| Chapter 10 |

Constitution-making and the Permanence of the Constitution

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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,[1] other states created lengthy and circumstantial rules.[2] 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.

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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[3] to the analysis of the Venice Commission on the issue of constitutional amendments,[4] 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".[5]

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".[6] 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,[7] constitution building[8] or constitutional design[9] 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."[10] The need to have a constitution in the modern sense can be linked to the Enlightenment[11] 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".[12]

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,[13] 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,[14] and the literature on the adoption of constitutions developed from this point.[15]

When a state decides to adopt a new constitution, the process is usually related to a crisis or an elemental change in society[16] – with a few exceptions, such as the constitution of Sweden in 1975,[17] 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.[18] However, if the constitution makers are not under any pressure to achieve the goal, the whole procedure can break down.[19] For example, the new constitution of Luxembourg has been prepared for almost a decade – since 2009[20] – and it has not entered into force.[21] According to the work of Ginsburg, Elkins and Blount on 150 constitutions, the average constitution-making process lasts 16 months.[22]

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.[23]

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[24] 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.[25] 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,[26] 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.[27]

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".[28] 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.[29]

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[30]; however, the process is not without risks.[31] As spontaneity and populism can endanger success,[32] 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[33] – some successful examples can also be found, as was the case in South Africa.[34]

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".[35] 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.[36] 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.[37] 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,[38] 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?',[39] distinguishing between constituent power (*pouvoir constituant)* and constituted power (*pouvoir constituant institué*). 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,[40] and an ordinary legislative power can only amend the constitutional text.[41] Sieyès was not the first to define this method,[42] 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.[43] Several authors followed his footsteps and analysed the same question.[44]

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.[45] 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,[46] Hungarian[47] and Slovak[48] 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".[49] 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"[50] 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,[51] while the amendment process is so rigid in some countries that there is almost no possibility to change the text formally.[52] 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".[53]

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.[54] The rigidity of the constitution has a connection with the power of the text's juridical interpretation.[55] 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.[56]

As a constitutional amendment is generally a response to an imperfection,[57] 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."[58]

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.[59]

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.[60]

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[61] and Serbia[62] 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.[63]

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,[64] 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.[65]

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"[66] 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".[67]

The other type of eternity clause is the implicit eternity clause,[68] which creates limitations on the constitution amending power outside of the constitutional text, typically by the decisions of the constitutional court.[69] 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,[70] the so-called achievements of the historical constitution.[71] 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.[72]

I argue that these achievements are implicit eternity clauses,[73] 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.[74]

In Croatia, according to the Constitutional Court,[75] 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.[76]

In the practice of the Slovak Constitutional Court, the following implicit eternity clauses were found in the material core of the constitution: sovereignty,[77] principles of democracy,[78] rule of law,[79] protection of fundamental rights and freedoms,[80] and taxes, levies and state budget not being subject of a referendum – in connection with fundamental rights.[81]

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".[82] 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."[83]

In their work, Ginsburg and Melton use the concept of constitutional culture to develop their measurement[84] and analyse the methods of other academics to observe the similarities and differences in the results.[85] 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.[86]

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".[87] Rasch and Congleton examined the formality and lawfulness of the constitutional amendments,[88] reaching the conclusion that the amendment process affects the stability of the constitutions.[89]

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.[90]

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.[91] 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).[92]

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[93] (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.[94]

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,[95] 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[96] or going against the Court of the European Union.[97]

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[98] and Hungary,[99] 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.[100] 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.[101]

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,[102] although the most influential case is related to the Supreme Court of India.[103] 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.[104] The idea is not as commonly used in Europe as in Asia, Latin-America and Africa,[105] 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.[106] 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.[107]

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.[108]

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.[109] Some unsuccessful attempts have been made since then,[110] although the crises of the system validate the demand[111]; 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.[112]

104 Roznai, 2017, p. 44.
105 Roznai, 2017, pp. 47–70.
106 Ľalík, 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.[113]

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.[114] 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.[115] 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.[116]

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[117]; 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".[118] The Croatian Constitutional Court has an activist approach that was built gradually[119] and open to external influences – especially the system of the European Court of Human Rights.[120]

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.[121] 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.[122]

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,[123] slightly achieving the majority needed for constitutional amendment. This proportion was also gained in the elections of 2010[124] and 2014.[125] Some of the constitutional amendments were mainly formal or only related to one issue[126]; nonetheless, some of the amendments were lengthy and touched upon several significant questions of state life and human rights.[127] The frequent amendment of the constitution is against its purpose of stabilising the constitutional system and giving a secure basis for the state.[128] According to the Venice Commission regarding the Ninth Amendment of the Fundamental Law of Hungary, there are concerns about some amendment provisions.[129]

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,[130] and the 20th amendment to the constitution was made in 2020.[131]

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.
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 Ľalík, 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.[132]

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.[133] 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[134] 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".[135] 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".[136]

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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