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COMPOSITION AND STRUCTURE OF THE EAST-CENTRAL EUROPEAN CONSTITUTIONAL COURTS

Abstract: *The present paper is going to deal with the composition, the recruitment base, the operational mechanisms and the inner structure of the constitutional courts in the course of constitutional adjudication of eight East-Central European countries (in alphabetical order: Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, Slovenia), from a comparative law perspective. Despite their partially different historical past and the distinctions in the existence of predecessor institutions (or the lack thereof), the inner organizational arrangements of the constitutional courts of the states analyzed and the rules of recruitment of constitutional judges therein show considerable similarity across the region.*

Keywords: *constitutional adjudication, constitutional courts, election of members and presidents of constitutional courts; East-Central Europe.*

1. INTRODUCTION

The present study provides a comparative legal analysis of the East-Central European constitutional courts, from the point of view of their similarities and differences in organisation and composition, and whether this allows us to speak of an East-Central European model of constitutional court organisation. To this end, the specific legal provisions on the organisation and composition of the constitutional courts of eight countries in the region (Croatia, the Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, Slovenia) were examined using a comparative method, with the primary focus on the specific statutory provisions

(as the institutional framework is not determined by case law but by positive law). Our initial hypothesis was that such a common model exists: at least in terms of the main organisational aspects of operation, we should observe significant similarities between the constitutional court organisations and the composition rules of the countries in the region.

Two main reasons inspired the formulation of this hypothesis. On the one hand, the countries under study have had similar historical experiences in recent decades. All of them have been governed by some form of state socialism since 1945, and all of them have undergone a change in the nature of state governance at the same time (between 1989–1991). The political system in each of the countries under review has changed from autocratic to democratic (from a one-party system to a genuine competitive multi-party system), the legal system from dictatorship to the rule of law, and the economic system from a command-and-control to a market economy. At the same time, state totalitarianism was replaced by liberalism: the classical liberal values (autonomy of ownership, individual responsibility, human rights, equality of rights) became the official ideological basis of the state and social order, i.e., of parliamentary democracy.

In this context, the second common feature is that in all the countries under review, the former institutional system, which was ultimately state-party oriented, has been replaced by institutions that operate and supervise democratic political systems and the rule of law in a legal and market economy, and that in all of them a constitutional court has been set up, the common model for which, for a number of reasons, has been the German *Bundesverfassungsgericht* (Federal Constitutional Court).¹ Since each constitutional court was given similar powers, which implemented a Kelsenian type centralised constitutional adjudication,² it could be assumed that the organisational and recruitment frameworks in these countries are also similar.

¹ According to Allan F. Tatham, the most important causes why the East-Central European constitutional courts borrowed most of their institutions regarding constitutional adjudication in the „post-communist era” from the German model are as follows: „1. Historic and legal cultural affinities; 2. Linguistic ability and intellectual stimulus; 3. Constitution and constitutional jurisdiction formation in the post-communist era; 4. Resultant influences on constitutional judicial practice.” (Tatham, Allan F.: *Central European Constitutional Court in the Face of EU Membership*. Koninklijke Brill NV, Martinus Nijhoff Publishers, Leiden, The Netherlands, 2013, p. 45.)

² For the enumeration of powers of East-Central European constitutional courts and the characteristics of these organs’ common competences deriving from their forms of centralized (or ‘concentrated’) constitutional adjudication, see: Tóth J., Zoltán: *Constitutional Adjudication*. In: Csink, Lóránt – Trócsányi, László (eds.): *Comparative Constitutionalism in Central Europe: Analysis on Certain Central and Eastern European Countries*. Central European Academic Publishing, Miskolc – Budapest, 2022 [DOI: 10.54171/2022.lcslt.ccice] pp. 361–383.

2. THE CONCEPT OF CONSTITUTIONAL ADJUDICATION

Constitutional adjudication³ is a broader concept than the activities of constitutional courts. Constitutional adjudication encompasses constitutional rights adjudication, and all the mechanisms of constitutional adjudication that relate to the establishment and enforcement of violations of the provisions of the Constitution. It is therefore important to note that the issue of constitutional adjudication does not extend to the proper investigation of the functioning of constitutional institutions, but only to cases where someone (typically a state body) violates the provisions of the Constitution and this violation must be established and repaired by a body appointed to do so.⁴ In all of the East-Central European countries⁵ under review, there is a so-called concentrated (centralized) constitutional adjudication which means that constitutional protection will typically be the responsibility of a dedicated, separate body, the constitutional court. There may, however, be other bodies in some of the legal systems under examination which also provide constitutional protection. In this paper, only the constitutional courts themselves will be analysed in detail, in terms of their composition, election rules of the

³ The term „constitutional adjudication” is distinct from „constitutional review”, which latter is often used to refer to the activity carried out by centralised constitutional adjudication bodies (as distinct from „judicial review” performed by ordinary courts carrying out decentralised constitutional adjudication). Constitutional review is „a system whereby judicial or quasi-judicial bodies can set aside and invalidate the democratically enacted laws on the basis of their alleged inconsistency with constitutional norms” (Sadurski, Wojciech: *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe*. Second edition. Springer, Dordrecht, 2014, p. xii.). Centralised constitutional courts, however, do not merely review the conformity of norms with the constitution, but also have a number of other functions which fall within the broader concept of adjudication. This is why we will use the term ‚constitutional adjudication’ including all the powers in which the constitutional court may act in a decision-making role (or as a proposing or opinion-giving body of a decision-maker).

⁴ As defined by former President of the Hungarian Constitutional Court, Peter Paczolay, „[c]onstitutional protection can be of two kinds: in a broad sense, it means the protection and preservation of the stability of the order of society, while in a narrower sense, constitutional protection means the protection of the norms laid down in the Constitution and superior to other laws. The task of defending the Constitution may be carried out by a public body, such as a plenary of Parliament (England) or a parliamentary committee (Sweden, Finland). In a narrow sense, constitutional protection means the judicial defence of the constitutionality of the Constitution, which can be done through ordinary courts or through specially established constitutional courts.” (Paczolay, Péter: *Alkotmánybíráskodás a jog és politikai határán*. [Constitutional adjudication on the border between law and politics] In: Paczolay, Péter (ed.): *Alkotmánybíráskodás, alkotmányértelmezés* [Constitutional adjudication, constitutional interpretation]. Rejtjel, Budapest, 2003, p. 10.)

⁵ These countries are usually referred to as Central and Eastern European states. However, all these examined countries are, in fact, in the central part of Europe, i.e., Central Europe, also in its eastern half (East-Central Europe). None of them are states of Eastern Europe in a geographical sense. Thus, we are going to refer these countries as East-Central European ones.

constitutional judges and structural issues. The main method employed is, primarily, analysis of the stipulations on the examined countries' constitutional courts and other positive law sources;⁶ however, numerous jurisprudential works also deal with such kind of organizational, selection and eligibility issues.⁷

3. CREATION OF CONSTITUTIONAL COURTS IN EAST-CENTRAL EUROPE⁸

In Romania, a system of constitutional review linked to the ordinary court was established very early on; in 1912, in the so-called 'Case of the Trams', the High Court of Cassation and Justice (the supreme court in Romania) recognised that courts can review whether an applicable legal rule is unconstitutional and, in the latter case, can decline to apply it on their own authority. The Constitutions of 1923 and 1938 expressly mentioned this power, stating that a joint session of the supreme court is empowered to rule on the inapplicability of a rule to a particular case on the grounds that it is unconstitutional. However, this did not entail a formal invalidity of the norm in question. During the socialist period, there was no constitutional jurisdiction in Romania. After the 1989 revolution, a new constitution was adopted in November 1991, based on the rule of law.⁹ Subsequently,

⁶ Thus, the primary sources of the comparison, without specific references, were the stipulations of the constitutions of the concerned countries and the respective constitutional court acts of those states analyzed. Other – secondary – sources, when they were used, will be indicated separately.

⁷ Just a few relevant examples from the scholarly literature, not for the sake of completeness: The latest and most recent are the introductory parts of those chapters dealing with constitutional interpretation in most of the countries in this region (analyzed also in this paper) being part of a comprehensive legal sociological study: Flander, Benjamin: Interpretation of Fundamental Rights in Slovenia, pp. 100-109 (in: pp. 99-179); Köblös, Adél: Interpretation of Fundamental Rights in Hungary, pp. 181-188. (in: pp. 181-243); Sehnálek, David: Interpretation of Fundamental Rights in the Czech Republic, pp. 245-255 (in: pp. 245-299); Šmigová, Katarína: Interpretation of Fundamental Rights in Slovakia, pp. 302-307. (in: pp. 301-343); Orlović, Slobodan: Interpretation of Fundamental Rights in Serbia, pp. 345-354 (in: pp. 345-399); Mostowik, Piotr: Interpretation of Fundamental Rights in Poland, pp. 401-405 (in: pp. 401-467); in: Tóth J., Zoltán (ed.): Constitutional Reasoning and Constitutional Interpretation: Analysis on Certain Central European Countries. Ferenc Mádl Institute of Comparative Law – Central European Academic Publishing, Budapest – Miskolc, 2021. Besides these, the structure of most of these courts are briefly introduced in a recent book edited by Kálmán Pócza; see: Pócza, Kálmán (ed.): Constitutional Politics and the Judiciary: Decision-making in Central and Eastern Europe. Routledge, London – New York, 2019, pp. 32-36, 96-99, 127-131, 156-161 and 184-186.

⁸ The model for constitutional adjudication in most of the countries examined was, primarily, that of the German legal system, just as for the legal system in general as well. (Cf.: Tatham, Allan F.: Central European Constitutional Courts in the Face of EU Membership. Martinus Nijhoff Publishers, Leiden, 2013, p. 41.

⁹ To enter into force, the Constitution had to be ratified by referendum, which took place on 8 December 1991. [hereinafter: Constitution of Romania]

Law No. 47 of 1992 on the Organisation and Operation of the Constitutional Court was adopted,¹⁰ and in June 1992 the Constitutional Court started its work, whose powers were modified and the legal consequences of the Constitutional Court decisions were strengthened by the 2003 constitutional amendment.¹¹

In the predecessor state of the Czech Republic and Slovakia, Czechoslovakia, which existed from 1918, a Constitutional Court was established in 1921, pursuant to the Constitutional Charter of 1920, with limited powers and a rather limited function compared to today. During the Second World War, this body ceased to function in any meaningful way, and was not restored even after the end of the Second World War. Although the Act on the Czechoslovak Federation of 1968 provided for the establishment of a separate constitutional court both at the federal level (in the Czechoslovak Socialist Republic) and in the two Member States (the Czech Socialist Republic and the Slovak Socialist Republic), with powers that essentially allowed for jurisdictional adjudication, limited norm control, political adjudication of members of parliament and an even more limited role for the defence of individual rights, neither constitutional court was established during the socialist period. In 1991, the Czechoslovak Federal Constitutional Court was effectively established, but, functioning only for a year, proceeded only in a few cases.¹² On 25 November 1992, the Czechoslovak Parliament (with effect from 1 January 1993) declared the dissolution of Czechoslovakia and the independence of the Czech Republic and Slovakia. The Constitution of the Slovak Republic had already been adopted in Slovakia on 1 September 1992,¹³ and the new Constitution was adopted in the Czech Republic on 16 December 1992.¹⁴ In Slovakia, the Constitutional Court was established under the Constitutional Court Act¹⁵ adopted on

¹⁰ Hereinafter: CC Act of Romania

¹¹ The Law for the revision of the Constitution of Romania, no. 429/2003. It entered into force on October 29, 2003. Only this amendment removed the Parliament's right to overrule the decisions of the Romanian Constitutional Court by a two-thirds majority. Cf.: Blokker, Paul: *New Democracies in Crisis?* Routledge, London – New York, 2014, pp. 69-71.)

¹² Altogether 1032 cases were brought before the Constitutional Court in this period. About two thirds of those were constitutional complaints in a small share of which the Constitutional Court annulled in deed the contested ordinary court decisions. (Cf.: Mészáros, Lajos: *The constitutional complaint in the practice of the Slovak Constitutional Court*. *Fundamentum*, 2020/2-3., p. 71.

¹³ The Constitution entered into force on 1 October 1992. [Hereinafter: Constitution of Slovakia]

¹⁴ [Hereinafter: Constitution of the Czech Republic] Besides the Constitution (which contains provisions on state structure), the Charter of Fundamental Rights and Freedoms is also a constitutional source that includes the human and civil rights and is appended to the Constitution. (For the content of these two legal sources, see: Glos, George E.: *The Constitution of the Czech Republic of 1992*. *Hastings Constitutional Law Quarterly*, Vol. 21 No. 4, Summer 1994, pp. 1058-1069.)

¹⁵ 38/1993 on the Organizational Structure of the Constitutional Court of the Slovak Republic and on the Proceedings brought to the Court and on the Position of Its Judges. [Hereinafter: CC Act of Slovakia]

15 February 1993, and in the Czech Republic it started functioning on 15 July 1993 under the Constitutional Court Act¹⁶.

In Poland, the Polish Constitutional Court, still officially known as the Constitutional Tribunal,¹⁷ was set up in 1982, following an amendment to the 1952 Constitution, at the request of the opposition political movement Solidarity, and became operational on 1 January 1986. Its decisions were not final, as they could be overruled by the legislative body, the Sejm, and therefore there was no „real” („full”) constitutional court at that time. In 1989, the Tribunal’s powers were extended, transforming it into a genuine constitutional court under the rule of law, however, until the adoption of the new Constitution of 1997,¹⁸ the Parliament was entitled to overrule the decisions of the Constitutional Tribunal¹⁹ by a qualified majority (two-thirds of votes cast).²⁰ In 1997 a completely new Constitution and Constitutional Tribunal Act as of 17 October 1997 were adopted. This latter Constitutional Court Act was replaced in 2016 and 2017 by several other Acts, which stipulate the organisation, procedure and powers of the Constitutional Court.²¹

In Hungary, a body called Constitutional Council existed from 1 January 1985,²² but it essentially functioned as an organ of the National Assembly, was linked to it both personally and organisationally, and could not declare the unconstitutionality of laws (and decrees); nor did it have the power to annul other, lower-level laws. In fact, it was authorised only to declare the unconstitutionality of the latter (and suspend the implementation of their unconstitutional provisions), but it could do no

¹⁶ Constitutional Court Act (182/1993 Sb.) of 16 June 1993. [Hereinafter: CC Act of the Czech Republic]

¹⁷ Hereinafter, we refer to this body either this way or (as the other states’ similar organs) as ‘constitutional court’.

¹⁸ [Hereinafter: Constitution of Poland]

¹⁹ As Robertson stated, until the entering into force of the new Constitution, the Constitutional Tribunal could not be regarded as fully independent. (Cf.: Robertson, David: *The Judge as Political Theorist: Contemporary Constitutional Review*. Princeton University Press, Princeton – Oxford, 2010, p. 98.)

²⁰ Cf.: Śledzińska-Simon, Anna: Polish Constitutional Tribunal. In: Kremnitzer, Mordechai – Steiner, Talya – Lang, Andrej (eds.): *Proportionality in Action. Comparative and Empirical Perspectives on the Judicial Practice*. Cambridge University Press, Cambridge, p. 387. Until the entry into force of the new Constitution of 1997, the Parliament overruled the Constitutional Tribunal’s decisions altogether 11 times (cf.: Saduski, op. cit., p. 110).

²¹ The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal (hereinafter: Status Act of Poland); The Act of 30 November 2016 on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal [Hereinafter, referring to the amended version: CC Act of Poland]; The Act of 13 December 2016 – the Introductory Provisions to the Act on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and to the Act on the Status of the Judges of the Tribunal.

²² Its creation was provided for by the Act II of 1983 amending the Constitution and was subsequently established, on the basis of this Act, by Act I of 1984.

more than appeal to the body which had issued the lower legislation or, if that was ineffective, to its superior body (e.g. the Council of Ministers in the case of a ministerial decree) to remedy the unconstitutionality. The Constitutional Council, which was unable to provide substantive constitutional protection, was replaced by the new Constitution (Act XXXI of 1989 amending the Constitution) and Act XXXII of 1989 on the Constitutional Court establishing a real constitutional court.²³ As of 1 January 2012, the old Constitution, which formally dates from 1949 (albeit renewed in content and based on the rule of law),²⁴ was repealed by the Parliament acting as constituent power and the Fundamental Law of Hungary²⁵ was created.²⁶ A new Constitutional Court Act was also enacted (Act CLI of 2011 on the Constitutional Court),²⁷ which also entered into force on 1 January 2012. This Act also partially modified the powers of the Constitutional Court, the most important of which were those concerning the scope of persons and organs entitled to initiate posterior norm control and the introduction of the so-called real constitutional complaint.^{28, 29}

²³ Although Act I of 1989 would have created a Constitutional Court with limited powers, a few months later neither the National Round Table nor the National Assembly considered these limitations to be a real basis for debate. Since it had become clear that there would be a 'real' change of regime, with a completely new political structure and new legal institutions, and the new Constitution (novella) was drafted in parallel with the Constitutional Court Act, the Opposition Round Table and thus the National Round Table adopted the three main substantive criteria of modern, centralised constitutional administration in order to preserve these achievements and created the idea of a real constitutional court with genuine competences.

²⁴ In Hungary and Poland, the transition, with keeping the old constitution in force, was based on „legal continuity”. (Cf.: Blokker, p. 50.) However, in 1989 in Hungary „practically a new Constitution came into force”. (Csink, Lóránt – Schanda, Balázs: The Constitutional Court. In: Csink, Lóránt – Schanda, Balázs – Varga Zs., András (eds.): The Basic Law of Hungary: A First Commentary. Clarus Press, Dublin, 2012, p. 157.)

²⁵ The constitution was named, after the German *Grundgesetz*, *Alaptörvény*, i.e., (correctly) Basic Law or (incorrectly but more often used in English translations) Fundamental Law (hereinafter: Fundamental Law).

²⁶ The Fundamental Law was promulgated on 25 April 2011, entered into force on 1 January 2012 and was subsequently amended 9 more times.

²⁷ [Hereinafter: CC Act of Hungary]

²⁸ As the new Fundamental Law substantially amended the competencies of the Constitutional Court, instead of the previously typical norm control procedures, the constitutional complaints became the main procedure thereof (taken also from the German legal system [cf.: Hartmann, Bernd J.: Verfassungsbeschwerden, Rechtsweg, Landesverfassung. In: Pieroth, Bodo – Silberkuhl, Peter (eds.): Die Verfassungsbeschwerde. Wolters Kluwer, 2008, pp. 59-166]: between 1990 and 2011, posterior abstract norm control represented the 50% of the procedures of the Constitutional Court while between 2012 and 2017 more than 90% of the submitted motions were related to constitutional complaint (and the rate of the cases regarding abstract norm control fell below 1%). (Cf.: Tóth J., Zoltán: Changes which Occurred in the Role of the Hungarian Constitutional Court in Protecting the Constitutional System. *Acta Universitatis Sapientiae, Legal Studies*, 7, 1 (2018), pp. 100-101)

²⁹ The scope of the Constitutional Court's powers and the way in which they are exercised have been revised since then; the rules on jurisdiction have been amended several times since 2012.

In the successor states to Yugoslavia, i.e., Serbia, Croatia and Slovenia, constitutionalism has a longer history, precisely because of the predecessor state's legal regulation. The fact that Yugoslavia is the only one of the former socialist countries in which bodies exercising (part of) constitutional jurisdiction existed decades before the political transformation of 1989/1991 (which is not true of any other former socialist country) was largely due to the fact that Yugoslavia, although a socialist country, remained outside the Soviet sphere of influence. In Yugoslavia, both the Federal Constitutional Court (due to the Federal Constitution of the Socialist Federal Republic of Yugoslavia)³⁰ and the Constitutional Courts of the six socialist republics³¹ were established in 1963. The Federal Constitutional Court could examine federal and state legislation that was in conflict with the federal constitution, while the constitutional courts of each republic could examine republican legislation that was in conflict with the republican constitution. In addition, apart from a few minor powers, they could solve – in a limited way – jurisdictional disputes and had a monitoring and signalling function, the latter powers being somewhat extended and practically strengthened by the new Federal Constitution of 1974.

With the dissolution of the federal state in 1991-1992, the constitutional courts of the individual, newly independent states were established, while the constitutional courts of Serbia and the remaining federal state, the Federal Republic of Yugoslavia (consisted of Serbia and Montenegro), which existed from 1992-2003, continued to function.³² In Serbia, which is now an independent unitary state, the Law No. 109/07 of 28 November 2007 on the Constitutional Court³³ was adopted on the basis of the new Constitution.³⁴ In Croatia, while being still a Yugoslav state, a new Constitution³⁵ was adopted in December 1990 – which, in addition to genuine powers of norm control, introduced the institution of constitutional complaint (firstly in the region) – and, after independence in 1991, the Constitutional Court of the Republic of Croatia was established in December 1991. However, the Constitutional Court Act³⁶ was not adopted until 1999 and the current version has been

³⁰ From 1945 until the 1963 Constitution, the official name of Yugoslavia was the Federal People's Republic of Yugoslavia.

³¹ Socialist Republic of Bosnia and Herzegovina, Socialist Republic of Croatia, Socialist Republic of Macedonia, Socialist Republic of Montenegro, Socialist Republic of Serbia, Socialist Republic of Slovenia.

³² Between 2003-2006 Serbia-Montenegro was a confederation.

³³ Hereinafter: CC Act of Serbia

³⁴ Constitution of the Republic of Serbia («Official Gazette of the RS» no. 98/2006). This replaced the 'democratic' Constitution of Serbia which was passed in 1990. [hereinafter: Constitution of Serbia]

³⁵ Hereinafter: Constitution of Croatia

³⁶ Constitutional Act on the Constitutional Court of the Republic of Croatia published in 'Narodne novine', No. 99/99 of September 29, 1999.

in force since 2002.³⁷ Finally, in Slovenia, following the declaration of independence, a new constitution under the rule of law was also adopted in December 1991³⁸ and the Constitutional Court Act was adopted in 1994, which, after amendment in 1997, is in force with the text as it stands today.³⁹

4. COMPOSITION OF THE CONSTITUTIONAL COURTS ANALYZED

4.1. Number of Members and Terms of Office

Constitutional courts everywhere, including in the East-Central European countries under review, are bodies with a small number of decision-makers, whose terms of office are considerably longer than those of political actors. This small number is due to the fact that all members of the body are entitled to decide on constitutional matters (at least the more important ones), which distinguishes it from the European supreme courts, which have many judges, up to more than 100, but they always adjudicate in smaller panels of a few members. Such smaller bodies also operate within the framework of constitutional courts, but their role is limited either to procedural (intermediate) decisions or to decisions of less cardinal importance on the merits; however, it is always the plenum that decides on the substantive questions of constitutionality.⁴⁰ The members of the constitutional courts are elected, in most cases, by political bodies (usually the parliament or one of the houses thereof); or they are appointed by political actors (e.g., the president). For this reason (unlike judges), they cannot be appointed for life, nor can their term of office be close to that of political bodies, since constitutional courts can operate independently of politics, solely on the basis of constitutional criteria.

The constitutional courts in the countries analysed consist of 9-15 members, appointed for 8-12 years, both of which correspond to the characteristics of concentrated constitutional adjudication. Constitutional courts in Romania and Slovenia consist of 9 members (constitutional judges),⁴¹ in Slovakia and Croatia of 13,⁴²

³⁷ Constitutional Act on Revisions and Amendments of the Constitutional Act on the Constitutional Court of the Republic of Croatia published in 'Narodne novine', No. 29/2002 of March 22, 2002. [hereinafter, with reference to the amended version: CC Act of Croatia]

³⁸ Hereinafter: Constitution of Slovenia

³⁹ The Constitutional Court Act (ZUstS) (Official Gazette of the Republic of Slovenia, No. 64/07-official consolidated text and No. 109/12). [hereinafter: CC Act of Slovenia]

⁴⁰ This is not the case, for example, in Germany (being out of scope of examination in this study), where the 16 constitutional judges are divided into two eight-membered Senates of which both of them being entitled to bring own and final decisions in those cases before these bodies.

⁴¹ Constitution of Romania, Art. 142; Constitution of Slovenia, Art. 163.

⁴² Constitution of Croatia, Art 122; Constitution of Slovakia, Art. 134.

and in the Czech Republic, Poland, Serbia and Hungary of 15.⁴³ Constitutional judges are appointed for 8 years in Croatia,⁴⁴ 9 years in Serbia, Poland, Romania and Slovenia,⁴⁵ 10 years in the Czech Republic,⁴⁶ 12 years in Hungary and Slovakia,⁴⁷ which is a good guarantee of their independence from politics, as these terms are two to three times the terms of office of members of parliament, prime ministers or presidents. It is precisely the long guaranteed term of office and the need to guarantee independence that makes re-election rare;⁴⁸ it is only possible in Serbia and the Czech Republic among the countries examined.⁴⁹

Interestingly, in Slovenia, the term of office of constitutional judges is extended if the new judges to replace them have not yet been elected. There is no upper limit to this extended mandate, so that a constitutional judge (if there is no political will to fill the position) can remain in office for a long time, even years, after the expiry of his/her 9-year term.⁵⁰ In Croatia, too, there is the possibility of extending the mandate, but only for a strictly regulated transitional period of no more than six months,⁵¹ which is merely a bridge between the term of office of the old and the new constitutional judge. In the other countries examined, there is no such possibility; once the term of office has expired, the mandate of the judge automatically (*ipso facto*) expires.

4.2. Rules of Election or Appointment of Constitutional Judges

Election or appointment is typically the prerogative of political actors; it only occurs exceptionally when judges (some of them) are elected or appointed by non-political entities. In Romania, the 9 judges are elected or appointed by three public entities, namely the lower and upper houses of the Parliament (the Chamber of Deputies and the Senate), by the majority of votes (simple majority), and the President of Romania, each of them having the power to decide on the appointment of three judges (all this by electing 3-3 judges every three years, i.e. each public

⁴³ Constitution of Serbia, Art. 172; Fundamental Law of Hungary, Art. 24; Constitution of Poland, Art. 194; Constitution of the Czech Republic, Art. 84.

⁴⁴ Constitution of Croatia, Art. 122.

⁴⁵ Constitution of Poland, Art. 194; Constitution of Serbia, Art. 172; Constitution of Slovenia, Art. 165; Constitution of Romania, Art. 142.

⁴⁶ Constitution of the Czech Republic, Art. 84.

⁴⁷ Fundamental Law of Hungary, Art. 24; Constitution of Slovakia, Art. 134.

⁴⁸ It is a constant professional criticism that where judges are eligible for re-election, their judgement may be seen to be in line with the will and interests of the (political) bodies that decide on constitutional judges' possible re-nomination. This criticism merely draws attention to the risk of damaging professional integrity, regardless of the extent to which judges operating under such a system are or are not actually influenced in their decision-making by this possibility.

⁴⁹ Constitution of Serbia, Art. 172.

⁵⁰ Constitution of Slovenia, Art. 165.

⁵¹ Constitution of Croatia, Art. 122.

entity can elect or appoint a judge every 3-3 years, so that every three years the constitutional court is partially renewed in stages). The election by the houses of the parliament is preceded by a nomination, where each deputy or senator is entitled to nominate a constitutional judge, but only candidates with political support have a chance of being elected. The President, on the other hand, has the discretion to appoint one third of the constitutional judges.⁵²

In Slovenia and Croatia, the election of the constitutional judges is preceded by a genuine nomination, i.e. a kind of application system, where eligible candidates can apply for the post themselves by submitting an application file proving their eligibility.⁵³ Nevertheless, here too, politics dominates the selection process. In Slovenia, the constitutional court judges are elected by the National Assembly, on the proposal of the President of the Republic, by a majority vote of all deputies (absolute majority).⁵⁴ At the same time, in Croatia, constitutional court judges are elected by a two-thirds majority of the Members of the Croatian Parliament (qualified majority), on the proposal of the competent parliamentary committee (which previously evaluated the applications submitted).⁵⁵

In the other countries there is no application system or similar procedure; election is purely at the will of the public entities assigned to it. Appointment is, like in Romania, split in Serbia: five judges are appointed by the National Assembly (on a proposal from the President of the Republic), another five by the President of the Republic (on a proposal from, vica versa, the National Assembly), and another five by the general session of the Supreme Court of Cassation (on a proposal from the general session of the High Judicial Court and the State Prosecutor Council).⁵⁶ In Serbia (and Romania), therefore, the election of judges is not based solely on political logic, but (in case of some judges) partly on professional criteria. In Hungary, the constitutional judges are elected with the votes of two thirds of the Members of the National Assembly (qualified majority),⁵⁷ on the proposal of a special ad hoc parliamentary committee of at least 9 and up to 15 members, composed of elected representatives of the parties with parliamentary groups.⁵⁸ In the Czech Republic, the judges of the Constitutional Court are appointed by the President of the Republic with the consent of the Senate (a simple majority of the Senators present is required to reach agreement),⁵⁹ in Slovakia, by the President of the Slovak Republic on a proposal of the National Council of the Slovak

⁵² Constitution of Romania, Art. 142; CC Act of Romania, Art. 5.

⁵³ CC Act of Croatia, Art. 6; CC Act of Slovenia, Art. 12-14.

⁵⁴ Act of Slovenia, Art. 14.

⁵⁵ Constitution of Croatia, Art 122., CC Act of Croatia, Art. 6.

⁵⁶ Constitution of Serbia, Art. 172.

⁵⁷ Fundamental Law of Hungary, Art. 24.

⁵⁸ CC Act of Hungary, Art. 7.

⁵⁹ Constitution of the Czech Republic, Art. 84.

Republic (upper house),⁶⁰ and in Poland, by the lower house of the Parliament (Sejm).⁶¹

In Slovakia, the upper house of parliament nominates twice as many persons as the number of constitutional judges to be elected, of whom the President is free to choose whom he or she will appoint;⁶² in Serbia, the nominating bodies (President of the Republic, National Assembly, general session of the High Judicial Court and the State Prosecutor Council) nominate twice as many persons, i.e. 10-10 persons, for the 5-5 seats that are subject to their nomination.⁶³ In Slovenia the President may nominate more candidates than vacancies, but it is not specified by how many; it is merely stipulated that the President of the Republic may propose more candidates than there are vacant positions on the Constitutional Court.⁶⁴ A similar provision exists in Croatia, whereby the competent parliamentary committee, that is responsible for the nomination of constitutional court judges, has to make the short list of candidates in a way that it has to include more nominees than the number of judges who will be elected.⁶⁵

4.3. Eligibility Criteria

As regards the conditions for election or appointment as a constitutional judge, most of the jurisdictions examined require a high level of legal knowledge and a certain age or professional experience. However, the degree of precision with which the requirement of high legal knowledge is defined varies considerably; in most countries it is regulated by general provisions which are difficult to impose on the bodies electing the constitutional judge.⁶⁶ In addition to a law degree as a prerequisite for legal knowledge, there are a few common rules which are everywhere a prerequisite for the appointment of a constitutional judge. These include being a citizen of the country⁶⁷ and having the right to vote (which typically means two things: no criminal record and no restrictions on capacity to act).

⁶⁰ Constitution of Slovakia, Art. 134.

⁶¹ Constitution of Poland, Art. 194.

⁶² Constitution of Slovakia, Art. 134.

⁶³ Constitution of Serbia, Art. 172.

⁶⁴ CC Act of Slovenia, Art. 13.

⁶⁵ CC Act of Croatia, Art. 6.

⁶⁶ Thus, in Romania the candidate must „enjoy high professional eminence”, in Poland he/she must be a person „distinguished by their knowledge” of the law, in Slovenia a „legal expert”, in Croatia a „notable jurist” and in Serbia a „prominent lawyer”.

⁶⁷ This is a general feature across Europe (and maybe throughout the world). The only exception in Europe is the Constitutional Court of Bosnia and Herzegovina where some of the members of the court can be foreign citizens as well. (Cf.: Orlović, Slobodan P.: Constitutional Issues of the Judicial Career in Western Balkan States (Serbia, Montenegro, Bosnia and Herzegovina, North Macedonia), p. 175. In: Central European Journal of Comparative Law, Volume II, 2021/1, pp. 163-184.

Country-specific professional requirements are 10 years of legal experience in the Czech Republic,⁶⁸ 15 years in Slovakia, Serbia and Croatia,⁶⁹ 18 years in Romania⁷⁰ and 20 years in Hungary.⁷¹ In Slovenia, there is no such specific precondition, only a general professional requirement and an age limit: the prospective constitutional judge must be a “legal expert”⁷² (a rather soft requirement and quite open to interpretation) and must be over 40 years of age.⁷³

In Poland, the conditions for becoming a constitutional judge are linked to the conditions for becoming a judge of the Supreme Court and the Supreme Administrative Court,⁷⁴ i.e., they must have at least ten years’ professional experience acquired in a number of taxatively defined legal professions.⁷⁵ In Hungary, instead of 20 years of professional experience, it is possible for candidates to become constitutional judges who are theoretical lawyers “of outstanding knowledge” (university professors or doctors of the Hungarian Academy of Sciences);⁷⁶ in Poland, the 10-year experience requirement does not apply to “persons holding the scientific title of professor or the scientific degree of PhD hab. in law who have worked in a Polish higher school, the Polish Academy of Sciences, a science and research institute or other science institution”;⁷⁷ in the end, in Croatia those persons who obtain a doctoral degree in legal science and fulfils all the other conditions may be elected a constitutional court judge if they have at least 12 years of experience in the legal profession⁷⁸ (instead of 15 years of experience as a general rule). However, in most of the countries examined, there is a specific age limit: in Serbia, Poland (through the rule originally referring to high court judges, mentioned above), Slovenia and Slovakia it is 40 years,⁷⁹ and in Hungary 45 years.⁸⁰ Hungary is also

⁶⁸ Constitution of the Czech Republic, Art. 84.

⁶⁹ Constitution of Serbia, Art. 172; CC Act of Croatia, Art. 5; Constitution of Slovakia, Art. 134.

⁷⁰ Constitution of Romania, Art. 143.

⁷¹ CC Act of Hungary, Art. 6.

⁷² Constitution of Slovenia, Art. 163.

⁷³ CC Act of Slovenia, Art. 9.

⁷⁴ The Act of 30 November 2016 on the Status of the Judges of the Constitutional Tribunal, Art. 3.

⁷⁵ The would-be constitutional judge has to have at least ten years of experience as a judge, prosecutor, President of the General Counsel to the Republic of Poland, Deputy President of the General Counsel to the Republic of Poland, counsel of the General Counsel of the Republic of Poland, or he/she must have performed the profession of an attorney-at-law, legal counsel or notary in Poland for at least ten years. [Act of 8 December 2017 on the Supreme Court (hereinafter: Supreme Court Act of Poland), Art. 30.]

⁷⁶ CC Act of Hungary, Art. 6.

⁷⁷ ACT of 8 December 2017 on the Supreme Court, Art. 30.

⁷⁸ CC Act of Croatia, Art. 5.

⁷⁹ Constitution of Serbia, Art. 172; CC Act of Slovenia, Art. 9; Supreme Court Act of Poland, Art. 30; Constitution of Slovakia, Art. 134.

⁸⁰ CC Act of Hungary, Art. 6.

the only country where there is an upper age limit for election: at the time of taking office, the elected constitutional judge must not be older than 70.⁸¹

Common rule in all the countries examined is that elected constitutional judges must take an oath before taking office.⁸²

5. REGULATIONS ON THE PRESIDENT OF THE CONSTITUTIONAL COURT

As regards the President of the Constitutional Court, he/she is appointed either by the President of the state, or by the Parliament, or by the Constitutional Court itself, from among its own members. In Slovakia and the Czech Republic, the President of the state appoints the President of the Constitutional Court;⁸³ this is also the case in Poland, but here the President of the state appoints him/her on the proposal of the General Assembly of the Judges of the Constitutional Tribunal itself.⁸⁴ In Hungary, the election of the President of the Constitutional Court is the competence of the Parliament.⁸⁵ In Slovenia, Romania, Serbia and Croatia, however, the President of the Constitutional Court is elected by the body itself.⁸⁶ The term of office of the President also varies; however, the final limit is the duration of the term of office of the Constitutional Court judge. Within this limit, the term of office is 3 years in Romania, Serbia and Slovenia (but the President can be re-elected after the expiry of the term in all countries),⁸⁷ 4 years in Croatia (where re-election is also possible),⁸⁸ 6 years in Poland,⁸⁹ and 7 years in Slovakia.⁹⁰ The

⁸¹ CC Act of Hungary, Art. 6.

⁸² CC Act of Croatia, Art. 8; CC Act of Serbia, Art. 11; CC Act of Slovenia, Art. 15; Constitution of the Czech Republic, Art. 85; CC Act of Hungary, Art. 9; CC Act of Romania, Art. 63; Status Act of Poland, Art. 6; Constitution of Slovakia, Art. 134.

⁸³ Constitution of Slovakia, Art. 135, CC Act of Slovakia, Art. 7; CC Act of the Czech Republic, Art 2.

⁸⁴ Constitution of Poland, Art. 194. The CC Act of Poland stipulates that it is now enough for a judge to be a candidate if he/she receives five votes at the session of the General Assembly of the Judges of the Constitutional Tribunal. Thus, the President of Poland is entitled to appoint a judge, who was not able to get the votes of the majority of the members of the body, President of the Constitutional Tribunal (and so is it in case of the Vice President of the Tribunal as well). (Cf.: Granat, Mirosław: Constitutional judiciary in crisis: The case of Poland, p. 133. In: Szente, Zoltán – Gárdos-Orosz, Fruzsina (eds.): *New Challenges to Constitutional Adjudication in Europe: A Comparative Perspective*. Routledge, New York, 2018, pp. 132-143.

⁸⁵ Fundamental Law of Hungary, Art. 24.

⁸⁶ Constitution of Serbia, Art. 172, CC Act of Serbia, Art. 23; Constitution of Croatia, Art 122; CC Act of Slovenia, Art. 10; CC Act of Romania, Art. 7.

⁸⁷ CC Act of Serbia, Art. 23; CC Act of Slovenia, Art. 10; CC Act of Romania, Art. 7.

⁸⁸ Constitution of Croatia, Art 122.

⁸⁹ CC Act of Poland, Art. 10.

⁹⁰ CC Act of Slovakia, Art. 11.

mandates of the President of the Hungarian Constitutional Court and the Czech Constitutional Court, however, last until the end of the term of their office as constitutional judges.⁹¹

6. INCOMPATIBILITY CONCERNS AT THE DOMESTIC LAW

Typically, the office of constitutional judge is incompatible with any other public office and with any other gainful occupation, except for activities of an educational, scientific or artistic nature.⁹² In all countries, it is an explicit rule that constitutional judges may not be members of a political party or engage in any public political activity that would call their impartiality into question.⁹³ Furthermore, constitutional judges in all countries enjoy immunity from prosecution for opinions expressed and votes cast in their capacity as constitutional judges, and may not be prosecuted or arrested during their term of office without the prior consent of the body competent to waive the immunity [the constitutional court itself (in Serbia, Hungary, Poland, Croatia, Slovakia, Romania), the Senate (in the Czech Republic) or the National Assembly (in Slovenia)]. Constitutional judges enjoy the same rights of immunity as members of parliament.⁹⁴

7. INNER BODIES OF DECISION-MAKING

In the end, as regards the organisational units of constitutional courts involved in substantive decision-making, adjudication is in most countries divided between a plenum or session of all constitutional judges and smaller bodies (senates, chambers, panels).⁹⁵ The exceptions to this are Romania and Poland, where

⁹¹ Fundamental Law of Hungary, Art. 24.

⁹² CC Act of the Czech Republic, Art. 4; Constitution of Croatia, Art 123, CC Act of Croatia, Art. 10; CC Act of Serbia, Art. 16; CC Act of Slovenia, Art. 16; Status Act of Poland, Art. 10; Constitution of Slovakia, Art. 137; Constitution of Romania, Art. 144.; CC Act of Hungary, Art. 10.

⁹³ CC Act of Croatia, Art. 10; CC Act of Serbia, Art. 15; Constitution of Slovenia, Art. 166, CC Act of Slovenia, Art. 16; Fundamental Law of Hungary, Art. 24; CC Act of the Czech Republic, Art. 4; Status Act of Poland, Art. 10; Constitution of Slovakia, Art. 137. In Romania, there is only a reference to this requirement of integrity, see Constitution of Romania, Art. 144.

⁹⁴ Constitution of Slovakia, Art. 136; Constitution of Croatia, Art 123; Constitution of Serbia, Art. 173; CC Act of Slovenia, Art. 17; Constitution of Romania, Art. 145; Constitution of the Czech Republic, Art. 86; CC Act of Hungary, Art. 14; Constitution of Poland, Art. 196.

⁹⁵ Of course, adjudication is assisted, in every analyzed country, by law clerks, assistant judges or other lawyers who prepare the case for decision-making. Not being the core issue of this paper, it is not presented here; however, for detailed county-by-country analysis, see, e.g.: Zegrean, Augustin – Costinescu, Mihaela-Senia (eds.): *The Role of Assistant-Magistrates in the Jurisdiction of Constitutional Courts*. Universul Juridic, Bucharest, 2016.

there are no chambers; all substantive cases are decided by the plenum.⁹⁶ In Serbia, in addition to the 15-member Session, there are two eight-member Grand Chambers (consisting of the President and seven other judges) and there are three-member small councils for minor matters.⁹⁷ In addition to the Plenum, in Slovakia, the Czech Republic and Slovenia there are three-member⁹⁸ and in Hungary five-member panels.⁹⁹ The most complex internal decision-making system is that of the Croatian Constitutional Court, where, in addition to the Session consisting of all the constitutional judges, chambers of different numbers and powers perform different functions.¹⁰⁰

8. CONCLUSION

Our initial thesis seems to be confirmed by the results of our research: the eight East-Central European constitutional courts examined are not only very similar in terms of their powers (not analysed here), but also (obviously not independently of the rules governing their powers) in terms of their composition and their organisational and internal functioning. There are no significant differences between the bodies examined, neither in the number of judges, nor in the internal administrative model, nor in the procedural framework for decision-making, nor even in the selection procedures. Overall, it can be concluded that these bodies operate in a similar way, which is mainly due to the common model of adapting the organisational framework of the German Federal Constitutional Court, while in certain aspects (e.g. the importance of plenary sessions with the participation of all constitutional judges) they have gone beyond it. At the level of the organisational framework, a modern and effective legal protection body has thus been created in all the States of the region, in line with the centralised model of constitutional jurisdiction, whose functioning and the functional performance of its tasks should be the subject of a separate study.

⁹⁶ CC Act of Romania, Art. 6 and Regulations on the Organisation and functioning of the Constitutional Court (adopted by the plenum of the Constitutional Court of Romania), Art. 4; CC Act of Poland, Art. 5-6.

⁹⁷ For the inner work of the Constitutional Court of Serbia, see in detail in its homepage: <http://www.ustavni.sud.rs/page/view/en-GB/265-101099/constitutional-court-sessions>

⁹⁸ CC Act of Slovenia, Art. 54; Constitution of Slovakia, Art. 135, CC Act of Slovakia, Art. 2 and 5.; CC Act of the Czech Republic, Art. 15.

⁹⁹ CC Act of Hungary, Art. 47 and 49.

¹⁰⁰ 2 six-member chambers for deciding constitutional complaints on the merits; 4 three-member chambers for preliminary decisions (First Chamber for Procedural Requirements, Second, Third and Fourth chamber for preliminary examination procedure); 2 six-member chambers for appeals for regular judges (First Appeal Chamber, Second Appeal Chamber); 4 three-member chambers for electorate disputes. (See in detail in the homepage of the Croatian Constitutional Court: <https://www.usud.hr/en/organisation>)

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Састав и структура уставних судова држава источно-централне Европе

Сажетак: У раду се размађра састав, рејрујна база, ојерајивни механизми и унујрацња сјрукјура усјавних судова у конјексју усјавно-судској одлучивања осам држава источно-ценјралне Евроје (по азбучном редоследу: Мађарска, Пољска, Румунија, Словачка, Словенија, Србија, Хрвајска и Чешка Република) са ујореднојравној асјекја. Ујркос њиховој делимичној различјој јроцлосји и разликама у инсјијуцијама које су им јрејходиле (или недосјайку исјих), унујрацња орјанизација усјавних судова анализираних држава као и јравила избора судија ових судова јоказују значајну сличносј щиром рејмона.

Кључне речи: усјавносудско одлучивање, усјавни судови, избор чланова и јредседника усјавних судова, источно-ценјрална Евроја.

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