Introduction

The countries of Central-Eastern Europe have been consolidating for 20 years and surely they have what to consolidate.

The political, economic and psychological practice evolved during the 40 years of communism have proven a much bigger barrier to quickly “returning” to Europe than it seemed in 1989. One thing is for sure the countries of Central-Eastern Europe have passed the point from where they could return to the old system.\(^1\)

The new constitutions of the Central-Eastern European countries entirely supported the process of stability and consolidation as a legitimizing factor.

We share the opinion of those who believe that the process of democratic consolidation has gone quite far in three of the Visegrád Countries and they are almost at the same level as the other post-transition countries of Southern-Europe and Latin-America.\(^2\) Though post-communist totalitarian heritage doesn’t really favour democratization.

The main difference between the transitions of Southern and Central-Eastern Europe is that while in the former soldiers immediately disappeared from the political stage as soon as democracy settled down in the latter reform-communists play an important and sometimes negative role in the new system.

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\(^1\) See also Antal Visegrády, Transition to democracy in Central and Eastern Europe: Experiences of a model country – Hungary, William & Mary Bill of Rights journal Vol. 1 Issue 2 Fall (1992)

\(^2\) F. Plasset et alii, Democratic consolidation in East-Central Europe (1998)
At the same time it is important to stress that consolidation cannot guarantee the immunity of democracy against political crises, ethnical tensions and other potentially destabilizing events.

The major peculiarities of the historical development in the societies of Central-Eastern Europe – such as Czech Republic, Slovakia, Poland, and Hungary – are easily discernable. The societies were delayed and did not originate from within the countries. The societies of Central-Eastern Europe were formed at the periphery of the continent, creating a permanent political, economic, and social disadvantage in comparison with the Western and Central European centers. Additionally, taking over external models (for example, the Hapsburg Empire) became a permanent constraint, politicizing every aspect of society.

Politics penetrated into the other spheres of the society and politicized them, causing abnormal development not only in these spheres of activity, but also in the development of the political system and political culture. As a result, only some elements of the Western European political system appeared in these regions – such as a deformed version of parliamentarianism in Poland and Hungary. Between the two world wars, Czechoslovakia was the only state which had a system of Western-style democracy. Again, in the period following World War II, Central-Eastern Europe societies developed according to an external model – the Stalinist Soviet model. The historical and social conditions, both internal and external, of “building a new society” increased the predominance of the political system and the problematic phenomena which correspond with it. History has shown that the socialist political system either does not work or presses so hard in those countries that adopt it that it is not able to ensure its own political legitimacy for long, even in a reformed version.

In recent decades the political changes in the Central-Eastern Europe countries included a revolution, such as the of Hungary in 1956, and several reformatory movements, such as those in Prague in 1968 and those in Poland during 1980 and 1981. In the second half of the 1980s, it became apparent that a new political system with a Rule of Law, namely a parliamentary democracy, was needed.

The external conditions for a democratic change of this type matured. The foreign policy of Soviet Premier Mikhail Gorbachev ensured a favorable international milieu which, by clearly giving up the Brezhnev doctrine, enabled other Central and Eastern European countries to detach themselves, not only from the influence of the Soviet zone, but from the “real” socialism which had proved to be a deadlock in history. Essentially the same regimes of authoritarianism collapsed in Central and Eastern European countries. In Poland, the authoritarian regime functioned with elements of a limited neocorporative-type pluralism. While the regime in Hungary governed

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under a theory of liberal paternalism, its counterpart in Czechoslovakia ruled in a pure authoritarian form.

It is not accidental that in the scientific literature these changes of regime in 1989 to the 1990s are called “constitutional”, “peaceful”, and “velvety” as a “negotiated” revolution. The Polish and Hungarian transitions were dominated by negotiations between the communist government and the oppositionist forces, while the East German, Czechoslovakian, and Bulgarian transitions were typified by nonviolent, mass mobilization. Only the Romanian political transition was sparked by violence.

The chain reaction started by the Hungarian and Polish political changes played a dominant role in the development of Czechoslovakia, East Germany, Bulgaria, and Romania. One similarity of the East German, Czechoslovakian, and Bulgarian transitions is that the former communist governments were not willing to start political reforms until it was too late.

The revolutionary changes in Central and Eastern Europe upon the collapse of the state socialist regimes are connected with the most radical change in the whole world system; and therefore, cannot be regarded as just another series of democratic transitions. Rather, these changes are about the disappearance of the Cold War world order as a fifty-year-long cycle in the bipolar world system and the emergence of a post-Cold War world order as a globalized, multi-polar world system.

The first global wave of democratizations may be regarded as the Cold War pattern of transitions with a unilateral U.S. dominance in the Free World and in political science with its “electoral” model of democracy. After the failure of the Almondian modernization-cum-Westernization model, by the breakdowns, the stability of the political systems came to the fore and with the newly emerging democracies this new approach was widened to the theory of transitions. The second global wave of democratizations, qualified as the post Cold War pattern, began in Latin America and Southern Europe. After Latin America and Southern Europe we can consider Central Europe to be the third stage of the second global wave of democratic transitions, and Eastern Europe will be the fourth.

The political parties of the region were still able to draw upon the experience of other countries during their change of regime. The Hungarian opposition parties borrowed from the experience of the Polish Round-Table negotiations, and the East German opposition parties borrowed from both of these experience. In Hungary, the former communist party (the Hungarian Socialist Workers’ Party) assumed a new name (the Hungarian Socialist Party) and entered the political arena with new faces. The Polish, East German, and Bulgarian communist parties followed this example.

Some features of the Hungarian transition may be helpful not only to countries of the region, but may also instruct states around the world. As a result of Gorbachev’s consolidation of power, Hungary was driven by Moscow’s “push” for changes and the West’s “receptiveness” to change. The two most significant preconditions for change

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were the disintegration of the party state and the emergence of an open, internal rift within the political and economic elite. A third prerequisite for change was “to take the lid off” the authoritarian system and to open up the way for the political organization of civil society. A fourth preliminary condition was pacifying the party apparatus, separating the state apparatus from the party apparatus and abolishing the nomenclature. Finally, the fifth preliminary condition for change was a radical shift in society’s political orientation. This change manifested itself in the people’s refusal to accept the legitimacy of one-party rule and the popular acceptance of the emerging opposition groups.

The young democracies of Central-Eastern Europe genuinely desire to learn from the Western European countries and the United States’ 200 years of experience with a democratic constitution. Of course, the democratic Rule of Law in the Central European region takes forms that reflect the traditions and culture of the respective countries.5

The pull of Western Europe and its form of democracy is felt in Central-Eastern Europe. There are strong, traditional ties between Poland and France, between Czech Republic and some Western European states, and between Hungary and Germany. Hence, Central-Eastern Europe’s adoption of institutions based upon models found in Western Europe is understandable.6

This study analyses some fields of this adoption, in some of which the adoption can be considered as successful, and in some cases there are still deficiencies. Rule of law and democracy principles are well established in the constitutional texts and in case law of the constitutional courts of Central and Eastern European (CEE) states, however in some of these countries they are not integrative part of the political culture [part A)].7 The constitution writing, the amendments to the constitution and the protection of constitutions are also important indicators of the democratic political culture. In some CEE states, the frequent amendments to the constitution erode the stability of constitutionalism [part B)]. The sovereignty and independence was a new experience and important value after the collapse of socialist regime, and thus strongly articulated in the constitutions of the states in this region. The accession to the European Union required and requires the new understanding of sovereignty in a


7 See to this e.g. the findings of the WVS 5 in case of Hungary in the presentation of TÁRKI (2009), available at http://www.tarki.hu/hu/research/gazdkult/publikacio.html. The Hungarian society is closed, not tolerant, the members of society are not active politically, the political rights and freedoms are not really important values for the citizens, who do not trust in the institutions and in other members of society.
multilevel constitutional sphere [part C]). Regarding the shared fate and the similar historical experiences of these societies, one might presuppose that solidarity is an integrative principle of the legal culture in CEE countries. However, it is not really reflected in the constitutional texts, and instead of social solidarity, the concept of political solidarity is preferred [part D]). The democracy cannot be explained without the respect, protect and fulfill of the obligations flowing from the universal human rights. A new challenge for the CEE states the adoption of the integrated European human rights standards [part E]).

A. Rule of law and democracy in Central and Eastern Europe

With the collapse of the socialist system in 1989 and 1990, opposition forces were unified in their wish to introduce social development of the sort that has been functioning for a long time in Western Europe and the United States. It is, however, another question what kind of steps should be taken to follow this development, and, on the other hand, which claims can be realized within one to two years, and which ones are those that need decade or more to be executed. The following discussion analyzes the key issues of a democratic transition, such as the Rule of Law and democracy. This discussion is approached from a historical perspective, concentrating on Central-Eastern Europe, especially Hungary.

The term “Rule of Law” essentially has been applied to two state systems. The “Rechtsstaat” (of a formal meaning) system mainly appeared in German legal theory and to a certain extent in Central-Eastern Europe. The essence is that government administration functions according to rules of law.8 The second system appeared after World War II, drawing upon lessons learned from the German Third Reich and to a lesser extent from the Stalinist political system. This system interprets the Rule of Law as a substantial value; the system’s characteristic features first appeared in the Anglo-Saxon legal principle of Rule of Law. The important difference between the two models is that in the formal “Rechtsstaat”, the state is primary and governs according to the laws. Governance by action-at-law is a characteristic feature.9 In the substantial-meaning “Rule of Law”, law is primary, and governing is effectuated “sub lege”. 10

It is no mistake that in Eastern Europe – Eastern Poland, historical Hungary, and south of historical Hungary – neither Rule of Law conception appeared in either theory or in practice; the idea of restricting the ruling power with laws was inconsistent with the Byzantine political and legal traditions that were widespread in Eastern Europe. Such a restriction was also inconsistent with the Eastern political

10 See Henry de Bracton, De Legibus et Consuetudinibus Angliae (George E. Woodbine ed., 1915).
culture which, in different times and ways, also influenced the political development of this region. To Eastern Europe, Rule of Law meant the sovereign will in a legal form.\(^{11}\) To Hungary, however, this Eastern European interpretation of law was unfamiliar. The historical explanation for this is that the Hungarian legal system and legal culture, like Western legal systems, were based on Roman law. The idea of Rule of Law appeared relatively early in the thirteenth century in Hungarian legal thinking, but the legal development following the compromise of 1867 with the Austrians was essentially built on the idea of the formal Rule of Law until World War I. From there, Hungary basically established a Central European legal system. In spite of this, in the nearly five decades following World War II, the “socialist” political model and legal thinking of Eastern Europe were forced upon Hungary. This successfully broke up the institutional network of the Rule of Law. One can distinguish two distinct periods in the attitude of Marxist political science and jurisprudence towards the problem of “Rule of Law”. The literature of the 1950s, 1960s, and even that of the 1970s was characterized by the flat refusal of “Rule of Law”, replacing it with the institutions of socialist legality.

In contrast, in 1988-89, political theorists have combined the ideas of the socialist state and the Rule of Law, argued in favor of the resulting socialist Rule of Law, analyzed the conditions for its realization, and theorized about the organization of its political and legal safeguards.\(^{12}\) They have defined the criteria of a socialist rule of law, as a democratic state of separated powers, governed by a constitution, that functions to initiate constitutional and administrative courts, create real independence for judges, develop the principles of self-government, effectuate the Rule of Law, guarantee human and civil rights through comprehensive legislation, strengthen democratic institutions and legal order, realize the conditions of a reliable legal regulation, and aid in developing the citizens’ legal culture. Consequently, if a socialist country incorporates these elements in organizing its state and legal system or improves its existing institutions in this direction, this qualifies as “socialist Rule of Law”.

The immense changes that have occurred recently in the region put the realization of parliamentary democracy on the agenda in order to facilitate peaceful political transitions from the one-party system into the multi-party system and from the party-state to the Rule of Law. In making the transition to the Rule of Law, Central-Eastern European countries should utilize the experiences of the different types of Rule of Law that have developed so far, while also paying attention to the distinctive historical, political, social, and economic characteristics of their state and region.

All the constitutions of the new democracies declare that they belong to the world of Rule of Law.

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\(^{11}\) See Kálmán Kulcsár, Lehet-e Jogállam Magyarországon [The Possibility of Rule of Law in Hungary], In Jogrendszerünk a XX. Század Végén 7 (1990).

Art. 2. of the Polish Constitution states that “The Republic of Poland is a democratic constitutional state, which applies the principle of social justice.”

According to the Art. 1. section (1) of the Czech Constitution “The Czech Republic is a sovereign, unified and democratic constitutional state, which is based on the respect for human and citizen’s rights and liberties”.

The Slovak Constitution also fixes that “The Slovak Republic is a sovereign, democratic constitutional state” [Art. 1. section (1)].

Finally, the Hungarian Constitution in force and the new Fundamental Law adopted in 2011 declares that Hungary “is an independent democratic constitutional state where all power belongs to the people” [Art. 2. section (1) and (2) of Constitution and Article B) of Fundamental Law].

There was and still is a strong commitment from the ruling elites to Rule of Law and democracy as well as strong support for the Rule of Law and democracy from a large part of the population according to sociological or public opinion polls.

This strong commitment and support for the Rule of Law is an effect of the experiences from the communist past and a strong element in the negative tradition of post-communist societies due to negative experiences with the prerogative state.

This ideal model of the Rule of Law is only a model and does not exist in the political and social reality of developed democratic societies. In particular societies some elements are closer to the features of the model and others are in not so close contact. The Rule of Law model could work as a standard for an evaluation of social reality in comparative perspective but the question is, does it have a universal character? Should all countries which try to establish law governed democratic states bring to life all elements of the model of Rule of Law or is it possible to develop individual strategies for implementation of the Rule of Law taking into account local problems and traditions? If the answer to the second question is positive what are the crucial elements for the strategy of implementation of Rule of Law in post-communist countries? A more specific question will be such: Considering that the peculiar type of normativity generated by post-communist society is closer to the “Gemeinschaft type” of society than the modern “Gesellschaft type” as described by Ferdinand Tönnies, is it possible to implement impersonal law and Rule of Law.\footnote{See Adam Czarnota, Meaning of Rule of Law in Postcommunist Society. In Rule of Law, Rechtstheorie Beiheft 17. Berlin (1997).}

One of the accompanying components of the daily management of transition is to cope with ensuing discrepancies, tensions, conflicts, and antagonisms, which do crop up unescapingly. As a matter of fact, their successive materialization in one or another (historically random) form is actually built into the scheme. The system patterned upon the ideal of Rule of Law and Constitutional Democracy reacts uniformly to differing acts, responds homogeneously to heterogeneous challenges, with partial steps taken for partial moves, sometimes even pressured by timely needs, without being able to control the final result. This is why it is especially doubtful, risking seriously of a self-corruptive effect, to resort to nothing but the routinized instruments, techniques and responses of the store of means called “the Rule of Law”, which
itself may have originally been designed and calibrated to use under average, everyday conditions.\textsuperscript{14}

Let’s see the first steps of Rule of Law in Poland.\textsuperscript{15}

In declaration law plays a very important role in the process of transformation. The revolution in Poland had a legal character through the Round Table Agreement. This contract between the elites on the one hand opened new spheres in social and political life and on the other delineated room for maneuvers enclosing possible political actions within the borders of legality and legal continuity. An outcome of this situation was the partial delegitimisation of a new social order. Despite the procedural agreement described above, since 1989 in Poland there has been a growing tension within the political elites: between opting for substantive justice or for procedural justice. Both have their own limitations in implementation of impersonality of law in Poland.

1. The first option, substantive justice, underlines a trust to law, works against the stability of law, and could have an impact on creation of a particular type of legal culture incompatible with the Rule of Law understood as the legal limitation of political power. An outcome of such a strategy will be the destruction of procedural agreement and new legalism.

2. The second option, procedural justice, accepts the existing structural conditions based on informality. More specifically, it formally legitimizes the special legal status of particular groups of people connected with the former regime.

Rule of Law means not only constitutional order based upon certain legal principles that limit the exercise of state power, but also the existence and functioning of institutions that maintain the recognized norms.

When the region's constitutional courts were established, Western European and American experience were considered. The constitutional courts were not given clearly defined missions, because of the historical context of their formation, they had exceptional freedom to develop their places in the constitutional order.

The Hungarian Constitutional Court played and plays a historical role in the transition to Rule of Law.

Issues of incompatibility between the democratic Constitution and the legal provisions enacted in the former regime are frequently brought before the Constitutional Court, but only in fragmented and random intervals. As a result, the Constitutional Court abrogates selected regulations that are unconstitutional rather than commenting on the wider issue of the validity of every piece of pre-revolutionary legislation.

The Constitutional Court also maintains the heritage of declaring unconstitutionality for formal reasons. Under the Suffrage Act, those who stayed abroad on the day of voting were prevented form voting. Arguing that a fundamental right was restricted

\textsuperscript{14} Cf. Csaba Varga, Transititon to Rule of Law (1995)
\textsuperscript{15} Czarnota, op.cit. 192-193
by a simple act and not by an act of constitutional force, the Constitutional Court considered it to be a limitation upon the constitutional right to vote.\footnote{16}{See László Sólyom, Az alkotmánybíráskodás kezdetei Magyarországon (The Beginnings of Constitutional Jurisdiction in Hungary) (2001)}

In Slovakia the legal order also contains a number of valid laws and provisions from the pre-1989 communist period. The priority among them is probably belonging to the law on the proceeding order of the National Council of the Slovak Republic, very well known as the law No. 44 1989 of the Code of Laws. This law did not undergo a substantial change yet, although it was partially altered. It can be used as a very impressive instrument of parliamentary control of the work of the government. It seems to be unconstitutional in some respects (e.g. it still gives the Parliament the competence to abolish a governmental ordinance by its resolution; although this competence has been ex constitutione and without any doubt entrusted to the Constitutional Court, created in 1993). In this respect – although Constitutional Court of the Slovak Republic is an independent judicial authority of protection of the constitutionality – it has no possibility to finish a case if it taken back by the proposal maker (as it can be shown on the case of the proposal made by the government in autumn 1994, which has been taken back: this step has been commented as a step within the use of disposition principle – in the decision published under No. 4994 of the Collection of Findings and Rulings of the Constitutional Court of the Slovak Republic 1993-1994).\footnote{17}{Cf. Alexander Bröstl, Challenges to the Rechtstaat – Model in Slovakia. In Rule of Law op. cit. 322.}

It is well known that the realization of the constitutional Rule of Law depends not only on legal regulation but on social, political, and cultural elements as well. From among all these, we would like to emphasize only one. The existence and effectiveness of the Rule of Law turns upon its ability to ensure human personality and liberty, here and now in Central-Eastern Europe. The most important obligation of legislators, appliers of law, and jurists is to protect the human content of the Rule of Law – to protect humanity and inherent values of law.

### B. Evolution of constitutionalism in CEE states

No constitution is perfect. Or everlasting.\footnote{18}{Based on global comparative legal research, the average life-span of constitutions is 19 years. Z Elkins, T Ginsburg and J Melton, The Endurance of National Constitutions (Cambridge University Press, Cambridge 2009) 2} A constitution may be considered optimal if it meets the requirements of the era, corresponds to the level of social development and normativises the common values of the political community that are acceptable for all of the members in accordance with the interest and value structure of the pluralist society. Thereby it integrates society and articulates to (if necessary: consolidates) the interdependence of the political community. When constitution-
making is taking place in some state (as a result of the foundation of a new state or the transformation of the social-political system or simply with the purpose of a change in model or the reform of the constitution), professional audience, as a matter of course, endeavours to contribute to achieving a result that draws near to the optimum. Naturally, constitution-making is a political decision, however, it is fortunate if good constitutional practice and scientific results are utilized in decision-making. This part sketches the development of the constitutions of Central and Eastern Europe, discusses the major motivating factors of the amendments, and draws conclusions regarding the process of constitution-making and constitution amendment in Hungary. The major steps in the constitution-making of Poland, the Czech Republic, Slovakia, Romania and Bulgaria will be surveyed, and also the development and changes of the Hungarian Constitution (1989-2012) and the rewriting of the constitution in 2011 will come under review.

The new Polish constitution was approved on April 2, 1997, and was confirmed by a national referendum on May 25. The constitutional regime change, however, had begun before, with the parliamentary elections in June 1989. The freely elected Sejm amended the constitution of 1952 at the end of the year. The modification known as the “December Amendment” annulled the Socialist doctrines on political, social and economic order, replacing them with the principles of a democratic state complemented with the principle of social justice. From then on, any regulations had to be interpreted with reference to the new principles. Minor amendments included the introduction of self-governing regional state units, the direct election of the president (1990) and the separation of judiciary powers from political powers (1991). The next major step in constitution-making followed on October 17, 1992, when the “Little Constitution” was adopted, which specified the relationship between the legislature on one hand and the executive and regional governments on the other. The Little Constitution was to be a compromise that would solidify as many democratic institutions as possible before all constitutional controversies could be resolved. Nevertheless, the new document would supersede all but a few provisions of the 1952 constitution and provide the basis for a full constitution when remaining points of dispute could be resolved. Its drafts retained the statement that Poland was a democratic state of law guided by principles of social justice. Agencies such as the Constitutional Tribunal, the State Tribunal, and the Office of the Commissioner for Citizens Rights were also retained. Preparations for the rewriting of the constitution were being made in parallel with these events starting in December 1989. In 1992, the two houses of parliament enacted a special law of constitutional force regarding the process of approving a new constitution. It stated that the new constitution must be passed by the Sejm and the Senate together, as the General Assembly, and it must be confirmed by a national referendum. The text of the constitution was to be written by a specially

\[\text{\textsuperscript{19}}\text{See also N Chronowski, Constitution-making in Central and Eastern Europe. The Analyst (Central and Eastern European Political and Economic Review) Volume 3, No. 1 (2007)}\]

established Constitutions Committee. The Constitutions Committee used the drafts previously approved by the two houses of parliament, as well as proposals prepared by various political actors – parties, trade unions and private persons. The constitution of 1997 created a rationalized parliamentary system of government, where the president was granted substantial executive powers. The system of fundamental rights was also updated in the constitutional text with regard to the international and European development of human rights’ protection. The Constitution also authorized Poland’s accession to the European Union. The Polish constitution has been amended only once since 1997 – in accordance with the decision of the Polish Constitutional Court, in connection with the European Arrest Warrant, in 2006 and concerned the possibility of transferring a Polish citizen for trial or detention if the citizen in question had committed a crime and was wanted both in Poland and abroad. In November 2010 an amendment to the Constitution was proposed, including an addition of a chapter devoted to the membership of Poland in the European Union. The proposal prepares the Constitution for the adoption the euro, adapts the law to certain provisions of the Lisbon Treaty and puts in order the division of competencies in EU policy-making.

The “Velvet Revolution” took place in Czechoslovakia in 1989. On November 25, 1992, the federal parliament declared the split of Czechoslovakia into Slovakia and the Czech Republic effective from January 1, 1993. The split put the adoption of the constitutions of the two states on the agenda. The Czech National Council passed the new democratic constitution on December 16, 1992, and it came into force concurrently with the split. The Charter of Fundamental Rights and Freedoms is formally part of the constitution, although it is a separate document. The constitution had to be amended in the nineties because of the European integration intentions of the Czech Republic. These amendments had consequences for the relationship between international law and domestic law, regulated the sharing of powers between the government and the parliament, and specified the obligations of the former to inform the public about EU affairs. The amendment of the constitution also bore relevance to legal practices, stating that national law courts had an obligation to observe international treaties in addition to domestic legislation. The body of regulations concerning constitutional law was substantially expanded, which was necessary due, among other causes, to the revision of previous regulations. With NATO membership, the Czech parliament amended the acts of the constitution affecting national defense policy, state of war and the jurisdiction of civil powers over the military. In 2009, the Czech Parliament approved a constitutional amendment that allows the legislative body to dissolve and hold early elections. The amendment came in response to a decision by

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23 See László Trócsányi, Attila Badó (eds.), Nemzeti alkotmányok az Európai Unióban [National Constitutions in the EU] (KJK Kerszöv; Budapest 2005) 218
the Constitutional Court that declared a former constitutional act on early elections unconstitutional.\textsuperscript{24} As of 2011, the constitution has been amended five times.

The new constitution of the \textit{Slovak Republic}, establishing a democratic state governed by the rule of law, was ratified on September 1, 1992. The constitution has been amended on five occasions: in August 1998, February 1999, February 2001, and twice in 2004. Amendments were required firstly in relation to the adoption of the general principles of international law and to European integration. Secondly, they concerned the structuring and operation of regional government. And thirdly, constitutional amendments were needed because Slovakia introduced a system where the head of state was to be directly elected and was granted new prerogatives.\textsuperscript{25} The amendment of 2001 admitted the constitutional authorization of regulations related to EU membership, and provided guarantees for observing the principles of power sharing and the rule of law. It further extended the jurisdiction of the constitutional court, introduced the ombudsman system, established the foundations of a reform of public administration, and clarified the details of regulations concerning the probationary period of judges, their appointment and release from duty.\textsuperscript{26} In 2004 the constitution was amended in relation to the preparation to the European Parliament election, and added sentence about inconsistency of being an MP in the Parliament and in the European Parliament. It also extended rights of the Constitutional Court of Slovakia for ruling whether the election to the EP is constitutional.

\textit{Romanian} constitution-making began in the context of the revolution in December 1989. The first constitutional document, declaring the appointment of a committee for the purpose of making preparations for the new constitution, was released by the National Salvation Front. The Front’s constitutional power was legitimized by the revolution. The regulations of the 1965 constitution concerning the structuring of powers were – explicitly or implicitly – revoked, but the articles relating to fundamental rights, judiciary and prosecution office, and the regional authorities of public administration remained in effect with certain modifications. The National Salvation Front was reorganized as the Interim National Council of Unity in February 1990, and passed a decree containing legally binding acts resembling constitutional laws. Of these, Act 92 of May 14, 1990, is worthy of special attention. Besides covering requirements concerning general elections, it laid down constitutional principles and outlined a framework of constitutional system for the use of the constituent assembly, meaning the document can be regarded as a sort of interim constitution. The act stated that the two chambers of parliament constituted a constitutional assembly and were under obligation to formulate the new constitution within nine months. In July 1990, the constitutional assembly appointed a committee to draft the constitution. The committee published the principles of the new constitution in December of the same year. The principles were the subject of political, social and scientific debates, as

\textsuperscript{24} Maxim Tomoszek, Proportionality in judicial review of constitutional amendments, \url{http://www.juridicas.unam.mx/wccdponencias/9/175.pdf}

\textsuperscript{25} Trócsány and Badó, op. cit.

\textsuperscript{26} \url{www.vlada.gov.sk/eu/Dokumenty/acquis2001_en/political_criteria_constitution_judiciary.doc
well as international negotiations, for several months. They were then returned to the constitutional assembly, whose committee had drafted the constitution. Following a process of amendment, the constitutional assembly approved the constitution on November 21, 1991, and it was confirmed by a national referendum on December 8. The constitution, which established a semi-presidential system of government, necessarily involved some compromises, given the brief preparation period and the revolutionary circumstances.\(^{27}\) Several issues were not dealt with, and it contributed little to the rights awareness of the general public. For this reason, its modernization had become a pressing need by the turn of the millennium.\(^{28}\) The constitution was amended by Act 429 of 2003, which introduced 79 modifications. The amendment followed four main directions: the reform of state administration and the reinforcement of the prerogatives of the constitutional court, the consolidation of the guarantees of fundamental rights and freedom, the reinforcement of the legal constitutional rights of ethnic minorities, and the establishment of the constitutional foundations for the Euro-Atlantic integration of Romania.\(^{29}\) The President of Romania in 2008 has established a public law expert committee to analyze the problems of the Romanian constitutional system, the possibilities of development of constitutionality and to outline possible solutions and alternatives by taking into consideration the problems identified. The report was published in 2009, and attracted a significant political attention. The report has become object of an internal political struggle, but no procedure of constitutional amendment was started, because the political conditions made it impossible.\(^{30}\)

The constitution of Bulgaria was adopted by the Grand National Assembly. It defines the state as a unitary parliamentary democracy. Constitution-making powers are shared between the parliament and the Grand National Assembly. Several proposals were brought forward for the amendment of the constitution in the 1990s, but none of these were formally debated. The proposals include the adoption of the Greek system in regulating the establishment of executive government. They also include the reinforcement of the institutional and functional guarantees of fundamental rights – for example, with the introduction of the ombudsman system, a system permitting individual complaints to be submitted to the constitutional court – and improvements to the operation of the judiciary. Proposals targeting the modification of the institutional structure all aimed to increase the efficiency of state administration, resting on and constrained by the principle of democratic constitutional governance.

\(^{27}\) Kelet-Európa új alkotmányai. (JATE Állam- és Jogtudományi Kar, Alkotmányjogi Tanszék, Szeged 1997) 40-44
\(^{30}\) Emőd Veress, Constitutional Reform in Romania: On the Report of the Stanomir Commission, Közjogi Szemle 2011/1
Other proposed amendments concerned the consolidation of the establishment of head of state and the extension of the jurisdiction of the president, the rationalization of government formation, the clarification of the status and jurisdiction of the accountable government, the establishment of a second chamber of parliament, and the restoration of the monarchy. These proposals, however, engendered heated political debate. Restrictions on the immunity rights of members of parliament, together with the introduction of financial federalism by increasing the powers of regional governments in matters of taxation, were put on the agenda in 2000. The greatest constitutional deficit was revealed in the mechanisms ensuring the institutionalized protection of human rights. The following amendments were suggested as a remedy: the introduction of the ombudsman system, adherence to the principles of necessity and proportionality in restricting fundamental rights, specification of the group of fundamental rights which may not be restricted under any circumstances, introduction of a procedure to submit individual complaints to the constitutional court, and introduction of a period for which decisions on proven unconstitutional behavior violating fundamental rights may apply retroactively. The need to amend the constitution to prepare for the anticipated EU membership became an issue in the first few years of the millennium.\(^{31}\) The amendments were finally approved in 2003, 2005, 2006 and 2007. In 2006, the constitution was amended to limit the independence of judicial powers. The amendment empowered the parliament to remove the Prosecutor General and the members of the Supreme Court from their positions. The European Union, however, raised objections regarding the powers and transparency of the judiciary. The Venice Commission of the Council of Europe had previously considered the guarantees of judicial sovereignty unsatisfactory, and found the Supreme Judicial Council to be overpolitical. These circumstances led to the amendment of the constitution once again in 2007, with reference to the judiciary. A new body was created with the title of inspectorate, whose responsibility is to monitor the activities of judicial establishments. This solution meets the requirements of the principle of judicial sovereignty. The amendment further enacted decentralization ambitions in the self-government system and abolished compulsory military service.\(^{32}\)

In Hungary during the change of regime (1989-90) no new constitution could be formally approved. The Constitution of the Republic of Hungary was a derivative of Act No. XX of 1949, which was comprehensively revised by Act No. XXXI of 1989. With regard to content, new laws emerged not through revolution, but via a parliamentary process of constitution-making accompanying the regime change. That is, the constitution was adopted by the National Assembly in its function as a constitution-making power. From then until 2011 the constitution has been under continuous revision, with several acts amending it. It became the most frequently


\(^{32}\) See also Comments on Constitutional Amendments Reforming the Judicial System in Bulgaria, European Commission for Democracy through Law Opinion No. 246/2003, Strasbourg, 17 September 2003
amended CEE constitution. In 2010 the parliamentary elections resulted in a two-third majority, which has enabled the right wing governing party alliance to write a new constitution (however, this ambition was not articulated during the campaign). The new constitution – Fundamental Law of Hungary – was adopted in April 2011 and coming into force on January 1, 2012.

Back to the beginnings of democratic constitutionalism in Hungary, the three-party political negotiations – “National Round Table” starting on June 13, 1989 – played a decisive role in the regime change and the amendment of the constitution. The participants of the National Round Table declared that the negotiations served to lay the political and legal foundations of a peaceful transition, establish a pluralist democratic state adhering to the rule of law, and seek a way out of social and economic crisis. Although the National Round Table did not exercise direct public powers – i.e., it did not act as a quasi parliament – the recommendations that were formulated through its activities were adopted by the National Assembly essentially without conceptual modifications. In accordance with the agreement reached at the National Round Table talks, the new constitution was announced on October 23, 1989 – in honor of the 1956 Revolution – and Hungary was declared a parliamentary republic. The proposed and approved amendments were fully compatible with the requirements of democracy and rule of law, but they did not eliminate the need for a new constitution. This responsibility, however, should have been fulfilled by the newly and freely elected parliament. The constitution that was announced on October 23, 1989, meant, beyond all doubt, a constitutional turn, and the birth of a democratic state. However, as a consequence of the negotiate-and-compromise nature of its process of creation, the revision was not comprehensive and the adopted solutions showed considerable inconsistency. The transitional parliamentary elections delivered, within legal limits, a freely elected parliament of unquestionable legitimacy, which assumed its role as a political representation encompassing a pluralist party system. The parliamentary majority of the government coalition was, however, insufficient for the amendment of the constitution. For this reason, the first party of the government majority and the largest opposition party came to an agreement for the purpose of consolidating the democratic establishments and the state administration. The results of the agreement were enacted in spring 1990 by two acts amending the Constitution. These amendments contained highly significant changes regarding the form of government, constitutional principles of economy, and the system of legal sources. The transitional constitution-making was completed in autumn 1990, with the creation of the system of local self-government, which replaced the previous local council system.33 After this period, the Constitution was amended more than 25 times between 1991 and 2010, and an attempt was made to draw up a new constitution during the parliamentary cycle of 1994-1998. The most comprehensive amend-

ment was carried out in December 2002, in connection with the anticipated accession of the country to the EU. An authorization was added permitting the signing of the treaty of accession, a commitment for the European unity was declared, regulations on the cooperation of the National Assembly and the government in matters of EU integration were determined, and the constitutional definition of the National Bank of Hungary was modified. In addition, the rules on voting rights were changed in anticipation of European parliamentary and European local elections. \(^{34}\) In 2010, parallel with the constant – altogether more than 10 – amendments of the existing Constitution along ad hoc political interests, the governing parties announced the creating of a new constitution. The constitution making procedure was criticized by the European parliament and Venice Commission for the absence of pluralistic social debate. \(^{35}\) The final draft of the governing parties was delivered in March 2011 and adopted by the parliament one month later. The democratic opposition parties did not take part in the process because of the former restrictions of the Constitutional Courts’ competences. It is in vain that the Fundamental Law contains the basic principles and institutional system having become crystallized during democratic constitution-making (like principles of rule of law, democracy, division of powers, protection of human rights), as they will not fully prevail – basically because of the rules of interpretation referring to the “historic constitution” of the ancient Hungarian kingdom and the restriction of constitutional jurisdiction. This is particularly true in cases where the Fundamental Law itself grants exemption from the implementation of fundamental principles. Although the catalogue of fundamental rights contained in the Fundamental Law is more modern in some parts than that of the Constitution, the system of fundamental rights protection as a whole outlined in the Fundamental Law suggests a step backward compared to the Constitution in force. This is manifested in the decrease in the level of rights protection by the ombudsman (one Commissioner for Fundamental Rights with deputies, a data protection authority instead of the ombudsman), the abolition of the abstract ex post norm control that may be initiated by anyone, and the disappearance of the rule serving as the ground for the enforcement of claims relating to fundamental rights and fundamental rights jurisdiction. It is undoubtedly the greatest weakness of the Fundamental Law that it does not guarantee any effective sanctions in case of its breach; in other words, it does not ensure the possibility

\(^{34}\) Nóra Chronowski, Integrálódó alkotmányjog [Constitutional law under integration]. Dialóg-Campus, Budapest-Pécs (2005) 190-199


Many of Hungarian scholars are also disappointed because the time limits of the drafting, deliberating and adopting of the new constitution were tight and this restricted the possibilities of the open political and social debate, which undermined the possibility to reach consensual norm content. See A Arato, G Halmai and J Kis (eds.), Opinion on the Fundamental Law of Hungary <http://lapa.princeton.edu/hosteddocs/amicus-to-vc-english-final.pdf>
of a comprehensive review and remedy of the violation of constitution by legislature. It is because the Fundamental Law reduces the scope of action of the Constitutional Court and maintains the procedural and material restrictions introduced in 2010 for an uncertain period. More specifically, the Fundamental Law lays down that with regard to ex post norm control and constitutional complaint procedures, the Constitutional Court is prohibited from reviewing the content of or annulling Acts on public finances, with the exception of four “protected fields of fundamental rights” as long as state debt exceeds half of the Gross Domestic Product. The regulation adopted on 16 November 2010 – basically corresponding to the contents of the Fundamental Law – which restricts the Constitutional Court’s right of review and annulment does not accord either with the principles of European constitutional development or the traditions of Hungarian constitutionalism developed since 1989-90 or democratic political culture. It violates the constitutional principles of the rule of law, legal security and separation of powers. As a result of the restriction of the procedure of the Constitutional Court, numerous fundamental rights (especially, for example, the right to property, social rights, the freedom of enterprise, the right to a profession) become “defenceless”. As the Fundamental Law is not effective yet, it is unpredictable to what extent will it erode the democratic constitutional culture in Hungary.

The examination of the causes of constitutional amendments in the countries of Central and Eastern Europe reveals some common characteristics. On one hand, the amendments are either related to political “partisan acts” originating in the internal political sphere and backed by political pacts, or they serve the majority interests of coalitions in power. On the other hand, amendments have been required to clear the way for participation in the international community, and for integration into the EU as a member state. Constitutional amendments elicited by internal circumstances reflect needs for adjustments, which are generated by executive problems appearing in the practical administration of new democracies. These amendments serve to optimize the operation of state administration, rationalize the powers of constitutional state organizations, and consolidate the stability of the government. Moreover, in most cases they also serve to specify the legal standards of fundamental human rights and extend the institutional and restriction guarantees of human rights. However, the amendments are not always seriously debated by a wide range of audience or groups of society, and the absence of such debates is a symptom of an important defect in the constitutional culture of CEE democracies. Among outside motives for the amendment of the constitution, the characteristics of EU law (supremacy and direct effect) are to be considered. The individual constitutions generally did not make satisfactory provisions for the adoption of international laws. The constitutions of the relevant countries were amended before gaining full membership of the EU, partly so that the accession treaty affecting the principle of sovereignty could be signed, and partly to ensure that community law could take effect in the given member state.

C. Questions of sovereignty

I. On sovereignty taken in the sense of constitutional law

The sovereignty and independence was a new experience and important value after the collapse of socialist regime, and thus strongly articulated in the constitutions of the CEE states. The accession to the European Union required and requires however a new understanding and interpretation of sovereignty in a multilevel constitutional sphere under the concept of cooperative constitutionalism.

Modern democratic constitutions of the CEE states name three projections of sovereignty: people’s sovereignty, legal sovereignty and state sovereignty. According to people’s sovereignty all power is in the hands of the people who, as a general rule, exercise it through representative organs. The power to adopt a constitution (constitution-making power) is in the hands of the people as well and the constitution which is the expression of legal sovereignty is created – in a specific organizational structure and by a specific procedure – in the course of exercising this power. According to legal sovereignty the constitution is the highest source of law in the national legal order and the validity of all other legal acts can be traced back to it and none of them can be in conflict with it. The constitution states the aims, functions, working principles and organs of the state by stipulating and limiting them. Thus state sovereignty is derived from and based on legal sovereignty and can be traced back to people’s sovereignty as well. To the latter in so far as people exercise their power through their representatives and legitimize parliament as an organ with a twofold (state and representative) character as a general rule.

As regards European integration mainly state sovereignty can be an issue under discussion, which justifies the interpretation of this category, though legal sovereignty taken in the sense defined above should also be dealt with.

State sovereignty means defining the supreme power of state by legal categories. The exercise of state power – taken in a legal sense – can be defined by the category of sovereign powers. Thus the supreme power of state – its sovereignty – is the aggregate of sovereign powers, all public law powers which ensure the prevalence of supreme power and serve the declaration and enforcement of state decisions. Sovereign powers include all aspects of public power which can be created through the means of law, in other words, the forms of action of all functions of state power, that is, legislation, governance, the executive, law enforcement and the administration of justice. The supreme power of a sovereign state is indivisible but the exercise of state power is and should be divisible – which manifests itself in assigning certain sovereign powers deriving from

state power to various organs. Sovereign powers are not abstract possibilities of action but the settings of actual competencies conforming to the fulfillment of particular state duties; in this respect they are thus orientated towards public duties and are tied to objectives: they cannot be separated from the role of the state in social coexistence and the expectations that the members of society impose on the state. To summarize: sovereign powers are powers due to the state in the interest of exercising power and which are embodied in rules of authority, in competence norms. It follows from this that state supreme power cannot be transferred; only the particular sovereign powers or rather their exercise. Sovereign powers remain rendered to the state even after their transfer as the state can actually enforce these rights. The limit of transfer is that it cannot lead to the dissolution or termination of the state. Thus the substantial law limits of transfer are the fundamental constitutional principles of the state and the fundamental rights. The transfer of sovereign powers does not terminate but only restricts the sovereignty of the state, which can be apprehended in partially waiving the exercise of supreme power and acknowledging the prevalence of EU law (or international law) within the state.\textsuperscript{38}

The EU acquire in an original way sovereign powers and competence for exercising them in a certain form in consequence of the limitation of sovereignty of the Member States for their benefit, which nevertheless does not mount to a single sovereign supreme power of the integrated organization. Derivative acquisition would mean the final transfer of sovereign powers and in this case Community/Union power could not mean more or else than the aggregate of the supreme power of the Member States or rather the integrated power would depend on the aggregate of the limitations of the supreme power of the Member States.\textsuperscript{39} This derivative acquisition is, however, refuted by the principle of single transferral of powers, the principle of acknowledging the identity of Member States and the flexibility of single authorization.\textsuperscript{40} The transfer of competence and the transfer or distribution of the exercise of sovereign powers cannot be regarded as final among others because the Lisbon Treaty, like the Treaty

\textsuperscript{38} N. Lorenz, Die Übertragung von Hoheitsrechten auf der Europäischen Gemeinschaften. Peter Lang, Frankfurt am Main (1990) 334

\textsuperscript{39} In accordance with the legal principles of nemo plus iuris ad alium transfere potest quam ipse habet and res transit cum onere suo.

\textsuperscript{40} Articles 4-5 and 20 of the EU Treaty as amended by the Lisbon Treaty. For the consolidated text see HL C-115/18. and C-115/27-28. (9/5/2008). Art. 4, “In accordance with Article 5, competences not conferred upon the Union in the Treaties remain with the Member States. The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional, inclusive of regional and local self-government. It shall respect their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State.” Art. 5, “The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality. Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.”
establishing a Constitution for Europe, intends to specify the rules of withdrawal from the Union as well. Thus the Member States of the future Union with a legal personality will remain international legal entities and retain their sovereignty taken in the sense of constitutional law, and will only limit their sovereignty by transferring sovereign powers or their exercise or by deciding to exercise them jointly. The limited supreme power of the Member States and the integrated power are in a coordinating relationship with each other and coexist in the same space, in a parallel way, in a kind of symbiosis, without a hierarchy being established among them.

Thus the transfer of certain state (constitutional) competences or of their exercise does not mean the loss of sovereignty since in a constitutional law sense people’s sovereignty, legal sovereignty, and state sovereignty are components of sovereignty mutually presuming each other. The transfer or distribution of sovereign powers or their exercise quantitatively decreases the content elements of state sovereignty, while only influences and re-evaluates the other two. Analyzing sovereignty from the aspect of constitutional law helps to understand why constitutional courts refer to the protection of sovereignty against Community acts. From the point of view of the Community, a substantial and a formal side of the transfer of competencies or their joint exercise can be distinguished. Which competence (sovereign power) is transferred or communalized concerns state sovereignty substantially. What form of exercise (e.g. qualified majority, co-decision procedure or right of Member State initiative) is attached to the transferred or communalized competence is a formal feature. Constitutional control over the transfer – in the interest of the protection of sovereignty – is tenable (however, also limited means) in both cases.

41 Article 50 of the EU Treaty as amended by the Lisbon Treaty. For the consolidated text see HL C-115/43-44 (9/5/2008)
42 Cf. N. Lorenz: op. cit. 333, 339. A similar idea is that a communalisation of sovereignty is taking place in the multilayer political space. Cf. Tibor Navracsics, A demokrácia problémája az Európai Unióban [The issue of democracy in the European Union] Politikatudományi Szemle 1998/1, 47. According to some, there is a certain “inverse hierarchy” of “centre-periphery” in the integration. The Union is in the centre and in the relationship of the Union and the Member States the highest level is the Union, which determines the policies to be implemented by the Member States. However, the Member States as the “masters of the Treaties” urge and determine the activity of the centre from the periphery. Thus hierarchy turns upside down. See Volker Röben, Constitutionalism of Inverse Hierarchy: the Case of European Union. Jean Monnet Working Paper 8/03. New York University School of Law (2003) www.jeanmonnetprogram.org/papers/03/030801.pdf
43 In the sense that the expression of legal sovereignty, the constitution, has to be harmonised with the Community legal requirements stemming from the general principles of international law (e.g. acknowledgement of human rights). This, however, does not mean a further limit of legal sovereignty as legal sovereignty expressed in the power to adopt a constitution is originally not unlimited either.
44 The term “transfer of sovereignty” is not only conceptually vague and misleading but not required by the Union either: on the one hand Article 6 (ex Article F) of the Maastricht Treaty respects the national identity of the Member States, on the other hand the ECJ has emphasised several times that the Community functions on the basis of the principle of limited individual competencies, thus only the transfer of competence or the transfer of the exercise of competence is expected. Boldizsár Nagy, A szuverén határai [The limits of sovereign] Fundamentum 2003/2, 45, also argues against the terms of “loss” and “impairment” of sovereignty.
II. European integration – Member State sovereignty

The Union, as the voluntary and deliberate association of sovereign states, rather means the expression of the sovereignty of its founders. Member States do not transfer their sovereignty in the process of integration but they transfer certain (constitutional / state) competencies or the exercise of such competencies forming part of their sovereignty, thus opening up their legal orders before EC/EU law. In the interest of the objectives of integration national constitutions themselves can also be amended, though this possibility is not unlimited. For the protection of sovereignty, “safety locks” have been built into the basic laws of the Member States in the form of partly substantive and partly procedural rules.

This was and still is especially necessary because the order of competence between EC/EU law and Member State constitutional law is not always and not in all cases crystal clear or transparent. It is not unequivocal who can make the final decision concerning the validity of a provision of secondary community law if it is in conflict with a constitutional norm of fundamental rights of a Member State, thus the legal order regards such a situation as a loss of the joint exercise of competence, the detriment of which is suffered by the citizens.

On the one hand, in respect of law the term sovereignty can be used in a formal sense as competence established by the legal order, the final binding force for decisions on the content and validity of legal norms (in other words: the competence of the last word). On the other hand – in respect of substance – it means the entirety of


46 From the aspect of European law it should be noted that contrary to the theoretical primacy of EC law, national legal orders have areas reserved in respect of constitutional law. If community law substantially and regularly restricted the essential content of fundamental rights or the Community grievously and regularly acted ultra vires and the European Court of Justice did not grant adequate protection against such infringements, national constitutional courts could not be denied the right to protect the essentials of the constitutions of the Member States. Günter Hirsch, Kompetenzverteilung zwischen EuGH und nationaler Gerichtsbarkeit. NVwZ Heft 9 (1998) 909

47 In this sense it is national constitutional law which determines how and to what extent the Member State confers power on the Union and also how to control its exercise. Bryan Harris, The Constitutional Law of the European Union. Franklin Pierce Law Centre, New Hampshire USA (2001) 240

48 Though the constitutional courts of the Member States, as self-appointed designates construed competence for themselves to handle such situations, this has resulted in a conflict with the European Court of Justice.

49 These provisions defining competence are legal norms which provide for the order of competence in themselves – serve for establishing competence (Kompetenz-kompetenz). In respect of content, competence serving for establishing new functions and competences (as the last word) means the sovereign power of the people, in other words, it cannot be linked to the state or to an entity above nations. See Ingolf Pernice, Multilevel Constitutionalism in the European Union, European Law Review October (2002) 519
competencies, the manifest of public power and the quantity and quality of powers.\textsuperscript{50} Formal sovereignty – as the competence of final decision – raises dogmatic issues when a collision between the legal order of the EC/EU and a Member State is to be resolved. In this respect two fundamental contradicting dilemmas (entailing the possibility of wrong conclusions) may arise.

– As regards Member State sovereignty, it may be claimed that promulgating statutes ratifying the Founding Treaties through constitutional authorization means the basis of the validity of the legal order of the EC/EU in a Member State.\textsuperscript{51}

– Referring to the autonomy of the Community legal order – which has almost been dogmatized by the European Court of Justice – leads to the argument according to which an autonomous legal order does not require a ground for validity affecting it, thus national law remains totally disregarded.\textsuperscript{52}

These two antagonistic argumentations cannot resolve the issue of collision, that is, whether in the case of colliding claims of validity the required collision norm may be selected only from the Community legal order or only from the legal order of the Member State. In theory it is conceivable that the collision norm of the primacy of community law may be derived from the legal order of the Member State as well. The authorizing article of the constitution of the Member State grants primacy to the validity of EC law but at the same time specifies the scope and limits of the primacy rule – also giving a collision norm – and in this latter respect the national constitution qualifies as the final binding standard as it may provide that community law shall have only limited and not exclusive primacy over domestic law. This standard can be set by the constitution of the Member State only by taking into consideration the autonomy of EC law and that is why it cannot make a final binding decision on the validity, content and the primacy rule of the Community legal norm. Thus the collision norms created by the Member States and derived from community law collide and which one should prevail is often decided by those applying the law according to which legal order seems to be more binding.\textsuperscript{53}

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\bibitem{50} Manfred Baldus, Zur Relevanz des Souveränitätsproblems für die Wissenschaft vom öffentlichen Recht. Der Staat (1997) 381.
\bibitem{51} However, generally this is an argument serving for establishing competence by the constitutional court. It can easily be refuted as follows: even if a later statute repeals the promulgating statute (which might as well perform the act of “leaving”), it has no effect on the international assumption of obligations – which are generally preferred by national constitutions. International obligations cannot be discharged unilaterally. See Christian Tomuschat, Die Europäische Union unter der Aufsicht des Bundesverfassungsgerichts. Europäische Grundrechte Zeitschrift Heft 20-21 (1993) 495
\bibitem{52} This argument is favourable to the European Court of Justice but can be refuted since community law is at most a separate but not an independent legal order in relation to Member State and international law. T. C. Hartley, Constitutional Problems of the European Union. Hart Publishing, Oxford (1999) 138-139 and 148
\bibitem{53} The premise – according to which these legal orders are autonomous and which can be traced back to differing fundamental norms in respect of their final validity in the sense of Kelsen’s “Grundnorm” – has led to the irresolvable conflict of the collision norms of community law and national law both being valid. Baldus op. cit. 391. Further see Hartley op. cit. 127-128
\end{thebibliography}
State – basic norm (constitution) can only resolve the conflict if the political power groups adjust the rationalized competence order to the system of values actually existing in European society. The most important task is to practically harmonise Member State constitutions with EC/EU law. This means that Member States withdraw their own constitutional claims to the extent they transfer sovereignty to the EC/EU. This solution is tenable because in the authorising article it is possible (and necessary) to impose the requirement of homogeneity in respect of the fundamental norms of the constitution against integration as the direction of development.54

Considering the current level of development of European law, the European Court of Justice may, with binding force, review the EU’s *ultra vires* procedure or a procedure contravening a national constitution since the validity of any Community (Union) act can only be established on the ground of the Founding Treaties. If the Court finds the legal act to be incompatible with the primary law, the Member States may only recourse to the so called “joint legal remedy”.55 Although a Member State may establish a breach of contract by its supreme court, constitutional court or parliament, it will not have a binding force on the Union. No suspending or discharging conditions are attached to the powers granted to the Union, they are linked only to the Treaties and are subordinate only to the control of the European Court of Justice. An ultra vires Community legal act or one contravening a national constitution will remain in force; however, it is open to question whether its supremacy is well-grounded and whether its applicability is tenable. The answer can be given by the intensity of the confrontation-ability of the Member State’s mechanism for the protection of its constitution.56 In the case of the European Court of Justice decisions jeopardizing Member State competencies, it becomes necessary for the national constitutional courts to assume a controlling role or even to establish a separate court with jurisdiction to resolve the competence conflicts between the Union and the Member States.57

When the Member States conclude Treaties pertaining to integration – in accordance with the provisions of their basic laws –, European institutions are granted authorization under which they may exercise actual powers in the constitutional “spaces” of the Member States without the Member State constitutional law being applicable to them.

The ground for the constitutionality review is the *authorizing provisions* of the constitution which may have various purposes:

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54 Jürgen Schwarze, *Das schwierige Geschäft mit Europa und seinem Recht*, Juristen Zeitung 1998/22, 1082

55 In the form in which the doubts concerning the jurisdiction of the European Union were intended to be cleared according to Declaration 4 of the Final Act of the Amsterdam Conference on 2nd October 1997.


enabling participation in the EU (transferring clauses);
- specifying content and procedural conditions of participation (national constitutional replies and feedback clauses);
- the expression of the modification of the internal distribution of power (e.g. in the relationship of government and parliament) or the confirmation of the prevalence of union law (consequence clauses);
- nominating national representatives to EU institutions and specifying their responsibilities.

Authorizing provisions have a double function. Outwards, in the direction of the Union the authorizing articles serve as a “bridge” between the integration organization and the constitutional order of the Member State allowing for the transfer of constitutional competencies and enabling control over the exercise of transferred competencies.58 Member State legal orders open up before the law of the Union by authorization and the rule of law values of the Member States which are linked vertically in the integration become enriched with the values of the Union. Thus the principle of the rule of law of the Member States acquires surplus content the constitutional ground of which is the authorizing article. Inwards, in the direction of the Member State legal order they serve as the specification of the special form of exercising power: in a constitutional order observing the principle of people’s sovereignty any power deriving from the people can exclusively be exercised in forms and in the manner specified in the constitution, thus, in addition to the traditional (representative and direct) forms of exercising power the special forms of exercising power (through organs of integration in a supranational manner) must also be provided for.

III. Sovereignty in the constitution of certain CEE EU Member States

Due to the confines of this article it is impossible to describe the constitutional regulation pertaining to sovereignty of each CEE EU Member State. However, this selection may be considered representative insofar as the selected states (republics) include the peculiarities and similarities of the sovereignty-related constitutional provisions of these countries.

The principles of the Polish Constitution pertaining to the organization of the state include national sovereignty, the independence and sovereignty of state and legal sovereignty.59 Supreme power in the Republic of Poland is vested in the Nation. It

58 It is well illustrated by the “Brückenhaus [tollbooth] theory” of the German Federal Constitutional Court which regards the statute announcing accession as a bridge from the tollbooth of which the particular national organs – especially the constitutional court – control whether the Community legal act remains within the limits of the transferred competencies. Schmitt Glaeser op. cit. 213 and BVerfGE 89, 155 (174).
59 Articles 4-5 and 8 of the Polish Constitution. See N Chronowski, Lengyel Köztársaság [The Republic of Poland]. In Európai kormányformák rendszertana [The taxonomy of European forms of government] (N Chronowski – T Drinóczi eds., HVG-ORAC, Budapest 2007) 445-446
follows from it negatively that neither a party nor any other social group may exercise public power. The concept of nation is used in the sense of political nation by the Constitution, that is, as the community of citizens and not as an ethnic notion. National sovereignty can be exercised in the form of representative democracy resulting from elections and based on free mandate, though in certain cases it can be exercised directly. Typical forms of the direct exercise of power are local and national referendums. State independence and sovereignty have been overturned several times in the history of Poland that is why in addition to the values listed in the Preamble it is also laid down that the Republic of Poland safeguards its independence and territorial integrity. The specification of the duties of the Armed Forces, the duty of the citizens to defend their homeland, and the definition of the constitutional status of the president of the republic have to be interpreted in the context of the above duty. It is not deemed as a violation of state sovereignty that the Republic of Poland may transfer the power of state organs to international organizations and institutions in cases defined by international treaties. A procedural limit to the ratification of such treaties is that it may be effected either in a statute, passed by the House of Representatives (Sejm) by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators or by a nationwide referendum. The choice of the ratification procedure is taken by the Sejm. The attributes of state sovereignty (national coat-of-arms, national colors, national anthem and the capital) are also defined in the Constitution. Legal sovereignty is guaranteed by the Constitution being the supreme law of the Republic of Poland. The provisions of the Constitution apply directly, unless the Constitution provides otherwise.

The Lithuanian Constitution includes the following principles of the organization of the state (i) the principle of independence, which – as emphasized in accordance with the historical experiences of the Soviet successor state – are expressed firstly in the Preamble and in Chapter 1 as a characteristic feature of the state, secondly in the principles of foreign policy, and thirdly in the act with constitutional force on the State of Lithuania; (ii) the principle of unrestrictable people’s sovereignty and the manners of its exercise directly connected to state sovereignty; (iii) other elements of state sovereignty (territorial integrity, citizenship, official language, state emblems

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60 Article 104 (1) of the Polish Constitution. Representatives are the representatives of the whole nation. They are not bound by any instructions of the electorate.
61 Cf. Articles 26, 85 (1) and 126 (2) of the Polish Constitution.
62 Article 90 of the Polish Constitution.
63 Article 8 of the Polish Constitution.
64 Articles 1 and 3 (2) of the Lithuanian Constitution. See N Chronowski, Litván Köztársaság [The Republic of Lithuania]. In Európai kormányformák rendszertana, op. cit. 303-305
65 Articles 135 (1) and 136 of the Lithuanian Constitution.
66 The act with constitutional force was adopted by Parliament on 11 February 1991 prior to the adoption of the Constitution following its approval in a referendum.
67 Articles 2 (“The State of Lithuania shall be created by the Nation”), 3 (1), 4 and 9 of the Lithuanian Constitution.
and the capital);\(^{68}\) (iv) the principle of legal sovereignty, which is expressed in the direct appficability of the Constitution and it being defined as the highest source of law.\(^{69}\) As regards state structure, Lithuania is an integral state and cannot be divided into any state-like formations. The state boundaries may be altered only by an international treaty of the Republic of Lithuania after it has been ratified by four fifths of all the Members of the Parliament (Seimas). As regards foreign policy, the Republic of Lithuania follows the universally recognized principles and norms of international law, and contributes to the creation of the international order based on law and justice. International treaties ratified by the Seimas of the Republic of Lithuania are a constituent part of the legal system of the Republic of Lithuania.\(^{70}\) Due to historical reasons, special emphasis is placed on external sovereignty in the Constitution: the provisions pertaining to national defense are quite detailed and the act with constitutional force on the State of Lithuania (which makes independence a principle of the organization of the state) and the act with constitutional force rejecting any possible eastern alliances with Soviet successor states.

Lithuania has been a Member State of the European Union since 2004, which is confirmed by the act with constitutional force (number IX-2343) on membership as of 13 July 2004. The preamble expresses the expectation that membership will result in the more intensive protection of human rights and the Union will respect the national identity of Member States. The act declares – as an authorizing provision – the possibility of the exercise of distributed and delegated power in areas defined in the Founding Treaties, jointly with other Member States, and to the extent necessary for the exercise of rights and fulfillment of obligations arising from membership.\(^{71}\) The legal norms of the Union form part of the Lithuanian legal order provided that they derive from the Founding Treaties, directly applicable, and are granted primacy over Lithuanian laws and other legal acts.\(^{72}\)

Romania is a sovereign, independent, unitary and indivisible national state. The state foundation is laid on the unity of the Romanian people and the solidarity of its citizens.\(^{73}\) The doctrine of a unitary state is of decisive importance in the ideological background of the Constitution of Romania. The territory of Romania is inalienable. No foreign populations may be displaced or colonized on the territory of the Romanian State. This provision was placed into the current Romanian fundamental law from the constitution of 1923 and means the constitutional prohibition of the displacement and exchange of peoples. National sovereignty resides within the Romanian people, which exercise it by means of their representative bodies, resulting from

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\(^{68}\) Articles 10 and 12-17 of the Lithuanian Constitution
\(^{69}\) Articles 6-7 of the Lithuanian Constitution. The principle of the rule of law, which is not included expressly in the Constitution – apart from the Preamble – has been developed by the practice of the Lithuanian Constitutional Court.
\(^{70}\) Articles 135 (1) and 138 (3) of the Lithuanian Constitution
\(^{71}\) Point 1 of the constitutional act of 2004 (Lithuania)
\(^{72}\) Point 2 of the constitutional act of 2004 (Lithuania)
\(^{73}\) Article 1 of the Constitution of Romania. E Veress, Románia [romania] In Európai kormányformák rendszertana, op. cit. 527-529
free, periodical and fair elections, as well as by referendum. No group or person may exercise sovereignty in one’s own name.\footnote{The Romanian State pledges to fulfill as such and in good faith its obligations as deriving from the international treaties it is a party to. Treaties ratified by Parliament, according to the law, are part of national law. If a treaty Romania is to become a party to comprises provisions contrary to the Constitution, its ratification shall only take place after the revision of the Constitution. Where any inconsistencies exist between the covenants and treaties on the fundamental human rights Romania is a party to, and the national laws, the international regulations shall take precedence, unless the Constitution or national laws comprise more favorable provisions.\footnote{Romania has been a Member State of the European Union since 1 January 2007. The constitutional amendment adopted in 2003 created the basis of the transfer of sovereignty. Romania’s accession to the constituent treaties of the European Union, with a view to transferring certain powers to Community institutions, as well as to exercising in common with the other Member States the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. A referendum is not a condition of accession to the founding treaties. As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory Community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. These provisions shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.} Romania has been a Member State of the European Union since 1 January 2007. The constitutional amendment adopted in 2003 created the basis of the transfer of sovereignty. Romania’s accession to the constituent treaties of the European Union, with a view to transferring certain powers to Community institutions, as well as to exercising in common with the other Member States the abilities stipulated in such treaties, shall be carried out by means of a law adopted in the joint sitting of the Chamber of Deputies and the Senate, with a majority of two thirds of the number of deputies and senators. A referendum is not a condition of accession to the founding treaties. As a result of the accession, the provisions of the constituent treaties of the European Union, as well as the other mandatory Community regulations shall take precedence over the opposite provisions of the national laws, in compliance with the provisions of the accession act. These provisions shall also apply accordingly for the accession to the acts revising the constituent treaties of the European Union.\footnote{Filip, Molek, Vyhnánek op. cit. 170}

The principle of the state sovereignty is stated in the first article of the Czech Constitution: ‘The Czech Republic is a sovereign, unitary and democratic, State of rule of law, based on respect for the rights and freedoms of man and citizen.’ Since 1989 this is a statement of facts which is not limited by any foreign interference; the international obligations voluntarily accepted by the state organs (as representatives of the popular sovereignty) are the only limits of the sovereignty. The observance of international obligations is explicitly stated in Article 1 paragraph 2 of the Constitution: ‘The Czech Republic shall observe its obligations under international law’, and concretized mainly in Article 10 (concerning the relationship between international and domestic law) and Article 10a (concerning the possibility of a transfer of certain powers of bodies of the Czech Republic to an international organization or institution). Article 10a of the Constitution has been discussed as the constitutional basis and the normative framework for a possible transfer of some of the sovereign rights to EC/EU.\footnote{The constitutionally acceptable extent of such a transfer was determined}
in the judgment of the Constitutional Court concerning the constitutionality of the Lisbon Treaty, which states, that the transfer of powers of bodies of the Czech Republic to an international organization under Article 10a of the Constitution ‘cannot go so far as to violate the very essence of the republic as a democratic state governed by the rule of law, founded on respect for the rights and freedoms of human beings and of citizens, and to establish a change of the essential requirements of a democratic state governed by the rule of law (Article 9 paragraph 2 in connection with Article 1 paragraph 1 of the Constitution). If, on the basis of a transfer of powers, an international organization could continue to change its powers at will, and independently of its members, i.e., if a constitutional competence (Kompetenz-kompetenz) were transferred to it, this would be a transfer inconsistent with Article 1 paragraph 1 and Article 10a of the Constitution.’

In this judgment, the Constitutional Court even analyzed the nature of the state sovereignty of a state in the present globalized world. It stated that ‘the limit for transfer of powers to an international organization under Article 10a of the Constitution consists of the essential requirements of a sovereign, democratic state governed by the rule of law under Article 9 paragraph 2 and Article 1 paragraph 1 of the Constitution. However, today sovereignty can no longer be understood absolutely; sovereignty is more a practical matter. In this sense, the transfer of certain competences of the state, which arises from the free will of the sovereign and will continue to be exercised with the sovereign's participation, in a manner that is agreed on in advance and is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.’

The Hungarian Constitution and the new Fundamental Law (FL) coming into force in 2012 also contains several – express and implied – sovereignty-orientated provisions. The principle of people’s sovereignty manifests itself in Article 2 (2) of the Constitution and in Article B) of the FL, under which all power belongs to the people who exercise it through elected representatives or – in exceptional cases – directly. On the one hand this means the people’s original power to determine the constitutional system which was manifested in the process of creating the Constitution in the framework of the National Roundtable and the formal parliamentary procedure following it. It worth to mention that during the constitution making of 2011 the opposition parties and other groups of society de facto were not involved into the procedure, and the FL was adopted exclusively by the governing parties having two

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80 Quoted according to Abstract of the Judgment concerning the Treaty of Lisbon. http://www.usoud.cz/scripts/detail.php?id=613, see Filip, Molek, Vyhnánek op. cit. 170
81 The analysis is based on J Petrétei, Az Alkotmány alapelvei [The principles of the Constitution]. In Magyar alkotmányjog I [Hungarian Constitutional Law I]. Dialóg-Campus, Budapest-Pécs (2002) 85-94
third majority in the parliament. On the other hand, in respect of the manner in which sovereignty is exercised – in the framework of the Constitution – it means that sovereignty is primarily representative and the direct exercise of power is complementary and exceptional. Regulations pertaining to suffrage, representation, referendum are provisions directly connected to it. The authorizing provision contained in Article 2/A of the Constitution and in Article E) of the FL can be regarded as the special level of the exercise of power. The exercise of power – jointly with other Member States or through the institutions of the EU – at a special level was legitimized by a referendum held under the Constitution as the expression of people’s sovereignty. The principle of legal sovereignty is manifested in the declaration of the rule of law, in defining the Constitution as the basic law and accepting its binding force. The guarantees of legal sovereignty are the procedural limits to the process of adopting the constitution and amending it and the institutionalization of constitutional court jurisdiction. Accepting the generally recognized principles of international law and ensuring the harmony between obligations assumed under international law and domestic law are regarded as the self-restraint of legal sovereignty due to one of the limits of the power to adopt a constitution. Independence and the objectives of foreign policy outline the external aspect of express norms concerning state sovereignty, while internal sovereignty is manifested in defining and dividing supreme state power into competences and distributing them, which is affected by the authorizing provision since it renders possible the exercise of constitutional powers jointly with other Member States and through Union institutions. State sovereignty can and should be interpreted in the framework of legal sovereignty and on the basis of people’s sovereignty by correlating norms expressing it with each other. Thus the state placed under the sovereignty of law is obliged to protect the sovereignty of the people and maintain external sovereignty through the obligation to refrain from the use of force and to take an active part in establishing a European unity. Participating in the international community and European integration determine the exercise of the constitutional powers of the state in a normative manner on the basis of the Constitution. In the Republic of Hungary participating in the Union is now a fact of constitutional law and also a program, the basis of which was a sovereign decision and the framework of which is laid down in the authorizing provision and in the purpose of the state concerning integration. Article 2/A (or Article E) of FL) is not a proof of “losing sovereignty” but may be the constitutional guarantee of protecting sovereignty. It follows from collating the constitutional norms entailing sovereignty that the Constitutional Court may control the exercise of certain constitutional powers at a special level as regards respect for the framework of authorization.

In the judicial practice of the Constitutional Court the necessity of the above has not arisen, however, jurists have tried to outline the possible directions of

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83 Articles 6 and 2 (1) of the Hungarian Constitution, and Article E) and B) of FL
84 Article 6 (4) of the Hungarian Constitution: “The Republic of Hungary shall take an active part in establishing a European unity in order to achieve freedom, well-being and security for the peoples of Europe.” The same wording appears in the new Fundamental Law in Article E).
constitutional defense in connection with community / union law.\textsuperscript{85} The consequences of Union membership have been carefully outlined in the decisions of the Constitutional Court. The judicial practice of the Constitutional Court prior to the accession established the general and theoretical possibility of the constitutional review of international treaties. The Constitutional Court declared in its Decision No. 4/1997. (I. 22.) that a promulgating act together with the international treaty forming part of it may be subjected to a posterior constitutionality review.\textsuperscript{86} In 1997 the body seemed to have been about to regard the constitutional examination of community law as its natural power. Decision No. 30/1998. (VI. 25.) AB, which implemented the constitutional review of one of the provisions of Act I of 1994 on the promulgation of the European Agreement (EA) pointed into this direction. The EA was treated as a traditional international treaty by the body. As regards form, it was right in doing so since then the republic of Hungary was not a Member State but as regards content, the EA also contained supranational features. For the sake of historical truth it should be mentioned that the abovementioned Decision No. 30/1998. (VI. 25.) AB of the Constitutional Court, in which it declared that in lack of constitutional authorization Parliament is not entitled to extend beyond the principle of territoriality in the area of law falling under the exclusive competence of state supreme power and cannot impliedly amend the Constitution by concluding and promulgating international treaties,\textsuperscript{87} made a considerable impact on adopting the authorizing provision amending the Constitution in December 2002.\textsuperscript{88} Activism has not characterized the practice of the Constitutional Court since the accession; the body tries to expel conflicts of norms arising in respect of EC/EU law from the scope of constitutionality issues. In its decision of 143/2010. (VII. 14) the Constitutional Court ruled that the Act of promulgation of the Lisbon Treaty is constitutional. According to the Court Article 2/A. of the Constitution cannot be interpreted in a way that would deprive the constitutional provisions on sovereignty and rule of law of their substance. It referred to its former decisions on the limitation of the exercise of sovereignty and came to the conclusion that although the reforms introduced by the Lisbon Treaty were of


\textsuperscript{86} ABH 1997. 41

\textsuperscript{87} ABH 1998. 220. 232, 234

\textsuperscript{88} Act LXI of 2002 on the Amendment of the Hungarian Constitution.
foremost importance, Hungary remained a sovereign and independent State with a prevailing system of rule of law.\textsuperscript{89}

Even this selective overview may prove that national constitutions include more than just a few provisions detailing the principle of sovereignty. Obviously, the constitutions of new democracies – considering historical experiences – more intensively emphasize the principle of independence, while the constitutions of older Member States contain fewer express provisions pertaining to sovereignty. However, these provisions cannot be regarded as shallow and empty regulation and their construction is implemented in each state referred to above. For instance the French Constitutional Council imposed a limit on the exercise of powers conferred on the Union by elaborating a test concerning the core of national sovereignty, while the German Federal Constitutional Court worked out the perpetuity clause entailing legal sovereignty in order to establish the basis of the constitutional control of ultra vires acts of the Union.\textsuperscript{90}

However, the CEE constitutional courts should elaborate their sovereignty-protection doctrine carefully, taking the principle of sincere cooperation into consideration. The Treaty of Lisbon contains guarantees for respect of the national and constitutional identity; and if any national institution – e.g. government or constitutional court – interprets the national constitutional sovereignty principles in a rigid way, that reactive protection of national interests weakens not only the Union level, but also the Member State’s position in the multilevel constitutional system of the European integration.

D. Integration of human rights standards

Central and Eastern European states are members of the Council of Europe and most of them also of the European Union. It follows from this that the legal documents of both regional organizations (European Convention on Human Rights, Charter of Fundamental Rights of the EU), and the judicial practice based on them have a binding force.

As regards to these states, the current challenge is also the reinforcement of the protection of fundamental human rights in the European Union. The core of the issue is how the two regional – supranational mechanisms for the protection of fundamental rights can be harmonized following the entry into force of the Lisbon Treaty amending the founding treaties of the Union.


\textsuperscript{90} N Chronowski, Integrálódó alkotmányjog [Constitutional law under integration] Dialóg-Campus, Budapest-Pécs (2005)107-109
The directions of the development of the protection of fundamental rights in the Union were already mainly shown in the process of creating the constitution of the Union.\textsuperscript{91} Working Group II\textsuperscript{92} of the European Convention kept two research directions in view – which otherwise have already been indicated by legal scholars several times. These two directions were as follows: on the one hand giving binding force to the EU Charter of Fundamental Rights by incorporating it into the Treaty establishing a Constitution for Europe, on the other hand the possibility of the accession of the Union to the ECHR. In addition, Working Group II dealt with the complementary issue of the possible activity of the European Court of Justice in the area of the protection of the fundamental rights of individuals. The Lisbon Treaty built these achievements into the Treaty on European Union (Article 6) and ensured the binding force of the Charter of Fundamental Rights of the European Union (CFR).\textsuperscript{93}

The Treaty on European Union as amended by the Treaty of Lisbon stipulates the authorization enabling the accession of the Union to the ECHR. Since each Member State of the Union is a party to the ECHR, accession seems to be the most obvious solution to the issue of the improvement of the protection of fundamental rights. However, some obstacles arise, though they might be overcome. The accession itself is a political issue the implementation of which falls under the competence of the European Council and this requires unanimity in respect of conditions and reservations. The accession also required the amendment of ECHR itself because under its original provisions only states could accede to it, at the time of the adoption of the ECHR there was no prospect of the participation of any supranational organization. The ECHR was amended by the 14\textsuperscript{th} Protocol that entered into force 1 June 2010, and now its Article 59(2) makes it clear that “The European Union may accede to this Convention”. However, the authorizations in the EU Treaty and in the ECHR are just starting points, because a separate accession treaty is needed for the accession of the Union and that is followed by the ratification procedure of all the EU members and contracting parties of ECHR.

There were and are several political and legal arguments for adopting the ECHR. (1) The Union, which expresses its fundamental value system through the CFR, could politically verify the coherence between the CFR and the European system of the protection of rights perceived in a broader sense by the accession. (2) Individuals would enjoy the same level of protection against the acts of the Union as against the acts of the Member States, which is especially justified by the fact that Member States have transferred several powers to the Union. (3) The accession might establish harmony between the case laws of Strasbourg and Luxembourg in the area of fundamental rights. This would not mean the violation of the autonomy of union law or

\textsuperscript{91} On the basis of the mandate and the immediate antecedents see E Szalayné Sándor, Gondolatok az Európai Unió alapjogi rendszerének metamorfózisáról [On the metamorphosis of the system of fundamental rights in the European Union], Európai Jog 3/2 (2003) 9-16

\textsuperscript{92} CONV 354/02 Final Report of Working Group II. Brussels, 22nd October 2002

that of the competence of the European Court of Justice (ECJ), neither would it entail the creation of a hierarchical relationship between the courts because the ECJ would remain the highest judicial forum of the union legal order whilst the European Court of Human Rights as a special court would exercise a kind of external control over the fulfillment of the Union’s obligations stemming from the ECHR. Thus the relationship of Strasbourg with Luxembourg could be the same as it is now with the constitutional courts and the supreme courts of the Member States. However, when examining the relationship of the judicial forums with each other, the issue of the hierarchical relationship between the ECJ and the ECtHR cannot be excluded, for if union citizens are not granted adequate legal protection sought by them in the course of the ECJ proceedings – similar to the present situation where they are not granted adequate legal protection by their Member States –, nothing will prevent them from turning to Strasbourg for legal remedy by referring to the European Convention on Human Rights. As the Union would be the obligor of the European Convention on Human Rights, the interpretation provided by the ECtHR would also be binding on it. All this would result in the primacy of the judicial practice of the ECtHR in fundamental rights matters over the judicial practice of the ECJ in similar matters, thus a process of unification might be predicted in the European protection of fundamental rights. This homogenization would naturally result in positive consequences in respect of the protection of fundamental rights; however, it would eliminate the phenomenon which might best be called “integration sensitivity”, which has always characterized the practice of the ECJ. When interpreting fundamental rights, the ECtHR could not take into consideration the current objectives of the Union, its structure (which – as it can be seen – is of great importance in the practice of the ECJ), and the level of integration since, concerning fundamental rights, it has to apply the same standards in respect of the Union and the other States Parties to the European Convention on Human Rights. Nevertheless, all these issues can be resolved by the provision of the CFR referring to the harmony of interpretation, under which only positive deviations may be made from the requirement of the same content and scope of fundamental rights: on condition the Union acquis guarantees a higher level of protection. (4) In addition to the direct connection, it will be possible for the Union to be a party in proceedings before the ECtHR in matters indirectly connected to union law, i.e. in matters concerning the fulfillment of the union obligations of Member States.

Two practical-technical matters can be the drawback of opening the forum in Strasbourg: the lengthening of the duration of the proceedings and the overloadedness of the ECtHR. The court in Strasbourg is definitely approaching the verge of its capacity after the opening up of the possibility of legal remedy for the citizens of the former socialist countries following the fall of the iron curtain. The possibility

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94 Articles 52 (3) and 53 of the Charter.
of referring Union proceedings to the ECtHR would make this situation even more difficult. Contrary to all this – considering the distinguished past of the ECtHR in respect of the protection and interpretation of fundamental rights – Strasbourg could significantly contribute to the Union’s system of the protection of fundamental rights and could make it part of the blood circulation of the European protection of fundamental rights.  

Ensuring the legally binding force of the CFR does not mean any changes in respect of the division of competencies between the Union and its Member States. This follows on the one hand from the guarantees pertaining to the scope of application stipulated in Article 51 of the CFR, on the other hand from the statement of the European Court of Justice holding that the protection of fundamental rights guaranteed by the Union cannot have the effect of extending the scope of the competencies stipulated in the Founding Treaties. These requirements do not contradict with the fact that certain fundamental rights laid down in the CFR pertain to areas over which the Union has no competence, for institutions acting with limited powers must respect the whole range of fundamental rights in the course of all their activities and acts. At the same time, lack of competence makes it doubtful to what extent the institutions of the Union lacking competence will be able to enforce the fundamental rights declared by the CFR. The CFR goes far to take into consideration subsidiarity, as it makes several references to the laws and practices of Member States, further, as its primary addressees are the European institutions – Member States in as much as they apply union law. However, it should be noted that judicial case law developing from the constitutional traditions of Member States has been built into the CFR thus it does not show any substantial differences as regards the basic laws of Member States.

It can be claimed that ensuring the binding force of the Charter and the accession to the ECHR are not alternatives, but rather they are complementary mechanisms which jointly make the system of the protection of fundamental rights complete at union level and make it more integrated at European level. The accession does not have an impact on the division of competencies between the Union and its Member States; it would not mean the extension of Union competences and would not change the relationship of the Member States to the ECHR either since these are stipulated in special provisions of the Article 6(2) of EU Treaty. The Union will not become a member of the Council of Europe nor will it become a political actor of the system as it would only be party to the ECHR and only in respect of its limited competences.

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97 C-249/96. Grant v. South-West Trains Ltd. [1998] ECR I-621. par. 45
The member delegated by the Union to the court in Strasbourg (and to other control bodies of the ECHR) ensures the expertise required in cases involving issues of union law. Under the Protocol(8) of the Lisbon Treaty special rules of participation have to be laid down in a separate agreement.101

For Central and Eastern European countries this strengthened system for human rights protection gives – or should give – further impetus for development their human rights standards. However, Poland has an “opt out” regarding the Charter. Under the articles of Protocol No. (30) of Lisbon Treaty ‘The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law. To the extent that a provision of the Charter refers to national laws and practices, it shall only apply to Poland or the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of Poland or of the United Kingdom.’

Czech Republic also annexed a declaration on the Charter to the Lisbon Treaty. ‘The Czech Republic recalls that the provisions of the Charter of Fundamental Rights of the European Union are addressed to the institutions and bodies of the European Union with due regard for the principle of subsidiarity and division of competences between the European Union and its Member States, as reaffirmed in Declaration (No 18) in relation to the delimitation of competences. The Czech Republic stresses that its provisions are addressed to the Member States only when they are implementing Union law, and not when they are adopting and implementing national law independently from Union law. The Czech Republic also emphasises that the Charter does not extend the field of application of Union law and does not establish any new power for the Union. It does not diminish the field of application of national law and does not restrain any current powers of the national authorities in this field. The Czech Republic stresses that, in so far as the Charter recognises fundamental rights and principles as they result from constitutional traditions common to the Member States, those rights and principles are to be interpreted in harmony with those traditions. The Czech Republic further stresses that nothing in the Charter may be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective field of application, by Union law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States’ Constitutions.’

It is worth to mention that the quoted protocol and declaration has rather political character, as the Charter in its Title VII contains all the guaranties of subsidiarity, level of protection and non reversal.

During the Hungarian constitution making in 2011 it occurred – and the Hungarian Government asked as well the Venice Commission\(^{102}\) – whether to what extent it is necessary to incorporate the Charter rights into the national constitution. The Venice Commission emphasized ‘that up-dating the scope of human rights protection and seeking to adequately reflect, in the new Constitution, the most recent developments in the field of human rights protection, as articulated in the EU Charter, is a legitimate aim and a signal of loyalty towards European values’. However, the Commission also underlined, that the incorporation of the Charter as a whole or of some parts of it could lead to legal complications. Thus, it should be taken into account that the interprÉtation of the EU Charter by the CJEU might deviate from the one provided by the Constitutional Court of Hungary; the interprÉtation of the substantive provisions of the EU Charter is dependent on the ECHR and the case-law of the ECtHR; in the case law of the ordinary domestic courts it might result problems that they should distinguish between the application of the Charter within and outside the scope of Union law. All these may be the case thereby giving up the constitutional autonomy of the Member State. The Venice Commission recommended ‘that it would be more advisable for the Hungarian to consider the EU Charter as a starting point or a point of reference and source of inspiration in drafting the human rights and fundamental freedoms chapter of the new Constitution.’\(^{103}\)

The seriousness of the question of the Hungarian Government is undermined however by the fact that the draft of the new constitution was not sent to the Venice Commission on time, thus the Opinion of 28 March 2011 contained general comments and not evaluated any particular provisions of the constitutional text. Meanwhile the governing party alliance published (07 March 2011) and submitted to the Parliament (15 March) a draft, which originally did not follow precisely the spirit and the content of the Charter. After a short – approx. one month – parliamentary debate, the adopted Fundamental Law contains more or less the same rights in its relevant Chapter, and some sentences of the Charter were finally incorporated, but – compared to the Charter regulation – the content of the rights enumerated by the Fundamental Law is poorer and the text raises the possibility of wider limitation of rights. The Venice Commission in its second opinion, which was given upon the request of the Parliamentary Assembly CE and was published on 20 June 2011,

\(^{102}\) The Venice Commission was addressed three legal questions by the Deputy Prime-Minister and Minister of Public Administration and Justice of Hungary. One of the questions was the following: To what extent may the incorporation in the new Constitution of provisions of the Charter of Fundamental Rights enhance the protection of fundamental rights in Hungary and thereby also contribute to strengthening the common European protection of these rights?

examining the final text revealed several controversies that should be eliminated by utilizing the common European values during the interpretation.\textsuperscript{104}

Conclusions

The common historical task of the Central-Eastern European countries is to establish democracy in both the institutions and the souls – the political culture. This means more than mere legislation or creation of organizations and institutions. This is the political creation of the nation. The victory of the new democratic governments in Central-Eastern Europe requires a new program promoting democracy. The establishment of democracy in these countries cannot be forced or follow one single sample, but it must be diverse, freely chosen, and built from below. Democracy cannot be proclaimed by laws – democracy need democrats! An important task of the young democracies in Central-Eastern Europe is to work out a system which educates citizens to be “democrats” because “it goes hand in hand with the kind of schooling its children get.” In addition, educational institutions and the media must strive to clarify and raise awareness of the nature of parliamentary democracy, the Rule of Law, human and civil rights, and the democratic political and legal culture. If the citizens thoroughly become acquainted with the order of our democratic constitutional state, the mistakes of the past, and the requirements of the future, their political activity, their sense of responsibility, and their readiness for cooperation will increase, and they will be willing to make sacrifices, if necessary.

In this respect, CEE countries can count on Western-European and American experts, programs, and extensive training of teachers, lawyers, and other professionals. A very important question in the new democracies is how to promote an equitable economic development and contain social unrest. To do this, the CEE counties need a new type of democracy, not just a new democracy.\textsuperscript{105}

Central-Eastern Europe hopes to establish an efficient mechanism of conflict-regulation and crisis-management based on a large national consensus and participatory rights. In the democratic transition of Central-Eastern Europe, a formalistic or procedural model of democracy would not work properly, and would certainly alienate people from politics. The people of these countries need a clear commitment by the new democratic state to enable all citizens to exercise fully their democratic political rights by providing all the necessary social and economic preconditions.


\textsuperscript{105} See Attila Ágh, Transition to Democracy in East-Central Europe: A Comparative View, In Democracy and Political Transformation (1991)
René Marcic properly pointed out that the constitutional state and democracy have common roots. A constitutional form of government kept in check by the supreme power of the people guarantees that the Rule of Law and human rights are truly realized. The Rule of Law must be democratic in its content as well as its procedure. The governments of Central-Eastern Europe must protect democracy and protect the Rule of Law from breaking down.

In the countries of Central-Eastern Europe there are commonalities of the process of democratization which make it possible to talk about a sui generis post-communist model. The characteristics of this – among others – are the following:

- the peacefulness of transition;
- unbroken legal continuity;
- full-pledged framework of Rule of Law, instituted in gapless way as far as its formal arrangement and in-built guarantees are concerned;
- ethos and prestige – unchallenged and unquestioned – of constitutional democratic establishment;
- it is not only about a democratic tradition, but there is a transition towards the market, from cold war to peace, to the Information Age and in several countries (Baltic States, Slovenia, Czech Republic and Slovakia) to the new forms of statehood;
- partitocrazia (Sartori);
- the weakness of political culture
- the problems of individual and collective rights of minorities;
- the tensions of transition contributed to the fast disappointment in politics as well as;
- the outburst of energies at local level (e.g. the progressive increase of the number of small- and middle businesses).

Researchers have paid quite little attention to the international dimension of the Central-Eastern European democratic transition and consolidation (with the exception of the role of Gorbachev).

International correlation plays a much more important role in the transitions of Central-Eastern Europe then it did earlier in Southern – Europe and Latin - America. The reason for this is partly because political and economic transitions are simultaneous.

Perhaps the most clear and most decisive is the constant influence of the European Union to the democratization efforts in the countries of region.

106 See René Marcic, Art Demokratie, in Katolisches Soziallexikon 138 (1964)
108 See Petr Kopecký, Cas Muddle, Mire tanít minket a kelet-európai irodalom a demokratizálódásról (és viszont)? [What can we learn from the East European Literature on Democratization?] Politikatudományi Szemle No. 3-4. (2000)
Since the effected countries took the necessary measures to membership by this they influenced the development of democratic consolidation in different ways. On the one hand positively since the effected countries accept the new reality and adapt the new aims, on the other hand negatively because the differences between the requirement of the Union and the demands of the citizens became even more visible.

During the two and a half years passed since the historic enlargement it became obvious that the economy of the newly accessed countries is very fragile. For this reason Brussels is expecting so called reforms from the new Members, such measures that are not in the interest of citizens in the short term.

The Visegrád Four – without any exception – have drifted into grave internal political crises (riots, governmental crises, ethnic conflicts, the state pulling out of several sectors, the situation of public health, unemployment, feelings against the Union, etc.)

The former socialist countries of Central-Eastern Europe are having their most difficult times since the change of the system and it is to be feared that this crisis will have an effect for years. One thing is for sure, Brussels alone cannot solve everything for them.\footnote{See Antal Visegrády: Major lessons of Central Eastern European democratic transitions, In Mélanges en l’honneur de Slobodan Milacic, Bruylant, Bruxelles (2007) 1119-1120}