

## The Change of Public Law in Central-Eastern European States

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### Abstract

*The roots of the current constitutional and political-governmental models of Central-Europe shall be searched in the period of the system change. This paper focuses basically on the constitutional changes in the former socialist countries. As a result of these changes, between 1990 and 1997 almost every post-socialist state adopted a new democratic constitution. (Except for Hungary, where the constitution was only amended, but a new constitution had not been adopted since 2011).*

*The paper is trying to find the answer, what those challenges were, that the constitutionalizers of the regime change had to respond to. Furthermore what the common or at least similar solutions, techniques and institutions were applied and introduced at that time.*

*The paper – as a result of the author’s nationality and the fields of his scientific researches – put an emphasis to the constitutional changes in the Hungarian public law system, both in political and in economic aspects. Beside the amendment of the text of the Hungarian Constitution in 1989 and 1990, the paper introduces the most relevant decisions of the Constitutional Court of Hungary, which had been established also as a result of the system change. The decisions of the Hungarian Constitutional Court played an important role in the system change, furthermore in the establishment and in the consolidation of the rule of law in Hungary.*

**Key words:** *change of public law, Central-Eastern European states, Hungary, democratic constitution, constitutional court.*

The roots of the current constitutional and politico-governmental models of Central-Europe can be found in the period of the regime shift, or rather the system change. There is, however, a slight difference between these two terms. “System change” reflects a more intense and more extensive social activity that existed during the period.

It is widely known that the chain of events that culminated in the system change actually started in the Soviet Union as a top-down reform of the state socialism. The fact that Mikhail Gorbachev and Boris Yeltsin considered the perestroika as the revolutionary renewal of socialism is somewhat contradictory.<sup>2</sup> It is obvious, however, that neither the Soviet Union nor the two socialist states leading the reform – Poland and Hungary – used the term “revolution” for this process at that time (between 1985 and 1989/90); this was probably because it allowed for the Bolshevik revolution of 1917 to remain on a pedestal and because the situation was not perceived as revolutionary.

The constitutionalizing process of the regime change began in 1989; its direct antecedents were especially remarkable where the transition was delayed and resulted from the previous era as its integral part. This is particularly true for Hungary whose democratic transition is referred to as a ‘constitutional revolution’<sup>3</sup> or ‘the revolution of the rule of law’<sup>4</sup> by some experts; these terminologies are simply more sophisticated ways of indicating a peaceful transition.

In the context of the Central-Eastern European constitutionalizing process,<sup>5</sup> however, the Hungarian example is considered unique. In 1989 a new constitutional document was born – practically the first new written constitution of the Central-Eastern European constitutionalizing process – which is formally regarded as a constitutional amendment. In fact, this constitution was declared provisional, but it reacted to every political and professional challenge that was set by the democratizing zeitgeist at the time. The fact that it did not take its place in

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<sup>3</sup> Szente, Zoltán: Európai alkotmány- és parlamentarizmustörténet (1945–2005). [A History of European Constitutions and Parliamentarism (1945–2005)] Osiris Kiadó, Budapest, p. 488–495.

<sup>4</sup> Majtényi, László: A jogállami forradalom történeti alkotmánya [The historical constitution of the revolution of the rule of law]. In: És mi lesz az alkotmánnyal? Szerk.: Majtényi László – Miklósi Zoltán. Eötvös Károly Intézet, Budapest, 2004. pp. 71–80.

<sup>5</sup> Halász, Iván: Alkotmányozás és a fontosabb alkotmánymódosítások Közép-Európában 1989 után. [Constitution-making and important constitutional amendments in Central Europe after 1989] In: Alkotmányozás Magyarországon és máshol. Szerk.: Jakab András – Körösenyi András. MTA TK PTI – U.M.K., Budapest, 2012. p. 163–176.

history in this aspect is due to the decision – made for political reasons by its creators – that the document would be called the amendment of the socialist constitution of 1949.

Between 1990 and 1997 almost every post-socialist state adopted a new democratic constitution. The Croats and Serbs had their constitutionalizing process in 1990; the Bulgarians, Macedonians, Romanians, and Slovenians adopted their new constitutions in 1991; the Czechs, Estonians, Lithuanians, and Slovaks in 1992; the Russians in 1993; the Belarusians and Moldovans in 1994; the Ukrainians in 1996; the Poles in 1997; and, finally, the Albanians in 1998. It should be noted, though, that the Serb constitution of 1990, was voted for by the republican parliament elected at the time of the one-party system and the practically omnipotent Communist League; thus, its democratic legitimacy was relatively apocryphal. Its provisions were not even supported by the reputation of the National Round Table like in Hungary.<sup>6</sup> Meanwhile, in 1995, the forced constitution of Bosnia and Herzegovina was born and was reestablished by the pressure of the international community; however, this is not related to the democratic transition but rather to the end of the Yugoslav Wars. Therefore, this fundamental law is not a product of compromise by the local political powers but is instead a document forced on them by the great powers.<sup>7</sup>

The democratic constitutionalizing process of the peaceful transition in Europe ended roughly with the adoption of the Polish constitution in 1997 and the Albanian constitution in 1998. It should be noted, however, that in the case of both countries the so-called “provisional constitutions” were adopted in the course of the peaceful transition – the Albanians in 1991, and the Poles in 1992. These laws were not true constitutions but rather constitutional statutes regulating the relation of powers. As the list of basic rights was missing from the Albanian one, the previously mentioned constitutional statute was complemented with a catalogue of basic rights in 1993.<sup>8</sup>

The later constitutions of the region, however, were established in a different era and were created to respond to different challenges. The Serbian constitution adopted in 2006, for instance, intended to react to the disappearance of the last remnants of Yugoslavian statehood, the collapse of the authoritarian regime also concerned in war crimes and marked by the name of Slobodan Milosevic, and the forthcoming secession of Kosovo. At the turn of the millennium there were several significant constitutional transitions in the region, but only a few efforts led to the adoption of a totally new constitutions. The

Croatian, Romanian, Slovakian, Ukrainian and other political elites confined themselves rather to significant amendments to the constitutions. Kosovo, while becoming independent, adopted its constitution in 2008 with serious, albeit indirect, international support. The document was necessary in order to gain independence in the face of the gradual withdrawal of the international community.

The period of the new constitutionalizing process was ended by Hungary with the adoption of the new Fundamental Law in 2011; however, it did not radically alter the existing legal structure. The provisions intended to be conservative and considered nationalistic did not even aim to subvert the structure put in place at the time of the regime change. Instead, the government wanted the past 20 years, which were declared transitional, to come to an end symbolically and wished to give the population the hope of a new beginning.<sup>9</sup> We may say that the outset of a new conservative based consolidation can be found in the adoption in this document.<sup>10</sup>

One country is missing from the above list – Latvia. The Latvian parliament annulled the Soviet annexation of the country in spring 1990 and some months later the Latvian democratic constitution of 1922 was entered into force provisionally. Originally, this was intended as a temporary solution by the Latvians but finally it became permanent; the public law system of the country continued to function and was democratic as well.<sup>11</sup> Only the issue of basic rights missing from the constitution of 1922 had to be solved, which were enshrined in the fundamental law in 1998.<sup>12</sup>

What were the challenges that the constitutionalists of the regime change had to respond to? What were the common – or, at least, similar – solutions, techniques and institutions that were applied and introduced at that time? Since the regime change entailed the renaissance of human rights issues, the Central-Eastern European constitutions paid a much greater deal of attention to this issue than the constitutions did between the two World Wars. This is, in part, a result of the fact that they could take into consideration the experience of the old West-European democracies and the activities of various universal and regional international organizations in developing law on human rights.<sup>13</sup> I have already mentioned that the Latvian constitution of 1922, in fact, ignored the catalogue of basic rights. As the population of the region knew, after the 40-year experience of state socialism: it is not enough to declare the rights but they also need to be guaranteed. Thus, many

<sup>6</sup> Tóth, Károly: Új alkotmányok előkészítése és elfogadása Kelet-Európa államaiban [The preparation and adoption of the new constitutions in Eastern European countries]. In: Kelet-Európa új alkotmányai. Ed. Tóth Károly. JATE, Szeged, 1997. p. 28.

<sup>7</sup> Halász, Iván: Nemzetközi igazgatás a válságövezetekben – adalékok a nemzetközi igazgatás történetéhez és jelenlegi dilemmáihoz. [International administration in the crisis areas] Külügyi Szemle IV. évf. 2005. No. 1–2. p. 254.

<sup>8</sup> Szente, Zoltán: Európai alkotmány- és parlamentarizmustörténet (1945–2005) [A History of European Constitutions and Parliamentarism (1945–2005)]. Osiris Kiadó, Budapest, pp. 514–515.

<sup>9</sup> Halász, Iván: Symbolic Elements in the Preambles to the Constitutions of the Visegrad Countries. Acta Juridica Hungarica, Vol. 52. No. 2. 2011. 126–127. p.

<sup>10</sup> Halász, Iván: „WE THE MEMBERS OF THE HUNGARIAN NATIONS” Remarks on the Changing Concept of Nation in the New Fundamental Law of Hungary. Journal on European History of Law. Vol. 4. 2013. No.1. p. 128–129.

<sup>11</sup> *Ibid.* pp. 48–49.

<sup>12</sup> Szente, Zoltán: op. cit.

<sup>13</sup> HALÁSZ, IVÁN: Central European Legal Assistance. Trends and Priorities After 2004. In: *Hungary's Legal Assistance Experiences in the Age of Globalization*. Nagoya, Nagoya University, 2006. p. 249–262.

mechanisms and institutions were included in the post-socialist constitutions that were intended to provide those guarantees. Two institutions were especially popular: the separate constitutional court and the institution of the commissioner for fundamental rights, that is, the ombudsman. Both institutions started to permeate slowly into the public law system in many Central-Eastern states already in the second half of the 1980s and became dynamic after 1989.

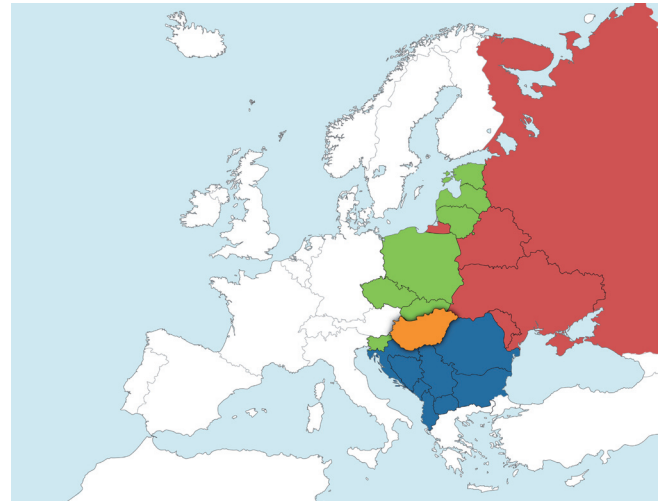
Even though the trends and solutions were similar, it is precarious to consider a totally homogenous model. While the constitution of most countries specifies only one general ombudsman of human rights, the Polish constitution of 1997 also included the institution of the ombudsman for children. In Hungary, however, four specialized ombudsmen operated before the constitutionalizing process of 2011 – the parliamentary commissioners for fundamental rights, minorities, data protection and future generation. Most post-socialist countries established a separate constitutional court, but the Estonians, in fact, decided on the American model, so the task of the constitutional court is carried out by a department of the Supreme Court instead of a separate constitutional court. According to the Estonian constitution the courts shall not apply unconstitutional laws.

The post-socialist region shows a more varied picture regarding the forms of government. In post-Soviet Eastern Europe, the model of strong presidential power became significant, specifically in Russia and Belorussia. Although Ukraine is vague in this respect, the position of the Ukrainian head of state is definitely stronger than those of his Central European colleagues'. In the so-called Central Europe of Visegrad (Poland, the Czech Republic, Slovakia and Hungary) the parliamentary governmental form is distinctly dominant, though the power of the head of state is different. The South-East European states show a varied picture in this respect, but it may also be said that after the end of the Yugoslavian wars, the power of the parliament started to increase even in the countries where strong authoritarian presidential regime was established due to war (for example, Serbia, Macedonia and Croatia). Despite the significant strengthening of the parliaments, the position of the head of state remained substantial in these countries. There are intensive debates about the Romanian form of government whether it is half-presidential or merely parliamentary-presidential. However, it should be considered that it is basically parliamentary, which is made more colorful by the rather independent institution of the head of state. The Romanian system shall be judged appropriately on the basis of the actual operation. The seriousness of the elected head of state directly increases if he can rely on the stable parliamentary majority that supports him, or is able to cooperate with the head of government. It can make his situation significantly easier if the latter is not the leader of the party at the same time. However, in the case that the head of government has strong parliamentary support and is also the leader of a strong party, the position of the head of state also weakens structurally. Similar duality is characteristic of Lithuania, which the literature considers sometimes a half-parliamentary, but sometimes half-presidential form of government.

There are relatively significant differences between the states of the region with regard to the actual legal status of the head

of state and the issue of the election process for the presidency: directly by the population or indirectly by the parliament. Initially, the head of state elected by the parliament was not uncommon in the region either, but this solution has seemed to diminish. Several states that had decided on electing the head of state by the parliament at the time of the regime change changed this method later. This is valid for the Visegrad States, too – the Slovaks changed to the direct election of the head of state in 1999, whereas the Czechs did only in 2012. Currently in this region the head of state is elected indirectly, i.e. by the parliament only in Hungary and Estonia.

The internal categorization of the post-socialist region is partly related to these characteristics of governmental form. As far as we are concerned, we can distinguish three sub-regions: the first includes the Baltic States and Central Europe in the narrow sense with Slovenia, the second includes the Balkan and the post-Yugoslav states, and the third includes mainly the European post-Soviet republics – that is, Russia, Ukraine, Belorussia and Moldova. We note that at the same time that this categorization is not of absolute value, there may be significant differences even within certain groups (for instance, between Russia with one central power and Ukraine with multi-central power and multi-speed, or the currently stable Croatia and the less stable Southern Balkan states.)



## Hungary

The Act of 1989 amendment to the Constitution of the Hungarian People's Republic, named the "constitution of the regime change" and the cardinal acts attached to it shall primarily be the basis of the answer to the question of what effect the regime change had on the Hungarian constitutional structure and what public law changes it resulted in.

The amended constitution promulgated on 23 October 1989 was established within the legal frames of the Soviet communist constitution, the constitution of '49, on the "grounds of legality"; its preamble includes the following sentence: "...- hereby establishes the following text as the Constitution of the Republic of Hungary, until the country's new Constitution is adopted..."

Based on this the primary aim of the Act XXXI of 1989 was to help the "peaceful political transition into the rule of law",

and establish the multi-party system, parliamentary democracy, and social market economy. This transition period, in the sense of public law, lasted for 22 years in Hungary, until the adoption of the Fundamental Law of 2011.<sup>14</sup>

The Fundamental Law – as I have mentioned previously – placed the system of basic rights and duties on new bases. It declares that the Hungarian Republic acknowledges the inviolable and inalienable rights of man, whose respect and defense are the primary duties of the state. Rights have been enshrined in the article on basic rights that were not included before, such as the freedom of enterprise and economic competition, the free movement and free choice of residence, the right to access and disseminate data of public interest, or to hold strikes.

Due to the amendment of the constitution of 1989 there was a major transitional period in Hungary, which meant the end of the socialist state, paving the way towards democracy and the rule of law. Among these changes there were some that became tangible immediately, such as the transformation of the party system, free parliamentary elections, and consequently the change in the political composition of the National Assembly – which provided for the legal continuity between the successive political systems.

The political parties as institutions and the electoral laws as legal filter mechanisms are parts of a whole that we usually indicate with the terms of political pluralism and multi-party democracy. The parties – that participate in the formation of the will of the people and its manifestation – can be formed and act freely with respect to the Fundamental Law and Constitutional laws. In order to guarantee this, their activities shall not involve gaining and exercising power violently, or possessing it exclusively. At the same time, the most telling example of Hungary's incomplete transition of public law is perhaps that the efficient regulation of transparent management and finance of political parties has been unsolved, which upholds the possibility of corruption and slightly hinders the promotion of the principle of equal opportunities.

There were also products of constitutionalizing at the end of the '80s that were influential in the transition process of the past 25 years. The Constitutional Court, the President, the State Audit Office, ombudsmen, and local governments are for example types of "institutions of regime change".

On the basis of the numbering of Acts of Parliament the amendment to the Constitution in 1989 (Act XXXI) was followed by the Act on the Constitutional Court (Act XXXII). The consecutiveness of the two acts cannot be considered a coincidence, as their adoption was carried out with respect to each other. The subsequent adoption of the Constitution and the

Constitutional Court at statutory level proves the close connection between the Constitution situated at the top of the hierarchy of law and the Constitutional Court protecting the constitutionality of laws. On the basis of the preamble of the Act on the Constitutional Court, the Constitutional Court was established by the National Assembly in order to build up the rule of law, protect the constitutional order and basic rights guaranteed in the Constitution, and establish the separation of powers and their mutual balance. The Constitutional Court might be the symbol of the paradox nature of the regime change: a revolution under Constitutional Court control. However, nobody was aware of this aspect at the time of the establishment of the Constitutional Court. The Constitutional Court belonged to the tools/instruments of the desired rule of law. The Constitution made democratic by an amendment was worth "protecting" by the negotiating political parties; the existence or non-existence of the Constitutional Court was a relatively insignificant part of a greater political bargaining. Neither Europe nor the Council of Europe regarded the existence of the Constitutional Court the requirement of Hungarian democracy. However, as it was established it has become a responsible guard of the transition methods unassailable in the aspect of the rights of liberty, makes decisions on the exceptions where the legal continuity can be broken, and transmits the content of the basic rights created and exercised in the democracies of the world with its interpretation activity.

Initially the Constitutional Court made significant decisions in connection with the regime change, for example the Constitutional Court resolution of 23/1990 (X.31) on the unconstitutionality of capital punishment,<sup>15</sup> or the Constitutional Court decisions of 9/1992 (I.30) and 11/1992 (III.5) on the criterion system of the rule of law.<sup>16</sup>

The basic frameworks of the rule of law were established in the course of the constitutionalizing process of 1989 and the ensuing state-building. In the following years, the consolidation of the basic institutions and ensuring their consistency had to be worked on. In building the system of the rule of law, it was less and less justified to maintain the nature of transition, the country needed a stable civil democratic structure. In the sense of public law this process was ended by the aforesaid adoption of the Fundamental Law of 2011 in Hungary.

Besides the political and public law transition, however, in the last decade of the 20<sup>th</sup> century the economic change related and due to the aforesaid took place as well. As a result of the privatization and "de-nationalization" of the economy, the market economy started to emerge also in Hungary and consequently the distribution of property changed, too.<sup>17</sup> The

<sup>14</sup> Halász Iván: Creation and Characteristics of the new Fundamental Law of Hungary. *The Lawyer Quarterly*, 2011. September, Vol I. No. 2. p. 85–105.

<sup>15</sup> For further details, see: Tóth, J. Zoltán: Halálbüntetés pró és kontra [Reasons for and against death penalty]. HVG-ORAC, Budapest, 2012, ISBN 978-963-258-177-4.

<sup>16</sup> Sólyom, László: Az alkotmánybíráskodás kezdetei Magyarországon [The beginnings of the constitutional court's jurisdiction in Hungary], Osiris, Budapest, 2001.

<sup>17</sup> Soós, Károly Attila: *Rendszerváltás és privatizáció*. [System change and privatisation] Corvina Kiadó, Budapest, 2009. For a historical survey about the development of the constitutional protection of property ownership see: Téglási András: *A historical survey about the development of the constitutional protection of property ownership*. In *Studia Iuridica Caroliensia* 4. Károli Gáspár Református Egyetem, Budapest, 2009. pp. 219–234.

amendment to the Constitution set out the equal protection of public and private property.<sup>18</sup>

The new provisions due to the constitutional system change of property created the constitutional basis of the start of the process, the result of which a great part of the national asset nationalized nearly on the whole after 1945 could be privatized again in 15 years.<sup>19</sup> This privatization process, taking place in a relatively short period in the aspect of history, played a significant role in the creation or revival of market economy (at the start of which the rate of state property exceeded 85 percent.)<sup>20</sup> By now, nearly four-fifths of the Hungarian economy has been privately owned.<sup>21</sup>

The comprehensive amendment to our Constitution in 1989 was inspired by the negation of the existing distribution of property of that time. This meant the rejection of the previous socialist system of property ownership leveling at the systematic eradication of private property – which was carried out successfully regarding capital goods.<sup>22</sup> The harmonization of the legal and political dimensions of this new system of distribution of property had to be carried out by the Constitutional Court, enabling the creation of the new distribution of property different from the previously existing ones.

In the course of the regime change, the problem of carrying out the compensation to be given for the deprived properties emerged first, or rather the claim for restitution of those who suffered non-material damage in the past systems (from 1939), so those who were persecuted or suffered disadvantages. Primarily the problem was how the old system of the distribution of property, which gave absolute priority to the state (social) property against all other forms of property, should be

demolished, transformed: through privatization or reprivatization.<sup>23</sup> The actual constitutional problem was: to what extent the previous nationalizations can be regarded unconstitutional. It is important to note that the intent of the redress of – political – grievances suffered in the previous system also played an important role in defining the solution methods.

The Constitutional Court decision made in the first period of its operation proved to be crucial not only in the field of the constitutional protection of property, but also in the aspect of the development of the entire legal system. The court also took decisions that the Parliament could not – and presumably did not want to – make, namely in which form the privatization shall be carried out in Hungary. The Constitutional Court stated that – except for a narrow group, the previous church property and land – there is no room for reprivatization; the privatization of state property and compensation could take place instead. In choosing the process of state property privatization it was crucial that ascertaining the original owners would have been impossible due to the changes in ownership after the nationalizations. But the investors purchasing state properties expected to buy them from the original owners. It is to be noted that reprivatization was carried out (in case the subject and object were known and they could be connected to each other) practically in every post-communist country – including Germany, Croatia, Romania and Ukraine, even Poland (where the land of the peasants were not collectivized to such extent as in our country) – except for Hungary.<sup>24</sup>

In Hungary the compensation as decided by the Constitutional Court was regarded as given on the ground of equity, i.e. *ex gratia* and not on subjective right.<sup>25</sup>

<sup>18</sup> Téglási, András: *A tulajdon alkotmányos védelme Magyarországon az Alaptörvény hatálybalépését követően*. [The constitutional protection of property in Hungary after the entering into force of the Fundamental Law] in: Drinóczi Tímea – Jakab András (szerk.): *Alkotmányozás Magyarországon 2010–2011. I. kötet*, Pázmány Press, Budapest – Pécs, 2013, pp. 307–310.

<sup>19</sup> Téglási András: *A tulajdoni rendszerváltás egyes alkotmányjogi aspektusai*. [Some constitutional aspects of the property system change] In: *A Köztársasági Alkotmány 20 éve (Tanulmánykötet)*. Ed.: Kocsis Miklós – Zeller Judit. Published by Pécsi Alkotmányjogi Műhely Alapítvány, Pécs, 2009, p. 307.

<sup>20</sup> Téglási, András: *Transformation of the property system in the Hungarian constitutional law*. In: *Studia Iuridica Caroliensia* 5. ISSN 1788-0246. Published by Károli Gáspár Református Egyetem, Budapest, 2010, p. 160.

<sup>21</sup> Téglási, András: *Transformation of the property system in the Hungarian constitutional law*. op. cit.

<sup>22</sup> Téglási, András: *A tulajdon védelme Magyarország Alaptörvényében – különös tekintettel az alkotmánybírói gyakorlat lehetséges változásaira*. [The protection of property in the Fundamental Law of Hungary – with special respect to the possible changes in the jurisprudence of the Constitutional Court] *Alkotmánybírói Szemle*, 2013/2., p. 116.

<sup>23</sup> For further details about the constitutional property ownership guarantee in the field of agriculture in Hungary see: András Téglási: *How is property ownership guaranteed constitutionally in the field of agriculture?* *Journal of Agricultural and Environmental Law*, CEDR Hungarian Association of Agricultural Law, No. 2009/7., pp. 18–29.

<sup>24</sup> Téglási, András: *A tulajdoni rendszerváltás egyes alkotmányjogi aspektusai* [Some constitutional aspects of the property system change]. op.cit., pp. 313–314.

<sup>25</sup> Téglási, András: *A tulajdoni rendszerváltás egyes alkotmányjogi aspektusai* [Some constitutional aspects of the property system change]. op.cit. pp. 311–312.