| Chapter 8 |

The Constitutional Development of Slovakia

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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[1] 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.[2]

> 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.[3]

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.

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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.[4]

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 (HSĽS), 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 constitusionalism 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, altough 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.[5]

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 democray 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.[6]

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 druting 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'[7] 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.[8]

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.[9]

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.),[10] 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'.[11]

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[12] as a form of government headed by the president.[13]

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".[14] 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[15] 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.[16]

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.[17]

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 infringment 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.[18]

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 Kandráč 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.[19]

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

19 Hodás, 2017.

from, then we should search for the source that has traces of reflections on the origin of the state and law.[20]

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 hat 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".[21] 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.[22]

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.[23]

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.[24]

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 consise 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).[25]

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),[26] 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.[27] 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".[28]

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.[29]

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.[30]

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 reffered 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.[31]

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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