CONSTITUTIONAL "POSTMODERNISM" OR ALSO THE MODERNIZATION OF CLASSICAL CONSTITUTIONAL MODELS

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Abstract: *The revolutionary political changes of the 1990s led to processes culminating in installation of new constitutional democracies in Central and Eastern European countries. Adoption of new constitutions was thus linked both to use of established models of classical Western democracies and to the constitutional creativity of new democratically elected authorities. The constitutional changes thus focused mainly on the installation of the separation of powers in the model of parliamentary form of government, the development of the concept of territorial self-governing units, the installation of so-called independent constitutional bodies, the constitutional enshrinement of the classical catalogue of fundamental rights and freedoms, and the constitutional establishment of constitutional review through constitutional courts. From the comparative point of view, the constitutional character of new democracies thus clearly demonstrates their modernising usefulness and enrichment of the experience of classical constitutionalism.*

Keywords: *Constitutional Models, New Constitutional Democracies, Separation of Powers, Parliamentary Form of Government, Constitutional State, Territorial Self-governing Units, Independent Administrative Bodies, Fundamental Human Rights and Freedoms*

INTRODUCTION

The constitutional law has a special position both in the legal orders of democratic states and in the international university context. Developments in the world, especially in the modern era, i.e. basically since the end of the 18th century, have gradually meant certain internationalisation of constitutional ideas and, especially after the Second World War, their *globalisation* as well. There is a certain global well of constitutional law ideas, concepts and models and these are transferred to national adaptations.[1] Comparative analysis of the history of constitutional law shows that inspiration from homogeneous constitutional documents is quite common and undoubtedly has its logic and effect.[2] This constitutional-legal institutional and model *transfer* has historically occurred both gradually and temporally individually, as well as in historical "waves", which thus also have distinctive historical-genetic logic and justification.

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[1] In this sense, for example, the so-called *"December Constitution"*, or the Austrian Constitution of 1867, was quite original, the author comments on it in the article: The December Constitution in the Comparative Context of the Development of Constitutionalism in Europe. In: *Právník*. 2017, Vol. 156, No.12, pp. 1041–1042.

[2] Three degrees of intensity of foreign inspiration are distinguished in the literature: a) inspiration, b) adoption, and c) so-called transplantation, (whether in creation, amendment or interpretation of the constitution. Cf. LÉKO, K. Foreign Inspiration in Changing Constitutions. In: Jan Wintr, Marek Antoš (eds.). *Ústavní právo v mezinárodním kontextu.* Prague: Charles University, Faculty of Law, 2013, pp. 13 ff.

1. THE HISTORICAL UNIQUENESS OF THE DOMINO-LIKE END OF THE FORMER SO-CALLED SOCIALIST STATES

The 1980's marked the growth of internal political tensions in the states conserving the regime of domination of a single political party and its associated ruling elite. The influence of Gorbachev's *perestroika*, consisting in certain attempt to liberalise the regime's directives, meant the gradual destruction of the totalitarian system of the *sui generis* model. The revolutionary changes of the former so-called socialist states in their succession of 1986 and subsequent years (beginning with the political-inversion experience of Poland provoking the introduction of rule of law institutions as early as the 1980s) had very clear impact on the need for fundamental and systemic constitutional changes. The regime's political changes, consisting of abolition of the previously unchangeable (and totalitarian) position of the leading role of the Marxist-Leninist-type party, also caused "domino" effect in the disintegration of the three so-called socialist federations of the time, and thus creation of almost twenty new states.[3] It is thus quite logical that a certain target solution of the new political ruling elite in the hitherto independent and "new" states became the adoption of new constitutions and anchoring in them the institutions of classical constitutionalism, i.e. also in form of certain established, traditional models of so-called Western constitutionalism.[4] Thus, the criterial portfolio of the science of comparative constitutional law is able to analyse and deduce the degree of similarity, applicability and use of these models, as well as their limited and creative development.[5] It is also necessary to take into account the varying degrees of historical experience of the functioning of democratic constitutionalism, even in short-term.[6]

The development of establishment of new constitutional systems after 1990 thus showed essentially two parallel directions, namely, a clear motivation to set models of constitutionalism more or less according to existing "Western" models, in particular European-continental versions of "written" constitutions, including the influence of the German constitutional doctrine of the constitution as the "fundamental law.[7] Some partial institutional influence is also evident in the presence of a number of elements of American constitutionalism.[8] At the same time, however, it is quite evident that none of the modern

[3] In this respect, L. Mezzetti states "the collapse of the internal and external dominion of the Soviet empire", cf. MEZZETTI, L. *Le demokrazie incerte. Transizioni constituzionali e consolidamento della demokrazia in Europa orientale, Africa, America Latina, Asia*. Torino: C. Giappichelli Editore, 2000, pp. 15 ff.

[4] The author deals with this issue for the first time comprehensively in the chapter "Restoration of Constitutional Democracy in Post-Socialist Countries – A Selection", KLÍMA, K. *O právu ústavním*. Prague: Wolters Kluwer, CR, 2012, pp. 238 to 254. More comprehensively elaborated KLÍMA, K. *Ústavní právo srovnávací*. Prague: Metropolitan University Prague Press, Wolters Kluwer, Czech Republic, 2020, pp. 154–164.

[5] The classical concepts of the conception of constitutionality and, in particular, the separation of powers are also reflected in the consolidated concepts of the scientific and pedagogical representation of the constitutional law, cf. for example the teaching structures of textbooks: CONSTANTINESCO, V., PIERRÉ-CAPS, S. *Drept constitutional*. Bucuresti: Universul Juridic, Bucuresti, 2022.

[6] This is the experience of Poland or the so-called *Baltic States*, i. e. Latvia, Estonia and Lithuania, on which the author elaborates in: *Ústavní právo srovnávací. pp.* 159 et seq.

[7] The Czech constitutional system in the Kelsenian tradition is based on the supremacy of all constitutional laws over "ordinary" laws, with constitutional laws having higher "legal force" and all other laws having to comply with them. This is also the position of Article 87(1) (a), according to which, if the Constitutional Court finds that a law is inconsistent with constitutional law, it shall repeal the law or its individual provisions.

democratic systems have just mechanically "copied" each other and the creative modern originality of the solutions is quite evident.[9] It is thus the purpose of the article to provide a kind of constitutional-comparative, i.e. external audit, which would be able to divide, distinguish, or define the degree of generality and also to conceptually specify. In this way, the author does not claim to ascertain or determine from experience which is optimal, more efficient, etc. Indeed, constitutionalism has its traditional criteria of regulativeness, and so it is primarily a question of whether any solution is functional.[10] Undoubtedly, the methodological technology of the science of comparative constitutional law is significantly applied in setting hypotheses and addressing questions of the phenomenality and even conceptual usefulness of the new constitutional systems of the so-called new democracies, since its subject precisely is the concept of democratic constitutionalism as an international phenomenon. But also the fact that after the Second World War, the multistage expansion of constitutional democracies (especially in Europe) is a reason to attempt a kind of doctrinaire (and group-oriented) comparison.[11]

2. HISTORICAL PARALLELS OF CONSTITUTIONAL DEMOCRATISATION AFTER THE SECOND WORLD WAR

A very distinct wave of constitutional reconstruction, i.e. as a renewal of constitutional democracy, can be seen in "Western" and "Southern" Europe itself after the Second World War. Liberation from fascist totalitarian systems meant a clear solution - the adoption of new constitutions (or even a return to the "pre-war" constitutions). Thus, **Austria** in particular returned to its 1920 constitution, and thus to the original federation, where the constitution is fundamentally based on the equality of the federation and the federal states. The constitutional foundation is based on the parliamentary form of government in the Federation, with Landtags operating in the Länder.[12] In **Italy**, the monarchy was abolished by referendum in 1946 and a republic was proclaimed at the same time as the

[8] This is significantly reflected in the current prevalence of direct election of presidents, but also references to the creation of a kind of functional *checks and balances*, which according to V. Sládeček means that "the Constitutional Court should first of all operate as an effective part of the system of checks and balances, within the framework of the separation of state powers ....," and "... barriers against attempts to misappropriate a part of public power by any of the state powers ...", cf. in: SLÁDEČEK, V., MIKULE, V., SYLLOVÁ, J. *Ústava České republiky. Komentář. 1st edition*. Prague: C. H. Beck, 2007, p. 666, point no. 9.

[9] Moreover, as seen in the accelerated constitutional settlement of the Czech Republic, the political and competitive dispute between the two party groupings had a far greater "impact" on the originality of the Constitution of the Czech Republic than the intention to build on the institutions of the original Czechoslovak constitutionalism, to the process of preparation and work on the Constitution of the Czech Republic, more specifically and perfectly in: SUCHÁNEK, R., JIRÁSKOVÁ, V. et al. *Ústava České republiky v praxi*. Prague: Leges, 2009, pp. 12 ff., then pp. 22–27.

[10] See for example V. Jirásková in her essay "The Transitional Period and the Adoption of New Constitutions in the Countries of Central and Eastern Europe, in: PAVLÍČEK, V. et al. *Transformace ústavních systémů střední a východní Evropy. Collection of essays and texts of the constitution, Part I*. Prague: Charles University in Prague, Faculty of Law, 1999, pp. 12–16.

[11] B. Banaszak's observation is certainly apt on the context of the expansion and extension of new democracies, as "..... part of globalisation, which aims at unifying the principles of socio-economic life in the world ...", in: BANASZAK, B. *Porównavcze prawo konstytucyjne wspólczesnych państw demokratycznych*. 2nd edition. Warsaw: Wolters Kluwer, Poland, 2007, p. 31.

[12] See more on this in: WALTER, R., MAYER, H. *Grundriss des Österreichischen Bundesverfassungsrecht*. Vienna: Maunz Verlag, 1996, p. 71.

establishment of the Constituent Assembly. The Constitution of the Italian Republic was then adopted in 1947, establishing a parliamentary form of government with consistent democratisation.[13] The **French Republic** is historically exceptional for its phenomenal constitutional history. After the liberation in 1945, it set up the system of the so-called 4th Republic, confirmed by the 1946 Constitution, which provides for a classical parliamentary form of government.[14] **Germany** did not have a long tradition of constitutionally based democracy before the Second World War either, with the concept of the recognised "Weimar Constitution" of the 1920s remaining a distinctive constitutional experiment. On the basis of the Potsdam Agreements, Germany's constitutional development was then clearly directed towards democratisation and decentralisation, and implemented in 1949 with the version of the constitution of the Federal Republic of Germany as the so-called Basic Law (*Grundgesetz*). The constitutional law experience of Germany is a comparative stage of constitutional democracy after the Second World War. It is particularly inspired by the notion of chancellor democracy as a stable version of the parliamentary form of government, as well as the notion of a federal state with a strong position of constitutionalism of individual states. The jurisprudential activity of the German Federal Constitutional Court has inspired many countries of the so-called new democracies (see below on point 3) with concepts of the protection of fundamental human rights and freedoms since the 1970s. **Japan's** post-war development should also be observed in this observed historical-contingent constitutional parallel. Japan, at the beginning of the Second World War II, allied itself with the fascist states of Germany and Italy, the so-called *"Berlin-Rome-Tokyo"* axis. As a country defeated in the war, Japan was placed under the directives of the Potsdam Agreements, and the principle of democratisation declared therein meant the installation of a democratic, i.e. constitutionally based, system in Japan. The new constitution of 1947 thus establishes a parliamentary monarchical form of government, respecting the fact that the Emperor has no executive power.[15] Japan's version of constitutional monarchy thus became an original combination of the dynastic-monarchical tradition with a modern parliamentary form of government. The gradual collapse of the fascist systems of Spain (1975), Greece (1975), and then Portugal (1976) in the 1970s constitutes a very special phase of constitutional democratisation in post-war Europe. First of all, the constitutional monarchy of the **Kingdom of Spain** is a modern constitutional state established by a constitution approved by referendum in 1978.[16] The history of Portuguese statehood is also one of the oldest in the world (since 1139), including extensive medieval colonial expansion, particularly in South America. After the fall of the dictator Salazar in 1976, however, a completely new constitutionality was established by the 1982 Constitution, including a parliamentary form of government and a constitutional court.

[13] The constitutional history of Italy dates back to the mid-19th century, when the so-called Statute of Albertina was adopted in Sardinia as the so-called octroyed constitution of Italy, establishing a monarchy of the so-called Salic type.

[14] The constitutional treatment of French forms of government can be considered an original model as a traditional segment of comparative constitutional law, the author on this in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 52–55.

[15] *Shinto*, as Japan's original state religion, remains a cultural-religious system of binding social values.

[16] Spain has restituted, and dynastic succession in Spain follows the tradition of Spanish monarchism, even referring to the constitutions of 1837 and 1876.

3. COMPARATIVE DIRECTIONS OF CONSTITUTIONAL CHANGES IN FORMER SO-CALLED SOCIALIST STATES

Although it is possible to deduce certain identical, or parallel, aspects of the acceptance of constitutionally based democracy of the so-called post-socialist states at the turn of the 1990s and the return of the former fascist states of Western Europe (and others) just after the Second World War to constitutional democracy, this new wave of democratization is still quite original in some aspects. First of all, the fact that the collapse of the socialist system of the totalitarian type had a multiple (collective) character, moreover, accompanied by the emergence of new states after the collapse of the three federations, it was logical (and almost conceptually "programmatic") to use the experience of already stabilized constitutional democracies of the "Western" type. A kind of "collective" programmaticism was thus clearly oriented also towards the historical sources of constitutionalism and their developmental connotations.[17] The development of modern constitutionalism is thus quite clearly tied to the constitutionally initiating English Revolution, the anti-feudal and in a way "national" liberationist American Revolution with its creative effect of written constitutionalism, and the extremely anti-feudal and anti-totalitarian French Revolution.[18] The latter was probably the most directed towards fulfilling the legacy of the philosophers in the concept of the so-called social contract. In a consolidated way, the author thus permanently places in a kind of enumeration the directions of the newly installed constitutional solution, common to all the so-called new democracies. It is thus about what the constitutional systems had to accommodate in the new constitutionalism in order to depict the new democratic system, representative democracy and the rule of law.[19]

In the sense of the above, it is thus possible to choose, first of all, the method of institutional induction in synthesis, which, on basis of the previous inductive "input" into the constitutional systems of the new democracies considered here, where most of these constitutions "date back" to the 1990s, can be deduced in this way and a certain systemic summary can be reached. To put it succinctly, the purpose and goal of the constitutional amendments was:

1. to constitutionally establish a system of parliamentary form of government, based on a multi-party political system and free competition between political parties,

2. to establish an electoral system that would allow the free selection of candidates for representative bodies of all levels, based on the real right to vote and be elected, with secret ballot,[20]

[17] It is not so out of place for the author to recall that from his knowledge of university academic cooperation within the former so-called socialist states, it is demonstrable that their law schools had an impeccable knowledge of classical constitutional history, as well as the realities of selected "Western" constitutional systems (i. e., the U.S., Germany, Great Britain, France, and Italy), and as such these systems were taught in the course "State Law of Capitalist Countries."

[18] As regards the typology of constitutional "models", see the author in the chapter "Constitutional models of separation of powers and their modalities", in: KLÍMA, K. *Ústavní právo srovnávací.* pp. 47 ff.

[19] Ibidem, in the chapter "Institutional Constitutional Comparative Law", pp. 56–107.

[20] A certain implementation inversion of one of the elements typical for the presidential form of government, i. e. the introduction of the direct versus totalitarian system (examples: L. Walesa in Poland, A. Göncz in Hungary, further applied in the Baltic countries, Slovenia, etc..

3. to replace the original planned economy by a system of equality of all types of property, with emphasis on the development of conditions for the restoration and protection of private property and free enterprise,[21]

4. to build a system of territorial self-governing units of a multi-level type, in relation to the size of the country, historical context and experience, demographic and locational situation of the population, including constitutional and judicial protection of territorial self-governing units,(see below),

5. to establish (apply) various mechanisms of direct democracy in the system of democratic governance, in the form of decisive, consultative or initiative forms such as referendum (central, regional and local), consultation with voters, parliamentary petition right, collective proposal to address the responsibility of top constitutional officials, etc.[22]

6. to incorporate into the constitutional foundations an internationally treaty-based catalogue of the rights of people and citizens, binding directly in the Council of Europe system, conceived in groups such as: fundamental human rights, political freedoms and economic, social and cultural rights.

7. to establish the concept of the rule of law as an institutionally functioning mechanism implementing the right to a fair trial and the protection of human rights and freedoms, with emphasis on installation and development of constitutional control and administrative justice, (see below),

8. to install in the system of the constitutional so-called horizontal separation of powers some so-called independent constitutional institutions with a similar systemic effect aimed at deepening the constitutional *horizontal* separation of powers, which effect relates primarily to both the control of the executive power and the guarantee of the protection of fundamental rights and freedoms of the people. (see below),

9. to implement the constitutional basis of the relationship of national law to international law, and in the form of state loyalty to international treaty obligations, including the direct binding nature of certain types of treaties, which has gained conceptual and jurisdictional precedent acceleration, especially in the process of accession of new democracies to the European Union system, (see below),

10. to implement the political change consisting in participation in military-defence pacts, including the establishment of the solution of war and civil emergencies by the concept of the so-called crisis constitution.[23]

In order to give some completeness to the specificity (and usefulness) of the phenomenon of the constitutions of the new democracies, it is necessary to add one important feature common to these constitutions. Namely, the process of separation of political attach-

[21] A certain peculiarity in the decommunization development can be considered the so-called restitution processes (restitution of property), which (very significantly) in Czechoslovakia, for example, concerned the restitution of property that was nationalized, confiscated or otherwise illegally and illegally confiscated by the regime after 1948.

[22] The scope of use of direct democracy is not only varied in number but also in forms of solutions, with remarkable absence in the Czech Republic, against for example, and a wider use in Slovenia, cf: GRAD, F., KAUČIČ, I., ZAGORC, S. *Ustavno pravo.* Ljubljana: Faculty of Law, University of Ljubljana, 2018, pp. 243 ff.

[23] This in more detail in: BRÖSTL, A. *Ústavné právo Slovenskej republiky.* 3rd revised edition. Plzeň: Aleš Čeněk, 2015, pp. 355 ff.

ment to the so-called Soviet bloc, and in particular to the political hegemony of the USSR, and the subsequent break-up of the three federations, meant both a free role in the decision-making of states "about their own affairs" and more. It also meant a large-scale and multiple manifestation of political emancipation, often associated with a gesture and proclamation of political sovereignty of the state. This was also reflected in the fundamental constitutional declaratory statements, but also in the first articles of the constitutions. In this context, the constitutions also often emphasised their relation to the sovereignty of the respective nation, which had thus 'emancipated' itself and thus became a *state-forming* constitution-maker.[24] This "group" characteristics not only represents a new "wave" of creative national constitutionalism, but also confirms the prominent role of the constitution in protecting national legitimacy and thus the territorial integrity of the state and the position of state-forming nations in the overall globalization process and its manifold effects.

4. REPRESENTATIVE DEMOCRACY IN TERMS OF VARIANTS OF THE SO-CALLED PARLIAMENTARY FORM OF GOVERNMENT

Establishing a classical type of parliamentarism as historically established and developed by European "Western" democracies, both in form of constitutional monarchies and French republicanism, became a key political and constitutional credo. However, the key question was certainly not what the optimal solution was, whether a unicameral or bicameral parliament. Setting up classical democratic so-called form of government was probably the central and first goal of democratic regime transformations, as it was the outcome of the effort to change the totalitarian system of one-party leadership from a system based on permanence and immutability to a system of competitive party democracy based on the plurality of political parties and free elections. These changes have in principle succeeded, with the creation and development of politically diverse party systems in various forms, in which, although the communist parties mostly ended relatively early, the differences between the so-called left and right groups have also been disappearing in the last decade. These relatively typical volatilities of party systems affect the legislative activity of parliaments and therefore the effective representation of citizens' interests, which also has implications for potential crises of government. Even the new democracies have come to the experience that the constitutional accountability of governments is practically governed by English "leadership", since if a government retains the political support of party coalitions, then no one can functionally control it, not even with the result of its office leaving. This fact significantly modifies the original intention of the 'new' democratic constitutionalists to establish the controllability of the executive by parliament as a representative body representing the citizens.[25] The constitutional separation of powers in

[24] Cf. on this in: KAMPA, V. M., SAVCHIN, M., B. (eds.). *Ustava i narodnyj suverenitet v Ukrajini: problemi teorii i praktiki realizaciji.* Kjiv: Dodrukarska pidgotovka ta druh, 2008.

[25] The academic literature highlights some of the dilemmas associated with the parliamentary form of government. Thus J. Drgonec states that "…. the parliamentary form of government is marked by the burden of particracy present behind the scenes of parliaments, and displacing from the exercise of public power democracy, which cannot be separated from the parliamentary form of government, …". Cf. in: DRGONEC, J. *Ústavné právo hmotné.* 1st edition. Bratislava: C. H. Beck, 2018, p. 224

the form of the so-called tripartite is in this way effectively eliminated, since the executive is more or less dependent on a political majority in parliament. So how did the so-called third power, the judicial power, develop? Certainly a distinct phenomenon of the process of installation of the concept of the rule of law was the generally common development of constitutional control in form of installation of constitutional courts (see below under 5). This fact, consisting of the intention to insert into the constitutional system the institution of control of the constitutional conformity of laws produced by the Parliament over the years, has thus made the constitutional courts a real competitor to the Parliament. This has effectively created duality of the constitutional separation of powers, whereby the constitutional court, by its derogatory function in relation to the laws of parliament under attack, is not only the body that can annul the law in question, but also, by its precedent opinion, influence future laws.[26] Thus, it is not illogical that expert and qualified opinions have emerged to the effect that such a constitutional separation of powers creates a system of "constitutional balance" (checks and balances in the US incarnation). Even if one accepts the logic of these claims, one cannot abandon the fundamental idea, which the parliamentary form of government and representative democracy is based on, namely the dominance of parliament in this system.

Comparatively interesting is the issue of the approach of the new constitutional democracies to the structure of parliaments, i.e. the application of so-called unicameral or bicameral parliaments. Since the historical beginnings of the formation of parliament-type bodies, the question of the structure of parliaments has arisen. Their development of the concept of *unicameralism* and *bicameralism* is thus also the inspiration for the new constitutional democracies, since each parliament is embedded in a system of separation of powers, which meant for the new constitutional democracies the application in the system of a parliamentary form of government. In relation to the development of the bicameral parliamentary system, it should be noted that its modern installation is rather based on the different electoral legitimacy of the so-called second chamber, which in the American version is the concept of the Senate (USA) as the representation of the *states* (USA), in the French version as the representation of the regions in their Senate, and in the version of the Constitution of the Russian Federation as the *Federation Council*. The new constitutional democracies, given the overwhelming unitary character of (especially) the new states, had no reason to be inspired by the aforementioned bicameralism. The exceptions are Poland, where the French and Italian experience was applied rather symbolically, the Czech Republic tried to renew the idea of the Senate of the First Czechoslovak Republic,[27] and Slovenia, by structuring its parlia-

[26] This was typically demonstrated in the Czech Republic in January 2021, when the Constitutional Court of the Czech Republic abolished the provisions of the electoral law regulating the closing quotas for coalitions in terms of the percentage needed to enter the Chamber of Deputies, and the subsequent and "quick" amendment of the electoral law created favourable situation for the ambitions of the so-called small parties for the subsequent autumn elections.

[27] The relatively late establishment of the Senate of the Parliament of the Czech Republic (elected since 1997, initially with a mandate of 2, 4 and 6 years, i. e. with gradual re-election every two years for 6 years), as well as its "weak" function in the legislative process, have raised persistent doubts about the purpose of its existence. The author does not share these doubts in principle, given the stabilizing role of this chamber in the constitutional system of the Czech Republic, on that see KLÍMA, K. *Ústavní právo*. 5th edition. Plzeň: Aleš Čeněk, 2016, p. 504.

ment, partly built on the experience of its own previous coexistence within the former "Yugoslav" constitutional self-government.[28]

5. VARIABILITY OF NEW PARTY-POLITICAL SYSTEMS AND NEW "ELECTORAL ENGINEERING"

In the constitutional mechanism of democratic power, the constitution of representative assemblies by citizens, in particular parliaments, is of fundamental constitutive importance. The science of the constitutional law thus traces various mechanisms of this electoral democracy, in our terms the so-called electoral technology.[29] Even the new democracies have thus set up new electoral systems as a priority for political change, which has been both enshrined in constitutions and specified in the laws that specify them.[30] Even in the so-called new democracies, certain political, constitutional and legislative organisational principles, such as universality, equality, directness of the electoral system and the provision of secret ballots were accepted. The nomination of candidates (mostly collectively) by political parties was also accepted, with the exception of so-called independent candidates. The representative character of parliaments is essentially based on the way in which the calculating mechanism as a reflection between the electoral votes received for the candidates and the *"seats"* in the parliament thus obtained, is organised in constitutional systems. This technology of representation is thus manifested in the legal way, in which seats are allocated to political parties and individual candidates on basis of election results. In this respect, the new constitutional democracies have also joined the traditional variation of model systems of mandate allocation, with the predominance of the application of the so-called proportional representation systems. The latter is then applied in a number of possible versions, in particular the so-called D'Hondt system is applied in Europe (for example: Czech Republic, Germany, Portugal, Wales, Scotland, etc.).[31] Even in the context of the application of the proportional representation system that a number of new democracies have also introduced the so called (German-style) closure *clause* into the system, as an organisational reduction of the access of some political parties to the parliament in the situation, when their election result did not exceed the legally set number (in percentage). Even in the context of political efforts to set up a democratic electoral system, the new constitutional democracies did not avoid such contexts of this search, where individual (new) political entities (political parties) sought in the classical variants of the allocation of mandates to political parties variants presumably advantageous for them.

[28] Slovenia's so-called *Državni svet* (40 MPs) is formed by groups of employees, employers, trade unions, farmers and other businesses, more on that in: ZAGORC, S. *Ustavno pravo*. pp. 446 ff.

[29] It is also worth recalling the well-established and accepted term for these processes, such as electoral engineering, according to Sartori: "Although the electoral system may not be formally included in the constitutional text, it nevertheless remains in fact a fundamental part of the operation of the political system", cf.: SARTORI, G. *Srovnávací ústavní inženýrství*. Prague: SLON, 2011, p. 9.

[30] The legislative basis for elections in the Czech Republic consists of individual laws: on elections to the Parliament of the Czech Republic, on elections to municipal councils, on elections to county councils and on elections to the European Parliament (Norway has only one electoral code).

[31] On the variability of model systems of mandate allocation within the experience of classical constitutionalism, see the author in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 84 ff.

The new constitutional democracies based their new political systems on the experience of classical constitutionalism, according to which political parties as a political phenomenon are recognised as the state-forming element of democracy. In this sense, their foundations are also consolidated by the constitutions, and we can thus speak of the constitutional institutionalisation of political parties and thus the basis of democratic competition for representation in parliaments. The new constitutional democracies have then mostly made legislative concretization of the position of political parties in constitutional systems, including their possible exclusivity as exclusive electoral subjects.[32] Classical 'Western democracies' are also pursued by subjecting the regulation of political party funding to statutory regulation, as well as the mandatory transparency of political party activities and sources of income, including electoral expenditure. Thus, even in new democracies, political parties are the consolidated part of the constitutional environment as a key agent of de facto constitutionalism. The political party system thus completes the so-called *de facto* constitution in these democracies, which to some extent interacts with the principles laid down in the constitution for the system of forms of government, electoral systems, the structure of parliament, as well as the control of constitutionality.

6. THE CORPORATE RIGHT TO TERRITORIAL SELF-GOVERNING UNITS AS POLITICAL COMPETITION TO THE CENTRAL CONSTITUTIONAL "SUPREMACY"?

Through targeted and programmatic political developments, there has certainly been a significant elevation of the constitutional concept of the right to territorial self-governing units. The constitutional enshrinement of territorial self-governing units can be considered a significantly innovative element of constitutionalism after the Second World War, to which the constitutions of the new democracies undoubtedly contributed.[33] Thus, the constitutional installation of the concept of at least two-tier local government became a programmatic goal that fundamentally entailed the decentralization of power, i.e. the separation of certain functions of public administration (functions of "organization of services of public interest") and their entrustment to the municipal and regional units of local government. The scope of these functions as executive activities entrusted to municipalities, districts and regions (mostly regions) is thus comparatively varied, and it is therefore impossible to assess the degree of decentralisation under any unifying criterion. But what is a certain comparatively common dilemma of the system of local government in the new democracies? Here, in this article, we are comparatively considering states which, since the late 1980s, have fundamentally changed their political regimes and hence their constitutional systems, and which generally belonged geographically to that part of Europe which began with Central European Czechoslovakia to the East of continental Europe, and significantly also to its continental Southeast and especially to the Balkans. Excep-

[32] Even "older" constitutions have been amended in this way, cf. for example first Germany and Italy in the 1960s, then Greece, Spain, Portugal, etc.

[33] In this sense, it should also be pointed out that the early membership of the new democracies in the Council of Europe system was influenced by the fact that the corporate right to territorial self-governing units is the basis of the relevant Charter of territorial self-governing units, which the states considered here have mostly ratified.

tionally, some of these states had experience of the original Austro-Hungarian administrative decentralisation, such as Czechoslovakia, Hungary, Slovenia,[34] some followed certain self-governing elements of the former Yugoslav federation (Slovenia, Croatia, the Serbian Federation, Montenegro, etc.), while the Polish experience was still being built up in the PSDS leadership system since the 1970s.[35] However, all Euro-continental systems have decentralised public administration from the original centralised systems of absolute monarchy, and what they have in common – and what is shared by contemporary Euro-continental constitutional democracies – is that the central constitutional power retains the function of legislating the scope of 'public self-government', and the executive power in form of the governmental and ministerial power is also superior not only in its supervisory function, but also directly manages some administrative functions through offices incorporated into local, district or regional authorities, but in parallel also manages a number of local public administration functions through its decentralised or devolved bodies.[36] The question is to what extent are territorial self-governing unit bodies truly "self-governing" and to what extent are they not more an executive apparatus of the governmental centre of the state, and whether the right to territorial self-governing units is not mainly a constitutional fiction.

7. THE INNOVATIVE CONTRIBUTION OF NEW CONSTITUTIONAL DEMOCRACIES TO THE CONCEPT OF CONSTITUTIONALISM AND THE RULE OF LAW

The concentration of political power during the period of so-called real socialism significantly undermined the protection of human rights and freedoms, especially the political ones. Thus, since the 1990s, the institutions of the rule of law, such as constitutional courts, ombudsmen, the so-called supreme councils of the judiciary (see below under a separate item), the administrative judiciary, independent audit offices, etc., have become the targeted direction of development of constitutional change. This is also related to the historical fact and motivating circumstance that the new democratic states were also becoming member states of the Council of Europe and the idea of the right to a fair trial of "its" Convention on Human Rights and Fundamental Freedoms became legally binding on their judicial systems. It was therefore undoubtedly a key and literally programmatic issue to set the classical catalogue of human rights and freedoms in the basic constitutional texts. This was done primarily in binding reflection on the Council of Europe's flagship document, the Convention on Human Rights and Fundamental Freedoms. The almost universal installation of constitutional courts in the new constitutional democracies then became a matter of course. In this sense, the conceptual source of the constitutional judiciary of the Federal Republic of Germany, and thus also the experience of the Consti-

[34] As a reminder, the legislative concept of so-called independent and so-called delegated powers was already established by the Austrian law of 1862, a solution adopted by the First Czechoslovak Republic, and it is permanently present in the current system of territorial self-government of the Czech Republic.

[35] This in more detail in: DABEK, D. *Prawo mjiescowe.* Warsaw: Volters Kluwer, Poland, 2007.

[36] Cf. On this, for example, in: TRELLOVÁ, L., VRABKO, M. *Priame prejavy práva na samosprávu obce v kontexte verejnej správy.* Prague: Leges, 2022, pp. 60 ff.

tutional Court of Germany in Karlsruhe, undoubtedly played a major role. It is also significant that the concept of specialised constitutional justice has its basis in the constitutional catalogue of decision-making powers conferred on constitutional courts, where the basic idea of the so-called abstract constitutional review based on an incidental review of the conformity of laws with constitutional norms is developed by concrete incidental review in subject-specific questions of constitutionality.[37] The question is what constitutional values are further protected in addition to judicial review of the constitutionality of the legislative production of parliaments. The particular expansion of the new democracies then was directed in particular to the enshrinement of the power of constitutional courts to rule on so-called constitutional complaints.[38] In a real quantitative competition, the preponderance of the idea jurisprudence of these submissions vis-à-vis the adjudication of the other powers of the constitutional courts may place the constitutional courts in a kind of additional *(quasi)* albeit extraordinary judicial review.[39]

The administrative judiciary, in particular in the review of respect for human rights and freedoms, has been of fundamental evolutionary importance in the development of an *independent judiciary*. Indeed, the review of the legality and, in many cases, the correctness of the decisions of state and other public authorities has created the controllability of administrative-legal decision-making. In its framework, public administration authorities, in a position of legislative supremacy, decide in particular on so-called public subjective rights as well as in the field of administrative punishment. Administrative justice thus guarantees in particular the key principle of the concept of the rule of law, which consists in claims to the strict legality of the decision-making of the "supreme" public administration. In this sense, it is precisely the administrative judiciary as a constitutional power distinct from the executive power and its role in incidentally controlling, in particular, the legality of the actions and decisions of public administration bodies that is essential.[40] In the area of the development of the verifiability of guarantees of human rights and freedoms, we can note a significant expansion of the institution such as the Swedish Ombudsman.[41] The experience of the *Polish Ombudsman* in the second half of the 1980s,

[37] On the concept of so-called constitutional responsibility, see the author in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 93 ff.

[38] Here the inspiration of the German constitutional judiciary in the form of their so-called *Verfassungsbeschwerden* is very evident.

[39] The real problem of the Czech constitutional judicial practice has thus led to the pragmatic selectivity of the treatment of constitutional complaints received by the Constitutional Court of the Czech Republic. The published statistical findings show that approximately 95% of these constitutional complaints are rejected as "unfounded" in a non-public decision of the benches of the Constitutional Court. The selective and potentially precedential purpose of these submissions, compulsorily represented by lawyers, thus significantly undermines the false hopes shared by the public about the importance of the ultimate protection of human rights and freedoms. The author illustrates this problem in an appended sub-study entitled "Precedential Constitutional Law as a Selection of Constitutionally Appropriate Cases", in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 218 ff.

[40] On the concept of so-called public subjective see the collective monograph: KLÍMA, K. et al. *Veřejná subjektivní práva*. Prague: Metropolitan University Prague Press, 2015, especially in the chapter by P. Vetešník "Public subjective rights and their protection provided in administrative justice", pp. 96 ff.

[41] The gradual "expansion" (initiating spread) of the institution of the ombudsman is already evident in the continuity of the new constitutional democracies with the constitutional development of the states democratised after the Second World War, when it was introduced: In Finland (as early as 1919), then in Norway (1952), Denmark (1954), Germany (1957), the United Kingdom (1967), Northern Ireland (1969), France (1973), Italy (1974), Portugal (1975), Austria (1977), Spain (1971), Poland (1987), Romania (1981), etc.

a kind of attempt to bring under some kind of control the then still constitutionally uncontrollable (and politically untouchable) power of the government and the executive, linked to the political leaders of the only leading and dictating political party, is historically absolutely precedent-setting.[42] The anchoring of this type of body has had both a constitutional character (for example in Poland)[43] and regulation (only) by ordinary law (for example in the Czech Republic). However, the many years of experience show that the actual status and effectiveness of the activities of such independent control bodies are varied and depend on the overall climate of respect of the general and actual policy towards this body.[44]

With regard to the implementation of the concept of the rule of law in terms of its implementation in a constitutional context, it should be recalled that, in particular, the judiciary in all contemporary constitutional democracies, in the system of their membership of the Council of Europe, is clearly subordinated to the respect for case law, established by the European Court of Human Rights and the possibility for private entities from any Member State to bring a complaint to this Court to review the decisions of their judicial authorities, in relation to compliance with Article 6 of the Convention in particular in the criterion of the case law of the "right to a fair trial".[45] In the case of the Convention, it is thus undoubtedly a *quasi-constitutional* document of substantive and, consequently, procedural law.[46] In the application of complaints by natural or legal persons addressed to the European Court of Human Rights, the burden of proof rests on the complainant to prove a violation of the "procedural" Article 6 of the Convention and, as a rule, a serious interference by the State authorities of a Member State with the complainant's fundamental human rights or a gross violation of a political freedom.

8. EUROPEANISATION OF CONSTITUTIONAL LAW OR EVEN CONSTITUTIONALISATION OF EUROPEAN LAW

The sovereignty of modern (classical) state power in its internal and external manifestation is declaratively affirmed by constitutional texts. The new constitutional democracies considered here have added to this, especially when the new constitution followed the

[42] On this, the author particularly in the chapter "Specific Polish constitutionalism", in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 155 ff. In this way, the author also demonstrates his enduring professional respect for Polish theoretical constitutionalism, which contributed significantly to the high conceptual and institutional quality of the 1997 Polish Constitution.

[43] In the Romanian Constitution, in Articles 58 to 60, the institution of the Ombudsman is referred to as "Avocatul popolurui", see: DRAGUE, L. *Drept constitutional si instituti politice, I*. Bucuresti: Universul Juridic, Bucuresti, 2022, pp. 129 ff.

[44] It is thus common knowledge that one of the Czech Public Defenders of Rights serving in this position – dr. Varvazovsky (formerly a judge of the Constitutional Court of the Czech Republic), in protest against the Chamber of Deputies' apparent lack of appreciation of its supervisory role, especially with regard to the ministerial executive, resigned prematurely.

[45] Cf. in: KMEC, J. et al. *Evropská úmluva o lidských právech*. Komentář. 1st edition. Prague: C. H. Beck, 2012, pp. 565 ff.

[46] The author thus permanently cultivates the hypothetical concept of the existence and justifiability of the so-called European constitutional law, cf. in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 283 ff.

creation of a new state and the declaration of its sovereignty.[47] After 1990, however, these new and democratically established states were logically admitted to the Council of Europe and then (in 2004) to the European Union. These new type of international associations a priori and as a result deviate from some of the requirements of public international law, in particular by a certain convergence with elements of constitutional confederalism or even federalism.[48] At the same time, this process also has a number of obvious other constitutional law aspects, notably elements of internal separation of powers, both horizontal and vertical, the role of the judiciary in "quasifederation" (meaning: European Union) or in upholding the right to a fair trial (in the Council of Europe system). However, the approach must take into account the development of the world after the Second World War, when, in connection with the internationalisation of international relations, elements of coherence or synergy with supranational systems are beginning to penetrate constitutional systems, especially those of European states. Of course, one of the reasons for this correlation of state sovereignties and *supranational* systems is the development of political plural democracies, democratic constitutionalism and thus the majority democratisation of Europe. At the same time, these new and European associative entities, through their own law, are moving into a position of contractual supremacy vis-à-vis all state entities that have voluntarily (and contractually) accepted this supranational obligation. For the new constitutional democracies, this aspect thus occurs as soon as they are admitted to the Council of Europe system, i.e. after the establishment of a constitutional version of democracy and a system of protection of human rights and freedoms.[49]

In the context of the above, it is necessary to discuss the *new concept of constitutional sovereignty* in the context of European Union integration. Most of the European constitutional democracies entered (were in the so-called accession process) the European Union system in 2004. Like French, German or Italian constitutionalism, the new political leaders had to clarify through the precedents of the constitutional courts what the relationship between state (national) constitutional sovereignty and the *special* EU sovereignty of the "supranational" is.[50] The EU was joined (or rather the states were admitted) by states that had to prove during more than a decade of previous development that they had been established as constitutional democracies by default and that they had actually functioned

[47] A typical example: Slovakia in August 1992 on the occasion of the traditional anniversary of the so-called Slovak National Uprising, the new Constitution then promulgated on 1. 9. 1992. Day 1. 1. 1993, i. e. the date of entry into force of the Constitution of the Slovak Republic, is considered to be the date of the establishment of the "2nd Slovak Republic", on this in: SVÁK, J., CIBULKA, L. *Ústavné právo Slovenskej republiky*. Bratislava: BVŠP, 2008, p. 19.

[48] For example, for the assessment of the character of the European Court of Human Rights and the Court of Justice of the European Union, both courts have in principle "self-defined" themselves as "federal", *quasifederal* or "supreme" courts, cf: MASQULET, J. C., TURPIN, D. *Libertées publiques et droits fondamentaux*. Paris: Vanves Éditions Foucher, 1997, pp. 26 ff.

[49] In this context, the adoption of the Charter of Fundamental Rights and Freedoms in Czechoslovakia in January 1991 was also aptly considered to be a "ticket to the Council of Europe".

[50] This remark also applies to the Czech ex-president V. Klaus, who, as President of the Czech Republic, triggered a constitutional review of the constitutionality of the so-called Lisbon Treaty, which led to a ruling of the Constitutional Court called "Lisbon II", when the Constitutional Court of the Czech Republic did not find this treaty (or three treaties) to be in conflict with the constitutional order of the Czech Republic for the second time.

as such in the preceding years. In addition, the political leaderships of these states also had to convince the population that they were entering a system where there was not only the supremacy of EU law but also the direct binding and applicability of some of its legislation, including decisions of the Court of Justice (the Union). The *quasi-federal* character of the new system of supremacy for the member states has thus gradually begun to be confronted with the essential elements of sovereign constitutionalism (often recently restored) as the constitutions establish and present it in their very first articles.[51]

A special stage of the functional coexistence of two types of power systems, one of which is a typical nation-state constitutionalism and the other can be characterized as a supra-state system. This system has its own powers, special legislation and legal system, as well as special bodies of a public (executive) type, but also with elements of an incomplete (imperfect) so-called parliamentary form of government.[52] It is therefore the current stage, namely that established by the so-called Lisbon Treaty of 2009. Even the constitutional courts of the new democracies have often been initiated to assess the relationship of constitutional systems to the "renovated" Union.[53] In addition, it should be noted that the constitutional democracies under discussion here have expanded the European Union in numbers, but they are mostly "small" states (under five million inhabitants), with only Poland (and perhaps Romania) standing out. This fact leads to a decision-making practice in which the states that dominate the Union (such as Germany and France) trigger the search for decision-making mechanisms where the possibility of numerical (majority) override or pressure from the European Commission or the loyalty of the CJEU to the law of the European Union can be used.[54] An assessment of only some aspects of the constitutional relationship of the new constitutional democracies to the two supranational systems of power allows us to infer some constellations. Both systems, in their contractual, structural and content composition, resemble a *constitutional law* mechanism, i.e. in the case of the European Union, a power-sharing type of system, with strong elements of a "parliamentary form of government" (*sui generis*, of course). In the case of the Council of Europe system, the case law of the European Court of Human Rights, based on the European Convention on Human Rights and Fundamental Freedoms, creates a European *case law* binding on the constitutional and legal systems of the Member States. Thus, in both cases, it is "European constitutional law" of a kind. The addressee, the user and the binding responsibility of each Member State is then the addressee of these systems. However, the common constitutional values of the Member States, the

[51] On the concept of "sovereignty" as regulated by the Constitution of the Czech Republic in its Article 1, cf. the author's commentary, in: KLÍMA, K. et al. *Komentář k Ústavě a Listině*. 2nd ed. Plzeň: Aleš Čeněk, 2009, p. 41, point 7 ff.

[52] In particular, it should be recalled that the European Parliament is not a 'legislator' and that normative activity is rather carried out by the executive branch of the European Union, primarily through its regulations, which are essentially a product of the nature of decree law. Even a realistic solution to the European Commission's accountability to the European Parliament is probably politically illusory.

[53] Precisely in relation to the decision of the Constitutional Court of the Czech Republic, the so-called Lisbon I. O. Hamulák uses the characterization as "salivary sovereignty", cf: HAMULÁK, O. *Právo Evropské unie v judikatuře Ústavního soudu České republiky*. Prague: LEGES, 2010, pp. 196 ff.

[54] This was confirmed in particular by the decision of the EU Council of Ministers of the Interior on the so-called quotas for the allocation of immigrants in 2015. In this context, the CJEU also rejected complaints by Slovakia and Hungary that the regulation was invalid.

constitutional culture of constitutionalism, are the source of the possible concept of European constitutionalism. And this certain constitutional European polycentrism, which the new constitutional democracies have undoubtedly creatively entered, is not only the Europeanisation of constitutional law, but also the *constitutionalisation* of European law.[55]

9. THE SPECIFIC EXPERIENCE OF CZECH CONSTITUTIONALISM, IN AUDIT AND COMPARISON

The constitutional development of the independent and democratic Czech state since 1993 was foreshadowed by the constitutional democratisation of Czechoslovakia and its coinciding defederalisation. Since December 1989, the Czechoslovak Constitution of 1960 and the Constitutional Law on the Czechoslovak Federation of 1968 have been gradually amended, and laws have been passed changing the political system to a pluralist one and the electoral system to a free competition of political parties. In June 1990, the newly elected Federal Assembly, as the so-called *Constituent Assembly*, was to adopt a new Czechoslovak constitution within two years, which, due to the different versions of the future federation proposed by the Slovak representation, failed to reach a consensus.[56] After the elections in June 1992, the winning parties from both republics immediately and surprisingly for the civil public agreed on a procedure for the division of the federal state. This political process was completed in November 1992, when the Czechoslovak Federal Assembly decided by two constitutional laws on the dissolution of Czechoslovakia and the division of its property between the two newly created states. The Constitution of the Czech Republic from its very beginning (effective from 1 1. 1993) is the result of the political and power context connected not only to the definitive constitutional end of the Czechoslovak federation. Indeed, a number of institutional issues not politically settled in December 1992 manifested themselves in its initial *polylegality* as a "set" of constitutional laws, and hence the need for open constitutional resolution of some constitutional institutions in the future. The Constitution thus had to be amended by numerous constitutional laws in the 1990s. In terms of the form of government, the constitutional system follows the continuity of a specific parliamentary form of government. The bicameral parliament is based on the dominant role of the Chamber of Deputies in the legislative process, as well as the equal role of the Senate in the approval of constitutional laws, international treaties, so-called presidential treaties, as well as possible changes in the national borders. The establishment of the Senate (81 senators in total) by direct election by the citizens is not based on different legitimacy of the so-called second chamber in relation to the directly elected Chamber of Deputies (which is certainly a comparative constitutional originality). The relatively strong role of the President of the Czech Republic within and in relation to the executive is enhanced by the additional introduction of his direct

[55] Similarly, in the chapter "Unfluenta europeana asupra contitunului constitutiilor nationale", in: DRAGUE, L. *Drept constitutional si instituti politice, I.* pp. 278 ff.

[56] More on this by the author in: KLÍMA, K and others *Encyklopedie ústavního práva.* Prague: ASPI. a.s., 2007, p. 91 ff.

election.[57] The Constitution of the Czech Republic defines the "judicial power" as an independent power, in which it particularly singles out the control of compliance with the Constitution exercised by the Constitutional Court of the Czech Republic. The portfolio of the Constitutional Court's powers in relation to other constitutional bodies is comparatively extensive, especially the possibility of repealing laws of the Parliament of the Czech Republic and the possibility of repealing decisions of courts of all kinds. In reality, the most numerous is the Constitutional Court's decision-making on constitutional complaints of natural and legal persons. Comparatively observable is the "case law" developed by the Constitutional Court, which often interferes with all branches of Czech sectoral law (criminal, civil, administrative, etc. This innovative trend of jurisdictional development has thus resulted since 1995 in the establishment of a specific judicial doctrine of formulated principles of the so-called right to a *fair trial,* which means a specific application of the case law of the European Court of Human Rights interpreting Article 6 of the European Convention. From the point of view of the organisation and powers of territorial self-governing units bodies, Czech legislation corresponds to the traditions of the European-continental so-called combined, or mixed (local administration and self-government), which combines the partial autonomy of the powers of elected bodies of territorial units with the vertical state administration by the concept of the so-called delegated competence, as the competence of the state exercised by the authorities of municipalities, towns and regions. This version of 'mixed public administration' in places and regions also includes the supervisory activities of the state.[58] The constitutional system of the Czech Republic was also inspired by the modern constitutionalism of "Western" democracies by establishing constitutional bodies independent of the government, such as "courts of accounts", central banks of the state, *"ombudsmen"* (originally Swedish-style), etc. Thus, the status of the Supreme Audit Office, the Czech National Bank, and the Public Defender of Rights and the Council for Radio and Television Broadcasting were established in separate chapters of the Constitution, and the Public Defender of Rights and the Council for Radio and Television Broadcasting were installed in separate laws.[59]

The Czech Republic also dealt with the constitutional context of its admission (accession) to the European Union. The constitutional situation was set by the amendment of the Constitution of 2001 (Constitutional Act No. 395/2001 of the Collection of Constitutional Laws, the so-called *"Euronovel"*), with the specific construction of "transfer of powers of certain state bodies to supranational bodies". The fundamental problems of how to understand a possible modification of the principle of state sovereignty were expressed by

[57] Although the President of the Republic is (primarily) the head of state, a peculiarity of the Czech constitutional system is a number of his executive powers. Upon the proposal of the Minister of Justice, the Minister appoints judges of all types of courts, and with the consent of the Senate, further judges of the Constitutional Court, and, quite independently, the presidents and vice-presidents of all supreme courts, as well as the governor and members of the Bank Board of the Czech National Bank. In categorising the Czech "form of government" in this way, the author does not categorise it as *semi-presidential* or similar "mutations".

[58] The Czech constitutional law clearly follows the original Austrian Municipalities Act (from 1862!), which also established this concept in terms of terminology.

[59] A body of the type of "supreme council of the judiciary" has not been established and is not even politically considered, cf. the author's detailed explanation in the chapter "Comparison of the status of supreme councils of the judiciary in selected EU countries", in: KLÍMA, K. *O právu ústavním.* pp. 103 ff.

the Constitutional Court of the Czech Republic in the decision called *"Sugar Quotas"* (from 2005), where on the one hand it expressed loyalty to the EU system of power as a supra-state system, recognizing its superiority over Czech legislation. At the same time, however, he put forward a version of a "conditional transfer of competences" (meaning state authorities) to the EU institutions, with the proviso that in the event of intensification of integration in the future, the Czech Republic's state sovereignty must not be "vacated". Thus, the Constitutional Court not only expressed the possibility of "blocking" the participation of the state in integration, but also indirectly expressed the possibility of withdrawal.

10. A GENERAL AUDIT AND, WHERE APPROPRIATE, CRITICAL EVALUATION OF THE CONSTITUTIONAL SYSTEMS OF THE NEW DEMOCRACIES

It is possible to start with some questions that could lead to answers to such possible problems as: why the constitutional situation in the countries studied here cannot be considered stable after 30 years, or – why political parties are not able to respect constitutional rules, or – what is the criterion that the constitutional institution has not proved itself and needs to be changed. In a way, the question arises whether the political instability caused by political clashes between rival parties and coalitions does not limit the constitutional rules to such an extent that it is possible to state certain latent dangers of degradation of constitutionality. And what would be even worse – such a degradation of constitutionalism where the political sphere is able to (perhaps deliberately) discard it altogether as a (supposedly) inefficient system.[60] A different danger then arises when electoral winners (and post-election hegemons) begin to tailor constitutional rules to their own ends.[61] Thus, it is necessary to state that in order to maintain the formal legal barrier of the rigidity of constitutional norms, as the difficulty of approving constitutional changes, political culture is faced with a rigidity that is ideological, autoregulatory and therefore legal.

In relation to the above, it is very often stated that the long-term development of German constitutionalism, i.e. the constitutional system of the Federal Republic of Germany, is a certain model of respect of political practice towards constitutional regulations. In this sense, it is a fact that must be taken into account that the FRG is a constitutional system that has been tested, refined and cultivated for more than 70 years. So is more than 30 years of life and development of constitutionalism of the so-called new democracies

[60] These indications were manifested, for example, in the Czech Republic after the autumn (2021) parliamentary elections in the formation of the new government of the Czech Republic, when the expansive arbitrariness of the President of the Czech Republic in his discretionary thinking before issuing the appointment decree to each minister threatened that the President would not respect the proposal of the new Prime Minister, for reasons where the proposed candidate did not meet the President's notions (of various kinds). In this way, there was also some political pressure to change the Constitution in the sense that the President "must" comply with the Prime Minister's proposals.

[61] This was very clearly demonstrated in the political turmoil in Poland, with constitutional implications, when the ruling PiS party took control of the situation to such an extent that constitutional changes politicised the appointment of judges of the Constitutional Court of the Republic of Poland, as well as the composition and functioning of the Provincial Judicial Council, and thus, together with other interventions, significantly modified the constitutional principle of the independence of the judiciary.

insufficient time to stabilize constitutionalism? Or, is it to be reckoned that the constitutional situation is susceptible to constitutional flexibility from the outset, as a normal, deliberate and even expected state of affairs?[62] Political practice may thus have become quite accustomed to purposeful constitutional amendments. Surely this is also the danger of actual (real) constitutionalism becoming so at odds with the written principles of the constitution that the public perceives constitutional norms as more of a fiction.

The development of the constitutionally based controllability of constitutional institutions is an undoubted developmental construct of the new constitutional democracies. A particular result of this development has been the inspiration of Western democracies in sense that so-called independent constitutional bodies have been inserted into the constitutional systems of these states, thus formally and de facto strengthening multiple functional control in constitutional systems, namely of a more or less *horizontal* constitutional type. And one can thus speak of a kind of 'fourth' power, as a power of *control,* referring of course to the control function of *ombudsmen* in particular (see above). Another of the classic constitutional systems of delegated application of so-called independent bodies are the bodies such as *courts of accountancy* (in the Czech Republic as the Supreme Audit Office) and the constitutional anchoring of *central banks.* In both cases, the purpose is the constitutional independence from the executive, the constitutional setting of government control, and the independence of the monetary and exchange rate functions, respectively.[63]

However, special attention should be paid to the so-called Supreme Councils of the Judiciary. Although bodies of this (quasi-constitutional) type can be discussed in the context of the installation of the concept of the so-called rule of law (see above), we prefer to include bodies of this nature in the discussion of bodies strengthening constitutional independence, in this case as an *a priori* principle (and *maxim*). The creative variety of the installation of bodies of this type, including the variability of their composition, the way they are constituted and, above all, their functions in relation to judicial systems, is very inspiring.[64] The absence of a body of this type in the Czech Republic is well known, where the decision-making superiority of the Minister of Justice is preserved, which greatly encourages his (their) *discretionary* subjectivism, especially in the appointment of judges to senior positions in the judicial system.[65]

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[62] The example of the Czech Republic in its concept of the so-called constitutional order under Article 112 of the Constitution of the Czech Republic, including the initial incompleteness of a number of constitutional institutions, the solution of which was already postponed "to the future" in December 1992.

[63] In case of the constitutional autonomy of the central bank, the main issue is the implementation of the guarantees of so-called price stability, where the variability of the government's economic policy (not on one side) and the central bank's attempts to guarantee some kind of price stability by means of exchange rates may come into controversy. A more detailed explanation of these mechanisms is, of course, beyond the constitutional law "space".

[64] The author thus refers to his analytical comparative study published in TLQ 3/2022 "Supreme Judicial Councils as a Guarantee of the Independence of Judicial Power and Their Role in the Appointment and Career Advancement of Judges", and dedicated to the international grant of the Metropolitan University in Prague, together with the University of Vilnius, dealing with the issue of "Selection of Judges" between 2020 and 2024, cf. In: *The Lawyer Quarterly* [online]. 2022 [2023-03-06]. Available at: <www.ilaw.cas.cz/tlq>.

[65] This is further reinforced by the similar "personal" dominance of the Minister of Justice (and his office) in relation to the system of organisation and activities of the public prosecution in the Czech Republic, the administration of the prison system, and the supervision of the otherwise autonomous system of advocacy, notary and bailiff services.

In the context of the above dilemmas, one more logical premise can be set out, namely as follows: if the world and the situation of life evolve, it is impossible to maintain the Constitution in its text from the time when it was established. Moreover, every constitution has its own "authors", it is both distinctive and payable to all sorts of people and things. But the example that first comes to mind, the life of the oldest and most valid constitution in the world, the U.S. Constitution (including its amendments), shows that it is possible to maintain the textual stability of the Constitution in any case, while relying on the U.S. Supreme Court to resolve the updating adaptation of the text to the needs of reality by interpretation and precedent in judicial incidents. The Constitutional Council of France also solved the deficit situation of the fundamental text of the French Constitution of 1958, when the constitutional text did not contain a regulation of human rights and freedoms, in a completely original interpretative way – by constitutionalising a number of previous constitutional and *quasi-constitutional* documents of French modern history (including the phenomenal Declaration of the Rights of Man and of the Citizen).[66] However, the experience of the constitutionalism of the Federal Republic of Germany shows that the "primordial" text of the constitution can be maintained (both politically and textually), relying on the self-effacing interpretive creativity of the Federal Constitutional Court (in Karlsruhe) and, of course, on the established and cultivated respect of the political sphere for the principle of the binding regulative character of the constitution in the face of possible political (especially post-election) turbulence in the country.[67]

II. CONCLUSION

More comparative conclusions could be drawn from the context of the whole article. However, if we base the premise (or key hypothesis) of the article on what the title of the article says, namely – can the new constitutional democracies be considered as a kind of *postmodernity*, a distinctive *innovation*, and even a potential constitutional *benefit* of this "wave" of a kind of constitutional globalization, the answer is almost unequivocal and certainly positive. The evaluation of more than thirty years of installation, development and functioning of "new" constitutional democracies testifies first of all to the fundamental (overall) humility of these systems towards classical constitutionalism. This, of course, concerns the substantial inspiration of the English, French, American (USA) and German (after the Second World War) constitutionalism. In doing so, the conceptual variability of these (new democratic) systems has completely enriched the comparative textual basis for evaluating precisely those peculiarities that potentially enrich constitutionalism. It can also be stated that constitutions and constitutional law have become a functional and functioning legal instrument in these countries, namely with emphasis on the fact that

[66] On this precisely in: GIBA, M. *Súdna kontrola ústavnosti vo Francúzku*. Bratislava: Wolters Kluwer, s.r.o. CR, 2017.

[67] During his internship of several months in 1991 at the Federal Constitutional Court in Karlsruhe, the author of the article listened to the opinion of the then judge Prof. P. Kirchhof (professor at the University of Heidelberg), to whom he was entrusted, to the effect that the (then) German experience with the stabilization of the constitutional system required a "multi-generational" life and development of the country, which in the opinion (here) of the author means at least about 40 years.

the constitution is the "fundamental law" (here the German inspiration). The constitution in the sense, the constitutional principles, as well as the text of the constitutional norms themselves, are the main source of law that must be implemented and, in particular, concretised by 'ordinary' laws. The constitutional norms and constitutional maxims then become the basis for their application in specific constitutional conflict situations and thus subject to interpretation by the constitutional courts.[68] In addition to this, it should be added that the mere "quantitative" increase in the number of constitutional courts in Europe as bodies of specialised judicial control of constitutionality is not only a comparative but also an effective contribution to this modern constitutional phenomenon.[69]

However, the previous decade also shows that a certain party-political instability of these systems is also capable of producing purposeful changes that are potentially capable of triggering initiatives to change constitutions, say, in a conceptually unjustified way. The problem also is the possible subjectivism of otherwise democratically occupied positions, where governance is based more on arbitrary reasoning than on professional and experiential charisma, or even on the idea of a kind of "revenge", let's say even historical-reminiscent connotations.[70] However, the "building" of the constitutional state also demonstrates that respect for this idea is very much threatened by both the little ability to fight the corruption of social life, the existing clientelism and undoubtedly also the judicial delays and therefore the problems of law enforcement.[71]

[68] Thus, before 1990, bodies for the specialised protection of constitutionality were active in Germany, Italy, France, Belgium, Austria, Spain, in the inter-war period also in Czechoslovakia, and in the post-war period also in Yugoslavia, and they were functionally linked in particular to the composite or autonomous statehood. After 1990, the systemic installation of constitutional courts is linked in particular to unitary statehood and the new extension of their subject-matter powers. The number of such courts is now close to two dozen, including a number of independent states of the former USSR or former Yugoslavia (but also former Czechoslovakia), with the exception of the Republic of Chile outside Europe.

[69] This in more details in: WITKOWSKI et al. *Prawo konstytucyjne*. Toruń: Dom Organizatora, 2015, pp. 19 and to 25. Also cf. in the author's annexed study "The Rule of Law and the Possible Limits of Creative Activity of the Constitutional Court", in: KLÍMA, K. *Ústavní právo srovnávací*. pp. 226 ff.

[70] It is evident in Poland, especially in 2021, in the political effort of the PiS party to legislate a reduction of retirement pensions for former top state officials of the Polish social period (as it is sarcastically called in Poland) *"under the Commune"*.

[71] A significant problem of the judiciary in the Czech Republic (and probably not only) is the disproportionate o-called protractedness of trials, often lasting more than a decade, and the system has not escaped several corruption scandals recently.