| Chapter 22 |

Comparative Constitutionalism in Central Europe – Summary

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ABSTRACT

Constitutions are more than legal documents that regulate the structure of the state and the relationship between the state and individuals. They also manifest the tradition, identity and political customs of the respective country. Different histories form different values which provide different interpretations of the constitutional text. Despite the similarities of constitutional institutions, one may see that constitutions are rather various.

To provide a general overview on the constitutionalism of Central European Post-Socialist countries, the volume first goes through the constitutional history of the examined states, then it analyses certain aspects of constitutional institutions. The last chapter aims to summarise the most basic findings of the previous chapters.

KEYWORDS

Comparative constitutionalism, constitutional history, state structure.

Many parts of state institutions are similar worldwide. Most countries have parliaments to legislate, governments to direct the executive branch and courts to adjudicate in civil, administrative and criminal issues. Institutions such as constitutional courts, local governments and ombudsman offices are also familiar actors of state organisation. Still, several aspects are worth comparing; despite their great similarity, they also present crucial differences.

The present chapter aims to describe the reasons of similarities and dissimilarities in the examined countries, sum up the most basic remarks of the previous chapters and finally give the 'conclusion of conclusions'.

The issue of state institutions proved to be crucial in European post-socialist countries. During the years of socialism, all countries except the 'dissident' former Yugoslavia had to follow the Soviet pattern, with little room for their own identity.

From the 1950s until the change of regime, the socialist states of Central Europe were characterised by considerable schematism. The 'people's democracies' of Europe, belonging to the Soviet area of interest, have adopted constitutions that are radically

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divided between classical traditions and achievements of constitutional development as their public law system was built on the scheme of the 1936 Constitution of the Soviet Union. This was accompanied by a departure from the values of constitutionality, the total nature of the exercise of power. The former Yugoslavia followed a different path after splitting with the Soviet Union in 1948; the country 'evolved' into no more than a 'softer' example of authoritarian state that lacked a basic respect for the rule of law.

Following the fall of socialism in the late 1980s, the states of Central and Eastern Europe faced the task of finding their way for a new model of state organisation in building democracy. They also had to create their political system, namely what relations should be established among state entities, especially the president, government and parliament. Thus, in addition to guaranteeing human rights and fundamental freedoms, the definition of the form of government became a key point in the transition, the formation of which was significantly influenced by both state theory and political considerations.

The first part of the volume is a cultural comparison, and it deals with the issue of how the different states developed from the end of World War I. As one may observe, history, traditions, politics and national identity all formed the political and constitutional structure of the states.

In his introductory paper, Szabó discusses how the former Hapsburg Empire turned to modern states. After the collapse of the empire some countries decided to have a 'new beginning' (especially Austria) and break with the heritage of the monarchy, while others (Hungary) rather emphasised continuity. Szabó points out that new countries face new problems:

> The most pressing problem of the Central European region was the impossibility to grant every nationality a contiguous territory since most nationalities lived in separate areas throughout the region. Therefore, when one ethnic group attempted to create a single nation state, it simultaneously enclosed areas with predominantly different ethnic groups. Moreover, creating state borders along ethnic lines was not a uniformly accepted solution as some nationalities wished to respect historical borders.[1]

Until the 1990s, several countries of the region formed federal states (Yugoslavia, Czechoslovakia); yet federalism could not last long, and they separated as the nations had the possibilities to decide on their own status. Analysing the constitutional history and identity of Croatia, Čepulo concludes that

> the Constitution of the Republic of Croatia is not based on the return to tradition yet influence of tradition can still be seen in certain important provisions. It is present in the dominantly 'historical' preamble, in the adopted definition of Croatia as the nation state as well as in the continuity of the Constitutional

1 See Szabó, Chapter 1.

> Court. As it regards deeper institutional and political layers of the Croatian constitutionality of the utmost importance is a principle of self-determination. (…) The Croatian political experience in the 19th and 20th century embodied two in a way 'opposing' characteristics – one is long experience of participation with its own constitutional identity in the broader multicultural structures, and the other is tendency to constitute its own independent state.[2]

Quite similarly, when Bardutzky analyses Slovenia, he reckons that

> the past hundred years have been turbulent, Slovenia was a part of different constitutional systems, not to mention diametrically opposite political, societal and economic systems. The three milestones – the creation of the monarchy of the South Slavs, the WWII and the creation of Socialist Yugoslavia, and finally the establishment of an independent and democratic Slovenia – were moments where Jacobsohn's 'political aspirations and commitments' culminated and found expression (or disappointingly failed to find expression) in constitutional documents and settlements. In between the milestones, the nation lived through traumas, fears, but also positive and encouraging developments.[3]

In his chapter, Jirásek analyses the formation of Czechoslovakia, the process of "breaking up with the constitutional-legal continuity and the tradition of Austrian constitutionality"[4] in detail. From the Slovak perspective, Erdősová evaluates how Czechoslovakia separated to two individual countries, how Slovakia was established and what the contemporary key issues are. She reckons that

> what was once homogeneously united around a polarised world now has polarised conflicts of opinion, but behind them are much more structured motivations and interests, and in fact society as a whole is struggling in a crisis caused by the shaking of original values. If the constitution is a fundamental law of the state and in fact an expression of the form of a social contract, it will probably be necessary to reconsider this treaty if it proves insufficient, despite the fact that this goes against the principle of immutability or more difficult variability, legal certainty and institutional trust. On the other hand, at present it is not just a matter for the states themselves to ask themselves how firm, how sovereign this treaty is, when the very essence of the democracy it was supposed to consolidate is in crisis, but today it is much deeper and we can talk about crisis in Europe and can hardly be expected to be resolved by states in isolation.[5]

2 See Čepulo, Chapter 2.
3 See Bardutzky, Chapter 9.
4 See Jirásek, Chapter 3.
5 See Erdősová, Chapter 8.

As for Poland, Dobrowolski and Lis-Staranowicz give a general overview on constitutional history. They find that "in political practice (…) Polish Constitutions were created slowly, yet they quickly collapsed,"[6] sum up the history from the 1791 constitution until the 1997 constitution and analyse the present constitutional situation of Poland.

When analysing Romania, Guțan mainly focuses on constitutional identity. He reckons that

> not accidentally, the Romanian constitutional debates of 1857, 1859 and 1866 focused primarily on issues intimately related to the Romanian national identity, like the definition of the citizenship, freedom of religion, the place of the Romanian Orthodox Church in the constitutional architecture, and the Romanian constitutional traditions.[7]

Finally, he concludes that

> the Romanian constitutional identity may be defined, in historical perspective, as a tendential constitutional identity. It reflects the strong desire of the Romanians to acquire constitutional modernization in terms of constitutional Europeanisation and, at the same time, to keep their national ethnic identity. In other words, it reflects a permanent need of constitutional modernization and change tamed by the anxiety to lose the national and constitutional self. This does not mean to be European and Romanian at the same time, but to be European only as long as the Romanian character is preserved. Romania did not have multiple constitutional identities, rather it was and still is between constitutional identities.[8]

Evaluating Hungarian constitutional identity, Szabó emphasises the relevance of history. He finds that unlike many countries of the region, Hungary relied on continuity: it "disrupted formal continuity while upholding substantial continuity".[9] He adds that continuity is also important at present as "the Fundamental Law establishes the 'achievements of the historical constitution' as a supplementary means to its interpretation".[10]

Finally, Petrov and Đorđević analyse the impact of Serbia's historical constitution on the country's identity. They review the trials and tribulations that the country faced in the twentieth century and find that to stabilise constitutional issues, the country should find a proper balance between presidential and parliamentary systems on the one hand and resolve long-lasting strategic issues such as those of Kosovo and Metohija on the other.[11]

6 See Dobrowolski and Lis-Staranowicz, Chapter 5.
7 See Guțan, Chapter 6.
8 See Guțan, Chapter 6.
9 See Szabó, Chapter 4.
10 See Szabó, Chapter 4.
11 See Petrov and Đorđević, Chapter 7.

The second part of the volume contains an institutional comparison of several constitutional topics of Central European countries, highlighting the similarities and dissimilarities of the institutions and intending to find the reasons for these differences. In general, one may notice an interdependence among the institutions as they can hardly be evaluated without the 'entire picture'. One of the most general elements of political systems is separation of powers. Kruzslicz argues that

> the separation of powers as implemented in the Central European region, lead to the rising of strong executive powers independently of the presidential character of certain regimes, on the contrary, even more when parliamentary regimes were constitutionally established.[12]

He also finds, admittedly optimistically, that

> the symbolic even mythic principle of the separation of powers, especially for Central European States, should not be forgotten, on the contrary, should be used in a more appropriate way in order to achieve its comprehensive aim but to do so, by taking into consideration its theoretical and contextual complexity.[13]

Within the complex system of separation of powers, Horváth examines the executive branch. He analyses the role of governments, territorial units and other state entities in performing executive power, yet he admits that

> the text of the constitutions served as starting point for the analyse of the structure of executive, it would be unwise to attach too great importance to the wording of the constitutions since their provisions per se are inadequate to explore the proper structure and functioning of the executive branch.[14]

Connected to the executive, my paper describes the role of presidents in the region. I evaluate the election, status, competences and termination of office of presidents. Köbel evaluates the legislative branch, concluding that

> that there is a substantial amount of similarity between the legislative powers of the countries, in all their aspects. There are no cardinal differences between the systems – notwithstanding the historical and cultural differences – that would significantly disrupt the semi-uniformly found between the observed legislative powers.[15]

12 See Kruzslicz, Chapter 12.
13 See Krizslicz, Chapter 12.
14 See Horváth, Chapter 15.
15 See Köbel, Chapter 14.

In addition to the political entities, the judicial branch is also significant. In his comparative analysis, Badó describes the challenges of the region. He admits that "judicial independence is still a vague concept today, despite the fact that almost every constitution in Europe, but especially post-communist constitutions, obligatorily enshrine this principle."[16] He describes in detail how the selection process, the structure and the administration should be developed to better fit general standards. Not only courts but also constitutional courts are parts of the judicial branch. Tóth analyses the competences of constitutional courts and finds that

> the "real" constitutional complaint (...) did not originally form part of the concept of concentrated constitutional adjudication; the original Kelsenian model completely lacked the possibility for citizens (...) to challenge the constitutionality of judicial decisions before the constitutional court. However, due to the spreading influence of German practice, such powers now exist in most European countries with centralised constitutional courts. This is also true for the vast majority of the East Central European countries examined; only in Romania and Poland is there no "real" constitutional complaint. But more importantly, where it exists, it has become a core competence of the constitutional courts, as most of the petitions before the constitutional courts and the majority of the decisions on unconstitutionality thereof are taken in this competence.[17]

Connected to constitutional courts – but using a broader perspective – Sándor analyses fundamental rights adjudication in Central Europe. He finds that countries of the region

> chose to adopt the centralised model in which a separate institution – in most of the cases a constitutional court – exercises the "constitutional review" function that includes the fundamental rights adjudication, but they are not part of the ordinary court system and do not adjudicate conventional litigations.[18]

Beyond rules on state organisation, identity seems to be a key question. Tribl highlights that "the constitution is more than a set of fundamental norms: it is a catalogue of principles and values on which the state is established."[19] He finds that

> constitutional values and constitutional identity, as we saw earlier, are linked at several points. One could say that constitutional values create the basis through which constitutional identity can be formed. However, defining constitutional values is perhaps much easier than defining constitutional identity.

16 See Badó, Chapter 17.
17 See Tóth, Chapter 18.
18 See Sándor, Chapter 19.
19 See Tribl, Chapter 11.

> The reason is simple: Constitutional values are explicit in national constitutions. It is from these values that the constitutional identity is usually derived, usually with the intervention of the constitutional courts. There are many theoretical and jurisprudential debates on constitutional identity. Debates about constitutional values are less scientific: it is more social or political. If we look at the constitutional values of a state and do this in isolation, we usually have to look for the historical reasons that led to the consideration that the lawmaker had enshrined in the constitution something that we later consider to be a constitutional value.[20]

Szakály analyses the constitutional-making processes of the region. She emphasises their importance and finds that "there is a similarity between the rigidity of the formal rules of constitutional amendment and the frequency of the actual constitutional amendments only in the case of one state".[21]

Lukács gives a general overview on the sources of law.[22] She evaluates the similatities and differences in the legal systems; points out the major characteristics of legal norms at various levels of norm hierarchy.

Korhecz analyses the rather sensible and disputed issue of national minorities. He analyses the history and the contemporary situation of minorities, both in theory (according to constitutional provisions) and in practice. He finally finds that constitutional courts in the Region demonstrated different level of readiness to protect constitutionaly gauranteed minority rights and that the minority question is still trapped in historical legacy to a large extent.[23]

Kurunczi gives a general overview on the electoral systems. He finds that "the regulation of electoral systems is always country-specific and in line with social and historical traditions"[24] and concludes that the "electoral system is one of the most national issues, where standards (…) can in no way provide a basis for accountability, but only for comparability".[25]

The purpose of the volume is to provide a better understanding of the constitutional background of Central Eastern Europe. In many ways, the countries are committed to following the 'West'; yet there are several peculiarities, which are based on both national identity and institutional solutions. This volume analyses the constitutional history and identity of the countries in its first part and turns to institutional comparison in its second part, presenting nothing other than the 'hardware,' the constitutional base of the countries. Hardware is essential but not enough to run the programme – all software issues, i.e. how the countries work in practice, belong to the field of politics.

20 See Tribl, Chapter 11.
21 See Szakály, Chapter 10.
22 See Lukács, Chapter 13.
23 See Korhecz, Chapter 20.
24 See Kurunczi, Chapter 21.
25 See Kurunczi, Chapter 21.