and the state economy was modified as a socialist economic system with a ban on human exploitation and designed as a planned management. The constitution defined three forms of ownership – state, cooperative and private. The constitution, in accordance with the then-orientation of the regime, did not contain a general protection of property – especially personal property – as a fundamental right.

The constitution allowed small businesses, though without the exploitation of foreign labour (i.e. regular employment). According to the constitution, the state was economically oriented towards the Soviet Union and other socialist states. An important starting point for the constitution was democratic centralism.<sup>6</sup>

It should be noted that, although the constitution enshrined, in the second chapter, an essentially broader catalogue of fundamental rights as well as the proclamation of a socially oriented state, the reality was quite different. It also guaranteed freedom of religion and the right to profess any faith or to have no faith – albeit on the condition that religious faith or belief cannot be a reason for someone to refuse to fulfil a civic duty imposed by the law.

The highest body of state power in the Czechoslovak Socialist Republic was the National Assembly.

However, the provisions that amended it were subsequently repealed by Constitutional Act No. 143/1968 Coll. on the Czechoslovak Federation, similarly to the abolition of those parts of the constitution that were regulated by the highest constitutional bodies.

Numerous changes to the constitution were brought about by the Velvet Revolution. The first revolutionary change was introduced by the Constitutional Act of 29 November 1989 no. 135/1989 Coll. with the deletion of Art. 4, i.e. the abolition of the leading role of the Communist Party of Czechoslovakia in society and the state.

6 For a detailed description of legal system during Socialism, see Erdősová and Garayová, 2020, pp. 32 et seq.

Finally, a territorial self-government was created based on municipality, while the national committees were completely abolished, and the competencies of the republics and the federation were defined.

#### **4. The Velvet Revolution and its impact on the change and development of the Slovak Republic**

It was President Václav Havel who proposed removing the adjective ‘socialist’ in the names of the republics and of the federation. At the same time, Václav Havel proposed a new name for the common state: the Czechoslovak Republic, which, however, did not correspond to Slovak national and state interests, according to a part of the Slovak political representation. The so-called ‘Dash war’<sup>7</sup> broke out around the name of the common state, although the name ‘Czechoslovak Federal Republic’ was valid for only one month. On 20 April 1990, a law was passed to change the name to the Czech and Slovak Federal Republic.

In 1990, the name of the state was changed twice by separate constitutional laws – first to the Czech-Slovak Federal Republic, then to the Czech and Slovak Federal Republic. Based on these changes, a new name was adopted for the constitution was used – first the Constitution of the Czech-Slovak Federal Republic, then the Constitution of the Czech and Slovak Federal Republic.<sup>8</sup>

The second half of 1990 was marked by two basic problems that caused social tension on the Slovak domestic political scene, namely disputes over the form of the ‘language law’ and of the ‘competent law’. The issue of language law gradually evolved into a serious political problem and became a dividing line not only within political parties but also throughout society. It was related to the growing tension in the ethnically mixed territory of southern Slovakia. Matica Slovenská and nationally oriented political parties understood the question of language as a question of the sovereignty of the Slovak nation in the Slovak Republic and an integrating element of communication between all its inhabitants. A passionate debate arose on the premises of the Slovak National Council, which resulted in a dispute over the wording of the language law.

The draft of a language law was discussed on 25 October 1990 based on the government’s proposal. With the adoption of the government’s draft language law, the official language in the territory of the Slovak Republic was the Slovak language, which had to be used by state bodies and municipal self-government bodies. Citizens could also use the Czech language in official communication. If members of a national minority made up at least 20% of the population in a town or municipality, they could use their language in official communication in such towns and villages.

7 Šútovec, 1999, p. 358.

8 Over the course of a few weeks, the name was changed repeatedly, until consensus was reached on ‘Czech and Slovak Federal Republic’ to emphasise that it was a federation of two republics (states).

As for the second major set of problems, they concerned constitutional order; this was most significantly affected by Constitutional Act No. 556/1990 Coll., which addressed the new definition of competencies between the federation and the national republics.

In terms of content, the new competence law significantly limited the powers of the federal authorities. The right of the federation to repeal the measures of the republics, which was introduced in 1970 even though it was not applied in practice, was completely deleted, and the area of the so-called 'common competence' of the federation and the republics was cancelled. With few exceptions, these competencies passed to the republics, ending the federation's remit in fields such as agriculture, transport or public safety. The state-owned property was divided between the property of the federation and the republics. The laws of the republics could transfer their state property to municipalities. Although foreign policy remained within the competence of the federation, it did not affect the right of both republics to conclude separate agreements in accordance with the foreign policy of the federation.

The Competence Act calmed Slovak-Czech relations for some time but did not address the philosophical side of the problem of different understandings of Czechoslovakia by Czechs and Slovaks and was thus only a temporary compromise. Therefore, it is understandable that the different views and efforts of some politicians to promote the originality of the Slovak nation led to devision of the federation and the creation of two separate republics. After the elections in 1992, due to the agreements of the winning political parties – the Civic Democratic Party (ODS) and the Movement for Democratic Slovakia (HZDS) – the process of an agreement to maintain a common state or another joint unit of the Czech Republic and Slovakia came to the opposite conclusion. Intensive work began on proposals for the constitutional division of the Czechoslovak Socialist Republic and the constitution of independent, sovereign national republics – the Czech Republic and the Slovak Republic.

In addition, the entry of Czechoslovakia into European structures required the adoption of legal norms that would codify the entire area of human rights and freedoms. Therefore, especially from the point of view of citizens, the adoption of the Charter of Fundamental Rights and Freedoms on 9 January 1991, which was contained in Constitutional Act No. 23/1991 Coll., became extremely important.

This law mainly established limits that state and territorial authorities could not exceed if they did not want to violate or restrict the fundamental rights and freedoms of the citizens guaranteed by constitutional law. These were rights and freedoms in the political, economic, national, judicial and other areas.

## **5. The constitutional character of the joint statehood of the Slovak Republic and the Czech Republic**

As mentioned above, until the last decade of the twentieth century, the modern history of Slovakia was associated with the existence of a common Czechoslovak

statehood, which after the entry into force of Constitutional Act No. 143/1968 Coll. The Czechoslovak Federation transformed into a compound state (federation).

According to Art. 142 para. 2 of this Constitutional Act, it was assumed that the member states of the Czechoslovak Federation would adopt their own (national) constitutions; however, this constitutional article was never fulfilled. On the contrary, at the end of the 1980s, in accordance with the conclusions of the XVII Congress of the Communist Party, not only considerations but also real steps were made that aimed at repealing the cited provision of Constitutional Act No. 143/1968 Coll. and preparing the so-called trinity of the Constitution of the Czechoslovak Socialist Republic, the Czech Socialist Republic (ČSR) and the Slovak Socialist Republic (SSR).

The turnaround in the indicated tendencies was caused by the events of November 1989. On 6 December 1989, with a resolution published in the Collection of Laws under no. 167/1989 Coll., the Slovak National Council already annulled its resolution of 31 October and definitively rejected the idea of a triangular constitution (subsequently, on 19 December 1989, the Czech National Council did the same with a resolution published under No. 166/1989 Coll.)

The analysis of the 1990–1992 period clearly shows that most constitutional efforts were focused on the political representations that emerged from the parliamentary elections in 1990 in search of a suitable model of state coexistence of Czechs and Slovaks. From the lapse of time, it is now possible to ask – only “academically” – whether the division of competencies between the federation and the republics introduced by Constitutional Act No. 556/1990 Coll. (and later amended to the detriment of the federation by other ‘competent amendments’ to the Constitutional Act on the Czechoslovak Federation) could realistically ensure the functionality of a joint state unit even in the longer term.

In addition, it should be noted that 17 November 1989 became a historic milestone in the modern history of Czechoslovakia and subsequently of both republics based on their division. In that sense, it allowed to raise many problems that were related to the 40-year communist regime on the one hand and to the beginning of the transformation of the political, legal and social systems as well as the economy and state status of national republics in the Czech-Slovak federation on the other.<sup>9</sup>

The programme of the Velvet Revolution was neither a new society nor a new man but a return to what was once there before communism. The revolution took place at a time of complete crisis of communism, at a time of decline and of a deepening agony for the vision of freedom, human rights and human dignity. It was therefore not a revolution based on economic hardship, with the aim of establishing a market economy or the privatisation of property. Its vision was one of freedom and human dignity.

The system of the main constitutional institutions of the state has fundamentally changed in the country. The demands of the opposition in the political field

9 Hlavová and Žatkuliak, 2002, p. 343.

manifested themselves with the end of the Communist Party's monopoly through the repeal of Art. 4 of the Constitution.

Other significant and fundamental changes included the introduction of political parties' equality, the possibility of their political competition (i.e. free, democratic and regularly repeated elections), the establishment of a free pluralist political system, the application of assembly and association law, the rehabilitation of citizens who were persecuted and otherwise punished by repressive people, the politics of the communist regime and many more.

## **6. The basic character of the Constitution of the Slovak Republic from 1992**

The Constitution of the Slovak Republic, which was adopted as the constitution of the independent state of the Slovak Republic of 1 September 1992 (No. 460/1992 Coll.),<sup>10</sup> is the current constitution and the hierarchically highest legal act valid in the Slovak Republic.

It entered into force together with the declaration on 1 October 1992, with the exception of certain provisions referred to in Art. 156, which entered into force on 1 January 1993. Its interpretation and control of its observance is within the competence of the Constitutional Court of the Slovak Republic.

Its basic characteristics include a written constitution that is rigid, polylegal (found not in one but several documents, i.e. constitutional acts), unitarist and democratic, and proclaiming a parliamentary form of government.

The attribute of 'written' belongs to it because it is a constitutional act, although this is made up of several constitutional acts that follow each other in time and materiality.

The nature of rigour is, in turn, based on the fact that its adoption and amendment require the consent of a three-fifths majority – the so-called 'qualified majority' of all deputies of the National Council of the Slovak Republic – while an absolute majority is sufficient for the adoption and amendment of ordinary laws. It could be stated that unlike the constitution of the totalitarian regime, this constitution is not only an expression of law in books but also of law in action. Thus, although it has the attribute of 'legal', we believe that this is incorrect because, for example, the legal basis of the Nazi regime in Germany during the World War II was valid law and even a catalogue of fundamental rights existed, but this situation was unprecedentedly at odds with reality. Therefore, we argue that it is better to talk about 'legitimacy' rather than 'legality'.<sup>11</sup>

10 The Constitutional Act on the Dissolution of the Czech and Slovak Republics was issued on 25 November 1992 (in the Collection of Laws under No. 542/1992 Coll.), which followed on from the Declaration of the Slovak National Council of 17 July 1992 on the Sovereignty of the Slovak Republic. The Constitution of the Slovak Republic was approved on 1 September 1992 – since then Constitution Day – and signed on 3 September 1992 with effect from 1 October 1992.

11 To read more about legal wrongdoing, see Alexy, 2009, p. 29.

The character of the constitutional establishment is further completed by the essence of unitarism, which is expressed in Art. 3 para. 1 of the constitution, which stipulates that the territory of the Slovak Republic is united and indivisible. The principle of democracy is then expressed separately in Art. 1 and Art. 2<sup>12</sup> as a form of government headed by the president.<sup>13</sup>

Nevertheless, it must be noted that the independent Slovakia inherited a substantial part of Czechoslovak ethnic minorities, and solving the problem of their position in the new state became a test of our readiness to join the ranks of developed European democracies. In this part of the country's "European graduation, we therefore necessarily had to answer the Hungarian and Roma questions".<sup>14</sup> It may be a matter of discussion whether this answer was satisfactory, and Slovakia successfully passed this 'graduation'.

## **7. The 'major amendment' of the constitution and its significance**

Before the approval of the so-called 'major amendment to the Constitution of the Slovak Republic', the constitution had been amended by two constitutional laws. The first amendment to the Constitution of the Slovak Republic came with Constitutional Act No. 244/1998 Coll., which entered into force on 5 August 1998 – the day of its promulgation. This amendment was very brief, and it enshrined that the president of the Slovak Republic was to be elected by the National Council of the Slovak Republic on the proposal of at least eight deputies by secret ballot for 5 years. At the same time, in the second provision, it stipulated that should the office of the president of the Slovak Republic be vacated, some of their powers would be transferred to the president of the National Council of the Slovak Republic.

The second amendment to the Constitution of the Slovak Republic was made by Constitutional Act No. 9/1999 Coll. and entered into force on the date of declaration (27 January 1999). This amendment was more extensive than the previous one and brought two basic changes concerning the office of the president of the Slovak Republic. It introduced the direct election of the president for 5 years by the citizens as well as the right to dismiss the president before the end of the election period by popular vote. In addition to these two main changes, this amendment to the constitution affected some of the powers of the president of the National Council and especially those of the president of the Slovak Republic as well as the process of the latter's election. It also touched upon the question of the jurisdiction of the Constitutional Court of the Slovak Republic.

12 State power comes from citizens who exercise it through their elected representatives or directly.

13 Art. 101 stipulates that the head of the Slovak republic is the president.

14 For details, see Kusý, 2001, pp. 281 et seq.

The proponents of the major amendment to the Constitution of the Slovak Republic justified its need for approval in the original wording, as submitted, mainly by the fact that if it was not approved, the country would not be accepted into the European Union and NATO. They further pointed out that many provisions were vague and unclear and that several other provisions of the Constitution of the Slovak Republic proved to be erroneous in practice. The approved amendment entered into force on the day of its promulgation in the Collection of Laws, namely 17 March 2001, and was effective from 1 July 2001, with the exception of Art. 125a, Art. 127, Art. 127a, Art. 134 para. 1, and 3 and Art. 151a, which entered into force on 1 January 2002.

The approved major amendment to the Constitution of the Slovak Republic, together with the previous two partial amendments, was included in the full text of the Constitution of the Slovak Republic no. 460/1992 Coll., which was published in the Collection of Laws, while making extensive and significant changes to the constitution; it was, therefore, one of the very significant milestones of an independent state's constitutional development.

Of particular importance is Art. 7 para. 2, which stipulates that

The Slovak Republic may, by an international agreement ratified and declared in the manner prescribed by law, or on the basis of such an agreement, transfer the exercise of part of its rights to the European Communities<sup>15</sup> and the European Union. Legally binding acts of the European Communities and the European Union take precedence over the laws of the Slovak Republic.

The adoption of legally binding acts that require implementation shall be carried out by law or government regulation. This provision was a precondition for the establishment of membership in the EU institutions and an opportunity for the function of the primacy and direct effect of EU law to be fulfilled.

Nevertheless, the question of the primacy of law still causes many controversies as to how broadly the constitution of a member state perceives this concept, namely in a simplified way or whether the theory of the so-called monism (and when monism is both national or international law) or dualism. In the case of monism, then, the question remains of whether the precedence of EU law in applied practice applies to the precedence over laws or even over the constitution and constitutional laws. In the Slovak Republic, this discrepancy was not as substantial, which prompted a more significant professional discussion around it.<sup>16</sup>

The Czech position, as an example of not accepting the absolute precedence of EU law, *inter alia*, illustrates the view that

15 Even before the adoption of the Treaty of Lisbon, terms such as 'communities' and 'community law' were used, which is no longer the case today because communities do not exist (with the exception of Euratom), the European Union has a separate legal personality, and the 'community' attribute applied to these facts.

16 *Inter alia*, Claes, 2015.

the Constitutions, therefore, on the one hand, allow EU law to take precedence, but, on the other hand, make this effect conditional and retain the last word in the event of a conflict. Ratification of the Treaties and review of the constitutional conformity of EU law are important mechanisms for Member States to guide the ‘exaggerated’ demands of EU law.<sup>17</sup>

Art. 7 para. 5 of the constitution subsequently fixes that international treaties on human rights and fundamental freedoms, international treaties for the implementation of which no law is required, and international treaties that directly establish the rights or obligations of natural or legal persons and have been ratified and proclaimed in the manner prescribed by law take precedence over laws. In this respect, it is more or less accepted from the point of view of judicial doctrine that, *inter alia*, the Convention for the Protection of Human Rights and Fundamental Freedoms is such a treaty, and in the event of a conflict, the scope of the rights and their interpretation under this convention must be given priority.

## **8. Provisions forming the core of the rule of law and changes in the field of human rights**

Part of the essential provisions and probably the most fundamental is Art. 1 para. 1 of the Constitution of the Slovak Republic, which states that “the Slovak Republic is a democratic and legal state that is not bound by any ideology or religion”. Sovereignty – or the sovereignty of the state – essentially means that state power is independent of any other power, both inside and outside the state. The concept of the rule of law includes, in particular, the understanding of the constitution as the legal basis of the state, to which state power is also bound. This is emphasised, in particular, in Art. 2 para. 2: “State bodies may act only on the basis of the Constitution, within its limits and to the extent and in the manner provided by the law”.

These are the basic attributes of a democratic form of government, but it must be said that these principles are easily jeopardised in a democracy and need to be specifically protected.

However, facts which constitute an infringement upon the rights laid down in this Convention may be considered in proceedings under the European Convention on Human Rights, but only under the condition they constitute a violation of one of the rights contained in the latter Convention.<sup>18</sup>

17 For details, see Kopal, 2014.

18 Erdősová, 2017, p. 302.



Another principle of the rule of law is the division of power, which is formally expressed in the Slovak constitution by the division of the legislative, executive and judicial into the fifth, sixth, and seventh chapters.

The Constitution of the Slovak Republic is also based on the principle of sovereignty of citizens from whom state power originates; it is a manifestation of the natural law theory and the theory of the contractual origin of the state.

Another principle is that of the division of state power into legislative, executive, and judicial power. At the same time, it strives for a balanced model, which in terms of the form of government can be characterised as parliamentary democracy. In the area of human and civil rights and freedoms, the principle of priority of international legal norms enshrined in international treaties binding and proclaimed in the territory of the Slovak Republic is applied, thus actually internationalising the position of the citizen and their legal protection in the area of human rights and freedoms.

One of the principles is that of the equality and inviolability of property, which in the market economy ensures the prosperity and satisfaction of the individual citizen and society's material and spiritual needs; these postulates were absent in previous constitutions funds, and private property was completely suppressed.

The major amendment to the second chapter of the Constitution of the Slovak Republic led to strengthening the fundamental rights and freedoms of citizens, in particular by a new amendment to Art. 17 paras. 3 and 4. Článok 17 ods. 3 provides for an extension of the time limit for detaining an accused or suspected criminal from 24 hours to 48 hours and for particularly serious offences up to 72 hours.

In addition to the above-mentioned significant change, the amendment to the Constitution of the Slovak Republic was made in Art. 13, by which the obligation may be established not only by law but also by an international agreement that directly establishes the rights and obligations of natural or legal persons or by a government regulation, if so provided by law.

The amendment from Art. 23 para. 4 deleted from the original text of the constitution that "a citizen cannot be extradited to another state"; thus, the amendment to the constitution of the Slovak Republic does not contain a ban on the extradition of our citizen abroad (so-called 'extradition'). In Art. 30 para. 1, the second sentence introduces a new element of the right to vote in the Slovak Republic's electoral system, namely that "foreigners with permanent residence in the Slovak Republic have the right to vote and be elected to municipal self-government bodies and to self-government bodies of higher territorial units". The major amendment to the constitution significantly affected its fourth chapter, entitled 'Territorial Self-Government', strengthening and deepening the constitutional regulation of self-government and its elements.

In addition, the amendment to the Constitution of the Slovak Republic extended and clarified the powers of the Constitutional Court, enshrining a new power that allows the Constitutional Court to conduct reviews of constitutionality. It decides on the compliance of

generally binding legal regulations of local state administration bodies and generally binding regulations of local self-government bodies, i. j. both of its levels, i.e. whether they are in accordance with the Constitution and constitutional laws, with government regulations and with generally binding legal regulations of ministries and other central state administration bodies, unless they are decided by another court. (Art. 125 letter d.)

In addition, the amendment to the constitution gives the Constitutional Court of the Slovak Republic the right to suspend the effectiveness of the challenged regulation before its substantive decision (Art. 125 para. 2). The right of the Constitutional Court to be able to award adequate satisfaction in the event of a violation of citizen's constitutional rights is to be welcomed. The amendment to the Constitution of the Slovak Republic also brought a change in the number of constitutional judges, the number of which increased from 10 to 13, and in the length of the term of office, from 7 to 12 years.

In the eighth chapter of the constitution, the second section of the amendment again enshrines a new constitutional institution that the Slovak Republic has not yet known. This is the anchoring of 'the public defender of rights', which is included in the constitutions of some EU countries under the name '*ombudsman*'. Although the nomenclature is different, the essence of their mandate and function is very similar. Pavel Kandrác was appointed the first ombudsman in 2002, and the post is currently held by Mária Patakyová, professor of commercial law, whose reports, traditionally presented annually in parliament, are repeatedly met with the reluctance and passive resistance of many deputies. A form of disagreement with criticism is a cornerstone of the ombudsman's control function, which is to enjoy respect; in a democratic society, this is precisely the critical attitude that fulfills the essence of an ombudsman's function.

The Constitution of the Slovak Republic is also significantly influenced by the process of globalisation and regional integration. The openness of the Slovak constitutional system to international law can already be documented in accordance with Art. 1 para. 2, according to which the Slovak Republic recognises and observes the general rules of international law, international treaties by which it is bound, and other international obligations, while a significant impact on its constitution also means EU membership.<sup>19</sup>

## **9. Constitutional development and its key decisions in the modern history of the Slovak Republic**

If we wanted to try to create a generally acceptable definition of the constitution as the basic law of the state, we may agree that it is a kind of summary of the most important rules of 'fair play' for state power. Its purpose is to constitute, i.e. to establish the state and organise its activities. If we think about where the constitution came

<sup>19</sup> Hodás, 2017.

from, then we should search for the source that has traces of reflections on the origin of the state and law.<sup>20</sup>

Of course, the content of the constitution in the various periods of development of the Slovak Republic's statehood significantly determined the political situation or the historical, revolutionary upheavals, such as the Velvet Revolution, which implied a substantial change in direction for the state and for its legal order. After this period, however, the struggle for democracy building did not end, and thus, the subsequent development was not a direct affirmation of one line of ideas about the form of the rule of law. It is therefore extremely difficult to choose what is essential, which, in the individual forms of this never-ending process, meant substantial changes or was otherwise important for the current wording and application of the present constitution. In the following text, we address those important findings of the Constitutional Court of the Slovak Republic, which go beyond the usual decision-making practice but have a paradigmatic character for the figure of the constitutional order of Slovakia.

### 9.1. 'Abortion Finding'

In support of the motion presented by a group of parliament members (PM) to declare the contested provisions of the Act on Abortion unconstitutional with the constitution and the contested provisions of the decree with the constitution and the Act on Abortion, the appellant (which headed the group of PM) gave two reasons: the right to life is the primary right of every individual, and it is subject to the existence of all other rights.

Deprivation of life results in the extinction of the human being as a subject of rights and obligations. Human life is a value that must be protected in a democratic society at every stage of its development. The right to life works, *erga omnes*, i.e. against any person who would endanger the right to life. However, the provision of § 4 of the Act on Abortion allows abortion in the first 12 weeks of pregnancy without proving a specific reason and only at the request of a woman, which means that the unborn human life does not enjoy any protection until the twelfth week of its development.

Thus, the legal regulation of abortions grants protection to the unborn life only after 12 weeks of its development, while the unborn life in the first 12 weeks is no less worthy of institutional protection than the unborn life after 12 weeks of its development. The legislature has no legitimate aim for such a distinction. The legal regulation of abortions contains a clash of two constitutional rights: the right to life under Art. 15 para. 1 of the constitution and the right of a woman to freely decide on the continuation of her pregnancy as an intangible value of a private nature protected by Art. 19 para. 2 of the constitution.

However, the right to privacy is not absolute, and its limit is the conflict with another right, under which abortion is allowed. In the event of non-compliance with these conditions, the performance of an abortion qualifies as a criminal offence of unlawful termination of pregnancy pursuant to Section 227 and Section 228 of the

20 Varvařovský, 2009, p. 95.

Criminal Code. According to the Explanatory (Report) Memorandum to the Act on Abortion, the freedom to decide on the termination of an unwanted pregnancy at the request of a woman is justified by her free choice; only contraindications and exceeding the 12-week pregnancy can prevent this right. The explanatory (report) memorandum also states statistics that abortion rates are lower in cases where legislation on abortion is more liberal.

In the proceedings, the expert opinion of bioethics prof. RNDr. P.S., PhD. focused, in particular, on the gradual development of the human being, stressing that this expert opinion should be an important source for the decision of the Plenum of the Constitutional Court. The appointed bioethics expert developed his expertise in a work entitled 'Abortions in a Philosophical, Ethical and Biological Perspective'. The moral responsibility of a company consists of the moral responsibility of its individual members and a common consensus on the basic moral values that its members want to respect. This common consensus is the result of society-wide negotiations and therefore of a necessary compromise.

Society-wide moral values cannot be imposed as people must identify with them. The extent of society's moral obligation, depending on the various stages of the foetus, changes as a result of the search for a compromise between two equally important but 15 consequent adversarial humanitarian values that contemporary European societies espouse. One value is the respect for human life.

The second value is personal freedom. The full and absolute application of one value would always be at the expense of suppressing the other value; therefore, the extent and degree of application of each of these values is determined in practice. In the case of respect for human life, this derives from the 'degree of human life', which increases with the age of the human foetus. According to Art. 15 para. 4 of the constitution, there would be a clash of constitutional rights of various natures: on the one hand, the right to life under Art. 15 para. 1 of the constitution; and on the other hand, for example – and especially – the right of a woman to freely decide to continue her pregnancy as an intangible value of a private nature protected by Art. 16 para. 1 or by Art. 19 para. 2 of the constitution, possibly with rights under Art. 40 and Art. 41 para. 2 (the right to protection of the health of a pregnant woman).

The concept of the second sentence of Art. 15 para. 1 of the constitution as an absolute subjective right and the subsequent application of Art. 15 para. 4 (which, in the sense of the above, necessarily contains an element of proportionality) would therefore, contrary to what the petitioners themselves require, preclude abortion for the protection of a pregnant woman's health, for genetic reasons or due to a criminal offence.

The need to strike a balance between those rights, the values and the principles at issue in the present case implies that the absolutisation of one or more of them – for example, an absolute ban on abortion or, conversely, the lifting of any restrictions – is precluded.

In particular, the Constitutional Court fully agrees with the view that “fetal life is intrinsically linked and cannot be isolated from the life of a pregnant woman”.<sup>21</sup> Another circumstance addressed in this finding was the regulation of abortion for genetic reasons by a decree and not by law. The key question in the sense of the above is therefore whether or not the setting of the time limit must be regulated by the legislator, i.e. by law. In the opinion of the Constitutional Court, the time limit for terminating a pregnancy represents such a fundamental issue of legal regulation that it must be regulated only by law, and therefore regulation by a by-law (decree) is excluded.

The rest of the proposal raises no further concerns, which means that the legal regulation of abortion at the request of a woman is possible until the first trimester of pregnancy and until the end of the second trimester for genetic reasons.

### ***9.2. Dispute over the material core of the constitution***

The events of the last days fuelled the dispute over the so-called ‘material core of the constitution’. Before we discuss its essence, it should be mentioned that the power of the constituent (constitutional power) can be metaphorically called the ‘mother of all powers’. A constitutional democratic and legal state (in theory and institutionally) has no force majeure to which the legislator is subject.

Nevertheless, the question currently under discussion is whether constitutional power still does not have any boundaries which the legislator must not exceed in its exercise, and who should therefore control the legislator in doing so. Here we come across the definition of the so-called ‘material core of the constitution’, which is a set of some eternal and inviolable principles in which even the legislator has no right to intervene.

The result is then tendencies leading to the restriction of constitutional power and its controllability by the judiciary. Of course, this judicial control, which would be possible, has been criticised because it carries a risk for a democratic legal order, where the judiciary would thus gradually gain dominance and be able to intervene activistically on issues that should be inviolable.

There must be some permanent, inviolable rule against changing majorities in parliament; there must be something basic in every system of government, something like a charter that is permanent and unchanging.<sup>22</sup>

According to Pavel Holländer,

the idea that a democratic constitution is not only a reflection of current power relations, but represents a fixation for the community of constitutive

21 See the Opinion of the European Commission on Human Rights, *X. v. The United Kingdom*, delivered on 13 May 1980, DR 19, p. 244.

22 Schmitt, 2008, p. 92.

values of freedom and equality, as well as their institutional guarantees, whose purpose, function, is to guarantee these values by justice and rationality, found in 19th century a concentrated expression in the awareness of the principle of the imperative of the immutability of the material focus (core) of the constitution.<sup>23</sup>

The question of the value orientation or value neutrality of the constitution reflects the conflict between positive and natural law, which has existed since time immemorial, and from the point of view of constitutional values, this conflict can be expressed as a dispute between two basic legal values within Western thinking: justice and order.<sup>24</sup>

We therefore do not consider the question of the existence of value bases and constitutional principles referred to as the ‘material core of the constitution’ or another concise term to be fundamentally controversial. We believe that in a democratic state governed by the rule of law, it is good for the material core of its constitution to be explicitly defined by the legislator themselves and form part of the constitutional text; this is certainly more appropriate than the uncertain definition of these principles by judicial activism because it is a risky certainty.

In other words, the so-called ‘clause of eternity’ would explicitly protect against change the basic constitutional principles and values forming the material core (focus) of the constitution, while as an inspiration could serve, e.g., Art. 9 (1) | 2 of the Czech constitution, which stipulates that a change in the essential requirements of a democratic state governed by the rule of law is inadmissible.

Proponents of the thesis on the immutable and irrevocable material core of the constitution generally claim that the latter word should have judicial power, which results in the thesis that the judiciary is also entitled to reviewing acts of sovereignty represented by constitutional power (constitutional laws) and repealing their conflict with the constitution. Conversely, opponents of this thesis argue that if a state is to be called democratic, the last word must belong to the sovereign (people).<sup>25</sup>

The brake on some constitutional changes could have been the Constitutional Court of the Slovak Republic, which, in its decision on the unconstitutionality of judges’ inspections (2019),<sup>26</sup> drew its controversial power to repeal the constitutional law, i.e. part of the constitution, for conflict with the implicit material core. However, the latest amendment to the constitution explicitly ruled out this possibility of the Constitutional Court, and thus, the constitutional majority in the National Council formally restored almost unlimited constitutional power. Although the implicit material core of the Constitution of the Slovak Republic does not seem to have existed, the Constitutional Court has been deprived of the opportunity to protect it. The

23 Holländer, 2009, p. 267.

24 Stein, 1974, p. 1.

25 Cf. Procházka, 2009, p. 386.

26 Finding of the CC of Slovak republic, no. PL. ÚS. 21/2014 by 30 January 2019.

Constitutional Court was the only obstacle to the unlimited power of 90 deputies of the National Council by assessing the compliance of a constitutional law with ‘nuclear constitutional law’.

However, this method was problematic at least in terms of legitimacy as seven constitutional judges would have the power to negate the decision of a qualified parliamentary majority, which is directly legitimized by the citizens. Therefore, even from the point of view of the theory of the people’s sovereignty, it is important that the content of the constitution be decided only by bodies directly elected by the citizens – i.e. the citizens themselves. Consequently, the Constitutional Court, as a qualified body, already plays an important role in its protection and interpretation, where its creative approach to the disputed interpretation can be transformed.

Conversely, if extremist groups, for example, enter parliament and reach a critically low qualified majority threshold, they may adopt institutional changes that could undermine the democratic rule of law.

Many opponents of the possibility for the Constitutional Court to repeal such a constitutional law argue that a similar situation can be achieved by adjusting the rigidity of the constitution, provided that the vast majority of society agrees.

The process of adopting constitutional changes can be made more difficult in several ways, and sometimes it is enough to look at other states.

Perhaps the easiest way is to increase the qualified majority from three-fifths to two-thirds, as is the case in the constitutional systems of several countries, including Hungary; in practice, 100 votes from a 150-member parliament would be needed to reach a qualified majority. Finally, the decision in question, under no. Pl. ÚS 21/2014, proposes that

[t]he basis of the implicit material core of the Constitution of the Slovak Republic (hereinafter referred to as the ‘Constitution’) is the principles of democratic and rule of law, including the principle of separation of powers and related independence of the judiciary.

The implicit material core of the constitution cannot be contradicted even by constitutional laws. The Constitutional Court of the Slovak Republic is entitled to review a possible conflict of the norms of a constitutional act with the implicit material core of the constitution, and if it finds a discrepancy, it is entitled to declare this inconsistency. Comprehensive inspections of judges with the possibility of dismissal from the judicial office represent a unique, quite exceptional measure in a democratic and legal state, which is accepted in a substantive legal state only immediately after the change from a totalitarian form of government to a democratic one.

Contrary to the material core of the constitution, verifying the presumptions of judicial competence of candidates for judges does not imply that in this verification the decisive basis for adopting the opinion of the Judicial Council of the Slovak Republic is that the executive republic does not ultimately have the possibility to verify in

practice.<sup>27</sup> The competence of judges appointed to office before 1 September 2014 (i.e. all current judges of general courts) was verified by the National Security Office (hereinafter referred to as the NSA), the conclusions of which were to be assessed by the Judicial Council of the Slovak Republic. These stated,

The contested provisions violate the content of the principle of the rule of law as defined in the constant case-law of the Constitutional Court, the principle of separation of powers, the independence of judges and the basic rule of their appointment without time limit.

In the historical-political context, it would be justified for the Constitution of the Slovak Republic of 1992 to explicitly subscribe to the immutability of certain constitutional norms by guaranteeing them by the clause of eternity. However, this did not happen.

In its decision, the Constitutional Court, on the basis of the performed legal analysis, came to the conclusion that (i) the constitution also contains an implicit material core, which is based on the principles of the democratic and rule of law, including the principle of the separation of powers and the related independence of the judiciary; (ii) the implicit material core of the constitution cannot be contradicted by constitutional laws either; (iii) the Constitutional Court is entitled to examine any conflict of the norms of the constitutional act with the implicit material core of the constitution and, if it finds a discrepancy, it is entitled to declare their incompatibility.

### ***9.3. Disputed amnesties directed by the Constitutional Court of the Slovak Republic***

#### *9.3.1. Mečiar's amnesty*

After the end of the term of office of President Michal Kováč on 2 March 1998, some presidential powers were given to Prime Minister Vladimír Mečiar as Deputy President. A few hours after their acquisition, he declared an amnesty on 3 March 1998 in the decision of the prime minister of the Slovak Republic no. 55/1998 Coll. Art. V ordered “not to be initiated and, if initiated, to discontinue the prosecution of offences committed in connection with the preparation and implementation of the referendums of 23 May and 24 May 1997”, and Art. VI “not to be initiated, and began to stop the prosecution of crimes committed in connection with the announcement of the introduction of Michal Kováč Jr. abroad”.<sup>28</sup>

On the same day, amnesties were issued in the Collection of Laws. On 5 March 1998, a 10,000-people assembly was held in Bratislava as a protest against the abolition of the referendum and the announcement of amnesties. Subsequently, the European Union also took a position, officially declaring in March 1998 that it was concerned

27 Finding of the Constitutional Court of the Slovak Republic file no. PL. ÚS 21/2014 of 30 January 2019.

28 Son of ex-President Kováč, author's note.



about the amnesties. The Slovak government rejected the criticism because, according to its official position, such a procedure for taking over powers was in accordance with the constitution.

One of the groundbreaking decisions of the Constitutional Court of the Slovak Republic was that on the conformity of the resolution of the National Council on the abolition of the so-called ‘Mečiar’s Amnesties’ with the Constitution of the Slovak Republic.<sup>29</sup>

On 5 April 2017, the National Council adopted a revised resolution annulling the decisions of Prime Minister Vladimír Mečiar on the amnesties of 3 March 1998 and 7 July 1998 (in the case of the former amnesty decision, only parts of it – Art. V and VI) and the decision of President Michal Kováč to grant pardon to Michal Kováč Jr. of 12 December 1997. The revised resolution of the National Council was subsequently published on 6 April 2017 in the Collection of Laws of the Slovak Republic (hereinafter referred to as the ‘Collection of Laws’) under no. 74/2017 Coll.

In the communiqué to the decision, the Constitutional Court wrote:

By amnestying the acts related to the introduction of Michal Kováč Jr. abroad, Prime Minister Vladimír Mečiar violated the principle of non-arbitrariness, the principle of legality, the principle of protection of human rights and fundamental values in conjunction with the principle of respect for international obligations, the principle of separation of powers, the principle of transparency and public control.<sup>30</sup>

It is obvious that with the prime minister having the requirement of restraint in exercising the power to grant amnesty, i.e. based on this finding, the prosecutor’s office began to investigate, after 22 years, whether V. Mečiar had committed a criminal offence of abuse of power by a public official.

### 9.3.2. *Repeal of Amnesties at the Court of Justice of the EU*

Currently, proceedings are being initiated before the Court of Justice of the EU for criminal prosecution in connection with Michal Kováč Jr’s abduction. The district court referred a preliminary question about the admissibility of issuing a European arrest warrant should the perpetrators be convicted for the abduction. The Slovak court had doubts whether the extradition would not violate the basic principle of criminal law – not twice in the same case (*ne bis in idem*).

Lately, the advocate general of the Court of Justice of the EU presented draft decisions addressing the question of whether the cessation of prosecution on the basis of an amnesty could be considered a valid exemption to prevent the case from being reopened. Given that amnesty is a mass pardon for certain crimes and it makes no assessment of the case itself, the district court could decide to issue a European arrest warrant.

29 Finding of the Constitutional Court of the Slovak republic by 31 May 2017, no. Pl. ÚS 7/2017-159.

30 Finding of the Constitutional Court of the Slovak republic by 31 May 2017, no. Pl. ÚS 7/2017-159.

Although the advocate general's opinion is not binding on the judges of the Court of Justice of the EU, decisions can be significantly influenced by the force of argument. If the court upholds this motion, the court in Slovakia will have to continue the criminal proceedings for the case of abduction.<sup>31</sup>

## 10. Conclusion

After 1989, as well as in the years that followed, several countries, including the Slovak Republic, adopted their new constitutions and faced one of the most dramatic changes in the state and constitutional establishment. These were years of hope, of a gradual consolidation of the foundations of democracy, and of the building of a free state. However, the roughly 30 years after the fall of communism were significantly affected by the Slovak Republic's membership in European structures and gradually raised several questions. Suddenly, the euphoria of freedom and new beginnings was gradually replaced by the fear that freedom was not enough. Will there not be too much of that freedom and are we able to define it, to set limits to it? We believe that it has raised the question of whether the ideal of democracy leaves man and, ultimately, the whole community of individuals in a certain ruthlessness and isolation, even though we live in an integrated world and a united Europe.

What was once homogeneously united around a polarised world now has polarised conflicts of opinion, but behind them are much more structured motivations and interests, and society is struggling in a crisis caused by the shake-up of its original values. If the constitution is a fundamental law of the state and an expression of the form of a social contract, it may be necessary to reconsider this treaty if it proves insufficient, even though this goes against the principle of immutability or more difficult variability, legal certainty and institutional trust. Nevertheless, it is now not only a matter for the states themselves to ask themselves how firm and sovereign this treaty is, when the very essence of the democracy it was supposed to consolidate is in crisis, but the situation is much more complex; we can talk about crisis in Europe and hardly expect it to be resolved by states in isolation.

From the above-mentioned, it follows that the world into which the first constitutions were born in the nineteenth and twentieth centuries is fundamentally different from that of today. If the constitution is to further guarantee its basic function, which is an integrative character and purpose, it must answer several difficult-to-define but fundamental value questions.

31 For the opinion see the details of Opinion of Advocate General Kokott, delivered on 17 June 2021, in Case C-203/20, AB and Others (Revocation of an amnesty), (Request for a preliminary ruling from the Okresný súd Bratislava III [District Court, Bratislava III, Slovakia]), [cit. 09/12/2021].

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# The Constitutional Development of Slovenia (1918 – 2021)

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## ABSTRACT

The chapter deals with the constitutional development in Slovenia from the end of World War I to the present day, covering roughly a century. This is the period of time during which Slovenia went from belonging to the Habsburg monarchy to being a part of the inter-war monarchy of the South Slavs, experienced the trauma and devastation of World War II and then became a part of the Yugoslav federation. Thirty years ago, in 1991, it gained statehood and adopted a liberal constitution still in force today. The chapter discusses these periods and sees the different changes and upheavals as milestones that helped shaped Slovenian constitutional identity. It also presents an overview of the constitutional order under the 1991 Constitution and finally, discusses what the authors suggests are some of the elements of the constitutional identity of Slovenia.

## KEYWORDS

Slovenia, Kingdom of Yugoslavia, socialist Yugoslavia, federalism, statehood, democracy, human rights and fundamental freedoms, constitutional identity, gender equality, right to language, distrust towards the military, European constitutionalism.

## 1. A historical overview

### ***1.1. The disintegration of the Austro-Hungarian monarchy and the processes of formation of Slovenian statehood***

The end of World War I, with the defeat and collapse of the Austro-Hungarian monarchy demanded that the Slovenian people reflect upon their future in the new, considerably different reality of post-war Europe. Ethnic Slovenians lived within the borders of the dual monarchy, but Slovenia was not an administrative or political unit of the monarchy. Instead, Slovenians were spread through several of the historical lands of the monarchy. It was the political ambition of the Slovenians, formulated during the 1848 Spring of Nations, to live in one political unit ('United Slovenia') within the Habsburg monarchy.<sup>2</sup> Another political programme in the second half of the XIXth and the beginning of XXth century was the unification of all South Slavs living in the monarchy (Slovenians, Croats and the Serbs that lived in the monarchy rather than

1 The author expresses his gratitude to Anže Mediževac for the research assistance.

2 Prunk, 2008, pp. 73–75.

in the Kingdom of Serbia) in one political unit which would become the third entity of the monarchy (trialism).<sup>3</sup>

The idea of unification of all the South Slavs living in the collapsed monarchy realised itself in the creation of the short-lived State of Slovenes, Croats and Serbs (*Država Slovencev, Hrvatov in Srbov*) on 29 October 1918.<sup>4</sup> The State was independent and ruled by the National Council in Zagreb, while the Slovenians, as part of the same project, also established a National Government in Ljubljana.<sup>5</sup> The National Government adopted the Decree on transitional administration (*Naredba o prehodni upravi*), considered an act of constitutional nature as it established authorities that ruled the territory inhabited by ethnic Slovenians. The decree was drafted by Ivan Žolger (Žolger's Constitution).<sup>6</sup> Slovenian armed volunteers secured the border in Styria towards the north; however, by way of the Carinthian plebiscite and the Treaty of Rapallo with Italy, a lot of the territory inhabited by ethnic Slovenians became a part of Austria and Italy, respectively.<sup>7</sup> Following from the 1917 joint political declaration, made on the island of Corfu by exiled representatives of the Austro-Hungarian South Slavs and Serbia's Prime Minister Nikola Pašić,<sup>8</sup> the State of Slovenes, Croats and Serbs soon unified with the Kingdom of Serbia to create a new state: the Kingdom of Serbs, Croats and Slovenes (*Kraljevina Srbov, Hrvatov in Slovencev*). It is noteworthy that despite the fact that the Kingdom of Serbs, Croats and Slovenes was ruled by the Serbian Karađorđević dynasty, the new Kingdom was not an 'enlarged' Kingdom of Serbia, but a new state with new subjectivity under international law.<sup>9</sup>

### **1.2. Slovenia in the monarchy of the South Slavs (1919 – 1941)**

A constituent assembly was called after the creation of the new Kingdom of Serbs, Croats and Slovenes, and on 28 June 1921 it adopted a new Constitution (St. Vitus' Day Constitution, *Vidovdanska ustava*, hereinafter: SVDC). Instead of recognising the cultural, linguistic, religious and societal diversity of the new country with some form of federalism, the new constitution chose to establish a unitary (and relatively centralised<sup>10</sup>) state. The parliament was unicameral and the territory was divided in 33 administrative districts (art. 95 SVDC), making sure that no ethnic group would have its "own" district.<sup>11</sup> In addition, the SVDC in art. 3 reformulated reality by declaring that there was one official language in the Kingdom, the inexistent "Serbian – Croatian – Slovenian", and by creating a "Serbian – Croatian – Slovenian" ethnicity

3 Prunk, 2008, pp. 92–94.

4 Prunk, 2008, p. 96.

5 Grad, Kaučič, Zagorc, 2020, p. 77.

6 Ribnikar, 2003, p. 120.

7 Prunk, 2008, pp. 100–101.

8 Encyclopaedia Britannica, Corfu Declaration, available at: <https://www.britannica.com/event/Corfu-Declaration>. See also Prunk, 2008, p. 95.

9 Žolger, 1923.

10 Grad, Kaučič, Zagorc, 2020, p. 78.

11 Šiftar, 1975, p. 181.

(art. 19). This was not only unnatural from the perspective of the Slovenians and the other two constituent peoples, each with their own history and identity, who were now considered “tribes” of a united nation.<sup>12</sup> Even more so, it was outright repressive to the other peoples or ethnic groups living in the new state (Montenegrins, Macedonians, Bosnians...). The Constitution declared a “constitutional, parliamentary and hereditary” monarchy, but the powers of the King (ch. 5 and art. 91 SVDC) were much too great to earn the new monarch the label ‘parliamentary’. The Constitution was relatively modern, however, when it came to listing fundamental rights in its ch. 3, among them even economic and social rights. Scholarship sees that as the influence of the Weimar constitution.<sup>13</sup> The Constitution in art. 70/III envisaged that a statute would be adopted extending voting rights to women, but that never came to fruition.

The Kingdom was poor and troubled by political instability, especially due to the conflicts between nationalists of the different ‘tribes’ and because of the conflicts between the authorities and the communists. King Alexander instituted a dictatorship on 6 January 1929 (*šestojanuarska diktatura*) and soon after changed the name of the country to ‘Kingdom of Yugoslavia’ (*Kraljevina Jugoslavija*). Almost all of the Slovenian territory within Yugoslavia belonged to the Drava Banate (*Dravska banovina*),<sup>14</sup> one of the nine newly formed administrative units. In 1931, the King declared a new Constitution. This constitution was thus not adopted by a democratically legitimate body and is considered forced (*octroyée*).<sup>15</sup>

### **1.3. World War II and the Creation of socialist Yugoslavia**

The territory of Slovenia suffered military aggression by forces of Nazi Germany and Fascist Italy in April 1941. The eastern part of Slovenia, Prekmurje, was ceded by Nazi Germany to Horthy’s Hungary, and a small portion of the territory in the Southeast was occupied by the illegal Independent State of Croatia.<sup>16</sup> The occupying Axis powers sliced up the territory among themselves and ruled it brutally: violence against the population was “clear in all walks in life and culminated in physical terror.”<sup>17</sup> Forced use of the languages of the occupiers instead of the Slovenian language, detention and deportation of Slovenian intellectuals and patriots, imprisonment in concentration death camps, executions not only of resistance fighters but also of civilians taken as ‘hostages’, removal of underage children from their parents and forcible conscription of Slovenians into the armies of the occupiers were widespread.<sup>18</sup> Occupiers also implemented antisemitic legislation and committed acts of

12 Perovšek, 2016, p. 48.

13 Grad, Kaučič, Zagorc, 2020, p. 78.

14 Prunk, 2008, p. 115.

15 Prunk, 2008, p. 116.

16 Šorn, 2016, p. 158.

17 Šorn, 2016, p. 158.

18 Pirjevec, 2008, pp. 24–35.

holocaust on the Slovenian territory.<sup>19</sup> The atrocities left deep scars on the nation. After the quick demise of the royal Yugoslav army, armed resistance was organised practically throughout the Slovenian territory with the creation of the Liberation Front of the Slovenian Nation (*Osvobodilna fronta slovenskega naroda*), which slowly but surely came under the control of the Communist Party.<sup>20</sup> The Liberation Front started establishing, on the one hand, structures of quasi-state authority, especially in the liberated territories.<sup>21</sup> On the other hand, the Liberation Front co-operated with the wider resistance efforts in Yugoslavia. The 1943 (Slovenian) Kočevje Assembly sent delegates to the second session of the Anti-Fascist Council for the National Liberation of Yugoslavia (usually known by the acronym AVNOJ) at Jajce, where the delegations from all over Yugoslavia lay the foundations for the post-war federal Yugoslavia.<sup>22</sup> The resolutions of the 2nd AVNOJ were confirmed at the Črnomelj session of the Slovenian National Liberation Council (SNOS).<sup>23</sup> SNOS also founded, in May 1945, a Slovenian national government.

Historians see the period of WWII in Slovenia as a combination of resistance struggle, revolution, domestic collaboration with the occupiers and even civil war.<sup>24</sup> The persecution during and after the war included mass extra-judicial killings of the collaborators and opponents of the new regime.<sup>25</sup> All of this added to the scars on the nation caused by the occupiers and their collaborators and Slovenia is still searching for a way to come to terms with its past.

#### **1.4. Slovenia as a constituent unit of Second Yugoslavia (1945 – 1988)**

Despite the relative independence of the resistance struggle in Slovenia and the existence of the constituent republics, the constitutional order of post-war socialist Yugoslavia was centralist, based on the principles of unity of power, both vertical and horizontal. The 1946 Constitution of the Federal People's Republic of Yugoslavia<sup>26</sup> and the 1947 Constitution of People's Republic of Slovenia were under Soviet influence.<sup>27</sup> However, Yugoslavia broke off from the Soviet bloc after the Informbiro conflict in 1948<sup>28</sup> and began seeking its own constitutional solutions. Those were all, however, still essentially defined by the dominating role of the Communist Party. Socialist Federal Republic of Yugoslavia (SFRY) and Socialist Republic of Slovenia

19 Pančur, 2016, p. 171–182.

20 Repe, 2008, p. 45.

21 Ibid, p. 43.

22 Radan, 2002, p. 187.

23 Grad et al. understand the *ex post* confirmation of the Yugoslav joint resolutions by a Slovenian body as an affirmation of Slovenian sovereignty.

24 Godeša et al, 2002, p. 121.

25 Rihtar Tominšek, 2006.

26 Available in Serbian (cyrillic script) at: [http://www.arhivyu.gov.rs/active/sr-latin/home/glavna\\_navigacija/leksikon\\_jugoslavije/konstitutivni\\_akti\\_jugoslavije/ustav\\_fnrj.html](http://www.arhivyu.gov.rs/active/sr-latin/home/glavna_navigacija/leksikon_jugoslavije/konstitutivni_akti_jugoslavije/ustav_fnrj.html).

27 Grad et al., 1999, p. 54. The proclaimed federalism was merely as a 'rhetorical tool', see Kovačević, 2017, p. 46.

28 Prunk, 2008, p. 176. See also Niebuhr, 2011, p. 146.



(SRS) adopted new constitutions in 1963 and then again in 1974.<sup>29</sup> The decisions of the League of Communists of Yugoslavia (ex-Communist Party) in the 1950s, and then the constitutional reforms in the 1960s and 1970s also developed ‘self-management’ (*samoupravljanje*).<sup>30</sup> This was an original socio-economic system, a path between market capitalism and (Soviet-style) socialism/communism, which at least on paper looked to an outside observer as an “anarcho-syndicalist’s opium dream”.<sup>31</sup>

The 1974 constitutional reform was an important step towards the affirmation of Slovenian statehood and sovereignty within federal Yugoslavia.<sup>32</sup> The constitutions of SFRY and SRS proclaimed that the peoples of Yugoslavia have joined to create a common state “based on the right of every nation to self-determination, which includes the right to secession,” while the “sovereign rights of the working people and of the nations and nationalities” were exercised within constituent republics, and within the federal state only when the federal constitution so declares (General Principle I of the 1974 SFRY Constitution, General Principle I of the 1974 SRS Constitution).<sup>33</sup>

### ***1.5. Path to Statehood, Independence and Democracy (1988 – 1991)***

Essential for the transformation of Slovenia from a socialist constituent republic into a democratic independent state was the 1989 adoption of the amendments VIII-LXXXI to the Constitution of SRS. These provided a legal basis for multi-party elections to the Assembly and to the Presidency. In Amendments XLVI and LXII The SRS Assembly got the power of nullification – to adopt appropriate measures should federal authorities violate the rights of the republic.<sup>34</sup> The constitutional amendments (e.g. XLIX, L, LI) included a list of classic liberal human rights, replacing more relativised formulations in the original 1974 constitutional text. Slovenia also abolished death penalty on a constitutional level (amendment XLVII), which has otherwise not been executed since 1959. Further amendments to the Constitution were adopted throughout 1990, gradually severing ties with the federation.<sup>35</sup>

On 23 December 1990, Slovenia held a referendum (*plebiscit*) where 88,5% of all registered voters voted in favour of an independent state. After unsuccessful attempts at negotiations with the federal authorities and the representatives of other constituent republics, the Assembly on 25 June 1991 adopted the Basic Constitutional Charter on the Independence of the Republic of Slovenia (*Temeljna ustavna listina o samostojnosti*

29 The 1963 Constitution of SFRY available in Serbian (latin script) at: <http://mojustav.rs/wp-content/uploads/2013/04/Ustav-SFRJ-iz-1963.pdf>; the 1974 Constitution of SFRY available in Slovenian at: [https://sl.wikisource.org/wiki/Ustava\\_Socialistične\\_federativne\\_republike\\_Jugoslavije\\_\(1974\)](https://sl.wikisource.org/wiki/Ustava_Socialistične_federativne_republike_Jugoslavije_(1974)); the 1974 Constitution of SRS available in Slovenian at: [https://sl.wikisource.org/wiki/Ustava\\_Socialistične\\_republike\\_Slovenije\\_\(1974\)](https://sl.wikisource.org/wiki/Ustava_Socialistične_republike_Slovenije_(1974)).

30 Wilson, 1978, p. 256.

31 Wilson, 1978, p. 253.

32 Grad et al., 1999, p. 63.

33 Similar formulations were in the previous constitutions, see also Grad et al., 1999, p. 70. See also Kovačević, 2017, p. 46.

34 See also Grad et al., 1999, p. 73.

35 See Grad et al., 1999, pp. 74–75.

*in neodvisnosti Republike Slovenije*), which was the legal act declaring Slovenia as an independent state.<sup>36</sup> An armed conflict (War of Independence) began some 36 hours later and lasted for ten days, with the Yugoslav Army attempting to take control of external border crossings and critical infrastructure, and the Slovenian Police and units of Territorial Defence Forces preventing it from doing so.<sup>37</sup> A moratorium on the independence efforts was negotiated with the help of the European Community.<sup>38</sup> In October 1991, the Yugoslav Army retreated fully from Slovenia.<sup>39</sup> On 15 January 1992, the Member States of the European Community recognised Slovenia and in May 1992, Slovenia joined the United Nations, successfully ending its path to independence and statehood.<sup>40</sup>

## 2. Constitution of the Republic of Slovenia (1991)

### 2.1. *The 1991 Constitution and foundational constitutional principles of the Republic*

The Constitution of the Republic of Slovenia (*Ustava Republike Slovenije*)<sup>41</sup> was adopted by the Assembly of the Republic of Slovenia, in a joint session of its three chambers, on 23 December 1991, six months after the declaration of independent statehood. The Constitution was adopted pursuant to the procedure of constitutional revision prescribed in the 1974 Constitution, which was the constitution of a federal unit within the Yugoslav federal state, thus maintaining a degree of continuity with the previous constitutional system while at the same time providing the new Constitution with requisite democratic legitimacy.<sup>42</sup> The discussions in the Assembly began in December 1990, when Slovenia was still a part of Yugoslavia and approximately around the time when the people of Slovenia voted in favour of independence in the referendum, thus lasting a year. Even before the beginning of the process of drafting the 1991 Constitution within the Assembly, two draft constitutional documents were created (but not adopted): the first one in April 1988, written by a group of Slovenian intellectuals and artists (Writers' Constitution), and the second one in March 1990 by the coalition of newly founded democratic parties ('Demos Constitution').<sup>43</sup>

#### 2.1.1. *A democratic and social state, governed by the rule of law*

The first chapter sketches the constitutional nature of the Slovenian state. It defines Slovenia as a democratic republic (art. 1), a clause that was later interpreted by the Slovenian Constitutional Court (hereinafter: CC) to embed a system of constitutional

36 Official Gazette RS, No. 19/91, 25.6.1991.

37 Niebuhr, 2006. See also Prunk, 2008, pp. 233 et seq.

38 Prunk, 2008, pp. 240–242.

39 Prunk, 2008, p. 242.

40 Prunk, 2008, p. 243.

41 Official Gazette RS, 33/1991.

42 Grad, Kaučič, Zagorc, 2020, p. 94.

43 See Jambreč, 1993, pp. 345 et seq.

democracy, intrinsically linked with respect for human dignity.<sup>44</sup> Slovenia is a ‘state governed by the rule of law’ (*pravna država*), a concept connected to the German *Rechtsstaat* and a ‘social state’ (*socialna država*) (art. 2). The former concept has seen its development in rich case law of the CC, where a number of subprinciples of *pravna država* were developed, such as the principle of legal security and predictability and the principle of clarity and ascertainability of legal norms. Legal force of retroactive norms is expressly prohibited in the Constitution (art. 155),<sup>45</sup> combined with the strict rule in art. 154/I that no general act can have effect before it was published in the Official Gazette.<sup>46</sup> Cornerstones of *pravna država* are also the principles of constitutionality (*ustavnost*), with the requirement that all state power is exercised within the bounds of the constitution and legality (*zakonitost*), which requires a basis in statute (or regulation that is itself based on a statute) for all actions of state organs.<sup>47</sup> Last but not least, the general principle of proportionality (*sorazmernost*) is not itself mentioned in the Constitution, but is a foundational principle of constitutional law.<sup>48</sup>

In contrast, the principle of social state has not seen such a substantial development in case law, as case law tends to be built upon connected substantive social rights or Chapter 3 rules.<sup>49</sup>

### 2.1.2. *People, nation, citizens*

The introductory part of the Constitution also defines Slovenia as a state of all of its *citizens*, and at the same time reaffirming what was at the time, in the context of the debates in the decaying federal state, a controversial but ultimately prevailing stance – that the basis for Slovenian statehood is the “permanent and inalienable right of the Slovenian *nation* to self-determination” (art. 3/I). While the reaffirmation in art. 3/I is seen to establish the idea of *national* sovereignty, art. 3/II introduces *popular* sovereignty<sup>50</sup> by proclaiming that in Slovenia, all power is vested in the *people*,<sup>51</sup> combining it with the principle of separation of powers.

### 2.1.3. *Separation of powers*

The power, vested in the people, is exercised by the citizens “directly and through elections, consistent with the principle of the separation of legislative, executive, and

44 Constitutional Court RS, case U-I-109/10, 26.9.2011.

45 This clause protects from real retroactivity, whereas de facto or pseudo-retroactivity (*nepravna retroaktivnost*) is prohibited if it violates the principle of guarantee of trust in the law, a subprinciple of *pravna država*. See also Constitutional Court RS, case U-I-39/95, 23.9.1995.

46 Constitution of the Republic of Slovenia.

47 Grad, Kaučič, Zagorc, 2020, pp. 593 et seq.

48 Šturm, 2019, in Avbelj et al., 2019.

49 Some of these are listed in Pernuš, 2011, p. 707.

50 Grad, Kaučič, Zagorc, 2020, p. 145.

51 ‘Nation’ (*narod*), ‘citizens’ (*državljeni in državljanke*, the only passage in the Constitution that uses both the masculine as well as the feminine form in Slovenian language) and ‘people’ (*ljudstvo*) are thus three linked but at the same time distinct subjects of sovereign constitutional power in Slovenian constitutional doctrine.

judicial powers.” (art. 3/II Constitution). While the formulation in the constitutional text relies on a classical trialist separation into three branches, the CC has already in 1995 concluded that the principle of separation of powers guarantees independence also to institutions, established to control the other organs of state, even if they are *sui generis* and not classifiable as part of the legislative, executive or judicial branch.<sup>52</sup> In some way, the Court upgraded the classical concept focused on the separation of branches. In today’s institutional landscape, we can without a doubt consider as such institutions that can rely on independence, *inter alia*, the Court of Audit (*Računsko sodišče*), the Human Rights Ombudsperson (*Varuh človekovih pravic*), the Information Commissioner (*Informacijska pooblaščenka*) and the Anti-Corruption Commission (*Komisija za preprečevanje korupcije*), Bank of Slovenia (*Banka Slovenije*), regardless of whether they were created by the Constitution or by statute. Other such institutions that require constitutional guarantees of independence, albeit perhaps in a different manner or to a different degree, could be the State Prosecution, the Police and the different independent agencies such as the competition authority.<sup>53</sup> This list may be open-ended, and the guarantees of independence may also vary depending on the mission and jurisdiction of the individual organ, but there is a strong constitutional logic behind this approach. In Slovenian constitutional doctrine, the principle of separation of powers is not intended to protect the organisations within the state apparatus, but in its final end to protect the citizen from unlawful and arbitrary encroachments by state power.<sup>54</sup>

#### 2.1.4. State as guardian of human rights and fundamental freedoms

While the entire Chapter 2 of the Constitution is designed as a list of human rights and fundamental freedoms, these are mentioned already among the fundamental principles in Ch 1. The formulation in art. 5 Constitution is that “in its own territory, the state shall protect human rights and fundamental freedoms” alongside some other constitutional values. This clause of the Constitution is seen as a basis for the state to uphold its positive obligations with regard to human rights and fundamental freedoms, i.e. not only violate them itself, but also ensure respect for them in horizontal relationships.<sup>55</sup> This, more generally formulated clause, is inseparably linked with arts. 14, 15 and 16 that present structural rules on the application, realisation and limitation of human rights and fundamental freedoms.<sup>56</sup>

One of the constitutional values that the state is charged with protecting are also the rights of the autochthonous Italian and Hungarian national communities (art. 5/I Constitution) An extensive list of the rights of these two communities is laid down in art. 64, and the two communities are also represented by two deputies of the National

52 Constitutional Court RS, case U-I-158/94, 9.3.1995, paras. 21, 22, 24, 27.

53 We draw here upon Levitsky and Ziblatt’s account on »capturing the referees« (Levitsky, Ziblatt, 2018, p. 78).

54 Constitutional Court RS, case U-I-158/94, 9.3.1995, para. 20.

55 Zupančič, 2002, on art. 5, para. 1, Constitution, in Šturm et al., 2002.

56 See Bardutzky, 2020, pp. 11–30.

Assembly, in essence giving the members of the communities a double vote in the parliamentary elections.<sup>57</sup> The Constitution is much more laconic with regard to the Romany community,<sup>58</sup> which also enjoys fewer collective rights.<sup>59</sup> Also, the constitutional text is completely silent about the other ethnic groups living in Slovenia, most notably the members and descendants of the peoples of Yugoslavia that had migrated to Slovenia, despite the fact that they greatly outnumber the Italian and Hungarian communities.<sup>60</sup> In 2011, the National Assembly adopted a non-binding, political declaration on the position of Albanians, Bosniaks, Montegrins, Croatians, Macedonians and Serbs living in Slovenia,<sup>61</sup> but their legal status as ethnic communities still lacks recognition.<sup>62</sup>

### 2.1.5. A unitary state with local self-government

The Constitution declares Slovenia to be a “territorially unified and indivisible state” (art. 4), effectively proscribing a federal order to be set up within Slovenia *in lieu* of a unitary state,<sup>63</sup> while at the same time guaranteeing local self-government (art. 5). The basic unit of local self-government in Slovenia is a municipality (*občina*). Despite the 2006 constitutional reform that envisaged an obligatory creation of regions (*pokrajina*), this has not yet happened.<sup>64</sup> The Constitutional Court linked the creation of *občine* to the realisation of what it referred to as a ‘constitutional right to self-government’.<sup>65</sup>

### 2.1.6. A secular state

Slovenia is a secular state, as art. 7 prescribes separation between state and religious communities. The Constitution also demands that the state treat religious communities equally, an important principle in light of the historical and societal dominance of the Roman Catholic church in Slovenia and its influence on politics.<sup>66</sup> The secular

57 Similar applies to the representation of these two communities in bodies of local government. As per Art. 64, para. 5, Constitution of the Republic of Slovenia, these representatives hold the power of absolute veto on laws governing *exclusively* the rights of the communities.

58 Art. 65, Constitution of the Republic of Slovenia.

59 Zakon o romski skupnosti (ZRomS-1, Eng. ‘Roma Community in the Republic of Slovenia Act’), Official Gazette RS, No. 33/07, 30.3.2007.

60 See more in [http://www.inv.si/DocDir/Publikacije-PDF/Razprave%20in%20gradivo/RIG%2056\\_57/VKB%2056\\_57.pdf](http://www.inv.si/DocDir/Publikacije-PDF/Razprave%20in%20gradivo/RIG%2056_57/VKB%2056_57.pdf).

61 Deklaracija Republike Slovenije o položaju narodnih skupnosti pripadnikov narodov nekdanje SFRJ v Republiki Sloveniji (DePNNS), Official Gazette RS, No. 7/11, 1.2.2011.

62 As relatively strong *individual* guarantees of linguistic and cultural identity, the members of these ethnic communities can rely on arts. 61 and 62, see below.

63 See Šturm, 2002, on art. 4 Constitution, in Šturm et al., 2002.

64 Grad, Kaučič, Zagorc, 2020, p. 730. For more on the constitutional basis and the possible frameworks for the creation of regions, see Senčur, 2019, on art. 143 Constitution, in Avbelj et al., 2019. Ustavni zakon o spremembah 121., 140. in 143. člena Ustave Republike Slovenije (UZ121, 140, 143), Official Gazette RS, No. 68/06, 20.6.2006. Grad et al., 1999, p. 430.

65 Constitutional Court RS, case U-I-114/11, 9.6.2011, para. 10.

66 The Constitutional Court (under certain conditions) confirmed the constitutionality of Slovenia’s Agreement on Legal Issues with the Holy See, see case Rm-1/02, 19.11.2003.

principle in art. 7 is closely linked with the Constitution art. 41 right to freedom of conscience and religion.<sup>67</sup>

## 2.2. The legislative and the executive branches of government

The constitutional text itself is ambiguous as to the composition of the Slovenian parliament. Without any doubt, the National Assembly (*Državni zbor*, hereinafter: NA) is the directly elected representative body with legislative and other typical parliamentary powers, including the power to revise the constitution. It is therefore a typical lower chamber of parliament. The National Council (*Državni svet*), however, is a more peculiar creature and could also be classified as a *sui generis* consultative organ as its powers are quite weak compared to upper chambers of modern parliaments and as it has no direct relationship with the Government.<sup>68</sup>

Nevertheless, all the powers of the National Council are linked to the work of the NA (e.g. the power of legislative initiative and suspensive legislative veto and legislative, art. 97 Constitution) and it is thus considered an organ within the legislative branch<sup>69</sup> or an upper parliamentary chamber *lato sensu*.<sup>70</sup> We can therefore conclude that Slovenia has a bicameral parliament in a situation of asymmetrical bicameralism.<sup>71</sup>

In addition to the classical functions of the parliament – legislative, budgetary, control – the NA also possesses comparatively strong powers of appointment and election. The strong powers of the appointment and election of the NA are frequently considered to be a remnant of the pre-1991 system of unity of powers.<sup>72</sup> The National Council is elected indirectly<sup>73</sup> and it is not composed of representatives of the people in general, but rather of representatives of ‘special (particular) societal interests’ (art. 96 Constitution) and should as such be a reflection of the complexity of the society.<sup>74</sup>

Slovenian constitutional doctrine usually considers that there are two of the highest organs of the state that belong to the executive branch of government. The President of the Republic (*predsednik republike*) is the head of state (Constitution Ch IV/c)).<sup>75</sup> The Government (*vlada*) sits on top of the executive-administrative apparatus and is thus the *de facto* head of the executive branch of power (Constitution Ch

67 See, e.g., Constitutional Court RS, case U-I-68/98, 22.11.2001. See also Constitutional Court RS, case U-I-92/07, 15.4.2010.

68 Bele et al., 1992, pp. 146, 149. See also Pernuš, 2011, p. 723.

69 Mozetič, 2002, on art. 96 Constitution, in Šturm et al., 2002.

70 Bele et al., 1992, p. 148.

71 Štrus, 2019, on art. 97 Constitution, in Avbelj et al., 2019.

72 Grad, Kaučič, Zagorc, 2020, p. 405.

73 Grad, Kaučič, Zagorc, 2020, pp. 338 et seq.

74 Mozetič, KURS 2002, art. 96 (<https://e-kurs.si/komentar/komentar-23/>).

75 It was confirmed by the Constitutional Court that the President of the Republic is to be considered a part of the executive branch, however with a constitutionally independent position with regard to her relationship with the NA. Constitutional Court RS, case U-I-57/06, 13.4.2006, para. 29.

IV/č).<sup>76</sup> The Government produces the majority of proposals for a statute; it also adopts substatutory legislation, thus exercising two powers unavailable to the President of the Republic. At least nominally, the control of the NA over the Government is very strong; unusually for parliamentary democracies, the appointment and removal of ministers is not in the hands of the President of the Government (*predsednik vlade*), but rather subject to a vote in the NA.<sup>77</sup>

The drafters of the 1991 Constitution rejected a powerful President which would turn Slovenia into a semi-presidential republic. Also, in art. 103, they opted for direct elections of the President, which the Slovenian constitutional doctrine considers somewhat unusual for parliamentary systems.<sup>78</sup> A direct election provides the President with strong democratic legitimacy which goes somewhat in vain,<sup>79</sup> as the list of powers of the President in art. 102 Constitution is relatively limited.<sup>80</sup> This office, however, does come with extensive powers of proposal of candidates for high state functions; perhaps the most important one is to nominate candidates for judge of the CC for appointment by the NA (Constitution Art 163/I).

### 2.3. The Judiciary and the Constitutional Court

The Constitution addresses the judiciary (*sodstvo*) in Ch IV(f)), declaring the Supreme Court (*Vrhovno sodišče*) to be the highest court of the land (Art 127). Ch VIII of the Constitution is devoted to the Constitutional Court (*Ustavno sodišče*), which the legislation, taking into account the somewhat confusing phrasing of art. 127, defined as the »highest organ of the judicial branch for the protection of constitutionality and human rights and fundamental freedoms.« (Constitutional Court Act Art 1). The judges, members of the judiciary, and the judges of the CC obtain their mandate in different ways;<sup>81</sup> also, while the judiciary is protected by permanent term of the judges, while the judges of the CC serve for a nine year non-renewable term.

The right to have one's case heard without undue delay by an independent and impartial court, established by statute, is enshrined in art. 23 Constitution, as is the right to be tried by a judge assigned according to *a priori* rules.<sup>82</sup> The subjective right to be tried by an independent judge is linked to the (institutional) constitutional clause affirming the independence of judges and their loyalty only to the Constitution and statutes (art. 125 Constitution) The CC has developed standards for the impartiality

76 Grad et al., 1999, p. 155.

77 Grad, KURS 2019 'Državna ureditev', art. 116, side no. 15.

78 Kaučič, KURS 2019 'Državna ureditev', art. 103, side no. 4. See Ribičič, 2016, pp. 39–62, for a discussion of the choices in the constitutional drafting process in 1990–1991.

79 For a discussion on the relationship between the legitimacy of the President of the Republic and the system of elections see Kaučič, 2016, pp. 139 et seq.

80 For a discussion of the status as Commander-in-Chief, see Pavlin, 2016, pp. 333–346.

81 The former obtain their mandate upon proposal of the Judicial Council (*Sodni svet*), see arts. 130 and 131, Constitution.

82 Art. 23, Constitution of the Republic of Slovenia.

of judges<sup>83</sup> and has considered the independence of judges an essential building block of the principle of separation of powers.<sup>84</sup> A central role in the protection of independence of judges is played by the permanent term of the judges enshrined in art. 129 Constitution.<sup>85</sup>

After the 1995 major reform of the Slovenian judiciary,<sup>86</sup> it encountered a large-scale, systemic problem, when the growing workload resulted in lengthy proceedings and in turn, a violation of the right to trial without undue delay (within reasonable time, in the language of the ECHR).<sup>87</sup>

The 1963 Constitution of Yugoslavia created the Constitutional Court of Yugoslavia, and the constitutions of the constituent republics followed suit. Hence, one could say that there is a long tradition of constitutional judiciary in Slovenia, but not without a caveat. Obviously, these institutions existed and functioned in a context radically different to today's constitutional democracy in Slovenia, in a political system and society dominated by the Communist Party, with very little room for dissent.<sup>88</sup> Upon the adoption of the 1991 Constitution, the Constitutional Court was instructed to continue functioning, but in accordance with the new constitutional order.

As a central function of the CC, the 1991 Constitution envisaged the control of conformity of hierarchically lower with hierarchically higher abstract norms, first and foremost the conformity of statutes with the Constitution. But the CC also reviews substatutory and local norms, and the legislature has been loath to distribute this workload to other courts.<sup>89</sup>

The CC is vested with a number of other powers,<sup>90</sup> *inter alia* the adjudication of impeachment procedures (arts. 109, 119, Constitution).<sup>91</sup> But the 1991 Constitution also introduced a novelty to the design of the CC that was destined to become the single most important procedure before the Court: the constitutional complaint (*ustavna pritožba*) for the protection of human rights and fundamental remedies (art. 160/I/1 Constitution). The constitutional complaint is filed against an *individual* legal act issued by an organ of public power. Constitutional complaints have represented the vast majority of the Court's workload for some time now, contributing importantly to the overburdening and backlogs at the Court. In 2007, the amendments to

83 Constitutional Court RS, case U-I-60/06-200, 7.12.2006, paras. 63–65.

84 Constitutional Court RS, case U-I-60/06-200, 7.12.2006, paras. 57–62.

85 Constitutional Court RS, case U-I-60/06-200, 7.12.2006, paras. 62–63; Bardutzky, KURS 2019 'Državna ureditev', art. 129.

86 See Skubic, 2011 for an overview of the pre-1995 structure of the judicial system and the 1995 reform.

87 Lukenda v. Slovenia – 23032/02, Judgment, 6.10.2005 [Section III]. See also Pavlin, 2009.

88 For a salient evaluation of these institutions, see Sadurski, 2008, p. 1.

89 The only exception is the jurisdiction of administrative courts to review the legality of spatial plans pursuant to Zakon o urejanju prostora (ZUreP-2, Eng. 'Spatial Management Act), Official Gazette RS, No. 61/17, 2.11.2017.

90 Pernuš, 2011, pp. 728 et seq.

91 Grad, Kaučič, Pogačnik, Tičar, 2002, p. 180.



the Constitutional Court Act (arts. 26, 55.a and 55.b)<sup>92</sup> have significantly narrowed the access to the CC via constitutional complaint, but excessive workload remains a serious issue.

The CC has played and continues to play a pivotal role in the construction of Slovenian constitutional democracy. It has in the past thirty years issued a number of important decisions, developed constitutional procedural guarantees, but also the protection of substantive human rights and fundamental freedoms, such as, e.g., freedom of expression and free economic initiative.

### 3. Slovenian constitutional identity

In discussing Slovenian constitutional identity, I rely, to some extent, on the starting point of the account of Gary Jacobsohn in his seminal book *Constitutional Identity*.<sup>93</sup> According to Jacobsohn, a constitution acquires an identity through experience. Identity of a constitution is something that emerges dialogically, as “a mix of political aspirations and commitments that are expressive of a nation’s past, as well as the determination of those within the society who seek in some ways to transcend the past.”<sup>94</sup> The temporal frame in which the inquiry in this volume is set, namely the past hundred years (approximately), is appropriate for the examination of Slovenian constitutional identity. As it has been outlined above<sup>95</sup>, this is the period of time during which Slovenians, after living for a millennium as a part of the Holy Roman Empire and later the Austro-Hungarian monarchy, have transformed itself into a nation with a state, and this state has in the past three decades developed a functioning constitutional democracy. The past hundred years have been turbulent, Slovenia was a part of different constitutional systems, not to mention diametrically opposite political, societal and economic systems. The three milestones – the creation of the monarchy of the South Slavs, the WWII and the creation of Socialist Yugoslavia, and finally the establishment of an independent and democratic Slovenia – were moments where Jacobsohn’s “political aspirations and commitments” culminated and found expression (or disappointingly failed to find expression) in constitutional documents and settlements. In between the milestones, the nation lived through traumas, fears, but also positive and encouraging developments. All of these can then be translated into decisions on constitutional design – with a view to the future, attempting to, as Jacobsohn would put it, transcend the past.<sup>96</sup>

92 Zakon o spremembah in dopolnitvah Zakona o Ustavnem sodišču (ZUstS-A, Eng. ‘Act Amending the Constitutional Court Act’), Official Gazette RS, No. 51/2007, 8.6.2007.

93 Jacobsohn, 2010.

94 Jacobsohn, 2010, p. 7.

95 See sections 1.1.–1.5. of this Article.

96 Jacobsohn, 2010, p. 7.

Attempts to define what constitutes the core of the Slovenian constitution, linked to constitutional identity, have been made in Slovenian scholarship.<sup>97</sup> Without a doubt the views of the scholars that what lies at the core are such fundamental values as human dignity, democracy, rule of law, protection of human rights, equality and so on, can be upheld. History of the making of the Slovenian Constitution, reference to the constitutional amendments in 1988, rich case law of the CC offer limitless corroboration for these claims. Similar statements could be made, with minor variations, with regard to most contemporary democratic constitutional systems in Europe and beyond.

The purpose of the present account is slightly different. It purports to articulate the elements of the Slovenian constitution that might be considered characteristic and to stand out in the Slovenian constitutional system when observed in the company of comparable constitutions. It can be acknowledged that the present inquiry into the characteristic Slovenian elements of constitutional identity is an initial contribution to this debate; we consider the list below an open-ended one to which elements could be added in the future.

### **3.1. European constitutionalism at the heart of Slovenian constitutionalism**

The notion of ‘European constitutionalism’ we apply here is broad and historical. We draw on the formulation of Slovenian constitutional scholar Peter Jambrek, according to whom the constitutional traditions common to the Member States are legal expressions of the ‘never again’ cries that have followed periods of suffering and injustice in Europe.<sup>98</sup> These legal expressions, in our view, were not only the post-WWII constitutions such as the German *Grundgesetz* or the Constitution of Italy, but also the creation of the Council of Europe and the European Economic Community, with their objectives of, respectively, furthering democracy, rule of law and human rights, and preventing nationalist excesses leading to wars. Obviously, in the case of Slovenia, before the project of post-WWII European constitutionalism and its values could be embraced, the nation had to endure a long period of rule of the Communist Party and widespread violations of human rights. But the situation is more nuanced in the case of Yugoslavia and Slovenia than in the case of most of the other socialist CEE countries. Yugoslavia, in line with its departure from the strict Soviet-style socio-economic system, also began establishing links with the projects of European integration. It had concluded three Trade and Co-operation Agreements with the European Community, aimed at increasing trade in goods but also protecting workers from Yugoslavia employed in the Community Member States.<sup>99</sup> As of 1983, Yugoslavia was an observer in EFTA, and as of 1989, the Federal Assembly of SFRY had the status of a ‘special guest’ in the Parliamentary Assembly of the Council of Europe. Between 1975 and 1990, nine sessions of the SFRY-EEC Co-operation Council (at the ministerial

97 Summarized by Kos, 2021, pp. 109–110.

98 See Bardutzky, 2019, fn. 167.

99 Artisien, 1981, pp. 31–32.

level) took place, as well as sporadic meetings of delegations of the European Parliament and the SFRY Assembly.<sup>100</sup> Also, the President of the Slovenian Executive Council Stane Kavčič (1967–1972) was seen as an advocate of closer links with the EEC, which was considered one of the reasons for his removal from office and public life.<sup>101</sup> In the 1980s, the growing doubt in Slovenia that Yugoslavia will indeed be able to join European integration processes became a source of disappointment with the Yugoslav project and an important contributing factor to the ambition of Slovenia to radically redefine the Yugoslav federation or even achieve full statehood.<sup>102</sup> In the beginning of the 1990s, when Slovenian path to statehood reached its final stages, the ambition of Slovenia to participate in European integration became a part of the discourse of the highest Slovenian representatives in exposing their demands for independence and justifying the decision for it.<sup>103</sup> The Declaration of Independence, adopted on 25 June 1991 alongside with the Basic Constitutional Charter, stresses the intention of Slovenia to join the United Nations, Council of Europe and the European Community.<sup>104</sup> And finally, the historical speech (“Tonight, we are allowed to dream”) of the President of the Presidency of Slovenia delivered at the ceremony for the declaration of independence on the 26 June 1991 declares the desire of Slovenians to join, under equal terms and with full responsibility, a Europe without borders.<sup>105</sup>

Slovenia acceded to the Council of Europe in 1993,<sup>106</sup> when it also ratified the European Convention on Human Rights.<sup>107</sup> It joined the European Union in 2004, after amending its Constitution, first, to remove obstacles to accession, and second, with the insertion of art 3.a in the Constitution, to provide a legal basis for accession.<sup>108</sup> On the basis of Art 3.a, a referendum was held, with 89,61% of those who voted declaring themselves in favour of accession to the EU.<sup>109</sup> Art 3.a Constitution does not mention the European Union by name; it speaks of transferring the exercise of a part of sovereign rights to “international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the

100 Djukanović, 2021.

101 Artisien, 1981, p. 31.

102 Repe, (Part 2) 2003, p. 16.

103 Along with adopting the statute that guaranteed legal basis for the 1990 independence referendum (Zakon o plebiscitu o samostojnosti in neodvisnosti Republike Slovenije (ZPSN, Eng. ‘Plebiscite on the Sovereignty and Independence of the Republic of Slovenia Act’) Official Gazette No. 44/90, 6.12.1990), the Slovenian Assembly also adopted a “Declaration of good intentions”, specifying that should the people vote in favour of independence, independent Slovenia will seek to join the Council of Europe as well as sign ‘appropriate agreements’ with the EC and EFTA. (Repe, Part 2 (2003), p. 242).

104 Repe, (Part 3) 2004, p. 34. See fn. 36.

105 Repe, (Part 3) 2004, p. 36.

106 Grad, Kaučič, Pogačnik, Tičar, 2002, pp. 312–313.

107 Grad, Kaučič, Zagorc, 2020, p. 756.

108 Ustavni zakon o spremembah I. poglavja ter 47. in 68. člena ustave Republike Slovenije (Eng. Constitutional Act amending Chapter 1 and Articles 47 and 68 of the Constitution of the Republic of Slovenia, Official Gazette 24/03, 7.3.2003).

109 Bardutzky, 2019, fn. 44.

rule of law”.<sup>110</sup> It thus reiterates the essential reason why Slovenia decided to become a part of the Union, and linked the project of attaining full statehood to it: to continue the project of European constitutionalism, under its cry of ‘never again’ directed at totalitarianism and authoritarianism that have violated human dignity throughout contemporary European history.

### 3.2. *Right to language*

The role of language in constituting the nation is of particular importance when it comes to Slovenians. Having been a part of the Holy Roman Empire and then Austro-Hungarian monarchy from early middle ages to the XXth century, with the members of the ethnic community inhabiting different political units of the Empire, Slovenians were not in a position, as many other nations were, to develop its own state, to engage in military actions on its behalf, and to shape itself into a nation by creating a narrative of noble and wise monarchs, slaughter on the warfield and sacrifice for the homeland. Instead, it was culture, and most importantly, the Slovenian language, that served as an anchoring point. So much so that the Slovenian intellectuals have sometimes used the description ‘nation of the language’ (*jezikovni narod*).<sup>111</sup> The treatment of the Slovenian language in the two Yugoslav states went counter the importance thereof for Slovenians. In the monarchy, it was merged into a new, inexistent linguistic concept.<sup>112</sup> In the post-WWII Yugoslavia, while on a declaratory level, the languages of the Yugoslav peoples were much more equal, in practice, Slovenian language struggled for recognition against the stronger ‘Serbo-Croat’ language, used primarily by federal authorities.<sup>113</sup> Of particular political importance was the 1988 trial, before a military court of the Yugoslav army, in Ljubljana, against Ivan Borštner, Janez Janša, David Tasič and Franci Zavrl, which was held in Serbo-Croat despite the fact that the four accused were Slovenians and that it took place on Slovenian territory.<sup>114</sup> The trial was highly controversial and led to mass protests, the largest public gathering in Slovenia since WWII.<sup>115</sup> The decision of the Slovenian assembly to include a clause on language equality in the 1988 constitutional amendment XLVI should therefore not be a surprise. Art. 11 of the 1991 Constitution declared Slovenian to be the official language, with Italian and Hungarian given the same status alongside Slovenian in areas populated with members of the two national minorities. But the constitution-maker did not stop at providing a ‘privileged status’<sup>116</sup> for these three languages. Art. 61 also entrenched the right of everyone to “freely express affiliation with his nation

110 Ibid., pp. 693–694, 730.

111 Paternu, 2005, p. 65.

112 See *supra* Section 1.2.; Škrubej, 2016, p. 312, points out, however, that this was not forced upon the Slovenian politicians at the time of the making of the Vidovdan constitution.

113 Gabrič, 2015, pp. 213 et seq. The 1963 Constitution of Slovenia declared Slovenian as the official language.

114 Zupančič et al., 1989, pp. 75 et seq.

115 Ramet, 1993, p. 870.

116 Constitutional Court RS, case Up-43/96, 30.5.2000, para. 18.

or national community, to foster and give expression to his culture, and to *use his language and script*.”<sup>117</sup> It is undoubtedly not a coincidence that the Slovenian constitution as a constitution of the ‘nation of the language’ guarantees one’s ethnic and cultural identity in the same clause as it entrenches linguistic rights. What is more important is that in this clause, the Constitution extrapolates the fruits of the struggle of the speakers of Slovenian for the use of their language to a more general notion of a right to language that can coexist with the privileged status of the Slovenian language (and the two minority languages). The CC linked the art. 61 right to the art. 35 right to privacy and protected the individual and free decision of anyone to use their own language publicly.<sup>118</sup> It seems that the historical struggle for free and uninhibited use of Slovenian in the context of politically stronger languages (German, Serbo-Croat, Italian and Hungarian<sup>119</sup>) with strong relevance for cultural and ethnic identity has transcended into a wider constitutionally guaranteed linguistic freedom that constitutes a part of Slovenian constitutional identity.

### ***3.3. Constitutional mistrust towards the use of military***

The development of a pluralist civil society in Slovenia in the 1980s, an important prelude to the processes of democratisation and establishing statehood, also saw the rise of a strong pacifist movement in Slovenia.<sup>120</sup> This movement produced an initiative for a demilitarised Slovenia that at the time enjoyed wide support.<sup>121</sup> This came against the backdrop of the Yugoslav society and political system with a strong role for the military. The Yugoslav People’s Army was even defined as guardian, among other things, of the constitutional order in art. 255 of the 1963 SFRY Constitution. The army, or rather its leadership, had its own political agenda, based on strong support for centralism, that often clashed with the views of the Slovenian communist leadership.<sup>122</sup> The previously mentioned protests against the trial of civilians in a military court<sup>123</sup> were also fueled by the disapproval of the military meddling with the civilian sphere, considered constitutionally problematic by some Slovenian lawyers.<sup>124</sup>

The pacifist tendencies in the Slovenian society on the one hand and the demand for protection of the civilian sphere echoed in two clauses of the 1991 Slovenian constitution. First, while participation in national defence is an obligation of all citizens (art. 123/I),<sup>125</sup> the Constitution (art. 124/III) is also clear: “In the provision of security the state proceeds principally from a policy of peace, and an ethic of peace and

117 Emphasis by author. Art. 62 guarantees the right to use one’s language in procedures before authorities.

118 Constitutional Court RS, case U-I-299/94 („Žalski nagrobniki“), 13.4.1995.

119 See *supra* Section 1.3.

120 Repe, 2000, p. 259.

121 Ibid.

122 Repe, 2000, pp. 247–248.

123 See fn. 114–115.

124 Zupančič et al., 1989, pp. 32–35.

125 At the same time, the 1991 Constitution entrenches conscientious objection as a human right (art. 123/II).

non-aggression.”<sup>126</sup> Second, military courts cannot be established in peacetime (art. 126/II).<sup>127</sup> The division between civilian and military spheres was put to test soon after the adoption of the new Constitution. The arrest of an undercover police agent by members of the military in 1994 led to the first ever dismissal of a minister, by the NA, in post-1991 Slovenian history.<sup>128</sup> The strong reaction confirmed the commitment to the separation of the civilian and military sphere. The commitment, however, eroded seriously with the 2015–2016 arrival of a large number of refugees, when the members of the Slovenian Armed Forces were temporarily vested with limited police powers for the protection of the state border.<sup>129</sup> Also, with Slovenia’s accession to NATO (with constitutional basis in art. 3.a), the country has conceded to potentially using its military for other than defence purposes. Nevertheless, peace (in external affairs) and strong restrictions on the use of military in civilian affairs (internally) remain historically rooted values of the Slovenian constitution.

### 3.4. Gender equality

History of gradual establishment of Slovenian statehood reveals attempts to recognize women as equal political subjects. The interwar monarchy period never saw equality of votes for women despite promising beginnings.<sup>130</sup> However, already in the elections for the organs leading the national resistance in Slovenia, women had the right to vote.<sup>131</sup> This was also enshrined in art. 23 1946 Yugoslav Constitution. Of course, it needs to be recognised that the wartime elections were not according to established standards, and that voting rights in post-1946 Yugoslavia should be considered in context of a one-party system, far from democracies at that time established in most of Western Europe. But on an abstract level, gender voting equality was there. The equal right to vote, enshrined in the 1991 Constitution, was built upon by the constitutional revision of art. 43, adding a constitutional basis for statutory measures to encourage gender equality in running for office.<sup>132</sup>

Another important issue is reproductive rights. The 1974 Slovenian Constitution, in art. 233, guaranteed the right of everyone to make free decisions regarding the birth of their children, with the possibility to limit this right solely for health reasons.

126 The brief discussion in the Assembly Committee for Constitutional Affairs that prepared the final text of the Constitution included proposals for a referendum on whether Slovenia should have an army at all or not. Cerar, Perenič, (Vol. III.) 2001, pp. 997–999.

127 To cite a discussant at the Assembly Committee for Constitutional Affairs when drafting the final text of the Constitution, whose name was not recorded: “The construction of this constitution is founded on a completely different attitude towards military judiciary, so this can be eliminated.” Cerar, Perenič, (Vol. III.) 2001, p. 1008.

128 STA, *IUS-INFO*, ‘Mineva 25 let od afere Depala vas’, 20.3.2019.

129 AFP, Reuters, *DW*, ‘Slovenia gives army expanded powers to tackle refugee crisis’, 21.10.2015.

130 See *supra* Section 1.2.

131 Grad et al., 1999, p. 53.

132 Ustavni zakon o spremembi 43. člena Ustave Republike Slovenije (UZ43, Eng. ‘Constitutional Act amending Article 43 of the Constitution of the Republic of Slovenia’), Official Gazette RS, No. 69/04, 15.6.2004.

This right was, ostensibly paradoxically, somewhat diluted with the phrasing of art. 55 1991 Constitution.<sup>133</sup> Despite this fact, the Slovenian constitution remains one of the few constitutional documents expressly protecting this right, which includes the right to abortion. This achievement, however, was diminished with the result of the 2001 referendum. The electorate refused the entry into force of a statute that would once again restore the right to biomedically assisted procreation to single women.<sup>134</sup>

Both the gradual assertion of gender equal voting rights, first implemented by a guerilla resistance movement, in my interpretation thereby symbolically recognising the equal role of women in the struggle for the survival of the nation, as well as the recognition of a strong right of women to privacy against the backdrop of supposed societal morals etc., demonstrate that as the Slovenian nation gradually developed its statehood alongside with recognition for an equal position of all of its members, regardless of gender. We believe this element of Slovenian constitutional identity to harbour the potential to transcend the issue of voting and reproductive rights and serve as a force for developing gender equality and identity in all walks of life.

#### 4. Concluding Remarks

As can indeed be said of many of the countries in Central and Eastern Europe, the timeframe that the editors of this volume expressed interest in was a period of dramatic and radical changes in Slovenia. The country experienced monarchies, republics, dictatorships, wars, capitalism, socialism – the list could go on. In the year that this chapter was written, it celebrates the thirtieth anniversary of adopting, for the first time, a democratic and liberal constitution of an independent state. In these three decades, the 1991 Constitution has witnessed the accession to the European Union and all the constitutional challenges that accompany it. We have also been able to observe that Slovenia was not immune to rule of law issues that have appeared in Europe. All of this promises the next thirty years as well as the next century to be captivating and intriguing for students of constitutional development and identity. It should be reiterated that my list of proposals for elements of Slovenian constitutional

133 The 50 pages of the transcript of the session of the Assembly Committee on Constitutional Affairs reveals this as one of the most controversial decisions of the 1991 constitution-making process. Cerar, Perenič, (Vol. II.) 2001, pp. 589–641. See also Horvat Vuković, A. and Samobor, A. (2022) 'The Constitutional Construction of Reproductive Rights and the Family in Croatia and Slovenia', paper prepared as part of the symposium on Women, Gender and Constitutionalism in Central and Eastern Europe, on file with author.

134 See art. 5, Zakon o zdravljenju neplodnosti in postopkih oploditve z biomedicinsko pomočjo (ZZNPOB, Eng. 'Infertility treatment and procedures of biomedically-assisted procreation act'), Official Gazette RS, No. 70/00, 8.8.2000. See also Horvat Vuković, A., Samobor, A. (2022) 'The Constitutional Construction of Reproductive Rights and the Family in Croatia and Slovenia', paper prepared as part of the symposium on Women, Gender and Constitutionalism in Central and Eastern Europe, on file with author.

identity is an open one; already based on Slovenia's constitutional path so far, more could be added; the future promises the appearance of even further candidates.

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# | PART II |



# Constitution-making and the Permanence of the Constitution

Zsuzsa SZAKÁLY

## ABSTRACT

After the adoption of the first modern constitution – that of the United States – a dispute started over the possible permanence of the document. While some states hold minor interest in creating special rules for amending the constitution,<sup>1</sup> other states created lengthy and circumstantial rules.<sup>2</sup> The rules for adopting and amending the constitution can show the attitude and the level of respect towards the constitution itself.

The aim of this chapter is to examine these processes and dynamics in the following states: Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia. I first examine the basic definitions and theories related to the dynamics at play in constitutional amendments and then the characteristics of the examined states' constitutional attributes. The age of the constitution itself and the number of constitutional amendments can illustrate a few basic points related to the issue of constitution-making and constitutional amendment. While some of the analysed constitutions guard the amendment process with several strict rules, some others use only slightly different rules for constitutional amendment compared to ordinary legislation. I thus examine the textual and practical rigidity of the formal constitutional amendment rules.

The significance of the adoption and the amendment of a constitution cannot be emphasised enough as the stability of the whole legal system is based on this document. After analysing the rules of the adoption and the amendment of the constitutions of Central and Eastern Europe, I draw several conclusions.

## KEYWORDS

constitution adoption, constitutional amendment, constitutional rigidity, constitutional flexibility, amendment frequency.

## 1. Introduction

As the adoption of a new constitution is an outstanding moment in the history of a state, the possible outcome of the process holds the interest of several actors of state

1 E.g. the constitutional amendment of Malta.

2 The Constitution of Canada has five different processes of formal constitutional amendment. See Albert, 2015, pp. 93–96.

life. Creating a new constitution is generally not part of a country's ordinary political life.

Since the United States adopted the first modern constitution, a dispute has continued about the possible permanence of the document. From the time when Thomas Jefferson and James Madison started their famous debate over the frequency of constitutional amendments<sup>3</sup> to the analysis of the Venice Commission on the issue of constitutional amendments,<sup>4</sup> several opinions have emerged about the question.

One of the guiding principles of this chapter is to take into consideration the role of the political, social, economic and historical characteristics of the examined state while using textual analysis as the “amendment formula does not operate in a vacuum”.<sup>5</sup>

## 2. Definitions

### 2.1. Adopting the Constitution

In the Federalist Papers, Alexander Hamilton wrote that “the establishment of a Constitution, in time of profound peace, by the voluntary consent of a whole people, is a prodigy, to the completion of which I look forward with trembling anxiety”.<sup>6</sup> The founding father felt the exceptional magnitude of the moment when the constitution of the United States of America was created. The modern constitution making may not always be as special as it was for the first time in history as nowadays almost every state has a written constitution, albeit the process of constitution-making,<sup>7</sup> constitution building<sup>8</sup> or constitutional design<sup>9</sup> is still a significant event of state life.

The constitution has a special role in the legal system. As Kelsen said, “since the constitution is the basis of the national legal order, it sometimes appears desirable to give it a more stable character than ordinary laws.”<sup>10</sup> The need to have a constitution in the modern sense can be linked to the Enlightenment<sup>11</sup> as the rights of the people and the limitations of the state power were defined in a written document, which has become a general solution to define the relations between the state and the people.

Some states, such as the United Kingdom, have unwritten constitutions, where different laws adopted in different times contain the constitutional issues. However, it should be emphasised that the substance is the decisive factor of the status of the law. The general model nowadays is the constitution, in which one document contains all

3 See Szakály, 2020b, pp. 27–36.

4 CDL-PI (2015).

5 Contiades and Fotiadou, 2017, p. 233.

6 Hamilton, 1788.

7 I will not analyse the definitions in detail as this is not the aim of this chapter.

8 Ghai and Galli, 2006, pp. 9–12.

9 Ginsburg, 2012, pp. 2–5.

10 Kelsen, 2006, p. 259.

11 Petrétei, 2011, pp. 50–54.



the significant constitutional questions. As Lutz stated, “over the past two centuries, we have moved from a situation where almost no country had a written constitution to one where almost every country has one”.<sup>12</sup>

The adoption of a new constitution is almost always related to a special factor in a state’s history, an unordinary event or a constitutional moment,<sup>13</sup> and the unique political, social, economic and historical aspects of the state determine the circumstances of the adoption. The examination of the phenomenon can be traced to at least 1783,<sup>14</sup> and the literature on the adoption of constitutions developed from this point.<sup>15</sup>

When a state decides to adopt a new constitution, the process is usually related to a crisis or an elemental change in society<sup>16</sup> – with a few exceptions, such as the constitution of Sweden in 1975,<sup>17</sup> where the circumstances were more ideal for a constitutional movement than in the typical situation of constitution-making. While the creation of a new constitution requires calm and deliberate discussions, the chance of achieving a peaceful process is quite low.<sup>18</sup> However, if the constitution makers are not under any pressure to achieve the goal, the whole procedure can break down.<sup>19</sup> For example, the new constitution of Luxembourg has been prepared for almost a decade – since 2009<sup>20</sup> – and it has not entered into force.<sup>21</sup> According to the work of Ginsburg, Elkins and Blount on 150 constitutions, the average constitution-making process lasts 16 months.<sup>22</sup>

If one looks at the reasons for adopting a constitution, several events can be named. According to Elster, the following circumstances can induce the adoption of a new constitution:

- social and economic crisis,
- revolution,
- regime collapse,
- fear of regime collapse,
- defeat in war,
- reconstruction after war,
- creation of a new state,
- liberation from colonial rule.<sup>23</sup>

12 Lutz, 2006, p. 4.

13 For the theory of constitutional moment in detail, see Ackerman, 1993, pp. 31–32 and 266–267.

14 Ginsburg, Elkins and Blount, 2009, pp. 2–3.

15 Ginsburg, Elkins and Blount, 2009, pp. 2–4.

16 Ginsburg, Elkins and Blount, 2009, p. 9.

17 Congleton, 2003, pp. 28–31.

18 E.g. the effect of revolutionary constitution-making on the constitution. See: Scheppele, 2008, pp. 1398–1404.

19 Elster, 1995, pp. 394–395.

20 Gerkrath, 2019, pp. 222–223.

21 See Sauer, 2021.

22 Ginsburg, Elkins and Blount, 2009, p. 9.

23 Elster, 1995, pp. 370–371.

In the examined states, the adoption of a new constitution was almost always related to a time of turbulence. I classified the examined states according to this list (see Table I). From the examined states, the constitutions of the Czech Republic and Slovakia<sup>24</sup> were adopted following the dissolution of Czechoslovakia, after which two new states emerged. The constitutional framers of Slovenia and Croatia also created a new constitution after leaving a former state – in this case, the federation of Yugoslavia. The constitution of Romania was adopted after the regime changes that had swept over Eastern Europe since 1989. The constitutional document of Poland was adopted in 1997 after a long and continuous dispute related to differences in the vision of the state's constitutional system.<sup>25</sup> Serbia and Hungary cannot be classified in Elster's system. The constitution of Serbia was adopted in 2006 as a consequence of the successful independence movement in Montenegro,<sup>26</sup> and the Fundamental Law of Hungary was adopted in 2011 after the governing party achieved the majority needed for adopting a constitution. Hungary was the only state in Central Eastern Europe where the political transition was not accompanied by a new constitution.<sup>27</sup>

New state	Regime collapse	Other reasons
Czech Republic	Romania	Hungary
Slovakia	Poland	Serbia
Slovenia		
Croatia		

**Table I.** Leading reasons to adopt the constitution in the examined states

In the analysed states, the constitutions adopted before the regime change were not democratic and had no real power over the power-wielding actors. The new constitutions became ‘emblems of political liberation’ and “symbols of renaissance of these countries as independent sovereign countries”.<sup>28</sup> However, the development of democracy showed that changing the constitution is not always bad as the turbulence of the change in these states could have been disrupted had the constitution been too rigid to amend. If strengthening democracy is a leading part of change, it is a welcomed one.<sup>29</sup>

24 In fact, the Constitution of Slovakia was adopted before the dissolution of Czechoslovakia, in 1992.

25 The new constitution was related to these debates, and only the process was delayed until 1997; I classified Poland in the regime collapse model as the will to change the constitution was related to that phenomenon.

26 Beširević, 2015.

27 Except for Latvia, where the Constitution of 1922 was reinstated.

28 Elster, Offe and Preuss, 1998, p. 63.

29 Holmes and Sunstein, 1995, pp. 275–277.

Different actors have significant roles in constitutional design. Politicians, international actors and academics can play determining roles in this process. The importance of public participation itself in the procedure has increased in recent years<sup>30</sup>; however, the process is not without risks.<sup>31</sup> As spontaneity and populism can endanger success,<sup>32</sup> extreme secrecy goes against a balanced constitution-making procedure. While public participation could seem excellent at first glance – though without having a real impact on the process, as happened in Zimbabwe<sup>33</sup> – some successful examples can also be found, as was the case in South Africa.<sup>34</sup>

While the US Constitution is generally considered the oldest constitution, it is in fact the oldest modern constitution. It could be seen as a ‘Constitution of the living dead’ as “(...) the founders rule us from beyond the grave”.<sup>35</sup> The oldest constitution still in force is the Constitution of San Marino from 1244. The US Constitution is still one of the most influential – albeit the current constitutional designers have several different paths to choose from, as the migration of constitutional ideas has become more and more universal during the process of constitution-making.<sup>36</sup> Nonetheless, in my view, the older a constitution is, the greater the respect it could achieve in society, if the development of the state can draw from the constitutional text. The second oldest constitution that is still in force is the Constitution of Norway from 1814. These two documents present the storybook examples of the success of the first endeavours in the field of constitution-making. While the durability of both documents is exceptional, the average lifespan of a constitution is only 19 years, according to the in-depth analysis from Elkins, Ginsburg and Melton.<sup>37</sup> If we look at the age of the examined constitutions, the oldest is the Constitution of Croatia from 1990, and the youngest is the Constitution of Hungary from 2012 (see Table II). In our examination, the average age of the constitutions is 24.5 years, which is an excellent result compared to the universal average. However, it could be related to the fact that after the political transition and the dissolution of Yugoslavia, the area was mainly peaceful and without an elemental regime collapse or wars.

The age of a constitution could be a positive sign of constitutional stability, although the real significance of the document is in its social perception: is it part of the life of the citizens? Do the citizens participate in discussions about constitutional questions?

State	Years in force
Croatia	32

30 Hart, 2003, pp. 2–5.

31 Ghai and Galli, 2006, pp. 15–16.

32 As it happened in the case of Iceland, see Gylfason, 2016, pp. 8–11.

33 Hart, 2003, pp. 9–10.

34 South Africa is the symbol of successful public participation. Hart, 2003, pp. 7–9.

35 Whittington, 2002, p. 8.

36 Perju, 2012, pp. 10–11.

37 Elkins, Ginsburg and Melton, 2009, p. 129.

State	Years in force
Czech Republic	29
Hungary	10
Poland	25
Romania	31
Serbia	16
Slovakia	30
Slovenia	31

**Table II.** The age of the constitution in the examined states

### **2.2. Differences between adopting and amending a constitution**

After a new constitution comes into force, the next point of analysis should be related to the document's permanence and flexibility. While the aim of the constitutional framers is to create a text that will endure changing times for several generations,<sup>38</sup> reality shows the need for the possibility of amending the constitution. However, amending the constitution could be a crucial point as the question of the difference between the constituted power and the constituent power emerges.

The general framework of the idea comes from Abbé Sieyès, who wrote a pamphlet in 1789 called 'What is the Third Estate?',<sup>39</sup> distinguishing between constituent power (*pouvoir constituant*) and constituted power (*pouvoir constitué*). The difference between the constitution making power and the constitution amending power was born in the modern constitutions as only the constituent power can create a constitution,<sup>40</sup> and an ordinary legislative power can only amend the constitutional text.<sup>41</sup> Sieyès was not the first to define this method,<sup>42</sup> but he framed it in the situation of French history and culture of his time, which immensely supported the development of the modern constitutional culture. His aim was finding support for the new concepts of nation, sovereignty and constitution.<sup>43</sup> Several authors followed his footsteps and analysed the same question.<sup>44</sup>

In modern constitutions, guidance can be searched in the provisions on the amendment process itself and the existence of eternity clauses. Eternity clauses are provisions of the constitution that cannot be amended, and only the adoption of a new

38 About the rights of the future generations, see Tremmel, 2006, pp. 199–203.

39 Sieyès, 1789.

40 Sieyès, 1789, pp. 12–15.

41 Lopez, 2017, p. 129.

42 See Roznai, 2017, pp. 107–108.

43 Pereira, 2017, pp. 108–109.

44 E.g. Martin, 2013, pp. 1–24; Schmitt, 2008, p. 150; Tushnet, 2015, pp. 639–654, pp. 644–653; Roznai, 2017, pp. 110–113.

constitution can change their substance.<sup>45</sup> If a constitution has an eternity clause, we can distinguish between constituted and constituent power. As the constitutions of the Czech Republic and Romania have explicit eternity clause(s), they can serve as beacon points to accept the distinction between constituted and constituent power. While constitutions generally have provisions on amending the constitution, the rules on the adoption of a new document are much less prevalent. Analysing the constitutional texts of the examined states on the question of adoption and amendment power, the Croatian, Hungarian and Slovak constitutions treat the two processes on the same level, while the other constitutions do not mention the rules of the adoption procedure at all. The Croatian,<sup>46</sup> Hungarian<sup>47</sup> and Slovak<sup>48</sup> constitutions have given this ability to the legislative power without creating a procedure for adoption that is more complex or difficult than that for amendment.

### 2.3.

While the founding fathers or/and mothers aspire to create an enduring constitution that becomes the state's foundation for several generations, reality often changes these plans. When political, social, economic and historical circumstances arise, affecting a state's development, the need for amending the constitutional text may arise. If a constitution is too rigid to amend, the actors may find an informal way to create change, or an entirely new constitution may be adopted.

According to Burgess, the amendment rules are “the most important part of a constitution”, as they determine “whether the state shall develop with peaceable continuity or shall suffer alterations of stagnation, retrogression, and revolution”.<sup>49</sup> While there is merit in his idea, I do not agree with it wholeheartedly, but rather with Klein and Sajó, who state that the amendment rule is the key as “it will allow the opening of the entire constitutional system and eventually its transformation or amendment”<sup>50</sup> While they recognise the unquestionable importance of the amendment rules, they do not present it as the single most significant part of the constitution.

The permanence of a constitution could be related to its flexibility. The quantity of formal amendments grows continuously overall,<sup>51</sup> while the amendment process is so rigid in some countries that there is almost no possibility to change the text formally.<sup>52</sup> If it is too difficult to change formally, and the constitutional amendment needed to cope with the social and political changes cannot be achieved, the informal ways of constitutional amendment come into the limelight, or a need for a new constitution

45 Szakály, 2020a, pp. 8–10.

46 Constitution of Croatia, Art. 81.

47 Fundamental Law of Hungary Art. S).

48 Constitution of Slovakia, Art. 84.

49 Burgess, 1890, p. 137.

50 Klein and Sajó, 2012, p. 12.

51 Ginsburg and Melton, 2015, pp. 689–691.

52 E.g. the Constitution of the United States. See Williams, 1963, pp. 221–238.

emerges. As Kelsen wrote, “there is no legal possibility of preventing a constitution from being modified by way of custom”.<sup>53</sup>

The phenomenon may be related to the power of the juridical interpretation of the constitution in the state; a competent court can support the development of the constitutional system, as has happened in the case of the United States several times.<sup>54</sup> The rigidity of the constitution has a connection with the power of the text’s juridical interpretation.<sup>55</sup> In the states where the role of the judiciary precedes the role of the formal constitutional amendment, the significance of the constitutional amendment process itself comes into question.<sup>56</sup>

As a constitutional amendment is generally a response to an imperfection,<sup>57</sup> the role of amendment to correct the constitutional instrument is one of the most important, although the constitutional character of every state differs. The rigidity of a constitution also depends on the concrete constitutional situation of the state. Both highly rigid and highly flexible regimes could have negative effects, albeit the ideal method differs for every state. Nonetheless, every constitution maker should keep in mind that “the price to be paid for stability is lack of flexibility, and vice versa.”<sup>58</sup>

Nonetheless, while the aim of a constitution ought to be noble, to achieve a better society with the help of these rules, the results may not be perfect in practice. As the political and social reality of a state meets the aim of the constitution makers, the outcome will generally be a compromise.

### **3. The constitutional characteristics of the examined States in the issue of permanence**

#### ***3.1. The possible amendment pathways***

The rules of amending the constitution have great importance in the constitutional system. If one aims to analyse the formal and informal amendments of a constitution, in the case of the formal amendments, a text-based inquiry should come first. Which factors would be useful to examine in this regard?

I chose one of several different possible ideas, which I found the most beneficial for the aim of this chapter. In the work of Albert, pathways are categorised single-track and multi-track. A single-track pathway means that only one amendment process can be used, while in a multi-track pathway, more than one procedure is codified. The other point is the difference in the rules’ latitude. One can distinguish between comprehensive, exceptional and restricted pathways. A comprehensive pathway means that all amendment procedures can be used on every constitutional

53 Kelsen, 2006, p. 260.

54 E.g. in the issue of the same-sex marriages, see the decision of *Obergefell v. Hodges*.

55 Lijphart, 1999, pp. 228–230.

56 Dixon, 2011, pp. 99–102.

57 The phrasing is borrowed from the title ‘Responding to imperfection’: Levinson, 1995.

58 Ekeli, 2007, p. 85.

rule; the exceptional pathway is the same as the comprehensive, but only one special procedure is related to the constitution's special provisions. Finally, in the restricted pathway, all constitutional rules have their defined rule on amendment.<sup>59</sup>

In sum, according to Richard Albert, the amendment pathways are six: comprehensive single-track, comprehensive multi-track, restricted single-track, restricted multi-track, exceptional single-track and exceptional multi-track.<sup>60</sup>

As can be concluded from the results (see Table III), two types determine the procedures of the examined states: the comprehensive single-track pathway and the exceptional multi-track pathway. It can be stated that the five countries who chose the comprehensive single-track pathway decided to create a simple procedure for amending the constitution without making a complex system of amendment rules; by not creating different rules for different provisions, they rejected the possibility of a formal hierarchy between the provisions. Conversely, states where the multi-track pathways are used decide on the greater significance of some constitutional articles by making their amendment rules more difficult, and with this decision, they give special status to these rules; thus, the single-track pathway model will not formally create this hierarchy, but it could evolve only in informal ways.

The other pathway, which was chosen by Poland<sup>61</sup> and Serbia<sup>62</sup> is the exceptional multi-track pathway. In this case, while there is a 'simple' way of amending the constitution, a special rule was created for a single norm or several norms. In Slovenia, the comprehensive multi-track pathway was chosen as the framework for the constitutional amendment.<sup>63</sup>

State	Pathway	Eternity Clause
Croatia	comprehensive single-track	implicit eternity clause
Czech Republic	comprehensive single-track	explicit eternity clause
Hungary	comprehensive single-track	quasi-eternity clause
Poland	exceptional multi-track	-
Romania	comprehensive single-track	explicit eternity clause
Serbia	exceptional multi-track	-
Slovakia	comprehensive single-track	implicit eternity clause
Slovenia	comprehensive multi-track	-

**Table III.** The amendment pathways and eternity clauses of the examined states

59 Albert, 2019, p. 179.

60 Albert, 2019, pp. 179–182.

61 Constitution of Poland, Art. 235.

62 Constitution of Serbia, Art. 203.

63 Constitution of Slovenia, Art. 170.

However, as I see it, another important factor should be taken into consideration while using this matrix: the eternity clauses. If a constitution has an explicit eternity clause,<sup>64</sup> it will create a new category since at least one rule of the constitution cannot be amended according to the text of the constitution. The change can only happen when a new constitution is adopted. To exclude the possibility of amendments of the rules that are the most important to the constitution makers is not a new agenda, as it was used, e.g., in the Norwegian Constitution of 1814.<sup>65</sup>

In the examined countries' constitutions, the Czech Republic and Romania have explicit eternity clauses. While both states took the comprehensive single-track pathway, the eternity clauses create a further observation. Because some of the provisions of the constitution cannot be amended, a hierarchy exists between the constitutional norms. In the case of the Czech Republic, "the essential requirements for a democratic state governed by the rule of law"<sup>66</sup> are protected at a higher level. In the Romanian constitution, the eternity clauses protect human rights, "the national, independent, unitary and indivisible character of the Romanian State, the republican form of government, territorial integrity, independence of justice, political pluralism and official language".<sup>67</sup>

The other type of eternity clause is the implicit eternity clause,<sup>68</sup> which creates limitations on the constitution amending power outside of the constitutional text, typically by the decisions of the constitutional court.<sup>69</sup> From the examined states, the constitutional courts of Croatia and Slovakia found implicit eternity clauses, and the Constitutional Court of Hungary created a special group of provisions, which in my view could be seen as implicit eternity clauses,<sup>70</sup> the so-called achievements of the historical constitution.<sup>71</sup> In Decision 22/2016. (XII. 5.), the Hungarian Constitutional Court stated that the achievements of the historical constitution are the following:

Freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us.<sup>72</sup>

I argue that these achievements are implicit eternity clauses,<sup>73</sup> albeit no decision of the Hungarian Constitutional Court supports this idea. Furthermore, the Hungarian

64 Szakály, 2020a, pp. 9–10.

65 Rasch and Congleton, 2006, p. 537.

66 Czech Constitution, Art. 9(2).

67 Romanian Constitution, Art. 152.

68 Szakály, 2020a, pp. 10–11.

69 E.g. India, Slovakia.

70 Szakály, 2020b, pp. 119–123.

71 Vörös, 2016, pp. 46–48.

72 Decision 22/2016. (XII. 5.).

73 Szakály, 2020a, pp. 14–16.



Constitutional Court stated that international *ius cogens* norms are a limitation on constitutional amendment power.<sup>74</sup>

In Croatia, according to the Constitutional Court,<sup>75</sup> the implicit clauses are the following: unitary and indivisible democratic and social state, popular sovereignty, freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, rule of law and a democratic multi-party system.<sup>76</sup>

In the practice of the Slovak Constitutional Court, the following implicit eternity clauses were found in the material core of the constitution: sovereignty,<sup>77</sup> principles of democracy,<sup>78</sup> rule of law,<sup>79</sup> protection of fundamental rights and freedoms,<sup>80</sup> and taxes, levies and state budget not being subject of a referendum – in connection with fundamental rights.<sup>81</sup>

As the explicit and implicit eternity clauses can support the idea of distinguishing between the different rules of a constitution and creating a hierarchy, they could also help the constitutional interpreter use this hierarchy in the cases that emerge. While the different pathways show the different possibilities of dealing with the constitutional amendments, the fundamental point of the question is the practical use of the different rules, which will be examined in the next subchapter.

### **3.2. The rigidity of the examined constitutional texts**

The rules of constitutional amendment can show the rigidity of the constitution on a textual level. However, a state's political, social, economic and historical environments must be taken into consideration when analysing the practical flexibility of a constitution. On one hand, a simple two-thirds majority requirement can be seen as a weak limitation in itself; if a state has a political system in which such majority cannot be achieved in the parliament, this rule will be rigid. On the other hand, if reaching a two-thirds majority is possible, the constitution could be amended easily.

Different authors have created different systems to measure the rigidity of constitutions. According to the theory of Lutz, after examining 82 constitutional texts, the determining factors are the “length of the constitution and the amendment process”.<sup>82</sup> Tsebelis uses the veto player approach to analyse data from 94 democratic states and reaching the conclusion that “high rigidity makes amendments rare, but low rigidity simply enables amendments, which may or may not occur, (...) low constitutional

74 Decision 61/2011. (VII. 13.).

75 Decision no. U-VIIR-164/2014 of 13 January 2014.

76 Constitution of Croatia, Art. 1–2.

77 PL. ÚS 16/95.

78 PL. ÚS 16/95.

79 PL. ÚS 16/95.

80 PL. ÚS 24/2014.

81 PL. ÚS 24/2014.

82 Lutz, 1994, p. 365.

rigidity produces a higher average rate and higher variance of significant constitutional amendments.”<sup>83</sup>

In their work, Ginsburg and Melton use the concept of constitutional culture to develop their measurement<sup>84</sup> and analyse the methods of other academics to observe the similarities and differences in the results.<sup>85</sup> Lijphart analyses two variables – rigidity and judicial review – in 36 democratic constitutions. According to his study, the two are correlated as a rigid constitution can support judicial review and vice versa.<sup>86</sup>

Lorenz analysed 39 constitutional texts while using some of the earlier ideas in the field to create a measuring system based on a “type of majority rule with the number of voting arenas or actors”.<sup>87</sup> Rasch and Congleton examined the formality and lawfulness of the constitutional amendments,<sup>88</sup> reaching the conclusion that the amendment process affects the stability of the constitutions.<sup>89</sup>

In the field-defining work analysing the endurance of constitutions from Elkins, Melton and Ginsburg, the authors reach the conclusion that a flexible constitution, which is easy to amend, can support the survival of the whole text as it is easier and more-cost effective to reach an agreement for an amendment than to adopt a whole new constitution.<sup>90</sup>

While the above-mentioned works relied on complex mathematical processes for their investigations, I reached the same conclusions by observing only the textual rigidity of the constitutions. For this purpose, I created my own system based on the following principles to analyse this textual rigidity.<sup>91</sup> Only the formal amendments defined in the constitutional text itself were used in the process.

The different methods of constitutional amendment processes are as follows:

- (i) majority (majority of the members of the parliament shall vote for the amendment);
- (ii) bicameral system (two houses of the parliament shall pass the amendment);
- (iii) initiative (who can propose a constitutional amendment in the parliamentary debate);
- (iv) delaying mechanisms (time delay during the amendment process);
- (v) constitutional assembly (special body for the amendment process);
- (vi) moratorium (prohibition of amendments for a specified lapse of time);
- (vii) referendum (popular vote on the amendment).<sup>92</sup>

83 Tsebelis, 2021, p. 14.

84 Ginsburg and Melton, 2015, pp. 699, 709–711.

85 Ginsburg and Melton, 2015, pp. 694–698.

86 Lijphart, 1999, pp. 228–230.

87 Lorenz, 2005, pp. 346–347.

88 Rasch and Congleton, 2006, pp. 540, 550.

89 Rasch and Congleton, 2006, p. 549.

90 Elkins, Melton and Ginsburg, 2009, pp. 99–103.

91 Szakály, 2015, pp. 559–565.

92 Szakály, 2015, p. 559.

As I examined the constitutional texts of the chosen states, the following methods were present in the constitutions (see Table IV). A kind of qualified majority is used in every examined state, with two-thirds being the most common. The second most popular method is the initiative, which is applied in six states. The next is the bicameral system, used in three states, and the referendum, which is compulsory only in Romania, optional in defined cases in Poland and Slovenia and compulsory in some cases in Serbia. Delaying mechanisms are not very frequent as only two of the examined states (Poland and Serbia) have chosen this method. The constitutional assembly and the moratorium are not part of the constitutional amendment process in any of the examined states. While there are some other means of methods, they are so rare that no common point could be found.

Country	majority	bicameral system	initiative	delaying mechanisms	constitutional assembly	moratorium	referendum	others
Croatia	x		x					
Czech Republic	x	x						E
Hungary	x		x					
Poland	x	x	x	x			S	
Romania	x	x	x				x	E
Serbia	x		x	x			S	E
Slovakia	x							
Slovenia	x		x				S	

**Table IV.** Constitutional amendment methods in the examined states

If we measure the textual rigidity of the analysed constitutions by attributing 1 to every type of method used in the text of the constitution, we can get to the following results (see: Table V.).

As can be concluded from the results of the textual analysis, the most rigid of the examined constitutions are the Polish and Romanian (4+1). While the Polish constitution uses the majority, the two chambers, the initiative and delaying mechanisms in every case, and the referendum in special circumstances<sup>93</sup> (exceptional multi-track pathway), the Romanian constitution chose the majority, the two chambers, the initiative and referendum in every instance and there are explicit eternity clauses in the text; thus, the comprehensive single-track pathway must be complemented with

93 Constitution of Poland, Art. 235.

the unamendable clauses as the top of the hierarchy in the question of amending the constitution.

Serbia has 3+2, almost the top, but in my view, the two methods, which can be used in special circumstances, are slightly weaker than a compulsory method, and the Serbian constitution has only three of them – the majority, the initiative and the delaying mechanisms.<sup>94</sup>

The Czech Republic and Slovenia both have 2+1 grade, which means two compulsory and one special method. In the Czech constitutional system, the majority and the two chambers of the parliament is complemented with an explicit eternity clause,<sup>95</sup> which was used in practice to limit the scope of constitutional change. The Czech Constitutional Court used this explicit eternity clause in cases such as declaring a constitutional amendment unconstitutional<sup>96</sup> or going against the Court of the European Union.<sup>97</sup>

In Slovenia, the majority and the initiative are used in every case, and there is a possibility of referendum. What is special about these rules is that Slovenia is the only state in the examination (and in the European Union) where the existing second chamber of the parliament does not need to approve the constitutional amendment. The next on the list are Croatia<sup>98</sup> and Hungary,<sup>99</sup> with two different methods: the majority and the initiative.

While most of the states recognised that the majority in itself is not enough to protect the amendment procedure and decided to use other methods in the constitutional amendment process, the constitution of Slovakia has no other methods for its amendment than the qualified majority, which is a three-fifths majority.<sup>100</sup> This created one of the easiest constitutional amendment processes in Europe and in the world. Nonetheless, the whole picture changed in 2019, when the Slovak Constitutional Court declared a constitutional amendment unconstitutional. The Constitutional Court stated that the amendment was against the material core of the constitution.<sup>101</sup>

While the Slovak Constitutional Court was in fact exceeding its competences with this decision, it was not the first court to choose this path. The ‘genesis’ of implicit unamendability is from the United States,<sup>102</sup> although the most influential case is related to the Supreme Court of India.<sup>103</sup> The Supreme Court of India developed the theory of basic structure, in which the parliament’s power to amend the constitution is limited by the basic structure of the constitution, and the Supreme Court has the

94 Constitution of Serbia, Arts. 203–204.

95 Constitution of the Czech Republic, Art. 9.

96 2009/09/10/ – PL. ÚS 27/9.

97 Komárek, 2012, p. 332; Vyhnánek, 2015, p. 241.

98 Constitution of Croatia, Arts. 147–150.

99 Fundamental Law of Hungary, Art. S).

100 Constitution of Slovakia, Art. 84(4).

101 Drugda, 2019.

102 Roznai, 2017, pp. 39–41.

103 Kesavananda Bharati ... vs State Of Kerala And Anr on 24 April 1973.

authority to examine the constitutional amendments in this view.<sup>104</sup> The idea is not as commonly used in Europe as in Asia, Latin-America and Africa,<sup>105</sup> and constitutional courts generally refrain from overstepping their boundaries and declaring a constitutional amendment unconstitutional.

The Parliament of Slovakia decided to step up against the extension of the competency of the Constitutional Court and adopted a constitutional amendment in 2020 that contained a provision about banning the Constitutional Court from reviewing constitutional amendments.<sup>106</sup> With this move, the parliament opposed the former decision of the Constitutional Court and tried to block the development of the unconstitutional constitutional amendment doctrine.

The formal rules of the constitutional amendment show the standpoint of the constitutional makers in this question; however, as something can be judged only from practical experience, the use of the amendment rules and their frequency should be the next step in the analysis.

### ***3.3. Frequency of constitutional amendments in the examined states***

I studied the amendment rate and the age of the constitution of the examined states (see Table V). The amendment rate is the frequency of constitutional amendments in a state during a defined timeline.<sup>107</sup>

In the textual examination, Poland and Romania were at the top of the list. While the Romanian constitution was amended only once since its promulgation in 1991, the Polish constitution was amended twice in 24 years. The Serbian constitution was amended only once since its adoption and then changed in 2022, in relation with the independence of the juridical system.<sup>108</sup>

The constitution of Romania is one of the most rigid according to the textual analysis, and it was amended only once in 30 years. A connection exists between the hardship of constitutional amendment and the lack of successful amendments; however, the political, social and economic situation of the state also plays an important role. The Romanian constitution was amended in 2003 to make the text compatible with joining the European Union.<sup>109</sup> Some unsuccessful attempts have been made since then,<sup>110</sup> although the crises of the system validate the demand<sup>111</sup>; however, the direction of informal constitutional change became visible in the field. The Romanian Constitutional Court tried to constitutionalise its own competences, with debatable results.<sup>112</sup>

104 Roznai, 2017, p. 44.

105 Roznai, 2017, pp. 47–70.

106 Lalík, 2020.

107 Ginsburg and Melton, 2015, p. 694.

108 Stojanovic, 2022.

109 Iancu, 2019, p. 1050.

110 Blokker, 2013, pp. 10–12.

A failed attempt from 2018: Romania marriage poll: Referendum to ban gay unions fails.

111 Blokker, 2013, pp. 7–16.

112 Selejan-Gutan, 2015, pp. 47–48.

The Polish constitution is hard to formally amend, and when amendments were attempted, a majority to achieve them was lacking several times; nonetheless, the constitution has been amended twice.<sup>113</sup>

The constitution's textual rigidity reached the same number in the Czech Republic, Serbia and Slovenia. If one considers the practical number of amendment rate, the constitution of Serbia is one of the most rarely amended documents in the examined states, with one amendment from the 2006 adoption, while Slovenia is the sixth, with 11 amendments, and the Czech Republic is the fifth, with nine.<sup>114</sup> As Bardutzky mentions, the abstract phrasing of the constitutional provisions is part of the Slovenian constitutional culture, which could be a reason for the rare need for constitutional amendments.<sup>115</sup> There is a dispute in Slovenian academia regarding the possible decision of the Slovenian Constitutional Court on the material core of the constitution and its relations with EU law.<sup>116</sup>

While Croatia and Hungary are on the same level in the field of textual rigidity, only the parliamentary majority and the possible starters of the initiative are considered methods for distinguishing the constitutional amendment from ordinary lawmaking, the practical results of the amending rate are considerably diverse. Croatia is the fourth, and Hungary is the eighth in the level of practical rigidity. In Croatia, the political party with the most members of the parliament, HDS (Croatian Democratic Union) has only 41% of the seats in the parliament in the current political cycle that started in 2020; their coalition partner, the SDSS (Independent Democratic Serb Party) only has three seats<sup>117</sup>; and the majority needed for a successful constitutional amendment is two-thirds of all members of parliament. Another factor of the growing stability could be “the growing importance of both the Constitution and the Constitutional Court”.<sup>118</sup> The Croatian Constitutional Court has an activist approach that was built gradually<sup>119</sup> and open to external influences – especially the system of the European Court of Human Rights.<sup>120</sup>

The most frequently amended constitution among those examined is the Hungarian Fundamental Law. It was amended nine times during the 10 years since it entered into force.<sup>121</sup> The rigidity of the textual methods is not the lowest but the same as the Croatian. It can be seen that a rule providing for a relatively rigid system in a state – Croatia – could create a highly flexible one if the circumstances make it possible. As the governing party in Hungary has the two-thirds majority needed for a successful

113 Biernat and Kawczyńska, 2019, pp. 749–753.

114 At the time that this chapter was written, no official English data were available about the new text of the constitution that took effect on 1 September 2021.

115 Bardutzky, 2019, p. 692.

116 Kos, 2021, pp. 107–111.

117 See <https://www.sabor.hr/en/mps/statistical-indicators-mps>.

118 Lang, Đurđević and Mataija, 2019, p. 1140.

119 Baric, 2016, pp. 27–36.

120 Capeta, 2020, p. 7.

121 About the first seven amendments, see Drinóczi, Gárdos-Orosz and Pozsár-Szentmiklósy, 2019, pp. 12–18.

amendment procedure, amending the constitution becomes almost as easy as amending a cardinal law.<sup>122</sup>

In Hungary, the methods are the same as in Croatia, but the governing parties – the Fidesz, Hungarian Civic Union and the Christian-Democratic People's Party (KDNP) – have 133 of the 199 seats of the parliament,<sup>123</sup> slightly achieving the majority needed for constitutional amendment. This proportion was also gained in the elections of 2010<sup>124</sup> and 2014.<sup>125</sup> Some of the constitutional amendments were mainly formal or only related to one issue<sup>126</sup>; nonetheless, some of the amendments were lengthy and touched upon several significant questions of state life and human rights.<sup>127</sup> The frequent amendment of the constitution is against its purpose of stabilising the constitutional system and giving a secure basis for the state.<sup>128</sup> According to the Venice Commission regarding the Ninth Amendment of the Fundamental Law of Hungary, there are concerns about some amendment provisions.<sup>129</sup>

While the textual method of amendment is the easiest in Slovakia, with only a three-fifths majority needed in the parliament, and the constitution has been amended several times since entering into force, it is still harder to implement than in Hungary. Gaining the support of 90 members of the parliament happened quite often in Slovakia,<sup>130</sup> and the 20th amendment to the constitution was made in 2020.<sup>131</sup>

State	Rigidity	Ranking	Stability grade	Ranking
Croatia	2	5.	5,33	4.
Czech Republic	2+1	3.	3,22	5.
Hungary	2	5.	1	8.
Poland	4+1	1.	8,33	2.
Romania	4+1	1.	15,5	1.
Serbia	3+2	3.	8	3.
Slovakia	1	7.	1,43	7.
Slovenia	2+1	3.	2,58	6.

**Table V.** The rigidity and stability ranking of the examined states

122 Pozsár-Szentmiklósy, 2017, pp. 286–289.

123 Distribution of parliamentary mandates, 2018. See <https://www.parlament.hu/web/house-of-the-national-assembly/distribution-of-parliamentary-mandates>.

124 See <https://static.valasztas.hu/dyn/pv10/outroot/vdin2/en/l50.htm>.

125 See [https://static.valasztas.hu/dyn/pv14/szavossz/en/l50\\_e.html](https://static.valasztas.hu/dyn/pv14/szavossz/en/l50_e.html).

126 As it was in the case of the third and the eight amendments.

127 As it was in the case of the fourth, the fifth and the ninth amendments.

128 Szakály, 2020b, p. 154.

129 CDL-AD(2021)029 pp. 20–22.

130 Lálík, 2017, pp. 126–135.

131 Drugda, 2020.

## 4. Conclusions

As can be concluded from the analysis, a difference exists between the role of the ordinary lawmaker and the constitution maker. The members of the parliament are chosen by the people for reasons other than what they hold important in the case of a new constitution.<sup>132</sup>

Another difference can be found in the degree of respect for the constitution itself as the significance of the document in the life and beliefs of the citizens could affect the lifespan of the constitution.<sup>133</sup> The results of the analysis suggest that the following can be stated about the formal and real rigidity of the examined states' constitutions.

A similarity exists between the rigidity of the formal rules of constitutional amendment and the frequency of the actual constitutional amendments only in the case of Serbia. The other exception is one of the states with the most rigid rules of constitutional amendment, Romania, also gained the first place in the stability grade. All the other states achieved different rankings in the case of rigidity of the formal rules of constitutional amendment versus the frequency of the actual constitutional amendments, which show that while the formal rules on constitutional amendments can guide perceptions of the constitution's flexibility, the reality almost always differs. As a seemingly rigid constitution can be amended frequently if the circumstances of the state allow it, e.g. in the Czech Republic, a lighter rule on the constitutional amendment can result in a rigid system if the will to amend the constitution does not emerge, e.g. in the case of Serbia. Moreover, the same formal rules can produce different rigidity, as in the case of Croatia and Hungary.

It can be stated that ultra-rigid and ultra-flexible constitutions can both be considered a failure; the two extremes are not beneficial for a democratic system<sup>134</sup> as "a democratic constitution's amendment process has to allow reforms that advance broad interests to be adopted, without undermining its practical value as a standing routine for advancing majority interests and protecting minorities".<sup>135</sup> The delicate balance between rigidity and flexibility must be found in every case as "(...) every constitutional system should be able to adapt to future changes, without sacrificing the protection it requires as the most important foundation of a modern state and its people".<sup>136</sup>

132 Ginsburg, Elkins and Blount, 2009, p. 12.

133 Ginsburg and Melton, 2009, p. 700.

134 Albert, 2019, p. 98.

135 Rasch and Congleton, 2006, p. 539.

136 Bekink, 2004, p. 672.



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# Constitutional Values and Constitutional Identity in National Constitutions

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## ABSTRACT

National constitutions are the basis of our constitutional systems. The question is, however, whether each European constitutional system is the same or whether, on the contrary, they are all unique. The answer is twofold. Of course we might have the same values, the same principles, but we have unique characteristics and we have our own values as well. Each constitutional system has its own specific characteristics, based on the history of the constitutional community and the constitutional system itself.

Reactions to certain events in history have shaped the constitutional community and the identity of the constitutional state. On this basis, it is possible to identify specific features that are specific to a given constitutional system, i.e. elements of its identity. At the same time, the constitutional system carries certain social and constitutional values which also define the system itself. We call these constitutional values, which could be different state by state, nation by nation and which created the idea of unity in diversity in Europe.

## KEYWORDS

identity, European values, national values, constitutional values, constitutional identity, national identity, national constitution.

## 1. Identity in general

The rules set out in a constitution, in the legal sense,<sup>1</sup> are the most fundamental legal norms that constitute the fundamental order of a state-organised society,<sup>2</sup> i.e. that establish the lasting fundamental order by regulating the organisation, exercise and control of state power<sup>3</sup> according to defined principles and requirements.<sup>4</sup> In the legal sense, the constitution as a fundamental law thus expresses the essence of the democratic order of the state, defines its institutional forms, the requirements of the rule of law, fundamental rights and their guarantees as

1 Bulmer, 2014, p. 2.

2 Petrétei, 2011, p. 48.

3 Zeller, 2005, p. 42.

4 Cf. Petrétei, 2011, pp. 99–155; Dorsen et al., 2003, pp. 10–12.

well as the purposes, means, organisation and limits of public power.<sup>5</sup> However, according to the value-centred conception of it, the constitution is more than a set of fundamental norms: it is a catalogue of principles and values<sup>6</sup> on which the state is established.

In this value-based approach, the constitution is both a means of popular expression and a reflection of the cultural heritage of the people,<sup>7</sup> which, however, raises the problem:<sup>8</sup> is it permissible for the constitution to contain the values laid down by the legislator (*prescriptive constitution*), or must it be value-neutral (*procedural constitution*)?<sup>9</sup>

It is worth noting that the hermetic separation between value-neutral and ‘value-oriented’ constitutions is more a theoretical category rather than a scale between two endpoints on which each constitution can be placed according to its value-oriented nature (in the case of Hungary, the former constitution can be seen as value-neutral, while the Fundamental Law has an explicit value-oriented character.) The purpose of this paper is not to take a position on the need for value neutrality in a constitution; rather, it does aim to examine the value content of the constitutions of some Central European States. At the same time, it is worth noting that the values already enshrined in the constitution are closely linked to the question of constitutional identity as the values enshrined in the constitution can shape the society that gives it life and vice versa. The constitution can only enshrine values that the constitutional community is able to embrace.

We must ask two basic questions about the values in the constitution: what do we consider to be values, and whose values are they?<sup>10</sup> However, these questions – or rather their answers – change fundamentally if they are not viewed from within the constitutional system (the mutual, mutually shaping relationship between the constitution and the society that gives it life, and the value-shaping influence (function?) of the constitution on society is examined by Habermas in his theory of constitutional patriotism.<sup>11</sup>

As a Hungarian author, Balázs Majtényi writes, the question ‘indoors’ is whether it is permissible for the constitution to declare defining principles – moral, historical, religious etc. – and considerations defined by the lawmaker and held by certain strata of the community to be constitutionally protected values at the level of the constitution.<sup>12</sup> In this case, one wonders whether there exists a homogeneous community that embraces these values or a ‘constitutional minority’ that does not embrace them.

5 Takács, 2007, pp. 28–29.

6 Cf. Ádám, 2010, pp. 115–127.

7 Takács, 2007, p. 28.

8 For a possible approach to the values enshrined in the constitution, see, e.g., Majtényi, 2017.

9 Bulmer, 2014, pp. 6–7.

10 Majtényi, 2017, pp. 5–11; Petréttei, 2011, pp. 147–157. On the values enshrined in the Fundamental Law of Hungary, see Smuk, 2013, pp. 446–463.

11 Habermas, 1976.

12 Cf. Majtényi, 2017, pp. 6–7.



If we start to look at these issues from an external perspective, at the level of European integration, the question is not whether there are, or can be, values at the level of the constitution, but what they are. What are the social, cultural, political, institutional-historical, etc. attributes that define the constitutional and political system of a state which, as a Member State, no longer exists in a “vacuum” but as part of a community? This perspective raises the question of the European Union as a community of values, and the idea of a European constitutional heritage as a single set of values that binds the Member States together.<sup>13</sup> However, in addition to a limited common set of values (the set of ‘European values’ in the Treaties<sup>14</sup>), each Member State also has its own values: individual attributes, arising from historical specificities, which define the constitutional system of a given Member State and which are not necessarily recognised in other Member States, or perhaps more importantly, are recognised with different content and varying levels of importance.

Take, for example, the protection of human dignity, which undeniably defines the entire European constitutional space both at the level of integration and at the level of member states. Germany, however, has enshrined the protection of human dignity in an eternity clause and declared it to be an immutable, fundamental attribute of the constitutional system. This high level of protection does not necessarily mean that the protection of human dignity in Germany is currently stronger or different from that in other European member states. The value to be defended is the same as anywhere in the European integration scheme, but social sensitivity and historical perspective make it different in different countries.<sup>15</sup> A similar phenomenon can be found in France and laicity,<sup>16</sup> and the list could go on. In fact, it would be difficult to identify and fully compile what exactly each European member state considers to be constitutional values given its constitutional traditions; the same concepts may have different and sometimes changing meanings in member states according to their historical perspectives (within the framework of the present examination, we attempt to do so only based on the constitutions of the Central European states, without claiming completeness.)

The need to protect these attributes, which differ from one member state to another, is the central phenomenon that has led to the revaluation of the concept of constitutional identity.<sup>17</sup> As the Hungarian author Tímea Drinóczi states, constitutional identity is primarily to be found in the provisions of national constitutions,

13 See Láncoš, 2013, pp. 153–170.

14 E.g. Art. 2 of the TEU, which states, “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail”.

15 Cf. Müller, 2016, pp. 73–79.

16 Cf. Levande, 2016, pp. 71–72.

17 Drinóczi, 2018, pp. 4–5.

which at the same time carry the specificity of the constitutional system (order) in a globalising context. The European significance of constitutional identity is thus created by the supranational community of values, in which each constitutional system must designate its own uniqueness, which is made possible by the value-bearing nature of the constitution.

All further issues to be discussed around constitutional identity, including its legal relevance, revolve around these two factors. The phenomenon of the valorisation of constitutional identity was inevitably triggered by the supranational environment, which entailed the development of integration into a community of values. This also means that the role of national constitutions seems to be supplemented by the protection of the institutions and values of the constitutional (and political) order, which is to be protected within the integration process and is specific to the member state concerned, and which is shaped in the course of organic constitutional development.

## 2. Constitutional identity<sup>18</sup>

In 1995, Michel Rosenfeld formulated the concept of constitutional identity as follows: “To create a constitutional identity that will endure over time, it is essential to weave together the past of its creators, our own present and the future of generations yet unborn”.<sup>19</sup>

If the treatment of the concept of constitutional identity is to be permanent, both sides – national and European – should show due consideration and mutual respect. The Constitutional Court should adhere to the guidelines promulgated by the Court of Justice of the European Union, and the Court of Justice of the European Union should provide guidelines, but not put a brake on national courts.<sup>20</sup>

These thoughts come from the President of the Czech Constitutional Court, Pavel Rychetsky, in 2017, 3 years before the German Federal Constitutional Court’s PSPP decision (Public Sector Purchase Programme of the European Central Bank), in which the German Court declared the decision inapplicable to itself on the grounds of a violation of German constitutional identity and the ultra vires nature of the Court of Justice of the European Union’s (CJEU) decision.<sup>21</sup>

A few decades ago, constitutional identity was an obscure concept that interested only a few scholars of European constitutional law, and it was almost non-existent

18 Drinóczi, 2020.

19 Rosenfeld, 1995, p. 1049.

20 Rychetsky, 2017, pp. 95–98.

21 See case C-493/17.

in the practice of the constitutional courts of European integration, even though the legal framework was already taking shape in those decades. However, the concept has now become a much researched – and contested – area and dimension of European constitutional law, not as a ‘scientific fad’ but rather as a consequence of the historically young but unique nature of European integration and its identity crisis.<sup>22</sup> The content and applicability of constitutional identity in European integration are linked to the direction of integration and its future.

In the second half of the twentieth century, the concept of constitutional identity was conceived in a context radically different from that of today. Its definition is nuanced by the fact that the Anglo-Saxon – and especially the American – interpretation of the term is also applied in a context that is significantly different from the European one. As regards the European interpretation, the concept of constitutional identity has in recent years become intertwined with the constitutional relationship between the European Union and its member states, which has made the concept itself as controversial as the system of relationships to which it is applied.<sup>23</sup>

Nevertheless, it must be taken as a fact<sup>24</sup> that in recent years constitutional identity has become a concept of practical importance in the practice of national constitutional courts within the European Union, and its significance is constantly growing, thus placing it at the centre of the academic discourse on constitutional law and European law.<sup>25</sup> This is because, within the system of European multilevel constitutionalism, a long-standing central debate of integration is the clash between the EU legal order and the constitutional rules<sup>26</sup> of the member states.<sup>27</sup> Although the Court of Justice of the European Union (hereinafter referred to as the CJEU) in *Costa v. E.N.E.L.* ruled<sup>28</sup> in general that member states cannot invoke the rules of national constitutions against integration, since the CJEU’s landmark decision, it has been evident that the rules established by the CJEU’s decision cannot stand without limits. Member states do not accept the absolute dominance of EU law over national constitutions, even more so since the Lisbon Treaty itself has since enshrined the protection of the fundamental constitutional specificities of the member states in Art. 4(2) TEU, which states that the European Union shall respect the national identities of the member states. The German Federal Constitutional Court (GFCC) has a particularly significant practice in the field of identity, which began to emerge with the well-known *Solange* decisions and the *PSPP* decision of 5 May 2020 can be considered a further milestone.

22 Sigmund, 2006, p. 66.

23 Cf. Manurung, 2015, pp. 15–16.

24 Cf. Chronowski, 2015, pp. 20–27.

25 Belov, 2017, p. 74.

26 Belov, 2017, p. 76.

27 Trócsányi, 2014, p. 474.

28 C-6/64 – *Flaminio Costa kontra E.N.E.L.*

At present, the prevailing view is that the European concept of constitutional identity must be interpreted by the constitutional courts of the member states (supreme courts with the power to interpret the constitution) as the authentic – *erga omnes* – interpreters of the constitution of the member states, and this practice must be based on national constitutions and the constitutional values enshrined in them.<sup>29</sup>

In this chapter, we focus on the constitutional identity and constitutional values of the countries examined.<sup>30</sup> However, with regard to constitutional identity in relation to national constitutions and constitutional values, we should first note the following:

- (i) The source of constitutional identity is the homogeneous human group – the demos – as an autonomous entity capable of forming a nation, and a state that, after the period of the natural constitution,<sup>31</sup> establishes its own constitutional order for the purpose of structural self-organisation.
- (ii) This conception of the nation as a homogeneous community, approached from the point of view of identity formation, can be called a constitutional community with its own values.
- (iii) Sovereignty is the fundamental characteristic of the entity created by the constitutional community (the state), which is ultimately the mapping and concentration of the right of self-determination, and the right of choice, which is the source and precondition of the creation of the state structure and social order, i.e. the constitutional system.
- (iv) The formation of a constitutional structure is a necessary consequence of the socialisation of the constitutional community, which, however, presupposes that the structure formed must correspond to the characteristics of the society that gives rise to it: the members of the constitutional community must be able to identify with the structure created and thus be able to accept it, that is, the collective identity of the community must be reflected in the structure it creates.
- (v) On the one hand, the constitution is the source of the state and social order in which the constitutional community exists, and on the other hand, it embodies it: the constitution (inseparably united with the source of its existence) also becomes the source and embodiment of state sovereignty.
- (vi) The constitutional system created by a constitutional community calls into being the values, institutions and social organisational principles specific to that constitutional community, which make it unique, characterise and define not only the constitutional community but also the constitutional system itself.

29 E.g. Rychetsky, 2017; Levade, 2016; Decision 22/2016. (XII. 5.) AB of the Hungarian Constitutional Court, etc.

30 Czech Republic, Slovakia, Croatia, Hungary, Poland, Slovenia, Romania, Serbia.

31 Cf. Deli, 2018.

- (vii) These values, institutions and principles are determined by the identity of the constitutional community (national identity) and by the confrontational relationship between all the factors that make up the constitutional order (constitutional community, constitutional power and constitution).
- (viii) It is only through this confrontational relationship that some elements of constitutional identity can be understood, which is also determined by the evolutionary process that the constitutional order undergoes from its existence.

The concept of constitutional identity could perhaps be best understood by comparing the theories of two leading authors in this field: Michel Rosenfeld and Gery J. Jacobsohn. Rosenfeld lays a solid theoretical foundation based on Hegelian philosophy, while Jacobsohn's system allows us to trace the practical realisation of constitutional identity and, through this, to understand its nature.<sup>32</sup>

Finally, the concept of constitutional identity within the European Union can be understood as the self-definition of the constitutional systems of the member states: a system of fundamental constitutional values, principles and institutions with historical origins that define the constitutional arrangements and whose respect is an obligation of the Union under Art. 4 TEU. Constitutional identity is also a quality that goes hand in hand with the constitutional system (order) and embodies its uniqueness, which is manifested in national constitutions as a result of the confrontational relationship between the constitutional community, the constitutional power and the constitution itself.

### **3. Constitutional identity and constitutional values in the states of the CEE region**

Art. 9 of the constitution of the Czech Republic contains an eternity clause on the constitutional system defined by the rule of law.<sup>33</sup> The Czech Constitutional Court, in its Lisbon decision (PL. ÚS 19/08), outlined its position that the transfer of powers to an international organisation cannot violate the essence of the republic on Art. 9 of the constitution. In the Lisbon judgement, the panel did not make any reference to constitutional identity<sup>34</sup> or constitutional values, but it did in the 'Slovak pension case' (decision ÚS 5/12). In this decision, the Czech Constitutional Court referred back to its earlier Lisbon ruling, essentially drawing a parallel (or more

32 See Tribl, 2020; Polzin, 2016, pp. 411–438; Polzin, 2017.

33 Art. 9 (1) This Constitution may be supplemented or amended only by constitutional acts. (2) Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible. (3) Legal norms may not be interpreted so as to authorise anyone to do away with or jeopardise the democratic foundations of the state.

34 But mentioned constitutional values; see Par. 120 of the judgement.

precisely, a common intersection<sup>35)</sup> between constitutional identity and Art. 9 of the constitution.<sup>36)</sup>

Based on the Croatian constitution, the Croatian Constitutional Court in case U-VIIR-164/2014 upheld the indivisible, unitary, democratic state system, popular sovereignty, freedom and equality of rights, equality of nationalities and genders, respect for peace, social justice, respect for fundamental rights, the sanctity of property rights, the preservation of a sustainable environment and the principles of the rule of law and pluralism as constitutional values and quasi-eternity clauses. The Constitutional Court has addressed the issue of constitutional identity in several decisions,<sup>37)</sup> in which the fundamental constitutional principles and values, the structural organisation of the Croatian state, the idea of a social state, the protection of national minorities and the democratic exercise of power can be considered elements of the constitutional identity of Croatia.

In accordance with the practice of the Slovak Constitutional Court (Pl. ÚS 24/2014 and Pl. ÚS 7/2017), the provisions of paras 1.1, 12.1 and 93.3 of the Slovak constitution enjoy special protection. On this basis, special protection is given to provisions relating to sovereignty, the democratic exercise of power, the rule of law, the protection of fundamental rights and freedoms and the parts of the state budget that affect the exercise of fundamental rights. Based on the decisions of the Slovak Constitutional Court in Constitutional Identity II ÚS 171/2005, III ÚS 427/2012 and Pl. ÚS 7/2017, the Slovak constitutional identity includes the person of the president of the republic, who expresses and embodies statehood and sovereignty, the republican form of state, the democratic exercise of power, the rule of law and the protection of fundamental rights and freedoms.

Two decisive elements in the practice of constitutional identity in Hungary are the Seventh Amendment of the Fundamental Law, adopted by the National Assembly on 20 June 2018, which enshrines the protection of constitutional identity in the National Avowal and Art. R), and the Constitutional Court's decision No. 22/2016 (XII. 5.) AB. It is worth noting that Hungary was the first member state of the European integration to enshrine the protection of constitutional identity at the constitutional level. The Hungarian Constitutional Court considered the wide range of constitutional values

35 The Constitutional Court derives the constitutional identity of the Czech Republic from its common past with the Slovak Republic. Cf. Decision No 5/12 ÚS, Chapter VII.: "...the Constitutional Court in its statement expressed the expectation that, at least in order to preserve the appearance of objectivity, the ECJ would familiarise itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic, which it draws from the common constitutional tradition with the Slovak Republic, that is from the over seventy years of the common state and its peaceful dissolution, i.e. from a completely idiosyncratic and historically created situation that has no parallel in Europe".

The text of the decision is available in English: [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/Pl%20US%205-12.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%205-12.pdf).

36 For a detailed analysis of Czech practice, see Drinóczy, 2016, pp. 10–11; Pítrová, 2013.

37 Decision U-IP-3820/2009, Decision U-IP-3826/2009, Decision U-I-3597/2010, Decision U-VIIR-5292/2013, Decision U-VIIR-1159/2015, Decision U-II-6111/2013.

enshrined in the Fundamental Law as the source of constitutional identity. In the above-mentioned decision, the Constitutional Court stated the following:

The constitutional self-identity of Hungary is not a list of static and closed values, nevertheless many of its important components – identical with the constitutional values generally accepted today – can be highlighted as examples: freedoms, the division of powers, republic as the form of government, respect of autonomies under public law, the freedom of religion, exercising lawful authority, parliamentarism, the equality of rights, acknowledging judicial power, the protection of the nationalities living with us. These are, among others, the achievements of our historical constitution, the Fundamental Law and thus the whole Hungarian legal system are based upon.<sup>38</sup>

Poland's practice on constitutional identity and constitutional values is based on the Polish Constitutional Tribunal's judgement K32/09 of 24 November 2010 (the so-called Lisbon decision).<sup>39</sup> The Polish Lisbon decision basically was founded on Polish constitutional values and principles, the sovereignty of the state and constitutional identity. The focus of the Polish Constitutional Tribunal's decision was on the transferability of powers to the European Union and the primacy of European Union law. With regard to constitutional identity and constitutional values, the tribunal stated,

The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on. (...) Therefore, constitutional identity is a concept which determines the scope of excluding – from the competence to confer competences – the matters which constitute the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences.<sup>40</sup>

38 Decision 22/2016 (XII. 5.) AB [65].

39 The Decision is available in English at: [https://trybunal.gov.pl/fileadmin/content/omowienia/K\\_32\\_09\\_EN.pdf](https://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf).

40 K32/09 of 24 November 2010.

In its decision, the Constitutional Tribunal examines and compares European values and Polish constitutional values, citing the preamble of the Polish constitution as one of the sources of constitutional values.<sup>41</sup>

According to the Polish Constitutional Tribunal, the “conferral of competences” is one of the means of implementing constitutional values and fulfilling the duties assigned to the state, and the conferral of competences makes sense only when it leads to better implementation of constitutional values and better fulfilment of constitutional duties. The Tribunal also noted that Poland has a constitutional obligation to refrain from conferring competences on an international organisation if such conferral does not serve better implementation of constitutional values and better fulfilment of constitutional duties. Finally, the decision of the Polish Constitutional Tribunal states that Art. 90 of the constitution should serve the effective implementation of constitutional values and the effective fulfilment of constitutional duties, but the application of that article is subject to evaluation from the point of view of those values and duties.<sup>42</sup>

The Constitutional Court of Slovenia does not apply the concept of constitutional identity in its practice; however, it is worth mentioning the preamble of the Constitution of Slovenia, according to which

proceeding from the Basic Constitutional Charter on the Sovereignty and Independence of the Republic of Slovenia, and from fundamental human rights and freedoms, and the fundamental and permanent right of the Slovene nation to self-determination; and from the historical fact that in a

41 According to the preamble of the Constitution, “Having regard for the existence and future of our Homeland, Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, We, the Polish Nation – all citizens of the Republic, Both those who believe in God as the source of truth, justice, good and beauty, As well as those not sharing such faith but respecting those universal values as arising from other sources, Equal in rights and obligations towards the common good – Poland, Beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, Recalling the best traditions of the First and the Second Republic, Obligated to bequeath to future generations all that is valuable from our over one thousand years’ heritage, Bound in community with our compatriots dispersed throughout the world, Aware of the need for cooperation with all countries for the good of the Human Family, Mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland, Desiring to guarantee the rights of the citizens for all time, and to ensure diligence and efficiency in the work of public bodies, Recognising our responsibility before God or our own consciences, Hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity in the strengthening the powers of citizens and their communities. We call upon all those who will apply this Constitution for the good of the Third Republic to do so paying respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others, and respect for these principles as the unshakeable foundation of the Republic of Poland”.

42 K32/09 of 24 November 2010.



centuries-long struggle for national liberation we Slovenes have established our national identity and asserted our statehood.

However, in 2011, the Constitutional Court of the Republic of Slovenia, instead of other values or self-determination, placed human dignity at the centre of the constitutional order in its decision on the ‘Tito street’ case.<sup>43</sup> In its decision, the Slovenian Constitutional Court stated that the Republic of Slovenia is defined by the principle of democracy as a constitutional democracy in which the human being and dignity lie at the heart of its existence and functioning and that human dignity is at the centre of the country’s constitutional order. The source of the statements of the Constitutional Court was Art. 1 of the constitution, which specifies that Slovenia is a democratic republic.<sup>44</sup>

In this context, we also should mention Art. 3 of the Slovenian Constitution, which states,

Pursuant to a treaty ratified by the National Assembly by a two-thirds majority vote of all deputies, Slovenia may transfer the exercise of part of its sovereign rights to international organisations which are based on respect for human rights and fundamental freedoms, democracy, and the principles of the rule of law and may enter into a defensive alliance with states which are based on respect for these values.

In the commentary on the constitution of Slovenia, Kaučič states that Slovenia can transfer part of its state sovereignty (on international organisations), with the values laid down in the foundations of the constitutional order (respect for human rights and fundamental freedoms, democracy and the principles of the rule of law) being set as a condition for this. With this claim, he implicitly acknowledges that respect for human rights and fundamental freedoms, democracy and the principles of the rule of law are core constitutional values.<sup>45</sup>

When we look at constitutional values and constitutional identity in Romania, we must first look at Art. 1 of the constitution, which states that (1) Romania is a sovereign, independent, unitary and indivisible national state; (2) the form of government of the Romanian state is a republic; (3) Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens’ rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values in the spirit of the democratic traditions of the Romanian people and the ideals of the Revolution of December 1989 and shall be guaranteed; (4) The state shall be organised based on the principle of the separation and balance of powers – legislative, executive and judicial – within the framework of constitutional democracy.

43 U-I-109/10 from 26 September 2011.

44 See more: Kleindienst, 2017, pp. 117–137.

45 See Kaučič, 2011, pp. 78 and 84–88.

However, it should be noted that Art. 1 of the constitution is not the only article to be examined in relation to the constitutional values and constitutional nationalism in Romania. Art. 4 of the constitution declares that the state is “founded upon the unity of the Romanian people”. According to Art. 6, “The State recognises and guarantees for members of the national minorities the right to preserve, develop, and express their ethnic, cultural, linguistic, and religious identity”.<sup>46</sup>

The Romanian Constitutional Court’s case law could be considered determining regarded to the concept of constitutional identity. One of the most important decisions of the court is Decision No 683/2012, in which the Constitutional Court applied the concept of constitutional identity and formed a constitutional limit in the exact cases of the application of EU law (decisions No 64/2015 and DNo 887/2015 of the Romanian Constitutional Court could be considered related cases.) One of the latest decisions of the court – No 390/2021<sup>47</sup> – should also be mentioned. In this decision, the Constitutional Court of Romania, based on constitutional identity, stated that it is empowered to ensure the supremacy of the Fundamental Law on the territory of Romania.<sup>48</sup>

Based on Art. 1 of the Serbian Constitution, the Republic of Serbia “is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values”. These values can be considered the source of Serbia’s constitutional identity. However, the whole picture of the Serbian constitutional identity is more complicated. As Aleksandra Varga-Kocsicska writes,

efforts to create a new image for Serbia after the fall of the Milošević regime in 2000 are fundamentally linked to the negotiations on Serbian “Europeanness” and the traditional national values promoted since the 1980s. The symbolic practices through which the post-2000 Serbian national identity was negotiated and maintained are of a conciliatory nature.<sup>49</sup>

## 4. Conclusion

Constitutional values and constitutional identity, as we saw earlier, are linked at several points. One could say that constitutional values create the basis through which constitutional identity can be formed; however, defining constitutional values

46 In the framework of constitutional values in Romania, Arts. 4, 13 and 32 of the Constitution could be noted. See more: Suteu, 2017, pp. 413–435.

47 The decision is available in English: [https://www.ccr.ro/wp-content/uploads/2021/07/Decizie\\_390\\_2021\\_EN.pdf](https://www.ccr.ro/wp-content/uploads/2021/07/Decizie_390_2021_EN.pdf).

48 It should be noted that the Romanian Constitutional Court’s practice based on the case law of the German Federal Constitutional Court. See Case 2 BvE 2/08, Cases 2 BvR 859/15, 2 BvR 1651/15, 2 BvR 2006/15 and 2 BvR 980/16.

49 Varga-Kocsicska, 2020, pp. 196–212.

is perhaps much easier than defining constitutional identity. The reason is simple: constitutional values are explicit in national constitutions. It is from these values that the constitutional identity is usually derived, usually with the intervention of the constitutional courts. Many theoretical and practical debates have arisen on constitutional identity not only in jurisprudence but also in the practice of national constitutional courts and the CJEU.<sup>50</sup> Debates about constitutional values are less scientific but more social or political. If one considers the constitutional values of a state in isolation, one must usually look for the historical reasons leading to the consideration that the lawmaker had enshrined in the constitution something that we would later consider a constitutional value.

In a general sense, a constitution is a legally regulated order of social coexistence, which must, however, meet the criteria of constitutionality.<sup>51</sup> According to the Hungarian author Gergely Deli, a constitution is understood as a unified and self-perpetuating order that contains the two agreements underpinning human coexistence: the association of people with each other on the one hand and their submission to the state on the other.<sup>52</sup> Deli – with reference to Carl Schmitt – distinguishes between the era of natural and relative constitutions,<sup>53</sup> stating that the latter necessarily rests on the former.

According to this view, the constitutional order in the age of natural constitutions is the order of natural human coexistence given by nature itself, and the coexistence of human beings is the natural consequence of the struggle for survival: the hierarchical order of the community of human beings thus created, based on the endowments, constitutes the natural constitution, which is best able to fulfil its primary function of protecting the community.<sup>54</sup> A community based on a natural constitution is naturally determined by the qualities of its individuals, i.e. the order of the community is determined by the individuals who constitute it and who submit to it.<sup>55</sup>

In other words, the identity of the individuals constituting the community determines the identity of the community itself (i.e. collective identity formation), so that the protective function of the community can be realised as effectively as possible, i.e. the functioning of the community is as close as possible to the individual to allow them to submit to it as fully as possible.

When the above order based on the protective function is institutionalised, we enter the era of relative constitutions.<sup>56</sup> In the era of relative constitutions, the state no longer seeks to merely protect the members of the community, but it seeks to distribute the (finite) goods available according to social justice.<sup>57</sup> It must do so, however,

50 See the cited decisions and sources above as well as Faraguna, 2017, pp. 1618–1640.

51 Takács, 2007, p. 22.

52 Ibid, p. 121.

53 Ibid, pp. 121–149.

54 Ibid, pp. 121–126.

55 Deli, 2018, pp. 125–129, 134–140.

56 Deli, 2018, p. 127.

57 Ibid, pp. 124–125.

in an order that best suits the nature of the persons creating and constituting the state, i.e. the community. This brings us to a kind of yardstick for constitutions: how well does the constitution correspond to the nature of the community that calls it into being? To what extent is the constitutional community able to accept constitutional order? To what extent do the values enshrined in the constitution reflect the values of the constitutional community?

The fundamental purpose of the constitution is thus to guarantee the functioning of the state by creating a sustainable order between the state and its citizens and between the citizens themselves, which in the postmodern constitutional era has been complemented by the unconditional guarantee of human dignity.<sup>58</sup> This question, however, leads us to the system of requirements of constitutionalism, i.e. the criteria by which the constitution must fulfil its natural purpose, namely to ensure public order.<sup>59</sup>

The supranational nature of European integration creates a special situation in which constitutional systems are unified, and the member states react to this, quasi by the law of the counter-effect, by constantly seeking to define themselves<sup>60</sup> and to defend their historical specificities and the values enshrined in the constitution that defines their constitutional order. It is at this point that the extent to which the individual cooperating member states are similar or different in terms of their values, which are of course largely determined by a shared historical narrative, becomes important.

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58 Ibid, pp. 147–148.

59 Cf. Holmes, 2012, pp. 189–217.

60 Cf. Rosenfeld, 2010, p. 38.

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 K32/09 of 24 November 2010

## The Separation of Powers

Péter KRUZSLICZ

### ABSTRACT

The constitutional principle of the separation of powers and the doctrine behind the principle are as fundamental as they are complex. Three main reasons are behind this complexity. Firstly, a doctrine and a proper theory based on which the doctrine and the principle are developed hide behind the principle. Secondly, by its nature, the concept of the separation of powers is related to the more general constitutional principle of the rule of law. Even though the rule of law appeared mainly after the separation of powers, as a more abstract principle, it also encompasses its constitutional requirement. At the same time, the substance of the separation of powers concerns the institutional organisation of the state despite its above-mentioned relation to the more general principle of rule of law.<sup>1</sup> Thirdly, the functions of the branches of power that are to be separated according to the principle are radically different. Regarding the three main branches, it is obvious that while the judiciary asks for complete independence, a logical gap exists between legislative and executive powers,<sup>2</sup> with the first one being general when the legal norms are adopted and the second one being concrete when it proceeds to the implementation of the norms. Hence, their separation is not so evident, and the principle may require an equilibrium by balancing those powers.<sup>3</sup> Finally, the last reason for the complexity inherent in the concept of separation of powers is due to the different approaches used for the interpretation of the principle. On one hand, it can convey the institutional meaning of separation of bodies, and on the other hand, it can be more functional if an equilibrium is to be maintained while exercising different state functions.<sup>4</sup>

As with all constitutional principles, the founding theory of the separation of powers should be analysed in the larger context in which it developed. It is strongly linked to what Montesquieu thought to be the English constitutional regime, even though he was obviously misreading the actual political context. It was implemented – not for the first time but with the most important consequences – in the newly established constitutional regime of the United States of America, and of course, the impact of the American context was greatly influenced the result of its implementation. When it comes to analysing the separation of powers in the context of contemporary states of the Central European region, those contextual facts should also be noticed. In addition, for this region of interest, in a comparative constitutional study, it is also important to notice that a voluntary implementation of an already well-developed principle in a new or different political context can lead to confusing results. Central European states have a particularly rich constitutional heritage, e.g. the Constitution of

1 E.g. Serbian Constitution, the relation between Art. 3 (rule of law exercised through the separation of powers) and Art. 4 (government system based on the division of powers).

2 Bibó, 1986, pp. 385–396.

3 E.g. Art. 1 of the Romanian Constitution: “The State shall be organised based on the separation and the balance of powers”.

4 Decision 38/1993 (VI. 11.) of the Constitutional Court of Hungary.

Poland and Lithuania was among the first to implement the separation of powers<sup>5</sup> as contemporary constitutional regulation, and the principle could be reintroduced in the very foundations of the legal order of Poland when socialist regime disappeared. When doing so, the constituent power of Central Europe could not only use the well-established theory and doctrine of the separation of powers, but it was also aware of and used the already existing constitutional solutions of other constitutional states for the implementation of the principle. However, the exportation of constitutional models to a different context can result in discrepancies in the political praxis.

According to the main hypothesis of this chapter, the separation of powers as implemented in the Central European region leads to the rise of strong executive powers. This phenomenon is independent of the presidential or the parliamentary character of the regimes. On the contrary, a strong executive power is even more common in parliamentary regimes. In addition, if there is a general, international tendency towards the strengthening of executives for many reasons,<sup>6</sup> the emergence of strong executives in the region can also be read as a consequence of Central European traditions and a special need for such strong governments in the particular political context of the region. On one hand, Central European states have struggled with important political, social and economic challenges during their modern history, often demanding a strong and stable executive. They did so to spare themselves of political difficulties which can result from a permanent governmental crisis due to the lack of strong leadership. Some of them also had a negative historical memory of the excessively strong parliamentarism causing such difficulties.<sup>7</sup> On the other hand, a permanent need for reforms – especially after the change of regimes – also required a strong political executive that would be able not only to propose but especially to implement such reforms with success. Thus, even for states such as Hungary or Croatia, which benefitted from an important tradition of parliamentarism under the dualist regime of the Habsburg empire, after the cataclysms of the twentieth century, a stronger executive seemed to be a good solution. However, implementing the separation of powers can be difficult in such a political and constitutional background and may call for special arrangements to guarantee the very fundamental aim of the principle: creating a legal obstacle to the concentration of power.

#### KEYWORDS

separation of powers, checks and balances, concentration of power, institutional equilibrium, constitutionalism and rule of law.

## 1. The general purpose of the separation of power and its implementation in Central European states

While the theory, doctrine and principles of the separation of powers can be complex, their meaning can easily be summarised according to the separation of power's purpose: to be an obstacle against the concentration of power in order to avoid arbitrary or abusive exercise of public power. That is the reason why one of its first and most obvious constitutional consecration directly linked it to the existence of a modern constitutional state: Art. 16 of the Universal Declaration of the Human and Civic Rights, which states that “any society in which no provision is made for guaranteeing rights or for the separation of powers, has no Constitution”. The authors of the declaration knew that the separation of powers should be a basic requirement for the organisation of a modern political society. Even more so, it became obvious that the

5 Lukowikowski and Fox, 1993.

6 Stumpf, 2015, pp. 8–14.

7 E.g. Poland or Hungary in different periods of their history.



definition of a modern constitution demanded the efficient protection of rights and the separation of powers.

Something similar was declared in a constitution coming from the Central European region in the same historical period. As mentioned above, the Constitution of Poland and Lithuania adopted on 3 of May 1791 stated that

the integrity of the states, civil liberty and social order remain always in equilibrium, the government of the Polish Nation ought to, and by the will of this law shall comprise three authorities, to wit: a legislative authority ... a supreme executive authority ... and a judicial authority.<sup>8</sup>

The Polish Constitution of 1791 is first to be mentioned as a proof of early constitutional dialogue between Western European theories and Central European constitutional regulations. Moreover, it was the first European constitution to implement the theoretical principle of the separation of powers to the institutional organisation of the state by establishing a regime of political accountability of the cabinet before the Sejm.<sup>9</sup>

Such a comprehensive understanding of a basic constitutional principle became even more interesting for Central European states during their constitutional transition. The separation of powers was obviously interpreted as a fundamental requirement of the rule of law, and it was cherished as such by post-communist constitutions. It could be a sign of complete change as regards to the former regime of the socialist state, characterised by the concept of dictatorship in the name of proletariat. In theory, socialism, according to the Marxist critics of the doctrine of the separation of powers, rejects this constitutional principle, considering it a tool in the fight of bourgeoisie against aristocracy. In reality, those regimes were mostly characterised by the concentration of powers at the level of communist parties and are thus qualified as state-party regimes; for that reason, during the constitutional transition, Central European constitutions paid a special attention to the principle of the separation of powers. This is also demonstrated by the fact that most Central European constitutions contain a special provision on the principle and underline its importance by inserting this provision at the very beginning of the constitutional text. In the Romanian constitution, it is under Art. 1, para. 4 that the principle of the separation of powers is declared as follows: “The State shall be organised based on the separation and balance of powers – legislative, executive, and judicial – within the framework of constitutional democracy”. The Czech constitution highlights the principle in Art. 2, para. 1: “The people are source of all power in the State; they exercise it through bodies of legislative, executive and judiciary powers”. A more recent example that also clarifies the importance of the principle consecrated in Art. C – the third one concerning the organisation of the state – is given by the Fundamental Law

8 Art. V of the Constitution of Poland and Lithuania of 3 May 1791.

9 Art. VII of the Constitution of Poland and Lithuania of 3 May 1791.

of Hungary as follows: “The functioning of the Hungarian State shall be based on the principle of the division of powers”.

Those Central European constitutional provisions highlight the importance of the principle of separation of powers by attributing it an exceptional position in their text. Of course, such an important place reserved in their texts is also motivated by the fact that the separation of powers is one of the most general and abstract principles. By reading the different constitutional provisions, it is also clear that they reflect the above-mentioned different approaches to the definition of the principle.

Those already cited mostly relate the principle to the organisation of the state: to its very exact organisation (as in the case of the Romanian provision), to the source of public power and the actors exercising it (as does the Czech constitution) or to the functioning of the state (as the Hungarian Fundamental Law states). The Slovenian constitution follows the same method as the Czech one, as stated in Art. 3 para. 2: “In Slovenia power is vested in the people. Citizens exercise this power directly or through elections, consistent with the principle of the separation of legislative, executive, and judicial powers”.

In the case of Poland and Croatia, the principle is attached directly to the system and to the government’s organisation. Such an approach is also interesting – especially in the case of Poland, where constitutional bodies do not fit clearly the classical division of powers. Under Art. 10, the Polish constitution defines the principle as the very foundation of the system of government: “The system of government of the Republic of Poland shall be based on the separation of and the balance between the legislative, executive, and judicial powers” Under Art. 4, the Croatian constitution states, “In the Republic of Croatia government shall be organised on the principle of separation of powers into the legislative, executive and juridical branches”.

The Serbian constitution different from the others, taking a comprehensive approach towards the principle and attaching it to the rule of law and the state’s institutional organisation at the same time, under its Art. 3 and 4, as follows: “Rule of law is a fundamental prerequisite for the Constitution which is based on inalienable human rights. The rule of law shall be exercised through ... separation of powers...” and “Government system shall be based on the division of powers into legislative, executive, and judiciary. Relation between three branches of power shall be based on balance and mutual control. Judiciary power shall be independent”. To be exhaustive, the Slovak constitution is the only one not referring directly to the principle of the separation of powers, which is, of course, a constitutional principle in Slovakia as well, but only the branches are mentioned in three respective titles – five, six and seven.

Upon a first read of those provisions, the different approaches are clear. Firstly, even though only the Serbian constitution reveals expressly the relation between the principle of the separation of power and the general principle of rule of law, it is obvious that as a constitutional principle, for every states of our interest, the first one is a normative requirement for the second one. It will have a great impact on its constitutional interpretation – especially in the above-mentioned context of the constitutional transition, where the concept of rule of law and its implementation

always benefitting from special attention. This is also proven by the fact that in the Romanian constitution, for example, the framework of constitutional democracy is expressly mentioned in relation to the constitutional consecration of the principle.

Secondly, most of the constitutional provisions take a more concrete approach by defining the principle in relation to public power and its exercise or, even more concretely, by connecting it to the organisation of the State or to the system and the organisation of its government. In both cases, the principle of separation of powers is declared with conformity to its result as an institutional principle regulating the organisation of the state's institutional framework. This helps to obtain a precise and proper interpretation of the principle when defining the relations between the institutions.

However, this definition is not only static but also and especially dynamic.<sup>10</sup> Thus, thirdly, the dynamic approach is also present even in the way that the principle is defined: the Romanian and the Polish constitutions state not only the separation but also the balance of powers. Of course, the first one does so in the context of a special, semi-presidential regime. And the second one puts forward the concept of balance with regards to the difficulty to range all the constitutional bodies into the classical division of the three branches of power.

The Serbian constitution goes even further by also addressing balance and mutual control. It is also the once that underscores the independence of the judiciary. As regards the ongoing constitutional reform, such a definition merits special attention.

Finally, the Hungarian Fundamental Law choses a special way to constitutionalise the principle. According to its already existing constitutional interpretation when the Fundamental Law was adopted, it consecrates the principle not in relation to the organisation but to the functioning of the state. This practical aspect is also highlighted by the context of the provision, the second paragraph of the same article, which forbids the acquisition and exercise of the power by force and its exclusive possession, and it even makes the right to resist such attempts a universal constitutional obligation.

After its importance due to its strong connection to the abstract concept and the general idea of rule of law and to the special context of the democratic transition in Central European states, in which the above-cited constitutional provisions were adopted, the complexity of the principle also appears. When the idea of making a strong, constitutionally guaranteed obstacle to the concentration of powers is more than appealing for Central European states, its exact definition, i.e. how to insert it in their newly adopted constitutions in a clear and efficient way, is not so easy to be found, even though an important number of – especially Western European – models are at their disposal.

First, its general importance should be exactly rephrased not only by the placement of the provision but also with regards to the link to public power exercised

10 Csink, 2018, pp. 313–325.

in a modern constitutional state. That is the reason why it took place between the first constitutional provisions, and it is often related to the source of power or to the general organisation of its exercise.

Secondly, the organisation of institutions and bodies should be efficient, but once again, not only by separating them, which would be impossible – except of course for the judiciary – due to the relation between the two other branches of the legislative and executive powers, but also by balancing them, thus speaking about balance or division as well as separation. The idea of mutual control is more than important, even if mutual trust could be also mentioned.

Thirdly, it is in the everyday reality of the constitutional exercise of powers that the principle is to be guaranteed; therefore, making it in relation with not only structure but also functioning can be an interesting solution. Such a definition is appealing especially with regard to the constitutional interpretation of the principle, which is often functional and not only institutional.<sup>11</sup> The theoretical complexity and the heaviness of the doctrine behind the principle show the complexity of its implementation.

## **2. The general theory of the separation of powers and its consequences for the implementation of the principle in Central European states**

With regard to its general and abstract but very comprehensive aim of making an efficient constitutional obstacle to the concentration of power, but also to the complexity of the doctrine and the theory of the separation of powers demonstrating the huge difficulty when, by the implementation of the principle, the above-mentioned aim is to be realised, first and for must, a theoretical analysis is to be presented. Because of the separate chapters covering the form of government, the parliamentarism, the head of states and the independency of the judiciary, this theoretical approach seems to be complementary; however, this theory-based method is also and especially adequate to the Central European context. It helps to understand with a comparative method, by learning from similarities and differences of the implementation of the principle, the apport of the theory but also the struggle of the region when it comes to applying it in its political reality.

An important evolution hides behind the principle, making it even more complicated to apply or at least asking for special prudence when applying it. Even though the very foundation of the separation of powers comes from a theoretical question answered in the late seventeenth and eighteenth centuries, no one can deny its practical importance in the context of the twentieth and the twenty-first century,<sup>12</sup> and new, modern interpretations of the theories are increasingly present in academic writing.<sup>13</sup>

11 Varga, 2013, pp. 1–8.

12 Bibó, 1986, p. 385.

13 Carolan, 2009.

When describing the theoretical development of the separation of powers, from the context of development as much as that in which the practical implementation took place, some conclusions can be drawn. By this theoretical analysis, in the second part of the present chapter, a nuanced overview of the constitutional consecration and the interpretative application of the principle of separation of powers can be developed. This overview aims to highlight the special apport of the theory in the context of Central European states, but it also makes some conclusive remarks on the difficulties and points of the reasons for a partial or uncomplete result in the principle's implementation.

Even though the impression that it would belong to history is obviously wrong, it is true that the doctrine of separation of powers is one of the most ancient constitutional theories. Though the aim of the doctrine to make an efficient obstacle to the concentration of power is always actual, it has come under constitutional attention in specific historical periods. Of course, the most important is the rise of the constitutional state after liberal revolutions based on the state theory of the Enlightenment. That is the reason why most of the scholars located its origin in the seventeenth century. However, for the present analysis, the second half of the twentieth century, such as the contemporary period, is just as important.

When fighting against totalitarian regimes, the practical apport of the theory of the separation of powers was brought up again. This theory has, of course, appeared to gain a special interest after the regimes changed in the Central European region. However, the contemporary period, characterised by the strengthening of powers outside the state's institutions at the national but also and mostly at the supra-, trans- and international levels, make the theory of separation of powers very actual.

Furthermore, it would be false to deny that its origin is a lot deeper in European political philosophy and that even for the good understanding of the doctrine, it is more than necessary to go back to Ancient Greece and to Medieval Europe. The theory was first mentioned during antiquity, and its real meaning could be developed thanks to the apport of medieval scholars. Thus, even for the aim of the present analysis, it is important to begin its presentation by analysing those historical periods. The doctrine of the separation of powers has always advanced thanks to the permanent dialogue between political philosophy, the theory of state and constitutional law, and its consecration politically driven.

### ***2.1. The development of the theory***

Undoubtedly, Aristotle was the first to mention the three branches of power. When examining the organisation of the state's public functions, he made a fundamental distinction between deliberating, leading and judging,<sup>14</sup> which he mostly used to describe the different form of political structures. He also studied the different nature of those functions and noticed the logical difficulty of making deliberating and leading functions parts of the same dimension. The basic apport of the theory

14 See Arisztotelész, 1969.

is to bring into light the existence of different political functions and to provide a clear definition of them, so that they could be used as elaborated terms for the following period of evolution of European political thoughts. At the same time, of course, by defining and proposing those functions, Aristotle not only suggested how power can be described and then organised, but he also directed political philosophy in a specific direction with the aim to relate those functions to the state's organisation. However, no normative meaning of the theory existed yet, and ancient political philosophy was not looking to give such a sense to its theories and notions.<sup>15</sup> The simple apport, as much as for the philosophers of the Enlightenment as for the contemporary constitutional doctrines, was to clarify that power can be divided in specific functions and that those functions are about deciding on policies, implementing policies and judging. Those functions are, of course, also interesting when one wishes to learn more about a special form of government.

When revisiting the theoretical evolution of the separation of powers, most scholars decide to make a jump from antiquity to the Enlightenment; however, medieval philosophers had made a great impact on the theory of separation of powers. This impact was as much indirect as fundamental for the evolution of a theory aiming to justify the structure of the organisation of powers. Its apport for the philosophers of the Enlightenment or for those working on constitutional regulation after the fall of the socialist states should be underlined as the very basic idea of the need for a moral or philosophical justification of power and of the structure in which it is exercised comes from this period of European history and political thought.

If Greek philosophers were, according to the method of stoicism, not interested in the practical aspects of their theory of state, when looking for ideal organisation of structures, they chose an only theoretical method; conversely, for medieval scholars, the moral or ethical justification of the reality of exercising public power became a central question due to the influence of Christianity. Even though monarchies finally managed to become the primary public authority in a long-term battle against the Church, they integrated the idea of a moral justification in their structure thanks to this victory. It is interesting to highlight that when the Church, by the so-called Gregorian reforms, attempted to take a path of constructing public organisation also by legal normativity, the public organisation of power tried to come back on a value-based justification in order to be considered the primary source and sole possessor of public authority. During the medieval period, the justification was moral and religious, which was about to change with modernity. However, the method of looking outside of the simple reality of exercising public power to justify it became central for the philosophers of the Enlightenment. The apport of this period was to ensure a theoretical basis for the organisation of the state which came from outside of its structure, and the symbolic, almost religious character of such a justification also has important consequences for our region of interest and even in contemporary times.

15 Bibó, 1986, p. 389.

The modern definition of the constitutional state has been elaborated with those theoretical requirements during the Enlightenment. The importance of the Enlightenment is crucial for the whole modern constitutional organisation of the state. The theory of the separation of powers as such has its origins also in the philosophy of the Enlightenment; however, that theory was not developed as obviously as one would now think or would have thought at the time of the adoption of the constitutional provision about this principle during the constitutional transition of Central European states.

The first author of the Enlightenment writing about the separation of powers was undoubtedly John Locke,<sup>16</sup> who made a distinction between the legislative, the executive and the federative powers of the state. Even though three categories of public power were identified and defined in his essay, the judiciary, which differed greatly by its nature from the others, was not among them. The so-called federative power would be, for us, part of the executive and about its external action. However, it is important to note that with Locke, the first modern approach to public power with a willingness to make a distinction between categories inside this power rather than functions appeared, and it remained a constant foundation of every theoretical study on public power. The idea to separate those inside the state's institutional structure also appeared with Locke, who was the first to see a reason for the justification of the state in a well-organised and regulated separation between those different categories of public power. However, the real author of the theory of separation of powers was Montesquieu<sup>17</sup> – not only because he decided to go back to the three functions already identified by Aristotle but also because he argued for their institutional separation to avoid the abusive exercising of public power, in the modern constitutional sense.

It is particularly important, even for the context of contemporary Central European states, to summarise the basic sense of the theory at its origin. First, when Montesquieu developed the theory, he analysed the English government. However, the structure of the English Commonwealth was not a real example of separation of powers in a way that Montesquieu wanted to propose it for the organisation of modern constitutional states. The structure and the dynamics of public power in England was more characterised, in the seventeenth and eighteenth centuries, by a constant fight between parliament (commons) and government (monarch). If those were separated, it is because of this special context. Instead of reaching an equilibrium, by the nineteenth century, this fight resulted in the supremacy of the parliament. Thus, when Montesquieu tried to find a well-balanced structure with mutual control and trust as an obstacle to the concentration of powers that results, obviously, in a risk for arbitrariness, he was misreading the English organisation of powers. However, the theory became as crucial as the idea of the protection of human rights – both related, from the nineteenth and twentieth centuries and in radically different ways and contents, to the principle of the rule of law for constitutional modernity, as reflected by the above-cited Art. 16 of the Universal Declaration. Only the aim was completely

<sup>16</sup> Locke, 1690. Chapter 12.

<sup>17</sup> Montesquieu, 1748; 2019.

clear with this observation: that all kind of powers can become arbitrary and abusive and that this can only be avoided when the concentration of power is prohibited by a special organisation of the state, i.e. power balanced by another power. However, even the first observation leads to the sorrow realisation of the most obvious character of power – that it looks for concentration, and, with institutionally separated state functions, only a formal limit is placed as an obstacle to such a general tendency. However, this formal or even symbolic justification with the attractive idea that a first power can be retained from its worse intentions by another power, if formally distinct, became a central element even as such for the modern constitutional state.

That is how the founding fathers of the United States of America have decided to make it the key element of the organisation of theirs newly founded states.<sup>18</sup> They opted for it, of course, mostly because they wanted to make a difference between themselves and the former king, for a presidential regime and a clear separation between the above-mentioned functions. However, they finally established checks and balances between legislative and executive powers. The first constitutional implementation of the theory of Montesquieu, is, for that reason, distinct from the theory itself. Usually, powers could not be kept absolutely separated, and this only worked because of the special context and a strong political will to avoid the concentration of powers.

The second implementation of the theory in France during the Revolution leads to a particular understanding of Montesquieu's original theory. First, it could not be easily implemented because of the political fight between the monarchy and parliamentarism, with a democratic justification of the latter's power. Meanwhile, the judiciary could become independent, and the whole nineteenth-century French constitutional history was characterised by the struggle in defining the relations between the legislative and the executive branches of powers. In this context, it is not so strange that the idea for a supervising power able to guard and guarantee the equilibrium according to the theory of Benjamin Constant came to help the implementation of the theory of separation of powers in order to “put the locomotive back on the rails”. However, even though the practical implementations of the theory resulted in radically different answers to the question of the effective organisation of the state's structure, and the praxis of the separation of powers revealed important challenges, it is a symbolic principle and a key element of the modern constitutional state around Europe and the Western world.

## ***2.2. The main critics of the theory***

The main critics of the basic theory should be analysed as much as its theoretical foundations. The first critics are as old as the theory of separation of powers itself. According to Jean-Jacques Rousseau,<sup>19</sup> the legislative and executive powers cannot be equal, and such an equality would be necessary to enable one to limit the other in a constitutional equilibrium. The reason is simple: the legislative expresses the general

18 Straub, 2011, Federalist Paper number 47.

19 Rousseau, 1762; 1978.



will of the sovereign, and the executive should act according to what the general will expressed. Thus, legislative power comes first and executive power second, and a hierarchy exists between them. Such a theory describes exactly the reality of the context in which the separation of powers had to be implemented, especially in European states. However, it is obvious that even though such a difference in the importance of the function, as much as the already mentioned logical problem in their different nature, make the realisation of the separation of powers difficult, they do not make it impossible. Especially because of these differences, there can be a well-balanced equilibrium in the state when the different categories of powers are exercised. As those functions are fulfilled by different institutions, it is even clearer that the relations between those institutions can be regulated in a well-balanced way.

The already mentioned Marxist critics saw, in the separation of powers, a simple idea of domination by the newly arrived bourgeoisie, who would be represented by the legislative, and the old dominating aristocracy, represented by the executive, according to the logic of the fight between social classes. Although those critics certainly took a different approach and drew radically different conclusion, they followed Rousseau's argument that a hierarchy exists between the two branches and that European history can be analysed as proof. Nevertheless, the concentration of power remains a danger, and the already presented reality of the socialist state is the best example of it. The abusive and arbitrary exercising of power cannot be avoided only with a constitutional regulation rebalancing the different branches of power by their relations. It is also to be noted that none of those main critics have dealt with the judiciary.

The main apport of those critics can be found, nowadays, mostly with regards to the constitutional problem of representative democracy as the source of legitimacy of power and constitutional democracy as its source of legality. However, those two appear in two different dimensions, and as such, they can be easily reconciled.

This is also an important aspect to be analysed for Central European states. It has been already mentioned that, e.g. the Romanian constitution, when consecrating the principle of the separation of power, relates it to the principle of the rule of law by placing it in the framework of the above-mentioned constitutional democracy. Democracy and separation of powers are not in contradiction but complementary to one another; however, in most Central European constitutional regimes, after the constitutional transition, a misunderstanding occurred when constitutional relations between the parliament and the government had to be interpreted following – albeit not always approving – the above-mentioned critics.

First, the attractive goal of the implementation of the rule of law became dominant. The constitutional interpretation of the separation of powers arguing for the institutional separation for itself but also for the integration, even if those are not considered as separate branches of powers in most of Central European states, of other constitutional bodies such as head of states, constitutional courts or local communities (the last ones being considered a proper branch by the Croatian and Slovak constitutions) to establish a balanced functioning of the state neglected the

importance of representative democracy, which is also, of course, a constitutionally protected principle. However, in a second time, the strong argumentation – once again, in logical line with the above-mentioned critics – about the democratic principle led to the strengthening of democratically legitimate organs – especially of governments benefitting from a strong parliamentary majority.

### **3. The consequences of the theory and its implementation in Central Europe: conclusive remarks**

As announced as the main hypothesis of the chapter, this tendency towards a strong executive despite the often functional and dynamic interpretation of the principle of separation of powers would be a main element of conclusion after the theoretical overview of its concept. Setting aside the judiciary power, whose independency is a basic constitutional requirement, despite some difficulties presented in a separate chapter, the constitutional interpretation of the separation of powers demanded, on one hand, an institutional separation of individual functions between legislative and executive, and on the other hand, the existence of a dynamic equilibrium between those two. Rejecting any hierarchy between the two branches, mutual control and even trust was proposed to establish an equilibrium where the balance can also be guaranteed thanks to complementary institutions such as the head of state and the constitutional court, even though the first – especially when directly elected – can be considered as part of the executive and the second as part of the judiciary.

Such an interpretation, when the executive could benefit from a strong parliamentary majority, leads combining the interpretation of the separation of powers with the application of the consequences of democratic principle to a particularly strong political position of the executive branch of power. As there is no hierarchy and the parliament became obedient to the government – also because of the constitutional choice of strong and stable executive – the executive branch of power has a large margin to realise its political programme. The only limit to that can be the constitutional framework when its protection is ensured by an independent constitutional justice. Such a strong executive is a danger for the implementation of the aim of the separation of powers because only elections can limit, periodically, the use of power.

However, with a general and theoretical study following a summary of the constitutional provisions on the separation of powers and without going into a more detailed analysis of the institutional framework of the Central European states, the basic character and the complexity of this fundamental constitutional principle were clarified, providing a more optimistic perspective. First, avoiding the concentration of power has a special importance in the region, especially after the fall of the socialist states, with a strong engagement with implementing the rule of law in the regional political reality. A symbolic principle such as the separation of powers could thus be more than essential, and its importance has been largely underlined by the constitutions adopted in the region. In addition, to make it real in the political praxis of the Central

European states, eager to realise such a constitutional experience but also aware of the difficulties of such a realisation, the complexity of the theory with regards to the regional political context must be highlighted.

Especially with regards to our analysis on its theoretical development, for contemporary Central European States, it means that there is no general or abstract magic solution for the separation of powers. According to historical examples, even with an independent judiciary which was more or less real for most European states by the end of the nineteenth century, the relations between legislative and executive demanded special arrangements. Moreover, for those arrangements, the context is an important factor. The political and social reality of the state in question has a great impact on the way that the theory of separation of powers can be implemented in the national constitutional framework, especially with regards to the national political praxis. If in a modern constitutional state, the organisation of the institutional framework should be structured by constitutional provisions, and a clear distinction between the main functions of the state can help to construct such a structure to avoid the concentration of power, the constitutional consecration of a symbolic principle is not enough. According to the political reality, it must be interpreted and applied in a dynamic way so that it could realise this very basic aim and protect it constitutionally. Therefore, several factors should be taken into consideration – the balance or the equilibrium not being static but always in movement and asking for rebalancing and control, and limitation or self-restriction by those who exercise the power being as important as their limitation or rebalancing by other powers. The separation of powers can become a constitutional reality only when, with all that complexity and with the help of an able and vigilant public administration,<sup>20</sup> a proper political culture is implemented.

Thus, as the constitutional provisions demonstrate, such a principle can be formally declared easily, but its constitutional textualisation can also help to apply it. Separation or division, balance or mutual control, organisation of the state, system of government or functioning of the state can contribute to the definition and the application of the separation of powers in the constitutional context of the state in question in a balance with democratic requirements.

Internal and external factors should also be taken into consideration. If from a sole constitutional perspective, head of states, constitutional courts or local communities (even though those are not considered as individual branches for most of the studied states) can play an important role to find a well-balanced equilibrium, political parties, the civil society or the media should also be considered as factors that can help find such an equilibrium. External actors often related to non-constitutional internal ones – e.g. transnational non-governmental organisations, transnational companies, supranational or even international institutions – also became important parts of the political reality of those states, and without considering them as such, it is impossible to realise the aim of the principle of separation of powers. In such an

20 Paczolay, 2013.

optimistic perspective and extremely rich theoretical heritage, with regards to the context, the symbolic and even mythic principle of separation of powers should not be forgotten, especially for Central European State. On the contrary, it should be used in a more appropriate way to achieve its comprehensive aim – but to do so, by taking into consideration its theoretical and contextual complexity.

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# The System of Sources of Law

Krisztina LUKÁCS

## ABSTRACT

This chapter aims to analyse the system of sources of law in the countries of the CEE region through a comparative constitutional lens. To this end, it first attempts to present and clarify some fundamental concepts that are necessary and relevant to examine the system of sources of law. Subsequently, it outlines the development of the various systems of sources of law from a historical perspective. In light of this general overview, the chapter then turns to each system of sources of law of this region to map and explore them in a comparative way. Accordingly, it describes the major characteristics of legal norms at various levels of the norm hierarchy as well as how they create a system of sources of law. Furthermore, it examines the place and role of international law and EU law. Finally, it outlines how states in the region provide access to legal norms in their respective systems.

## KEYWORDS

system of sources of law, legal norms, norm hierarchy, constitutions, acts, decrees, regulations, decrees of the local governments, access to legal norms.

## 1. General introduction

### *1.1. Fundamental concepts regarding the system and individual sources of law*

Sources of law can be examined from various perspectives and with regards to the numerous existing legal fields. The constitutional approach that is central to the present chapter uses the concept of sources of law in a dual sense. On the one hand, the legal rule that gives a frame to the law can be considered a source of law, which includes every form that contains the rights and obligations of legal entities. On the other hand, those who are empowered to make law can also be considered sources of law. Consequently, the concept of the sources of law refers to two major characteristics of the legal norms: from which organ it originated – i.e. which institutions have lawmaking powers – and in which forms the legal norms can appear – i.e. in what forms the lawmaking authority issue legal rules. These characteristics together allow one to define the unique place of various legal norms in the legal system, and the examination of the sources of law of a given state allows one to explore which organs have lawmaking authority and how and in what forms they can exercise it. From these two approaches, this chapter favours the second one and describes the legal

system of the examined countries according to the forms in which the legal norms can appear.

The various sources of law created by state institutions do not prevail simultaneously in a given state; instead, they rather have a hierarchical relation. This hierarchical system consists mainly of the same elements in Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, the Slovak Republic and Slovenia. Accordingly, two major groups can be distinguished: laws and public law regulatory instruments. The major difference between the two is in their binding power: laws have generally binding power, while public law regulatory instruments have an internal character, and they only bind the organisational units which are subordinated to the issuing authority. This latter category cannot establish rights and obligations for citizens. Within this public law regulatory instruments, one can find, among others, resolutions and orders. As the aim of this chapter is to examine the system of legal norms that have generally binding power, it focuses on laws and does not cover public law regulatory instruments.

Within the sources of universally binding law, the constitution is located at the top of the system of legal sources in each examined country. The highest level of law is the 'act', which can be of multiple types according to the rules relevant to legislation in the states that are examined, e.g. general category of legislative act, constitutional act or act with constitutional force, organic act and ordinary act. Acts are followed by generally binding legal norms adopted by either the executive or the heads of independent regulatory organs. These are adopted by each country in the CEE region under different names, namely decrees or regulations. As Karpen notes, "the admissibility and use of regulations on a hierarchical level below statute law differ from state to state, and are often not very transparent".<sup>1</sup>

This overview clearly shows that the system of legal sources in the region is rather diversified. Each source of law fulfils a social function, regulating generally valid and durable patterns of behaviour, and their violation has legal consequences. Therefore, each element of this system serves a common objective. These sources of law introduce settled expectation towards the people's behaviour and thus help prevent social conflicts as well as the resolutions of such disputes when necessary.

Both the constitution and the law can determine hierarchical relations among the sources of the law. As a result of the hierarchical relations between the legal sources, provisions of the subordinate sources of law cannot be in opposition to hierarchically superior sources. In the case that the legal sources at various levels do contradict, the subordinate rules that are in contradiction to the superior ones are invalid. A normative act is superior in a hierarchy to another normative act if the former normative act can derogate from the latter normative act, while the latter normative act cannot derogate from the former one.<sup>2</sup>

1 Karpen, 2017, p. 2.

2 Jakab, 2020, p. 888.



A given legal norm becomes part of the legal hierarchy if certain conditions are met, the most important of which are the validity and the entry into force of the legal norms. In general, validity means that the legal norm is capable of having legal effects, and a certain legal source can be considered valid if it complies with validity requirements. One of these requirements is to originate from an organ duly empowered to make law, and it is fulfilled if the given state organ has a lawmaking competence provided by law with regards to the question that is to be regulated. Furthermore, the validity of the rule requires that legal sources be made in accordance with the relevant procedures, i.e. the legislature observes the procedural order. A fundamental requirement is that the legal rule should fit with the hierarchy of the legal sources, i.e. it shall not be inconsistent with superior rules. Finally, a further condition of validity is that the legal source shall be promulgated and accessible. This is usually fulfilled via publication in the official journal. A source of law is valid only if it fulfills all four validity requirements. By contrast, the entry into force of the legal norm means that the intended legal effects can be realised in a certain territory, time and with regards to certain persons, i.e. the actual source of law can and shall be applied and enforced. Based on its entry into force, the source of law can create, modify and terminate legal relations; accordingly, the entry into force has territorial, personal and temporal scope.

### ***1.2. Shifts in the system of sources of law from a historical perspective***

Two major cultural regions had been identified in Europe since Late Antiquity: the Latin (Catholic-Protestant), Western European region and the Greek (Orthodox and partly Muslim) Eastern European one. The border had been relatively stable between the Latin West and the Greek East, and the cultural differences between these two regions had a role to play in the legal culture because each region defined the role of law in a different way – at least partially.<sup>3</sup> Consequently, two distinct legal-cultural spheres can be delimited in Europe: Latin Western European and Greek Eastern European. The differences due to the different traditions are present in the buildup of the system of the sources of law. Although the countries that are examined in the present volume belong to the Western European legal culture, these countries are situated on the Eastern periphery of this region, which gives them unique characteristics.

World War I was a major turning point in the history of the countries examined.<sup>4</sup> The Austrian-Hungarian Monarchy that had dominated this region was dissolved, and Hungary could shape its constitutional system and legal order on its own. In the region between Germany and Soviet Russia – then the Soviet Union – Czechoslovakia, which had never existed before, was established; Poland was reborn; and Romania was significantly enlarged.<sup>5</sup> Hungary continued to exist with the largest territorial losses. Because several new states were established, the adoption of new constitutions

<sup>3</sup> Küpper, 2017, [4]-[6]; Szűcs, 1981, pp. 313–359.

<sup>4</sup> For more details, see Halász, 2014, p. 28–43.

<sup>5</sup> Halász, 2014, p. 28.

became necessary.<sup>6</sup> Consequently, among the newly created constitutions were the Czechoslovak in 1920, the Polish in 1921, and the Romanian in 1923.<sup>7</sup> The newly established states enjoyed great liberty in the course of drafting their constitutions since they did not need to take into account the status of public law prior to 1920.<sup>8</sup> Therefore, the foreign, mainly Western constitutional models managed to prevail. The French constitutional jurisprudence had an influence on multiple parts of the 1920 Czechoslovak constitution as well as on the 1921 Polish constitution. Furthermore, there were American influences as well, and surprising as it may be, German traditions are also relevant in this region.<sup>9</sup>

However, the examined states were not able to catch up with the Western constitutional tradition despite the peaceful decades, and this hope was soon completely destroyed by World War II. After these turbulent times, the fate of the examined countries was definitely sealed amidst the shifting public law environment. While part of the Latin Western region consisted of states that are democratic and follow the rule of law, the Eastern segment of this region created socialist systems. The ruling Soviet dictatorship was clearly built upon Eastern historical, social and political characteristics, which countries in the region had to introduce into their societies. The aftermath of World War II, therefore, had a decisive role in shaping regional characteristics, and consequently, the legal-cultural region that is examined here consisted of such states that belonged to the Latin Western Europe and at the same time were under socialist rule. In 1948–49, these countries began to create and adopt so-called democratic constitutions when it turned out that they would be attached to the socialist geopolitical and societal system. Instead of the Western-type constitutions, the 1936 Soviet-type – the so-called ‘Stalin’ constitution – served as a model. Considering the system of sources of law as well as the legislative processes during this period, they continued to respect the rule of law traditions before the socialist rule. For example, they managed to maintain the hierarchy of the sources of law in the legislative process. In contrast, in the Soviet Union, a simple government decree could modify the constitution. The Polish, the Czechoslovaks and the Hungarians drafted the law in a far more precise way than the Soviets, and their promulgations were generally consistent with the rule of law requirements.<sup>10</sup> This type of system of sources of law defined the legal order up until the regime changes in these countries.

The last decades of the twentieth century marked another turning point in the history of the region, when the Soviet Union began to decline, and it became increasingly obvious that the Soviet-type government structure could not be maintained. In the second half of the 1980s, it became clear that the Soviet-type dictatorship could not be

6 Halász, 2014, p. 28.

7 In Romania, the 1923 constitution was replaced by the constitution that introduced a royal dictatorship in 1938.

8 Halász, 2014, p. 41.

9 Halász, 2014, p. 41.

10 Küpper, 2017, [34].

maintained in Central Europe without the support of the Soviet Union.<sup>11</sup> The question of coexistence of the Czechs and Slovaks was again in the forefront of public debate in this defining period of history. The resurgence of the opposition finally led to a peaceful division of the country into the Czech and Slovak Republics as two independent states.<sup>12</sup> The change of regimes was implemented peacefully, except for the case of Romania.<sup>13</sup>

Considering these developments, the change of regimes from socialist to democratic can now be considered completed; this, however, does not mean that all the socialist sources of law were eliminated in the legal orders in CEE. Even though increasingly fewer valid laws remain from the era of socialism, some important legislative acts still preserve the socialist traditions.<sup>14</sup> However, as socialism was introduced in countries where the level of legal development was different, after the homogenous socialist era, the region continued to develop in various ways and different manners after the change of regime.

In its constitution, every country examined defines itself as a state governed by the rule of law, the basis of which is the legislative act adopted by the parliament. The adequate regulation in details and in depth of the legislative process is therefore of fundamental importance. After the transition period of the change of regime, the number of legislative acts has increased in the region because this level of legislation has become the primary source of regulation.<sup>15</sup> The law is being frequently modified with the growing and shifting roles of the state, but these are regulated in acts instead of lower-level sources of law. Despite the recognition of the rule of law, the legal systems of these states are burdened by the legacy of the socialist past. Among such burdens are the excessive extent of legislation or the large number of specific details.

## 2. Specific provisions – systems of sources of law

One of the fundamental requirements of high-quality legislation is that the sources of law be in order. The hierarchy of sources of law is defined in the regulations of all the states that are examined, although there are differences in how the sources of

11 Gruber, 2010, pp. 71–91; Bartha, 2010, pp. 23–45.

12 Hamberger and Szilágyi, 2000, pp. 59–72.

13 The revolution that aimed to change the regime took place in Romania in December 1989. The revolutionary events began on December 16 in Timisoara, where the peaceful demonstration of a small group of believers supporting their church leader, László Tőkés, a reformed pastor, turned into an anti-regime uprising. As a result of the bloody retaliation that took place on the night of December 17–18, 1989, the revolution spread throughout the country. In Bucharest, on December 21, 1989, Ceaușescu ordered a mass demonstration that aimed to back the system; however, this was interrupted by objections and shouts, and an anti-regime demonstration soon ensued. The army forces were ordered to open fire on the demonstrators, causing a bloodbath. The insurgents reached victory on December 22 with the help of the army's converted units. Ceaușescu and his wife were captured while fleeing and executed shortly afterwards (Petrescu and Petrescu, 2015, p. 5.).

14 For example, even in Hungary, the area of international private law was regulated by an act adopted during the socialist era.

15 Küpper and Szabó, 2016, p. 65.

law regulate this. It shall be noted that only a few countries adopt laws that regulate legislation and the system of the sources of law, the latter of which can be mostly determined by reading both provisions of the acts and decrees with the constitution.

The Polish constitution is the only one among these constitutions that regulates the sources of the generally binding law of the Republic of Poland<sup>16</sup> in a separate chapter of the constitution.<sup>17</sup> These sources are the constitution, acts, ratified international agreements, decrees as well as local legislation issued by local bodies in specific areas. The constitution also regulates the public law regulatory instruments, that is, the types of internal source of law (resolutions and orders) which are not universally binding.<sup>18</sup>

The Hungarian Basic Law defines the various types of norms at certain levels of the hierarchy of sources of law in a separate provision rather than in a separate chapter.<sup>19</sup> Based on Art. R), the Fundamental Law shall be the foundation of the legal system of Hungary and is thus located at the top of the hierarchy of the sources of law. According to Art. T), laws shall be acts, government decrees, prime ministerial decrees, ministerial decrees, decrees of the Governor of the Hungarian National Bank, decrees of the heads of independent regulatory organs and local government decrees.<sup>20</sup>

By contrast, the Croatian constitution declares succinctly<sup>21</sup> that the “laws shall comply with the Constitution and other regulations shall comply with the Constitution and law”. Finally, the Slovenian and the Serbian constitutions apply the same unique solution that is different from the other states. In their case, a separate chapter of the constitution called ‘Constitutionality and Legality’<sup>22</sup> lays down that laws, regulations and other general acts must be in conformity with the constitution.<sup>23</sup>

The constitutions of the other countries examined do not expressly define the various types of norms in the hierarchy of the sources of law; instead, they contain provisions on the types, creation and relations of the sources of law among the rules that govern the government arrangements and organisations. For example, the Slovakian hierarchical system of sources of law is based on the chapter of the constitution related to the Constitutional Court of the Slovak Republic.<sup>24</sup> The case is different in Romania, where the hierarchy of the sources of law is based on Art. 1 para. (5) of the

16 The Constitution of the Republic of Poland, Art. 87.

17 The Constitution of the Republic of Poland, Chapter III Sources of Law.

18 The Constitution of the Republic of Poland, Art. 93.

19 The Fundamental Law of Hungary, Art. R)(1) and Art. T)(2).

20 In addition, decrees of the National Defence Council adopted during a state of national crisis and decrees of the President of the Republic adopted during a state of emergency shall also be laws.

21 The Constitution of the Republic of Croatia, Art. 5.

22 The Constitution of the Republic of Slovenia, Chapter VII.; The Constitution of the Republic of Serbia, Part Eight.

23 The Constitution of the Republic of Slovenia, Art. 153; The Constitution of the Republic of Serbia, Art. 194.

24 The Constitution of the Slovak Republic, Art. 125.

constitution,<sup>25</sup> according to which “in Romania, the observance of the Constitution, its supremacy and the laws shall be mandatory”.

The most important questions of the development of the system of legal sources and the adoption of legal norms located at various levels of each legal source are also always regulated by the constitutions. These provisions determine which bodies and persons are empowered to initiate or adopt legislation, and they also regulate the procedures whereby each type of norm can be created. The current chapter describes these issues only by way of reference from the perspective of the system of sources of law and taking into consideration the other chapters of the present volume – in particular, the chapters that explore the competences of the head of state, the legislature as well as the executive.

### ***2.1. The constitutions***

Sovereignty of the law in the states of this region is ensured by the fact that the constitution is the highest level of law, that is, it is situated at top of the hierarchy of sources of law. The provisions of the constitutions are mandatory, and they must be applied directly. The prominent place and significance of the constitution in the legal systems are manifested in different ways by the regulations of each country. For example, the Polish constitution<sup>26</sup> and the Serbian constitution,<sup>27</sup> like the Hungarian Basic Law,<sup>28</sup> declare that the constitution is the highest legal norm. In Romania, the constitution emphasises its own priority.<sup>29</sup> In Croatia<sup>30</sup> and Slovenia,<sup>31</sup> the constitutions provide that the laws and other legislation must be in conformity with the constitution.

All constitutions that are examined are codified ones, and most of them were adopted after the change of regimes throughout the 1990s.<sup>32</sup> The Hungarian Basic Law is an exception that is only a decade old; in a similar vein, the situation of Serbia is also exceptional, where the Constitution of 1990 was in force until 11 November 2006. The

25 Popescu and Gheorghe, 2012, pp. 104–105.

26 The Constitution of the Republic of Poland, Art. 8(1).

27 The Constitution of the Republic of Serbia, Art. 194.

28 The Fundamental Law of Hungary, Art. R(1).

29 The Constitution of Romania, Art. 1(5).

30 The Constitution of the Republic of Croatia, Art. 5.

31 The Constitution of the Republic of Slovenia, Art. 153.

32 The dates when the constitutions entered into force are the following: The Constitution of the Republic of Croatia (Ustav Republike Hrvatske) 22 December 1990; The Constitution of the Czech Republic (Ústava České republiky) 16 December 1992; The Fundamental Law of Hungary (Magyarország Alaptörvénye) 1 January 2012 (adopted on 25 April 2011); The Constitution of the Republic of Poland (Konstytucja Rzeczypospolitej Polskiej) 17 October 1997 (adopted on 2 April, ratified in 25 May); The Constitution of Romania (Constituția României) 8 December 1991 (adopted on 21 November); The Constitution of the Republic of Serbia (Устав Републике Србије/ Ustav Republike Srbije) 8 November 2006; The Constitution of the Slovak Republic (Ústava Slovenskej republiky) 16 September 1992; (adopted on 1 September); The Constitution of the Republic of Slovenia (Ustava Republike Slovenije) 23 December 1991.

adoption of new constitution became necessary when Serbia became independent after Montenegro's secession and the dissolution of Serbia and Montenegro.<sup>33</sup>

The prominent place of the constitutions in the hierarchy of the legal sources is illustrated by the fact that their amendment requires special procedures. The constitutional amendment procedure is regulated in a detailed way in most of the constitutions of the countries examined. The Czech constitution provides that the constitution may be supplemented or amended by constitutional acts<sup>34</sup>; in contrast, the Croatian,<sup>35</sup> Polish,<sup>36</sup> Romanian,<sup>37</sup> Serbian<sup>38</sup> and Slovenian<sup>39</sup> constitutions set out the rules that are necessary to amend the constitution in a separate chapter or title. The Hungarian Basic Law contains the provisions that governs its adoption and amendment in Art. S).

## 2.2. *The acts*

The legislative acts are binding rules of conduct that govern fundamental areas of the relations between the individual and society. Below the hierarchical level of the constitution, they regulate all essential questions that are necessary for the functioning of the state. The constitutions of the countries examined all recognise the general category of legislative act.<sup>40</sup> At the same time, however, differences exist with regards to the special categories of acts provided in each constitution. A common feature of the latter special category is that a higher than simple majority votes, and a qualified majority is required for their adoption and amendment.

Some of the states examined have so-called constitutional acts or acts with constitutional force, which can be adopted, amended or repealed by the majority that is required to amend the constitution. According to the Czech constitution,<sup>41</sup> the constitutional order of the Czech Republic<sup>42</sup> is made up of the constitution, the Charter of Fundamental Rights and Basic Freedoms and the constitutional acts adopted pursuant to the constitution. Under the Czech constitution, a constitutional act may designate the conditions under which the people may exercise state authority directly,<sup>43</sup> and the constitution can only be supplemented or amended by a constitutional law.<sup>44</sup>

33 The proposed text of the constitution was adopted by the National Assembly on 30 September 2006 and put to a referendum, which was held on 28–29 October 2006. After 53.04% of the electorate supported the proposed constitution, it was officially adopted on 8 November 2006. Further: Kálóczy, 2010, pp. 7–8.

34 The Constitution of the Czech Republic, Art. 9.

35 The Constitution of the Republic of Croatia, Chapter VIII.

36 The Constitution of the Republic of Poland, Chapter XII.

37 The Constitution of Romania, Title VII.

38 The Constitution of the Republic of Serbia, Part Nine.

39 The Constitution of the Republic of Slovenia, Chapter IX.

40 For the details on the legislative process, see the chapter on the legislative power in this handbook.

41 The Constitution of the Czech Republic, Art. 112.

42 Ústavní pořádek České republiky.

43 The Constitution of the Czech Republic, Art. 2(2).

44 The Constitution of the Czech Republic, Art. 9(1).

The Romanian constitution also allows the parliament to adopt constitutional acts<sup>45</sup> that can only aim to modify the constitution. Furthermore, the Slovak constitution also recognises the concept of constitutional act,<sup>46</sup> whereby the National Council of the Slovak Republic can approve the treaties on a union of the Slovak Republic with other states and the repudiation of such treaties by constitutional law. In Croatia, the laws on equality and on the protection of the rights of minorities as well as on the Constitutional Court are considered a constitutional act or acts with constitutional force.<sup>47</sup> In Serbia, a constitutional act can only be adopted for the enforcement of the amendments to the constitution.<sup>48</sup> In Slovenia, a “constitutional act shall be passed in order to implement this Constitution and to ensure transition to the application of the provisions of this Constitution”.<sup>49</sup> Amendments to the constitution are also made in the form of constitutional acts.<sup>50</sup>

In addition to the previously mentioned constitutional acts, the Romanian constitution also regulates the so-called organic act and ordinary act and exhaustively defines the issues to be regulated by the former.<sup>51</sup> Accordingly,<sup>52</sup> an organic act regulates the issues of major importance to the state, including state borders, Romanian citizenship, the state coat of arms and seal, the general legal status of property and inheritance, the organisation and holding of referendums, criminal offences, penalties and the execution of sentences, the organisation and functioning of the Superior Council of Magistracy, the courts of law, the public ministry, and the Court of Audit, the rights of individuals affected by the action of the authorities, national defence, the organisation, functioning and financing of political parties, and the structure of government bodies. Ordinary acts shall regulate all other areas that are not covered by organic acts, and they cannot change or modify hierarchically higher norms, that is, organic acts or the constitution.<sup>53</sup>

In Croatia, it is also necessary to regulate certain areas such as the rights of national minorities, other fundamental rights and freedoms or the electoral system through organic acts.<sup>54</sup> In addition, the Hungarian Basic Law defines and uses the

45 The Constitution of Romania, Art. 73(1)–(2).

46 The Constitution of the Slovak Republic, Art. 86 b).

47 The Constitution of the Republic of Croatia, Arts. 15 and 127.

48 The Constitution of the Republic of Serbia, Art. 205.

49 The Constitution of the Republic of Slovenia, Art. 174.

50 See e.g., Constitutional Act Amending Chapter I and Arts. 47 and 68 of the Constitution of the Republic of Slovenia (UZ3a, 47, 68); Constitutional Act Amending Art. 14 of the Constitution of the Republic of Slovenia, 15 June 2004 (Official Gazette of the Republic of Slovenia, No. 69/04); Constitutional Act Amending Art. 80 of the Constitution of the Republic of Slovenia, 25 July 2000 (Official Gazette of the Republic of Slovenia No. 66/00).

51 The Constitution of Romania, Art. 73(3).

52 See <https://n-lex.europa.eu/n-lex/info/info-ro/index>.

53 Organic laws shall be passed by the majority vote of the members of each Chamber. Ordinary laws shall be passed by the majority vote of the members present in each Chamber. The Constitution of Romania, Art. 76(1)–(2).

54 The Constitution of the Republic of Croatia, Art. 83.

concept of the cardinal act; accordingly,<sup>55</sup> cardinal acts shall be acts, the adoption and amendment of which requires the votes of two-thirds of the members of the National Assembly present. Cardinal acts regulate, among others, the protection of families,<sup>56</sup> the establishment of religious communities<sup>57</sup> or the detailed rules for the operation and management of parties.<sup>58</sup>

### ***2.3. Generally binding legal norms adopted by the executive and the heads of independent regulatory organs***

In each country, below the hierarchical level of legislative acts are legal norms that provide generally binding provisions for the citizens. For these general legal norms, the legal systems of the examined countries use different expressions,<sup>59</sup> and they are adopted by the executive as well as by the heads of independent regulatory organs. Within these sources, one can differentiate between legislative and general competences.

In addition to the general legislative powers of the parliament, other institutions of the public administration may exceptionally play a role in this area. While in the socialist legal system, it was common for the collective parliamentary presidents or the body of the heads of state to exercise the parliament's legislative power between two sessions when the parliament was only convened for a few days each year, this extraordinary or supplementary legislation is only allowed under 'exceptional' circumstances.<sup>60</sup> The Czech constitution provides this competence to the Senate: if the Chamber of Deputies is dissolved, the Senate shall be empowered to adopt legislative measures concerning matters which cannot be delayed and which would otherwise require the adoption of a statute.<sup>61</sup> Only the government may submit proposals for such legislative measures to the Senate, and some important pieces of legislation, such as the election law and budget, are excluded from this right of initiation. These acts must be confirmed immediately by the Chamber of Deputies once it has regained its decision-making capacity; otherwise, they will be repealed.

The situation is different in Croatia<sup>62</sup> and Romania,<sup>63</sup> where, based on the French model, the parliament may pass an individualised special law with a predetermined temporal scope, enabling the government to issue ordinances in fields outside the scope of organic acts. In Romania, the government is often empowered to adopt ordinances before the adjournment of the session until the next one.<sup>64</sup> The regulatory areas that are excluded from this type of rulemaking – such as those of fundamental

55 The Fundamental Law of Hungary, Art. T)(4).

56 The Fundamental Law of Hungary, Art. L)(3).

57 The Fundamental Law of Hungary, Art. VII (2).

58 The Fundamental Law of Hungary, Art. VIII (4).

59 Decrees, regulations.

60 Küpper and Szabó, 2016, p. 47.

61 The Constitution of the Czech Republic, Art. 33.

62 The Constitution of the Republic of Croatia, Art. 88.

63 The Constitution of Romania, Art. 115(1).

64 Veress, 2004, cited in Küpper and Szabó, 2016, p. 47.



rights and the right to vote – are regulated by the constitution or organic acts in both countries. The empowering act requires a simple majority since it cannot empower the adoption of a legislative act that requires a higher proportion of votes. In Romania, the parliament can decide in the enabling law whether the ordinances shall be submitted to the parliament for approval.<sup>65</sup> Besides this type of ordinance, the government in Romania can adopt emergency ordinances (*ordonanța de urgență*) in exceptional cases without specific empowerment if it justifies the emergency status – albeit the concept of emergency has no constitutional definition. With regards to the emergency ordinances, the government has the power to regulate the area of organic acts with some limitations; they cannot affect, among others, the legal status of the basic institutions of the state, the constitutional rights, freedoms and obligations or the right to vote. Such an emergency ordinance shall only come into force after it has been submitted for debate to the Chamber having the competence to notify it. It can be either approved or rejected; however, in other cases, such as the Hungarian Basic Law, based on the negative historical experiences, the constitution – except for the special legal order or the state of national crisis – does not allow the government to adopt a legal norm that has legislative force.<sup>66</sup>

Regulations adopted under legislative competence shall be distinguished from legal norms adopted under general competence, and they are always situated below the legislative act in the hierarchy of sources of law. However, differences exist among the countries in terms of who is empowered to adopt such source of law. In the framework of the public administration/central administration, the government, the prime minister and the ministers have such rights in each of the countries examined. In addition, the rulemaking powers of assigned independent agencies are also recognised in several countries.<sup>67</sup>

For example, in Slovenia, according to the relevant act, the government may issue decrees.<sup>68</sup> The Slovenian constitution also includes the category of ‘Decrees with the Force of Law’. If the National Assembly is unable to convene due to a state of emergency or war, the president of the Republic of Slovenia may, on the proposal of the government, issue decrees with the force of law.<sup>69</sup>

In Poland, regulations<sup>70</sup> are executive acts passed by bodies authorised by statutes: the president,<sup>71</sup> the Council of Ministers,<sup>72</sup> the prime minister<sup>73</sup> and a minister.<sup>74</sup> The Constitution of Poland describes the presidential regulation with the force of law,

65 The Constitution of Romania, Art. 115(3).

66 Drinóczi, 2015, pp. 19–31.

67 Slovak Republic, Czech Republic, Romania.

68 Government of the Republic of Slovenia Act, Art. 21.

69 Such decrees may, in exception, restrict individual rights and fundamental freedoms as provided by Art. 16 of this constitution. The Constitution of the Republic of Slovenia, Art. 108.

70 Rozporządzenie.

71 The Constitution of the Republic of Poland, Art. 142.

72 The Constitution of the Republic of Poland, Art. 146(4).

73 The Constitution of the Republic of Poland, Art. 148(3).

74 The Constitution of the Republic of Poland, Art. 149(2).

which can be issued during a period of martial law when the Sejm cannot convene. However, such regulations must be approved by the Sejm at its next sitting, and these regulations shall have the character of universally binding laws.<sup>75</sup> In Poland, a regulation can also be issued by the National Council of Radio Broadcasting and Television.<sup>76</sup>

In Slovakia and Hungary, the president of the central bank has this authority.<sup>77</sup> Furthermore, according to Hungarian Basic Law, the head of an independent regulatory organ shall issue decrees; no such decree shall conflict with any act, government decree, prime ministerial decree, ministerial decree or decree of the Governor of the Hungarian National Bank.

Such a general legal norm can typically be adopted to apply or enforce a law or in matters that are not regulated by legislative act. In contrast, in Romania, decisions shall be issued by the government to organise the execution of laws, while ordinances shall be issued under a special enabling law, within the limits and in conformity with the provisions thereof.<sup>78</sup>

#### ***2.4. The decrees of the local governments***

Within the hierarchy of the legal sources, decrees or regulations are typically followed by decrees of the local governments that are adopted based on the empowerment or authorisation of legislative acts. These acts regulate the areas of competence of local government bodies, and they only have a binding force within the administrative territory of the local government.<sup>79</sup> According to the Polish constitution, for example, “enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments”.<sup>80</sup> However, according to the Czech constitution, “representative bodies may, within the limits of their jurisdiction, issue generally binding ordinances.”<sup>81</sup> The Hungarian Basic Law similarly provides that “acting within their functions, local governments shall adopt local government decrees to regulate local social relations not regulated by an Act or on the basis of authorisation by an Act”. It also stipulates that “no local government decree shall conflict with any other law”.<sup>82</sup>

#### ***2.5. International treaties in the system of sources of law***

The sources of law in each state usually go beyond the borders of that state. Nowadays, it is not rare that agreements enter into force among states based on the rules

75 The Constitution of the Republic of Poland, Art. 234.

76 The Constitution of the Republic of Poland, Art. 213(2).

77 The Constitution of the Slovak Republic, Art. 56(1); The Fundamental Law of Hungary, Art. 41(5).

78 The Constitution of Romania, Art. 108.

79 See, e.g., The Constitution of the Czech Republic, Art. 104(3); The Fundamental Law of Hungary, Art. 32; The Constitution of the Slovak Republic, Art. 68.

80 The Constitution of the Republic of Poland, Art. 87(2).

81 The Constitution of the Czech Republic, Art. 104(3).

82 The Fundamental Law of Hungary, Art. 32(2)–(3).

of international law, whereby rights and duties arise for the parties, i.e. the states. The role that these international instruments play in the legal system of a given state should also be mentioned when discussing the hierarchy of the sources of law. The international treaties ratified by the national parliament are part of the legal system of a given state<sup>83</sup>; however, where can they be placed in the hierarchical system of sources of law?

In the Czech Republic, international conventions ratified by the parliament and thus binding on the country play a somewhat superior role over other legislation. If an international treaty's provision contradicts a piece of legislation, the international treaty must be applied.<sup>84</sup> It is also important to mention that the Constitutional Court of the Czech Republic has the power to review the compatibility of international treaties signed by the Czech Republic with the Czech constitutional order.<sup>85</sup> International agreements concluded in accordance with the constitution, ratified and subsequently promulgated by the parliament form an integral part of the legal order in Croatia as well, and they are situated above the legislative act in the hierarchy of the sources of law. The legislative act which is contrary to an international act is not applied; rather, the international act is applied directly, but the legislative act is not altered or repealed unless the parliament does it or the Constitutional Court abolishes the act in question.<sup>86</sup> Similarly, under the Polish<sup>87</sup> and Slovak<sup>88</sup> constitutions, the provision of a ratified international convention takes precedence over the legislative acts. The Constitution of Poland establishes a general rule in Art. 9, which states that the Republic of Poland shall respect international law binding on it. In the third chapter dedicated to the sources of law, the constitution mentions the ratified international agreements within the sources of universally binding law.<sup>89</sup> It also regulates the requirements of promulgation and ratification of different international agreements.<sup>90</sup>

Similarly, in Slovenia, laws and other regulations must comply with generally accepted principles of international law and with treaties that are binding on Slovenia<sup>91</sup>; furthermore, laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general acts must also be in conformity with other ratified

83 See, e.g., The Fundamental Law of Hungary, Art. Q (3); The Constitution of Romania, Art. 11(2).

84 The Constitution of the Czech Republic, Art. 10.

85 Czech Republic Constitutional Court Judgement 2008/11/26 – Pl. ÚS 19/08: Treaty of Lisbon I, [https://www.usoud.cz/fileadmin/user\\_upload/ustavni\\_soud\\_www/Decisions/pdf/Pl%20US%2019-08.pdf](https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2019-08.pdf);

Czech Republic Constitutional Court Judgement 2009/11/03 – Pl. ÚS 29/09: Treaty of Lisbon II, [https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable\\_en.pdf](https://www.cvce.eu/content/publication/2013/10/22/c746a974-58eb-4907-b022-c9f486b6c3d2/publishable_en.pdf).

86 The Constitution of the Republic of Croatia, Art. 134.

87 The Constitution of the Republic of Poland, Art. 91.

88 The Constitution of the Slovak Republic, Art. 7(5).

89 The Constitution of the Republic of Poland, Art. 87.

90 The Constitution of the Republic of Poland, Arts. 88(3) and 89.

91 The Constitution of the Republic of Slovenia, Art. 8.

treaties.<sup>92</sup> According to the Slovenian Constitutional Court,<sup>93</sup> international treaties are superior to state law in the legal hierarchy of Slovenia.<sup>94</sup> According to the Serbian constitution, ratified international treaties and generally accepted rules of the international law shall be part of the legal system of the Republic of Serbia.<sup>95</sup> However, ratified international treaties may not be in non-compliance with the constitution. Laws and other general acts enacted in the Republic of Serbia may not be in non-compliance with the ratified international treaties and generally accepted rules of the international law.<sup>96</sup> In addition, a separate rule is laid down in the Romanian constitution with regards to international human rights treaties. It stipulates that

where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favourable provisions.<sup>97</sup>

### ***2.6. The EU law in the system of the sources of law***

The EU has established a new type of international relationship between states compared to the traditional agreements governed by international law. The founding treaties of the EU confer rights and obligations that directly affect the nationals of the contracting states. In addition to their own national legal systems, member states of the EU are also subject to its legal system; thus, they must allow and ensure the coexistence of the two legal systems in their respective jurisdiction.

Their membership in the EU and, consequently, the primacy of the application of EU law play a decisive role in assessing the hierarchy of the sources of law in the states examined in this volume. There can be no derogation in the case of two legal systems out of which one is the EU legal system – including EU law that takes precedence over the other, which in this case is the law of a member state.

In such a case, it does not matter which norm was created first because, if a conflict arises between a provision of an EU legislation and a provision of a national legal norm, the primacy of the EU law promptly settles the conflict.<sup>98</sup> If the domestic law conflicts with EU law, the latter shall apply. The recognition of such primacy does not require a ruling by the Court of Justice of the European Union nor by the constitutional court of a member state that would rule on this conflict. Every law enforcement authority has a duty to determine it and must act accordingly and where appropriate, disregarding the law of the member states and applying EU law instead. If the laws of

92 The Constitution of the Republic of Slovenia, Art. 153.

93 Ustavno sodišče.

94 National legislation, Slovenia: [shorturl.at/fmxHS](http://shorturl.at/fmxHS).

95 The Constitution of the Republic of Serbia, Art. 16.

96 The Constitution of the Republic of Serbia, Art. 194.

97 The Constitution of Romania, Art. 20.

98 Csink, Schanda and Varga, 2020, p. 887.

the member states do not align with EU law, then the member state might be liable before the Court of Justice of the European Union.<sup>99</sup>

As a result, EU law and the national laws of the member states form two separate legal systems that have no derogating relation, which is why the concept of the hierarchical sources of law is not capable of dealing with the relation between EU law and the laws of the Member States. However, as a result of a country's accession to the EU, the law of the EU also becomes applicable. Unless a given constitution provides otherwise, the application of EU law is governed by the provision that relates to the international treaties; thus, the principle of the superiority of international law also prevails. This principle stipulates that if a rule of the law of the EU conflicts with a national rule of a member state, the provision of the law of the EU must be applied in a given case. This principle holds in the case where a national rule is in conflict with either the primary EU law (founding treaties and international treaties of the EU) or with secondary EU law (regulations, directives etc.). The constitutions of Croatia and Romania contain an explicit provision with regards to the application of EU law. The Croatian constitution contains a whole chapter on the EU, which states that the rights provided in EU law ought to be exercised in the same way as the rights under Croatian law, and it is the Croatian courts' duty to protect them.<sup>100</sup> The Romanian constitution has a separate title that deals with the Euro-Atlantic region. One of its provisions expressly establishes the primacy of the founding treaties and other binding regulations of EU law over the national legal rules that are in conflict with them.<sup>101</sup>

## 2.7. Legal sources

The regulatory system of each state has a database which provides information on the elements comprising the system of the sources of law, e.g. the collection of Croatian legislation<sup>102</sup> includes the legislative acts that are published in the official journal of the Republic of Croatia, *Narodne Novine*. This collection also includes other legal and political acts<sup>103</sup> if they have been published in the official journal. The database is part of the central register<sup>104</sup> of official documents of the Republic of Croatia. The Czech Republic provides access to the collection of legislative acts as well as of international treaties<sup>105</sup> through an application called '*Sbírka Zákonů*'.<sup>106</sup> In Hungary, the '*Nemzeti Jogszálytár*' (National Legislation Database)<sup>107</sup> is a legal search service that is free of charge and available to anyone. It is operated and maintained by the Magyar Közlöny

99 Consolidated Version of the Treaty on the Functioning of the European Union Arts. 258 and 260.

100 The Constitution of the Republic of Croatia, Art. 141c.

101 The Constitution of Romania, Art. 148(2).

102 See <https://n-lex.europa.eu/n-lex/info/info-hr/index>.

103 Such as resolutions and declarations by the Croatian Parliament, national strategies, annual state budgets, reports in the domain of the public authorities and their statutes.

104 See <https://sredisnjikatalogrh.gov.hr/>.

105 See <https://n-lex.europa.eu/n-lex/info/info-cz/index>.

106 See <https://aplikace.mvcr.cz/sbirka-zakonu/>.

107 See <https://njt.hu>.

Lap- és Könyvkiadó Kft.<sup>108</sup> In Poland, such online database is available on the website of the House of the Polish Parliament, the Sejm.<sup>109</sup> It provides regularly updated texts and bibliographic lists of the legal acts that are published in the official journal of the Republic of Poland<sup>110</sup> or by the Polish Observatory.<sup>111</sup> However, this database does not contain local government law or internal law.<sup>112</sup> The development of the Romanian legislation portal<sup>113</sup> was realised as part of the N-Lex project, co-financed by the European Social Fund under the Operational Programme for Administrative Capacity Building.<sup>114</sup> On the site of the National Assembly of the Republic of Serbia, access to the database of adapted legal sources is provided.<sup>115</sup> The Slov-Lex database of the Slovakian ministry of justice<sup>116</sup> provides wide access to the country's legal norms and legislative processes as well as to the case law of the national constitutional court and ordinary courts, among others. The portal also enables the public to acquaint itself with proposed bills and take an active role in the lawmaking process using commenting tools.<sup>117</sup> In Slovenia, the so-called PIS<sup>118</sup> is a free and open database about Slovenian and EU legislation, and it is operated by the Slovenian Government Office for Legislation. It can also be used to monitor the legislative process in Slovenia and to search the case law of Slovenian judiciary. It integrates more than 15 national public databases and enables the users to search the relevant legal information more effectively.<sup>119</sup>

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110 Dziennik Ustaw.

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116 Slov-Lex – Legislative and Information Portal of the Ministry of Justice of the Slovak Republic, see <https://www.slov-lex.sk/web/en>.

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## The Legislative Power

Szilvia KÖBEL

### ABSTRACT

In this chapter, we present the legislative branches of eight countries (Poland, Czech Republic, Slovakia, Romania, Serbia, Croatia, Slovenia and Hungary) through the following subjects: a) legislative bodies and sources of parliamentary law (laws regulating the function of the parliament, bylaws etc.); b) the authorities of parliaments; c) the officeholders of parliaments, the house president, and committees of parliaments; d) parliamentary groups; e) the legal status of officeholders (rights of the MPs, conflict of interest, immunity).

The structure of the study follows the order of the above-mentioned subjects and treats them as subchapters. At the beginning of each subchapter is a short explanation of the subject, highlighting in broad terms what it wishes to showcase. The study focuses on the legislative branches of governments as the main goal of the study is to observe their legislative ecosystem and organs, powers and members.

### KEYWORDS

legislative bodies, branches of power, standing orders, committees, office holders, parliamentary groups.

### 1. Legislative bodies and their sources of parliamentary law

The first subchapter briefly examines the kind of sources from which legislative bodies draw their powers and their place within the broader systems of government of the eight countries analysed.

These legislative bodies are the bicameral Polish parliament, made up of the Sejm and Senate; the Chamber of Deputies and the Senate in the Czech Republic; the National Council in Slovakia; the Chamber of Deputies and the Senate in Romania; the National Assembly of Serbia; the Croatian parliament; the National Assembly of Slovenia; and the National Assembly of Hungary.

The primary and most fundamental level of legislation is the same for each country: the constitution.

The constitutions of the observed countries all declare their parliaments as the legislative power; however, major differences exist in these declarations as some are unicameral and others are bicameral, with one notable exception, which we will briefly address. The constitutions of the countries where the parliament is bicameral

(Poland, Czech Republic and Romania) name both chambers of parliament as the legislative powers, although their specific tasks and competencies vary. In countries where the parliament is unicameral (Slovakia, Serbia, Croatia and Hungary), an adjective such as 'sole' or 'supreme' is added to the declaration to emphasise that the named organ is the singular legislative power – even if 'supreme' does not necessarily imply that on its own. The notable exception previously mentioned is Slovenia, where the structure of parliament is a so-called 'incomplete bicameral system', meaning that while it technically has two chambers, only one – in this case the National Assembly – is vested with legislative powers, while the second chamber – the National Council – is made up of local representatives and various other functional bodies.<sup>1</sup>

Apart from national constitutions, the sources for parliamentary law also include the internal rules of parliaments. The observed countries chose different methods of regulating their own parliaments, with three main ones observable.

The first general method is that the internal rules are on a lower level in the legislative hierarchy than laws. Examples of this method are Poland, Romania, Croatia<sup>2</sup> and Slovenia, with the types of legislation being named either resolution,<sup>3</sup> decision,<sup>4</sup> standing orders<sup>5</sup> or rules of procedure,<sup>6</sup> respectively. In the case of Poland and Romania (and technically also in Slovenia), both chambers have their own internal rules, but interestingly, for the joint activities of the two chambers, the Romanian parliament makes a separate decision<sup>7</sup> – a 'Decision of Parliament (as in a decision of both chambers) – outclassing the separate internal rules.

The second method is that the internal rules are created in the form of laws. Examples of this are the Czech Republic<sup>8</sup> and Slovakia.<sup>9</sup> These internal rules are only internal in that they only address the members of parliament as, technically, they are universally binding.

1 Dieringer, Lindstrom and Stuchlik, 2005.

2 In Croatia, this is a result of the interpretation of the Constitutional Court as organic laws are drafted by a majority of all members of Parliament (U-II-1744/2001 from 11 February 2004).

3 Rules and Regulations of the Senate, Resolution of the Senate of the Republic of Poland of 23 November 1990 (hereinafter: Rules and Regulations of the Senate).

The Standing Orders of the Sejm of the Republic of Poland – Resolution of the Sejm of the Republic of Poland of 30 July 1992 (hereinafter: The Standing Orders of the Sejm).

4 Senate Regulation of Romania, approved by Senate Decision no. 28/200 (hereinafter: Senate Regulation); The Regulation of the Chamber of Deputies of Romania, approved by the Decision of the Chamber of Deputies no. 8/1994 (hereinafter: The Regulation of the Chamber of Deputies).

5 The Standing Orders of the Croatian Parliament. Narodne novine nos. 81/13.

6 Rules of Procedure of the National Assembly of Slovenia of 2 April 2002 (PoDZ-1 – Official Gazette of the Republic of Slovenia No. 35/02) (hereinafter: Rules of Procedure Slovenia).

7 Regulation of the joint activities of the Chamber of Deputies and the Senate, approved by the Decision of the Romanian Parliament no. 4/1992.

8 The Standing Rules of the Senate of the Czech Republic – Act No. 107/1999 Coll (hereinafter: The Standing Rules of the Senate); Rules of Procedure of the Chamber of Deputies of the Czech Republic – Act no. 90/1995 Coll. (hereinafter: Rules of Procedure of the Chamber of Deputies).

9 Act of the National Council of the Slovak Republic 350/1996 on Rules of Procedure of the National Council of the Slovak Republic (hereinafter: Rules of Procedure of the National Council).

The third method utilised in Serbia and Hungary combines the first two methods – the internal rules are split in two, and there are both laws on the parliaments alongside their own internal rules. In both cases, these laws<sup>10</sup> establish the fundamental provisions, with the internal rules<sup>11</sup> regulating the detailed workflow and procedure of the parliaments.

The place of the legislative bodies of power within the branches of power is addressed in the constitutions of every country. The constitutions of Poland, the Czech Republic, Romania, Serbia, Croatia and Slovenia declare verbatim the separations of powers into executive, judicial and legislative branches, although with slightly differing wording, such as “the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers” (Poland) or “all state authority emanates from the people; they exercise it through legislative, executive, and judicial bodies” (Czech Republic). The Constitution of Slovakia takes a different approach and names three of its chapters after the branches; the separation of the powers is not explicitly declared either. Almost conversely, the Fundamental Law of Hungary only explicitly declares the principle by which “the functioning of the Hungarian State shall be based on the principle of the division of powers” and does not expand directly on the topic.

## 2. The authorities of the parliaments

In this subchapter, we briefly examine the competencies of parliaments by focusing mainly on their tasks and functions; a meaningful analysis of the legislative process of each country would necessitate its own study.

The Polish parliament, being bicameral, has its tasks and powers divided and shared between the two houses, although the Sejm, in which control over the executive branch is solely vested, plays a dominant role. The creation of standing, special and investigative committees, the declaration of war and peace and the ability to order nationwide referendums are also competencies of the Sejm. Both the Sejm and the Senate also have the right to adopt their own rules of procedure, and this power is shared if the two chambers act as the National Assembly. The right to introduce legislation is not exclusive to either chamber as a group of at least 100.000 citizens who can vote in the elections of the Sejm also has this right.

In the Czech Republic, the Chamber of Deputies and the Senate constitute the parliament. The two chambers are not symmetric in their functions and powers; however,

10 Law on the National Assembly of the Republic of Serbia, Official Gazette of the Republic of Serbia, No. 9/10;

Act XXXVI of 2012 on the National Assembly of Hungary (hereinafter: Act XXXVI of 2012).

11 Rules of Procedure of the National Assembly of Serbia, Official Gazette of the Republic of Serbia, No. 52/10 (hereinafter: Rules of Procedure Serbia).

Resolution 10/2014. (II. 24.) OGY on certain provisions of the Rules of Procedure of the National Assembly of Hungary (hereinafter: Resolution 10/2014. (II. 24.) OGY).

one is not majorly dominant over the other either. The control and supervision of the executive power is vested solely in the Chamber of Deputies. Bills are introduced in the Chamber of Deputies and are submitted to the Senate after approval, where the Senate either adopts, rejects or returns the bill to the Chamber with proposed amendments. Some powers are exclusive competencies of both chambers combined, i.e. the parliament. These powers are the declaration of war, consenting to sending armed forces outside of the Czech Republic, and the ratification of certain specified treaties.

The Slovakian parliament is unicameral, and as such, the National Council does not share its legislative competencies with any other governmental organ. Art. 86 of the Constitution of the Slovak Republic lists, as some of the main tasks of the parliament, the approval of certain treaties; the approval of referendums; the establishment of ministries and other governmental bodies; the monitoring of government activities; the approval of the state budget; the debate on fundamental domestic, international, economic, social and other issues; declarations of war; and the consent to dispatching military forces, among others. Art. 86 is not an exhaustive list of the powers and competencies of the parliament. Other powers include the ability to introduce draft laws (alongside with other state organs), establish committees and have some influence on the president of the Slovak Republic, notably to decide whether or not to prosecute the president for treason.

The Chamber of Deputies and the Senate of Romania make up the legislative branch of power in Romania. The joint sittings of both chambers declare war, appoint and revoke some state authorities, such as the directors of the intelligence services, the Advocate of the People etc. As part of the parliamentary control over the executive powers, the two chambers can – in a joint sitting – carry a motion of censure against the government to withdraw the confidence granted to it. The legislative initiative lies with the government, deputies, senators or at least 100.000 citizens entitled to vote, although the direct initiative of citizens is limited in comparison. It must be noted that the topic of bicamerality of the parliament of Romania has visited the Constitutional Court of Romania on multiple occasions, mainly on the matter of what criteria legislative functions must adhere to in order for the constitutional control of a bicameral system to be effective.<sup>12</sup>

The Constitution of the Republic of Serbia declares the main competencies of the National Assembly, among which are the adoption and amendment of said constitution, changes concerning the borders of Serbia, the ratification of international contracts, calls for referendums, decisions on war and peace, the adoption of the budget of the Republic of Serbia, the election and supervision of the government, and the appointment and dismissal of judges of the constitutional court. Every deputy, the government, assemblies of autonomous provinces and at least 30,000 voters all have the right to propose laws.

12 Apostolache and Apostolache, 2018.

Art. 80 of the Constitution of the Republic of Croatia lists the tasks and powers of the Croatian parliament, examples of these being the decision on the state budget and on war and peace, the adoption of the National Security Strategy and Defence Strategy, calls for referendums, decisions on alterations of the border, the conduction of elections, the supervision of the government's work and the ability to grant amnesty for criminal offences and perform further tasks specified by the constitution. Examples of these further tasks include forming commissions of inquiry or authorising the government to regulate by decree in certain areas that are not specified as exclusive to the parliament.

The National Assembly of Slovenia calls legislative referendums (if the prerequisites are met), declares state of emergency or war, decides on the use of defence forces and orders inquiries into matters of public importance. Any deputy of the National Assembly, the government or at least 5,000 voters have the right of legislative initiative. The National Council is the second chamber in the incomplete bicameral system of the Slovenian parliament and is the representative body for social, economic, professional and local interests. It has very limited legislative power compared to the National Assembly; it can convey its opinion, require inquiries or adopt a so-called 'suspensive veto' on a law before its promulgation as well as propose the passing of laws (but not propose laws itself).<sup>13</sup> The veto is only suspensive because it can be outvoted by the National Assembly with absolute majority.

Art. 1 para. (2) of the Fundamental Law of Hungary lists the most important powers of the National Assembly, among which are the adoption and amendment of the Fundamental Law of Hungary; the adoption of the central budget; the authorisation of the expression of consent to be bound by international treaties; the election of the president of the republic, the prime minister, members and president of the Constitutional Court, the President of the Curia, the Prosecutor General, the Commissioner for Fundamental Rights; the ability to declare a state of war and to make peace, grant amnesty or exercise further functions and powers laid down in the Fundamental Law or in an act. These further functions are, e.g., the establishment of standing committees and parliamentary groups and the ability to call national referendums. Uniquely, the right of legislative initiative is not regulated in the Fundamental Law but by the internal rules – which list the MPs, parliamentary committees, the government and the president of the republic – instead.<sup>14</sup>

In general, the legislative organs of the eight countries tend to have very similar fundamental powers. It is interesting to observe how bicameral parliaments handle the most important powers. In Poland, the Sejm is clearly dominant over the Senate as it is vested with the rights to declare war and to exercise control; in the Czech Republic, the Chamber of Deputies is somewhat dominant as it has the power to exercise control over the government, but declaring war is a competence of both chambers; in Romania, both powers are competencies of the joint sittings. The matter of legislative

13 Rules of Procedure of the National Council of Slovenia, Article 67(1).

14 Resolution 10/2014. (II. 24.) OGY, Article 31(1)–(2).

initiative is also interesting as only half of the observed (Poland, Romania, Serbia, Slovenia) countries declare this right, and although the number of citizens required seems to vary greatly from 5,000 to 100,000 voters, the percentage of population required (~0,0026% for Poland, ~0,0051% for Romania, ~0,0044% for Serbia, ~0,0025% for Slovenia) shows some consistency.

### **3. The officeholders of parliaments, the house president, and committees of parliaments**

In this subchapter, we present the persons and organs in parliaments with extraordinary powers and tasks and briefly analyse the committees of parliaments. We purposefully avoid mentioning parliamentary groups as a separate subchapter is dedicated to that topic.

In Poland, the officeholders of the parliament are named ‘Organs of the Sejm’ and ‘Bodies of the Senate’, with both listing the exact same four types of positions: the Marshal of the Sejm/Senate, The Praesidium of the Sejm/Senate, The Council of Seniors and Sejm/Senate Committees.<sup>15</sup> The marshals of the Sejm and the Senate represent the Sejm/Senate, preside over their sittings, supervise their committees, convene and preside over the sittings of the Praesidium of the Sejm/Senate and Council of Seniors, and in certain scenarios, they shall temporarily discharge the duties of the president of the republic.<sup>16</sup> The Praesidium of the Sejm/Senate – which consists of the respective marshals and vice/deputy marshals – establishes principles and oversees the work of each respective chamber – more precisely the performance of deputies and senators.<sup>17</sup> The standing committees of both chambers are mainly tasked with both examining matters in deliberation by the Sejm/Senate (in the case of the Senate, even on their own initiative) and supervising the chambers.<sup>18</sup> Both house rules list the types of standing committees to be established.

The two chambers of the parliament of the Czech Republic have very similar officials within their houses. The Rules of Procedure of the Chamber of Deputies dedicate two chapters to officials and committees, while the Standing Rules of the Senate combine both organs into one chapter.<sup>19</sup> Both list a presidential position – President of the Chamber of Deputies and President of the Senate – as the leading organs tasked with representing, leading and supervising their own chamber as well

15 Rules and Regulations of the Senate, Article 4; The Standing Orders of the Sejm, Article 9.

16 Rules and Regulations of the Senate, Article 8; The Standing Orders of the Sejm, Article 10.

17 Rules and Regulations of the Senate, Article 9; The Standing Orders of the Sejm, Article 12.

18 Rules and Regulations of the Senate, Article 12, 1–2.; The Standing Orders of the Sejm, Article 17.

19 Rules of Procedure of the Chamber of Deputies, Part Five, Part Six; The Standing Rules of the Senate, Part Four.

as other related powers.<sup>20</sup> The President of the Chamber of Deputies convenes joint meetings of the chambers. Both rules of procedures list the vice presidents and committees as the other organs of the chambers. The house rules only list a small number of standing committees, the Senate committees being Committees on Agenda and Procedure, Mandate and Immunities, and the Chamber committees being Committees on Mandate and Immunity, Petitions and Budget, Oversight Committee, Steering Committee, Electoral Committee and the Committee on European Affairs, with both houses retaining the power to create other standing committees.<sup>21</sup>

Part Five of the Rules of Procedure of the National Council of Slovakia regulates the officers and committees of the National Council. The officers are the Speaker of the National Council and the Deputy Speakers of the National Council. The house rules list the powers and tasks of the Speaker, of which some of the most important are representing the National Council, signing the resolutions of the National Council, promulgating laws and performing other tasks authorised by the National Council or provided by law.<sup>22</sup> The Deputy Speakers of the National Council direct and organise the National Council in areas authorised by the Speaker and substitute the Speaker, along with further specified tasks in the Rules of Procedure.<sup>23</sup> As specified by these rules, the National Council appoints four standing committees – the Mandate and Immunity Committee, the Committee on the Incompatibility of Functions, the Committee of the National Council on European Affairs and the Constitutional and Legal Affairs Committee – while retaining the power to create more standing committees, if need be.<sup>24</sup> The act specifies four main tasks for committees: submitting bills and other recommendations to the National Council, supervising and observing the implementation of laws, considering the principal matters of economic and social development in the Slovak Republic and cooperating with the authorities of public administration.<sup>25</sup>

The main organs in both chambers of the Romanian parliament are the president (of the Senate/of the Chamber of Deputies), vice presidents, the Standing Bureaus and the committees. The Standing Bureau of each chamber comprises the president, four vice presidents, four secretaries and four quaestors and is tasked in both chambers with deciding, in the case of legislative initiatives, whether to retain, debate and adopt them or to transfer them to the Senate/Chamber of Deputies and with controlling the services of the Senate/Chamber of Deputies, among other things.<sup>26</sup> The president of each chamber convenes ordinary and extraordinary sessions, convenes and directs

20 Rules of Procedure of the Chamber of Deputies § 29 (1)–(2); The Standing Rules of the Senate, Section 33 (1)–(2).

21 Rules of Procedure of the Chamber of Deputies § 29 (1)–(2); The Standing Rules of the Senate Section 36 (1).

22 Rules of Procedure of the National Council, Section 43 (2).

23 Rules of Procedure of the National Council, Section 44.

24 Rules of Procedure of the National Council, Section 45(1)–(2).

25 Rules of Procedure of the National Council, Section 45(3).

26 Senate Regulation, Chapter I, Section 3 Article 35 (1); The Regulation of the Chamber of Deputies, Chapter I, Section 4 Article 32(1).

the work/meetings of the Standing Bureau, represents the Senate/Chamber of Deputies and fulfils any other task provided by the law, by the house rules or by decision of the Senate/Chamber of Deputies.<sup>27</sup> If the presidency of Romania is vacant, the President of the Senate or the President of the Chamber of Deputies – in this order – shall fulfil the interim position. In both chambers, the committees' main task is to prepare the legislative activity and the exercise of parliamentary control.<sup>28</sup> Both house rules list the standing committees and leave the option to establish committees of inquiry or special committees, such as joint committees of the two chambers, open.<sup>29</sup>

According to both the Law on the National Assembly of the Republic of Serbia and its Rules of Procedure, the officers and organs of the parliament are the Speaker, the Deputy Speakers and the Collegium of the National Assembly, along with working bodies – standing working bodies are the committees, ad-hoc working bodies are inquiry committees and commissions.<sup>30</sup> The Speaker represents the National Assembly, convenes and chairs the sessions of the National Assembly and the Collegium and ensures the application of the house rules, among other tasks.<sup>31</sup> The Deputy Speakers assist or substitute the Speaker.<sup>32</sup> The Collegium of the National Assembly consists of the Speaker, the Deputy Speakers and the heads of parliamentary groups and is tasked with coordinating the work of the National Assembly as well as aiding the Speaker in representing, convening and determining the agenda of the National Assembly.<sup>33</sup> The committees are mainly established for the consideration of submitted bills and other acts, review of policies pursued by the government as well as the supervision of the government.<sup>34</sup> The standing Committees of the National Assembly are listed in Art. 46 of the Rules of Procedure of the National Assembly.

The Standing Orders of the Croatian Parliament name the Speaker of Parliament, Deputy Speakers, the presidency of Parliament, the secretary of Parliament and the Deputy Secretary as officers and list committees together with commissions as the working bodies of parliament.<sup>35</sup> Some of the powers of the Speaker of Parliament are representing the parliament, convening and presiding over its sessions, proposing the agenda for the sessions, signing laws and regulations enacted by the parliament, replacing the president of the republic in circumstances described by the constitution,

27 Senate Regulation, Chapter I, Section 3 Article 38(1); The Regulation of the Chamber of Deputies, Chapter I, Section 4 Article 34.

28 Senate Regulation, Chapter I, Section 4 Article 45; The Regulation of the Chamber of Deputies, Chapter I, Section 5 Article 40.

29 Senate Regulation, Chapter I, Section 4 Articles 45, 68 (2); The Regulation of the Chamber of Deputies, Chapter I, Section 5 Articles 41 and 60.

30 Law on the National Assembly of the Republic of Serbia, Articles 19, 24, 26 and 27.

31 Law on the National Assembly of the Republic of Serbia, Article 19; Rules of Procedure Serbia, Article 27.

32 Law on the National Assembly of the Republic of Serbia, Article 24.

33 Law on the National Assembly of the Republic of Serbia, Article 26.

34 Law on the National Assembly of the Republic of Serbia, Article 27; Rules of Procedure Serbia, Article 44.

35 The Standing Orders of the Croatian Parliament, Articles 32, 35 and 39.



officially accepting sponsorships and performing other tasks determined by the constitution, laws and standing orders.<sup>36</sup> The presidency of parliament is made up of the Speaker and the Deputy Speakers, and is responsible for accepting sponsorships on behalf of the parliament and establishing its annual schedule of sessions, amongst other things.<sup>37</sup> The working bodies debate motions and initiatives for the enactment of laws and other acts as well as other matters within the competence of the parliament, and they monitor the work of the government.<sup>38</sup> The list of committees and their tasks are specified in the Standing Orders.

The main officers and organs of the National Assembly of Slovenia, as stated by the Rules of Procedure, are the President of the National Assembly, the vice presidents, the Council of the President of the National Assembly, the Secretary General of the National Assembly, the Legislative and Legal Service of the National Assembly and the working bodies – committees and commissions.<sup>39</sup> Some of the main tasks of the President of the National Assembly are representing the National Assembly, convening and presiding over sessions of the National Assembly, signing laws and other adopted acts, referring issues for discussion to the working bodies and other tasks specified by the constitution, laws and Rules of Procedure.<sup>40</sup> The vice presidents assist and substitute the president.<sup>41</sup> The Council of the President consists of the president, the vice president, the leaders of deputy groups and the deputies of national communities.<sup>42</sup> It is primarily tasked with deciding on adopting draft laws by urgent procedure, discussing them with a shortened procedure or holding preliminary discussions on a law, the duration of sessions and other issues specified by the house rules.<sup>43</sup> The Secretary General heads the services of the National Assembly and the legislative and legal service and delivers opinions on the conformity of draft laws, others acts and amendments with the constitution and the legal system.<sup>44</sup> Working bodies are established in the National Assembly to monitor the state of affairs in individual areas, to prepare policy decisions in such areas, to formulate positions on particular issues and to discuss draft laws and other acts of the National Assembly.<sup>45</sup> The tasks handled by committees in the parliaments of other countries presented in this chapter are taken care of by commissions, either standing or ad hoc – e.g. the Constitutional Commission, which is necessary in the process of amending the constitution.<sup>46</sup>

36 The Standing Orders of the Croatian Parliament, Article 33; The Constitution of the Republic of Croatia, Articles 78 and 97.

37 The Standing Orders of the Croatian Parliament, Article 37.

38 The Standing Orders of the Croatian Parliament, Article 44.

39 Rules of Procedure Slovenia, Articles 19, 20, 21, 25, 27 and 32.

40 Rules of Procedure Slovenia, Article 19(1).

41 Rules of Procedure Slovenia, Article 20(1)–(2).

42 Rules of Procedure Slovenia, Article 21(2).

43 Rules of Procedure Slovenia, Article 21(6).

44 Rules of Procedure Slovenia, Articles 25(1) and 27(1).

45 Rules of Procedure Slovenia, Article 32(1).

46 Rules of Procedure Slovenia, Articles 35 and 174–175.

The officers of the National Assembly of Hungary are the Speaker, the Deputy Speakers, the Principal of the National Assembly and the parliamentary notary.<sup>47</sup> The main functions of the Speaker according to this act are to ensure the rights of the National Assembly; to provide, safeguard, maintain order in and organise the work of the National Assembly; to represent the National Assembly; to open, conduct impartially and close the sittings; to oversee compliance with the Rules of Procedure (this act); to chair the sittings of the House Committee; to conduct the operation of parliamentary committees; and to perform other tasks specified by the Fundamental Law, this act or another act or resolution of the National Assembly.<sup>48</sup> The Deputy Speakers substitute the Speaker in the order specified by the Speaker, and the Principal of the National Assembly exercises the functions of the Speaker, which are delegated to them by the Speaker.<sup>49</sup> Parliamentary notaries fulfil administrative duties.<sup>50</sup> The Hungarian Parliament includes two main types of committees: the House Committee, which acts as a general advisory organ for the National Assembly, and the Committees of the National Assembly, which can also be divided into standing, ad-hoc or inquiry committees.<sup>51</sup> Standing committees mainly propose initiatives, make proposals, deliver opinions, make decisions in specified cases, contribute to and supervise the work of the government and exercise further powers specified in the Fundamental Law, acts, and provisions of the Rules of Procedure in the form of resolutions.<sup>52</sup>

#### 4. The parliamentary groups

This chapter focuses on parliamentary groups and their creation and powers as well as their internal rules and regulations.

Both in the Sejm and in the Senate of the Polish parliament, two types of parliamentary groups exist. The larger groups of members of parliament (hereinafter MPs) in both chambers are called ‘clubs’, with a minimum of seven senators (Senate) and 15 deputies (Sejm). The second, smaller ones are called ‘groups’ and need three senators or three deputies, respectively.<sup>53</sup> The authorities and goals of both types in both chambers – beyond political cooperation – are determined by the groups themselves, with each having to present their internal regulations to the Praesidium of the Senate and to the Marshal of the Sejm, respectively.<sup>54</sup> In both chambers, one senator or one

47 Act XXXVI of 2012, Section 1 a)–d).

48 Act XXXVI of 2012, Section 2(1)–(2).

49 Act XXXVI of 2012, Section 3(1), Section 4(1).

50 Act XXXVI of 2012, Section 5(1).

51 Act XXXVI of 2012, Sections 11(1) and 14(1).

52 Act XXXVI of 2012, Section 15(1).

53 Rules and Regulations of the Senate, Article 21(2)–(3); The Standing Orders of the Sejm, Article 8(2)–(3).

54 Rules and Regulations of the Senate, Article 21(7); The Standing Orders of the Sejm, Article (8)(7).

deputy can only belong to either one group or one club.<sup>55</sup> In both chambers, a Council of Seniors ensures the cooperation of the clubs and the respective chambers, mainly by issuing opinions draft plans on the agenda of sittings.<sup>56</sup>

In the Senate of the Czech Republic, a minimum of five senators can establish a senators' group, and if the number drops below five after the establishment, the group ceases to exist.<sup>57</sup> Senators can do this either within their own political party, or if they are independent senators or senators whose political party does not have sufficient numbers to establish a group, they may either establish a group together with other such senators or join established groups.<sup>58</sup> The powers and tasks of the groups are scattered throughout the Standing Rules of the Senate. In the Chamber of Deputies, the deputies may associate with political groups within their political parties – the Rules of Procedure specify a minimal number of three members.<sup>59</sup> In addition, new political groups can be formed by deputies from different political parties or independent deputies that have left their political parties. In both cases, the minimal number of members is 10.<sup>60</sup> In both the Senate and the Chamber of Deputies, new groups must notify their respective president of the chamber in writing about certain information about the groups.<sup>61</sup> According to the regulations of both chambers, each MP may only be part of one group.<sup>62</sup>

The primary ways of establishing political caucuses in the National Council of Slovakia are to either be in the same political party, movement or election coalition as the other members or through the splitting and merging or said caucuses.<sup>63</sup> Other ways of establishing caucuses are not specified; instead, the formation must be approved by the National Council.<sup>64</sup> At least eight members are needed for the formation, and each MP may only be the member of a singular caucus.<sup>65</sup> The purpose – beyond associating with other MPs – and powers of the caucuses are not specified. The other manifestation of political groups in the National Council is the Gremium of Members, which comprises members delegated by the caucuses and is tasked with considering issues of political and procedural nature concerning the activities of the National Council and its bodies.<sup>66</sup>

55 Rules and Regulations of the Senate, Article 21(4); The Standing Orders of the Sejm, Article (8)(4).

56 Rules and Regulations of the Senate, Article 16(1); The Standing Orders of the Sejm, Article 14.

57 The Standing Rules of the Senate Section 20(1); Section 21(1)–(2).

58 The Standing Rules of the Senate Section 20(1)–(2).

59 Rules of Procedure of the Chamber of Deputies, § 77(1) and (5).

60 Rules of Procedure of the Chamber of Deputies, § 77(2).

61 Rules of Procedure of the Chamber of Deputies, § 77(7); The Standing Rules of the Senate, Section 21(3).

62 Rules of Procedure of the Chamber of Deputies, § 77(4); The Standing Rules of the Senate, Section 21(1).

63 Rules of Procedure of the National Council, Section 64(1)–(2).

64 Rules of Procedure of the National Council, Section 64(3).

65 Rules of Procedure of the National Council, Section 64(4)–(5).

66 Rules of Procedure of the National Council, Section 66(1)–(3).

The house rules of both chambers of the Romanian parliament start with describing the process of establishing the groups, with 10 deputies being the minimum in the Chamber of Deputies and seven being the minimum in the Senate.<sup>67</sup> In both the Chamber of Deputies and the Senate, only MPs elected with the same political party or political or electoral alliance or who were independent may form a group, and those representing national minorities may form into a singular group.<sup>68</sup> The rule of one MP per group is curiously only found explicitly in the rules of the Senate, with the rules of the Chamber of Deputies only mentioning the change of membership.<sup>69</sup> The powers of the leader of the parliamentary group – and thus the powers of the groups themselves – are clearly defined. Some of these powers are representing the group, presenting information about the group, proposing the method of voting and participating – without the right to vote – in the meeting of the Standing Bureau (in both chambers).<sup>70</sup>

The Law on the National Assembly of Serbia only briefly mentions parliamentary groups and avoids details regulating to the Rules of Procedure.<sup>71</sup> These Rules of Procedure split the legislation on parliamentary groups into two parts: the first addresses the formation of such groups, and the second elaborates on the duties of the head and deputy heads and the changes in group membership. Parliamentary groups are to be formed in the National Assembly by at least five MPs, no MPs may be in more than one parliamentary group, and parliamentary groups are deemed ‘formed’ as soon as a list of members signed by every member is submitted to the Speaker of the National Assembly.<sup>72</sup> The head of the parliamentary group represents the group.<sup>73</sup> Beyond that of participating in the work of the National Assembly in the manner stipulated by law, the tasks and powers of parliamentary groups are not specified, and the rules are scattered throughout the Rules of Procedure.<sup>74</sup>

The regulations about political groups in the Standing Orders of the Croatian Parliament list a variety of combinations of MPs needed to establish a group.<sup>75</sup> This ‘decision’, as the Standing Orders refer to the establishment as well as any changes in the work and membership of the group, must be submitted to the Speaker of the Parliament and the Secretary of Parliament.<sup>76</sup> MPs are limited to being members of only one political group, except for those elected as representatives of national

67 Senate Regulation, Chapter I, Section 2 Article 16 (2); The Regulation of the Chamber of Deputies, Chapter I, Section 2 Article 13(1).

68 Senate Regulation, Chapter I, Section 2 Article 16(2)–(3); The Regulation of the Chamber of Deputies, Chapter I, Section 2 Article 13(1).

69 Senate Regulation, Chapter I, Section 2 Article 16(1).

70 Senate Regulation, Chapter I, Section 2 Article 18(1); The Regulation of the Chamber of Deputies, Chapter I, Section 2 Article 15(3).

71 Law on the National Assembly of the Republic of Serbia, Articles (30)–(31).

72 Rules of Procedure Serbia, Article 22.

73 Rules of Procedure Serbia, Articles 39–40.

74 Rules of Procedure Serbia, Article 38.

75 The Standing Orders of the Croatian Parliament, Article 29.

76 The Standing Orders of the Croatian Parliament, Article 30.

minorities, who may join another political group in addition to being members of the political group of national minorities.<sup>77</sup> The powers and tasks of a political group are not specifically listed, but it is noted that the chairperson of a political group has the status of chairperson of a parliamentary working body and thus shares the same rights and obligations.<sup>78</sup> Political groups may employ officials as secretaries and for administrative tasks, the costs of whom are covered by parliament funds.<sup>79</sup>

According to the Rules of Procedure of the National Assembly of Slovenia, deputy groups are to be formed at most seven days after the National Assembly elects its president.<sup>80</sup> Until these are formed, deputy groups consist of the deputies elected from the same list of candidates, deputies from voters' lists and deputies representing national communities.<sup>81</sup> Other than forming a group, deputies also have the right to become or cease to become members of an already formed group, and groups can also merge into one group, although the familiar limit of one group per MP still stands.<sup>82</sup> Under normal circumstances, at least three deputies are needed to form a group, but with two exceptions.<sup>83</sup> The first is that the deputies who were elected from voters' lists can form deputy groups irrespective of their number, and the other is that the two deputies of the Italian and Hungarian national committees together have a status equal to that of a deputy group.<sup>84</sup> It is interesting to observe that the house rules of the Slovenian parliament – uniquely out the observed countries in this regard – name the two most prominent national committees, as opposed to merely slotting them under representatives of national minorities. The tasks and powers of the groups are not specified.

Provisions about parliamentary groups are scarcely found in the act on the National Assembly of Hungary as it only regulates a few powers as well as details related to the expenses of the groups.<sup>85</sup> The rules on establishment, functioning, powers, rights and termination are found in the resolution on certain provisions of the Rules of Procedure. Members belonging to the same political party may only form a single parliamentary group, with a minimum of five MPs needed to set up a group, which decreases to three if the MPs belong to the same political party and have obtained their mandate from the same independent national party list.<sup>86</sup> The parliamentary group must elect a leader, and it can choose to elect deputy leaders and other officials.<sup>87</sup> Uniquely amongst the observed rules of parliaments, the termination process of a parliamentary group is regulated in detail, with the reason for

77 The Standing Orders of the Croatian Parliament, Article 29.

78 The Standing Orders of the Croatian Parliament, Article 29.

79 The Standing Orders of the Croatian Parliament, Article 31.

80 Rules of Procedure Slovenia, Article 16.

81 Rules of Procedure Slovenia, Article 11(1).

82 Rules of Procedure Slovenia, Articles 28 and 31(1).

83 Rules of Procedure Slovenia, Article 29(2).

84 Rules of Procedure Slovenia, Article 29(3)–(4).

85 Act XXXVI of 2012, Section 6(1).

86 Resolution 10/2014. (II. 24.) OGY, Section 1(1)–(2), Section 2(1)–(2).

87 Resolution 10/2014. (II. 24.) OGY, Section 3.

termination being the decrease of members to less than five/three, the termination by choice of the group or the termination of the political party that was the basis of the group.<sup>88</sup>

The similarities in the regulations of parliamentary groups are prevalent, with only a few exceptions. All countries require a minimum number of MPs to form groups (and the numbers are fairly similar), with the only exception being those mentioned in the Slovenian parliament. All regulations limit MPs to be members of only one group, and almost none of countries specify the powers and tasks of the groups. It is clear that political groups as institutions are generally similarly regulated in all observed countries. One other point of interest in the regulations is the tendency of having limited options when it comes to switching groups or founding new one, such as a higher minimal member count in the case of the Chamber of Deputies of the Czech parliament or the formation of new caucuses (in addition to the ones created through the merging or splitting of existing ones) needing the explicit approval of the parliament. These are likely measures taken by parliaments to prevent ‘party switching’, i.e. the change of parliamentary groups of MPs – a phenomenon that was largely prevalent in post-communist countries.<sup>89</sup>

## 5. The legal status of officeholders

In our final chapter, we examine how parliaments handle conflict of interest and immunity and the nature of MPs’ mandates. As a comprehensive listing of these would exceed the limits of this study, we limit the analysis to the most important rules found in the constitutions, relevant acts and house rules.

One of the most fundamental rules in any bicameral parliamentary system is that no person may be a member of both chambers. This happens in the Polish parliament, with the very first rule specifically on deputies and senators in the Polish constitution being that “no one may be a Deputy and a Senator at the same time”. The prohibited positions alongside having a mandate in the Senate of the Sejm are listed with specificity in the constitution. Immunity is also primarily regulated on the level of the constitution, which declares that “a Deputy shall not be held accountable for his activity performed within the scope of a Deputy’s mandate during the term thereof nor after its completion”; a Deputy cannot be held criminally accountable without the consent of the Sejm/Senate until their mandate expires. The mandates of Deputies and Senators are free, unrestricted mandates, with the constitution explicitly declaring that “they<sup>90</sup> shall not be bound by any instructions of the electorate”. These rules

88 Resolution 10/2014. (II. 24.) OGY, Section 5(1).

89 Semenova, 2015, pp. 272–291.

90 The regulations of Article 107, 1. are formulated with primarily the deputies of the Sejm in mind; however, Article 108 states that Articles 103–107 shall apply, as appropriate, to Senators as well. Thus, we do not specify in every instance that both chambers are affected. The Constitution of the Republic of Poland, Chapter IV, Article 108.

are expanded upon – as the constitution itself states – by statutes, e.g. the house rules regulating internal conflicts of interests, such as simultaneously being a member of a standing committee of a subject area over which one holds the position of minister or secretary.<sup>91</sup>

Conflict of interest, immunity and MPs' mandates are primarily regulated in the Constitution of the Czech Republic. The constitution states that no person may serve as a member of both chambers of parliament at the same time and adds a brief list of the most important incompatible positions, together with the consequences such incompatibilities result in, as well as opening the list up to be expanded in statutes. Act of Law No. 159/2006 Coll., on Conflict of Interests<sup>92</sup> regulates the conflicts of interest of MPs in detail and expands on this list of prohibited activities and offices, such as a managerial position in a corporate entity or at a public administration office.<sup>93</sup> The constitution ensures the free mandates of MPs by declaring that "Deputies and Senators shall perform their duties personally in accordance with their oath of office; in addition, they shall not be bound by anyone's instructions". On the immunity of MPs, the constitution declares that there shall be no legal recourse for their votes in the parliament; further, they shall not be criminally prosecuted except with the consent of their chamber for the duration of their mandate, and they have the right to refuse to give evidence if they learned about it through their position as MPs. The house rules of both chambers expand on the immunity rules by regulating the Committees on Mandate and Immunity, which handle decisions on the criminal prosecution of MPs.<sup>94</sup>

Similarly to the first two examples, the fundamental rules on conflict of interest, immunity and mandates are found in the constitution in the case of Slovakia as well. The constitution deals with mandates first, by stating that "they [Members of Parliament] shall exercise their mandates individually and according to their best conscience (...)" and declaring laconically that "no orders bind them [Members of Parliament]". When it comes to MPs' conflicts of interests, the constitution mentions the most important incompatible offices, such as those of judge, public prosecutor or members of the armed forces. Detailed rules on incompatibility are included in the Constitutional Act on the Protection of Public Interest in the Performance of Offices by Public Officials No. 357/2004<sup>95</sup>, which lists the offices, jobs and activities where conflict of interest arises for public officials, e.g. members of parliament.<sup>96</sup> Matters of incompatibility of MPs are handled by the Committee on Incompatibility of

91 Rules and Regulations of the Senate, Article 20(4).

92 Act of Law No. 159/2006 Coll., on Conflict of Interests.

93 Act of Law No. 159/2006 Coll., on Conflict of Interests, Articles 5(1) and (3).

94 Rules of Procedure of the Chamber of Deputies § 45; The Standing Rules of the Senate, Section 13.

95 Constitutional Act on the Protection of Public Interest in the Performance of Offices by Public Officials No. 357/2004.

96 Constitutional Act on the Protection of Public Interest in the Performance of Offices by Public Officials No. 357/2004 Article 4(2) a), d); Article 5(2).

Functions of the National Council.<sup>97</sup> The provisions on an MP's immunity declare absolute protection – as in no prosecution even after the expiration of the MP's mandate – on votes and statements, and relative protection for any criminal action only to be prosecuted, sanctioned, otherwise disciplined or held in pre-trial detention with the approval of the National Council until the expiration of the mandate. The Mandate and Immunity Committee of the National Council decides on questions related to mandate and immunity, such as the proper acquisition of the mandate, ascertaining the eligibility or deciding over a permission for detaining an MP.<sup>98</sup>

The Constitution of Romania is rather short-spoken concerning incompatibilities and a free mandate, but immunity is somewhat expanded upon. The mandate of the Deputies and Senators shall be in the service of the people and is to be used freely; being a Deputy or a Senator is mutually exclusive and incompatible with exercising any public office in authority except for government membership, and further incompatibilities are to be regulating in organic laws; immunity is absolute for votes cast and political opinions expressed and relative for criminal investigation and prosecution, as those are allowed, but searching, detaining or arresting an MP is only possible with the consent of the chamber to which they belong, although if caught in the act, they can be searched and detained without the need for approval. The internal rules detail the purpose, general rules and procedures affiliated with the mandate, immunity and conflict of interest, in the latter of which the list of incompatibilities is greatly expanded.<sup>99</sup> Both chambers have dedicated committees for examining the issues with both immunity and conflict of interest and fulfil their task by presenting an opinion, arguing for both sides, on the basis of which the given chamber can cast a vote.<sup>100</sup> Immunity is treated with rigorous regulation in Romania as the country has theorised about the institution more in depth than the surrounding countries, and the public reception to parliamentary immunity tends to be more negative.<sup>101</sup>

In the case of Serbia, the rules on this chapter's topic are also only briefly mentioned in the constitution, and detailed regulation is delegated to laws – most prominently the Law on the National Assembly – but also to the internal rules. Art. 102 and 103 of the Constitution of the Republic of Serbia only establish fundamental decrees on the most basic incompatible positions with other such conflicts of interests to be stipulated by law, and the rules of immunity against criminal or other proceedings. As with some of the previous examples, immunity is once again absolute when it comes to expressed opinions or votes cast in parliament. The Law on the National Assembly and the Rules of Procedure go into more detail when regulating these topics, but only in terms of procedural rules, and they do not add fundamental provisions, not even

97 Rules of Procedure of the National Council, Section 58.

98 Rules of Procedure of the National Council, Section 57.

99 Senate Regulation, Chapter IV, Sections 1–3; The Regulation of the Chamber of Deputies, Chapter V, Sections 1–3.

100 Senate Regulation, Chapter IV, Section 1 Article 189(7), Section 2 Article 199(1); The Regulation of the Chamber of Deputies, Chapter V, Section 1 Article 220(3), Section 2 Article 228(2).

101 Negoită, 2015, pp. 89–109.



an expansion on the list of incompatibilities. One notable exception to this would be, however, that the free nature of mandate of the deputies – as this attribute was only indicated in the constitution – is specified in the Law on the National Assembly, which declares that “a Member of Parliament shall decide, act and vote in accordance with his/her personal convictions”.<sup>102</sup>

Unlike all previous examples, the Constitution of the Republic of Croatia only regulates two of the three topics, namely the mandate and immunity of deputies, but it makes no mention of the deputies’ conflicts of interests. The regulations in the constitution on mandate and immunity are – as we have grown to expect – short, only establishing the most basic of rules: mandates cannot be imperative, and the members of the Croatian parliament enjoy immunity, meaning that they cannot be held criminally liable for their expressed opinions and cast votes, and they can only be held liable for criminal offences with the approval of the Croatian parliament or if they are caught perpetrating a serious crime. The internal rules expand somewhat on these rules – albeit only with procedural decrees and only a singular mention of incompatibility, also of a procedural nature, under the rules about mandates.<sup>103</sup> The main source of regulations for incompatibilities of MPs is the Act on the Prevention of Conflict of Interest,<sup>104</sup> which lays down general rules about conflict of interest and prohibited conducts, especially with other public offices or administrative positions in business entities.

The rules on mandates, conflict of interest and immunity of MPs in the Constitution of Slovenia are also rather short, with only three articles specifically on the National Assembly and National Council. Art. 82 and 83 declare the fundamentals on mandates, incompatibilities and the immunity of deputies of the National Assembly. The deputies are not to be bound by any instructions, and the law shall establish incompatibilities. MPs have representative mandates by nature, and as such, their criminal liability is dependent on either the permission of the National Assembly or being caught in the act of a serious offence. They have complete immunity for expressed opinions and votes cast in the National Assembly and its working bodies. Art. 100 establishes the incompatibility and immunity rules of the National Council by stating that no one may be a member of the National Council and deputy of the National Assembly at the same time and that the immunity of members is identical to that of deputies. The Rules of Procedure of the National Assembly only expand upon the rules of immunity, regulating the procedure in detail and assigning the Commission for Public Office and Elections to handle such issues.<sup>105</sup> The comprehensive rules for conflict of interest are found in the Integrity and Prevention of Corruption Act.<sup>106</sup> Amongst many other fundamental incompatibility rules, the act establishes

102 Law on the National Assembly of the Republic of Serbia, Article 37.

103 The Standing Orders of the Croatian Parliament, Articles 12 and 23.

104 Act on the Prevention of Conflict of Interest (OG no. 143/21).

105 Rules of Procedure Slovenia, Articles 36 and 203–214.

106 Integrity and Prevention of Corruption Act, Official Journal of the Republic of Slovenia N. 45/10.

the Commission for the Prevention of Corruption, which is an autonomous and independent state body tasked with handling such matters. The act regulates office incompatibilities – e.g. a general ban on any professional or other activity aimed at generating income or proceeds for a professional official – with certain exceptions, such as pedagogical and scientific activities, and the Commission for the Prevention of Corruption may allow individual exception from these rules.<sup>107</sup> The act also prohibits professional officials to be a member or be a part of management/supervision/representation of a company, economic interest group, cooperative, public agency or any other entity governed by public or private law.<sup>108</sup>

Art. 4 in the Fundamental Law of Hungary is the only article that deals with the three topics in some way, but even then, only the mandate of MPs is substantially addressed as the article declares their free mandate: “They [members of the National Assembly] shall perform their activities in the public interest, and they shall not be given instructions in that respect”. The second section of the article briefly deals with immunity and conflict of interest by stating that “[MP’s] shall be entitled to immunity and to remuneration ensuring their independence” and delegating the regulation of conflict of interest to a cardinal act. The act in question – at least in the case of MPs – is the act on the National Assembly, which dedicates an entire chapter to the status of its members. The immunity regulations differ somewhat from the previous examples, in that the immunity for the votes cast and opinions communicated is not absolute but has two exceptions where an MP can be held liable.<sup>109</sup> The main rules on conflict of interest are divided into incompatibility and economic conflict of interest. Incompatibility means that a “member’s mandate shall be incompatible with any other state, local government or economic office or position”; furthermore, the MP may not pursue any other gainful occupation except for scientific, artistic, or editorial activities.<sup>110</sup> The rules of incompatibility also give an exhaustive list on what offices an MP can hold.<sup>111</sup> Under the regulations of economic conflict of interest, MPs are banned from being exclusive or majority owners or executives or senior employees of a financial entity, from being shareholding members or shareholders in a non-transparent business organisation, or from leading/being members of an organ established for awarding grants.<sup>112</sup> The procedural rules on conflict of interest and immunity are found in the resolution on certain provisions of the Rules of Procedure.<sup>113</sup>

The legal status of officeholders is, in almost all cases, only regulated on a surface level in the constitutions of the countries, and the more detailed rules about the topics are delegated to either the internal rules or – mostly for conflict of interest – a dedicated law.

107 Integrity and Prevention of Corruption Act, Article 26(1)–(2), (4).

108 Integrity and Prevention of Corruption Act, Article 27(1).

109 Act XXXVI of 2012, Section 73(1).

110 Act XXXVI of 2012, Section 80(1).

111 Act XXXVI of 2012, Section 80(2).

112 Act XXXVI of 2012, Section 84.

113 Resolution 10/2014. (II. 24.) OGY, Sections 146–147, Sections 149–152.

## 6. Conclusion

The goal of this study was to inform using primary, currently-in-effect sources. We wished to present institutions connected to the legislative powers through these sources and grant an overview over the parliaments of the observed countries. Through the obtained information, certain general conclusions could be drawn. The post-communist parliaments of the observed countries generally have the same authorities, functions and structural solutions, with the main differences being the level of legislation on which certain institutions or topics are regulated. Committees, for example, generally have the same types and main functions; parliaments are either unicameral or bicameral (or incompletely bicameral); officeholders generally fulfil the same functions and sometimes even have the same names; and constitutions tend to lay down only the most fundamental of provisions.

If we had to summarise this comparative study with a central observation, it would be that a substantial number of similarities exist between the legislative powers of the countries examined in all their aspects. The systems have no cardinal differences – notwithstanding the historical and cultural differences – that would significantly disrupt the semi-uniformity found between the observed legislative powers.

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## The Executive Power

Attila HORVÁTH

### ABSTRACT

“The executive power is the moving force of a government. It represents, in the political system, that mysterious principle which, in moral man, unites action to the will”.<sup>1</sup> Although more than 200 years have passed since Jacques Necker, the finance minister for Louis XVI, completed his essay on the executive power, his definition still holds in many respects. However, the term ‘executive’ as the name of a branch of government may be misleading. As Vile notes, the executive “gets its name from one of its major functions, that of putting the law into effect”.<sup>2</sup> It goes without saying that the executive means more than just implementing laws passed by the legislature. Although explaining the concept of the executive and enumerating its task would greatly exceed the scope of this chapter,<sup>3</sup> it is worth recalling some thoughts of Mansfield, who claimed in his seminal work on modern executive power that it is the executive power that made the principle of separation of powers workable. In his view, “for executive power, always ready for emergency, ensured that the power of government was not diminished, much less stalemated, when it was separated into three branches”.<sup>4</sup> His volume revolves around the idea of ambivalence of the modern executive: “The beauty of executive power, then, is to be both subordinate and not subordinate, both weak and strong. It can reach where law cannot, and thus supply the defect of law, yet remain subordinate to law”.<sup>5</sup>

The chapter unfolds as follows (since the current volume devotes a whole chapter to the powers of the heads of state, this chapter focuses on governments): in the first section, we outline the structure of the executive power in the eight examined states. The second section is devoted to the governments as key actors of the executive power, dealing with their status, composition, competencies and formation while paying special attention to the question of responsibility. The third section briefly outlines the territorial level of the executive.

### KEYWORDS

executive power, governments, prime ministers, government formation, vote of (no) confidence.

1 Necker, 1792, p. 1.

2 Vile, 1998, p. 67.

3 For a comprehensive summary of the history of executive power, see Liebert, McDowell and Price, 2012 (Chapter 1–5).

4 Mansfield, 1989, p. xvi.

5 Ibid.

## 1. Parliamentarism, quarter-presidentialism and semi-presidentialism: the structure of the executive power

In the past centuries, the structure of the executive power showed great diversity. The former communist states of Central and Eastern Europe are no exception in this regard. While the actual form of government evolved in several Western countries at the latest after World War II, the post-communist states underwent major changes even during the transition in the third wave of democracy. The regime changes of 1989–1991 and the breakup of Czechoslovakia and Yugoslavia resulted in new independent states and considerably new constitutional systems. As Elster and his colleagues note, constitutions did not play an important role under communism, stating that although “the constitutional texts were formally in force, they were not meant to constrain and to obligate the power elites”.<sup>6</sup> However, the constitution-making process became more important during the democratic transition of Eastern and Central Europe and the newly adapted constitutions came to resemble their Western counterparts even in their role. The idea of separation of powers did not prevail during the communist rule at all; therefore, it would be rather meaningless to disentangle the possessors of executive power in these states. Although the constitutions of Czechoslovakia, Hungary, Poland, Romania and Yugoslavia had formal provisions on the head of state (be it either a president [Czechoslovakia, Romania from 1974 and Yugoslavia] or a collective head of state [Hungary, Poland, Romania until 1974]) and on the government (which had far less powers than the current ones), the personal rule of the (*de facto*) party leader was the crucial factor.<sup>7</sup> It is a matter of course that the fundamental changes of the democratic transition heavily affected even the executive.

While it is quite evident that who possesses legislative power in a given country, and even the organs of the judiciary, can be identified more or less clearly, the executive branch is slightly different in this regard. Then, who holds the executive power? To answer this question, two actors deserve special attention: the head of state and the government.<sup>8</sup> This raises the complex issue of forms of government, which is at the intersection of constitutional law and political science. As is well known, one can distinguish three basic (and even some other) types of forms of government, based on the structure of the executive and on the relationship between legislative and executive power:<sup>9</sup>

6 Elster, Offe and Preuss, 1998, p. 63 (for constitutional politics in Eastern Europe, see Chapter 3).

7 For the structure and functioning of the communist regimes of Eastern Europe, see Staar, 1982.

8 However, it must be noted that the executive branch is not equal to the head of state and the government. Depending on the proper understanding of executive, even the independent regulatory authorities, other public administration bodies and local governments may be involved in the executive branch.

9 For a brief overview of the systems, see Müller, 2017, pp. 137–141; Pérez-Liñán, 2017, pp. 87–89.

- a) presidential systems, where all executive power is vested in a single, directly elected politician (president) for a fixed term, who is (at least politically) not accountable to the legislation (the United States is the most obvious case);
- b) parliamentary systems, characterised by dual executive system, i.e. the separation between the head of the government (the prime minister) and the head of state (either a monarch or a president); the government holds the real political power and is accountable to the parliament, while the head of state plays a rather symbolic role (e.g. United Kingdom or Germany);
- c) semi-presidential systems, in which the executive is shared by the head of state and the government, but contrary to parliamentary systems, the head of state is always directly elected and possesses a considerable amount of power (the archetypical case is France).

As for the eight examined countries, as noted in Chapter 6, none of them institutionalised a presidential system, but they rather decided between parliamentary and semi-presidential republics. It would be quite logical and probably expected by the readers at this point to classify the eight polities and find the proper 'label' (either parliamentary and or semi-presidential) for the analysed states; however, this task proves to be surprisingly complicated. Even if one disregards the significant changes of the past decades in some of the constitutional arrangements in CEE countries and focuses on the current constitutional framework, several problems still arise in their classification. Semi-presidentialism is a genuinely travelling concept; as Brunclík and Kubát note, "the literature on semi-presidentialism is full of paradoxes, ambiguities, confusions and disagreements".<sup>10</sup> As different scholars use different approaches and methods to grasp the concept of semi-presidentialism,<sup>11</sup> the classification of the states may vary from study to study. It should be also noted that semi-presidentialism has divergent subtypes – e.g. premier-presidentialism (the government is exclusively accountable to the parliament) and president-parliamentarism (characterised by dual accountability, since the government is dually accountable to the president and to the parliament),<sup>12</sup> which is an additional complicating factor. It is very telling that Brunclík and Kubát devoted a whole book to categorise three countries – the Czech Republic, Poland and Slovakia – regarding their form of government.<sup>13</sup> Their contribution clearly demonstrates the problems and caveats of this classification. Considering these difficulties, and bearing in mind that the current volume positions itself as a constitutional law book, while the question of forms of government has significant aspects of political science (e.g. the role of strong political personalities, informal power and influence, the internal working of government and other issues beyond the scope of this constitutional law volume), we do not attempt to provide a clear-cut

<sup>10</sup> Brunclík and Kubát, 2019, p. 6.

<sup>11</sup> For a brief overview, see Brunclík and Kubát, 2019, pp. 6–22.

<sup>12</sup> Shugart and Carey, 1992, pp. 55–75.

<sup>13</sup> They argue that Slovakia and the Czech Republic have been parliamentary regimes since 1989 and Poland since 1997, see Brunclík and Kubát, 2019, p. 134.

classification and refrain from making categorical judgements. Instead, we focus on the structure of the executive power according to the wording of the constitutions (see Table 1), while making some references to the forms of government attributable to the examined countries.

Dual executive <i>expressis verbis</i>	Indirect reference to dual executive	The government is the sole possessor of the executive	No reference to the possessor of the executive
Poland	Czech Republic Slovakia	Croatia Hungary Serbia	Romania Slovenia

**Table 1.** The structure of the executive in constitutions

*Source: author's compilation*

The arrangement introduced by the former Small Constitution of 1992 of Poland may be described as semi-presidential, considering the strong competencies of the president. As the 1997 constitution currently in force significantly weakened the powers of the president, some argue that 1997 marked the beginning of a cabinet-parliamentary regime complemented by elements of semi-presidentialism.<sup>14</sup> The 1997 Constitution offers a clear-cut example of a dual executive system when it stipulates that “executive power shall be vested in the President of the Republic of Poland and the Council of Minister”. This judgement is rather controversial among the scholars of constitutional law. Some claim that vesting the executive power in two separate and distinct entities may give rise to conflicts in the future, and in addition, “such classifications runs counter to tendency to weaken the position of the president and the clearly articulated wish to strengthen that of the prime minister”.<sup>15</sup> In contrast, others argue that the dualism of the executive power is a solution typical of parliamentary systems and corresponds to the classical separation of powers.<sup>16</sup> According to Granat and Granat, the double-headed executive is one of the main problems of Poland’s constitutional system: “On the one hand, the Constitution introduces a presidency with a strong democratic mandate, while, on the other hand, it places the prime minister in a powerful position in respect of the exercise of governmental power”.<sup>17</sup>

Contrary to Poland, both the Constitution of the Czech Republic and that of Slovakia refrain from directly identifying the possessors of the executive power. However, each of these constitutions has a separate chapter on executive power, and both these chapters include two sections: the president of the republic and the government. Based on this structure of the two constitutions, one may conclude that the president of the republic and the government share the executive power. As the commentary on

<sup>14</sup> Sula and Szumigalska, 2013, p. 111.

<sup>15</sup> Szmulik and Szymanek, 2019, pp. 82–83.

<sup>16</sup> Ibid.

<sup>17</sup> Granat and Granat, 2019, p. 157.



the Czech constitution emphasises, the term ‘executive power’ is not explicitly defined by the constitution, and the content of this term must therefore be inferred primarily from what is regulated in the related chapter.<sup>18</sup> The Czech constitutional (and even political) landscape changed dramatically in 2012, when the parliamentary elected president was replaced by a directly elected head of state. The amendment of the constitution triggered an ongoing debate on the role of the president and a putative shift from a parliamentary to a semi-presidential system.<sup>19</sup> Brunclík and Kubát conclude that the direct election of the president introduced in 2012–2013 was a serious blunder made by Czech political elites. As the authors argue, “the desirable reform efforts should focus on rationalising the regime in terms of strengthening of the prime ministers within the cabinet and the cabinet itself within the parliamentary system”.<sup>20</sup>

As mentioned above, the chapter on the executive power of the Constitution of Slovakia resembles that of the Czech Republic as it consists of regulation on the president of the republic and the government, indirectly suggesting the idea of a dual executive. The relations between the president of the republic and the government belong to those areas which are in many respects only very broadly and vaguely regulated in the constitution.<sup>21</sup> Although the constitution was changed to provide for popular election of the president in 1998 (also much earlier compared to the Czech Republic), its introduction was not followed by a substantial strengthening of the president’s competencies.<sup>22</sup> A recent study argues that the position of the Slovakian president is primarily determined by its constitutional definition, meanwhile their personality does not play a significant influence on the exercise of their power.<sup>23</sup> In contrast, Hloušek concludes, in his analysis on the Czech presidents, that “the real distribution of roles inside the executive body depends on the current distribution of power” (mainly on strong political personalities).<sup>24</sup>

The constitutions of Croatia, Hungary and Serbia place the executive power solely into the hands of the government; therefore, the president of the republic seems to be outside of the executive power – at least in virtue of the constitution. While the Croatian Constitution of 1990 established a semi-presidential system very similar – although not absolutely identical to – the contemporary French constitutional form of government,<sup>25</sup> the reform of the Constitution of 2000–2001 considerably tuned down the power of the president, which resulted, borrowing Sokols’s striking phrase, in a “quarter-presidential” system.<sup>26</sup>

18 Sládeček et al., 2016 [commentary to Art. 54].

19 E.g. Hloušek, 2014; Brunclík and Kubát, 2016; Wintr, Antoš and Kysela, 2016.

20 Brunclík and Kubát, 2016, p. 5.

21 Giba et al., 2019, p. 237.

22 Spáč, 2013, p. 126.

23 Horváth et al., 2021.

24 Hloušek, 2014, p. 115.

25 Sokol, 1992, pp. 4–17.

26 Sokol, 2008, cited in Kostadinov, 2016, p. 94.

The Hungarian Constitutional Court declared, shortly after the democratic transition, that “the President of the Republic stands outside the executive power and has independent presidential powers. It cannot be derived from the Constitution that the Government and the President of the Republic hold executive power jointly and that they mutually monitor and counterbalance each other or come to consensual decisions”.<sup>27</sup> Although Hungary adopted a new constitution in 2012, the working logic of the executive was not affected by the changes.

As for Serbia, the system established by the 1990 constitution is considered to be semi-presidential,<sup>28</sup> not overlooking the fact that the period of 1990–2000 was characterised by the predominant constitutional position and strong political and personal authority of the then-president Slobodan Milošević.<sup>29</sup> The new constitution adopted in 2006 did not bring significant changes to the formal rules.

Romania and Slovenia form another group since their constitutions do not regard either the head of state or the government as an organ of the executive power, although they declare the separation of powers. Romania is usually qualified as a semi-presidential regime, and in contrast to the lack of clear provisions of the constitution on the possessor of the executive power, the country has a *de facto* dual executive.<sup>30</sup> However, various approaches exist regarding the proper position of the president within (or according to some views, outside) the executive power.<sup>31</sup> Conversely, Slovenia, despite the directly elected president, is basically regarded as a parliamentary system<sup>32</sup>; as Boban claims, “by all normative and empirical properties, the regime is parliamentary”.<sup>33</sup>

Although the overview of the structure of the executive presented above is rather schematic, one can draw some concluding remarks. First, Hungary, having had parliamentary elected presidents since 1990, is the only country to be unanimously regarded as a parliamentary system. Second, for the remaining seven countries, the situation is significantly more complicated. It is no exaggeration to argue that each of these seven polities has already been described both as a parliamentary and semi-presidential system in the literature. However, this fuzzy picture does not imply that the seven countries take the same position on the imaginary presidentialism–parliamentarism scale. Evaluating academic points of views, one may tentatively claim that while Poland – and perhaps even more so, Romania – are usually regarded as semi-presidential systems, Slovakia and Slovenia seem to be closer to a pure form of parliamentarism. Croatia, Serbia and recently the Czech Republic are rather intermediate categories between the parliamentary and semi-presidential systems (let us

27 48/1991. (IX. 26.) Decision of the Constitutional Court, Part A), Chapter IV (translated by Dezső, 2010, p. 98.) For a broader explanation, see Dobos, Gyulai and Horváth, 2013.

28 Pejić, 2019, p. 52.

29 Pejić, 2007, p. 8.

30 Gherghina, 2013; Perju, 2015.

31 Varga, 2019, pp. 430–431.

32 Krašovec and Lajh, 2013.

33 Boban, 2007, p. 173.

quote Sokol's snappy definition of "quarter-presidentialism"). Third, if one considers any of the seven countries as semi-presidential, it is quite unambiguous that they may fit solely into the so-called premier-presidentialism subtype as the governments in these systems are exclusively accountable to parliaments. Fourth, it should also be noted that, regardless of the role of the head of state, the government is the centre of the executive power in each of the investigated countries. To put it another way, it is the governments that "wield real executive and proactive, constructive power" and act as chief executives, i.e. executive bodies in charge of all areas of policy-making.<sup>34</sup> In contrast, presidents, even though their formal competencies vary from country to country, have limited power and greater room for manoeuvre, primarily in certain exceptional situations.

Finally, although the text of the constitutions served as a starting point for the analysis of the structure of the executives, it would be unwise to attach too great importance on the wording of the constitutions since their provisions *per se* are inadequate to explore the proper structure and functioning of the executive branch. For instance, as can be seen above, neither the Constitution of Romania nor that of Slovenia make any reference to the executive; however, it does not follow that these polities have no executive power. In addition, one should also take into account the actual 'weight' of the head of state when investigating the executive power. Once a more proactive president who is able to expand their personal influence assumes office, the constitutionally entrenched relation of the president and the prime minister (government) may, at least temporary, undergo some changes.<sup>35</sup>

## 2. Governments as key actors of the executive power

As a starting point, it must be stressed that the term 'government' has several meanings. First, as a broad definition, government includes all public institutions that make or implement political decisions either on the federal, state or local level. Second, as a general understanding, it includes the executive, legislative and judicial branches. Third and most common, the term refers to a country's central political executive as 'the government'.<sup>36</sup> Since this chapter focuses on the executive branch's top body, the latter meaning is used in the following.

### 2.1. Definition and status of governments

It is interesting to compare how the constitutions in this study grasp the concept of government. Some of them include an exact definition for the term:

- a) Czech Republic: "The government is the highest body of executive power"
- b) Hungary: "The Government shall be the general organ of executive power"

<sup>34</sup> Brunclík and Kubát, 2019, p. 134.

<sup>35</sup> For this phenomenon, see Hloušek, 2013.

<sup>36</sup> Müller, 2017, p. 137.

- c) Serbia: “The Government shall be the holder of executive power in the Republic of Serbia”
- d) Slovakia: “The Government of the Slovak Republic shall be the supreme executive body”.

The Constitution of Croatia operates in a similar vein, stipulating the role of the government: “The Government of the Republic of Croatia shall exercise executive power in compliance with the Constitution and law”. These definitions show an unequivocal similarity as each of them makes a reference to the executive power.

The Polish and Romanian constitutions do not offer any definition but establish the function of the government. According to the former, “The Council of Ministers shall

- a) conduct the internal affairs and foreign policy of the Republic of Poland,
- b) conduct the affairs of State not reserved to other State organs or local government
- c) manage the government administration”.

The related provision of the Romanian constitution reads as follows:

The Government shall, in accordance with its government programme accepted by Parliament, ensure the implementation of the domestic and foreign policy of the country, and exercise the general management of public administration.

The Constitution of Slovenia stands out in this respect since it does not make any attempt to define the government. However, the Act on Government replaces the missing definition, stipulating that the government is the body holding executive power and the supreme body of state administration.

## ***2.2. Composition of the governments***

Governments, as a general rule, consist of the prime minister, deputy prime ministers and ministers. In addition, according to the Polish government, “the presidents of committees specified in statutes” may also be appointed to membership in the Council of Ministers.<sup>37</sup> Pursuant to the Romanian constitution, “other members as established by an organic law” may hold membership in the government. The latter may be, according to the act on the organisation and functioning of the Romanian government, ministers of state, as well as so-called delegated ministers, with special tasks attached to the prime minister.

37 However, no such presidents of committees have been appointed to membership in the past decades (Pach, 2015).

It is solely the Constitution of Slovenia that does not make any reference to the position of deputy prime minister; however, the act on the government clarifies that the function of deputy prime minister is performed by one or more ministers.

### ***2.3. Competencies of governments***

While the functions and powers of the legislation and the judiciary are clearly defined, it is much more difficult to pinpoint the competencies of the executive branch and mainly the competencies of the government. It is reasonable to compare the constitutions from the way in which they interpret the powers of the government. One may distinguish three basic – partly overlapping – methods here. Four out of the eight constitutions (Croatia, Poland, Serbia, Slovakia) apply an itemised list to describe the government's competencies. Nonetheless, the lists are not complete; governments may also perform tasks other than the ones stipulated in the constitution. The Constitution of Romania and the Hungarian Fundamental Law use a general definition to outline the powers of the government. In Hungary, while the Constitution of 1989 included a long itemised list of the competencies of the government (including some rather vague function such as “ensures the formulation of social and economic policies and the implementation thereof”), the Fundamental Law acts in a more parsimonious way in this regard as it states that the government “shall exercise all the functions and powers which are not expressly conferred by the Fundamental Law or the law on another organ”. A similar regulation is found even in the Polish constitution (beyond the itemised list): “The Council of Ministers shall conduct the affairs of State not reserved to other State organs or local government”. According to the Constitution of Romania,

The Government shall, in accordance with its government programme accepted by Parliament, ensure the implementation of the domestic and foreign policy of the country, and exercise the general management of public administration.

The constitutions of the Czech Republic and Slovenia are more laconic in this regard since neither define the powers of the government in either way. However, it does not mean that these constitutions are silent about the government as both of them make several ‘scattered’ reference to its competencies.

### ***2.4. Government formation***

In parliamentary systems, the government derives its legitimacy from the confidence of the legislature. Thus, parliaments are crucial actors in the government formation process, and even the head of state has their own constitutional role. Meanwhile, the process of government formation has some common points, the proper regulation shows striking variety, and it is no exaggeration to say that almost each of the examined constitutions differs from the others.

The government formation process is often seen as a three-stage process (nomination – negotiation/appointment – parliamentary ratification).<sup>38</sup> To highlight the differences, we divide the government formation process into four rather than three phases (see Table 1). As can be seen, the process starts with the president in each state since the head of state has the right to make a proposal for the prime minister (nomination or designation) or even appoint the prime minister. As a general rule, constitutions allow presidents a certain leeway in selecting the prime minister or prime minister-designate. Pursuant to the constitutions of Romania, Serbia and Slovenia, prior to their proposition, the president is obliged to consult with the leaders of the parliamentary parties (or deputy groups). The Constitution of Romania stipulates a further restriction:

The President of Romania shall designate a candidate to the office of Prime Minister, as a result of his consultation with the party which has obtained absolute majority in Parliament, or – unless such majority exists – with the parties represented in Parliament.

As a consequence, if any party obtains absolute majority in the parliament, the Romanian president has no latitude at all and is obliged to designate the proposed person to the office of prime minister.<sup>39</sup>

As noted earlier, in parliamentary systems, the government's legitimacy is based on the confidence of the legislature, but how is this confidence manifested? In several countries worldwide, government formation rules are formulated in a positive way, i.e. the parliament has to express its confidence by voting. In contrast, in other countries (e.g. Austria and the Netherlands) the constitutional rules are of negative form, i.e. a government must only be tolerated by the parliament (but can be ousted by a vote of no confidence at any time).<sup>40</sup> As for the eight countries examined in this volume, the government formation rule is definitely positive since the government (or the prime minister) must seek and receive the explicit support of the parliament within a so-called investiture vote.<sup>41</sup> This leads us to the next question: when shall an investiture vote take place? Comparing the relevant parts of the eight constitutions, two basic methods can be distinguished. On the one hand, in the Czech Republic, Poland and Slovakia, the prime minister gains office from the president, and the appointment of the member of the government takes place prior to the vote of confidence, which means that the government come into existence even before the vote of confidence (ex-post formation vote). This process may result in controversial situations if a

38 Carrol and Cox, 2011, p. 3; Brunclík, 2015, p. 30.

39 Varga, 2019, p. 458.

40 Bergman, 1993, pp. 56–57.

41 Following the concept of Rasch, Martin and Cheibub, 2016, p. 3 “Investiture consists of a vote in parliament to demonstrate that an already formed or about to be formed government has legislative support”.

government loses the vote of confidence but remains in office.<sup>42</sup> On the other hand, the constitutions of the remaining five countries follow a different logic since the vote of confidence takes place before the final establishment of the government (*ex-ante* formation vote). To sum up, as Rasch, Martin and Cheibub<sup>43</sup> clarify, the vote of investiture can happen at two stages in the process of government formation: either after the head of state has appointed a new government or at some point between the beginning of a new government formation process and just before a new government is appointed by the head of state.

While comparing the investiture rules, Hungary stands out in an important respect: the parliament elects the prime minister without having official information on the prospective ministers. Thus, this is the only state in which the parliament has no formal influence on the ministers.<sup>44</sup> To put it another way, the only task of the parliament is to elect the prime minister, the further steps of the government formation takes place independently from the parliament.<sup>45</sup> This arrangement is in line with the so-called chancellor democracy – the concept that has had a deep impact on the constitutional framework of Hungary.<sup>46</sup>

Despite the pronounced heterogeneity of the government formation process, one may detect two important similarities. Firstly, presidents are the key actors in the initial phase of the process since they are entitled to either nominate or appoint the prime minister. It is not an obvious competence of the presidents as the head of state has no role at this stage in several European countries (e.g. Sweden, Netherlands, Ireland). However, the role and leeway of the presidents compared here is constrained by the constitution and by the constitutional conventions. Secondly, contrary to some countries such as Austria or France, there is a significant parliamentary control over government formation. Although the patterns and methods greatly vary, the vote of confidence is an essential part of the government formation process. The rationale of the vote of confidence is quite evident: bearing in mind the internal logic of the parliamentary systems, no government shall take office (or remain in office for a longer period) without the consent of the majority of the parliament. It must be emphasised again that the confidence may be expressed in the entire government as a body or solely in the prime minister (for the latter, see Hungary).

42 E.g. the cabinet of Jiří Rusnok in Czechia appointed in July 2013 failed to win the vote of confidence; however, it remained in office for more than a half year as a caretaker government (cf. Kopeček and Brunclík, 2019, pp. 125–127).

43 Rasch, Martin and Cheibub, 2016, pp. 9–10.

44 However, as the Act on the Government Administration stipulates, “the person nominated for the position of Minister shall be heard by the committee of the National Assembly competent according to the duties of the Minister prior to his or her appointment”. This hearing is not equivalent to the vote of confidence at all since it takes place in the committee (not in the plenary session), and the committee has no veto power on the person nominated for the position of minister.

45 For the critic of this method (partly in Slovenian context), see Kocjančič, 2012.

46 Schieman, 2004.

While the government formation process usually unfolds without a hitch, a number of problems (e.g. failed coalition negotiation or defeat by votes of no confidence) may arise during the procedure; therefore, each of the constitutions includes some additional regulations for the case of unsuccessful government formation to avoid a crisis caused by a lack of an elected/appointed government. Three typical ‘emergency solutions’ are enacted in the constitutions.

First, the president shall appoint a new prime minister (Czech Republic) or make another proposal for the parliament (Croatia, Romania, Slovenia). Although the constitutions of Hungary, Serbia and Slovakia do not have such an explicit provision, it is the president’s duty to facilitate the successful government formation even if the first attempt failed.

Second, the president may lose their initiative. In the Czech Republic, if the government appointed on the second attempt does not receive a vote of confidence from the Chamber of Deputies either, the president shall appoint the prime minister based on a proposal by the president of the Chamber of Deputies. In Poland, the Sejm is empowered to choose a prime minister (as well as members of the Council of Ministers, as proposed by the prime minister) if the Council of Ministers has not been appointed by the president or has failed to obtain a vote of confidence in the Sejm. In this case, the president shall appoint the Council of Ministers as chosen by the Sejm (however, the president regains their initiative if even the latter process proved to be unsuccessful.) Slovenia is slightly different in this regard since the president does not completely lose their initiative: if the prime minister candidate proposed by the president has been voted down by the parliament, the president may propose a new candidate (or the same candidate again), but candidates may also be proposed by deputy groups or a minimum of 10 deputies.

Finally, if not only the basic formation mechanism failed, but the ‘backup processes’ also proved to be unsuccessful, the dissolution of the parliament and call for early elections are a last resort. In these cases, the dissolution of the parliament is binding for the president in Croatia, Poland, Serbia and Slovenia and only an option in the Czech Republic, Hungary, Romania and Slovakia.



	Croatia	Czech Republic & Slovakia	Hungary	Poland	Romania	Serbia	Slovenia
<b>Step 1</b>	The president entrusts a person with the mandate to form a government.	The president appoints the prime minister. <sup>47</sup>	The president makes a proposal for the prime minister to the National Assembly.	The president nominates a prime minister.	The president designates a candidate to the office of prime minister.	The president proposes a candidate for prime minister to the National Assembly.	The president proposes a candidate for prime minister to the National Assembly.
<b>Step 2</b>	The prime minister-designate forms the government.	The prime minister makes a proposal for the ministers to the president.	The National Assembly elects the prime minister.	The nominated prime minister proposes the composition of a Council of Ministers.	The candidate to the office of prime minister completes the list of the government.	The prime minister candidate completes the list of the government.	The National Assembly elects the prime minister.
<b>Step 3</b>	The prime minister-designate presents the government to the parliament and seeks a vote of confidence.	The president appoints the ministers.	The prime minister makes a proposal for the ministers to the president.	The president appoints the prime minister together with ministers.	The candidate to the office of prime minister seeks the vote of confidence in the parliament (joint sitting of the Chamber of Deputies and the Senate).	The National Assembly votes on the election of the prime minister and members of the government.	The prime minister makes a proposal for the ministers to the National Assembly.
<b>Step 4</b>	The president appoints the prime minister; the prime minister appoints the ministers.	The government asks for a vote of confidence before the Chamber of Deputies (Czech Republic) / National Council (Slovakia)	The president appoints the ministers (but not the prime minister).	The prime minister asks for a vote of confidence before the Sejm.	The president appoints the members of the government.	The National Assembly elects the ministers.	

*Note: for the sake of simplicity, we use the term 'president' for each head of state, regardless of the proper title of the function*

**Table 1.** Stages of government formation process – Source: author's compilation

<sup>47</sup> It must be noted that a kind of constitutional convention exists in both the Czech Republic and Slovakia that before the president appoints someone as prime minister, they authorise (entrust) a certain person to form the new cabinet; however, this authorisation is not regulated by the constitutional text.

### 2.5. Responsibility and the vote of (no) confidence

As demonstrated in Chapter 6, the parliamentary systems embodies the principle of parliamentary accountability, which has evolved gradually between the eighteenth and twentieth centuries.<sup>48</sup> On the one hand, the formation of the governments of the parliamentary systems requires the approval of the majority of the legislative (as outlined above). On the other hand, the government shall have the confidence of the parliament during its entire mandate, and the latter may revoke this confidence at any time.

The principle of parliamentary accountability (in other words, responsibility) clearly appears in each examined constitution, although the proper wording varies by state (Table 2).

<b>Croatia</b>	The government shall be accountable to the Croatian parliament. The prime minister and the members of the government shall be jointly accountable for the decisions made by the government and shall be personally accountable for their respective purviews.
<b>Czech Republic</b>	The government is accountable to the Chamber of Deputies.
<b>Hungary</b>	The government shall be accountable to the National Assembly. Members of the government shall be accountable to the National Assembly for their actions, [...]
<b>Poland</b>	The members of the Council of Ministers shall be collectively responsible to the Sejm for the activities of the Council of Ministers. The members of the Council of Ministers shall be individually responsible to the Sejm for those matters falling within their competence or assigned to them by the prime minister.
<b>Romania</b>	The government is politically responsible for its entire activity only before parliament. Each member of the government is politically and jointly liable with the other members for the activity and acts of the government.
<b>Serbia</b>	The government shall account to the National Assembly for the policy of the Republic of Serbia, for enforcement of laws and other general acts of the National Assembly as well as for the work of the public administration bodies.
<b>Slovakia</b>	The government shall be responsible for the exercise of governmental powers to the National Council of the Slovak Republic.
<b>Slovenia</b>	Within the scope of their powers, the government and individual ministers are independent and accountable to the National Assembly.

**Table 2.** The wording of the government's responsibility in the constitutions  
*Source: author's compilation*

48 For the overview of the origins of parliamentary responsibility, see Przeworski, Asadurian and Bohlken, 2012.

The withdrawal of confidence may be conducted in two different ways: by either a motion of no confidence or a motion of confidence.

The motion of no confidence has two types – the regular vote of no confidence and the constructive vote of no confidence. As the constitutional regulation of vote of no confidence shows considerable variety,<sup>49</sup> it seems to be expedient to highlight the differences in a tabular format (Table 3).

	Type	Target	Threshold of support to introduce (at least)	Required majority to pass
<b>Croatia</b>	regular	government prime minister ministers	one-fifth of MPs	absolute majority of all MPs
<b>Czech Republic</b>	regular	government	50 (out of 200) MPs of the Chamber of Deputies	absolute majority of all MPs of the lower chamber
<b>Hungary</b>	constructive	prime minister	one-fifth of MPs	absolute majority of all MPs
<b>Poland</b>	constructive	government ministers	government: 46 ministers: 69 (out of 460) MPs of the lower chamber	absolute majority of all MPs of the lower chamber
<b>Romania</b>	regular	government	one-fourth of the total number of MPs of both chambers	absolute majority of all MPs of both chambers
<b>Serbia</b>	regular	government prime minister ministers	60 (out of 250) MPs	absolute majority of all MPs
<b>Slovakia</b>	regular	government prime minister ministers	one-fifth of MPs	absolute majority of all MPs
<b>Slovenia</b>	constructive	government	10 (out of 90) MPs of the lower chamber	absolute majority of all MPs of the lower chamber

**Table 3.** Parameters of vote of no confidence

*Source: author's compilation*

As compared with the constructive vote of no confidence, a regular vote of no confidence is the simpler and more common form of no confidence voting. Once the majority of the MPs supports the motion of no confidence, the mandate of the government is terminated, and a new government formation process starts from the very beginning. Croatia, the Czech Republic, Romania, Serbia and Slovakia adopted this version of vote of no confidence in their constitutions. Compared to the constructive one, the

49 For the relevant indicators of the vote of no confidence, see Lento and Hazan, 2021, pp. 4–6.

regular vote of no confidence can be a major source of political instability, especially in fragmented and deeply divided parliaments where the parliamentary groups strongly disagree with each other (Germany under the Weimar Republic serves as an obvious example).

A constructive vote of no confidence requires the legislature to designate a new prime minister upon submitting the motion; thus, this method allows the parliament to revoke confidence from the government (or prime minister) only if there is a positive majority for a prospective successor. Once the parliament supports the motion of no confidence, it thereby expresses its lack of confidence in the government (or prime minister) and simultaneously either elects the person proposed for the office of prime minister in the motion or the president is obliged to appoint the proposed person. The constructive vote of no confidence is quite a rare phenomenon since less than 10 constitutions apply this method worldwide.<sup>50</sup> Germany and Spain are the most famous examples, but three out of the eight analysed countries (Hungary, Poland [from 1997] and Slovenia) have also institutionalised this type of vote of no confidence. Its rationale lies in the fact that it provides a greater degree of stability for the incumbent prime minister (and thus for the whole government).<sup>51</sup> While the majority of MPs may agree to dismiss the incumbent prime minister in certain turbulent situations (negative majority), it is much more complicated to find a new prime minister candidate whom the majority of MPs may support (positive majority), especially in a fragmented parliament that consist of parties of radically different ideological views. As Just notes, “consensus on the removal of something / someone (negative approach) is easily found, while finding consensus on some alternative (positive approach) may be a superhuman task”.<sup>52</sup> However, some objections may also be made to the constructive vote of no confidence. Critics stress that this regulation makes the government practically unremovable from power, and even a dysfunctional government could thus be kept in power only because there would have not been enough votes for the nomination of a new prime minister.<sup>53</sup>

The motion of no confidence may be examined even from the aspect of the ‘target’ of the motion. The primary goal of the motion of no confidence is to remove the government from office; therefore, the motion may be submitted against the government in each country.<sup>54</sup> In some constitutions (Croatia, Serbia, Slovakia), it is also possible to table the motion against the prime minister.

50 Rubabshi-Shitrit and Hasson, 2021, p. 2.

51 According to the findings of Rubabshi-Shitrit and Hasson (2021), governments in countries with the constructive vote of no confidence tend to be more durable than governments in countries with a regular vote of no confidence.

52 Just, 2015, p. 171.

53 Just, 2015, p. 173.

54 In Hungary, the motion of no confidence may be taken formally solely against the prime minister. However, this is equal to the motion being submitted against the government since upon the termination of the prime minister’s mandate, the mandate of the government terminates automatically.

The crucial question is whether the motion may be submitted against a minister. The Croatian, Polish, Serbian and Slovak constitutions allow it, but the ministers in the other four countries cannot be removed in this way. The theoretical background of this question revolves around the interpretation of the accountability (responsibility) of the government. Two distinct approaches can be outlined in this regard. The first concept understands accountability in a broader sense, claiming that the government's responsibility involves even the removal of particular ministers. The second concept takes the following view: once the prime minister has selected their ministers, the parliament shall not be empowered to oust them, virtually circumventing the prime minister as the head of the government. This method strengthens the role of the prime minister while somewhat weakening the parliamentary oversight. As the legislation cannot overthrow the particular ministers, their mandate depends solely on the will of the prime minister. It is also noteworthy to mention that the motion of no confidence against the ministers is always a regular one (not constructive); thus, MPs are not forced (and even not entitled) to designate the new candidate.

Table 4 also reveals the preconditions for submitting a motion of no confidence. While in some European countries (e.g. Ireland or Denmark) even a single MP can lodge the motion, a certain threshold of support is required to introduce the vote of no confidence in the scrutinised eight countries. As can be seen, at least 10–25% of the MPs can table the motion. Politics with bicameral legislatures (Czech Republic, Poland, Romania and Slovenia) deserve more attention since the chamber(s) involved in the process vary. In the Czech Republic, Poland and Slovenia, only the lower house of the parliament is affected by the vote of no confidence since both the initiation and the voting procedure take place here. Romania considerably differs in this regard as even the senators (members of the upper chamber) may participate in the submission and are entitled to vote as the parliament decides on the motion in a joint sitting.

The majority required to pass a vote of no confidence is another important point. As Lento and Hazan note, the government is more vulnerable if only a plurality (simple majority) of the votes is needed to pass the motion.<sup>55</sup> Our eight countries do not differ in this respect since an absolute majority of all MPs must vote 'yes' for the vote to pass. In bicameral systems, with the exception of Romania, only the MPs of the lower chamber participate in the voting. In Romania, even the Senate is involved in the process; thus, an absolute majority of all MPs of both chambers is needed to pass the motion.

Although the issue of confidence mainly emerges related to the vote of no confidence, another process must be examined. While the vote of no confidence is based on the motion of the MPs, even the government may initiate a vote to reveal whether it still has the support of the parliament or not (although the terms 'vote of no confidence' and 'vote of confidence' are often used interchangeably, in the interests of clarity, hereby the latter refers to the motion initiated by the government.) One may pose a question about the rationality of a vote of confidence since, at first glance, it

55 Lento and Hazan, 2021, p. 4.

may seem pointless for the government to enter into a risky situation. However, under certain circumstances, the government may be forced to judge its support and call for a vote of confidence.<sup>56</sup> The risk of the motion is obvious: if the parliament expresses its lack of confidence, the government's mandate terminates (usually either by a mandatory resignation or automatically). As for the positive outcome, if the government receives the support of the majority of MPs, the 'victory' may enhance the position of the government (at least politically).<sup>57</sup>

Initiating a vote of confidence may have a further reason since the motion can be combined with a proposal by the government. In these cases, the government may announce that the vote on its own proposal shall be simultaneously a confidence vote. Accordingly, if the parliament votes down the government's proposal, it expresses its lack of confidence in the government at the same time. Practically, a government applies this process if it wants to put pressure on the parliamentary majority in case of an uncertain government proposal.<sup>58</sup>

Concerning the examined countries, each of the eight constitutions includes provisions regarding the vote of confidence requested by the government or the prime minister (Table 4).

	<b>Vote of confidence <i>per se</i></b>	<b>Vote of confidence linked with a proposal</b>	<b>Consequence of a failed vote of confidence</b>
<b>Croatia</b>	Yes	No	The prime minister and the government shall resign.
<b>Czech Republic</b>	Yes	Yes	The government shall submit its resignation to the president of the republic.
<b>Hungary</b>	Yes	Yes	The prime minister's (simultaneously the entire government's) mandate terminates.
<b>Poland</b>	Yes	No	The prime minister shall submit the resignation of the Council of Ministers to the president of the republic.
<b>Romania</b>	No	No	—

<sup>56</sup> Kis and Cserny, 2015, p. 174.

<sup>57</sup> In 2006, the incumbent Hungarian prime minister's Gyurcsány Ferenc's famous 'we lied' speech was leaked, causing a nationwide political crisis, mass protests and rioting. To gauge his support in the parliament (mainly in the parliamentary groups of the coalition parties), the prime minister initiated a motion of confidence. As the parliament expressed its confidence, Gyurcsány Ferenc stabilised his position to a certain degree.

<sup>58</sup> The fall of the Slovak government in 2011 serves as an illustrative example for that. As the support of the European Financial Stability Facility caused huge debates within the then ruling coalition, prime minister Ivetta Radičová linked its ratification to a vote of confidence in the government. Since the majority of the parliament (including the MPs of a junior coalition party) refused to support the proposal, the government was brought down.

	Vote of confidence <i>per se</i>	Vote of confidence linked with a proposal	Consequence of a failed vote of confidence
<b>Serbia</b>	Yes	No	The term of office of the government ends, and the president of the republic shall be obliged to initiate proceedings for the election of the new government.
<b>Slovakia</b>	Yes	Yes	The president of the republic shall recall the government.
<b>Slovenia</b>	Yes	Yes	The National Assembly must elect a new prime minister or, in a new vote, express its confidence in the incumbent prime minister; if this fails, the president of the republic dissolves the National Assembly and calls new elections.

**Table 4.** Parameters of vote of confidence*Source: author's compilation*

As can be seen, the vote of confidence *per se* is a much more common form, while vote of confidence linked with a proposal is mentioned only in the constitutions of the Czech Republic, Hungary, Slovakia and Slovenia.

Romania shows a remarkable deviation in this regard since neither of the two forms of vote of confidence is regulated by the constitution; instead, the constitution stipulates the so-called ‘assumption of responsibility by the government’, which works in a way similar to the vote of confidence linked with a proposal. If the government assumes responsibility of a programme, a general policy statement or a bill before the Chamber of Deputies and the Senate in a joint sitting, the MPs are entitled to lodge a motion of no confidence against the government within 3 days of the date of presenting the programme, the general policy statement, or the bill. If the government has not been dismissed by the vote of no confidence, the bill presented, amended or completed, as the case may be, with the amendments accepted by the government shall be deemed as passed. Although the process may be a bit risky, it has obvious advantages since a bill may be passed within an exceptionally fast procedure, without any debate<sup>59</sup> (however, the institution’s judgement of the government’s assumption of responsibility is rather controversial, raising a number of legal problems.)<sup>60</sup> Thus, one can conclude that a vote of confidence does not exist in its pure form in Romania, and the special form of vote of no confidence – the assumption of responsibility by the government – fills the gap.

59 Varga, 2019, pp. 410–411.

60 Vrabie, 2014, pp. 73–80.

### 3. Territorial level of the executive

Although the executive branch is principally attributed to the governments and heads of state, it has its own territorial dimension. Contrary to the legislative power, which can be easily centralised (at least in unitary states), the executive would be unable to function without territorial and/or local administrative bodies. From the viewpoint of centralisation, states can be divided into three categories (with a certain simplification): federal, regional and unitary states. The constitutions of Croatia, the Czech Republic, Poland, Romania and Slovenia explicitly claim that the state is unitary, while the other three constitutions do not cover this issue. Nevertheless, each of the eight countries subject to investigation easily fits into the category of unitary state since each lacks self-governing provinces, states or other regions, though one can detect some differences regarding the supremacy of the central government and the level of decentralisation. However, it must be noted that Serbia is exceptional in this aspect as the constitution recognises two autonomous provinces: Vojvodina and the disputed territory of Kosovo. According to the constitution, these provinces are autonomous territorial communities, in which the citizens exercise the right to provincial autonomy.<sup>61</sup> The new statute of the Autonomous Province of Vojvodina (passed in 2014) stipulates that the provincial government shall be the executive authority of the province. Taking the status, accountability and competences of the provincial government into account, it is no exaggeration to say that Vojvodina has its own executive system.

Table 5 summarises the territorial level of the executive.

	Performer of the state administration at the regional level		Territorial level (number of bodies)
	Body	Head	
<b>Croatia</b>	county local governments	county governor	counties + capital (20+1)
<b>Czech Republic</b>	regional local governments	governor	regions + capital (13+1)
<b>Hungary</b>	capital or county government offices	government commissioner	counties + capital (19+1)
<b>Poland</b>	voivodeship offices	voivode	voivodeships (16)
<b>Romania</b>	prefectures	prefect	counties + capital (41+1)
<b>Serbia</b>	administrative districts	head of administrative district	districts + capital (29+1)
<b>Slovakia</b>	district offices	head of district office	72

<sup>61</sup> Beretka, 2014.



	Performer of the state administration at the regional level		Territorial level (number of bodies)
	Body	Head	
<b>Slovenia</b>	administrative units	head of administrative unit	administrative districts (58)

*Note: the table does not include the bodies operating at lower levels of state administration*

**Table 5.** Territorial level of the executive

*Source: author's compilation*

Although each of the eight constitutions has some provisions on public administration, only three of them refer to the territorial authorities of the government. According to the Fundamental Law of Hungary, “The capital and county government offices (*fővárosi és megyei kormányhivatal*) shall be the territorial state administration organs of the Government with general competence”. These government offices operate at the county level and in the capital, headed by the government commissioner (*kormány megbízott*), who counts as a political appointee of the prime minister. Although capital or county government offices have their own precursors dating back to the 1990s, the territorial representation of the government has been considerably strengthened after 2010.<sup>62</sup>

In Poland, the highest-level administrative division are the 16 voivodships (*województwo*). The constitution establishes that the voivode (*wojewoda*) shall be the representative of the Council of Ministers in a voivodship. The voivode, appointed by the prime minister, is responsible for implementing the policy of the Council of Ministers in the voivodeship and acts as the head of central government institutions at the regional level.

In Romania, the constitution stipulates that the prefect (*prefect*) is the representative of the government at the local level and directs the decentralised public services of ministries and other bodies of the central public administration in the territorial-administrative units. The prefectures (*prefectură*) have been established in each of the country's 41 counties as well as the capital.

In Serbia, the territorial state administration is based on the 24 (29 including Kosovo) administrative districts (*upravni okrug*). According to the law on administrative districts, these are the regional centres of state administration, integrating district regional units of all state administration bodies. The head of the administrative district (*načelnik upravnog okruga*) is appointed by the government and accountable to the minister of state administration and the government for their work.

Similar to the Czech Republic, Slovakia does not have public administration bodies with general competencies at the regional level, i.e. at the level of the eight

62 Barta, 2016, pp. 1–10.

regions (*kraj*); therefore, sub-central state administration activities have been conducted since 2013 primarily by the 72 district offices (*okresný úrad*).<sup>63</sup>

The Czech Republic may be characterised by the so-called ‘mixed’ model of public administration, which means that “state administration activities as well as self-governmental activities may be exercised by the same bodies of municipalities/regions”<sup>64</sup> and not by bodies with separate competencies. The territorial state administration bodies with general competence were dissolved in 2002, and their tasks were transferred primarily to the 13 regional self-governments (headed by the governor [*hejtman*]) and to the so-called 205 municipalities with extended responsibilities (*správní obvody obcí s rozšířenou působností*).

As for Croatia, a new law on state administration was adopted in 2019 which abolished the county state administration offices (*ured državne uprave*) as first-instance state administration bodies, and their competences were transferred to the county-level units of local self-government (*područna [regionalna] samouprava*).<sup>65</sup> The directly elected county governor (*župan*) is the holder of the executive power in the counties and is responsible for the execution of the transferred tasks.

In contrast to the previous countries, no official intermediate unit has been established between the municipalities and the central government in Slovenia. The state administration tasks are performed by the 58 administrative units (*upravne enote*), which are the only subdivisions of government administration (with general competence). The units are headed by the head (*načelnik upravne enote*), appointed by the minister of public administration.

As this brief overview demonstrates, the eight countries show remarkable differences regarding the territorial dimension of the executive. The governments of Hungary, Poland and Romania have relatively powerful representatives at the regional level who are rather political appointees, and their position is raised to the constitutional rank. The arrangement is somewhat similar in Serbia, although the heads of the administrative district are in a less significant position than the government commissioner, voivode or prefect. Slovakia and Slovenia notably differ from the previous countries as neither of them has established a government representative at the regional level; the district offices and the administrative units primarily serve as customer services. Finally, the Czech Republic and Croatia form another group as the state administration tasks are performed mainly by regional self-governments.

63 Masárová, Koišová and Habánik, 2017, pp. 52–64.

64 Špaček and Špalek, 2007, p. 218.

65 Lopžić and Toman, 2021, pp. 43–45.

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## Presidents

Lóránt CSINK

### ABSTRACT

Comparing heads of states theoretically is a rather difficult task.<sup>1</sup> The comparative method is useful only if the institutions set together are comparable. In general, several institutional solutions exist for the status and competences of heads of states; nevertheless, there is a significant difference between the queen (or king) of the United Kingdom, the president of the United States and the German federal president, even though they all function as head of states.

This chapter focuses on the presidents of Central Eastern Europe. Firstly, it examines the role of presidents of the region; secondly, it analyses the ways of elections; thirdly, it addresses the competences of the presidents; and finally, it deals with the termination of office. This chapter does not deal with the crucial question of the extent to which the president is involved in daily politics or how they affect governance; this issue, which concerns the form of government, is the topic of a separate chapter. However, the form of government is inseparable from the president, and this chapter necessarily reflects on the president's role in state power.

### KEYWORDS

election of presidents, competences of presidents, parliamentarism, separation of powers.

### 1. Presidents of Central Eastern Europe

For centuries, most of Central Eastern Europe had belonged to the Hapsburg Empire or constituted independent monarchies. Like many countries, monarchical institutions changed in the twentieth century; some countries became republics either after World War I (Germany, Poland, Austria) or World War II (Italy, Hungary, Romania). Still, the reputation of the Hapsburg Empire – and especially of Franz Joseph – had an impact on the countries, e.g. president Tomaš Masaryk and prime minister Karel Kamár of Czechoslovakia first thought of forming a monarchy and later on turned to democratic republicanism.<sup>2</sup>

1 I am grateful to Eszter Benkő (Pázmány Péter Catholic University), Attila Dudás (University of Novi Sad), Gábor Hulkó (University of Szeged) and Bálint Kovács (University of Debrecen) for their contribution.

2 Halász, 2013, p. 217.

After the transition, all countries of the region decided between parliamentary and semi-presidential republics, even though Brunner reckons that parliamentary monarchies combine the advantages of semi-presidential and parliamentary governments.<sup>3</sup> In many countries of transition, restoring the monarchy was not only a romantic conception but a real political ambition. Although no country in the region did do so, in Bulgaria, former king Simeon II gained the majority in 2001 elections and served as prime minister between 2001 and 2005. Albania was even closer, with Leka Zogu, son of the last Albanian king Zogu I, intending to return to political life and a referendum on the restoration of the monarchy held in 1997. Although the initiative was rejected, the 30% result of the royalists is still remarkable.

In the countries where constitutional continuity was unbroken, state organisation was being shaped by smaller modifications and long-term reforms. On the contrary, the countries of political transformation had to break with the former regime's heritage and set up a new basis of constitutional order, and the creation of the model was influenced not only by legal expectations but also by political bargains. After the transition, the countries of the region decided to follow either the German model of parliamentary or the French semi-presidential system. The two systems are outcomes of different historical and political circumstances. In the mid-twentieth century, France needed a strong leader; therefore, the Constitution of the Fifth Republic instituted a strong presidency to balance the parliament. Conversely, due to the sad experience of the totalitarian regime, Germany emphasised the dominance of the legislature (and the government's accountability to it) in the 1949 Basic Law (*Grundgesetz*). The models of the Fifth Republic and the *Grundgesetz* symbolised the main differences, advantages and disadvantages of semi-presidential and parliamentary systems, providing assistance to Central European States in finding their way of governance.

In the first years of transition, Czechoslovakia and Hungary became parliamentary, while Poland and Romania combined a semi-presidential system with strong elements of parliamentarism. Referencing historical experience, Shugart reckons that the power of presidents is inversely proportional to that of parties. In countries where the 'people's bloc' took control, presidency became strong; on the contrary, where the parliament created the new regime, governments gained power.<sup>4</sup> Holmes adds that if the society is not organised enough to create a parliament through elections, a strong presidency emerges. He considers that in case of grave crisis, society is more likely to give power to a strong leader (a president), while it rather trusts in parliaments if the problems are smaller.<sup>5</sup> As for governance, Kukorelli differentiates two aspects that constitutions must consider: social and political pluralism in the parliament on the one hand and stability on the other.<sup>6</sup> The two aspects compete; the more fragmented the parliament is, the less likely anyone could achieve stable governance. Experience

3 Brunner, 1993, p. 136.

4 Shugart, 1993, p. 32.

5 Holmes, 1993–1994, p. 37.

6 Kukorelli, 1992, p. 162.



shows that countries which emphasised the first aspect became parliamentary, while those that focused on stable governance became semi-presidential.

In addition, the time of adoption of the constitution is also relevant. Hungary stabilised its state organisation soon after the first free elections (May 1990), and the Fundamental Law of 2011 did not make any change in this regard. The Czech Republic and Slovakia adopted their constitutions in 1992 (before Czechoslovakia terminated), while Poland adopted a constitution in 1997 (replacing the Little Constitution of 1992).

When defining the role of presidents, it is also important to examine who is in office. The role of a president according to the wording of the constitution does not necessarily show their actual influence on governments.<sup>7</sup> Tomáš Masaryk, Eduard Beneš of Czechoslovakia or László Sólyom of Hungary did not have too much power according to the constitution, but they had a greater role in society due to their popularity. Gepl and Gillis presume that “a line-by-line analysis of the formal powers of president inscribe in a written constitution is not sufficient. An alternative approach can be described as constitutional realism”. They argue that factors such as prevailing public opinion, political circumstances and political culture, personalities of the main political actors, and traditions surrounding the institution are critically important to the president’s real power.<sup>8</sup>

According to Duverger, the real power of presidents relies not only on the content of the constitution but also on other factors, such as history and political circumstances, the composition of the parliamentary majority and the president’s relation to it.<sup>9</sup> All in all, describing presidential power is more complicated than interpreting the text of the constitution as it requires a broader analysis and comparison.

The president’s relation to the governing majority raises the question of cohabitation. Elgie describes cohabitation as a situation where a president from one party holds power at the same time as the prime minister from an opposing party and where the president’s party is not represented in the government.<sup>10</sup> He argues with the mainstream view that cohabitation may disrupt the stability of governance and states that the collapse of the political system occurs only under certain circumstances and that these circumstances are unlikely to combine very frequently.<sup>11</sup> Both direct and indirect elections can result in cohabitation. If the president is elected directly, it is possible for the general opinion on the president to be different from the view on political parties (e.g. the general public supports a conservative president while voting for a socialist party). In the case of indirect elections, the president’s term of office does not coincide with that of the parliament, and there emerges a situation in which the newly elected parliament’s ideology is different from the president’s. One

7 Paczolay, 1992, p. 173.

8 Gepl and Gillis, 1993, p. 64.

9 Duverger, 1978.

10 Elgie, 2010, p. 29.

11 Elgie, 2010, p. 30.

may observe that cohabitation is not a constitutional system but a political reality, and it depends on the actors in power.

Perhaps because of the experience of the Fifth Republic of France, cohabitation is generally linked to semi-presidential systems, which I presume to be a mistake. Cohabitation is also possible in parliamentary systems, even if the president's possibilities are weaker. The CEE region has experience in cohabitation with Michal Kováč and Vladimír Mečiar in Slovakia; Traian Băsescu and Victor Ponta, Klaus Iohannis and social democratic prime ministers in Romania; László Sólyom<sup>12</sup> and Ferenc Gyurcsány in Hungary; or Borut Pahor and Janez Janša in Slovenia.<sup>13</sup> Experience shows that presidents in cohabitation are more active if they belong to different parties, or, if the president and the prime minister are from the same party, they handle their disagreements behind closed doors.

I conclude that the role of a president is different in cohabitation, even in parliamentary states. Using their competences, they act as political balances with which they have a major influence on governance. If the president belongs to the same party, they have a smaller effect on politics.

## 2. Election and term of office

### 2.1. *Direct or indirect elections?*

One major difference between presidents and monarchs is that the former have a fixed term of office, and the constitutions of republics determine the way of electing presidents. The two major ways of electing a president are direct election and election by the parliament. A third possibility exists, namely the establishment of an electoral body, which is how Germany and Italy elect their presidents. In both countries, an electoral body composed of the representatives of the parliament and of the regions elects the president.<sup>14</sup>

Previously, the mainstream view was that the way of election corresponded with the form of government: semi-presidential states elected their presidents directly, and in parliamentary states, the parliament elected the president.<sup>15</sup> The reason might be that if the people elect both the parliament and the president, there is a 'dual

12 Interestingly, Sólyom filled his entire term of office in cohabitation; he was elected in 2005 with the support of Fidesz minority (as certain MPs of the government side implicitly supported him by abstaining from voting), and he was in cohabitation with two socialist governments. A couple of months before his term ended, Fidesz formed a government, but Sólyom disagreed with it with regards to several issues.

13 In many countries, the president must terminate their political party membership; therefore, it is not a cohabitation in a formal sense. However, the existence or the lack of party membership does not have a drastic influence.

14 How the United States of America elect their president is entirely different. They emphasise that the mandate of the president derives from the states (and not from the people), and such an election is neither direct nor indirect.

15 Kopecky, Meer Krok-Paszowska and Muyzenberg, 1995, p. 77.

legitimacy' in the country. According to Juan J. Linz, in a parliamentary system, in line with its plain meaning, the parliament is the only institution with democratic legitimacy,<sup>16</sup> and the entire government depends on its confidence.<sup>16</sup>

However, in the last few decades, an increasing number of parliamentary states have turned to direct elections. In 2003, Ray Toras said that there was "a slight preference in post-communist countries to elect the president directly"<sup>17</sup> and that all countries of the region elect their president directly, except for Hungary. Zdeněk Koudelka even concludes that direct election is a "civilisation trend".<sup>18</sup> Indeed, no clear link exists between the power of the president and the way of election; however, the question of direct or indirect elections influences the characters of the candidates, the campaign and the president's relation to the parliament.

## ***2.2. Regulation of elections***

Hungary opted for indirect elections, i.e. the parliament elects the president. In the first round, the candidate is elected if they receive the votes of two-thirds of all MPs. If none of the candidates receive such a majority, a simple majority is enough for the second round. Moreover, the Hungarian regulation is unique in the sense that it does not require a quorum for the second round; consequently, the president can be elected with one single vote if all other MPs abstain from casting votes.

Where there are direct elections (all countries except for Hungary, as mentioned), the system is absolute majoritarian. The candidate who receives the majority of all votes (more than 50% of the votes cast) is elected president in the first round. The regulation is even stricter in Romania: the candidate needs to receive the majority of votes of the electors entered on the electoral lists to be elected in the first round.<sup>19</sup> If none of the candidates receive such a majority, there is a second round in which the candidate receiving the most votes becomes the elected president.

However, the regulation has certain differences and peculiarities. In Poland, it is the right of the people to nominate candidates: people who are supported by 100,000 signatures can stand in elections.<sup>20</sup> In the Czech Republic and in Slovakia, both the parliament and the people have the right to nominate candidates. In the Czech Republic, either 50,000 citizens or 20 deputies or 10 senators can nominate a candidate,<sup>21</sup> and in Slovakia, either 15 MPs or 15,000 citizens can do so.<sup>22</sup>

Another issue is eligibility. Several countries of Europe require special (additional) criteria for presidency, which can be either ancestry (Greece, Portugal), citizenship by birth (Finland, Bulgaria, Lithuania) or no dual citizenship (Latvia). The countries of the region analysed here do not stipulate such circumstances. However, certain

<sup>16</sup> Linz, 1992, p. 143.

<sup>17</sup> Taras, 2003, p. 120.

<sup>18</sup> Koudelka, 2014, p. 21.

<sup>19</sup> Art. 81(2).

<sup>20</sup> Art. 127(3).

<sup>21</sup> Art. 56(5).

<sup>22</sup> Art. 101(3).

countries have a special age limit, which is 35 in Hungary,<sup>23</sup> Poland<sup>24</sup> and Romania<sup>25</sup> and 40 in the Czech Republic<sup>26</sup> and Slovakia.<sup>27</sup>

Certain constitutions also stipulate when to hold elections. The most common regulation is 60 to 30 days prior to the termination of office of the previous president. This is the regulation of Croatia,<sup>28</sup> the Czech Republic<sup>29</sup> and Hungary.<sup>30</sup> The Constitution of Slovenia defines the end term of the election only: 15 days before the expiry of the term of the incumbent president.<sup>31</sup> Serbia and Poland opt for an earlier election: in Serbia the election must be held between 90 and 30 days<sup>32</sup> and in Poland between 100 and 75 days<sup>33</sup> from the expiry of the term of the president in office. Obviously, in all countries the regulation pertains only to situations where the president's office ends due to the termination of the fixed term. In case of an extraordinary situation (death, resignation, etc.) different regulations pertain to the election.

The regulation on elections is summarised as follows:

	Way of election	Special eligibility requirement	Nomination of candidates	Time of election
Croatia	direct (majoritarian)	NO (18 yrs.)		60–30 days
Czech Republic	direct (majoritarian)	YES (40 yrs.)	50,000 voters or 20 deputies or 10 senators	60–30 days
Hungary	indirect (by parliament)	YES (35 yrs.)	1/5 of MPs	60–30 days
Poland	direct (majoritarian)	YES (35 yrs.)	100,000 voters	100–75 days
Romania	direct (majoritarian)	YES (35 yrs.)		
Serbia	direct (majoritarian)	NO (18 yrs.)		90–30 days
Slovakia	direct (majoritarian)	YES (35 yrs.)	15,000 voters or 15 deputies	
Slovenia	direct (majoritarian)	NO (18 yrs.)		more than 15 days

23 Art. 10(2).

24 Art. 127(3).

25 Art. 37(2).

26 Art. 57(1) Reference to Art. 19(2), eligibility for election to the Senate.

27 Art. 103(1).

28 Art. 95.

29 Art. 56(7).

30 Art. 11(1).

31 Art. 103.

32 Art. 114.

33 Art. 128(2).

### 2.3. *Term of office*

The term of office does not have too many peculiarities. All presidents are elected for 5 years and can be re-elected once. They have to take an oath before taking office, and its words are either in the constitution (the Czech Republic, Poland, Romania) or in a piece of legislation.<sup>34</sup>

There are slight differences in when exactly the president takes office. Slovakia prescribes that the office begins at noon of the day of the termination of the previous president,<sup>35</sup> while other constitutions define midnight or consider the oath as a starting point.

## 3. Competences

### 3.1. *Representation*

Despite the great variety of presidential powers, the wordings of different constitutions prove to be very similar. Nearly all presidents have ‘classic’ functions (representing the state, granting pardons and decorations, deciding on citizenship, etc.) and competences relating to state organisation.

Yet a great difference exists if one considers the content of presidential competences. For instance, all constitutions declare that the president represents the state. This power has a dual interpretation. On the one hand, representation may mean a competence of foreign politics; the president may act on behalf of the state when negotiating with other states, signing international agreements, hosting members of international diplomacy etc. This is the meaning of representation in Germany; according to Art. 59 (1) of the Grundgesetz, “Der Bundespräsident vertritt den Bund völkerrechtlich” (“the Federal President represents the Federation under international law”). The situation is much the same in Slovakia: the president represents the Slovak Republic *externally*, negotiating and ratifying international treaties.<sup>36</sup> External representation appears in the Czech constitution,<sup>37</sup> and the Romanian constitution also mentions powers in matters of foreign policy.<sup>38</sup>

On the other hand, representation may mean the symbolic representation of the state. In this regard, representation is not a competence but part of the president’s status. The president, as head of state, may act in the name of the state not only externally but also domestically. When the president gives decorations, they represent the acknowledgement of the whole country; when they grant pardon, they spare from punishment and ‘forgive’ in the name of the state.

34 In Hungary, the Constitutional Court found it unconstitutional that the wording of the presidential oath be stipulated in the standing orders of the Parliament and not in an act of Parliament, concluding that standing orders cannot pertain to presidents [Decision 9/2008. (I. 31.) CC].

35 Art. 101(7).

36 Art. 102(1) a).

37 Art. 63(1) a).

38 Art. 91.

The two interpretations are not mutually exclusive. The Serbian constitution explicitly declares that the president represents Serbia in the country and abroad.<sup>39</sup> The Hungarian constitution does not have an explicit declaration, but the mainstream academic view is that representation covers both international and symbolic representation.<sup>40</sup>

The symbolic role of the president is not equal in the countries. Historical heritage and constitutional and political background all influence how the president symbolises the state and the country.<sup>41</sup> Unlike the Polish and Hungarian constitutions, the Czech and the Slovak ones do not mention the symbolic role of the president, even though these are the states with the greatest cult of presidents. The Czech castle of Hradšchin (the Prague Castle) symbolises presidential power, and the Czech president is the only one who has their own flag.<sup>42</sup>

Another explanation for the president's symbolic role might be that presidents of parliamentary states are usually out of daily politics. According to Benjamin Constant's model, heads of states are out of governance, and they are to represent the unity of the nation; therefore, they can be more accepted than members of the parliament and government.

### **3.2. Countersignature**

In cases of countersignature, a presidential act is valid only if the pertaining member of the government signs it. The refusal of consent results in the president's decision being null and void. The key issue concerning countersignature is political responsibility. As the president is not accountable to the parliament for their actions (except for breaching the law, which I discuss later), the minister or prime minister bears responsibility for the action taken.

Countersignature does not only link to the parliamentary system, but it is also common in semi-presidential states. However, the list of competences that require countersignature is various. In certain countries of the CEE region, countersignature is the general rule: all presidential decisions must be countersigned, unless there is a constitutional reason for the opposite. Examples of the exceptions include the nomination of judges or the signing of statutes because constitutions do not wish the government to be involved in such issues. In other countries, countersignature is exceptional, and it is required only if the president would have too much influence on governance.

In the CEE region, the constitutions of Slovenia and Serbia do not mention countersignature at all. The Slovak constitution requires countersignature only to receive, appoint and recall diplomatic missions as well as for amnesty and decisions that the president makes as commander-in-chief. Countersignature is more common in the

39 Art. 112(1).

40 Petrétei, 2008, p. 229.

41 Halász, 2013, p. 216.

42 Halász, 2013, p. 230.

Czech Republic. Art. 63 (1) gives a long list of competences requiring countersignature. Apparently, the representation of the state requires countersignature, which logically pertains only to diplomatic representation. It is even more interesting that the appointment of judges also needs countersignature as most countries do not want the executive branch to be involved in the personnel of the judiciary. Further, it is noteworthy that judges of the constitutional court are appointed with the consent of the Senate.<sup>43</sup> As for the Constitution of Poland, Art. 144 (2) sets that the actions of the president are valid only with the signature of the prime minister. However, a long list of exceptions covers competences of appointments, proclaiming elections, granting citizenship and pardon, signing laws, conferring orders and decorations etc. Hungary formally has no general rule, but the requirement of countersignature is more common. Exceptions are the ones where the government's influence is unwanted, such as when proclaiming elections, signing bills, appointing judges etc.

On the contrary, the Constitution of Romania requires countersignature only exceptionally; it pertains only to foreign policy, defence and emergency issues, conferring decorations, appointing military leaders and granting individual pardon. Similarly, the Constitution of Croatia declares that countersignature is necessary only in cases of emergency and diplomatic measures and in certain issues stipulated in the constitution.

### ***3.3. Signing acts of parliaments, veto powers***

For centuries, it had been the king's prerogative to verify bills, and no statute was promulgated without the king's consent. In parliamentary republics, presidents continued the tradition of signing bills that the parliament adopted, with a very different meaning. On the one hand, the president's signature has a symbolic meaning, and the act of parliament is 'ready for promulgation'. It may also stipulate that the bill is 'in order', i.e. the legislative procedure was in accordance with the standing orders. The time frame for signature varies; in Hungary it is five days, in Poland it is 21 (7 days in the case of budget law), and in between in other countries.

Interestingly, the Constitution of Slovakia declares that laws can be promulgated even without the signature of the president: if the president refuses to sign the bill, even if they are obliged to do so, the act is promulgated without the signature.<sup>44</sup>

It is various if the president has any possibility to refuse giving their consent, i.e. if the president can veto a bill that the parliament already adopted. In general, constitutional law acknowledges two kinds of veto. Constitutional veto is the one with which the president questions the constitutionality of the law and challenges it at the constitutional court. It is a further question if the veto can be based on formal grounds only (namely that the procedural rules were not fulfilled, the parliament did not adopt the law with the required majority etc.) or the president can raise substantial constitutional issues.

43 Art. 84.

44 Art. 88(3).

On the contrary, with political veto, the president expresses their disagreement with the law.<sup>45</sup> Generally, presidents do not have absolute veto power, i.e. they cannot hinder legislation. Certain political vetoes require only the reconsideration of the law, and the parliament's only task is to re-debate the bill with regard to the president's remarks. However, in some countries the parliament can re-adopt a vetoed statute with a greater majority.

Countries of the CEE region are various if they grant the power of veto to their presidents, and if they do, what kind of veto does the president have? Hungary, Poland and Romania ensure both constitutional and political veto. In all countries, the constitutional veto can be based on substantial grounds, too. Hungary is special in this regard as there is an exception: constitutional amendments can be based only on formal (procedural) grounds.

The Romanian regulation is remarkable in the sense that it is not the president's exclusive competence to initiate ex-ante review; this can also be initiated by one of the presidents of the two chambers, the government, the High Court of Cassation and Justice, the Advocate of the People and a number of at least 50 deputies or at least 25 senators.<sup>46</sup> For this purpose, the draft is sent to the individuals and bodies mentioned above 5 days before it is sent to the president for promulgation. If any of the lists are initiated ex-ante review, the president cannot promulgate the law until the Constitutional Court has made a decision.

Slovenia does not grant veto power to their presidents at all; neither does Croatia, yet the president can initiate ex-post review at the Constitutional Court. The constitutions of Serbia, Slovakia and the Czech Republic only stipulate political veto.

As for the Czech Republic, although the president has no power to initiate ex-ante review at the Constitutional Court, according to the Act on the Constitutional Court, they can challenge the constitutionality of the law with posterior law review. One remarkable case was when President Havel challenged the Act on Court and Judges.<sup>47</sup>

The following chart summarises the veto powers of presidents:

	<b>Political veto for reconsideration (same majority)</b>	<b>Political veto for greater majority</b>	<b>Constitutional veto (substantial)</b>	<b>Constitutional veto (formal)</b>
Croatia	NO	NO	NO (but the president can initiate ex-post review, after promulgation)	NO (but the president can initiate ex-post review, after promulgation)

45 I find the most important distinction between constitutional and political veto if it is a judicial (the constitutional court) or a political body (the parliament) that decides on the vetoed bill. It is entirely possible that the president refuses to return a bill to the parliament because of constitutional concerns (as it happens quite frequently in Serbia and also several times in Hungary); I still find it a political veto as the decision-making process is political.

46 Art. 146 a).

47 Gillis, 2003, p. 4.



	Political veto for reconsideration (same majority)	Political veto for greater majority	Constitutional veto (substantial)	Constitutional veto (formal)
Czech Republic	NO	YES (absolute majority required, the Parliament cannot amend the proposal)	NO	NO
Hungary	YES	NO	YES (except for constitutional amendments)	YES
Poland	NO	YES (three-fifths majority required, budget law cannot be vetoed)	YES	YES
Romania	YES	NO	YES (others can also initiate review)	YES (others can also initiate review)
Serbia	NO	YES (absolute majority)	NO	NO
Slovakia	YES	NO	NO	NO
Slovenia	NO (the National Council has veto power instead of the president)	NO	NO	NO

### 3.4. Pardons and amnesties

Granting pardons and amnesties are also usually competences of presidents. Presidents may grant pardon in individual cases for persons who are under trial or already convicted; conversely, an amnesty means that the perpetrator of a certain offence is acquitted from criminal procedure or their sentence is released.

The president's possibility to grant pardon is rather general. It is a major difference if the decision on pardon needs countersignature. Hungary and Romania require the consent of the government for such an action, while it is not necessary in other countries.

There are major differences in providing amnesty. This is a legislative task in Croatia, Hungary, Romania, Serbia and Slovenia.<sup>48</sup> In the Czech Republic and in Slovakia, the president has the right to grant amnesty; however, this action needs countersignature (unlike in the case of individual pardons). In the Czech Republic, the fact

48 In Slovenia, while there is no constitutional provision pertaining to the subject, the right to grant amnesty is vested to the legislative branch and has been exercised before (See: Smailagić, 2020, pp. 80–81).

that ministerial approval is required perhaps stems from bad memories of President Havel's hasty decision to empty the prisons soon after the Velvet Revolution.<sup>49</sup>

In Slovakia, the constitution delegates the competence to the government in case of offences and to the president in case of crimes.<sup>50</sup>

Pardons and amnesties are summarised in the following chart:

	<b>Pardon</b>	<b>Amnesty</b>
Croatia	YES	NO (right of the parliament)
Czech Republic	YES	YES (needs countersignature)
Hungary	YES (needs countersignature)	NO (right of the parliament)
Poland	YES (may not relate to individuals convicted by the Tribunal of State)	NO (no constitutional regulation on amnesty)
Romania	YES (needs countersignature)	NO
Serbia	YES	NO
Slovakia	YES	YES (needs countersignature)
Slovenia	YES	NO (right of the parliament)

### ***3.5. Dissolution of parliaments***

Perhaps the most significant borderline between parliamentary and semi-presidential systems is the issue of dissolution. If the president can dissolve the parliament for merely political reasons, the system is semi-presidential, and if there are only legal grounds for dissolution, the system is parliamentary. In the French constitutional system, dissolution is the 'appeal to the people' in the debate between the president and the parliament, with the sole limit that parliament cannot be dissolved in the year of election. However, in Central Eastern Europe, there are narrowly tailored possibilities for the president to dissolve the parliament.

In the constitutions of the region, one may observe that serious malfunctioning might be a cause for dissolution. According to the Constitution of the Czech Republic, the parliament can be dissolved if it cannot concord in vote of confidence or simply does not function due to lack of quorum or it is adjourned longer than permitted.<sup>51</sup> In formal constitutional terms, the Czech House of Deputies (first chamber of Parliament) cannot dissolve itself; however, if they ask the president to dissolve it with three-fifths of votes, the president is obliged to do so. Seemingly, the president has very little discretion in exercising this power.<sup>52</sup>

49 Gepl and Gillis, 2003, p. 66.

50 The English translation of the Slovakian constitution might be misleading; Art. 119 l) 'offence' is not a high crime but an administrative misdemeanour.

51 Art. 35.

52 Gepl and Gillis, 1993, p. 65.

The Constitution of Slovakia regulates dissolution in a rather similar way. Art. 102 (1) e) says that the president

may dissolve the National Council of the Slovak Republic if the National Council of the Slovak Republic, within a period of six months from the nomination of a Government of the Slovak Republic, has not passed its Programme Proclamation, if the National Council of the Slovak Republic has not passed within three months of the formation of a Government a draft law with which the Government has combined a vote of confidence, if the National Council of the Slovak Republic has not managed to hold a session for longer than three months although its sitting has not been adjourned and it has during this time been repeatedly called for a meeting, or if a session of the National Council of the Slovak Republic has been adjourned for a longer time than is allowed by the Constitution.

In Hungary, dissolution also links to the malfunctioning of the parliament, yet it is slightly different. The president may dissolve the parliament if it does not elect the prime minister in 40 days or if it does not adopt the central budget until the end of March.<sup>53</sup> The situation is much the same in Slovenia: the National Assembly can be dissolved if it does not elect the prime minister (president of the government) on time. Similarly, in the Constitution of Romania, the president may dissolve Parliament if no vote of confidence has been obtained to form a government within 60 days after the first request was made and only after rejection of at least two requests for investiture.<sup>54</sup>

Serbia also allows the president to dissolve parliament if it cannot form a government. Apparently, the government may also propose the dissolution of parliament. The proposal must be elaborated and does not oblige the president to do so.<sup>55</sup> The Croatian president may also dissolve parliament if it passes a vote of no confidence in the government or fails to adopt the state budget within 120 days after the date on which it was proposed. This action requires the proposal of the government, countersignature of the prime minister, and the president must consult with the representatives of parliamentary parties.<sup>56</sup> The situation is much the same in Poland: if the three constitutional procedures for forming a government fail, the president is obliged to dissolve parliament.<sup>57</sup> Further, there is another possibility to reduce the term of the parliament (albeit not obligatory): if, within 4 months of the submission of the draft budget bill to the Sejm, this is not presented to the president of the republic

53 Art. 3(3).

54 Art. 89(1).

55 Art. 109.

56 Art. 104.

57 Art. 155(2).

for signature, the president of the republic may, within 14 days, order the shortening of the term of the Sejm.<sup>58</sup>

To sum up the possible reasons for dissolution, one may conclude that in every country of the region, the president's power for dissolution is narrowly tailored. Dissolution is admitted if there is a grave disfunction in the government (lack of budget, no government etc.), which is practically possible only without a solid majority in parliament. The key principle of parliamentarism is that majority governs: without a majority, the parliament cannot stand. The reason for the president's power for dissolution is closely connected to the parliamentary system: the president calls a new election if the current parliament does not operate.

In certain countries, the president is the only actor who can help the parliament through the crisis. In certain countries, the parliament can dissolve itself (Hungary), in some others it cannot but ask the president (Czech Republic), and in some others the government can propose the dissolution (Romania). This latter might be interesting in cases if the government loses majority in parliament, but the new majority could govern.

Finally, it is interesting to consider the Hungarian draft on presidential powers. When working on the new Hungarian constitution in 2011, the drafting committee suggested that the president should have the power to dissolve the parliament in major political crises. This possibility was out of the final draft as such a political reason for dissolution would have easily led to semi-presidentialism.

#### 4. Replacement of presidents

Instituting a vice president as in presidential systems is not common in parliamentary countries. Therefore, constitutions must find someone to replace the president when they are temporarily unable to fulfil presidential duties, or the office becomes vacant.

The general solution is that the president of the parliament (the Speaker) replaces the president. Slovakia and the Czech Republic are exceptions. In Slovakia, presidential powers are delegated to the government and the prime minister if the office is vacant or the president is unable to perform their tasks.<sup>59</sup> If the obstacle lasts more than 6 months, the Constitutional Court declares the office vacant. In the Czech Republic the prime minister replaces the president in certain competences if the office is vacant and the president of the House of Deputies if the president is unable to discharge duties of the office.<sup>60</sup> All other constitutions delegate the competence of replacement to the Speaker; however, the regulations have certain differences.

According to the Constitution of Poland, the Speaker can replace the president only if either the president informs them about the incapacitation or the Constitutional

58 Art. 225.

59 Art. 105.

60 Art. 66.

Tribunal decides that the president is unable to discharge the duties of office.<sup>61</sup> The Speaker replaces the president in Romania,<sup>62</sup> Hungary,<sup>63</sup> Slovenia<sup>64</sup> and Serbia.<sup>65</sup> The Constitution of Croatia is the most sophisticated as it differentiates among short-term and long-term absence and vacancy of office.<sup>66</sup>

There is also a difference if the replacement is full or limited. In the latter case, the person replacing the president can exercise certain competences but not all of them. Replacement pertains only to certain competences in Romania, Serbia, Slovakia and the Czech Republic; in Croatia, the countersignature of the prime minister is required for signing the bills if the president is replaced.

Another difference might be found in who promulgates that the president cannot discharge the duties of office. For instance, it is the decision of the parliament in Hungary and the decision of the Constitutional Tribunal in Poland, while in Croatia, short-term replacement is parliamentary, and long-term replacement is a decision of the Constitutional Court.

## 5. Termination of office, responsibility

The causes of termination of office are rather typical. Some of them are matters of fact: the expiry of the term and the death of the president. Unlike monarchs, presidents have a fixed mandate, and the expiration automatically results in its end. Even if the president is re-elected, it is a new mandate and not the extension of the previous one. Needless to say, death also results in the end of mandate.

How constitutions regulate incapacity is more various. Incapacity means a situation when the president is unable to fulfil the duties of office; if it is temporary, the president is replaced, as it was discussed in the previous part of this paper. Yet, according to most constitutions, it results in the termination of office after a while. In certain countries, incapacity is a matter of fact, while in some others it is a matter of law. In the first case, incapacity itself terminates office, while in the latter, the declaration of incapacity is the cause of termination.

In Poland, the National Assembly votes on the president's permanent incapacity with a two-thirds majority. The parliament can deliver such decision only if the president cannot discharge the duties of office due to their state.<sup>67</sup> In the Czech Republic, the two houses of the parliament declare incapability.<sup>68</sup> In Slovakia, it is not the par-

61 Art. 131.

62 Art. 98.

63 Art. 14.

64 Art. 106.

65 Art. 120.

66 Art. 97.

67 Art. 131 2(4).

68 Art. 66.

liament but the Constitutional Court which decides on incapability, delivering such a decision if the president cannot discharge the duties of office for 6 months.<sup>69</sup>

On the contrary, incapacity is a matter of fact in Hungary, Romania and Slovenia. In Hungary, office terminates after 90 days of incapacity,<sup>70</sup> and ‘permanent incapacity’ ends office in Romania<sup>71</sup> and Slovenia.<sup>72</sup> The parliament’s declaration of the vacancy of office is a different issue, but office terminates because of the fact of incapacity rather than the declaration.

Certain grounds for termination of office are matters of law: resignation, incompatibility and removal. The first two are rather obvious: in all countries, the president can resign; in certain countries, although they need the parliament’s approval, this is a formal decision, and the parliament cannot stop the president from resigning.

Removal closely connects to the president’s responsibility. Unlike governments, presidents are not accountable to parliaments, and parliaments cannot withdraw the president’s mandate due to lack of confidence.

In the region, only one country – Romania – established an impeachment procedure, like in the US. In case of impeachment, there is legal ground to initiate the procedure (mostly treason, infringing the constitution) and finally the legislative body (the Congress) decides whether to remove the president or not. According to the Constitution of Romania, the two Chambers of parliament decide on impeachment by two-thirds majorities of votes.<sup>73</sup> In contrast, in other countries, it is not the parliament but a judicial body that can remove the president. In all countries, the parliament can initiate the procedure against the president. The parliament’s decision requires a two-thirds majority in Poland, Hungary and Croatia. The required majority is three-fifths in the Czech Republic<sup>74</sup> and Slovakia, and the constitution does not stipulate a special majority requirement in Slovenia. In Serbia, the procedure is initiated with the proposal of one-third of all MPs and confirmed (after the Constitutional Court’s decision) with two-thirds.

Most countries delegate the power of removal to the Constitutional Court, which decides with a single majority in Hungary, Serbia, the Czech Republic and Slovakia and with a two-thirds majority in Croatia and Slovenia. It is not the Constitutional Court but the Tribunal of State that decides on the removal of the president in Poland. The Tribunal of State is composed of a chairperson, two deputy chairpersons and 16 members chosen by the Sejm for its current term of office from amongst those who are not deputies or senators,<sup>75</sup> and its task is to decide on the constitutional responsibility of high officers.

69 Art. 105(2).

70 Art. 12(3) c).

71 Art. 98(1).

72 Art. 106.

73 Art. 96.

74 In the Czech Republic, both chambers must pass the initiative separately by a three-fifths majority.

75 Art. 199(1).

Romania and in Slovakia adopt special ways to remove the president. Both countries institute recall elections, involving the people in the president's removal; however, the procedures are different. In Romania, the two chambers can suspend the president by a majority vote in case of grave constitutional infringement.<sup>76</sup> If the proposal of suspension from office has been approved, a referendum shall be held within 30 days to remove the president from office.

In Slovakia, the president may be recalled from their post before the end of their term of office by a plebiscite, which can be initiated by the National Council and adopted by at least a three-fifths majority of all members. The president is recalled if an absolute majority of all legitimate voters votes for their recall in a plebiscite. If the president is not recalled in a plebiscite, the president dissolves the National Council, and a new presidential electoral term begins.<sup>77</sup> One apparent case of such a recall occurred in Slovakia; however, it dates back to before the amendment of Art. 106, when the National Council could remove the president. The National Council initiated a no-confidence motion against president Kovac, receiving 80 votes in favour, 40 against and 30 abstentions; despite the clear majority, it did not receive the support of three-fifths of all deputies.<sup>78</sup>

Seemingly, the Romanian constitution mixes political and legal responsibility and appeals to the people to decide a constitutional issue, namely if the president infringed the constitution. As the Slovakian procedure is a purely political one, there is no need to stipulate the causes of removal.

## 6. Concluding remarks

At first glance, the positions of presidents in our region are much the same. All constitutions delegate 'policy-making' to the prime minister and the government, who are accountable to the parliament; yet, if presidents are observed in a closer look, one may find crucial differences. On the one hand, their position is not unified in that they politically balance (or at least influence) governance. On the other hand, they have a variety of competences, especially in the fields of veto powers, countersignature, dissolution of parliament, granting amnesties and pardons and representation.

However, it is hardly possible to provide an institutional comparison without a proper analysis on how the constitutions work in practice. Presidential status is closely connected to factors other than the constitution, which may explain why the president's power changes even if the constitutional text remains unchanged.

<sup>76</sup> Art. 95.

<sup>77</sup> Art. 106.

<sup>78</sup> Zifcak, 1995, p. 61.

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# The Constitutional Challenges of the Judiciary in the Post-socialist Legal Systems of Central and Eastern Europe

Attila BADÓ

## ABSTRACT

Despite theoretical experimentation, although one cannot speak of a separate post-socialist legal family,<sup>1</sup> it is without a doubt that CEE, post-socialist countries – and more precisely, the countries aspiring for EU membership – have had to cope with similar problems since the 1990s. Among the difficulties concerning the transition from dictatorship to democracy,<sup>2</sup> a political – or rather, professional – discourse that mostly occurs in constitutional courts and is aimed at the true nature and the method of ensuring judicial independence has been and is now given more emphasis in Western countries as well. Independence from party politics or governmental authority plays an increasingly important role in CEE countries since the collusion of the single-party state and courts frequently had tragic consequences during the Stalinist period<sup>3</sup> (the later and milder phase of the dictatorship in some countries was not always associated with an unfailing prevalence of judicial independence either, although direct political pressure could not be detected in a considerable part of legal disputes.<sup>4</sup>) In light of this saddening historical period, it is understandable that the chances of party political aspects that appear are more resounding than usual in post-socialist societies. Such fears are predominant in a narrow social stratum since the system of CEE political traditions, a weakened democratic legacy and frail or malfunctioning autonomies result in indifference towards institutional changes concerning the judicial independence as well.

In this study, the most important constitutional foundations of the judicial systems of post-socialist CEE countries are presented. The judicial system of the assessed legal systems is presented by defining the constitutional bases and the rules laid down in the most important laws through the presentation of the literature on the institution. Having clarified the structural issues and the constitutional status of the courts – the central forms of administration – an assessment is conducted as to how well-known aspects of judicial independence and accountability play a role in the administration of justice of a given legal system. At the heart of the analysis is the much-misunderstood concept of judicial independence. Within this, the organisational independence of the judiciary, which determines the relationship of courts with other branches of power, on the one hand, determines the actual margin of appreciation of judges, and on the other hand, it may shed light on the reforms of CEE judicial systems on their way to democracy following dictatorship and the single-party system. The above may also reveal how these systems tried to meet the requirements of European accession

1 See, e.g., Fekete, 2010, p. 209.

2 Anderson, Bernstein and Gray, 2005, p.132.

3 Kahler, 1993, p. 291; Graver, 2015, p. 301.

4 Fleck, 2001, p. 276.

and how they responded to societal needs. Although the system of the organisation of the judiciary in post-socialist countries has also undergone changes, mainly due to constitutional amendments aimed to enforce the principle of access to justice, no analysis of the changes is conducted here due to a lack of space. Although we can talk about a broader and narrower meaning of the concept of justice, in this chapter, the situation of CEE legal systems based on the narrower concept is also presented for reasons of length. Thus, we specifically deal with courts, which are the central actors in the application of the law. We also dispense with the presentation of constitutional courts' activities, to which this volume devotes a separate chapter. At the beginning of this chapter, we conduct an analysis of how the Court of Justice of the European Union and the Council of Europe, which connects the wider Europe, interpret the concept at its heart: judicial independence. Afterwards, we discuss the constitutional foundations and the central administration of courts. As a conclusion, we outline possible ways of development in post-socialist judicial systems.

#### KEYWORDS

Judiciary, Constitutional challenges, Post-socialist legal systems, Judicial Councils, Administration of justice.

## 1. Judicial independence and judicial organisational independence across the European area

Judicial independence is still a vague concept, even though almost every constitution in Europe – but especially post-communist constitutions – obligatorily enshrine this principle. However, its exact content is difficult to determine as a principle and phenomenon of judicial independence can be examined from various aspects: the organisational independence of the judiciary, the existential security of the judge, or the independence and impartiality of the judge performing their judicial functions.<sup>5</sup> International agreements as well as international and domestic jurisprudence have managed to establish basic yet occasionally highly restrictive and vague standards concerning judicial independence.

The institutions of the European Union are endowed with limited competences and even more limited tools to safeguard judicial independence in the member states, but a number of unexploited institutional possibilities are available in the EU for the effective monitoring of judicial independence and signalisation or other active involvement if needed. Pursuant to Art. 2 of the Treaty on European Union (TEU),

the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

Art. 6 TEU also underlines that “fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall

5 Russel and O'Brien, 2001, p. 326.

constitute general principles of the Union's law". An alternative argument for EU involvement is the creation of an Area of Freedom, Security and Justice that is based, *inter alia*, on the automatic mutual recognition of judicial decisions rendered in other member states. Mutual recognition is based on mutual trust, and a crucial component of this trust is the conviction that a judgement rendered in another member state has been adopted by an independent and impartial tribunal in a fair procedure. Despite an unequivocal theoretical commitment to uphold the rule of law, the EU actually has very few tools to effectively implement it. The European Council, acting by unanimity on a proposal by one-third of the member states or by the European Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a member state of the values referred to in Art 2, after inviting the member state in question to submit its observations (Art. 7 TEU).<sup>6</sup>

The EU Charter of Fundamental Rights might serve as another basis of EU action. Pursuant to Art. 47 of the Charter, everyone whose rights and freedoms guaranteed by EU law are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented. However, Art. 51 of the Charter limits the scope of these provisions by stating that they are addressed to the institutions, bodies, offices and agencies of the EU with due regard for the principle of subsidiarity and to the member states only when they are implementing EU law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties. In addition, the Charter does not extend the field of application of EU law beyond its powers, establish any new power or task for the EU or modify powers and tasks as defined in the Treaties. As a consequence, the Charter is not very likely to prove an effective tool to promote the independence of domestic courts in member states. However, since 2010, the Commission has published an annual report on the implementation of the Charter and can also initiate infringement procedures, but these are usually not based exclusively on the Charter.<sup>7</sup> Another important European initiative on judicial independence, including the organisational

6 Based on the unsatisfactory experiences related to the application of Art. 7 TEU as a nuclear option, on 11 March 2014, the Commission presented a new initiative for addressing systemic threats to the rule of law in member states that was supposed to be complementary to the infringement procedures and Art. 7 procedural activities on monitoring the 'rule of law' in member states and taking proportionate and effective action if needed.

7 For example, when – as mentioned above – the Commission contested the early retirement of around 274 judges and public prosecutors in Hungary caused by a sudden reduction of the mandatory retirement age for this profession from 70 to 62, the Court of Justice of the European Union upheld the Commission's assessment that this mandatory retirement was incompatible with EU equal treatment law (the Directive prohibiting discrimination on the basis of age and Art. 21 of the Charter) – and not on considerations related to the independence of the judiciary.

independence of the judiciary, is the action plan<sup>8</sup> proposed by the Council of Europe's Committee of Ministers in 2017, which includes recommendations and the monitoring of member states. The action plan aims to depoliticise courts but continues to respect the specificities of the member states. It does not require the establishment of judicial councils everywhere; however, it articulates the need to avoid the election of members of the councils or other judicial bodies.<sup>9</sup> Overall, there are many different views and ideas in the EU about what the independence of the judiciary entails. The analysis and examination of the different solutions used in various EU member states must also consider the specificities of each country's domestic political institution.

For CEE countries, it is often difficult to understand the criticisms from EU institutions or human rights organisations that call into question a court action. This is most noticeable in connection with the administration of justice and the selection and disciplinary accountability of judges, for which stable Western European democracies also show various solutions. For decades, individual legal systems in Europe have been experimenting with ways and means of ensuring the separation of powers, mutual control and a balance of independence and accountability in the judiciary. Although a clear trend is that the former ministerial powers are gradually being taken over in most countries by so-called judicial councils, which are designed to establish judicial self-government, the competences and composition of these councils still show considerable variation. In addition, some European countries (Austria and Germany) do not follow the indicated trend and still include the external administration of courts in governmental competence.<sup>10</sup>

Thus, even judicial systems with centuries of continuous legal traditions may employ institutional solutions that might arouse doubts concerning the independence and impartiality of judges. However, it is quite possible that due to the peculiarities of the legal and political culture, these solutions do not lead to the violation of the fair trial principle at all in practice. Nevertheless, that of political and legal culture is also a vague concept, based on which it would be extremely difficult to make an informed decision due to the violation of judicial independence.

## **2. Constitutional foundations: Central administration of courts.**

After the collapse of the Soviet Bloc, almost everywhere, the courts of the post-socialist countries of Central and Eastern Europe faced the problem of how to transpose the institutional structures rooted in Western democracies after World War II and the

8 Council of Europe Action Plan on strengthening judicial independence and impartiality (CM(2016)36 final).

9 "Measures should be taken to depoliticise the process of electing or appointing persons to judicial councils, where they exist, or other appropriate bodies of judicial governance" (Appendix, explanatory note p. 19).

10 Rieger, 2011, p. 209.

principles governing the functioning of the judiciary into a legal system defined for decades by a dictatorial framework.

Since the 1990 regime change, CEE, post-socialist countries have been struggling with how to meet the judicial independence requirement with a view to accession to the European Union. To this end, certain legal systems pushed through several reforms under which the judicial organisation has been restructured several times.<sup>11</sup> One could witness the expansion of the application of the judicial self-administration bodies in accordance with Western European trends. Since the accession of CEE, post-socialist countries to the EU proved to be successful, a new development occurred. The EU has rather limited means to exert influence over the judicial administration systems of its member states; thus, considerable leeway is given to post-socialist countries where the democratic traditions and the frailness of the politico-legal culture provide fertile ground to orientate towards the creation of an opportunist judiciary loyal to the government or, even better, the court management in case of the existence of a political intention to this effect. Regarding enforcement attitudes, the dictatorial state apparatus that lasted for almost half a century left an indelible mark in these countries.

In the post-socialist countries of the regime change, the ongoing rule of law reforms were guided by the fact that judicial independence could be realised in the face of decades of party statehood, when communist governments intervened to a greater or lesser extent in the substantive issues of the administration of justice. In the initial euphoric state, the political elite of democratising societies placed much more emphasis on this than on the question of the accountability of judges. Moreover, accountability seemed to be more of an obstacle to the realisation of judicial independence. However, in post-socialist countries, similarly to Western European countries, regime change parties experimented with varied solutions to achieve the above goals. Since the government had been responsible for the external administration of courts everywhere in the past, in addition to the degree of external pressure already mentioned after the change of regime, it was up to politicians to decide when and to what extent they would allow more judicial self-government.

Western European (ministerial, self-government and mixed) administrative models can thus also be found in the assessed post-socialist legal systems. In this chapter, the aim is to briefly present these varied solutions. Although important empirical studies have been conducted on the effectiveness of the administrative models introduced in post-socialist countries, describing them is beyond the scope of this study.<sup>12</sup>

In Hungary, 7 years after the change of regime, a judicial council with a judicial majority council was established in the framework of the 1997 comprehensive justice reform, with which the council took over almost all the powers of the government

11 See, e.g., Anderson and Gray, 2007, pp. 329–355.

12 See, e.g., the work on the operational experience of the Czech ministry and the Slovak local government model: Kosař, 2016, p. 488.

over the administration of justice.<sup>13</sup> In addition to the Minister of Justice, the Council also included the Prosecutor General representing the Public Prosecutor's Office, and the President of the Bar, but the majority of the judges elected by their representative bodies provided full self-government. Prior to that, ongoing political battles had begun, mostly over the appointment of court heads. However, since the formation of the council, professional criticism has emerged and gradually intensified in Western European countries over the full self-administration of justice: administrative managers elected by judges induce a barely controllable corporate system, leading to an increase in nepotism within the judiciary. The government, which gained a two-thirds parliamentary majority in 2010, implemented judicial reform, entrusting the administration of the courts to an administrative body with broad powers and headed by a leader appointed by a two-thirds parliamentary majority. The supervision of this body was entrusted to the Judicial Council, composed exclusively of judges but with less substantial powers. The new organisational form has been widely criticised for giving a single person exceptional power over the courts.<sup>14</sup> The National Office for the Judiciary (NOJ) is responsible for practically all matters related to the selection of judges and court leaders, and it supervises the administrative activities of all courts except the Hungarian Supreme Court – the Curia. The task of the Council in the field of central administration is basically to control the activities of the NOJ.<sup>15</sup> The service courts in Hungary have the right to adjudicate disciplinary cases; since 1997, the influence of the ministry of justice on the day-to-day operation of the courts has only been informal.

In Romania, immediately after the fall of Ceausescu's regime, the Judicial Council was established in 1991 with a historical predecessor (in 1909, well before the French Judicial Council, first recorded in the literature, a judicial council was established to assist the minister in the promotion of judges and to have competencies in the disciplinary matters of judges.) The Council, established in 1991, had weak powers compared to the Minister of Justice; therefore, one of the key issues in the European accession process until 2007 was the extent to which the government was able to relinquish control of the judiciary, thus increasing the Council's powers, and in parallel, what institutional guarantees the government managed to establish to tackle corruption, which is a particular problem in Romania. Under pressure from the EU, a comprehensive reform took place in 2003. Following lengthy political debates, together with other constitutional and legal rules related to European accession, an extremely broad, judicial majority body of 19 members representing the wider judiciary has emerged. In addition to the 14 judge members elected by the general meetings of the magistrates, there were two renowned lawyers elected by the Senate, the Minister of Justice, the President of the High Court of the Court of Cassation and the Attorney General. The Council has been given full power over virtually all matters affecting

13 Act LXVII of 1997 on the Organisation and Administration of Courts.

14 By the end of the 2010s, there had been a change of staff at the Head of the Office due to increasing conflicts between the Judicial Council and the Head of the Office.

15 Section 103(1)(a) of Act CLXI of 2011 on the Organisation and Administration of Courts.



the careers of judges. Judges and prosecutors are appointed by the president of the republic on a proposal from the Council. The reform has fundamentally changed the status of the judiciary, and the government has almost completely lost control of this branch of power. Although the Minister of Justice has become a member of the council, he cannot, for example, take part in the adjudication of disciplinary matters. The Council has been given full power not only in matters concerning judges but also in those regarding prosecutors. This significant change was associated with typical ‘side effects’. The full independence required by the European Commission has resulted in a lack of external control and strengthened the corporate nature of the system.<sup>16</sup> To counter this, the process of judicial reform between 2017 and 2019, which intensified the conflicts between the government and the judiciary, can also be seen as such. The acts of parliament on the appointment of prosecutors and the prosecution of judges have also been brought before by the European Court of Justice (ECJ), at the end of which judges found certain elements of the reform to be incompatible with EU law and the independence of the judiciary.<sup>17</sup> The central administration of the Romanian judiciary is the subject of more extensive and detailed debates than those described above, which, as in the countries of the region, continue to reflect a state of searching for a way forward.<sup>18</sup>

Poland also took some time to form the Judicial Council following the regime change. Although initiatives had been proposed, the creation of a body that took over a significant part of the government’s powers in the administration of courts was finally incorporated into the Polish constitution in 1997, at the same time as Hungary. Since 1997, the National Council of the Judiciary has had 25 members: 15 judges elected by their peers, a representative of the President of Poland, the Minister of Justice, six members of parliament, the President of the Supreme Court of Poland and the President of the Supreme Administrative Court of Poland.<sup>19</sup> The Polish solution belongs to the so-called mixed system. In addition to the Council, the ministry of justice has retained significant powers in administrative matters, from the issue of the courts’ budget to the appointment of heads of court. Although several conflicts of competence have arisen as a result of the Council’s work, the serious debate between the government and the judiciary – and later EU institutions – unfolded far beyond the

16 For details on ‘side effects’, see Selejan and Gutan, 2018, pp. 1707–1740.

17 On 18 May 2021 the ECJ ruled on the legal nature of the Cooperation and Verification Mechanism and the EU Commission’s progress reports and their binding effect for the Romanian courts.

18 See: <https://verfassungsblog.de/failing-to-struggle-or-struggling-to-fail-on-the-new-judiciary-legislation-changes-in-romania/>;

<https://verfassungsblog.de/new-challenges-against-the-judiciary-in-romania/>; <https://muse.jhu.edu/article/698921/pdf>;

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<https://www.iacajournal.org/articles/10.36745/ijca.350/>; [https://ec.europa.eu/info/sites/default/files/ro\\_rol\\_country\\_chapter.pdf](https://ec.europa.eu/info/sites/default/files/ro_rol_country_chapter.pdf).

19 The council was established in Arts. 186 and 187 of the Constitution of Poland.

particular problem in the late 2010s.<sup>20</sup> The problem of accountability/independence of the judiciary in Poland has come to the forefront of political battles with the aim of changing the composition of the Judicial Council at the government's initiative. The argument was to strengthen accountability, which was sought to be achieved by changing the interpretative practice for the selection of Council members. Until then, the judge members of the judicial majority panel had been elected by the municipal judicial panel. The government took the view that the way of election is also constitutional if these members are elected by the legislature, thus strengthening parliamentary control. The Polish opposition considered this step, together with other measures taken in the field of justice, to be a serious violation of judicial independence. A draft law in 2017 aimed at reforming the National Council of the Judiciary: the 15 judges nominated by the self-governments would be elected by the *Sejm* instead; however, the law was vetoed by President Andrzej Duda.<sup>21</sup> The European Commission subsequently initiated a unique measure against Poland by triggering Art. 7 of the Treaty of the European Union, following which it was proposed to suspend Poland's voting rights due to certain elements of the judicial reform. The Polish president responded with the immediate signing of the previously vetoed law. Voicing the violation of Polish sovereignty, the government raised the idea of "Polexit" following a European Court of Justice ruling on the disciplinary liability of Polish judges. The European Commission took the matter to the EU Court of Justice in October 2019 because it considered that Poland had failed to fulfil its obligations under EU law through a disciplinary system established in 2017. In the Commission's view, several elements of the disciplinary reform infringe EU law. Once the concept of a disciplinary offence had been broadened, this could, in their view, increase the number of cases in which court judgements can be brought under political control. Following the court ruling, the Polish Constitutional Court even handed down a judgement declaring the supremacy of Polish law over EU law.<sup>22</sup> In 2018, a disciplinary chamber for judges was set up within the Supreme Court, in response to which the European Commission launched infringement proceedings against Poland. The chamber is composed entirely of judges selected by the National Council of the Judiciary, whose members are appointed by the *Sejm*. An important milestone in the dispute between Poland and the EU was the 12-2 Decision of the Constitutional Court, which ruled that the ECJ's interference in the Polish judicial system violated the rules guaranteeing the primacy of the constitution and EU rules respecting sovereignty. According to the ruling, Art. 1 and 4 of the

20 For the history of conflict see Mazur and Wortham, 2019, p. 875.

21 See Mazur and Żurek, 2017, p. 56; Matczak, 2018; Matczak, 2018, pp. 6–7.

22 The second subparagraph of Art. 4(3) TEU in conjunction with Art. 279 TFEU in so far as the Court of Justice imposes *ultra vires* obligations on the Republic of Poland in the context of interim measures related to the justice system and jurisdiction of Polish courts as well as the mode of proceedings before them – is incompatible with Art. 2, Art. 7, Art. 8(1) and Art. 90(1) in conjunction with Art. 4(1) of the Constitution of the Republic of Poland, and accordingly, it is not covered by the principles of primacy and direct effect referred to in Art. 90(1)–90(3) of the Constitution (P 7/20/14 VII 2021).

Treaty on European Union are not in line with Art. 2 and 8 of the Polish Constitution and with Art. 90(1).<sup>23</sup> The dispute is therefore based on the fact that the Polish Constitutional Court does not recognise the primacy of EU law, which is established by the Member States in the joint exercise of certain elements of their sovereignty, by invoking Art. 8 of the Polish constitution, which states that the constitution is the supreme law of Poland and that its provisions are directly applicable unless the constitution itself provides otherwise.<sup>24</sup> There still seems to be no resolution on the debate on the central administration of justice, either at home or at the EU level.

For a long time after the change of regime, the Slovak judiciary continued to operate in an almost unchanged form under the administration of the ministry of justice. The Report of the European Commission Expert Mission and the Slovak ministry of home affairs of November 1997 concluded that the Slovak judiciary did not comply with the rule of law as the courts were completely dependent on the executive from an administrative point of view. Due to the lack of judicial self-government, the report called for a review of the system. An amendment to Chapter 7 of the constitution and the establishment of the Judicial Council were therefore mainly due to external influences in 2001.<sup>25</sup> At the same time, the Slovak political elite was reluctant to completely let go of the judiciary by strengthening the role of judicial self-government. The council does not necessarily have a majority of judge members. Among the 18 members, nine judges are delegated by the judges, and the government, the president of the republic and parliament can also delegate three members each to the panel,<sup>26</sup> although for the latter nominations, a professional judge may be delegated to

23 EU charges Poland's Constitutional Tribunal with violating EU law (see David R. Cameron, 2022). Comp.: Opinion of the National Council of the Judiciary of 30 January 2017 on the government Draft Act amending the Act on the National Council of the Judiciary and certain other acts (UD73). Opinion No. 904/2017. European Commission for Democracy Through Law (Venice Commission) Poland – Opinion on the Draft Act Amending the Act on the National Council of the Judiciary. File No III PO 7/18 Judgement in the Name of the Republic of Poland.

24 The Polish argument is somewhat contradicted by the fact that Art. 90(1) of the constitution states that the Republic of Poland may, on the basis of international agreements, delegate the powers of the organs of state power in certain matters to an international organisation or institution. It would appear that the status of judges and the independent functioning of the courts do not fall within this specific scope. Art. 178(1) of the constitution states that judges are independent in the exercise of their office, subject only to the constitution and the law, and Art. 190(1) states that the judgements of the Constitutional Court are generally binding and final. Thus, while the Polish constitution itself recognises that the Republic of Poland may delegate certain powers to an international organisation or cooperation on the basis of an international agreement, these powers or competencies do not extend to areas that affect the system of judicial organisation.

25 Art. 141a of the constitution concerning the Judicial Council of the Slovak Republic was inserted by Act No. 90/2001 Coll. entering into effect on 1 June 2001. On 11 April 2002, the National Council of the Slovak Republic approved the Act No. 185/2002 Coll. on the Judicial Council of the Slovak Republic as amended.

26 Nine judges elected and recalled by judges of the Slovak Republic; three members elected and recalled by the National Council of the Slovak Republic (parliament); three members appointed and recalled by the President of the Slovak Republic; three members appointed and recalled by the Government of the Slovak Republic.

the panel, as evidenced by the current composition of the council. The creation of the Judicial Council resulted in a significant change in the Slovak Republic. Based on the changes, the judicial self-government bodies are involved in the procedure of appointment, removal, transfer of judges.<sup>27</sup> In any case, the Slovak solution seeks a balance typical of Western European mixed models, which can ensure mutual control of the branches of power over the judiciary, so that management of a self-government character is also realised. Scandals, debates and the resulting reform efforts in the Slovak judiciary intensified in the late 2010s, when the new coalition government declared an anti-corruption fight after 13 judges were indicted with serious crimes. Subsequently, the government made proposals to strengthen the accountability of judges, change the composition of the Judicial Council, establish the Supreme Administrative Court and other proposals requiring constitutional amendment.<sup>28</sup>

Court administration in the Czech Republic is the only one of the countries analysed in which the ministry of justice plays a dominant role. The ‘executive model’ has survived only in this post-socialist country in Central and Eastern Europe, with the element of judicial self-government largely missing. Judicial councils have an exclusively consultative role but do not participate in decision-making.<sup>29</sup> The judicial administration of the eight regional and 86 district courts is conducted by the ministry of justice directly or indirectly through the presidents of these courts. The two supreme courts (the Supreme Court and the Supreme Administrative Court) are administered exclusively through their presidents, who are nominated by the ministry of justice and appointed by the president of the republic. The appointment of court presidents in the supreme courts is for a term of 10 years (for a term of 7 years in district and regional courts) and cannot be reappointed to the same court.<sup>30</sup>

Each year, the president of the relevant court is responsible for determining the court’s work plan for the following year, setting out the composition of the judicial bodies and the mechanisms for allocating cases.<sup>31</sup> Functions related to human resources and financial management are divided between the ministry of justice and the presidents of the courts. The presidents direct the professional training of the trainees and determine the number of lay judges. The presidents of the regional courts detail the state budget available for the operation and management of the respective regional and related district courts. As a result, the presidents of the district courts do not participate in the preparation and planning of the budget, but their task is to ensure the functioning of the given court by taking into account organisational, personal, economic, financial and educational aspects.<sup>32</sup> Each court employs a person

27 The Judicial Council of the Slovak Republic is constituted by the Constitution of the Slovak Republic. Competences of the Judicial Council are stipulated by the Constitution in Art. 141a, para. 4 and by Act No. 185/2002 Coll. on the Judicial Council of the Slovak Republic.

28 Domin, 2020.

29 Smith, 2008, pp. 85–93.

30 Contini, 2013, p. 82.

31 Blisa, Papoušková and Urbániková, 2018, pp. 1951–1976.

32 Fabri, 2013, p. 101.

known as a court director, who deals with court administration. Court directors are appointed by the presidents of the courts based on a competitive examination. They do not have a law degree, and economists usually fill this position. Their employment is regulated by the Labour Code, and they can fill their positions without any time limit. In disciplinary cases, the councils in the higher courts act in the first instance and the disciplinary council of the Supreme Court in the second instance. Disciplinary proceedings may be initiated by the president of the court concerned or by the Minister of Justice. The request may be submitted within a period of 60 days from the knowledge of the act giving rise to the disciplinary proceedings but no later than 2 years from the date of the act. Judges are appointed by the president of the republic on the basis of a multi-stage appointment procedure. Given that most new judges are essentially appointed to the court of first instance, the initial step in the appointment procedure is taken by the president of the court in which the vacancy occurs. The president of the court shall propose to the ministry of justice the appropriate candidates; thereafter, the Minister of Justice is entitled to accept or reject the proposal received about the candidates.<sup>33</sup> Given that the president of the republic may exercise the power to appoint a judge with the government's consent, the list of candidates shall be forwarded to the government. If the government agrees with the candidates on the list, the president of the republic shall appoint the candidate(s).<sup>34</sup>

It is characteristic of each of the emerging states of the former Yugoslavia that, following their independence, they reformed their judicial systems to join the EU and set up judicial councils everywhere.<sup>35</sup> The foundations of Croatia's judicial system, including the Judicial Council, were established in 1993. The last significant changes were made with the new court law, which came into force on 1 January 2019.<sup>36</sup> The administration of the Croatian courts can be classified as a mixed administration system, as while the powers related to the selection and disciplinary responsibility of judges were transferred to the Judicial Council with one exception,<sup>37</sup> the executive retained powers in other administrative matters of the courts. The State Judicial Council (SJC) is an independent and autonomous body within the meaning of Art. 121 of the constitution, which guarantees the independence and autonomy of the judiciary of the Republic of Croatia.<sup>38</sup> It decides independently on the appointment, promotion, transfer, dismissal of judges and court presidents (except the President of the Supreme Court), disciplinary

33 Law on Courts and Judges No. 6/2002.

34 Art. 63(1) of the Constitution of the Czech Republic.

35 For an analysis of the situation in the former Yugoslav countries, see Dietrich, 2008, p. 11.

36 The objective of the legislator was to solve the problems related to the administration of large courts as well as the difficulties related to small courts with comprising less than 10 judges and therefore difficult to manage effectively.

37 The President of the Supreme Court is elected by the Parliament on the proposal of the president of the republic after consulting the General Council of the Supreme Court and the competent committee of the Parliament.

38 Ustav Republike Hrvatske. Pročišćeni tekst. Narodne novine 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14, see <https://www.zakon.hr/z/94/Ustav-Republike-Hrvatske>.

proceedings and the further training of judges and members of the judiciary.<sup>39</sup> It consists of 11 members, seven of whom are judges, two professors of law and two members of parliament, elected for a 4-year term subject to re-election on a single occasion. The presidents of the courts may not be members of the SJC. The president of the SJC is elected by the members from among their ranks.<sup>40</sup> All administrative matters which do not fall within the competence of the council are the responsibility of the ministry of justice, which it addresses in cooperation with the president of the courts. In this context, the Minister of Justice has the right to terminate, repeal or annul any unlawful administrative provision (Section 71). The Minister adopts the Rules of Court, which set out the organisation and administration of courts and determine the number of judges presiding each court. The Minister keeps a register of judges, can ask for any information and may also ask the sentencing judge for an explanation of certain lawsuits.

The establishment of the Slovenian judicial self-government was motivated by the transition to a constitutional democracy and, pragmatically, by its admission to the Council of Europe, which was also strongly supported by the academic sphere.<sup>41,42</sup> Self-government manifests itself in the mutual control of the three branches of power and their influence on the judicial power. The main feature of the system is that in addition to the establishment of judicial self-government, the role of the executive branch (budget, preparation of legislation related to courts etc.) cannot be neglected either. What is interesting, however, is that all Slovenian judges, on a proposal from the Judicial Council, are appointed judges following a decision by the parliament. Afterwards, however (apart from the President of the Supreme Court), the Judicial Council decides on judicial promotions and the appointment of court presidents and vice presidents. The Council for the Judiciary [*Sodni svet*] was established in 1990, immediately after independence,<sup>43</sup> and it consisted of nine members: five judges, three respected lawyers and the minister of justice, who have yet to obtain their mandate from the socialist Parliament. The Council possessed only a weakened role. The constitution – and then the subsequent laws on the courts<sup>44</sup> and those on the service of judges<sup>45</sup> – already pro-

39 Appointment of judges, appointment and dismissal of court presidents, transfer of judges, disciplinary proceedings and decisions on the disciplinary responsibility of judges, decisions on the dismissal of judges, participation in the training of judges and judicial officers, conduction of the registration of candidates to the State School for Judicial Officials and the process of taking final exams, adoption of methodologies for evaluating judges, recording of judges and management and control of assets declarations of judges.

40 Its composition is regulated in more detail in Section 4 of the latest amendment in force since 1 September 2018, prescribing that the members elected from among the judges are as follows: two judges of the Supreme court, one judge of a higher court (one judge), three judges of county courts and one judge from a court of first instance (usually district court). Judges elected to the SJC have a reduced duty in their courts: 75% for the President of the Council and 20% for the members of the council.

41 Kosař, 2016, p. 488.

42 See, for example, Guasti, Dobovšek and Ažman, 2012, pp. 175–190.

43 Fišer, 2001.

44 OJ RS 94/07.

45 OJ RS 94/07.

vided for the establishment of a strong judicial self-government body, which already gives broader powers to the central judicial council (some ideas would have extended the powers of the council to the prosecutor's offices, but this was ultimately rejected by the political parties.) Art. 131 of the constitution provided for the establishment of a Judicial Council with a majority membership of judges. In addition to the six elected judges, five members are elected by the parliament on the proposal of the president of the republic. In terms of its status, as confirmed by the Slovenian Constitutional Court, the council is a *sui generis* body independent of other branches of power, which is also not a representative body of judges.<sup>46</sup> To ensure the independence of judges, the constitution establishes two guarantee provisions, namely that a judge may be appointed and dismissed only based on a proposal by the council.<sup>47</sup> Although some initiatives have transferred the appointment of judges from the parliament to the president of the republic due to the risk of politicisation, this initiative has become a moot point due to the strong and independent powers of the Judicial Council and the unwillingness of political parties. The powers of the council were strengthened in 2017, in a separate law<sup>48</sup> on the Judicial Council, in which four main competence groups were detailed: (1) selection, appointment and removal of judges, court presidents and vice presidents<sup>49</sup>; (2) other powers related to judicial human resources policy<sup>50</sup>; (3) the role of the council in disciplinary matters. The council shall set up a disciplinary committee, initiate disciplinary proceedings and ensure that disciplinary action is taken. The fourth group includes the competences that allow the implementation of the previous ones.<sup>51</sup> It shall, in consultation with the Minister for Justice, adopt the criteria for the selection of judges and the evaluation of judges already appointed. It shall create a code of ethics and integrity, and the Minister of Justice shall consult the council on the necessary number of judges and organisational issues.

Serbia is the only legal system among those analysed that is merely seeking to join the EU. The European Commission's Strategy for the Western Balkans predicts this could happen in 2025 at the earliest, but in the meantime, several reforms are needed, including in the judiciary. Following the secession of Serbia and Montenegro and the simultaneous declaration of the independence of Serbia, a national strategy for the

46 Constitutional Court of Slovenia Case U-I-224/96, par. 11.

47 Constitution, Arts. 130 and 132.

48 Official Gazette of the Republic of Slovenia 23/17.

49 Art. 23/1 of the Judicial Council Act. In this context, the council shall have the right to make proposals to the person of the President of the Supreme Court, and it shall also propose the identity of supreme court judges. It shall have the power to appoint all other presidents and vice-presidents of the court and also decide on all judicial promotions. It shall propose the appointment of new judges, and Parliament shall decide on the appointment of judges. It shall deliver an opinion on the procedure for removing the President of the Supreme Court. Proposing the removal of judges shall also fall within its competence.

50 Judicial Council Act, Art. 23/2. Conflicts of interest, promotions, the award of higher judicial titles and the upgrade to a higher remuneration category are also included, and the council ultimately decides on the negative assessment of judges and on complaints against judges, the transfer of judges and other matters relating to their status.

51 Judicial Council Act, Art. 23/4.

transformation of the judiciary was adopted in 2006, which would lead to the adoption by 2010 of the law laying the foundations for a post-socialist Serbian administration of justice. The High Judicial Council (HJC) was established, which also played an important role in the selection, disciplinary matters and dismissal of judges. A mixed system was adopted, in which the administration of justice is jointly conducted by the HJC and the ministry of justice (Section 70). The latter oversees the administrative work of the courts, collects statistical and other data, maintains facilities, decides on budgetary matters and oversees the financial activities of the former beyond the courts. The HJC had an eleven-member body: the President of the Supreme Court, the Minister of Justice and the chair of the competent committee of the parliament, with eight members elected by the parliament: six judges (from the Autonomous Province of Vojvodina) and two prestigious lawyers with at least 15 years of work experience.<sup>52</sup> The council had the right to elect and withdraw the judges having been finalised.<sup>53</sup> As in Slovenia, efforts to establish mutual control between the branches of power were apparent. In addition to the ministry and the council, the legislature was given significant powers to appoint judges and select members of the council. The latter was a critical element of the judiciary in the EU accession process as the legislature elected almost two-thirds of the members of the council; in this way, the parliament had an indirect influence not only on the election of judges on probationary period but also on the appointment of all judges.

European integration efforts have prompted the Serbian government to change the situation, initiating a constitutional amendment.<sup>54</sup> The draft ended up significantly limiting the role of the legislature. On 16 January 2022, Serbia held a referendum on the constitutional reform, which confirmed the changes initiated by the government. The council's powers have increased considerably; its composition has also been changed, and judges elected by their peers now enjoy a majority in the body. Six judges out of 11 members are elected by their peers, and four members are elected by the National Assembly from the 'eminent jurists'. The President of the Supreme Court is the seventh judge to sit on the panel. The justice minister will not be a member of the council. The Constitutional Amendment guarantees that judges and prosecutors are elected without the direct involvement of the National Assembly, and judges and court presidents are elected exclusively by the HJC.<sup>55</sup> The 3-year probationary mandate for judges was also abolished (parliament elects only the Supreme State Prosecutor and five out of 15 Constitutional Court judges.)<sup>56</sup>

For comparability, Table 1 summarises the key features of the judicial councils of the countries under analysis.

52 Zakon o Visokom savetu sudstva ("Sl. glasnik RS", br. 116/2008, 101/2010, 88/2011 i 106/2015).

53 See <https://vss.sud.rs/sites/default/files/attachments/Zakon%20o%20sudijama%2001.01.2016..pdf>.

54 EWS, 2021, see <https://europeanwesternbalkans.com/2021/06/08/serbian-parliament-votes-to-trigger-amending-the-constitution-in-the-field-of-the-judiciary/>.

55 Prosecutors will be elected by the High Council of Prosecutors.

56 USTAV REPUBLIKE SRBIJE ("Sl. glasnik RS", br. 98/2006 i 115/2021).



Questions	Hungary	Poland	Romania	Croatia	Slovenia	Serbia	Slovakia	Czech Republic
Is there Judicial Council responsible for judicial administration?	✓	✓	✓	✓	✓	✓	✓	No (only with consultative role)
Type of administration	Administration by Council and Judicial Office	Council + Executive	Council + Executive	Council + Executive	Council + Executive (Parliament has special role in appointing judges)	Council + Executive	Council	Executive
Total number of members	15	25	19	11	11	11	18	X
Is there a possibility to be renewed as a member?	No	Yes, but no more than twice	No	Yes, but no more than twice	Yes, but not right after the former term	No	Yes, but not more than for 2 subsequent terms	X
Make up	1 – President of the Curia – delegated; 1 – judge from a Regional Court of Appeal; 5 judges from Regional Courts; 7 judges from District Courts; 1 judge from and Administrative and Labour Court The other 14 judge members are elected by secret ballot with a simple majority.	15 judges elected by their peers; 1 representative of the President of Poland; 1 – the Minister of Justice; 6 members of Parliament; 1 – the President of the Supreme Court; 1 – the President of the Supreme Administrative Court	14 magistrates (9 judges and 5 prosecutors) – elected by the general assemblies of magistrates; 2 lay members (elected by the Senate); 3 ex officio members (the President of the High Court of Cassation and Justice, the minister of justice, the general prosecutor of the Prosecutor's Office)	2 judges of the Supreme Court; 2 county court judges; 2 municipal court judges; 1 judge of the specialised court; 2 university professors of law; 2 members of Parliament – one of them from the opposition	6 judges – elected by their peers; 5 members elected by Parliament on the proposal of the President of the republic	1 – President of the Supreme Court of Cassation; 6 judges elected by their peers; 4 eminent lawyers nominated by Parliament	9 judges – elected by their peers; 3 members – elected by the Parliament; 3 members – appointed by the President; 3 members – appointed by the Government	X
Is there a majority of judges?	Yes	Yes (15 out of 25)	Yes (10 out of 19)	Yes (7 out of 11)	Yes (6 out of 11)	Yes (7 out of 11)	By law, at least 50 %	X
Is ultimately responsible for judicial appointment?	No – makes proposal to the President of the Republic	No – makes proposal to the President of the Republic	No – makes proposal to the President of the Republic	Yes	No – makes recommendation to Parliament	Yes	Yes	X
Is ultimately responsible for removing judges?	No (Judicial Office proposes for the President of the republic)	No (Disciplinary chamber at the Cassation Court of Poland)	No (Appeal before the High Court of Cassation is possible)	Yes	No – makes recommendation to Parliament	No (appeal to constitutional court is permitted)	Yes	X
Main competences	• Gives opinion on the candidates of the President of the National Judicial Office and that of the Curia • Decides in the question of a renewed nomination of a President or a deputy President of the regional court of appeal, the tribunal, the administrative and labour court, and the local court. • Nominates the President and the members of the official court. • Coordinates Judicial training	• Consideration and evaluation of candidates to serve offices of judges and submission to the President of the Republic of Poland of motions for appointment of judges of the Supreme Court, the Supreme Administrative Court, common courts, provincial administrative courts and military courts; • adoption of a catalogue of professional ethical rules of judges and monitoring of their observation.	• Appointment into leading positions, transfer, secondment, proposals for appointment into and the release from the leading positions within the High Court of Cassation and Justice, advice on the proposal of the minister of justice for the appointment into and release from leading positions within the Prosecutor's Office by the High Court of Cassation and Justice); • Coordinates Judicial training	• Appoints judges; • Appoints and dismisses of court Presidents; • Decides on the immunity of judges; • Reassess judges; • Conducts disciplinary proceedings and deciding on the disciplinary liability of judges; • Decides on the dismissal of judges; • Decides on the transfer of judges; • Participates in the training and professional development of judges and court staff	• Appoints judges based on opinion of the responsible person within the institution where the judge will be appointed; • Appoints and dismisses Presidents of courts (except for the President of the supreme Court of Republic of Slovenia); • Decides on promotion to higher judicial positions and on faster promotion within wage grades; • Decides on the incompatibility of judicial office	• Appoints, selects judges, court presidents; • Decides on the dismissal of judges – pass the Code of Ethics • – determine the number of judges and lay judges for each court; • – perform affairs of the judicial administration on behalf of the country within its remit; • – rule on issues of immunity of judges and Members of the Council	• Adopts opinion on adequacy of candidates; • Presents candidates for appointment and proposals to recall judges to the President; • Decides on assignment and transfer of judges; • Presents candidates to the Government who should act on behalf the country within international judicial bodies; • Judicial training – determine the subject matters of judicial education, propose members of the pedagogical staff and examination committees	X

Table 1. Comparison of judicial councils in East Central Europe (Attila Badó, 2021)

### 3. Challenges of post-socialist judicial systems: Conclusion

Despite the shared history in the Soviet Bloc and the identical features of the subsequent regime change, the diversity of institutional solutions is what characterises East Central European countries today. Apart from diversity, the most paramount identical feature may constitute the fact that the relationship between independence and accountability<sup>57</sup> reveals inconsistencies and confusion in the judicial system, despite regularly occurring reforms.<sup>58</sup> One may conclude from the reforms that the settlement of the relationship between independence and accountability is omnipresent in disputes relating to the distribution of powers.<sup>59</sup> Constant reference to independence is often paired with a lack of preparation and with seclusion, increasing corporate elements and the lack of transparency in courts. Councils for the judiciary that established following Western examples show significant differences in certain legal systems regarding both their composition and competences. In Hungary, a Council composed exclusively of judges controls a president elected by the legislature, who heads the Judicial Office. In Romania, Poland and Slovenia, the council of a majority of judge members has taken over the administration of justice, but the latter also provides an example of the importance of the legislature in the process of appointing judges. The same has been the case in Serbia, which has so far seceded from the former Yugoslavia and has not yet joined the EU; here, the legislature not only elected the majority of the members of the council, but it also played a decisive role in the appointment of judges. Until recently, a new constitutional amendment proposed by the Venice Commission to facilitate the EU accession process has given considerable support to the organisational independence of the judiciary.

The Slovak solution is characterised not only by a balance in the composition of the council but also by a division of responsibilities between it and the ministry of justice. As for the Czech ministerial administration, it provides an example that even in a post-socialist country, the Austrian/German model may become acceptable to the EU if this solution is acceptable to the domestic political elite.

It is clear that most of the controversy in post-socialist Central European legal systems is in the area of judges' appointment as well as the promotion and selection of judges, although recently, the issue of holding judges accountable has been hotly debated in some countries, prompting EU criticism about Romania and Poland. Of course, selection is not a specific problem of these countries; however, the judicial culture rooted in the dictatorial past and the one-party system reinforces fears about the vulnerability of judicial independence.

In the twenty-first century, the legitimacy of the administration of justice came from a deep conviction shared by the society that in bringing decisions, the courts

57 Solomon, 2012, pp. 909–937.

58 Piana, 2009.

59 Fleck, 2011, p. 33; Fleck, 2012, pp. 793–835.

are not influenced by an inappropriate connection to external actors (e.g. political parties, government, lobbyists, judicial leaders or voters) but are founded exclusively on professional legal considerations and a legal sense of justice.<sup>60</sup> The question of selecting judges and court management is a recurrent subject in disputes. The culture of relying heavily on social capital can be traced in every post-socialist country. This attitude of capitalising on liaisons was necessarily strengthened everywhere by the shortage economy characteristic of socialism, engulfing justice in the process as well. Where corruption does not prevail in deciding court cases (Hungary, Czechia and Poland), it is more or less dominant in the selection of judges and court management. Similarly to Romania, this is even traceable where in the framework based on the French example the introduction of a competitive examination is made mandatory in the case of judicial (and prosecutorial) appointments. The EU accession process played an unequivocally positive role in increasing merit-based elements. More objective forms of judicial selection appeared in various instances. Be that as it may, whether it is about ministerial administration, a Central Council for the Judiciary or the fortified role of local judicial self-governments, the acceptable degree of objectivity of the system of selection procedures is being questioned everywhere, and one may hear about either party political or selection distorting effects that come from within the judiciary. Where no nationwide and mandatory introduction of the competitive examination takes place, the situation may even be bleaker.<sup>61</sup>

It is in vain that fine-worded requirements are included in the recommendations of various international organisations concerning judicial recruitment<sup>62</sup> without binding EU norms, member states may easily divert the enforcement of merit-based elements in the selection of judges and court management. This special situation is emphasised by Ramona Coman and Cristina Dallara in their work on the Romanian judicial independence.<sup>63</sup> Under such circumstances, beside the aforementioned historical traditions, the judges may become more easily defenceless and opportunistic, which may provide a great scope for internal or external attempts at influencing them.

60 Badó, 2014, pp. 27–58.

61 Michal Bobek, in his 2014 study on the Czech selection system according to which applying the competitive examination is only optional in the selection of candidates, writes the following: “Today, the greatest problem still lies in the absence of any open, transparent and clear criteria according to which new candidates will be picked by the presidents of regional courts...” (Bobek, 2014, p. 12).

62 See, for example, Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2010.

63 Coman and Dallara, 2012, pp. 835–855.

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## Constitutional Adjudication

Zoltán J. TÓTH

### ABSTRACT

The present chapter deals with constitutional adjudication<sup>1</sup> in eight East Central European countries (in alphabetical order: Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia). It concentrates primarily on the tasks and competences of the institutions performing the function of constitutional adjudication.

Constitutional adjudication is a broader concept than the activities of constitutional courts. It encompasses constitutional rights adjudication, which will be the subject of a separate chapter in this book, and all the mechanisms of constitutional adjudication that relate to the establishment and enforcement of violations of constitutional provisions. It is therefore important to note that the issue of constitutional adjudication does not extend to the proper investigation of the functioning of constitutional institutions but only to cases where someone (typically a state body) violates the provisions of the constitution, and this violation must be established and repaired by a body appointed to do so.<sup>2</sup> All the CEE countries under review adopt a so-called concentrated (centralised) constitutional adjudication, which means that constitutional protection will typically be the responsibility of a dedicated, separate body – the constitutional court. Other bodies in some of the legal systems under examination, however, may also provide constitutional protection. Although this chapter mentions

1 The term ‘constitutional adjudication’ is distinct from ‘constitutional review’; the latter is often used to refer to the activity performed by centralised constitutional adjudication bodies (as distinct from the ‘judicial review’ performed by ordinary courts conducting decentralised constitutional adjudication). That of the constitutional review is ‘a system whereby judicial or quasi-judicial bodies can set aside and invalidate the democratically enacted laws on the basis of their alleged inconsistency with constitutional norms’ (Sadurski, 2014, p. xii.). Centralised constitutional courts, however, do not merely review the conformity of norms with the constitution, but they also have a number of other functions which fall within the broader concept of adjudication, which is why we use the term ‘constitutional adjudication’ in the following and include all the powers in which the constitutional court may act with a decision-making role (or as a proposing or opinion-giving body of a decision-maker).

2 As defined by the President of the Hungarian Constitutional Court, Peter Paczolay, ‘[c]onstitutional protection can be of two kinds: in a broad sense, it means the protection and preservation of the stability of the order of society, while in a narrower sense, constitutional protection means the protection of the norms laid down in the Constitution and superior to other laws. The task of defending the Constitution may be carried out by a public body, such as a plenary of Parliament (England) or a parliamentary committee (Sweden, Finland). In a narrow sense, constitutional protection means the judicial defence of the constitutionality of the Constitution, which can be done through ordinary courts or through specially established constitutional courts’ (Paczolay, 2003, p. 10).

the competences of these other bodies, only the constitutional courts themselves will be analysed in detail – in terms of their competences and functions – due to the space available.

Today, based mainly on the German model,<sup>3</sup> five (plus one)<sup>4</sup> typical main activities of concentrated constitutional courts function in all the CEE legal systems examined in this study: (1) norm<sup>5</sup> control (both with abstract and concrete manner; (2) individual (direct) protection of fundamental rights (fundamental rights adjudication), (3) resolution of conflicts on competence; (4) adjudication regarding the functioning of the state (charges against public officers, banning of political parties etc); and (5) the adjudication on election disputes;<sup>6</sup> furthermore, +1) the interpretation of the constitution in connection with all these and also as separate competence.<sup>7</sup> All of this also indicates that constitutional adjudication is an activity separated (institutionally and mostly functionally) from ordinary adjudication and basically cannot be considered as the part of judicial system in the classical division of powers by Montesquieu.

#### KEYWORDS

Constitutional adjudication, judicial review, abstract norm control, concrete norm control, judicial initiative, constitutional complaint, jurisdictional disputes, election disputes.

### 1. The norm control (review of conformity of laws and legal regulations with the constitution)

The most traditional function of constitutional adjudication, being part of the Kelsenian model, is norm control: deciding on the constitutionality of legislation.<sup>8</sup> If, in the exercise of this power, a constitutional court finds that a statute or statutory

3 According to Allan F. Tatham, the most important causes why the CEE constitutional courts borrowed most of their institutions regarding constitutional adjudication in the ‘post-communist era’ from the German model are as follows: ‘1. Historic and legal cultural affinities; 2. Linguistic ability and intellectual stimulus; 3. Constitution and constitutional jurisdiction formation in the post-communist era; 4. Resultant influences on constitutional judicial practice’ (Tatham, 2013, p. 45).

4 As per the author’s own classification.

5 A norm is a provision prescribing a course of conduct. Several types of norms exist, and only one type thereof is the legal norm. Legal norms can be rules (legal provisions laying down specific regulation for a particular situation) or legal principles (legal provisions laying down a general value for a variety of situations with common characteristics). In the following, we deal with a special types of legal norms – constitutional norms.

6 Although in the majority of the countries examined, constitutional courts have other powers in addition to these, the competences listed above are the most typical ones, which can be considered the core of constitutional adjudication and the characteristic powers of constitutional courts; thus, in the following, we only analyse and present these five main types of competences listed here.

7 It is only the constitutional court that is entitled, with *erga omnes* effect, to interpret the constitution (within the so-called concentrated constitutional adjudication). The constitutional court necessarily performs it during the exercise of any of its other concrete competences, and in general, in some countries (Hungary, Slovakia), it is also entitled to perform it to protect the unity of constitutional order in abstract manner, in a special, distinct proceeding independently from concrete cases.

8 In the case of norm control, a body (e.g. the Constitutional Court) annuls a law or a legal provision because of a conflict with a higher legal norm (e.g. due to its unconstitutionality). This form of constitutional adjudication is also known as ‘negative legislation’, after Hans Kelsen as, in this case, the Constitutional Court eliminates from the legal system the norm that governs the rights and obligations of the natural and legal persons, i.e. (from the moment the Constitutional Court decision takes effect), and it cannot, as a rule, have legal effects.

provision is unconstitutional, it annuls the statute (statutory provision), so that it cannot produce legal effects once the annulment has taken effect. Therefore, it is a necessary condition of the concentrated constitutional adjudication that the constitutional court functioning independently could examine the constitutionality of any legal regulation or the compliance thereof with the provisions of the constitution and could annul these provisions if they were found to be unconstitutional, i.e. it could also formally take them out from the existing legal system. Two types of norm control exist: abstract and concrete norm control. (1/A) abstract norm control means that, on the motion of the entitled persons and organs, the constitutional court examines the compliance of a norm with the constitution in a general manner (independently of a specific case or procedure), while in case of (1/B) concrete norm control, a concrete case (procedure) in which the possibility of the unconstitutionality of a given statute (statutory provision) arises is implied.

### ***1.1. Abstract norm control***

A type of norm control that is closely linked to the classical Kelsenian model of constitutional protection and inseparable from the concept of concentrated constitutional adjudication is abstract norm control (i.e. norm control that can be conducted independently of a specific, individual case and procedure). This function/competence is characterised by the fact that the Constitutional Court acts to safeguard the integrity of the constitutional order, irrespective of whether there is (already) a specific natural or legal person who has suffered damage as a result of the unconstitutional law. In this case, harm involves the loss of stability of the constitutional order, confidence in the constitution and the smooth functioning of the state, which is ultimately, indirectly, in the interests of all natural and legal persons. The perception of an abstract risk of such harm is the reason for initiating such proceedings, which may occur before or after the promulgation of the challenged legislation. The former is known as *ex-ante* review or preliminary norm control and the latter as *ex-post* review or posterior norm control.

#### *1.1.1. Ex-ante review*

No preliminary norm control is possible at all in Croatia. Such limited review is available in Slovenia only in relation to international conventions: if an international treaty is ratified, based on the proposal of the president of the republic, the government or one-third of the deputies of the National Assembly, the Constitutional Court issues an opinion on the conformity of such treaty with the constitution. The petitioners concerned have discretionary rights to decide whether or not to request the Constitutional Court to act. In Slovakia, also in the framework of the pre-ratification control of international treaties, the President of the Slovak Republic or the government may submit a proposal for a decision concerning such negotiated international treaties to which the assent of the National Council of the Slovak Republic is necessary.

In the Czech Republic, in the framework of *ex-ante* review, only international treaties may also be examined, but – in case of treaties regulating certain subjects – of

a mandatory, automatic nature<sup>9</sup> (thus, no petitioners are specified here). In Serbia, the constitutional review of adopted laws can also be initiated before promulgation. In addition, in the frame of the jurisdiction called ‘procedure for deciding on suspending the entry into force of a decision of an autonomous province authority’, the examination of constitutionality or legality of a decision of an autonomous province authority that has not yet entered into force can also be initiated. In such case, the government can propose to the Constitutional Court to suspend the entry into force of the contested decision until the Constitutional Court decides on its constitutionality or legality.

The Romanian and Hungarian constitutional courts and the Polish Constitutional Tribunal have the strongest powers of *ex-ante* review. In Romania, on the one hand, there is also the possibility of a preliminary assessment of the constitutional conformity of international conventions; this procedure may be initiated by the president of either of the chambers of the parliament – at least 50 Deputies or at least 25 Senators. In addition, the constitutionality of laws (acts) may be reviewed by the Constitutional Court before promulgation, partly at the initiative of the above-mentioned public actors but also at the initiative of the President of Romania, the government, the High Court of Cassation and Justice and the Advocate of the People (Ombudsman). Lastly, the Constitutional Court may also review the conformity of not yet promulgated laws with the constitution *ex officio*. However, the most interesting power, which is not found in the constitutions of any of the other states under study, is the competence of verification on the constitutionality of initiatives for the revision of the Constitution. In the course of it, before submission to the parliament to initiate the legislative procedure for the revision of the constitution, the bills or the legislative proposals concerning the revision of the existing constitutional regulations are to be handed in to the Constitutional Court, which must declare within 10 days that the preliminary proposal to amend the constitution has been made in compliance with and in consideration of the existing constitutional norms. This rule allows an exceptional examination of the constitutionality of the content, but it can also ensure that constitutional procedural standards are respected.<sup>10</sup>

In Poland, the president of the republic can send an adopted bill, before they sign it, to the Constitutional Tribunal; if they deem to have already found it in accordance with the Constitution, they must sign it; if the Tribunal held that the whole act is

9 In the Czech Republic, a preliminary assessment of constitutional compliance is automatically required for international treaties that affect the rights or duties of persons; that concern alliance, peace or that are of other political nature; by which the Czech Republic becomes a member of an international organisation; that are of a general economic nature; which concern additional matters the regulation of which is reserved to statute; and by which certain powers of Czech Republic authorities may be transferred to an international organisation or institution (Cf.: Constitution of the Czech Republic, Art. 49).

10 The substantive review is essentially limited to the violation of the provisions of Art. 152 (the eternity clause) of the Romanian Constitution. Varga, 2020, p. 71.

unconstitutional, the bill returns to the Sejm (lower house of parliament) for reconsideration. If the discordance with the constitution relates to particular provisions of the bill, and the Tribunal has not judged that they are inseparably connected with the whole bill, the president of the republic may sign the bill with the omission of those provisions considered as being unconstitutional or may return the bill to the Sejm for the purpose of removing the unconstitutional regulations.<sup>11</sup> The president of the republic has the possibility of initiating the ex-ante review of international treaties as well, i.e. before ratifying an international agreement, they may turn to the Constitutional Tribunal with a request to adjudicate upon its conformity to the constitution.

However, the most complex legislation on ex-ante control among the countries examined exists in Hungary. The Hungarian Fundamental Law considers the preliminary examination of the constitutionality of laws (i.e. acts made by the parliament) to be an ideal-typical case of this power. This can be initiated by two public actors, namely the parliament (National Assembly) itself and the president of the republic. The former provision is unique since there is no example in the legal systems under consideration (and it is rare even in other legal systems) that such an organ would make the Constitutional Court check the constitutionality of legal norms which are to be made by itself, i.e. the body that is responsible for the creation of these norms. Accordingly, the parliament can send the adopted but not yet promulgated law to the Constitutional Court for examination of its conformity with the Fundamental Law<sup>12</sup> (only the whole law, not some of its provisions). If the Constitutional Court finds the bill unconstitutional, the parliament reopens the lawmaking process (after which the parliament can re-initiate the preliminary review); if the law is not unconstitutional, the Speaker of the Parliament signs the bill and send it to the president of the republic. If the parliament has not requested a preliminary review by the Constitutional Court, and the president of the republic considers the law or any of its provisions to be unconstitutional, they send the adopted bill to the Constitutional Court for examination of its conformity with the constitution. If the Constitutional Court finds that the bill in question is unconstitutional, the parliament reopens the process. If the Constitutional Court, however, does not establish any conflict with the Fundamental Law, the president must sign the act and order its promulgation.<sup>13</sup>

11 Besides the possibility of initiating the ex ante review process ('constitutional veto'), the Polish Constitutional Tribunal (just as the Hungarian Constitutional Court) is also empowered to return the bill to the Parliament for reconsideration if they disagree with the content of the adopted but not yet promulgated bill ('political veto').

12 It can do it by a motion of the initiator of the act, the government or the Speaker of the National Assembly. The initiation must be submitted before the final vote on the bill.

13 In addition, similarly to the situation in Poland, the president of the republic has the right not only to a constitutional veto but also to a (temporary) political veto.

However, it is not only laws that are subject to constitutional review before the Hungarian Constitutional Court but also international treaties.<sup>14</sup> In Hungary, after ratification, one more step is required for an international treaty to enter into force, namely for the competent authority (either the president of the republic, in the case of international treaties promulgated by law, or the minister responsible for foreign policy in the case of international treaties promulgated by government decree, and exceptionally the prime minister) to acknowledge the binding force of the international treaty. On the motion of the president of the republic in the former case or of the government in the latter, the Constitutional Court conducts a preliminary review of the conformity of the international treaty or of its provisions with the Fundamental Law. In addition, there exists the possibility of an ex-ante examination of an internal normative act, i.e. the Standing Orders of the Parliament, which does not constitute a law, on the motion of the initiator thereof, the government or the Speaker of the Parliament. Finally, the Constitutional Court also has the power to examine, solely for conformity with the procedural provisions of the constitution (and not for substantive constitutionality), a new constitution (fundamental law) or an amendment to the constitution (amendment to the fundamental law) which has been adopted but not yet promulgated.

#### *1.1.2. Ex-post review*

In Croatia and the Czech Republic, ex-post review can be initiated to examine both the constitutionality of laws and regulations and the legality of lower-level norms by the respective constitutional Court.<sup>15</sup> In Hungary, in addition to the Constitutional Court's review of the constitutionality of legislation, the Supreme Court (Curia) is responsible for reviewing the legality of local government decrees. It is also possible to apply to the Constitutional Court for review of the constitutionality of international treaties and of uniformity decisions made by the Curia (as abstract norms) as well as for reviewing the conflict of domestic laws and other statutory regulations with international conventions.

In Poland, the Constitutional Tribunal adjudicates concerning the conformity of statutes and international agreements to the constitution, the conformity of a statute to ratified international agreements and the conformity of legal provisions issued by central State organs to the constitution, ratified international agreements or statutes. In Slovakia, the Constitutional Court can also rule both on the compliance of laws

14 At the beginning of its operation, the Constitutional Court was also given the special right to rule on the constitutionality of bills still under discussion in Parliament and to express its – binding – opinion on bills during the political debate. However, it never exercised this power, and long before its formal repeal, in 1991, it stated in its self-limiting decision [Decision 16/1991. (IV. 20.) AB] that “the Constitutional Court is not a consultant of the Parliament but the judge of the legislative outcome of the Parliament’s work” (Cf. Csink and Schanda, 2012, pp. 164–165).

15 In the Czech Republic, statutes may provide that in place of the Constitutional Court, the Supreme Administrative Court shall have jurisdiction to annul legal enactments other than statutes or individual provisions thereof if they are inconsistent with a statute (Constitution of the Czech Republic, Art. 87[3]).

(acts), government decrees and generally binding legal regulations of ministries and other central state administration bodies with the constitution, constitutional laws or ratified international treaties; and on the compliance of generally binding legal regulations of the local bodies of state administration and generally binding regulations of the bodies of territorial self-administration with the constitution, constitutional laws, ratified international treaties, government regulations and generally binding legal regulations of ministries and other central state administration bodies.<sup>16</sup>

In Romania, posterior abstract norm control (as opposed to ex-ante abstract norm control and ex-post concrete norm control) is narrowly available. On the one hand, the Constitutional Court has jurisdiction to examine the conformity with the Constitution of the Standing Orders of the Parliament or of parliamentary resolutions on the functioning of the lower and upper houses.<sup>17</sup> On the other hand, the Constitutional Court may, on the motion of the Advocate of the People (ombudsman), inquire whether any law or ordinance, or of any provision thereof,<sup>18</sup> which is in force is unconstitutional.<sup>19</sup> Finally, Slovenia and Serbia have very similar rules: the constitutional courts of both countries are empowered to review the constitutionality of laws and other central legislation as well as international conventions, the legality of lower-level legal norms (central decrees, municipal regulations and general acts issued for the exercise of public authority) and, in particular, the conflict of laws and other legal norms with ratified international treaties or general standards of international law (in Serbia, ‘generally accepted rules of the international law’; in Slovenia, ‘general principles of international law’).

In Slovakia and Slovenia, in connection with the constitutional review, the constitutional courts of these countries also have the power to suspend the application of the effective legal regulation under review. The Slovak Constitutional Court can suspend the effect of the challenged statutes or their provisions either if fundamental rights and freedoms may be threatened by their further application or if there is a risk of serious economic damage or other serious irreparable consequence. Similarly, in Slovenia, until a final decision, the Constitutional Court may suspend in whole or in part the implementation of a law, other regulation or general act issued for the exercise

16 In Slovakia, however, the promulgation of a decision of the Constitutional Court does not invalidate a lower-level regulation declared to be in conflict with a higher-level legal norm as the constitution provides that these bodies (that issued these legal regulations) are obliged to harmonise them with the higher-level norm. Only if they fail to do so within 6 months will the legal provisions concerned cease to be valid (Cf., e.g., Láštík and Steuer, 2019, p. 187).

17 In 2012, the government sought to withdraw this power from the Constitutional Court with Emergency Ordinance 38/2012, but later that year, the Constitutional Court found this power-limiting ordinance to be unconstitutional. Cf. Nergelius, 2015, p. 303.

18 The Romanian Constitutional Court acted with a special power not explained by the constitution and the Constitutional Court Act, when it annulled the High Court of Cassation and Justice’s 21/2016 resolution of questions of law on the allowances for doctoral degrees. Cf. Varga, 2020, p. 84.

19 The Advocate of the People has the right to petition not only for violations of fundamental rights but also to allege in its petition violations of any constitutional norm and to seek the annulment of laws and legal provisions on the basis of those norms.

of public authority if difficult to remedy harmful consequences could result from the implementation thereof. In the other countries under scrutiny, constitutional courts do not have such powers – at least in the context of ex-post review of legal rules.

In most of the countries examined, ex-post review can be initiated by specific public actors, whose scope and the types of legal norms that they can refer to constitutional review are extremely varied. In most countries, the petitioners include the government, the president of the state, a certain number or proportion of deputies (and/or senators where there is a senate), the ombudsman or various bodies or officials of the judiciary;<sup>20</sup> in some countries, the right to petition has also been granted to enti-

20 In Croatia, one-fifth of the members of the Croatian Parliament, any committee of the Croatian Parliament, the President of the Republic of Croatia, and the Government of the Republic of Croatia may initiate the ex-post review (both the constitutionality and the legality of regulations). As a special procedure, local and regional self-governments have the right to initiate proceedings for an ex-post review if they consider that a law regulating their organisation, competence or financing does not conform with the constitution. In the end, the Constitutional Court itself may decide to institute proceedings to review the constitutionality of the law and the review of constitutionality and legality of other regulations. In the Czech Republic, the examination of the constitutionality of laws in the context of abstract norm control may be initiated by the president, a group of at least 41 Deputies (this is the most common way of initiating an a posteriori abstract review – cf. Šípulová, 2019, p. 37) or a group of at least 17 Senators and the government, while the examination of the constitutionality or legality of other (lower-level) legal norms may be initiated by the government, a group of at least 25 Deputies or a group of at least 10 Senators, the representative body of a region, the ombudsman ('Public Protector of Rights'), the Interior Minister, the competent ministry or other central administrative office, the director of a regional office, the representative body of a municipality and the head of a county office. In Poland, the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Chief Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights (ombudsman) may petition the ex-post review on a general basis, and the National Council of the Judiciary may initiate it specifically in case of violation of judicial independence; moreover, the constitutive organs of units of local self-government have the right of petition. In Hungary, an inquiry into the abstract constitutionality of legislation and its conflict with international treaties may be initiated by one quarter of members of Parliament, the government, the President of the Curia, the Prosecutor General or the Commissioner for Fundamental Rights (ombudsman). The Slovak Constitutional Court may proceed with an ex-post review upon a motion submitted by at least one-fifth of all members of Parliament, the President of the Slovak Republic, the Government of the Slovak Republic and the Attorney General. In Slovenia, the procedure for the review of the constitutionality or legality of regulations or general acts issued for the exercise of public authority can be initiated, by a request of, as typical movers, the National Assembly, one-third of the deputies, the National Council, the government, the ombudsman for human rights, the 'information commissioner', the State Prosecutor General, representative bodies of local communities and, due to the Protection Against Discrimination Act of 2016, the Advocate of the Principle of Equality (if, in this latter case, a statute's unconstitutionality or illegality takes the form of discrimination). In Romania, as mentioned above, the ex-post review of legal norms can be, in general, initiated only by the ombudsman (Advocate of the People), while the constitutionality of the Standing Orders of the Parliament can be examined by the Constitutional Court on the motion of the presidents of the two Chambers, a parliamentary group or a number of at least 50 Deputies or 25 Senators. Finally, in Serbia, state bodies, bodies of territorial autonomy or local self-government and at least 25 deputies can initiate a proceeding on examining the



ties which make this possibility unique among countries with concentrated constitutional adjudication.<sup>21</sup> Croatia also has (uniquely among the examined jurisdictions, and as a rare exception in the whole world)<sup>22</sup> an *actio popularis*,<sup>23</sup> i.e. in Croatia any natural or legal person may apply to the Constitutional Court for a declaration that a law or subordinate legislation is unconstitutional.<sup>24</sup> However, the decision to initiate proceedings in this case is upon the Croatian Constitutional Court, as opposed to the mandatory initiation of proceedings on the motion of any of the public entities.

### 1.2. Concrete norm control

Concrete norm control is a type of constitutional review where the court, the Constitutional Court or another body empowered to do so interprets the constitution in the underlying cases before them (i.e. in case-by-case disputes). The constitutional review of a legal norm is therefore not conducted in an abstract manner but in relation to a specific litigation or non-litigation case or legal proceeding of a particular person, and typically, the decision in the case of a norm control can also affect the concrete case before the ordinary court or another body.

#### 1.2.1. Judicial initiative for ex-post review in concrete cases

Constitutional review on the initiative of an ordinary court in an individual case is possible in all the jurisdictions examined. A specific feature of these cases is that the

constitutionality or legality of statutes or statutory provisions, and this procedure may also be instituted by the Constitutional Court itself upon a well-reasoned proposal of the president, a working body or a judge of the Constitutional Court.

21 In Slovenia, the Bank of Slovenia, the Court of Audit, representative associations of local communities and national representative trade unions can initiate posterior norm control. In Poland, constitutive organs of units of local self-government, national organs of trade unions, national authorities of employers' organisations and occupational organisations and churches or other religious organisations can be petitioners if the challenged legal regulation relates to matters relevant to the scope of their activity.

22 The *actio popularis* cannot be considered either as a normal or expected instrument of individual legal protection or as an abstract defence of the constitutional order. In fact, the example of Croatia has shown where allowing the petition for review of the constitutionality of norms without any legal interest leads to; the possibility of this has led to the overburdening of the Croatian Constitutional Court. This is why even one of the main advocates of constitutional protection, the Venice Commission, does not recommend its introduction – precisely because of the Croatian experience (as regards the new Hungarian constitutional changes of 2011, cf.: Venice Commission, CDL-AD[2012]009, Opinion on Act CLI of 2011 on the Constitutional Court of Hungary, para. 49).

23 In Hungary, until 1 January 2012, when the old Constitution expired, *actio popularis* was also possible; however, this unlimited right of petition, which was not linked to legal interest or the holding of public office, was abolished by the new Fundamental Law. For details about these issues and their impact, see Tóth J., 2012, pp. 11–19 and iss. 2012, pp. 29–37.

24 In Croatia, municipal decrees are 'general acts', and the Constitutional Court rejects its competence regarding 'general acts', except for statutes of local self-government. See, e.g., Decision U-II-6111/2013 from 17 October 2017. The Constitutional Court established, by its practice, that it is competent only for 'other regulations' (Art. 125 of the constitution). The legality, but not the constitutionality of 'general acts', is examined by the High Administrative Court.

court, in the course of the proceedings before it, finds that the rule (either substantive or procedural) applicable to the case in question is unconstitutional and asks the Constitutional Court to declare this and to annul the rule and/or to exempt it from the obligation to apply the rule in a particular case. In this case, therefore, unlike in the abstract review, there is a concrete proceeding in which the ordinary court must decide on the rights and obligations of a client or, if there are opposing parties in the procedure, on the resolution of a legal dispute. Exceptionally, the unconstitutionality of legal regulations may not only arise before a court but before other state organs; however, it is also a typical feature of such cases that the decisions made in them (the vast majority of them) can be challenged before a court. Therefore, it seems to be appropriate to treat the possibility of the latter together with the concrete norm control on the initiative of courts. In addition, this concern can also be justified on the grounds that where such a possibility exists, the constitutional rules themselves, in a general way, stipulate the right of initiative of the courts and that of other bodies together and regulate them in a very similar way.

According to the Croatian Constitutional Court Act, either the Supreme Court of the Republic of Croatia or any other ordinary court can initiate proceedings before the Constitutional Court if the issue of constitutionality of laws and regulations or legality of decrees and other regulations has arisen in proceedings conducted before that particular ordinary court of justice. If a law or a provision of a law is contrary to the constitution, the court hearing the case must stay proceedings and apply for a declaration to the Constitutional Court that the unconstitutional law or provision is unconstitutional; until the Constitutional Court has ruled on the case, the court may not apply the challenged rule. However, if a lower-level statute would not be in accordance with the constitution, the ordinary court must continue its proceedings and pass a decision, in addition to initiating the constitutional court proceedings.

In Poland, any court (including, in addition to common courts, specialised courts) may turn to the Constitutional Tribunal as to the conformity of a normative act to the constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court. In Romania, too, not only courts of law but also courts of commercial arbitration have the right to turn to the Constitutional Court if they consider that the laws and ordinances which they apply and which are in force, or any provision thereof, are contrary to the constitution. They may do so either *ex officio*, on the motion of the parties, or, in criminal cases, on the motion of the public prosecutor. However, the Constitutional Court Act does not provide for a mandatory stay of proceedings.

In Slovenia, a court which has taken the initiative to declare the unconstitutionality of the applicable legal rule by the Constitutional Court must, together with the submission of this initiative, issue a separate order to stay proceedings. If the Supreme Court finds that the rule applicable to the proceedings before it is unconstitutional, it stays proceedings in all cases in which it should apply such law or part thereof in deciding on legal remedies. In Hungary, if a court is required to apply a legal regulation which it finds to be unconstitutional in an individual case, it must

stay the proceedings and ask the Constitutional Court to declare the provision unconstitutional. If the rule is no longer in force, as the Constitutional Court has already ruled that it is unconstitutional and annulled it, but the rule should still be applied in the specific case (which was initiated before the rule expired), the court may request a declaration that the legal regulation in question should not be applied to the specific proceedings (i.e. the court is also allowed to ask the exclusion of the application of the legal regulation contrary to the Fundamental Law). The court may initiate an examination of the constitutionality not only of statutes but also of normative decisions and orders, uniformity decision of the Curia (Supreme Court) and the conflict of all of these with an international treaty, if the decision in the individual case should be made in whole or in part on the basis of the latter.

In Slovakia, the Constitution merely provides that, among other public actors,

[t]he Constitutional Court shall commence proceedings upon a motion submitted by [...] a court”, and the Constitutional Court Act only adds that in such a case, i.e., if the proposal was submitted by a court in relation with its decision-making activity, the secondary parties to the action are the parties of the proceedings which were brought to the court which submitted the proposal.<sup>25</sup>

The Serbian Constitutional Act stipulates that if during a procedure before a court of general or special jurisdiction, the issue of compliance of law or other general act with the constitution, generally accepted rules of international law, ratified international agreements or law is raised, the court shall, if it finds that the issue has grounds, adjourn the procedure and initiate a procedure for assessing the constitutionality or legality of that act before the Constitutional Court. Finally, the Constitution of the Czech Republic also provides for the possibility of the judicial initiative since if a court concludes that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it must submit it to the Constitutional Court.<sup>26</sup>

### *1.2.2. Concrete norm control on the motion of natural and legal persons*

In almost all countries surveyed, both natural and legal persons can initiate a specific review of the legal rules. This can be done against legal provisions which have been applied in proceedings before a court (exceptionally another public body), i.e. against statutory regulations on which the court’s decision was based. These provisions, like in the course of the review that can be initiated by judges, can be either substantive or procedural rules. However, this type of procedure differs from the former in that the underlying judicial (exceptionally other) proceedings have already ended and there

25 In addition, in cases of criminal law, if the proceedings relate to the criminal trial proceedings, the party to the action is represented by a person against which the legal action (the criminal trial proceedings) is taken and the prosecutor.

26 Constitution of the Czech Republic, Art. 95(2).

is a final decision of which the natural or legal person bringing the action considers to be in breach. The constitutional stipulations governing these proceedings also provide that the harm must consist not merely in an incorrect interpretation of the applicable law or a judicial error in the determination of the facts but specifically in the fact that the law applied is contrary to the constitution (or in some legal systems, to other, higher level statutory regulations). It is not always a requirement that the petitioner must have been a party to the underlying legal proceedings (or a defendant in criminal proceedings), but it is a requirement that their right, obligation or legal position must be affected by a judicial decision based on the challenged legislation.

In Poland, this competence is known as a constitutional complaint; however, it cannot be used against the judicial decision itself but only to challenge the unconstitutionality of the underlying legislation. It can be brought by any natural person whose constitutional freedoms or rights – according to them – were violated either by a court or an organ of public administration; nevertheless, legal persons can use this legal institution by a limited manner.<sup>27</sup> In Slovenia, the constitutionality of a legal rule may be examined on individual initiative not only if it was based on a judicial (or other formal public authority) decision but also if it was applied directly, without any formal public authority decision. In the former case, anyone who demonstrates legal interest<sup>28</sup> may lodge a petition for this kind of review in their own concrete case. In the latter case, if these unconstitutional regulations have direct effects and interfere with the rights, legal interests or legal position of the petitioner, a petition may be lodged within 1 year after such act enters into force or within 1 year after the day the petitioner learns of the occurrence of harmful consequences. The situation is similar in Hungary; two of the three specific types of legal instrument referred to here as ‘constitutional complaints’ fall within the scope of the specific review of the law discussed in this chapter. One type of constitutional complaint may also be lodged in the case of the alleged unconstitutionality of a statute or legal provision applied in court proceedings and may be initiated by the natural or legal person affected by the court decision. The other type of complaint can be lodged (within 180 days of the entry into force of the unconstitutional act) if the rights guaranteed by the Fundamental Law were violated directly, without a judicial decision, i.e. if the rule is directly applicable or directly effective without a judicial decision (e.g. changes to pension rules, changes to employment conditions or provisions on dismissal, modifications on the regulation of enterprises etc.).

In Serbia, the same legal instrument is called ‘constitutional appeal’, and certainly, persons can use it if they consider any law or legal regulation unconstitutional or a lower-level legal norm unlawful, provided that the application of the unconstitutional or unlawful norm ‘by state bodies or organisations exercising delegated public

27 According to the Constitutional Tribunal, legal persons of private law can initiate such proceedings if they deem that such a right was infringed of which they can be subjects (e.g. right of property).

28 According to the Constitutional Court Act of Slovenia, legal interest is deemed to be demonstrated if a regulation or general act issued for the exercise of public authority whose review has been requested by the petitioner directly interferes with their rights, legal interests or legal position.

powers' violated or denied human or minority rights and freedoms guaranteed by the constitution, if other legal remedies for their protection have already been applied or not specified. However, since decisions of other public bodies which affect the substantive rights of persons can always be challenged in court, this rule is intended to deal with unconstitutional situations caused by judicial decisions which infringe human rights, where the decision is final, and the unconstitutionality or illegality does not arise from the application of the law by the judiciary but from the law itself. In addition, the Serbian Constitutional Court has a special and unique competence, namely the competent body of an autonomous province may institute a proceeding of assessing the constitutionality or legality of laws and regulations of the Republic of Serbia or the legal act of the local self-government unit which violates the right to the mover's provincial autonomy; moreover, a municipality has the same right if the constitutionality or legality of any statutory rule of the Republic of Serbia or of an autonomous province violates the initiator's right to local self-government.

In Croatia, both natural and legal persons may apply to review the constitutionality of the provision of a law or the constitutionality and legality of the provision of another regulation, not only – reasonably – in the context of an ex-post abstract review of a norm based on *actio popularis* but also in the context of an individual concrete review of a norm. The latter is preferable for the petitioner because in this case, if the Constitutional Court accepted the proposal of the petitioner and repealed the challenged provision of the law or the challenged provision of another regulation, they have the right to submit a request to the competent body to change the final individual act whereby their right was violated, and which was passed on the basis of the repealed provision of the law, or the repealed provision of the other regulation.

In the Czech Republic, a constitutional complaint includes a direct (so-called 'real' or 'full') constitutional complaint against a judicial decision. A complaint for review of a norm (which is the subject of the present subchapter) is possible only in connection with the real constitutional complaint (and not on its own, without challenging the judicial decision). The complainant may submit, together with their constitutional complaint, a petition by which they propose the annulment of a law, decree or individual provisions thereof, the application of which resulted in the situation that is the subject of the real constitutional complaint.<sup>29</sup> In Slovakia, on the other hand, there is no possibility of individual review of a norm on the initiative of the persons concerned; only a court may initiate a specific review of a norm, and individuals merely have the right to contest the problematic judicial decision directly (by means of a so-called real constitutional complaint) before the Constitutional Court but not the norm applied by the court in their case. Finally, in Romania, the parties do not have the possibility to challenge the law applied in the judicial procedure before the Constitutional Court; they only have the right to initiate the court's constitutionality review during the pendency of the case, i.e. to ask the court to exercise its power (judicial initiative for ex-post review) described in subsection 3.1.2.1.

29 Constitutional Court Act (182/1993 Sb.) of the Czech Republic, Art. 74.

## 2. Fundamental rights adjudication: the ('real') constitutional complaint

The typical form of fundamental rights adjudication is constitutional complaint and, in particular, its form developed in German constitutional law, the so-called 'real constitutional complaint' (*Urteilsverfassungsbeschwerde*). In this type of complaint, any natural (and/or legal) person concerned in a judicial (or sometimes administrative) process can turn to the constitutional court even if it is not the legal regulation applied by the court (or the administrative organ) that the person considers to be unconstitutional but (with recognising the constitutionality of the legal regulation) the court's (administrative organ's) decision itself or the legal procedure leading to that decision. It means that the constitutional problem is about the unconstitutional application of the otherwise constitutional norm (including not only procedural mistakes but, first and foremost, the unconstitutional interpretation of the given norm).<sup>30</sup>

In Slovenia, a constitutional complaint may be lodged against individual acts by which state authorities, local community authorities, or bearers of public authority decided the rights, obligations or legal entitlements of individuals or legal persons in case these decision-makers are deemed to have violated any of the human rights or fundamental freedoms of the concerned subjects. As is the case with the competence to lodge a real constitutional complaint in general, the ordinary remedies available must be exhausted.<sup>31</sup> The same is the case in Serbia: a 'constitutional appeal' may be filed by everyone who believes that their human or minority rights and freedoms guaranteed by the constitution have been violated or denied by an individual act or action of a state authority or organisation vested with public authority (since a judicial review is always conducted against decisions of public authorities taken in individual proceedings affecting the rights of individuals, in practice, such a constitutional appeal is possible only after a final judicial decision.)<sup>32</sup> In addition, similarly to the competence of the Constitutional Court of Serbia related to the abstract norm control presented above, by the appeal of the competent body of the autonomous province, the Constitutional Court can assess if an individual legal act or action of a state body

30 A 'real' constitutional complaint, thus, is a legal institution where the concerned person, following a final court decision on the merits of the case affecting their rights, obligations and legal situation, may appeal to the Constitutional Court not against the law applied by the court but against the court's decision itself and the interpretation of the law contained therein, which they consider unconstitutional. In this case, the (allegedly) unconstitutional situation is not caused by the inherently unconstitutional nature of the law but by the fact that the judge interpreted and applied the otherwise constitutional norm in such a way that it resulted in an unconstitutional situation. In such a case, the Constitutional Court has the power not to annul the law but to annul the decision of the court itself, without affecting the effectiveness of the statutory regulation on which the contested judicial decision was based.

31 There is one exception: before all extraordinary legal remedies have been exhausted, the Constitutional Court may exceptionally decide on a constitutional complaint if the alleged violation is manifestly obvious and if irreparable consequences for the complainant would result from the implementation of the individual act.

32 Cf. Korhecz, 2020, p. 61.

or body of local self-government unit obstructs performing the competences of the autonomous province that lodged the appeal, or, on the initiative of the competent body of a municipality, an individual legal act or action by a state body or body of local self-government unit obstructs performing the competences of the municipality

In Croatia, the scope of the rules regarding the real constitutional complaint are broader: this complaint can be lodged against decisions taken by state bodies, bodies of local and regional self-government and legal persons vested with public authority, provided that such decisions violated human rights and fundamental freedoms or, in special cases, the right to local and regional self-government guaranteed by the constitution. Such a complaint can be lodged by any natural person (including suspects and defendants in criminal proceedings). As an exception, the procedure of the Croatian Constitutional Court may be invoked even before the exhaustion of the ordinary remedies available, if the ordinary court did not decide within a reasonable time about the rights and obligations of the petitioner in the judicial proceeding or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights, and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not commenced. There also exists a special institution regarding the protection of judicial independence and judges' personal right to hold their office: the judges of ordinary court can lodge an appeal to the Constitutional Court against a decision relieving them of judicial office or against a decision by the National Judicial Council on their disciplinary accountability.<sup>33</sup> In addition, the Serbian ordinary judges, public prosecutors and deputy public prosecutors can also lodge an 'appeal' to the Constitutional Court against the decision<sup>34</sup> by which the tenure of their office was terminated.<sup>35</sup>

In the Czech Republic, there may also be a real constitutional complaint if constitutionally guaranteed fundamental rights and basic freedoms have been infringed as a result of the final decision in a proceeding to which the petitioner was the party. In addition, a representative body of a self-governing region can also lodge such a complaint against an "unlawful encroachment by the state".<sup>36</sup> The Constitutional Court of Slovakia, however, also may decide on complaints of natural and legal persons if they are pleading the infringement of their fundamental rights or freedoms or human rights and fundamental freedoms resulting from the international treaty which has been ratified by the Slovak Republic and has been promulgated. In this case, claimants can lodge a constitutional complaint not only to challenge a judicial

33 If the judge lodges such an appeal, this excludes their right to file a constitutional complaint.

34 A judge's tenure of office may be terminated by the decision of the High Judicial Council. A public prosecutor's tenure of office may be terminated by the decision of the National Assembly. A deputy public prosecutor's tenure of office may be terminated by the decision of the State Prosecutors Council.

35 This 'appeal' is not identical to the legal institution of 'constitutional appeal', and in case of the former, the latter cannot be initiated.

36 Constitutional Court Act (182/1993 Sb.) of the Czech Republic, Art. 72(1).

act but also on a judicial omission.<sup>37</sup> Slovakia also has a special kind of constitutional complaint regarding the rights of municipalities: if an unconstitutional or unlawful judicial decision or state action infringes the municipalities' rights related to a matter of territorial self-administration, the concerned municipality can turn to the Constitutional Court.

In Hungary, the real constitutional complaint, i.e. the third main type of the institution of constitutional complaint – as a 'compensation' for the abolition of *actio popularis*<sup>38</sup> – was introduced by the Fundamental Law that entered into force on 1 January 2011, and it acquired its current form in 2019. Originally, this complaint could be lodged by a natural person, legal entity or other organisation concerned by an individual judicial proceeding if the decision on the merits or other decision ending the court proceedings violated the petitioner's right guaranteed by the Fundamental Law. In 2019, public law entities (public authorities, courts and other public bodies) were also granted the right to file such a complaint; since 20 December 2019, they have also been able to lodge a constitutional complaint if, like other petitioners, the decision on the merits of the case or any other decision ending the court proceedings violated any of their rights guaranteed by the Fundamental Law and also if such a court decision limited their powers in an unconstitutional manner.

The Constitutional Tribunal of Poland only has competence to rule on norms applied by a court or organ of public administration as a special kind of constitutional complaint ('appeal') but it has no power for adjudicating on real constitutional complaint lodged directly against the judicial decision. In Romania, too, there is no possibility of a real constitutional complaint (nor, as could be seen above, of a complaint for review of a norm on the motion of the persons concerned).<sup>39</sup>

### 3. Other powers of the Central and Eastern European constitutional courts

#### 3.1. Resolution of jurisdictional disputes

During adjudication on jurisdictional disputes, which is, just as the power of abstract norm control, also the part of the original model of Kelsen, the Constitutional Court settles the disputes between other constitutional bodies regarding their competence. This means that if the state's different constitutional bodies disagree<sup>40</sup> on which of them may proceed and make a decision in certain cases, the Constitutional Court will

37 See, e.g., Mészáros, 2020, p. 73.

38 The abrogation of *actio popularis* was also supported by the Venice Commission, which suggested, as a better means of individual rights protection, the introduction of the real constitutional complaint (a suggestion that was accepted by the constitution maker). Cf., e.g., Sonnevend, Jakab and Csink, 2015, p. 47.

39 There, the concrete review of a norm is only possible through a judicial initiative.

40 The Constitutional Court typically judges only the conflicts between *different types* of public bodies. The conflicts within a given organisational system (e.g. disputes on the competence of courts) will be resolved by the 'key organisation' of the given system (e.g. in case of conflict of competence between ordinary courts, the Supreme Court).



decide the dispute by interpreting the constitution's relevant provisions. The conflict of competence may be 'positive' if two or more bodies wish to proceed in a given case or make a certain type of decision, and it may be 'negative' if no organisation wants to resolve a task resulting from the constitution.

In all the countries under scrutiny, constitutional courts have the power to rule on jurisdictional disputes. In Slovakia, the Constitutional Court can rule on disputes between central state administration bodies; in Romania, on disputes between public authorities in the broad sense; and in Poland, on conflicts of jurisdiction between central constitutional organs of the state. The Croatian Constitutional Court has a broader competence: it can rule on jurisdictional disputes between the legislative, executive and judicial branches. In the Czech Republic, the Constitutional Court and the Supreme Administrative Court are authorised by the constitution to decide on jurisdictional disputes between state bodies and bodies of self-governing regions.

In Slovenia, the Constitutional Court may decide on jurisdictional disputes between the state and local communities, between local communities, between courts and other state authorities and, in the end, between the National Assembly, the president of the republic and the government. In Hungary, the Constitutional Court of Hungary may proceed if the conflict of competence arises between state organs or between a state organ and local government organs, with the exception of jurisdictional disputes between courts and public administration authorities. The Constitutional Court of Serbia may decide on the conflict of jurisdictions between courts and state bodies, between republic and provincial bodies or bodies of local self-government units, and between provincial bodies and bodies of local self-government units.

Most jurisdictional disputes can be brought before the Constitutional Court by the bodies concerned; in some countries, public actors specifically designated by the constitution or the Constitutional Court Act (in Romania, the President of Romania, the president of either of the Chambers of Parliament, the prime minister or the President of the Superior Council of Magistracy; in Poland, the president of the republic, the Marshal of the Sejm, the Marshal of the Senate, the prime minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control) have the right to file a petition.

### ***3.2. Adjudication regarding the functioning of the state***

In all examined countries, there exists a possibility of impeachment of the president of the state, in which the Constitutional Court has a role in each jurisdiction. The exceptions are Poland, where this power is exercised by the Tribunal of State, and Romania, where the impeachment procedure is conducted by the High Court of Cassation and Justice (here the Constitutional Court only may give an advisory opinion on the proposal to suspend the President of Romania from office). These proceedings are initiated by the parliament (by members of parliament, deputies or senators) according to varying procedural rules and are based on the grounds that the president of the state has deliberately violated the constitutional rules or the provisions of the constitution (Croatia, Hungary, Czech Republic, Slovakia, Poland, Serbia and

Slovenia), deliberately committed a serious breach of the law (Hungary and Slovenia), committed treason or high treason (Czech Republic, Slovakia and Romania) or other crimes (in Hungary, any deliberate crime). The Constitutional Court (or the Tribunal of State in Poland and the High Court of Cassation and Justice in Romania) decides on the liability of the president or on the rejection of a motion by the parliament (a certain proportion of MPs or senators) in a special procedure (e.g. in Croatia, liability requires the agreement of two-thirds of all the judges of the Constitutional Court; in Hungary, the agreement of two-thirds of the plenary session members present; in Slovenia, a two-thirds majority vote of all judges).

It is a common rule that during the impeachment proceedings, the president may not exercise the powers of their office; however, in Slovenia, although the Constitutional Court is merely allowed to order the president not to exercise their power, it is not obligatory for the Constitutional Court to do so. It is also a common feature that finding of the president's responsibility entails their removal from office (they lose the presidency). In Hungary, however, the Constitutional Court *may* remove the president of the republic from office, but this is not mandatory; it is up to the Constitutional Court to decide whether the president who has deliberately violated the constitution or the law or committed a deliberate criminal offence may remain in office.

In Poland and Slovenia, public officials other than the president may also be accountable and held liable under public law. In Poland these are the prime minister, ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the prime minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces. A deputy or a senator of the parliament may also forfeit their mandate if the Tribunal of the State establishes that they performed any business activity involving any benefit derived from the property of the State Treasury or local self-government or to acquire such property; in addition, the Constitutional Tribunal, on request of the Marshal of the Sejm, is entitled to determine whether there exists an impediment to the exercise of office by the president of the republic.<sup>41</sup> In Slovenia, members of the government, i.e. the prime minister and the ministers, in addition to the president of the state, can be brought before the Constitutional Court for an impeachment proceeding on charges of violating the constitution and laws during the performance of their office.

In Slovakia, the Constitutional Court (or more precisely, the president thereof) has a role regarding the resignation of the President of the Slovak Republic, who may resign from their office with a written announcement delivered to the President of the Constitutional Court (which will be effective at the time that the President of the Constitutional Court received it). In addition, in the event that the president cannot perform the duties of their office for more than 6 months, the Constitutional Court may declare that the post of president has become vacant. The latter function is also

41 If the Constitutional Tribunal so finds, it requires the Marshal of the Sejm to temporarily perform the duties of the president of the republic.

practised by the Croatian Constitutional Court; if the president cannot perform their duties for a longer period, the Constitutional Court, at the proposal of the government, may declare the vacancy. On account of this declaration, the Speaker of the Parliament may perform the duties of the President of Croatia.

Another frequent competence is the task of monitoring the constitutional functioning of political parties. In exercising this power, a country's Constitutional Court may find that a party is operating in an unconstitutional manner and may ban the party. In Hungary, the Constitutional Court does not have such powers (the public prosecutor has the power to control the functioning of political parties, and the ordinary courts can decide on the basis of the public prosecutor's motion for abolishing a party (as a special form of association engaged in political activity) that is operating unconstitutionally or unlawfully. Similarly, in Slovakia, the Constitutional Court cannot rule on the banning of a party but on whether a decision dissolving a political party or movement, suspending political activities or rejection of an application for registration thereof is in conformity with the constitutional laws and other laws. The constitutional courts of all other countries have jurisdiction to ban parties that operate unconstitutionally.

In Romania, however, the Constitutional Court may also establish the reality of the circumstances justifying the interim in the exercising of the office of President of Romania.

### ***3.3. Review of decisions in election disputes***

In most of the jurisdictions examined, constitutional courts have special power at the border between adjudication regarding the functioning of the state and adjudication on election disputes. In Slovakia and the Czech Republic, the Constitutional Court can decide on a complaint against a decision verifying or rejecting verification of the mandate of a member of parliament (in Slovakia) or of a deputy or senator (in the Czech Republic). This is also the case in Serbia, where an 'appeal' can be lodged against decision regarding the confirmation of mandate of members of parliament. In Slovenia, the candidate in the elections whose mandate was not confirmed by the National Assembly can turn to the Constitutional Court by a special kind of constitutional complaint asking it to confirm that they have been elected deputy.

All CEE constitutional courts have responsibilities in relation to parliamentary and/or municipal elections. In Hungary, the decisions of election committees acting on election objections can be reviewed by the ordinary court, and a constitutional challenge can be brought to the Constitutional Court against the court's decision as against any other final decision of an ordinary court. In Slovakia, a constitutional complaint can also be submitted about unconstitutionality or unlawfulness of the elections to the Slovak parliament or to a body of a local self-government, on one hand, or against the result of the elections, on the other. As a result, the Constitutional Court of Slovakia is entitled either to proclaim the results of elections not to be valid or to cancel the contested result of the elections. In Serbia, a petition for deciding on electoral disputes may be lodged in cases for which a court's jurisdiction is not defined

by law. In Croatia, the Constitutional Court monitors whether elections are conducted in compliance with the constitution and laws and may resolve electoral disputes which fall outside the jurisdiction of the ordinary courts. In this competence, on one hand, the Constitutional Court can undertake relevant measures, performing the control of the constitutionality and legality of the elections if the electoral activities are being conducted in discordance with the constitution and the law.<sup>42</sup> On the other hand, however, the Croatian Constitutional Court, acting as a court of appeal, can also decide on *par excellence* electoral disputes, i.e. on appeals against the ruling of the competent electoral commission.

Constitutional courts also have special powers (not closely related to elections in the strict sense) in relation to referendums. In Hungary, for example, the Constitutional Court can, on the basis of a real constitutional complaint, act in cases relating to referendum disputes, similarly to electoral cases. In such cases, the decision of the ordinary court hearing the application for judicial review against the decision of the electoral commission can be challenged. A parliamentary decision to order a referendum may also be contested: according to the Fundamental Law, parliamentary resolutions ordering a referendum or dismissing the ordering of a referendum to be obligatorily ordered can be reviewed by the Constitutional Court with regard to constitutionality and legality on anyone's petition. Similarly, in Slovakia, the Constitutional Court may decide, on the initiative of the President of the Slovak Republic, on whether the subject of a referendum to be declared upon a petition of citizens or a resolution of the National Council of the Slovak Republic is in conformity with the constitution or constitutional law, but it can also decide on complaints against the result of a referendum and complaint against the result of a plebiscite on the recall of President of the Slovak Republic. In Croatia, the Constitutional Court also controls the constitutionality and legality of national referendums and, similarly to those, measures, procedures and competences which were presented above in accordance with the competence deciding on the constitutionality and legality of the elections or on the electoral disputes.

In Romania, the Constitutional Court supervises the observance of the procedure for the organisation of and call for a referendum and confirms its results. In addition, the Romanian Constitutional Court, even *ex officio*, verifies the fulfilment of the conditions for the citizens' exercise of the legislative initiative (plebiscite) by which the parliament can pass an act on the subject contained by this initiative. In the end, as a special competence, it may also supervise the observance of the procedure for the election of the president of Romania and validate the mandate of the president-elect.

Poland, in the end, is the only CEE country under scrutiny where the Constitutional Tribunal has no jurisdiction to review the verification of parliamentary mandates nor to proceed in electoral or referendum disputes.

42 When the Constitutional Court of Croatia ascertains that the participants in the elections act contrary to the constitution and the law, it informs the public over the media – and if needed, warns the competent bodies – and in case of violation which influenced or might have influenced the results of the elections, it annuls all or separate electoral activities and decisions that preceded such violation.

#### 4. Conclusion

The constitutional courts of the eight CEE countries examined perform largely similar functions and consequently exercise similar powers. The concentrated constitutional courts, as a consequence of the implementation of the Kelsenian model, necessarily carry out norm control. Croatia is the exception as it also covers the possibility of ex-ante review, but this does not necessarily mean checking the conformity of domestic legislation with the constitution; in several countries under scrutiny, this possibility is limited for the constitutional courts to check the constitutionality of international treaties that have been ratified but not yet promulgated. By contrast, an ex-post abstract review of norms can be conducted in all countries because it is at the heart of centralised constitutional administration, without which constitutional courts would not exist as autonomous bodies. *Actio popularis*, however, is only possible in the Croatian constitutional system. In addition, and in keeping with the European tradition of constitutional adjudication, concrete norm control is now also part of the essence of constitutional review, whereby either the ordinary court proceeding in an individual case or the persons concerned may turn to the Constitutional Court if they consider that a legal rule applicable or applied in a specific case is unconstitutional. Judicial initiative is possible in all the countries examined, while concrete norm control on the motion of the persons concerned is not possible in only two countries, Romania and Slovakia, but is an existing and functioning institution in the others.

The ‘real’ constitutional complaint (*Urteilsverfassungsbeschwerde*), developed by the German constitutional law, and the German *Bundesverfassungsgericht* did not originally form part of the concept of concentrated constitutional adjudication; the original Kelsenian model completely lacked the possibility for citizens (or other natural and/or legal persons) to challenge the constitutionality of judicial decisions before the Constitutional Court. However, due to the spreading influence of German practice, such powers now exist in most European countries with centralised constitutional courts. This is also true for the vast majority of the CEE countries examined, and it is only in Romania and Poland that no ‘real’ constitutional complaint exists. However, more importantly, where it exists, it has become a core competence of the constitutional courts, as most of the petitions before the constitutional courts, and the majority of the decisions on unconstitutionality thereof are taken in this competence.<sup>43</sup>

43 In Serbia, for example, constitutional complaints account for more than 98% of all cases (cf. Korhecz, p. 63). In Slovakia, these account for about 85% of all Constitutional Court proceedings (Cf. Mészáros, 2020, p. 74). In Hungary, over 90% of cases are ‘complaints’. Complaints based on ex-post facto concrete norm control constituted more than half of all complaints; however, among the successful ones, there are many more ‘real’ complaints, i.e. those submitted against judgements rather than against the law on which the judgement is based (Cf. Tóth J., 2018, pp. 95–107). In Poland, where no direct fundamental rights adjudication exists, the number of complaint cases based on concrete ex-post norm control, the cases of abstract review concerning the constitutionality of laws (acts) and the legality of sub-statutory regulations decided by the Constitutional Tribunal on the merits were all about a few dozens each year (Cf. Wołek and Kender-Jeziorska, 2019, pp. 130–131 as regards only the complaint cases).

Finally, a further common feature of the rules on the jurisdiction of the constitutional courts under scrutiny is that based on the Kelsenian model, constitutional courts can act in cases of jurisdictional disputes between state organs belonging to (typically) different branches of division of power. Further, they are also empowered to resolve certain situations of extreme danger to public order caused by state bodies (adjudication regarding the functioning of the state) and, in most countries, to proceed in electoral jurisdiction – in addition to other radically diverse competences that may be exercised in some of the countries analysed.

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## Fundamental rights adjudication in the Central European region

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### ABSTRACT

The protection and adjudication of fundamental rights have been playing an increasingly important role in the legal systems of Western countries since the end of World War II. However, the early origins of fundamental rights go back well over two millennia. The theories of fundamental rights first appeared in the legal system of the ancient empires. The Code of Hammurabi in the ancient Babylon articulated the first requirement for fair trial as it provided that unfair judges be fined and removed from their positions. The Torah first revealed by Moses (c.1304–1237 bce) also contained provisions on the prohibition of false witnesses. The first human rights document has been claimed to be the Charter of Cyrus from 539 bce because the word ‘rights’ specifically appears therein.<sup>1</sup> However, the modern concept of human rights that the state is for the people and not the other way around began to take root at the end of the eighteenth century.<sup>2</sup>

After their first appearances, the historical development of fundamental rights has taken place either through an organic and gradual process or as a result of independence or revolutionary movements. Different phases of this development can be distinguished, which involved the rights of the noble, limitation of the power of absolute monarchies, and individual and collective rights. The development in England is an example of the former where the power of monarchs were bound by law and rights as early as the adoption of the Magna Charta Libertatum in 1215.<sup>3</sup> The subsequently created Petition of Right (1628), Habeas Corpus Act (1679) and Bill of Rights (1689) are gradual fulfillment of the historic path of rights.<sup>4</sup> In the CEE region, Hungary underwent similar organic development with the adoption of the ‘Aranybulla’ in 1222, which set constitutional limits on the power of the monarch and granted rights to the Hungarian nobility.<sup>5</sup> In contrast to this type of gradual expansion, in other countries, the recognition and codification of fundamental rights were the result of cataclysmic events such as an independence movement or revolutionary war, e.g. in France or in the United States.<sup>6</sup> It must also be mentioned that while national constitutions served as the cradle of the modern conception of fundamental rights, they began to enjoy the protection of international law with the adoption of the UN Charter (1945) along with the Universal Declaration of Human Rights

1 Haas, 2014, pp. 44–45.

2 Halmai and Tóth, 2008, pp. 36–44.

3 Marinkás, 2012, pp. 75–91.

4 Haas, 2014, pp. 47–49.

5 Kovács, 1980.

6 Haas, 2014, p. 51.

(1948).<sup>7</sup> This so-called ‘normative revolution’ marked a major turning point in the development of both human rights law and international public law.<sup>8</sup> However, the universality of human rights, instead of standardising rights, would allow – and also require from – states to implement these rights according to the national, historical, cultural and religious traditions of their respective communities.<sup>9</sup> Consequently, the primary places of nurturing and protecting fundamental rights remain within the states and local communities.

Accordingly, not only individual rights in the abstract but also the institutions and control mechanisms that serve to protect them are embedded and shaped by the various histories, traditions and legal cultures of the states. In numerous countries – such as the United States of America, Australia, Japan or the Scandinavian countries in Europe – ordinary courts are empowered to conduct a ‘judicial review’ to protect rights enshrined in the constitution. This type of ‘judicial review’ was first applied by the Supreme Court of the United States of America in the famous case of *Marbury v. Madison* in 1803 as part of the system of checks and balances, whereby the judicial branch serves as a check on the legislative as well as on the executive.<sup>10</sup> In other countries – such as those in continental Europe – a separate and centralised institution – the Constitutional Court – is responsible for conducting fundamental rights adjudication.

This chapter aims to provide a comparative analysis on the historical path, major institutions and mechanisms of fundamental rights adjudication in countries of the CEE region. To this end, it first outlines the concept, function, characteristics as well as the institutions of fundamental rights adjudication along with the aspects of limitation of fundamental rights (Section II). Then, it turns to the countries of the Central European region. This chapter aspires to provide a comparative overview about the unique characteristics of the systems of each country’s fundamental rights’ adjudication and concludes with a short assessment (Section III).

#### KEYWORDS

fundamental rights, protection and limitation of fundamental rights judicial review, centralized and decentralized constitutional review, Ombudsmen-like institutions

## 1. General Section

Before World War II, only a few European states – including Austria,<sup>11</sup> which served as a model from this aspect – introduced institutional mechanisms for protecting fundamental rights even though the concept of a centralised constitutional court was invented by the Austrian Hans Kelsen after World War I and that of the ombudsman in the eighteenth century.<sup>12</sup> One exception is the Czechoslovak Constitutional Court that was established in 1920 based on the Austrian model; however, it never really heard a single case that challenged the constitutionality of a statute.<sup>13</sup>

7 Even though the Universal Declaration of Human Rights is itself not an international treaty, undoubtedly, many of its provisions today do reflect customary international law. See Kovács, 2009, p. 64 and Hannum, 1995, pp. 340–341.

8 Halmai and Tóth, 2008, p. 67.

9 As the Catholic philosopher Jacques Maritain put it, “many different kinds of music could be played on the document’s thirty strings”. See Glendon, 2001, pp. 221–222 and Cançado Trindade, 2012, pp. 15–19.

10 The decision of the Supreme Court is available: <https://supreme.justia.com/cases/federal/us/5/137/>.

11 See: [https://www.vfgh.gv.at/verfassungsgesichtshof/geschichte/history\\_overview.en.html](https://www.vfgh.gv.at/verfassungsgesichtshof/geschichte/history_overview.en.html).

12 Halmai and Tóth, 2008, pp. 195–196 and 236–239.

13 Taborsky, 1945.

The cataclysmic events during World War II led to the recognition and institutionalisation of the protection of fundamental rights by international law as well as to the establishment of various mechanisms in Western European countries that aim to safeguard these rights. Despite this general trend, countries under the Soviet military occupation and Communist Party dictatorship took a different direction. Even though they adopted written constitutions, they neither recognised the fundamental rights of human beings nor set up any real institutional mechanisms for their protections. The ultimate objective of the communist ideology and regimes was to establish egalitarian societies; however, they evolved into totalitarian states that were generally characterised by the lack of individual freedom and rights.<sup>14</sup> Consequently, fundamental rights adjudication was practically unknown in that region under the era of party dictatorship up until the collapse of the Soviet dominance at the end of the 1980s. Moreover, beyond the uncompetitive control and command economic system, the lack of individual freedom and their legal and institutional guarantees contributed to the downfall of the Soviet domination. This became obvious with the adoption of the Helsinki Accords in 1975, which opened the first ‘cracks’ for review based on certain human rights such as freedom of thoughts or speech.<sup>15</sup>

Against this background, the change of regimes at end of the 1980s and at the beginning of the 1990s represent a major milestone in reintroducing the concepts of fundamental rights in the legal systems of the states that are examined in this volume and also in establishing the modern public institutions of their protections. This development coincided with the commitment to accept the international – both universal and regional – European mechanisms of human rights protection. This commitment was also a precondition of the ultimate aspiration of this region, namely to become part of the European Union as well as of the Western economic and military community in a broader sense. Therefore, strong national institutions with broad competences were established with the ultimate objective of guarding over the achievements of the newly independent and free states. In Hungary, for instance, the newly established Constitutional Court not only became the symbol and a major guarantor of the transition period leading up to the era that built on the respect of democracy, the rule of law and fundamental rights, but it also became one of the driving forces by reviewing the constitutionality of legal norms adopted both before and after the regime change. This was illustrated by one of the earliest decisions in the history of the court, that is, the decision that ultimately abolished capital punishment.<sup>16</sup> To this end, the Constitutional Court in Hungary was given an exceptionally broad mandate by the introduction of the so-called *actio popularis*, whereby anybody, without having any interest or involvement in a specific case, was provided with the right to file a petition against any legal norm that are claimed to be contrary to the

14 See Muravchik, 2019.

15 Shaw, 2003, pp. 346–350.

16 Decision 64/1991 of the Constitutional Court of Hungary.

constitution.<sup>17</sup> This type of competence turned out to be a major vehicle in defining the limits and contents of fundamental rights as well as the role of the Constitutional Court in the government's arrangement of the country.

Therefore, the institutions that guarantee fundamental rights were established both as a result and as a driving force of the regime change in the countries that are examined here. Among such institutions are the constitutional courts, the ordinary courts as well as the institutions of ombudsmen; in addition, some other public institutions could also take up minor roles in the area of fundamental rights and contribute to their protection while fulfilling their main mission. One example of such institution could be the prosecution service in Hungary, which is part of the judicial branch in a wider sense<sup>18</sup> and therefore, according to the Hungarian Constitutional Court, is not the 'defender of the indictment' but rather a contributor to the administration of justice.<sup>19</sup> Consequently, the prosecution service is responsible for guaranteeing and promoting the procedural rights of the defendants, such as the right to a fair trial or legal assistance in the course of the investigation and the trial phase of the procedure.<sup>20</sup>

However, in the universe of the national institutions that are designed and empowered to protect fundamental rights, the institution responsible for 'constitutional review' or 'judicial review' plays a central role in fundamental rights adjudication. It serves as the most important guarantee of constitutionality and thus ensures that, among others, fundamental rights prevail in the whole legal system and permeate the social, political as well as economic-business relations in a country. The institution that conducts a constitutional review not only has the final word with regards to fundamental rights adjudication, but it also has the duty to forge a uniform practice throughout this area that other state institutions shall follow. As it was already briefly mentioned in the introductory section of this chapter, constitutional review has two basic models. The first is the decentralised (i.e. 'diffuse') system, which is based on the 'judicial review' of the United States of America and in which the 'constitutional review' and 'dispute resolution' functions are concentrated in the hand of the single judiciary and every court is entitled to perform both functions. The second is the centralised or continental model, which is based on the conception of the Austrian legal theorist Hans Kelsen, separates the two functions and concentrates them in two distinct institutions.<sup>21</sup> The states examined here – and in a broader sense, every CEE country that went through a transition period after the collapse of the Soviet domination – chose to adopt the centralised model in which a separate institution (in most cases

17 Art. 37 of the Act no. XXXII of 1989 on the Constitutional Court of Hungary.

18 Varga, Patyi and Schanda, 2015, pp. 227–230.

19 Art. 29(1) of the Fundamental Law of Hungary.

20 See, e.g., Decision 8/2013 and 33/2013 of the Constitutional Court of Hungary. Another example from Hungary was the Independent Police Complaints Board, which was established to examine and adjudicate violations of fundamental rights in relation to police operations. The Independent Police Complaints Board was established in 2008 and merged into the institution of the Commissioner for Fundamental Rights in 2020.

21 Schwartz, 1992, pp. 742–747.

a Constitutional Court) exercises the ‘constitutional review’ function that includes fundamental rights adjudication, but they are not part of the ordinary court system and do not adjudicate conventional litigations. The only exception is Estonia, where, considering the small number cases along with the influence of the Scandinavian region, a separate chamber of the Supreme Court conducts constitutional review.<sup>22</sup>

Constitutional courts have numerous competences that are closely scrutinised in the chapter on constitutional adjudication.<sup>23</sup> However, through the exercise of most competences, constitutional courts are also required to protect fundamental rights that are enshrined either in the constitution or in the human rights treaties ratified by the states. Constitutional courts that are designed to ensure the governance and the separation of powers under and according to the constitutions are also required to ensure that other public institutions comply with fundamental rights. It is even true with regards to the legislative or other acts of the European Union in the cases when a given Constitutional Court reviews them based on the national constitution.<sup>24</sup> Among the various competences, however, there is usually one, the so-called constitutional complaint procedure, which is specifically designed to adjudicate and protect fundamental rights; this type of procedure has the outright purpose to safeguard individual liberties and rights as well as to define, through its case law, the methods of their restrictions as well as the potential public interests that could serve as their just limitation. Depending on the actual competences of a given Constitutional Court, the constitutional complaint procedure can extend to legal norms – either directly or through the application by courts and institutions – that concern the petitioner’s rights and to the decisions of ordinary courts as well. Full constitutional complaint includes both types, while the normative one only recognises the constitutional complaint against legal regulations.

Even though the constitutional complaint procedure provides the primary and central place for fundamental rights adjudication, constitutional courts are not the only institutions that play a role in fundamental rights adjudication. Other public institutions are also indispensable to monitor, conciliate and channel disputes that involve dilemmas of fundamental rights to the constitutional courts, and from this perspective, they have an auxiliary role in fundamental rights adjudication. There are two such institutions: the ordinary courts or the judiciary and ombudsmen-like institutions. Ordinary courts, depending on their precise mandate, might play a dual role in protecting fundamental rights. On the one hand, in case they are required to interpret the texts of the laws in light of and according to the constitution, they must protect fundamental rights in the course of their dispute resolution or other regular operations that belong under the umbrella of the administration of justice. On the other hand, if they are empowered to turn to their respective constitutional court, they must monitor the constitutionality and the conformity with the fundamental

22 Halmai and Tóth, 2008, p. 196.

23 For a more detailed insight on the competences of constitutional courts, see Zoltán Tóth J., Constitutional Adjudication chapter of the present book.

24 Blutman, 2020.

rights of the legal norms that are applicable in a particular case. Such a competence does not only forge a bridge between the constitutional court and the ordinary court system, but it also requires judges to recognise the relevance of the constitution and the fundamental rights in given cases.

Ombudsmen-like institutions or national human rights institutions have a long history that dates back to the eighteenth century. It was first established by Charles XII of Sweden to examine complaints against the acts or inactivity of the public administration.<sup>25</sup> However, it quickly spread throughout the Scandinavian and Anglo-Saxon world, and under the mandate of the parliaments, it became an important institution in the protection against ‘maladministration’ in a broader sense that also includes the protection of fundamental rights. However, as opposed to the competences of the Constitutional Court and the judiciary, ombudsmen-like institutions do not have the power to resolve concrete cases or adjudications in a binding and definite way; instead, their main role through the flexible nature of their proceedings is exploratory or investigative, and therefore, it can influence fundamental rights through their recommendations or petitions and also by raising public awareness. Even though these national human rights institutions are not considered unavoidable in a constitutional state, they have become increasingly vital in the complex public law, public regulation as well as business and human rights relations of the past decades.<sup>26</sup> In that spirit, the Committee of Ministers of the Council of Europe in 1985 welcomed the development of the institutions of ombudsmen.<sup>27</sup> The need to introduce ombudsmen-like institutions in the states that are examined in this chapter arose during the regime change as a further check on the powers of the state and public administration. However, while constitutional courts were a product – and many times also a symbol – of the change of regime in Central European countries, ombudsmen-like institutions were generally established afterwards, in the years between 1995 and 2000. Depending on the concrete competences, one major role that these institutions can play in regard to fundamental rights adjudication is their abilities to initiate procedures before the constitutional courts. In this capacity, they serve as a crucial bridge that can channel both individual and systemic abuses of fundamental rights to the constitutional courts, whereby they can strengthen and widen fundamental rights adjudication.

Lastly, the institutions of the Council of Europe – especially the European Court of Human Rights or the Venice Commission – have also played an important role in the formation and solidification of the fundamental rights adjudication of the CEE countries. Even though they are organised according to international law, they continue to have a significant impact on domestic institutions that are responsible for fundamental rights adjudication.

25 Halmai and Tóth, 2008, pp. 236–237.

26 Varga, Patyi and Schanda, 2015, pp. 246–249.

27 Recommendation No. R (85) 13 of the Committee of Ministers to Member States on the Institution of the Ombudsman (adopted by the Committee of Ministers on 23 September 1985 at the 388th meeting of the Ministers’ Deputies).

In light of these aforementioned general observations, this chapter focuses on the breadth of constitutional complaints that enable individual persons to resort to fundamental rights adjudication. Then, it also explores the role of the judiciary in fundamental rights protection either through their own interpretative operations or in requesting procedures before the constitutional courts. The comparative analyses also place emphasis on the role of ombudsmen-like or national human rights institutions and their roles in facilitating the fundamental rights adjudication.

## 2. Specific Section

Constitutional complaint procedures are the primary place of fundamental rights adjudication; however, the types and breadths of these procedures vary across countries and jurisdiction as well as in different time periods. For example, the first Act on the Constitutional Court of Hungary only recognised one type of such complaint that is designed to offer protection against a law applied in a particular case.<sup>28</sup> Even though the so-called *actio popularis* provided anybody with the right to file a petition against any kind of law regardless of whether there was a particular case or not, the Constitutional Court did not have power to review judicial decisions that are contrary to fundamental rights requirements. The Fundamental Law adopted in 2011 increased both the types of constitutional complaints to three as well as the review power of the Constitutional Court.<sup>29</sup> As a result, three types of constitutional complaints currently offer avenues in Hungary to fundamental rights adjudication with regards to both legal regulation and judicial decisions that concern the applicant.<sup>30</sup> In these types of procedures, the Constitutional Court has a specific role to protect fundamental rights.<sup>31</sup> One of the novel and unique characteristics of the Hungarian regulation is that under exceptional circumstances, the attorney general and public institutions can also request such proceedings before the Constitutional Court. With regards to the possible sanctions, the Hungarian Constitutional Court can either annul a decision or law or prohibit its application.

The regulation of the constitutional complaint procedure is similar in the Czech Republic as the Czech constitution recognises the full complaint procedure<sup>32</sup>; moreover, it also aims to protect the principle of ‘subsidiarity’ and local government by providing them with the right to file a complaint.<sup>33</sup> The Polish constitution has a

28 Art. 48 of the Act no XXXII of 1989 on the Constitutional Court.

29 Art. 24 of the Fundamental Law of Hungary.

30 The Venice Commission is in favour of full constitutional complaint, not only because it provides for comprehensive protection of constitutional rights but also because of the subsidiary nature of the relief provided by the European Court of Human Rights and the desirability to settle human rights issues on the national level. See the Compilation on the Venice Commission on Constitutional Justice (Strasbourg, 14 April 2020 CDL-PI(2020)004).

31 Decision 8/2013 of the Constitutional Court of Hungary.

32 Art. 87(1) d) of the Czech Constitution.

33 Art. 87(1) c) of the Czech Constitution.

somewhat narrower approach as it only recognises the normative type of constitutional complaint and thus only allows the normative acts to be complained of and challenged before the Polish Constitutional Tribunal.<sup>34</sup> Similarly, the Romanian constitution only allows normative constitutional complaint as it states that the Constitutional Court has the power to “decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration”.<sup>35</sup> However, it also allows the Advocate of the People to address the unconstitutionality of the legal norm,<sup>36</sup> and the ordinary Romanian court system is entrusted with fundamental rights adjudication.

The Constitutional Court of the Slovak Republic has a broad ground to hear cases and a wide variety of sanctions to apply in case of non-conformity with the constitution. This includes, for example, the suspension of the effects or the annulment of the regulation in question. Beyond the fundamental rights recognised by the constitution, in the Slovak Republic, the constitutional complaint procedure also protects the human rights enshrined in international treaties that are ratified by the country.<sup>37</sup> The Slovak Constitutional Court can hear a case if a fundamental rights violation arises from inactivity of public institutions and order them to act.<sup>38</sup> Furthermore, the Slovakian regulation allows the Constitutional Court to award adequate financial awards to the persons whose rights have been infringed.<sup>39</sup> The Croatian regulation also introduced constitutional complaints that can be filed against a wide array of decisions including

individual decisions taken by state bodies, bodies of local and regional self-government and legal persons vested with public authority where such decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia.<sup>40</sup>

As far as the consequences are concerned, the Constitutional Court of Croatia repeals or annuls any other regulation if it finds it to be unconstitutional or unlawful.<sup>41</sup> The Slovenian constitution also acknowledges the full constitutional complaint procedure as it stipulates that the Constitutional Court decides on the “constitutional complaints stemming from the violation of human rights and fundamental freedoms by individual acts”.<sup>42</sup> As far as the legal consequences are concerned, the Slovenian Constitutional

34 Arts. 79 and 188 of the Polish Constitution as well as Art. 3 of the Constitutional Tribunal Act. Although Chapter II of the Polish constitution recognises the right to a court and fair trial, the right to remedy and right to compensation for unlawful acts of public authority.

35 Art. 146 d) of the Romanian Constitution.

36 Art. 146 d) of the Romanian Constitution.

37 Art. 125(1) of the Slovakian Constitution.

38 Art. 124(2) of the Slovakian Constitution.

39 Art. 124(2) of the Slovakian Constitution.

40 Art. 125 of the Croatian Constitution.

41 Art. 126 of the Croatian Constitution.

42 Art. 160 of the Slovenian Constitution.



Court has the competence to annul *ab initio* or abrogate such regulation or act; lastly, the Serbian Constitutional Court can also hear cases based on constitutional complaints.<sup>43</sup>

Access to courts and the right to a fair and public hearing are recognised as a fundamental right, which is part of the fair trial requirement and is necessary for an effective remedy.<sup>44</sup> A further and separate question is whether – and if so, how – ordinary courts can be involved in the interpretation and application of the constitution that also includes fundamental rights adjudication to a certain extent. As it was mentioned before, in countries where the decentralised or ‘diffuse’ model of constitutional adjudication is adopted, courts are naturally empowered to settle the regular court functions, primarily including dispute settlement as well as fundamental rights adjudication. However, in the case of the centralised or continental model, the involvement of the judiciary in fundamental rights adjudication is not as obvious and depends on the actual mandate and competences of the courts. In this system, ordinary courts can be involved in fundamental rights adjudication either directly or indirectly by referring concrete cases to and cooperating with the constitutional court, which remain to be the decisive voice of fundamental rights adjudication. The states examined here follow this latter approach.

One of the most important novelties of the Hungarian Fundamental Law was that ordinary courts are required to interpret the text of the laws primarily in accordance with their purpose and with the Fundamental Law.<sup>45</sup> Art. 28 of the Fundamental Law also adds that “[w]hen interpreting the Fundamental Law or laws, it shall be presumed that they serve moral and economic purposes which are in accordance with common sense and the public good”. In the case-law of the Hungarian Constitutional Court, Art. 28 of the Fundamental Law, on the one hand, requires ordinary courts to identify the fundamental rights aspects of the case or dispute to be settled, and on the other hand, it requires the courts to interpret the law applicable in the concrete case in light of the content of the identified fundamental right.<sup>46</sup> The failure to comply with these requirements is that the court’s decision will be contrary to the fundamental rights and thus unconstitutional.<sup>47</sup>

The Slovak constitution stipulates that in their decision-making process, judges are not only bound by the law but also by the constitution as well as by international treaties, including human rights treaties for which exercising a law is not necessary, which directly confer rights or impose duties on natural persons or legal persons and which were ratified and promulgated in the way laid down by a law shall have precedence over laws.<sup>48</sup> The Czech constitution also refers to the role of the courts in

43 Art. 29(1) of the Law on the Constitutional Court of Serbia.

44 This fundamental right is recognised by all universal and regional human rights treaties as well as Art. 8 of the Universal Declaration of Human Rights. See, e.g., Csink and Schanda, 2017, pp. 291–292.

45 Art. 28 of the Fundamental Law of Hungary.

46 Decision 3/2015 of the Hungarian Constitutional Court.

47 See, e.g., Decision 3236/2018 of the Hungarian Constitutional Court.

48 Arts. 7 and 144 of the Slovak Constitution.

the field of fundamental rights adjudication when it declares that “[c]ourts are called upon above all to provide protection of rights in the legally prescribed manner”.<sup>49</sup> The Czech constitution also declares that judges, when making their decisions, “are bound by statutes and treaties which form a part of the legal order” that also includes human right treaties.<sup>50</sup> Similarly, the Slovenian constitution succinctly states that judges “shall be bound by the Constitution and laws”.<sup>51</sup> In the same vein, the Croatian constitution also explicitly requires courts to administer justice according to the constitution and international treaties that include human rights treaties; however, in contrast to these countries, Poland, Serbia and Romania do not have similar explicit requirements in their respective constitutions, which suggest that their court systems are less involved in fundamental rights adjudication directly.

Ordinary courts, nevertheless, could be involved in fundamental rights adjudication in a more indirect way via the cooperation or so-called ‘institutionalised dialogue’ with constitutional courts, who still remain the main vehicle of fundamental rights adjudication. Judicial dialogue, in a broader sense, plays a vital role in the smooth and potentially flourishing cooperation among courts that operate in different areas of the law or even in different legal systems.<sup>52</sup> For example, the cooperation between the European Court of Justice and the national courts of the member states of the European Union, through the preliminary ruling procedure, is considered to be crucial in preserving the autonomy as well as the efficient and swift implementation of the law of the European Union.<sup>53</sup> Similarly, this institutionalised dialogue between the ordinary courts and the constitutional courts – and as a result, the binding decision and guidance of the Constitutional Court – is key in efficiently implementing the constitution, including its fundamental rights provisions that also enrich the constitutional culture in a given country. Nevertheless, this kind of dialogue is also essential for the constitutional courts to be able to recognise and consider the constitutional challenges on the ground. The Hungarian Constitutional Court expressly recognises the need for such a dialogue between the ordinary courts and the Constitutional Court.<sup>54</sup> Therefore, many of the states that are examined here allow or even require ordinary courts to request a proceeding before the Constitutional Court if they are bound to apply a legal regulation that is perceived to be contrary to the fundamental rights enshrined in the constitution.

In light of this general consideration, Hungarian judges are required to suspend the judicial proceedings and submit a petition to the Constitutional Court if they are bound

49 Art. 90 of the Czech Constitution.

50 Art. 95 of the Czech Constitution.

51 Art. 125 of the Slovenian Constitution.

52 Raisz, 2009.

53 For example, based on such a procedure, the Court of Justice of the European Union ruled in the so-called *Achmea* case, by which investor-state dispute resolution based on international agreements has an adverse effect on the autonomy of EU law and is therefore incompatible with EU law. See *Slovak Republic v. Achmea B.V.* (Case C-284/16).

54 Decision 35/2011 of the Hungarian Constitutional Court.

to apply a legal regulation that is perceived to be contrary to the Fundamental Law.<sup>55</sup> The importance of such proceedings is shown by the fact that they enjoy priority and the Hungarian constitution requires the Constitutional Court to rule on the petition of judges within no more than 90 days.<sup>56</sup> The regulation in Slovakia similarly recognises this type dialogue between the Constitutional Court and ordinary courts. The Slovak constitution stipulates that if a court assumes that a generally binding legal regulation, its part or its individual provisions which concern a pending matter contradicts the constitution or constitutional law, international treaty pursuant, it shall suspend the proceedings and submit a proposal for the commence of proceedings before the Constitutional Court of the Slovak Republic. The legal opinion of the Constitutional Court contained in the decision shall be binding for the court.<sup>57</sup> The Czech constitution has a similar requirement as it provides that “should a court come to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it shall submit the matter to the Constitutional Court”.<sup>58</sup>

The Polish constitution has a separate rule that allows any court to

refer a question of law to the Constitutional Tribunal as to the conformity of a normative act with the Constitution, ratified international agreements or statute, if the answer to such question of law will determine an issue currently before such court.<sup>59</sup>

In a similar vein, the Act on the Slovenian Constitutional Court declares that “when in the process of deciding a court deems a law or part thereof which it should apply to be unconstitutional, it stays the proceedings and by a request initiates proceedings for the review of its constitutionality”. If the Supreme Court of Slovenia deems a law that it should apply unconstitutional, it stays proceedings in all cases in which it should apply such law.<sup>60</sup> The regulation in Croatia enumerates the Supreme Court or any other court of justice among the institutions that have the power to request the proceedings before the Constitutional Court provided that “the issue of constitutionality and legality has arisen in proceedings conducted before that particular court of justice”.<sup>61</sup> Even though the Serbian law does not provide courts with a right to initiate a procedure before the Constitutional Court, the procedure to assess constitutionality and legality might be initiated by the Constitutional Court itself.<sup>62</sup>

55 Art. 24(2) b) of the Fundamental Law as well as Art. 25 of the Act on the Constitutional Court of Hungary.

56 Art. 24(1) b) of the Fundamental Law of Hungary.

57 Art. 144 of the Constitution of Slovakia.

58 Art. 95(2) of the Czech Constitution.

59 Art. 193 of the Polish Constitution.

60 Art. 23(1)-(3) of the Act on the Constitutional Court of Slovenia.

61 Art. 35 of the Act on the Constitutional Court of the Republic of Croatia.

62 Art. 168 of the Serbian Constitution.

These comparative analyses show that nearly all of the states examined here allow their courts to suspend their proceedings and turn to their respective constitutional courts in case they need to apply a law of questionable constitutionality. Furthermore, the Hungarian, Slovak and Polish regulations expressly allow ordinary courts to suspend their judicial proceedings and initiate a constitutional review procedure if they are bound to apply a legal regulation that they perceive to be contrary to an international treaty, including a human rights treaty.<sup>63</sup> Consequently, these provisions also require courts to consider and balance aspects of fundamental rights in their own proceedings.

Even if these countries all introduced centralised systems in which the constitutional review, along with the fundamental rights adjudication, were concentrated in the hands of constitutional courts, ordinary courts would still remain decisive players in this area. On the one hand, their function is auxiliary as they are capable of channelling questions on fundamental rights to the Constitutional Court. On the other hand, they necessarily become involved in fundamental rights adjudication since both the constitutional complaint and the judicial initiative competences of constitutional courts indirectly foster and require a judicial dispute resolution that considers fundamental rights.

The role of ombudsmen-like institutions in fundamental rights adjudications is critical, and they might perform two main different tasks. On the one hand, they survey and analyse the situation of fundamental rights on their own while paying special attention to the most vulnerable and marginalised people in society. On the other hand, they often serve as a bridge to the Constitutional Court if they are provided with the competence to request a proceeding if they find a systemic violation of fundamental rights. For example, the Commissioner for Fundamental Rights in Hungary was provided with a wide competence to request petitions. Accordingly, the Commissioner for Fundamental Rights can initiate an ex-post review of conformity with the Fundamental Law,<sup>64</sup> examination of conflicts with international treaties<sup>65</sup> and the abstract interpretation of Fundamental Law.<sup>66</sup> In numerous cases,<sup>67</sup> the Constitutional Court of Hungary ruled that a specific legal provision violates fundamental rights based on the request of the Commissioner for Fundamental Rights; for example, one notable case was the restriction of the freedom of debates about public affairs “on the basis of acknowledgeable public interest” that the Constitutional Court declared unconstitutional and annulled.<sup>68</sup>

63 Art. 24(2) f) of the Fundamental Law of Hungary and Art. 32 of the Act on the Constitutional Court of Hungary, Art. 144(2) of the Constitution of Slovakia and Art. 193 of the Polish Constitution.

64 Art. 24(2) of the Act on the Constitutional Court of Hungary.

65 Art. 32(2) of the Act on the Constitutional Court of Hungary.

66 Art. 38(1) of the Act on the Constitutional Court of Hungary.

67 According to the statistics of the Hungarian Constitutional Court, the Court declared a regulation unconstitutional in nearly 20 cases over the past decade. Available here: <https://alkotmanybirosag.hu/ugykereso>.

68 Decision 7/2014 of the Constitutional Court of Hungary.

The Slovak constitution established the institution of the Public Defender of Rights as an independent institution that participates in the protection of the fundamental rights and freedoms of natural persons and legal persons in the proceedings, decision making or inactivity of public administration bodies.<sup>69</sup> Even though the Public Defender of Rights has a major role to play by conducting their own procedures, they cannot request a petition to the Constitutional Court; this right is reserved to at least one-fifth of all members of parliament, the President of the Slovak Republic, the Government of the Slovak Republic, a court and the Attorney General.<sup>70</sup> The introduction of the institution of the Commissioner for Citizens' Rights was one of the emblematic results of the regime change in Poland as it was established in 1987.<sup>71</sup> According to the Polish constitution, "the Commissioner for Citizens' Rights shall safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts".<sup>72</sup> Their independence is guaranteed by the Constitution of Poland.<sup>73</sup> The Polish Commissioner for Citizens' Rights has the power not only to initiate investigations on their own but also to request the procedure of the Constitutional Tribunal.<sup>74</sup>

The national human rights institution is also recognised in the Czech Republic even though the Czech constitution does not mention it. It was founded well after the change of regime in 1999, and a separate act regulates the institution of the Public Protector of Rights.<sup>75</sup> The Act on the Constitutional Court of the Czech Republic provides the Public Protector of Rights with the power to file a request of proceeding before the Constitutional Court.<sup>76</sup> The Romanian constitution regulates the institution of the Advocate of the People to defend the natural persons' rights and freedoms.<sup>77</sup> The Romanian constitution empowers – among other public institutions – the Advocate of the People to request a petition with regards to the constitutionality of laws.<sup>78</sup>

The Ombudsman for Human Rights and Fundamental Freedoms was introduced in the constitutional order of Slovenia in 1991, when the country separated from Yugoslavia and became independent. The Slovenian constitution requires the establishment of such institution, and a separate legislative act regulates its competences in detail.<sup>79</sup> The Act on the Constitutional Court empowers the Ombudsman for Human Rights and Fundamental Freedoms to request a proceeding before the Constitutional Court of Slovenia in order to review the constitutionality or legality of regulations or general acts issued for the exercise of public authority.<sup>80</sup> In addition, the Ombudsman may, under

69 Art. 151a of the Slovak Constitution.

70 Art. 130 of the Polish Constitution.

71 The Act of 15 July 1987 on the Commissioner for Human Rights.

72 Art. 208 of the Polish Constitution.

73 Arts. 210 and 211 of the Polish Constitution.

74 Art. 191 of the Polish Constitution.

75 Act 349/1999 Coll. of 8th December 1999 on the Public Defender of Rights.

76 Art. 64(2) f) of the Act on the Constitutional Court of the Czech Republic.

77 Art. 58 of the Constitution of Romania.

78 Art. 146 of the Constitution of Romania.

79 Art. 159 of the Constitution of Slovenia.

80 Art. 23a(1) of the Act on the Constitutional Court of Slovenia.

the conditions determined by this, lodge a constitutional complaint in connection with an individual case with which they are dealing.<sup>81</sup> The Croatian constitution provides that the “Ombudsman and other commissioners of the Croatian Parliament responsible for the promotion and protection of human rights and fundamental freedoms shall enjoy the same immunity as Members of the Croatian Parliament”.<sup>82</sup> The Act on the Constitutional Court of the Republic of Croatia provided the People’s Ombudsman with the right to request a proceeding before the Constitutional Court.<sup>83</sup> The Protector of Citizens is an independent and autonomous government body responsible for the protection and promotion of rights and liberties in Serbia, but it has no general recourse to the Constitutional Court. Consequently, nearly all ombudsmen-like institutions in the states that are examined here, with exception of Slovakia and Serbia, are provided with the power to request a petition before the Constitutional Court.

As a result of this comparative analysis, it can be established that the primary channel of fundamental rights adjudication of the states examined here is provided by the constitutional complaint procedure. Most countries recognise – and the Venice Commission favours – the full constitutional complaint competence that extends to both legal norms and judicial decisions. The most ambitious constitutional complaint competence schemes – such as that found in Slovakia – allow constitutional courts to conduct their review based on international human rights treaties. However, beyond the centralised constitutional court system, ordinary courts and ombudsmen-like institutions also play a vital role in fundamental rights adjudication. Usually, ordinary courts do not only have the power to request a proceeding before constitutional courts as part of a unique judicial dialogue, but they are pushed to consider the fundamental rights aspects of the cases that they adjudicate due to the availability of constitutional complaints. Ombudsman-like institutions have a vital role in identifying systemic violations of human rights, and in most of the states examined here, they also have the power to channel these concerns to constitutional courts; consequently, fundamental rights adjudication takes place in the triangle of the Constitutional Court, the judiciary or ordinary court system and ombudsman-like institutions. The key to its efficiency is their harmonious cooperation.

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## National Minorities – Constitutional Status, Rights and Protection

Tamás KORHECZ

### ABSTRACT

National minorities and their status, rights and protection are among most sensible and disputed political issues all over Central and Eastern Europe (CEE). All eight analysed nation states constitutionally recognise national minorities and at least some group-specific minority rights. The list of constitutional group-specific minority rights varies, and it is longest in Serbia, Slovenia and Romania; however, national legislators in all states have wide discretion to regulate these constitutional rights and to determine their scope and content with laws. The constitutionally protected minorities are named only in Slovenia and Croatia, and constitutions only exceptionally make difference between minorities based on territoriality or numerical concentration. The jurisprudence of constitutional courts generally reveals no particular judicial activism in this area – with the exception of the Constitutional Court of Slovenia – and courts have usually failed to conceptualise minority rights and made no proper equilibrium between minority rights and constitutional provisions protecting and promoting the nation state and dominant position of the titular nation. Furthermore, in some states, the status of minorities is tacitly still more a state security issue and less a constitutional law question.

### KEYWORDS

National minorities, titular-dominant nations, constitution, group-specific minority rights, nation state building, equality.

### 1. Introduction

This chapter has the ambition to describe, compare and analyse the current constitutional framework for the protection of national minorities in Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia and Slovenia. Beyond the analyses of the relevant constitutional provisions, the chapter also includes some reflections regarding the protection and practice of constitutional, group-specific minority rights. Before delving into these issues, it might be useful to address the historical and political roots of the minority issue in these states, such as the ethnic composition of these areas.

In the twentieth century, the eight analysed states underwent turbulent, dynamic processes of state formation, unification and state partition, losing and gaining

sovereignty, territories and population, and expulsions and exchanges of residents with other states. What seems permanent in the region is the centrality of the minority issue as well as the variety of state policies and responses for managing the status of minorities in CEE countries. Many scholars identify the heart of the problem to be the idea of the nation state ‘one nation (people) one state’, where the borders of the state and nation overlap, meaning that the population of the state is composed of inhabitants belonging to one nation and sharing the same language, culture and traditions. Such a fiction or ideal of the nation state simply does not correspond to the physical reality, meaning that nation states are usually inhabited by diverse ethnic groups that use different languages and share different cultures and traditions.<sup>1</sup> From the late nineteenth century and onwards, CEE states have pushed forward various drastic and soft nation-state building policies – accompanied with a corresponding legislative framework – to achieve homogeneity of the population, to ensure that the titular majority nation gradually becomes the state-bearing nation with a dominant influence on state institutions. After World War II, CEE countries became part of the communist area; however, even under the rule of the international and supra-national communist ideology, explicit or implicit nation state-building took place in these countries.<sup>2</sup> Furthermore, after the collapse of the Communist Bloc, in post-communist state building, during the period of EU integration, the accommodation of ethno-national diversity was mainly overshadowed by the importance of political processes revolving around the ethnicity of the majority, state-bearing community.<sup>3</sup> In parallel with nation-state building policies insuring the domination of the state-bearing majorities, states were also developing legislative frameworks protecting ethnic diversity and guaranteeing group-specific rights to national minorities or persons belonging to these minorities to protect their distinct language and identity and ensure their effective participation and representation in state institutions. All analysed states, or their predecessors, were parts of the international system of minority protection under the auspices of the League of Nations<sup>4</sup>; consequently, they created their domestic legal frameworks for the protection of national minorities and ethnic diversity. Most recently, after the collapse of the Socialist Bloc, in the course of EU integration, these states ratified international minority treaties framed within the Council of Europe.<sup>5</sup> The current legal framework for the protection of national minorities in these states, developed in the last hundred years, shows some common features but also noteworthy differences between states.

The minority issue and its management in nation states have two, often competing dimensions: human rights (equality) and security. The human rights approach is based on the concept of full and effective equality of all inhabitants of states, irrespective

1 Kymlicka and Strehle, 1999, p. 73; Pan, Pfeil and Videsott, 2017, p. 3.

2 Agarín and Cordell, 2016, p. 35.

3 Agarín and Cordell, 2016, pp. 57 and 59.

4 Macartney, 1934, pp. 212–423.

5 The European Charter for Regional and Minority Languages (1992) and The Framework Convention for the Protection of National Minorities (1995).

of the native language, culture and traditions (ethnicity). Such an approach requires the protection of national minorities, guarantees of various group-specific minority rights, differentiation and sometimes even affirmative measures ensuring the equality of the majority and minorities. Numerically strong, concentrated minorities with developed national identities usually respond to nation-state building policies with ethnic homogenisation as well as claims for self-determination, territorial autonomy and ethnic-based power-sharing, and such claims are often considered a threat to the security of states.

Although the turbulent conflicts and coercive nation-state building policies in the analysed states altered the ethnic landscape substantially during the twentieth century,<sup>6</sup> national minorities still inhabit the analysed states in significant numbers. According to 2011 censuses, in the analysed states, 3–20% of the total population belongs to various national minorities, demonstrating that national diversity is not merely a relic of history but a living reality in the region.<sup>7</sup>

State	Titular ethnic group and its proportion in the total population	Most numerous minorities with their overall number	Tendency concerning the number of the persons belonging to national minorities increasing/decreasing
Croatia	Croats – 90.4%	Serbs (186,633), Bosniaks (31,479), Italians (17,807), others and no indication (84,962)	Decreasing
Czech Republic	Czechs – 95%	Slovaks (147,152), Ukrainians/Ruthenians (53,992), Poles (39,096), others (209,404)	Decreasing
Hungary	Hungarians – 85.6	Roma (315,583) Germans (185,696) Romanians (35,641), no indication (664,401)	Increasing
Poland	Poles – 94.8%	Kashubians (232,547) Germans (147,814), Ukrainians (61,532). Others and no indication 591,334)	Increasing

6 The most drastic change to the ethnic map of CEE countries occurred with the Holocaust of Jews and the expulsion of millions of ethnic Germans from Czechoslovakia and Poland, where they had lived for centuries, after WWII. Moreover, hundreds of thousands of Germans were forced to leave Hungary, Romania, Serbia, Croatia and Slovenia (former Yugoslavia). The policy of 'ethnic cleansing' during the armed conflicts after the breakup of the former Yugoslavia also made drastic changes to the ethnic map of the involved states.

7 In discussing national diversity and protection of minorities in this section, we focus exclusively on traditional national minorities, leaving aside the twentieth- and twenty-first-century immigrations.

State	Titular ethnic group and its proportion in the total population	Most numerous minorities with their overall number	Tendency concerning the number of the persons belonging to national minorities increasing/decreasing
Romania	Romanians – 83.3%	Hungarians (1,229,159), Roma (621,573), Ukrainians (50,920), others and no indication (1,257,351)	Decreasing
Serbia	Serbs – 83.3%	Hungarians (253,899), Bosniaks/Muslims (167,579), Roma (147,604), others (320,450)	Decreasing
Slovakia	Slovaks – 80.7%	Hungarians (458,467), Roma (105,738), Ruthenians (40,912) others and no indication (393,216)	Decreasing
Slovenia	Slovenians – 83.1%	Hungarians (8,328), Roma (6,009) Italians (3,388), others and no indication (82,746)	Increasing

**Table 1.** Ethnic national diversity according to the year 2011 data<sup>8</sup>

## 2. Constitutional status, rights and protection of national minorities

The status, protection and rights of national minorities in constitutions shall be analysed in this section with a comparative law lens. In the following sub-sections, relevant constitutional provisions will be elaborated on, compared and analysed on various grounds. In the first subsection, national constitutions will be analysed to determine whether constitutions explicitly recognise the existence of national minorities and whether national minorities – or some of them – are named concretely in the text of the constitution, what their status in the state and their position compared to the titular nation/people are and what terminology is used for them. In the second subsection, the provisions on group-specific minority rights will be compared and analysed applying the following criteria: the number of provisions on these rights, the list of concrete rights protected, the direct applicability of group-specific minority rights and the freedom of legislators to prescribe the content of these rights, and equal/universal group-specific rights for all national minorities or rights related to specific territory and numerical strength of the minority.

<sup>8</sup> Pan, Pfeil and Videsott, 2017, pp. 97–194.

### ***2.1. Constitutional status and identification of national minorities, terminology and their relation with the titular nation***

All constitutions under scrutiny in this chapter explicitly recognise the existence of national minorities; however, the terminology used for these groups varies. In three constitutions (Croatian, Romanian and Serbian), the term ‘national minority’ is utilised, while in the constitutions of the Czech Republic and Poland, the term used is ‘national and ethnic minority’. The constitution of Slovakia uses the term ‘national minority and ethnic group’, while the Hungarian Fundamental Law uses the term ‘nationality’. Finally, the Slovenian constitution uses the term ‘autochthonous national community’. Only the constitutions of Croatia and Slovenia enumerate concrete protected national minorities. The preamble of the constitution of Croatia enumerates the following national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs and Albanians.<sup>9</sup> The Constitution of Slovenia specifies Hungarians, Italians and Roma – albeit with a different status.

Concerning the determination of the status of national minorities in relation to the state, constitutions differ considerably. The constitutions of Croatia and Hungary stipulate that the state incorporates – and also ‘belongs’ to – persons of national minorities<sup>10</sup> or to national minorities as a group.<sup>11</sup>

The constitutional status of national minorities is also indirectly determined with the constitutional status of the titular nation, such as with provisions serving nation state building. Although all analysed states can be categorised as nation states, the centrality and special position of the titular, state-bearing ethnic group/nation/people is not equally emphasised and stipulated in constitutional provisions. In this respect, the constitution of the Czech Republic is unique, lacking provisions openly declaring the status and dominance of the titular nation in the state or serving the nation-state building policies. The preamble the Czech constitution stipulates that the constitution is enacted by the citizens of the Czech Republic; however, a kind of exception is present in the Charter of Basic Rights and Freedoms,<sup>12</sup> of which the preamble

9 It is noteworthy that the current list of national minorities (22) was introduced with amendments in 2007; until that time, only the first 10 groups had been enlisted with the adjective ‘autochthonous’.

10 The preamble of the Croatian constitution stipulates that “...the Republic of Croatia is established as the national state of the Croat people and is also the state of members of national minorities: Serbs, Czechs, Slovaks, Italians, Hungarians, Jews, Germans, Austrians, Ukrainians, Ruthenians, Bosniaks, Slovenians, Montenegrins, Macedonians, Russians, Bulgarians, Poles, Roma, Romanians, Turks, Vlachs and Albanians”.

11 The National Avowal/preamble of the Basic Law of Hungary stipulates that “we consider the nationalities and ethnic groups living in Hungary to be part of the political community and constituent parts of the State...”.

12 The Charter of Basic Rights and Freedoms is a separate act; although it is part of the constitution, according to Arts. 3 and 112, it is part of the constitutional order of the Czech Republic. The charter was enacted in 1991 during the period of existence of Czechoslovakia.

stipulates that the charter is enacted “based on the Czech and Slovak Peoples right for self-determination...” The constitution of the Czech Republic has no provision on the official language nor on the determination of the state to support Czechs outside its borders. In all seven remaining constitutions, the specific position of the titular nation and its relation with the state and constitution is declared and emphasised in various ways. In the constitutions of Croatia, Poland and Slovakia, this was done in the preambles<sup>13</sup>; in the constitution of Romania in the legal-normative parts<sup>14</sup>; and in the constitutions of Hungary, Serbia and Slovenia, it was done in both the preambles and in the legal-normative parts.<sup>15</sup>

Beyond the above listed provisions related to the specific position of the titular nation in the state and its role in the enactment of the constitution, nation-state building provisions are also those stipulating the obligation of the state to support the members of the titular nation living outside its borders, and those guaranteeing the dominance and official use of the language of the titular nation. Such provisions are present in all analysed constitutions except in the case of the Czech Republic. The duty of the state to take care of and support co-nationals outside the borders is stipulated in all seven constitutions with some variations<sup>16</sup>; however, the Fundamental Law

13 The preamble of the Constitution of Croatia stipulates that “the Republic of Croatia is established as the national state of the Croat people”; the preamble of the Constitution of Poland stipulates that the constitution is enacted by “... the Polish Nation – all citizens of the Republic”; finally, the preamble of the constitution of Slovakia stipulates that the constitution is enacted by “...the Slovak nation...”.

14 The Constitution of Romania, in various provisions, emphasises the position and status of the Romanian people and the nation-state character of the state. For example, “Romania is a national state...in spirit of democratic traditions of the Romanian people...” (Art. 1); “national sovereignty is vested to the Romanian People” (Art. 2); and “the bases of the Romanian state is the unity of the Romanian People” (Art. 4).

15 The preamble/National Avowal is declared by the “members of the Hungarian nation”, while Fundamentals, Art. D stipulates the “the unity of the undividable Hungarian nation”, and Art. IX prohibits expressions directed towards the violation of the “dignity of the Hungarian nation...”. The preamble of the Serbian constitution declares that the constitution is enacted “considering the state traditions of the Serbian People...”, while Art. 1 defines that the “Republic of Serbia is a state of the Serbian people...” The preamble of the Constitution of Slovenia stipulates that the constitution is enacted “from the eternal right of the Slovenian people for self-determination... and centuries long straggle for liberation of Slovenes...”, and Art. 3 stipulates that “...Slovenia is based on the eternal and non-alienable right for self-determination of the Slovenian people.”

16 The Constitution of Croatia stipulates in Art. 10 that Croatia “guarantees care and protection for persons of Croat nationality living in foreign countries”. The Constitution of Poland stipulates that Poland helps “the Poles living abroad in maintaining their links with the national cultural heritage”. The Constitution of Romania stipulates that “the state supports the maintaining of contacts of the country with Romanians outside the borders, and supports the preservation, development and declaration of their ethnical, cultural, linguistic and religious identity...” The Constitution of Slovakia in Art. 7A stipulates that “Slovakia supports the national and cultural identity of Slovaks outside its borders...” Art. 5 of the Constitution of Slovenia stipulates that “Slovenes without Slovene citizenship can enjoy special rights and privileges in Slovenia” and that “it (Slovenia) shall maintain concern for the autochthonous Slovene national minorities in neighbouring countries and for Slovene emigrants and workers abroad and shall foster their contacts with the homeland”.

of Hungary stipulates most extensively the duties of Hungary towards Hungarians outside of Hungary.<sup>17</sup> Concerning the constitutional status of the titular national language, provisions differ. While in the constitutions of Hungary, Poland, Romania and Slovakia, the official language status of the dominant language is exclusive,<sup>18</sup> in the constitutions of Croatia, Serbia and Slovenia, the official status of national minority languages is also guaranteed – or at least permitted – to some extent.<sup>19</sup>

## ***2.2. Comparison and analyses of the provisions on group-specific minority rights***

In this section, we deliberately use the term ‘group-specific minority right’, although one may find different terms for these rights in the literature, such as ‘additional rights of minorities’, ‘group rights’, ‘collective rights’, ‘special rights of minorities, or persons belonging to national minorities’. These rights are usually considered as cultural or language rights; however, they are deeply linked to power-sharing between the majority and minorities,<sup>20</sup> including access to economic resources, public services, public employment and political powers.<sup>21</sup>

All analysed constitutions contain provisions recognising and guaranteeing group-specific minority rights aimed to ensure full and effective equality between individuals belonging to the titular nation and those belonging to a national minority, but they also constitute a redistribution of power between state and national

17 The Fundamental Law of Hungary, in the preamble/National Avowal, stipulates that “we promise to preserve the intellectual and spiritual unity of our nation, torn apart by the storms of the past century”, while in the Fundamentals, Art. D, it stipulates that “bearing in mind that there is one single Hungarian nation which belongs together, Hungary shall assume responsibility for the fate of Hungarians living outside its borders and shall foster the survival and development of their communities; it shall support their endeavors to preserve their Hungarian identity, the assertion of their individual and collective rights, the establishment of their community self-governments, and their prosperity in their native lands, and shall promote their cooperation with each other and Hungary”.

18 Hungary’s Fundamental Law (Fundamentals, Art. H), Constitution of Poland (Art. 27), Constitution of Romania (Art. 13) and Constitution of Slovakia (Art. 6) all stipulate that the Hungarian, Polish, Romanian and Slovak language, respectively are the official language of the state, without referring directly to a possibility that any other language could have an official status on the territory of the state. However, the cited Art. 27 of the Constitution of the Republic of Poland states that “Polish shall be the official language in the Republic of Poland. This provision shall not infringe upon national minority rights resulting from ratified international agreements”. This provision indirectly opens the door for the official status of a minority language.

19 Art. 12. of the Constitution of Croatia stipulates that the Croat language is the official language in Croatia, but on some territorial units, other languages can be official as well in accordance with the law. Art. 10 of the Constitution of Serbia stipulates that the Serb language is the official language of Serbia, and the use of other languages can be prescribed by law based on the constitution. Furthermore, Art. 79 of the constitution explicitly guarantees the possibility that administrative and court procedures can be conducted on the languages of national minorities. The Constitution of Slovenia in Art. 11 explicitly guarantees that the Hungarian and Italian languages are official languages (in addition to the Slovenian language) in communities where these minorities reside.

20 Pan, Pfeil and Videsott, 2017.

21 Choudhry, 2012, p. 999.

minorities.<sup>22</sup> The number of provisions guaranteeing group-specific rights – such as the lists of these rights – differ substantially from country to country. The number of constitutional provisions guaranteeing group-specific minority rights is the largest in the case of the constitution of Serbia, but the constitutions of Slovenia and Romania also guarantee group-specific right relatively extensively. In the case of Serbia, 37 articles stipulate something on minority rights, while 12 articles with dozens of provisions explicitly stipulate various group-specific minority rights.<sup>23</sup> The constitution of Slovenia<sup>24</sup> has seven, while the constitution of Romania has five such articles.<sup>25</sup> The remaining five constitutions have a lesser number of articles containing some group-specific minority rights.<sup>26</sup> Regardless of the number of provisions on group-specific minority rights, it is more important to compare and analyse the specific content of these constitutional provisions. To make this comparison, we group these rights into the following sub-groups: in the first, I sorted individual group-specific rights related to the preservation of specific identity; in the second, rights related to the minority self-governance; in the third, rights guaranteeing special representation in public bodies; while in the fourth category, I sorted all other group-specific minority rights.

Group-specific minority rights guaranteeing the preservation of specific identity are stipulated in all analysed constitutions, albeit with remarkable differences. The general individual rights to freely declare one's own national affiliation and to express and preserve the specific identity, culture and traditions are stipulated by all constitutions with different wording. Six out of eight constitutions stipulate the right to school education in the national minority language,<sup>27</sup> and six out of eight contains the right to establish minority associations or institutions.<sup>28</sup> The most extensive and detailed list of group-specific rights related to the preservation of identity is stipulated in the constitution of Serbia, which includes the right to maintain transborder relations with co-nationals, to use personal names in the native language, to use one's own national symbols in public, to display street names and topographic signs in minority language and to conduct court and administrative procedures in the minority language. Only a slightly shorter list of rights is stipulated in the constitution of Slovenia.<sup>29</sup>

Concerning the group-specific minority right to elect-establish minority, self-governance (autonomy) bodies, only three constitutions contain the group-specific

22 Pan, Pfeil and Videsott, 2017, p. 7.

23 Korhec, 2021, pp. 28–30.

24 Arts. 5, 11, 61, 62, 64, 65 and 80.

25 Arts. 6, 32, 62, 120 and 128. See Varga, 2019, p. 91.

26 Croatia (Arts. 3, 15 and 43), Czech Republic (Arts. 3, 24 and 25), Hungary (Art. XIX), Poland (Arts. 27 and 35) and Slovakia (Arts. 12, 33 and 34).

27 The constitution of Croatia and Poland contains no such provisions.

28 The constitutions of Hungary and Romania contain no such provisions.

29 The right to use personal names in a minority language is not specifically stipulated in the Constitution of Slovenia.



collective right to establish minority self-governments: the constitutions of Hungary, Serbia and Slovenia.<sup>30</sup>

Most of the analysed constitutions contain some provisions on the right of national minority to special representation in state authorities. Five constitutions, in one way or another, stipulate that national minorities must be represented in national parliaments. The constitution of Slovenia guarantees seats in parliament for the Hungarian and Italian national minorities, together with veto rights related to the legislative acts regulating their group-specific rights.<sup>31</sup> The constitution of Romania guarantees one seat in parliament for all national minorities if their organisations failed to acquire seats under general electoral conditions.<sup>32</sup> The constitution of Croatia refers that national minorities may elect their representatives to parliament in a manner stipulated by the law.<sup>33</sup> The constitution of Serbia stipulates that the representation of national minorities in parliament is guaranteed,<sup>34</sup> while the constitution of Hungary stipulates that the participation of nationalities in the work of the parliament shall be regulated by cardinal law.<sup>35</sup> The rights for special representation in elected assemblies of local territorial units are stipulated only in the constitutions of Serbia and Slovenia.<sup>36</sup>

Beyond the representation and participation of national minorities in elected state bodies, only the constitution of Serbia contains guarantees regarding the adequate employment of persons belonging to national minorities in state and local assemblies.<sup>37</sup>

Some of the analysed constitutions contain provisions guaranteeing fewer common rights, which do not fall into any of the previously analysed categories. The constitution of Serbia stipulates affirmative measures (positive discrimination) and prohibits measures resulting in the change of the national composition of the population in areas inhabited by national minorities.<sup>38</sup>

At the end of our analyses of group-specific minority rights in the eight analysed constitutions, we discuss some notes on the regulation of these rights by the legislator

30 The Constitution of Hungary stipulates that “nationalities living in Hungary shall have the right to establish local and national self-governments” (XXIX.2). The Constitution of Serbia stipulates that national minorities “may elect their national councils in order to exercise the right to self-governance in the field of culture, education, information and official use of their language and script” (75.3). The Constitution of Slovenia stipulates that national minorities “may establish their own self-governing communities in the geographic areas where they live” (64.2).

31 Constitution, Art. 64(3) and (5).

32 Constitution of Romania, Art. 62(2).

33 Constitution of Croatia, Art. 15(2).

34 Constitution, Art. 100(2).

35 Fundamental Law, Art. 2(2).

36 Constitution of Serbia, Art. 180 (4); Constitution of Slovenia, Art. 64(3).

37 Constitution, Art. 77(2) stipulates that “when taking up employment in state bodies, public services, bodies of autonomous province and local self-government units, the ethnic structure of population and appropriate representation of members of national minorities shall be taken into consideration”.

38 Constitution of Serbia, Arts. 21(1), 76(3) and 78(3).

regarding the issues of territoriality, such as on the provisions restricting group-specific minority rights.

All analysed constitutions empower the legislator to regulate the specific content and the implementation of enumerated and guaranteed group-specific minority rights. This means that these constitutional rights are, as a rule, not directly applicable; their content should be regulated by legislative acts. In other words, legislators are usually only obliged to regulate these rights but not in a specific manner; thus, they enjoy wide freedom. However, some of the constitutions protect the basic content of human and minority rights, which cannot be subject to limitations.<sup>39</sup> Another commonality among most of the analysed constitutions is that they offer the same scope of rights to members of all national minorities, making no differentiation between minorities based on their size, territorial concentration and distribution etc. However, it is not excluded that the legislator, when regulating the implementation of these rights, can still differentiate between groups. Exceptions are provided in the constitutions of Slovenia and, to a lesser extent, in the constitution of Serbia. The Slovenian constitution reserves most group-specific minority rights to the Hungarian and Italian autochthonous national communities, with references to the territory where they reside. The constitution of Serbia makes no differentiation between national minorities, nor does it list them, but some of the group-specific rights are guaranteed only on territories populated in large numbers by the particular minority (official language use, bilingual public inscriptions); furthermore, autonomous provinces are entitled to prescribe additional rights to the members of national minorities.<sup>40</sup> Finally, it is noteworthy that two constitutions contain provisions specifically restricting the application of minority rights. The constitution of Slovakia stipulates that “the exercise of rights by citizens of a national minority guaranteed by this Constitution may not threaten the sovereignty and territorial integrity of the Slovak Republic or discriminate against other citizens”,<sup>41</sup> while the constitution of Romania stipulates that “the protective measures taken by the state to preserve, develop, and express the identity of the members of the national minorities shall be in accordance with the principles of equality and nondiscrimination in relation to the other Romanian citizens”.<sup>42</sup>

### 3. Implementation and practice

The ‘law in books’ does not always coincide with the ‘law in practice’; therefore, the analyses of constitutional provisions should be complemented with some basic knowledge on the protection, implementation and practical application of constitutionally protected, group-specific minority rights. Constitutional guarantees of basic rights remain

39 Constitution of Serbia, Art. 20(3).

40 Constitution of Serbia, Art. 79(2).

41 Constitution of Slovakia, Art. 34(3).

42 Constitution of Romania, Art. 6(2).

nothing but empty declarations if they are not protected and enforced by constitutional and regular courts and if these rights are not implemented in legislative acts and applied and financed by the administration. In this section, first, we make several assessments on the judicial interpretation and protection of group-specific minority rights by constitutional courts; then, we present some information on legal practice, primarily with reference to the monitoring mechanisms of the Council of Europe conventions.

### ***3.1. Judicial interpretation and protection of group-specific minority rights***

Constitutional courts have a primary role in the interpretation and protection of constitutional rights, including group-specific minority rights. Evaluating the accomplishments of CEE constitutional courts related to the protection of minority rights, the well-known Polish scholar Wojciech Sadurski concluded that constitutional courts in CEE states have been neither intellectually equipped nor morally and politically prepared to interpret minority rights in an expansive, generous manner and have not played a significant role in shaping the ‘toleration regimes’.<sup>43</sup> The relevant literature related to the case law of constitutional courts in the analysed eight states concerning group-specific rights of national minorities is rather nuanced compared to Sadurski’s conclusions. The Slovenian Constitutional Court often expansively interpreted provisions of the constitution to uphold and validate challenged legislative and other provisions implementing and concretising constitutional minority rights, protecting the rights of Hungarian and Italian autochthonous national communities. In one of those cases, the Constitutional Court of Slovenia upheld the constitutionality of the challenged provision of the law allowing the usage of national minority symbols, which might be identical to the symbols of a foreign state.<sup>44</sup> In another remarkable constitutional dispute, the Constitutional Court upheld the constitutionality of legislative provisions, making it possible for voters belonging to the Hungarian and to the Italian autochthonous national communities to cast two votes/ballots on parliamentary elections – one as all other citizens (general voting right) and the other as members of the autochthonous national community, to elect minority representatives to parliament (special voting right).<sup>45</sup> Furthermore, the Constitutional Court of Slovenia, with

43 Sadurski, 2014, pp. 289 and 328.

44 The court stated that the constitutional phrase ‘national symbols’ means symbols of the Italian and Hungarian nation “to which Italian and Hungarian communities belong” and adds that national symbols of the Italian and Hungarian nation are “well known and cannot be matter of choice”. In the absence of a clearly worded constitutional restriction, these communities can use their symbols irrespective of whether they are identical to the symbols of the Italian and Hungarian states (Decision 691 of the Constitutional Court, Official Gazette of RS, No. 14/1999, p. 1322).

45 The Constitutional Court admitted that such regulations make exceptions from the principle of equal voting right, but these exceptions are demanded by the constitution itself, which guarantees direct special representation and does not limit the general voting rights of minorities as citizens. If the legislator forced the members of ethnic community to choose between the “realization of their general or special voting right (between the vote on the minority deputy or other deputies), one of the two constitutionally guaranteed right would be taken from” (Decision 844 of the Constitutional Court, Official Gazette of RS 20/1998, p. 1312).

similar reasoning, rejected the initiative challenging Art. 53 of the Statute of Koper municipality that guaranteed a seat of deputy mayor to the members of the Italian minority if the elected major was non-Italian.<sup>46</sup> The constitutional court also rejected initiative challenging provisions of the Act on the Protection of Consumers obliging business entities to ensure communication with consumers also in the Hungarian and Italian languages.<sup>47</sup> Moreover, the Constitutional Court was ready to declare unconstitutional legislative provisions favouring the Slovenian language over the official language of national communities by the relevant provisions of the Societies Act.<sup>48</sup> We can agree with Teofilović, who, after scrutinising the analyses of the case law, concluded that the Slovenian Constitutional Court has consistently interpreted positive measures expansively, defining no strict limits for their appropriateness, and in some found that special rights were justified even where they contradicted the general constitutional principle of equality of all citizens or where they collided with some other constitutionally guaranteed rights.<sup>49</sup>

The Constitutional Court of Croatia has also had considerable number of cases in which it interpreted group-specific rights; however, it demonstrated less consistency in their protection and expansive interpretation.<sup>50</sup> In some cases, the Constitutional Court expansively interpreted constitutional rights and principles to protect group-specific minority rights,<sup>51</sup> or when faced with contradicting legal provisions, it gave a preference to provisions more favourable to minorities.<sup>52</sup> In other cases, it gave advantage to the provision of the law less favourable to the rights of national minorities<sup>53</sup> or

46 Decision U-I-283/94, 12 February 1998, Pt. 6.

47 Decision U-I-218/04-31, 20 April 2006.

48 Decision U-I-380/06-11, 11 September 2008.

49 Teofilović, 2021, pp. 137–138.

50 Teofilović, 2021, p. 138; Beretka, 2021, p. 115.

51 The Constitutional Court declared unconstitutional referenda initiative demanding amendment of the relevant law in a way to restrict the official use of minority language to local units in which a national minority constitutes local majority. The court based its decision on general constitutional values such as pluralism, tolerance, freedom of thought, expression of ethnicity and emphasis on minority consciousness. Decision U-VIIR-4640/2014 of 12 August 2014, pt.10.2.

52 In electoral disputes related to the guaranteed seats for national minority representatives, the Constitutional Court applied the provisions of the law on local elections and not those of constitutional law on the rights of national minorities, which were more restrictive concerning the conditions for a guaranteed seat in the local assembly (Decision U-VIIA-3004/2013, 26 May 2013. and Decision U-VII-3122/2013, 4 June 2013).

53 The Constitutional Court rejected the constitutional complaint of the applicant whose request for the identity card in Serbian language (bilingual) was rejected on the ground that the Law on the Use of Language and Script of National Minorities restricts the issuance of public documents bilingually or multilingually to municipalities, cities or counties where the minority language is introduced into official use. On the other hand Art. 9, par. 2. of the Constitutional Law on Minority Rights guarantees the issuance of identity cards in the national minority language as well, without territorial restrictions, or direct reference to sectorial law on official language use. The Constitutional Court interpreted Art. 9, par. 2 together with Art. 12, par. 3. of the Constitutional Law (referring to the regulation of some issues of the official language use of national minorities by other laws), despite of the fact that Art. 12, par. 3 is not directly related to Art. 9, par. 2. neither it refers to the language and script of identity cards. This way

by means of a restrictive interpretation, and the court simply avoided the protection of the group-specific right in question.<sup>54</sup>

Even though the 2006 constitution extensively guarantees group-specific minority rights (overregulation), the Constitutional Court of Serbia has only rarely demonstrated capacities and willingness to interpret and protect minority rights in an expansive manner.<sup>55</sup> Its traditional deference towards the acts of the actual political majority in the legislation<sup>56</sup> is generally detectable in its case law related to minority rights as well. The court acknowledged the wide discretion of the legislator in regulating the implementation and content of constitutional minority rights in many decisions<sup>57</sup>; conversely, judicial activism was exceptionally present in other cases, where the court annulled legislation generously stipulating some minority rights.<sup>58</sup> Various authors have emphasised the restrictive interpretation of the constitutionally guaranteed collective right to self-governance by the Constitutional Court's Decision IUz-882.<sup>59</sup> In the almost 30 years covering the period from 1990 to 2019, the Serbian Constitutional Court invalidated no provision of any law on the ground that it restricted a minority right, nor did the court ever uphold an initiative launched by members of national minorities or their organisations seek protection of a minority right against a violation by a law or regulation.<sup>60</sup>

The Constitutional Court of Romania has rich case law related to the rights of national minorities because the bulk of legislative acts regulating group-specific

the Constitutional Court interpreted minority rights in restrictive way, accepting its limitation of a right by provisions of the law on official language and script. (Decision U-III-4856/2004 of 12 March 2007). Another example of such a restrictive approach is related to the conflicting provisions of the constitutional law on the constitutional court and the constitutional law on the protection of national minorities. While the first one excludes minority councils from the subjects empowered to launch constitutional complaints on behalf of the persons whose minority rights were violated, the second empowers them. The Constitutional Court gave advantage to the more restrictive provision (Decision U- I – 1029/2007, 1030/2007, 7 April 2010).

54 The Constitutional Court upheld provisions of the statutory decision of the Vukovar municipality stipulating that the application of some rights of the Serb minority be postponed, even though there were no bases for that in the law (Decision U-II-1818/2016, 2 June 2019).

55 The 'pro minority' decisions were mainly enacted in the period of the 1990 constitution (Decision IU-110/2004 from 15 July 2004, Decision IU-334/2004 from 2 December 2004, Decision IU-171/2002 from 5 June 2003, Decision IU-446/2004 from 18 February 2010).

56 Beširević, 2014, pp. 972–973; Papić and Djerić, 2019, p. 59; Tripković, 2011, pp. 744–745.

57 Decision IU-328/1992 from 14. October 1993, Decision IU-7/1998 from 1. June 2000, Decision IUp-42/2008 from 14 April 2011.

58 In its cornerstone Decision IUz-882/2010 from 16 January 2014, the Constitutional Court invalidated many provisions of the Law on the National Councils of National Minority, often not referring to a concrete constitutional provision violated. The CCS invalidated provisions basically on two ground: first because provisions were not in harmony with the so-called sectorial laws regulating the area of electronic media, administrative procedure, public broadcasting, educational system etc.; second, because the court simply concluded that the "legislator went outside actions for the implementation of additional rights of persons belonging to national minorities", without determining what the constitutional limits of these 'actions' were.

59 Beretka, 2019, p. 281; Tóth, 2017, pp. 235–236; Korhecz, 2019, p. 124.

60 Korhecz, 2021, p. 48.

minority rights end up before this court.<sup>61</sup> The court has usually rejected initiatives related to the legislative provisions enlarging the rights of minorities in the area of minority language education, claiming that those provisions violate neither the rights of the Romanian people nor the status of the Romanian language.<sup>62</sup> Conversely, in the area of language rights, the court tends to apply a much more restrictive interpretation, promoting the exclusive use of the Romanian language in written communication before courts and administrative authorities.<sup>63</sup> Although, the Constitutional Court had not decided on this topic, some authors claim that the National Assembly of Romania violated the constitution by omission because it failed to enact the organic law on national minorities in accordance with Art. 73 para. 3 of the constitution.<sup>64</sup>

The Constitutional Court of Slovakia made only few decisions related to group-specific minority rights. The main political-legal disputes emerged around the State Language Act stipulating the dominant use of the Slovak language and allegedly violating language use of minorities. From the challenged provisions the Constitutional Court, Decision PL. ÚS 8/96 (from August 26, 1997) invalidated only one provision (Art. 3, par. 5), expressly excluding the possibility to address authorities in minority language in written form. The constitutionality of other contested provisions was confirmed based on formal argument that the State Language Act does not regulate the use of minority languages. In another case PL. ÚS 4/97 (24 February 1998), the Constitutional Court rejected the initiative of the president of the republic, challenging the House rules stipulating the exclusive use of the Slovak language in the work of the National Assembly based on the grounds standing that no rule obliges a state to prescribe the equal use of all languages.

In the last 30 years, the Constitutional Court of Hungary has had a moderate number of decisions related to group-specific minority rights.<sup>65</sup> Most of these cases were related to the right for special representation, including the status and remits of minority self-governments and representation in the parliament and in local assemblies. In several cases, the Constitutional Court determined how this special representation is not constitutionally permitted<sup>66</sup> or which affirmative measures are not

61 Varga, 2019, p. 102.

62 Decision No. 72 from 1995, Official Gazette no. 167/1995, Decision No. 114 from 1999, Official Gazette no. 370/1999, Decision No. 2 from 2011, Official Gazette no. 136/2011.

63 Despite explicit constitutional provisions allowing the use of minority language before local authorities and courts, the court upheld legislative provisions requiring that written submissions of parties shall always be submitted in the Romanian language (or also in the Romanian language), making the use of minority language practically useless (Decision No. 40 from 1996, Official Gazette 362/1999, Decision No. 636 from 2016, Official Gazette no.41/2017, Decision No. 633 from 2018, Official Gazette no. 1020/2018).

64 Veress, 2020, p. 8.

65 Only about 30 out of approximately 10.000 (Nagy, 2020, p. 37).

66 The delegation of elected leaders of national minorities to parliaments violates the constitutional principle of equality and directness (Decision no. 34/2005 and Decision no. 14/2006).

inevitable in electoral legislation.<sup>67</sup> Nevertheless, it failed to determine what the constitution requires from the legislator in order to implement this right, leaving indeed a wide margin of discretion to them.<sup>68</sup> It is noteworthy that the Constitutional Court has regularly confirmed the constitutionality of legislative provisions on consent powers of minority self-governments in the area of education.<sup>69</sup> Nagy concluded, in general, that the jurisprudence of the court towards minorities is characterised by a complete lack of judicial activism as it has avoided addressing petitions whenever possible, usually on the grounds that they did not contain a specific constitutional problem, that the regulation of the matter in question belongs to the legislator's competence or that it is not up to the Court to deal with practical issues.<sup>70</sup>

### ***3.2. Minority rights in practice, international obligations and monitoring***

The full enjoyment of constitutionally guaranteed, group-specific minority rights usually needs further regulation, positive actions and measures by state authorities. Without budgetary planning, proper organisational measures and the establishment of a functioning institutional framework, minority rights might remain a 'law in books' declarative right without substance. The enjoyment of these rights depends to some extent on interpretations and protection provided by the judiciary as well as on government policies and administration. Perhaps the most objective and impartial insight into the practice of minority rights is possible through documents prepared within the monitoring mechanism of the Council of Europe Framework Convention for the Protection of National Minorities. All states analysed in this chapter have signed and ratified this international convention, whose implementation is provided through periodical state reports and corresponding opinions of the Advisory Committee (AC), evaluating the implementation of state obligations from the state parties.<sup>71</sup>

Concerning the practice in Croatia, the AC calls on the authorities to implement laws stipulating the use of minority languages and scripts in official contacts with local authorities more consistently. The AC also points to the high threshold for the official use of minority language established by the law.<sup>72</sup> While the legal framework is well constructed and favourable, the practical application is hindered by the absence of a systematic government strategy to promote interethnic dialogue and reconciliation.<sup>73</sup> In the Czech Republic, the AC most often criticises discriminatory practices

67 The court rejected the initiative of the minority Ombudsman challenging the constitutionality of the 5% electoral threshold applicable for minority candidates, stating that it is not discriminatory (Decision 1040/B/1999).

68 Nagy, 2021, p. 55.

69 Decision no. 792/B/1998, Decision 713/B/2002, Decision no. 657/B/2004.

70 Nagy, 2021, p. 69.

71 Advisory Committee usually organises onsite visits to the respective state to consult with all relevant actors, to establish facts and to properly reflect on the states' statements.

72 Fourth Opinion on Croatia, adopted on 18 November 2015, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 29 November 2016, ACFC/OP/IV(2015)005rev.

73 Szalai, 2021, p. 77.

towards the Roma minority, e.g. provisions prescribing high thresholds for displaying bilingual public inscriptions such as street names or names of settlements. The European Court of Human Rights found discriminatory practices in public education (segregation) towards Roma minority in Czech Republic but also in other States in the CEE.<sup>74</sup> In Hungary, the AC positively evaluates the newly established legislative framework but reiterates its call on the authorities to encourage persons belonging to national minorities to use minority languages when dealing with administrative authorities. Authorities should create an environment that is not obstructive to such a possibility in practice. Furthermore, the AC notes that the ‘magyarisation’ of the names (e.g. using Hungarian letters in writing) in practice blocks the full enjoyment of the right to use one’s own name in one’s own language.<sup>75</sup> In Romania, the AC frequently raises concern over the police brutality and discrimination faced by the Roma national minority; however, improvements were recently made. Although the funding of minority cultural life is generally acceptable, the state refuses to use the name ‘Szeklerland’, its symbols and the authorities have failed to present the documentation required for recognition by UNESCO as non-material heritage of humanity of an annual Whitsunday pilgrimage to Șumuleu Ciuc in the Harghita County practiced by a very large number of persons belonging to the Hungarian national minority. The Advisory Committee finds this regrettable.<sup>76</sup> In Serbia, the AC states that the legal framework of minority rights is solid, but discrepancies between laws still exist. There are disparities between law and practice and between certain regions, and the implementation is not monitored using evidence-based approaches.<sup>77</sup> In Slovakia, some shortcomings identified in the first opinion of the AC are still actual and mainly related to anti-Roma practices: hate speech, lack of adequate strategies for combating hates speech and promoting social dialogue, and the enrolment of Roma children into schools for children with disabilities.<sup>78</sup> The AC points to the proportionally low participation of national minorities in public administration, particularly Roma.<sup>79</sup> In Slovenia, the major concern of the AC from the first report and onward is the distinction between ‘autochthonous’ and ‘non-autochthonous’ minorities<sup>80</sup>; however,

74 See *D. H. and Others v. Czech Republic*, Application no. 57325/00, judgement 13 November 2007, *Oršuš and Others v. Croatia*, Application no. 15766/03, judgement 16 March 2010 *Horváth and Kiss v. Hungary* Application no. 11146/11, judgement 29. January 2013.

75 Fifth Opinion on Hungary, adopted on 26 May 2020 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 12 October 2020, ACFC/OP/V(2020)002Final, p. 18.

76 Fourth Opinion on Romania – adopted on 22 June 2017 Published on 16 February 2018. ACFC/OP/IV(2017)005, p. 17.

77 Fourth opinion on Serbia, adopted on 26 June 2019, Advisory Committee on the Framework Convention for the Protection of National Minorities, Strasbourg, 18 December 2019, ACFC/OP/IV(2019)001, pp. 1–2.

78 Szalai, 2021, p. 86.

79 Fourth Opinion on the Slovak Republic adopted on 3 December 2014 ACFC/OP/IV(2014)004, p. 27.

80 Despite criticism from the AC, Slovenia preserved the distinction between the autochthonous and non-autochthonous minorities, not without convincing arguments. On the issue, see more in Ribičič, 2004, pp. 29–43.



significant improvement has been noted concerning the measures protecting Roma (enactment of the Roma Community Act) and former Yugoslav minorities (Parliamentary declaration enacted in 2011).<sup>81</sup> Concerning the rights of autochthonous national communities, the AC objects to the shortcomings in the implementation of this legal framework; for instance, the use of language in public spaces at the local level and the quality of education offered in minority languages are not fully respected.<sup>82</sup>

#### 4. Conclusions

Analysing the CEE constitutions, Iván Halász concluded that in constitutional provisions one can often trace a turn towards the ethnic notion of the people or nation – or at least a dual notion of the people-nation.<sup>83</sup> This complicates the determination of the constitutional position and status of persons belonging to national minorities. The eight analysed CEE states are, beyond any doubt, all nation states, but their constitutions recognise the existence of national minorities and, to some extent, constitutionally guaranteed, group-specific minority rights. Except in the case of the Czech Republic, the constitutional protection of minorities goes hand in hand with constitutional provisions ensuring the special, privileged position of the titular nation and its protection.

The most developed constitutional catalogue of rights is guaranteed in Serbia, Slovenia and Romania; however, the practical protection and implementation of these rights does not always correspond to the number or subject/matter of constitutional provisions. For example, in Serbia, the Constitutional Court has not shown readiness to strike any law or regulation for unconstitutionally limiting those widely guaranteed constitutional rights. Maybe the most considerable exception is Slovenia, where constitutional provisions are conceptualised, interpreted and protected by the constitutional court in a rather generous way, making their relationship with other constitutional values and provisions rather clear. However, the Slovenian record on group-specific minority rights is also not flawless, limiting the application of these rights explicitly to the Hungarian and Italian minorities and excluding the larger Serb, Croat and Bosniak minorities out *expressis verbis* by the constitution.

What seems a long-standing internal problem of CEE constitutions is to establish an equilibrium between nation state with state-bearing dominant nation and constitutional rights of national minorities. Constitutional texts themselves are not clear, and constitutional courts have also not clearly conceptualised this relationship. It seems that provisions on group-specific minority rights are more reflective of international pressures than a genuine constitutional development, while provisions on

81 Szalai, 2021, p. 80.

82 Fourth opinion on Slovenia, adopted on 21 June 2017 by the Advisory Committee on the Framework Convention for the Protection of National Minorities, 25 January 2018, ACFC/OP/IV(2017)003Fourth Opinion, 25. January 2018.

83 Halász, 2014, p. 206.

nation-state building demonstrates the determination and sentiments of the ruling ethnic majority to create a national state. The minority question is not primarily a human rights question in many states: for example, the use of national symbols in Kovasna and Hargita counties in Romania, which are dominated by Hungarians, is considered a threat to security issue, rather than one of identity, by the Romanian authorities. Similarly, in Croatia, issues related to the use of the Serbian language and Cyrillic script are considered within the scope of military uprising of local Serbs during the nineties of the twentieth century. The minority question is still trapped, to a large extent, in historical legacy.

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# Electoral Systems

Gábor KURUNCZI

## ABSTRACT

The present study compares the electoral systems of the eight countries analysed in this volume based on the specifics of Central Eastern Europe. As a starting point, the study examines the expectations of the electoral system, e.g. the purpose of displaying the will of the electorate as accurately as possible, ensuring stable governance, and aspects such as the size of the country, its traditions or other political considerations. The study undertakes a comparative analysis of the electoral systems of each country primarily on the following issues: how do the electoral system and the political system of a given country interact? How are active and passive voters defined? What are the social reasons for the parliamentary representation of minorities? What impact have these rules had on electoral systems? What common features and differences can be discovered in each national electoral system? How can a given electoral system be evaluated among proportional-majority systems? The chapter concludes that the regulation of electoral systems is always country-specific and in line with social and historical traditions. It is therefore not possible to mechanically take over the electoral system of other countries in any country as some of its elements will not necessarily be compatible with the specificities of the others. The history of the eight countries analysed (the legacy of communism, the 'problem' of nationality) shows several points of connection, even though their electoral systems are not uniform. Although most countries – in line with European trends – have proportional electoral systems, these have many different regulations. By comparison, in Hungary (or even in Romania), legislators took a completely different approach in defining the electoral systems after the change of regime. It can thus be stated that the definition of the electoral system is one of the most national issues, where standards can and should be set, but these standards only provide a basis for comparability rather than accountability.

## KEYWORDS

electoral system, proportionality, majority elements, stable governance, political influence, active and passive suffrage.

## 1. Introduction

In a democratic state, the definition of the parliamentary electoral system<sup>1</sup> is of paramount importance as the indirect exercise of people's sovereignty is realised through the electoral system. The right to vote is, therefore, on the one hand, the body of legislation that determines the way in which representative bodies (e.g. parliaments,

1 In my study, I examine the requirements for electoral systems only in relation to parliamentary elections.

local governments etc.) are set up.<sup>2</sup> This approach can also be considered as the material side of the right to vote (substantive law), as a kind of instrumental approach.<sup>3</sup> On the other hand, the right to vote is a fundamental political right, which means the right to participate in power or conducting public affairs, and as such, it can be defined as the subjective side of the right to vote (subjective right): who has the right to vote and to stand as a candidate. Among the major international instruments, Art. 25 of the International Covenant on Civil and Political Rights (ICCPR) and Art. 21 of the Universal Declaration of Human Rights (UDHR) also deal with electoral systems. The ICCPR emphasises the possibility of voting in regular elections and – similar to UDHR – participating in the conduct of public affairs through its freely elected representatives.

The present study compares the electoral systems of the eight countries analysed in this volume (Poland, the Czech Republic, Slovakia, Hungary, Slovenia, Croatia, Serbia and Romania) based on the specifics of Central Eastern Europe. However, the comparison is not based on a static comparison of the electoral systems of each country but rather focuses on the similarities and differences that result from the systems analysed. As a starting point, we need to examine the requirements for electoral systems as well as the commonalities of the countries studied.

## **2. General characteristics of electoral systems – constitutional requirements of electoral systems**

The principle of people's representation is a clearly highlighted issue in modern mass democracies. In this regard, representative democracy should be given priority over the means of direct democracy (such as a referendum); therefore, the electoral system used by a country in electing members of various representative bodies (primarily members of parliament) is of particular importance. The electoral system, as a key element of the constitutional-institutional system, significantly influences other elements of the political system, namely party structure and the system of power and government.<sup>4</sup> Therefore, this section of the study focuses on the requirements that must be considered in the definition of electoral systems, which, in their interest, are considered constitutional and at the same time fair (and suitable for the social context in which they are used).

2 In jurisprudence, this approach to state organisation has been stronger for a long time as suffrage has not been a fundamental right for many years (Halász, 2018, p. 715).

3 Based on the instrumental approach, we see the right to vote as a means of establishing representative bodies and ensuring democratic legitimacy. To set up a body based on the principle of popular representation, it is essential that a section of the population has the right to vote (Ficzere, 2010, pp. 289–290).

The instrumental justification of passive suffrage would be as follows: as the establishment of representative bodies is essential, it is necessary for certain persons to become elected representatives; therefore, people must run as candidates as it would not be possible to hold elections without candidates (Bodnár, 2016, p. 8).

4 Fábíán, 1999, p. 53.



### 2.1. *About electoral systems in general*

Before analysing the main requirements of electoral systems, it is important to review their main basic types. Election systems are primarily those systems (and the methods and techniques associated with them) that are used to distribute mandates after the end of voting, that is, they determine which of the individual candidates will get a mandate or how many will get a mandate from the lists of party.<sup>5</sup> On this basis, we can distinguish three basic electoral systems: the majority system, the proportional system and the mixed system. In the case of majority systems (which may be absolute or relative majority systems<sup>6</sup>), representation is based on an acquired majority. In contrast, in proportional systems, mandates are allocated in proportion to the votes, and this system seeks to create consistency between the votes cast and the mandates.<sup>7</sup> In mixed electoral systems, a combination of the two principles of representation is implemented, the additional element of which is provided by the institution of compensation. Of course, these electoral systems<sup>8</sup> do not always work according to their pure meaning, but they have many variants and combinations in the world, as seen in section 4 of the study for the countries studied.

Before further examining the requirements of these electoral systems, it is important to analyse the tendency of electoral systems of EU countries. The electoral systems of the EU member states can be grouped according to three major subtypes of electoral systems, according to which a proportional electoral system can be observed, e.g. in Austria,<sup>9</sup> Belgium,<sup>10</sup> Bulgaria,<sup>11</sup> Cyprus,<sup>12</sup> Denmark,<sup>13</sup> Estonia<sup>14</sup> and

5 Tóth, 2016, p. 202.

6 In the case of the former, a candidate who obtains more than 50% of the total votes cast obtain a mandate; however, in the case of the latter, it is sufficient for a candidate to obtain a majority of the votes cast. The advantage of an absolute majority system is that it can result in the most stable governance as the elected candidates enjoy broad support. A serious disadvantage, however, is that it does not always produce an end result since in the event of a more even distribution of votes, none of the candidates receives an absolute majority, and the fate of the mandate remains open. In contrast, the advantage of a relative majority system is that it is practically always effective (statistically very unlikely to have exactly two of the large number of votes cast for each candidate). The disadvantage, however, is that against the will of many voters (in our example, against three-fourths of the voters), someone is elected with few votes and that even in this system, all the votes that were not cast for the winner are lost.

7 The advantage of a proportional system is that it reflects the will of the electorate more accurately so that voters who remain in the minority are also represented. Another advantage is that a single vote will certainly be successful, i.e. there will be no need to organise another round, re-mobilising huge human and material resources. However, the disadvantage is that the representative body can become too fragmented, and many parties can get a mandate, which can make decision-making very difficult; further, it takes a disproportionate amount of time and energy to reach a consensus.

8 For more details on the nature of electoral systems, see Cservák, 2017, pp. 27–40.

9 Federal Law in National Council Elections Law 471/1992. 1–2. §.

10 See the Electoral Code of Belgium.

11 Gancheva, Musorlieva and Naykova, 2016, pp. 100–113.

12 Stumpf and László, 2018, p. 180.

13 Pap, 2007, p. 198.

14 Riigikogu Election Act.

Finland.<sup>15</sup> Among the proportional electoral systems, it is important to highlight the electoral system in Greece. Of the 300 members of the Greek parliament (Vouli), 238 are elected in single and multi-member electoral districts (based on list voting), and 12 mandates are distributed on a party list. In addition, however, 50 parliamentary mandates are automatically awarded to the party that won the most votes in the election. This is known as the principle of ‘enhanced proportionality’, by which the system responds to the main flaw in proportional electoral systems: an overly fragmented parliament.<sup>16</sup> Proportional electoral systems are also present in The Netherlands,<sup>17</sup> Ireland,<sup>18</sup> Latvia, Malta, Portugal, Spain, Sweden<sup>19</sup> and Luxembourg.<sup>20</sup> A majority electoral system is used in, e.g. the United Kingdom<sup>21</sup> and France.<sup>22</sup> In addition to proportional electoral systems, the second most commonly used method in the European Union is the mixed electoral system, which seeks to combine the advantages of a proportional and majority system while eliminating their disadvantages. Such a system can be observed in Lithuania, Germany and Italy.

## ***2.2. Constitutional considerations related to the definition of electoral systems***

With regard to the various electoral systems, the primary question that arises is according to which criteria we can consider an electoral system to be constitutional or fair. Can these aspects be determined at all? Can there be an absolutely bad and absolutely good electoral system? What are the main directions of each electoral system? Based on the trends in the European Union,<sup>23</sup> one can observe the dominance of proportional systems. However, it can also be seen that, in addition to ensuring and increasing proportionality, some elements in the practice of individual countries seek to ensure stability at the same time (see, e.g., the Greek electoral system). It can also be considered as such that in several countries, smaller electoral districts are set up to strengthen the relationship between voters and members of parliament (even if more than one mandate is allocated in a given electoral district).<sup>24</sup>

However, whatever system a country uses, it can be stated with great certainty that several aspects must be considered in its definition of the electoral system, i.e. several aspects will affect the operation of the system. In a study, Dieter Nohlen states that electoral systems can be designed in both a narrower and a broader sense. In his view, the concept of the electoral system is interpreted extremely broadly in the political debate on electoral systems, encompassing almost everything that affects

15 Finnish Election Law.

16 Stumpf and László, 2018, p. 184.

17 Act of 28 September 1989 containing new provisions governing the franchise and elections.

18 Irish Electoral Act XIX. Chapter 118–128. §.

19 Stumpf and László, 2018, pp. 186–193.

20 Loi Electorale No. 30 21 février 2003.

21 Representation of the People Act 1983.

22 See the Electoral Code.

23 Kurunczi and Szabó, 2020, pp. 787–788.

24 Fábíán, 1999, p. 60.

the electoral process.<sup>25</sup> Thus, e.g., elements that influence the electoral system are (1) the type of electoral system (majority-proportional-mixed), (2) the regulation of the process of becoming a candidate (e.g. that it is tied to a voter recommendation or just the payment of a financial deposit),<sup>26</sup> (3) the process of forming electoral districts,<sup>27</sup> (4) the definition of mandate allocation mechanisms<sup>28</sup> or (5) the electoral redress system<sup>29</sup> as well as (6) the requiring voters to participate in elections.<sup>30</sup>

However, if we wish to examine the aspects that are essential for the establishment of a constitutional electoral system in general terms, then, instead of analysing the specific elements of electoral systems, we must examine this issue from a distance. As a hypothesis, we can state that an electoral system must ensure both the fullest representation of the will of the electorate and stable governance. In my view, the fulfillment of either condition is not in itself a sufficient condition of fair and well-functioning electoral systems.

In the context of electoral systems, the requirement of proportionality should be emphasised first. The principle of people's representation will be complied with primarily by the electoral system that best reflects the will of the voter. This is because a proportional electoral system can display the election result in the composition of the elected body in the most perfect way (as mandates are allocated in proportion to the number of votes cast). However, this aspect cannot and should not be seen as overriding as no electoral system will be better or worse because it enforces proportionality less. For example, a mixed electoral system will necessarily tip to the majority or proportional side. A good example of this is the comparison of the electoral systems of Germany and Hungary, which are often compared; yet proportionality can be perfectly observed in the case of the former and the predominance of majority elements in the case of the latter.<sup>31</sup> In the context of the requirement of proportionality, the question is also whether it can be regarded as a necessary and essential condition. For example, the Hungarian Constitutional Court<sup>32</sup> took the position that, according to the Basic Law, the electoral system does not necessarily have to be proportionate as the Basic Law does not include a provision on the proportion of proportional, majority or compensation subsystems of the electoral system.<sup>33</sup> At the same time, it can be

25 Nohlen, 1996, p. 7.

26 See, among others, Cserny, 2018, pp. 43–64.

27 Nohlen, 1996, p. 12.

28 Stumpf and László, 2018, pp. 176–195.

29 Temesi, 2018, pp. 195–210.

30 Some electoral models treat the exercise of the right to vote not only as a right but also as an obligation, thus sanctioning the absence of voting if there is a right to vote. Such can be observed, e.g., in Belgium. For more, see Cserny, 2018, p. 25. Belgium introduced compulsory voting in 1893. Art. 62 of the Belgian Constitution, providing that Belgian nationals must exercise their right to vote (Hallók, 2018, p. 121).

31 See, e.g., the so-called the institution of 'winner-compensation' in our country.

32 Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary.

33 Decision 3141/2014. (V. 9.) AB of the Constitutional Court of Hungary, Reasoning [39].

stated that an electoral system must strive to reflect the will of the voter as much as possible.

In addition to proportionality, the second important requirement for an electoral system is that its application should ensure a stable governing majority. According to the instrumental approach to suffrage, it can also be considered a tool for concluding and renewing the social contract (the indirect exercise of power by the subjects of people's sovereignty); thus, an electoral system that serves only proportionality and does not take the need for a stable governing majority into account will not be ideal in itself. If an electoral system results in a fragmented parliament (or other elected body), it can easily lead to government crises and thus to socio-economic crises. According to Tibor Ördögh, diverse parliaments demand the formation of coalition governments that can make the political system unstable.<sup>34</sup> Therefore, most electoral systems also include elements that help achieve stability. The Greek example, where the winning party gets an additional 50 seats to help governability, can also be considered as such, but the institution of 'winner compensation' appearing in the Hungarian electoral system can also serve as an example of this.<sup>35</sup>

An additional requirement of electoral systems is that they should minimise the possibility of cheating (i.e. they should not allow manipulation). In this regard, especially the institutional elements of electoral systems must be considered – thus, e.g., the formation of electoral districts, the possibility of re-registration or voting by mobile ballot box or the ways in which votes are cast (see, e.g., the institution of voting in the letter).

Finally, as a fourth requirement, an electoral system must always be adapted to the social and cultural roots and organisation of the given country. According to Dieter Nohlen, social development and structure, political culture, power relations or even the behavioural patterns of the political elite all determine the structure of the electoral system.<sup>36</sup>

Of course, the criteria of an electoral system can be determined based on other requirements. Thus, important criteria of an electoral system are that it must

1. provide appropriate legitimacy (that is, for the various social groups to recognise the electoral system, to accept the legitimacy of the power created by it);
2. ensure political integration (do not cause political polarisation in society by the debate over the electoral system);
3. properly represent the will of the voters (do not result in a result contrary to the will of the voters); and
4. result in representative government.<sup>37</sup>

34 Ördögh, 2016, p. 104.

35 See the end of the study for more details on this institution.

36 Nohlen, 1996, p. 8.

37 Nohlen, 1996, p 30.

It is therefore important to emphasise that the criteria of electoral systems can be determined on the basis of any aspect (which, in addition to the above, can also be influenced by the size, traditions or even political considerations of a country<sup>38</sup>); in any case, only the creation of a complex, multi-faceted system (which displays all the above requirements) will serve the fullest realisation of the principle of people's representation. For this reason, we can also state that the definition of an electoral system is one of the most national issues in the formation of constitutional order.

### 3. The challenge of a common 'heritage'

In the previous section, we established that the social environment of the state also plays an important role in defining an electoral system. The development of democracy in the countries of Central Eastern Europe after the change of regime was influenced by several factors.<sup>39</sup> One of the common historical starting points of these countries was the 'reckoning' of the communist heritage after the change of regime, that is, how and in what way these countries were able to start building a democracy.<sup>40</sup> In this matter, almost all countries kept in mind the importance of social dialogue, political compromises and peaceful transition (except Romania), primarily because wanted to avoid armed conflict.<sup>41</sup> It is worth highlighting the Czech Republic in this context, where the social structure in the communist period was also determined primarily by civic culture, which also made the democratic transition easier.<sup>42</sup> In Slovakia, on the other hand, the 'socialist culture' prevailed, and civic traditions withered. At the same time, during the regime change, both countries were characterised by peaceful political movements.<sup>43</sup> In contrast to the Czech Republic and Slovakia, the civil society in Romania had weak roots, and the centralised military system of state organisation was not conducive to independent initiatives.<sup>44</sup> As a result, the following party systems have developed in these countries. In the Czech Republic, a stable multi-party system developed after the change of regime, as opposed to Hungary, where a bipolar system developed in the 1990s and early 2000s. In Poland, the political situation became unstable after the transition, so as in Romania and Slovakia (albeit not to the same extent).<sup>45</sup> In Serbia, the opposition parties that emerged in the 1990s were formed primarily for anti-communist purposes; however, each party was also determined by the importance of national purpose.<sup>46</sup> The Croatian party system was clearly influenced

38 In this context, it is also important to note that changing certain elements of the electoral system can always change the balance of political power. See Szoboszalai, 1999, pp. 261–297.

39 Lanchester, 1996, pp. 104–109.

40 Fricz, 2017, pp. 40–41.

41 Balogh, 2012, p. 14.

42 Balogh, 2012, p. 16.

43 Balogh, 2012, p. 16.

44 Balogh, 2012, pp. 18–19.

45 Balogh, 2012, pp. 24–28.

46 Ördögh, 2016, p. 48.

by the South Slavic War of Independence. Although the system established in 1990 was stable during the war, its democratic nature was questionable.<sup>47</sup> In Slovenia, the period of democratisation began in 1989. At the same time, the parties formed after the communist era continued to be dominated by social democrats; thus, in the 90s, the political palette was mostly determined by such parties.<sup>48</sup>

#### 4. Electoral systems of the studied countries

The starting point of the social environment of the studied countries was the intention to break up with the communist system, which also affected the electoral system. At the same time – considering the aspects described in point 1 of this study – the systems of each country have taken different directions in many respects. Taking all this into account, it is advisable to compare the analysed systems along the following aspects:

1. How do the electoral system and the political system of a given country interact?
2. How are active and passive voters defined? What are the social reasons for the parliamentary representation of nationalities? What impact have these rules had on electoral systems?
3. What common features and differences can be discovered in each national electoral system? How can a given electoral system be evaluated among proportional-majority systems?

##### *4.1. Interactions between political and electoral systems*

An electoral system must always be adapted to the social and political system of a given country; therefore, how political and electoral systems affect each other should also be examined. With regard to electoral policy, it is widely accepted that the electoral system used by a country determines the party system of that state.<sup>49</sup> In addition, an electoral system also affects the role that the parliament is given for the functioning of the political system, that is, whether it primarily serves political representation or governance.<sup>50</sup> Thus, e.g., in all countries with a purely proportional system, where voters can only vote on a single list, party representation is emphasised. In Slovenia, e.g., there is a constant debate on whether the majority or mixed system should be used instead of the proportional system to achieve more stable governance,<sup>51</sup> but there has never been the right political will for this change.<sup>52</sup> In the case of Serbia,

47 Ördögh, 2016, p. 51.

48 Ördögh, 2016, p. 52.

49 Simon, 1997, p. 362.

50 Köröskényi and Tóth, 2005, p. 261.

51 For example, the abolition of constituencies and preferential votes emerged as a proposal. See M. R., 2020.

52 Ördögh, 2016, p. 104.

it is important to highlight that between 2000 and 2011, the order on the list was for information only, and party leadership was determined only a few days before the election; therefore, the role of parties increased significantly during this period.<sup>53</sup> Then, in 2011, the Serbian Constitutional Court ruled that parties could not change the order of the list.<sup>54</sup>

Ethnic conflicts also have an impact in Serbia (especially in political life). The structure of the parties is characterised by a nationalist-civil opposition. This tension has somewhat eased since 2012, especially since the start of the EU accession processes.<sup>55</sup> The development of the Croatian party structure was also significantly influenced by the South Slavic conflict, Croatia's independence from Yugoslavia and the ensuing anti-Serb sentiment. In addition, regional policy is of great importance in Croatia. In the Croatian party system, regional parties are permanent members of the legislature.<sup>56</sup>

#### ***4.2. Defining the suffrage***

As stated in the introduction, the fundamental rights approach to suffrage is at least as important as the instrumental side. For whatever electoral system is typical of a country, the decision will not be made by the electoral system but by the voters. Even if an electoral system meets the constitutional requirement (e.g. it is also sufficiently proportionate and ensures a stable governing majority), but the range of persons entitled to vote is unduly narrow or excludes certain persons from the list of voters without appropriate guarantees, then the electoral system itself will necessarily be eroded.

In this respect, each of the countries examined requires citizenship and a certain age for parliamentary elections. This – except in Hungary – was determined to be the age of 18. In Hungary, the Basic Law uses the concept of adulthood, which can be linked to the age of 18 under civil law but is also available after the age of 16 by marriage with an official permit. It is important to highlight the issue of exclusion from the right to vote in this regard. In this respect, each country regulates in accordance with two main rules: lack of ability to judge and a ban on public affairs may justify exclusion. However, each country regulates this issue in different detail. Due to lack of ability to judge, most of the countries studied (except Hungary and the Czech Republic) use automatic exclusion (thus, it is not possible to restrict someone's ability to act but leave their right to vote). In this context, it is important to highlight that the Czech Constitutional Court ruled in 2010,<sup>57</sup> by which it is only possible to restrict the right to vote due to intellectual disability based on an individualised examination and

53 Ördögh, 2016, p. 104.

54 See: Decision of the Constitutional Court of Serbia IUp 42/2008, SGRS 28/2011.

55 Ördögh, 2016, pp. 57–58.

56 Ördögh, 2016, pp. 57–58.

57 See IV.ÚS 3102/08 of the Constitutional Court of the Czech Republic (12 July 2010).

as a general rule, according to which no one who is incapable of acting has the right to vote, does not apply.<sup>58</sup>

Regarding the right to vote, it is also important to note that in the Czech Republic, Poland, Romania and Slovakia, the definition of passive suffrage<sup>59</sup> differs from the active voting age; e.g. in the Czech Republic, only those who are at least 21 years old have passive suffrage (and in the case of the Senate, they must be 40 years of age).<sup>60</sup> In Poland, only a person who is 21 years old can be elected to the Sejm as a representative, and to the Senate, only a person who has reached the age of 30.<sup>61</sup> In Romania, only a person who is at least 23 years old can be elected as a member of parliament, and only one who is at least 33 years old becomes a senator.<sup>62</sup> In Slovakia, only persons who have reached the age of 21 have passive suffrage.<sup>63</sup>

The common social challenge of each of the countries studied is also the parliamentary representation of the minorities living in their country<sup>64</sup> (except in the Czech Republic and Slovakia, where this is not provided). Indeed, in countries where the proportion of minorities in relation to the majority of society is significant, in many cases, special rules must be applied to ensure their parliamentary representation.<sup>65</sup> In Poland, national minorities are facilitated when it comes to establishing a nationalities list.<sup>66</sup> If a national minority establishes a territorial list in at least five electoral districts, it also becomes entitled to establish a nationality list.<sup>67</sup> In Slovenia, 88 members of parliament are elected according to general rules, but two members are elected by the Italian and Hungarian communities in special electoral districts set up for this purpose. Representatives of national minorities are elected on the basis of preferential votes, and only a minimum of 30 members of the Italian or Hungarian community may nominate a minority candidate.<sup>68</sup> However, it is also important to note that voters of Italian and Hungarian nationality can vote not only for the representative of their nationality but also for party lists.<sup>69</sup> In Croatia, Albanian, Bosnian, Macedonian, Montenegrin, Slovenian as well as Czech, Slovak, Serbian, Italian and Hungarian minorities can obtain a nationality mandate by reaching a minimum

58 Gurbai, 2016, p. 190.

59 The essence of passive suffrage is that the voter can also run in the elections as a candidate. In contrast, active suffrage entitles one to vote.

60 See 'On the election of members of parliament and senate' 247/1995. Sb. Arts. of 25. and 27.

61 See Art. 10 of the Act on the Election of Members of Parliament and Senators of the National Assembly.

62 Constitution of Romania, Art. 37(2).

63 See Zákon c. 333/2004. Z. z. Art. of 3.

64 For more on this topic, see Dobos, 2018, pp. 7–39.

65 Pozsár-Szentmiklósy, 2016, p. 32. and Juberias, 2014, pp. 279–302.

66 A nationality list is a list set up at the national level that is drawn up by members of that nationality and can only be voted on by voters of that nationality.

67 Dezső, 1998, p. 191.

68 Roter, 2017, pp. 75–80.

69 Horváthné, no date, p. 29.



number of votes.<sup>70</sup> In Romania, those national minorities can each obtain a parliamentary mandate under preferential rules, who, in accordance with the general rules, did not obtain at least one mandate in the elections<sup>71</sup> but reached 5% of the vote required to elect a member of parliament.<sup>72</sup> In Serbia, according to Art. 100 of the constitution, the equality of persons belonging to national minorities in parliament is ensured. Under section 81 of the Electoral Procedure Act, the parties or coalitions of national and ethnic minorities are entitled to a mandate even if they have not reached the 5% electoral threshold; however, in Serbia, the electoral system does not know the institution of a guaranteed minority parliamentary mandate.<sup>73</sup> In Hungary, the preferential mandate has been granted to 13 recognised minorities since 2014 provided that the number of votes required for the preferential mandate is obtained.<sup>74</sup>

### ***4.3. Characteristics of the electoral systems used***

The evolution of electoral systems is influenced by many factors. In this section of the study, I examine the electoral systems of the countries analysed.

As we have seen before, most EU member states adopt a version of the proportional electoral system; however, some countries adopt a pure majority system or even a mixed electoral system. It is therefore a question of where the electoral systems of the eight countries studied are located in this coordinate system and by what characteristics we can group them.

First, it is important to note that most of the countries analysed use a proportional electoral system. In the Czech Republic, e.g., members of parliament (more precisely, the members of the Chamber of Deputies) are elected in 14 multi-member electoral districts, for a total of 200 people. However, an interesting element of the Czech system is that the number of mandates that can be allocated in each electoral district is not predetermined, and only the total of 200 mandates that can be allocated will be recorded, although their allocation among electoral districts varies depending on turnout<sup>75</sup> (where more people go voting, the electoral district ‘gets’ more mandates).<sup>76</sup> Poland also voted in favour of a proportional electoral system. Members of the Sejm are elected by list: in 41 multi-member (7–20 mandates) electoral districts, Polish citizens can vote for one candidate from a list they choose (thus, in Poland the so-called ‘free list’ works).<sup>77</sup> In Slovakia, 150 members of the National Council are also elected in a proportional electoral system, in a single electoral district covering the whole country.<sup>78</sup> Serbia also adopts a pure proportional electoral system, where the whole

70 In Croatia, as in Hungary, minorities must choose between a party list and a nationalities list (Roter, 2017, pp. 80–83).

71 Dezső, 1998, p. 187.

72 Horváthné, no date, p. 29.

73 Horváth, 2019, pp. 410–411.

74 For more about the Hungarian system, see Kurunczi, 2020, pp. 107–145.

75 Cerny, 1999, pp. 80–83.

76 Stumpf and László, 2018, p. 180.

77 Dezső and Pozsár-Szentmiklósy, 2016, pp. 224–232.

78 See Arts. 11 and 25 of the Act on the Election of Members of Parliament and Senators.

country consists of a single electoral district. The list is closed, and voters have no say in its order.<sup>79</sup> This system is also present in Croatia, where the current electoral system, which applies a proportional electoral system with closed lists, has been in place since 2000. Under section 81 of the Electoral Act, the country was divided into 10 electoral districts, between which there should not be more than a 5% deviation. In these electoral districts, parties can nominate a maximum of 14 candidates, bringing the total to 140 members of parliament.<sup>80</sup> Slovenia also has a proportional electoral system, based on which 88 of the 90 members of parliament are elected. The country is divided into eight electoral districts, in which the so-called ‘open lists’ can be set and voters can choose their preferred candidates and vote for them directly on the list (however, everyone has only one vote).<sup>81</sup> Romanian parliamentarians are elected in two steps. As a first step, at the constituency level, an election coefficient is calculated separately for the Chambers of Parliament (CP) and for the Senate. This is done as follows: the total number of votes cast is divided by the number of CPs and Senate seats required by law in that constituency.<sup>82</sup> Each county list receives as many seats as the number of votes equal to the election coefficient received on the list. An independent candidate shall obtain a seat if they have received a number of votes equal to or higher than the election coefficient. As a second step, mandates not allocated on the basis of the above are allocated by the Central Electoral Office on the basis of unused votes, and at the national level, on the basis of the principle of proportionality<sup>83</sup>; therefore, the Romanian electoral system is also a proportional electoral system. Thus, of the eight countries examined, only Hungary uses a non-proportional electoral system but rather a completely mixed system. Along with the adoption of the Basic Law, the Act on the Election of Members of Parliament was enacted, which maintained a mixed electoral system but reduced the number of members of parliament and strengthened the majority elements in the electoral system instead of the previous proportional nature. According to the current regulations, 106 members of parliament are elected in individual electoral districts (no longer on the basis of an absolute majority but based on a relative majority system) and 93 members of parliament based on party lists.<sup>84</sup>

As a second consideration, it is important to determine whether each country applies a nomination or entry threshold. The disadvantage of proportional electoral systems may be the creation of a fragmented parliament, and it is therefore essential to examine this issue. In the Czech Republic, if a party (or parties) wishes to set

79 Lieszkovszky, 2016, pp. 250–256.

80 Koic, 2016, pp. 113–125.

81 Kopic, 2016, pp. 266–272.

82 For example, if 70,000 votes are cast in a given county, and the law provides five seats, the election coefficient is 14,000.

83 See the Romanian electoral system for more details: Law no. 208/2015 of 20 July 2015 on the election of the Senate and the Chamber of Deputies as well as on the organisation and functioning of the Permanent Electoral Authority, Art. 94.

84 This system also provides for the possibility of parliamentary representation on the basis of nationality. See Kurunczi, 2014, pp. 56–65.

a party list, an amount of 15,000 Czech Crowns must be deposited with the Czech National Bank no later than 72 days in advance, which will be the revenue of the central budget as a contribution to election expenses.<sup>85</sup> Lists may win mandates if they reach more than 5% of the valid votes, which rises to 10% for two parties, 15% for three parties and 20% for four or more parties.<sup>86</sup> In Poland, according to Art. 196 of the Electoral Code, only those parties can set the list (similarly to Hungary); they can obtain a mandate if they receive 5% of the votes and, in the case of a common list, 8% of the votes. In Romania, according to Art. 94 of the electoral law,<sup>87</sup> a party must obtain 5% of the votes to receive a mandate (it increases to 8% for two parties, 9% for three parties and 10% for four or more parties) or 20% of the total number of validly cast votes in at least four electoral constituencies for all electoral competitors. If the parties do not achieve this, but their candidates have won at least six mandates, they can get mandates of the list without reaching these percentages. In Slovakia, lists can be set by parties; as these are free lists, voters choose one of the lists and can support those four candidates with their votes.<sup>88</sup> There is also an election threshold – as a general rule, 5%, while it is 7% in the case of two or three parties and 10% in the case of a group of four or more parties. Interestingly, according to Art. 42 of the Electoral Act, if no party or party association reaches the limit set for it, then each election threshold will be reduced by 1-1 points until the seats can be allocated. In Serbia, each party can only participate in setting a single list. A uniform 3% threshold<sup>89</sup> is applied in elections, except in the case of nationalities, who may obtain a mandate without it.<sup>90</sup> In Croatia, a 5% entry threshold must be reached for successful mandates. In Slovenia, according to Art. 45 of the Electoral Act, the Hungarian and Italian minorities must obtain the recommendations of 30 voters to stand for election; here the election threshold is 4%. The other two members of parliament are elected by the Hungarian and Italian minorities in a majority system.<sup>91</sup> In Hungary, only parties can make a list, but only if they were able to nominate individual candidates in at least 71 individual electoral districts, 14 counties and the capital. The election threshold is generally 5%; however, this increases to 10% for a joint list of two parties and to 15% for a joint list of three or more parties.

The third element that must be examined is whether the electoral system in question contains some national characteristics which are country-specific. One such element is the issue representation of minorities already discussed earlier, which is defined according to national specificities and follows a different pattern from country

85 See Art. 31(4) of the Act of Law 247/1995 Coll., on elections to the Parliament of the Czech Republic.

86 See Art. 49(1) of the Act of Law 247/1995 Coll., on elections to the Parliament of the Czech Republic.

87 See Law no. 208/2015 of 20 July 2015 on the election of the Senate and the Chamber of Deputies as well as on the organisation and functioning of the Permanent Electoral Authority.

88 See Arts. 18, 23 and 30 of the Act on the Election of Members of Parliament and Senators.

89 The electoral threshold was reduced from 5% to 3% in 2020. See Molnár, 2021, p. 74.

90 Ördögh, 2016, p. 100.

91 Ördögh, 2016, pp. 102–103.

to country. It is interesting to note that in the practice of the eight countries, many have a second chamber (e.g. in Romania, Poland and the Czech Republic) – e.g. in Slovenia, which has a second chamber chosen by different interest groups (e.g. chambers, trade unions, craftsmen, universities, local interest groups etc.) appears and organised on a functional and territorial basis. It is also important to highlight the strengthening of the majority element in Hungarian regulation. Six of the countries analysed have a fully proportionate system, and in Romania, this is also dominant, even if the rule strengthening the majority element also appears there. Hungary, however, not only adopts a mixed system, but it also explicitly strengthens the majority. In addition, the electoral law introduced an important (and controversial) innovation in the so-called ‘winner compensation’ rule which further strengthened the majority element of the mixed electoral system. The essence of this is that the number of votes of the candidate holding a mandate in the individual electoral district above the votes of the candidate in the second place is also considered a fractional vote. This institution was also examined by the Hungarian Constitutional Court, which concluded that because the elements of the electoral system are predetermined and apply to everyone to the same extent, considering the previous case law of the Hungarian Constitutional Court (according to which the legislator has a wide range of motion in formulating electoral system<sup>92</sup>), the institution of ‘winning compensation’ is not constitutionally objectionable. I fully agree with the constitutional content of this decision of the Hungarian Constitutional Court, but it must be stated that this institution is a majority element, thus pushing the Hungarian parliamentary electoral system towards stable governance. In addition, the institution of ‘winner compensation’ is opposite to the purpose of the institution of compensation. The purpose of compensation is to ensure that non-mandated votes are not lost in individual electoral districts, and thus the electoral system should make these votes appear on the party lists of the parties or even on a separate compensation list. To do this, ‘winner compensation’ also compensates the winning candidate in the individual electoral district for the votes that are above the number of votes of the second-place candidate by one. The logical starting point for the compensation is that the winner did not need these votes; however, this would only be fully true if we were to look at these (according to the system) ‘unnecessary’ votes as votes that had not already been cast. Namely, if we consider that they were cast, but not to the winning candidate – since they ‘did not need it’ – then these votes may have been cast elsewhere, in which case, however, the final winner would not have won the mandate. Thus, we can only regard these votes as if they should not have been cast for the winner to take their mandate. In this theoretical case, however, the justification for compensation is also lost.

92 See Decision 26/2014. (VII. 23.) AB of the Constitutional Court of Hungary: “[...] the National Assembly has wide discretion in choosing the electoral system and in establishing the rules of the electoral procedure. The legislature is free to determine the electoral district’s systems, the procedure for nominating candidates, voting and obtaining mandates, and only the Basic Law sets the framework for this legislative freedom”.

## 5. Conclusion

The regulation of electoral systems is always country-specific and in line with social and historical traditions. It is therefore not possible to mechanically transpose the electoral system of other countries to any country as some of its elements will not necessarily be compatible with the specificities of the other country. The history of the eight countries analysed (the legacy of communism, the ‘problem’ of nationality) shows several points of connection; nevertheless, the electoral systems of the analysed countries are not uniform. Although most countries – in line with European trends – have a proportional electoral system, they have many different regulations. By comparison, in Hungary (or even in Romania), legislators adopted completely different electoral systems after the change of regime. It can thus be stated that the definition of the electoral system is one of the most national issues, where standards can and should be set; however, these standards can only provide a basis for comparability rather than accountability.

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## Comparative Constitutionalism in Central Europe – Summary

Lóránt CSINK

### ABSTRACT

Constitutions are more than legal documents that regulate the structure of the state and the relationship between the state and individuals. They also manifest the tradition, identity and political customs of the respective country. Different histories form different values which provide different interpretations of the constitutional text. Despite the similarities of constitutional institutions, one may see that constitutions are rather various.

To provide a general overview on the constitutionalism of Central European Post-Socialist countries, the volume first goes through the constitutional history of the examined states, then it analyses certain aspects of constitutional institutions. The last chapter aims to summarise the most basic findings of the previous chapters.

### KEYWORDS

Comparative constitutionalism, constitutional history, state structure.

Many parts of state institutions are similar worldwide. Most countries have parliaments to legislate, governments to direct the executive branch and courts to adjudicate in civil, administrative and criminal issues. Institutions such as constitutional courts, local governments and ombudsman offices are also familiar actors of state organisation. Still, several aspects are worth comparing; despite their great similarity, they also present crucial differences.

The present chapter aims to describe the reasons of similarities and dissimilarities in the examined countries, sum up the most basic remarks of the previous chapters and finally give the ‘conclusion of conclusions’.

The issue of state institutions proved to be crucial in European post-socialist countries. During the years of socialism, all countries except the ‘dissident’ former Yugoslavia had to follow the Soviet pattern, with little room for their own identity.

From the 1950s until the change of regime, the socialist states of Central Europe were characterised by considerable schematism. The ‘people’s democracies’ of Europe, belonging to the Soviet area of interest, have adopted constitutions that are radically divided between classical traditions and achievements of constitutional development as their public law system was built on the scheme of the 1936 Constitution of the Soviet Union. This was accompanied by a departure from the values of

constitutionality, the total nature of the exercise of power. The former Yugoslavia followed a different path after splitting with the Soviet Union in 1948; the country 'evolved' into no more than a 'softer' example of authoritarian state that lacked a basic respect for the rule of law.

Following the fall of socialism in the late 1980s, the states of Central and Eastern Europe faced the task of finding their way for a new model of state organisation in building democracy. They also had to create their political system, namely what relations should be established among state entities, especially the president, government and parliament. Thus, in addition to guaranteeing human rights and fundamental freedoms, the definition of the form of government became a key point in the transition, the formation of which was significantly influenced by both state theory and political considerations.

The first part of the volume is a cultural comparison, and it deals with the issue of how the different states developed from the end of World War I. As one may observe, history, traditions, politics and national identity all formed the political and constitutional structure of the states.

In his introductory paper, Szabó discusses how the former Hapsburg Empire turned to modern states. After the collapse of the empire some countries decided to have a 'new beginning' (especially Austria) and break with the heritage of the monarchy, while others (Hungary) rather emphasised continuity. Szabó points out that new countries face new problems:

The most pressing problem of the Central European region was the impossibility to grant every nationality a contiguous territory since most nationalities lived in separate areas throughout the region. Therefore, when one ethnic group attempted to create a single nation state, it simultaneously enclosed areas with predominantly different ethnic groups. Moreover, creating state borders along ethnic lines was not a uniformly accepted solution as some nationalities wished to respect historical borders.<sup>1</sup>

Until the 1990s, several countries of the region formed federal states (Yugoslavia, Czechoslovakia); yet federalism could not last long, and they separated as the nations had the possibilities to decide on their own status. Analysing the constitutional history and identity of Croatia, Čepulo concludes that

the Constitution of the Republic of Croatia is not based on the return to tradition yet influence of tradition can still be seen in certain important provisions. It is present in the dominantly 'historical' preamble, in the adopted definition of Croatia as the nation state as well as in the continuity of the Constitutional Court. As it regards deeper institutional and political layers of the Croatian constitutionality of the utmost importance is a principle of self-determination.

1 See Szabó, Chapter 1.

(...) The Croatian political experience in the 19<sup>th</sup> and 20<sup>th</sup> century embodied two in a way ‘opposing’ characteristics – one is long experience of participation with its own constitutional identity in the broader multicultural structures, and the other is tendency to constitute its own independent state.<sup>2</sup>

Quite similarly, when Bardutzky analyses Slovenia, he reckons that

the past hundred years have been turbulent, Slovenia was a part of different constitutional systems, not to mention diametrically opposite political, societal and economic systems. The three milestones – the creation of the monarchy of the South Slavs, the WWII and the creation of Socialist Yugoslavia, and finally the establishment of an independent and democratic Slovenia – were moments where Jacobsohn’s ‘political aspirations and commitments’ culminated and found expression (or disappointingly failed to find expression) in constitutional documents and settlements. In between the milestones, the nation lived through traumas, fears, but also positive and encouraging developments.<sup>3</sup>

In his chapter, Jirásek analyses the formation of Czechoslovakia, the process of “breaking up with the constitutional-legal continuity and the tradition of Austrian constitutionality”<sup>4</sup> in detail. From the Slovak perspective, Erdősová evaluates how Czechoslovakia separated to two individual countries, how Slovakia was established and what the contemporary key issues are. She reckons that

what was once homogeneously united around a polarised world now has polarised conflicts of opinion, but behind them are much more structured motivations and interests, and in fact society as a whole is struggling in a crisis caused by the shaking of original values. If the constitution is a fundamental law of the state and in fact an expression of the form of a social contract, it will probably be necessary to reconsider this treaty if it proves insufficient, despite the fact that this goes against the principle of immutability or more difficult variability, legal certainty and institutional trust. On the other hand, at present it is not just a matter for the states themselves to ask themselves how firm, how sovereign this treaty is, when the very essence of the democracy it was supposed to consolidate is in crisis, but today it is much deeper and we can talk about crisis in Europe and can hardly be expected to be resolved by states in isolation.<sup>5</sup>

As for Poland, Dobrowolski and Lis-Staranowicz give a general overview on constitutional history. They find that “in political practice (...) Polish Constitutions were

2 See Čepulo, Chapter 2.

3 See Bardutzky, Chapter 9.

4 See Jirásek, Chapter 3.

5 See Erdősová, Chapter 8.

created slowly, yet they quickly collapsed,”<sup>6</sup> sum up the history from the 1791 constitution until the 1997 constitution and analyse the present constitutional situation of Poland.

When analysing Romania, Guțan mainly focuses on constitutional identity. He reckons that

not accidentally, the Romanian constitutional debates of 1857, 1859 and 1866 focused primarily on issues intimately related to the Romanian national identity, like the definition of the citizenship, freedom of religion, the place of the Romanian Orthodox Church in the constitutional architecture, and the Romanian constitutional traditions.<sup>7</sup>

Finally, he concludes that

the Romanian constitutional identity may be defined, in historical perspective, as a tendential constitutional identity. It reflects the strong desire of the Romanians to acquire constitutional modernization in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity. In other words, it reflects a permanent need of constitutional modernization and change tamed by the anxiety to lose the national and constitutional self. This does not mean to be European and Romanian at the same time, but to be European only as long as the Romanian character is preserved. Romania did not have multiple constitutional identities, rather it was and still is between constitutional identities.<sup>8</sup>

Evaluating Hungarian constitutional identity, Szabó emphasises the relevance of history. He finds that unlike many countries of the region, Hungary relied on continuity: it “disrupted formal continuity while upholding substantial continuity”.<sup>9</sup> He adds that continuity is also important at present as “the Fundamental Law establishes the ‘achievements of the historical constitution’ as a supplementary means to its interpretation”.<sup>10</sup>

Finally, Petrov and Đorđević analyse the impact of Serbia’s historical constitution on the country’s identity. They review the trials and tribulations that the country faced in the twentieth century and find that to stabilise constitutional issues, the country should find a proper balance between presidential and parliamentary systems on the one hand and resolve long-lasting strategic issues such as those of Kosovo and Metohija on the other.<sup>11</sup>

6 See Dobrowolski and Lis-Staranowicz, Chapter 5.

7 See Guțan, Chapter 6.

8 See Guțan, Chapter 6.

9 See Szabó, Chapter 4.

10 See Szabó, Chapter 4.

11 See Petrov and Đorđević, Chapter 7.

The second part of the volume contains an institutional comparison of several constitutional topics of Central European countries, highlighting the similarities and dissimilarities of the institutions and intending to find the reasons for these differences. In general, one may notice an interdependence among the institutions as they can hardly be evaluated without the ‘entire picture’. One of the most general elements of political systems is separation of powers. Kruzslicz argues that

the separation of powers as implemented in the Central European region, lead to the rising of strong executive powers independently of the presidential character of certain regimes, on the contrary, even more when parliamentary regimes were constitutionally established.<sup>12</sup>

He also finds, admittedly optimistically, that

the symbolic even mythic principle of the separation of powers, especially for Central European States, should not be forgotten, on the contrary, should be used in a more appropriate way in order to achieve its comprehensive aim but to do so, by taking into consideration its theoretical and contextual complexity.<sup>13</sup>

Within the complex system of separation of powers, Horváth examines the executive branch. He analyses the role of governments, territorial units and other state entities in performing executive power, yet he admits that

the text of the constitutions served as starting point for the analyse of the structure of executive, it would be unwise to attach too great importance to the wording of the constitutions since their provisions per se are inadequate to explore the proper structure and functioning of the executive branch.<sup>14</sup>

Connected to the executive, my paper describes the role of presidents in the region. I evaluate the election, status, competences and termination of office of presidents. Köbel evaluates the legislative branch, concluding that

that there is a substantial amount of similarity between the legislative powers of the countries, in all their aspects. There are no cardinal differences between the systems – notwithstanding the historical and cultural differences – that would significantly disrupt the semi-uniformly found between the observed legislative powers.<sup>15</sup>

12 See Kruzslicz, Chapter 12.

13 See Kruzslicz, Chapter 12.

14 See Horváth, Chapter 15.

15 See Köbel, Chapter 14.

In addition to the political entities, the judicial branch is also significant. In his comparative analysis, Badó describes the challenges of the region. He admits that “judicial independence is still a vague concept today, despite the fact that almost every constitution in Europe, but especially post-communist constitutions, obligatorily enshrine this principle.”<sup>16</sup> He describes in detail how the selection process, the structure and the administration should be developed to better fit general standards. Not only courts but also constitutional courts are parts of the judicial branch. Tóth analyses the competences of constitutional courts and finds that

the “real” constitutional complaint (...) did not originally form part of the concept of concentrated constitutional adjudication; the original Kelsenian model completely lacked the possibility for citizens (...) to challenge the constitutionality of judicial decisions before the constitutional court. However, due to the spreading influence of German practice, such powers now exist in most European countries with centralised constitutional courts. This is also true for the vast majority of the East Central European countries examined; only in Romania and Poland is there no “real” constitutional complaint. But more importantly, where it exists, it has become a core competence of the constitutional courts, as most of the petitions before the constitutional courts and the majority of the decisions on unconstitutionality thereof are taken in this competence.<sup>17</sup>

Connected to constitutional courts – but using a broader perspective – Sándor analyses fundamental rights adjudication in Central Europe. He finds that countries of the region

chose to adopt the centralised model in which a separate institution – in most of the cases a constitutional court – exercises the “constitutional review” function that includes the fundamental rights adjudication, but they are not part of the ordinary court system and do not adjudicate conventional litigations.<sup>18</sup>

Beyond rules on state organisation, identity seems to be a key question. Tribl highlights that “the constitution is more than a set of fundamental norms: it is a catalogue of principles and values on which the state is established.”<sup>19</sup> He finds that

constitutional values and constitutional identity, as we saw earlier, are linked at several points. One could say that constitutional values create the basis through which constitutional identity can be formed. However, defining constitutional values is perhaps much easier than defining constitutional identity.

16 See Badó, Chapter 17.

17 See Tóth, Chapter 18.

18 See Sándor, Chapter 19.

19 See Tribl, Chapter 11.

The reason is simple: Constitutional values are explicit in national constitutions. It is from these values that the constitutional identity is usually derived, usually with the intervention of the constitutional courts. There are many theoretical and jurisprudential debates on constitutional identity. Debates about constitutional values are less scientific: it is more social or political. If we look at the constitutional values of a state and do this in isolation, we usually have to look for the historical reasons that led to the consideration that the lawmaker had enshrined in the constitution something that we later consider to be a constitutional value.<sup>20</sup>

Szakály analyses the constitutional-making processes of the region. She emphasises their importance and finds that “there is a similarity between the rigidity of the formal rules of constitutional amendment and the frequency of the actual constitutional amendments only in the case of one state”.<sup>21</sup>

Lukács gives a general overview on the sources of law.<sup>22</sup> She evaluates the similarities and differences in the legal systems; points out the major characteristics of legal norms at various levels of norm hierarchy.

Korhecz analyses the rather sensible and disputed issue of national minorities. He analyses the history and the contemporary situation of minorities, both in theory (according to constitutional provisions) and in practice. He finally finds that constitutional courts in the Region demonstrated different level of readiness to protect constitutionally guaranteed minority rights and that the minority question is still trapped in historical legacy to a large extent.<sup>23</sup>

Kurunczi gives a general overview on the electoral systems. He finds that “the regulation of electoral systems is always country-specific and in line with social and historical traditions”<sup>24</sup> and concludes that the “electoral system is one of the most national issues, where standards (...) can in no way provide a basis for accountability, but only for comparability”.<sup>25</sup>

The purpose of the volume is to provide a better understanding of the constitutional background of Central Eastern Europe. In many ways, the countries are committed to following the ‘West’; yet there are several peculiarities, which are based on both national identity and institutional solutions. This volume analyses the constitutional history and identity of the countries in its first part and turns to institutional comparison in its second part, presenting nothing other than the ‘hardware,’ the constitutional base of the countries. Hardware is essential but not enough to run the programme – all software issues, i.e. how the countries work in practice, belong to the field of politics.

20 See Tribl, Chapter 11.

21 See Szakály, Chapter 10.

22 See Lukács, Chapter 13.

23 See Korhecz, Chapter 20.

24 See Kurunczi, Chapter 21.

25 See Kurunczi, Chapter 21.

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