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From Marx to Montesquieu: Differences between Socialist and Liberal Constitutionalism

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[Abstract]

Socialist constitutions very much looked like their Western counterparts: a written document on the top of the legal hierarchy with state principles, rules on state organisation and basic rights. Despite the similar appearance, in content they were fundamentally different from liberal documents. The most important difference was the compulsory ideology and its guardian, the Communist Party (CP). Elections did not function to award a political choice but to legitimise the rule of the CP. The ideology required the subordination of the state and its law, including the constitution, under the tutelage of the CP. Formally relying on Rousseau, socialist constitutionalism rejected all checks and balances, advocating a 'socialist division of labour' among state organs. The hyper-centralised 'monolithic' state did not accept any separation of powers, neither horizontal nor vertical. Basic rights were interpreted as granted by the state and could be exercised only in a way the CP accepted.

When socialism ended, most states wanted to establish a liberal democracy, true human rights and freedoms, a market economy, and a rule of law. This required a shift from socialist to liberal constitutionalism. The most important change was the abolition of the compulsory ideology and the acceptance of political pluralism. This entailed a new quality of individual political rights and freedoms such as the liberty to form or join parties. The socialist state had to be decentralised by, inter alia, the introduction of a separation of powers and checks and balances, and by restoring local and other autonomy. Replacing a planned by a market economy required a new quality of individual economic and social rights as well as a re-definition of the economic role of the state. Finally, constitutional rights had to be re-defined as a true empowerment of the individual. These changes were essential for the creation of the rule of law.

[Keywords]

Constitutionalism, Socialist State Theory, Pluralist Democracy, Separation of Powers, Checks and Balances, Rule of Law, Market Economy, Human Rights and Freedoms.

I. Introduction

Formerly socialist countries have undergone considerable constitutional change in the last 35 years. They have gone "from Marx to Montesquieu", a process which raises numerous questions. Not all of these questions have been given a satisfying answer so far. Therefore, we still need to look at how socialist and liberal constitutionalism differs, and what the transition from the one constitutional culture to the other means for the states concerned on the long run.

At first sight, socialist constitutions looked quite similar to the classical constitutions of the Continental European type. They were a written document placed at the top of the hierarchy of norms, containing state principles, rules on the organisation of the public sphere and basic rights.[1] Despite their similarity in outer appearance, socialist and liberal constitutions are very different from each other in content.

The core difference is that liberal constitutions set the rules and outer limits of the political game but leave the contents of that game to the political arena. They accept and encourage political pluralism. Socialist constitutions, on the other hand, installed a compulsory ideology, in most states referred to as 'Marxism-Leninism', as well as its watchdog, the Communist Party (CP)[2]. The CP and its ideology enjoyed a rank above the state and its law, including the state's constitution, because the CP claimed to administer historical truths and necessities, whereas the state was only one of its tools to implement historical necessity. In this view, it is obvious that the tool (the state) cannot be superior to the end (the ideology).

The first and pivotal step to create a post-socialist, liberal constitutional order was the annulment of the monopoly of the state ideology and the dismantlement of the leading role of the CP. This was the first constitutional step from monism to pluralism (ch. 1).

It opened the avenue for further changes from socialist to liberal constitutionalism. The step from monism to pluralism was not limited to the negative measure of abolishing the Marxist-Leninist state ideology, but encompassed positive action designed to install a multi-party system and create the individual political rights necessary to operate party pluralism (ch. 2). The self-styled 'monolithic' socialist state had to be decentralised,

[1] We speak about the socialist constitutions in the past tense. It is true that some countries such as China, North Korea, or Laos continue to define themselves as socialist. However, their socialist constitutionalism was sui generis even before 1990. The 'classical', Soviet-type socialist constitutionalism is a matter of the past.

[2] In some countries, the state party did not call itself Communist but used some other self-definition, e.g. in Mongolia the Mongolian People's Revolutionary Party. In this paper, 'CP' refers to all state parties of socialist states irrespective of their exact name.

state powers had to be separated, and a system of checks and balances as well as integrity institutions such as constitutional courts had to be established. A vertical separation of powers was re-installed by granting the local authorities their traditional autonomy (ch. 3). A re-definition of the role of the state was required in the field of economy as well. Post-socialist states wanted to develop from a planned to a market economy, which has certain constitutional implications (ch. 4).

A liberal system centres neither on the state nor on an ideology, but on the individuals and their freedom. On a constitutional level, this meant for formerly socialist states that the basic rights and their underlying doctrine had to change radically (ch. 5). The most important instrument of a liberal system to ensure individual freedom is the law, more precisely: the rule of law, designed to eradicate arbitrariness. Whereas socialist systems depreciated the law to a point that some scholars spoke of 'legal nihilism' (Luchterhandt 2021; Tumanov 1989), a liberal system has to endow the law with a high value and prestige so that it can play its role in safeguarding individual freedoms (ch. 6).

Finally, given all this change in the very basic assumptions of constitution, constitutionalism and constitutional culture: are there continuities between socialist and post-socialist constitutions? Is there still some Marx in the present-day Montesquieu (ch. 7)?

II. From monism to pluralism: the end of the compulsory ideology

The central feature of socialist statehood, as well as socialist constitutionalism, was the dominance of one monopolistic ideology: Marxism-Leninism, sometimes in local variants. This ideology was compulsory not only in the public sphere but in all fields of life, including private life. Some socialist constitutions mentioned Marxism-Leninism as the basic and all-encompassing ideology of the country, e.g. Article 6(2) Soviet Constitution (1977, the so-called 'Brezhnev Constitution'), Article 1(1) Constitution GDR (1968/1974) or Article 3(2) Albanian Constitution (1976). In socialist doctrine, the Marxist-Leninist ideology was based on historical necessities, and the CP executed these necessities. The state, its law and its constitution were just one tool in the hands of the CP. For this reason, Marxism-Leninism and the CP had a higher rank than the state and its institutions. The ideology defined the ends and purposes. In this line of thought, the ideology and its executive organ, the CP, necessarily were superior to their mere tool, the state. Insofar, the state and its constitution had to comply with Marxism-Leninism and the political plans of the CP, not vice versa. Article 6(3) Soviet Constitution (1977) seems to suggest otherwise, but in practice, the priority of the CP over the state was never

questioned.

One of the first constitutional measures during the change of system was to delete the ideology clauses in the otherwise still socialist constitutions. As a mere deletion, this step was negative: it abolished the old but did not create anything new in itself. It terminated the compulsory role of Marxism-Leninism. This restored the 'sovereignty of the constitution'. In a liberal rule-of-law system, the law is the supreme guideline for all relevant behaviour, and the constitution is the supreme layer of the law. (We will not discuss here whether international law has a higher rank than domestic constitutional law.) This is why we can speak of the 'sovereignty of the constitution' with respect to liberal systems. In socialism, Marxism-Leninism and the CP were supreme; in a liberal system, the law and especially its top layer, the constitution, are supreme.

The restoration of the 'sovereignty of the constitution' was a very important first step from Marx to Montesquieu. Whereas the CP set the rules for the state in socialism, in the new liberal systems it is the state and its law that set the rules for the political parties (in plural!) and their ideologies. The priority of the law over the political parties is set out quite clearly in Article 16(10)2 of the Mongolian Constitution of 1992.

III. From monism to pluralism: acceptance of a multi-party system and individual political rights and freedoms

The step from political monism to pluralism included another aspect. In socialist constitutions, the CP enjoyed a monopoly for the political activities in the country, as was set out, e.g., in Article 6 Soviet Constitution (1977) or the Preamble and Article 82(2) Mongolian Constitution (1960). The constitutional amendments which deleted Marxism-Leninism (mentioned in ch. 1) at the same time repealed the so-called party clauses[3]. This created, in principle, the room for new parties and a multi-party system to emerge.

However, after several decades of a one-party state, it is not enough to terminate the old political monism. Next to this negative step, positive action is required to create political pluralism. On a constitutional level, it is helpful to enshrine the principle of a multi-party democracy among the state principles, as happened in Article 11(1) Bulgarian Constitution (1991), Article 5 Czech Constitution (1993) or Article 13(1)–(3) Russian Constitution (1993)[4]. The principle of political pluralism and a multi-party

[3] This took place before the liberal constitutions were enacted. In Mongolia, e.g., the party clause fell in March 1990: Sanders (1992), p. 510.

[4] Russia is not a liberal democracy, but its constitution, especially the original version of 1993, is a text of liberal constitutionalism. Later amendments, especially those of 2020, reinforced neo-imperial and authoritarian traits: Küpper (2022); Partlett (2024); Partlett/

democracy, if set out expressly in the constitutional text, makes it clear that the old structures are over, and may invite citizens to become active in a variety of political contexts[5].

An additional guarantee is to concentrate the decision about the unconstitutionality of a political party in the constitutional court, as Article 149(1) no. 5 Bulgarian Constitution (1991) or Article 21(4) German Constitution (1949) do. The concentration of the prohibition of a political party in the highest judicial authority prevents conflicting decisions[6] and helps to ensure high professional standards in such decisions.

Objective principles and rules alone are not enough. A liberal constitution must enshrine the individual right to found, join and leave a political party, too. Obviously, socialist constitutions did not grant such a right. If they mentioned a right to political activities at all, they limited it to petitions and participation in the public administration (e.g. Article 85 Mongolian Constitution (1960) or Articles 48–49 Soviet Constitution (1977)). In contrast, liberal constitutions contain the basic right to political organisation in parties and, eventually, other forms of association, as Article 16(10) Mongolian Constitution (1992) or Article 29(1) Greek Constitution (1975), less explicit Articles 13 and 30 Russian Constitution (1993) do. In such a system, citizens can enforce their basic right to form or join a political party just like any other constitutional right, which contributes to creating a pluralist party system.

The rules on active and passive voting rights in the more mature socialist constitutions usually corresponded, on a formal level, with the requirements of liberal constitutionalism: free, equal, universal suffrage with secret and direct ballot. In this field, the constitutional rules required only minor adjustments. In some countries, the pertinent electoral laws had to be adapted because they were based on the monopoly of the CP or socialist organisations and did not allow a free competition of a plurality of political parties.

Sub-constitutional legislation is important not only on elections, but also on the freedom to found and join parties. In Russia, e.g., the Constitution guarantees these rights, but the law sets very high, i.e. prohibitive thresholds to the foundation of new parties[7]. As a consequence,

Küpper (2022), pp. 36-60; Wedde (2020). Nevertheless, the old parts of the text may be quoted to illustrate liberal constitutionalism in a post-socialist context even if they lack practice.

5 Russian Constitutional Court, decision no. 18-P of December 15, 2004. See also Wieser in Wieser, 2014, Article 13 nos. 1–4.

6 This is, however, no safeguard against a constitutional court decision being conflicting in itself, as the decision of the Russian Constitutional Court no. 9-P of November 30, 1992, on the unconstitutionality of the Russian CP illustrates quite clearly.

7 Federal Law of July 11, 2001, on political parties; the restrictive law is accepted by

it is practically impossible to found a new party in Russia without the permission of the government which, obviously, is contrary to the basic idea of a multi-party competitive democracy.

IV. From the 'monolithic state' to checks and balances and a separation of powers

In socialist systems, all state power was concentrated in a uniform, highly centralised apparatus which often was addressed as the 'monolithic' state power. The adjective 'monolithic' meant that there were no autonomous sections outside the general power structures, and that all state organs were united in one centralised structure which had, in theory, the supreme Soviet – in Mongolia the Supreme People's Khural – at its top. This concentration of power used Rousseau as a fig-leaf because that philosopher had interpreted democracy as the realisation by the state of what he called the 'volonté générale'. All state organs, with the people's representation at the top, were obliged to further that 'volonté générale' and therefore were not organised in separate power branches. The socialist rulers replaced the 'volonté générale' with Marxism-Leninism but upheld Rousseau's idea that the state organs should co-operate in a sort of division of labour but not control each other. The supremacy of the people's representations, the Soviets, was formally upheld. At the same time, Soviets on all levels were weakened by the rarity of their sessions, as was set out, e.g., in Article 25(1) Mongolian Constitution (1960). In practice, the socialist state was dominated by the executive, with top party and state positions being in the same hands. The socialist constitutions expressed this special idea of monolithic hyper-centralisation with the term of 'democratic centralism', as in Article 5(1) Mongolian Constitution (1960) or, in more detail, Article 3 Soviet Constitution (1977).

The prevailing opinion in Western political theory is that Rousseau is not undemocratic per se but that his idea of a 'volonté générale' is prone to abuse (Oppelt 2017), as the socialist systems illustrate quite vividly. For this reason, it is not Rousseau with his centralistic 'volonté générale' but Montesquieu with his decentralised separation of powers who has made it to be the yardstick of modern liberal and democratic constitutionalism. For a post-socialist state, this means that the democratic centralism with the formal supremacy of the supreme Soviet and the factual preponderance of the executive, and with its so-called 'division of labour between the state organs' had to be replaced by the organisation of the state organs in three independent state powers. This required several measures.

the Russian Constitutional Court, decision no. 1-P of February 1, 2005, but criticised by the European Court of Human Rights in the decision 12976/07 of April 12, 2011 (Republican Party of Russia v. Russian Federation).

IV.1. The classical power branches

In the legislative power, Parliament has to become a true decision-maker which requires that it sit in permanence, as Article 27(2) Mongolian Constitution (1992) guarantees. The Parliament is the arena of the various political parties and thus the centrepiece of political pluralism. As such, it is the law-maker, it elects certain state officials such as, e.g., the head of state, the members of the constitutional court, or the ombudspersons, and it controls the executive. The latter function rests largely with the opposition. The essence of a liberal parliament is the free mandate. Every M.P. represents the entire people, cannot be revoked by the voters and decides, in theory, freely on the basis of their conscience. Where socialist constitutions set out an imperative mandate, i.e. the (theoretical) possibility for the voters to revoke their representative (e.g. Articles 134(2), 142 Yugoslav Constitution (1974)), this had to be changed into the free mandate that a liberal constitution requires (e.g. Article 23(1) Mongolian Constitution (1992)).

Whether the executive power is independent from, or interdependent with, Parliament is a question of the governmental system. In presidentialism, the government answers to the President, but not to Parliament; in a parliamentary system, the government depends on its majority in Parliament. In hybrid systems, both Parliament and President take part in creating and dismissing the government. The Mongolian government is accountable to Parliament (Article 41(2) Constitution (1992)). Parliament may dismiss an incumbent government (Articles 43(4), 44 Constitution (1992)). Thus, the government and the majority in Parliament are of the same political colour and therefore co-operate closely. This intertwining is the usual form that the separation of powers adopts in all parliamentary and some hybrid systems.

The judicial power is required to be totally separate from the other two powers because one of its tasks is to control the legality of state activities. The rule of law demands that courts decide on the basis of the law, free from political influence and considerations. Its institutional guarantees encompass, inter alia, life tenure and the strict separation of the judicial branch from all other state power. However, a certain interdependence exists in the nomination process of judges which usually involves other state organs in one form or the other. Many post-socialist countries try to reduce this interdependence by installing a Judicial Council (e.g. Article 49(3)–(5) Mongolian Constitution (1992)). Ideally, the majority of the members of these judicial councils are elected by the judiciary, and the councils take part in decisions on judicial appointments and promotions. As a result, the judiciary gains a strong influence on its own personnel. This co-optation

may reduce government influence but creates problems of its own, such as the loss of the individual judge's freedom vis-à-vis all-powerful court presidents (Venice Commission 2008; Küpper 2003). In reality, the most important problem of the judicial branch in most post-socialist countries is not so much the outer setting of the courts and the judges but the judges' lack of inner independence, of an appropriate judicial ethos which makes them independent from political and other expectations. Creating a judge with inner independence is a task for generations (Küpper 2024; Uzelac 2010).

In sum, the post-socialist constitution-maker had to reform and re-define all three state powers. They had existed in socialism, but not in a form compatible with a liberal democracy or the rule of law. Since the relevant state organs such as a Parliament, a government, or courts had existed in socialist constitutionalism, the way "from Marx to Montesquieu" is very much a path where the small details matter.

IV.2. New state organs outside the classical power branches

In the field of the separation of powers, the creation of a liberal constitution did not only require a re-definition of the pre-existing classical state organs. It also meant the creation of entirely new constitutional players, most of them control and integrity organs.

One example is the head of state. Most socialist states had not possessed a head of state in the strict sense[8]. They created this office after the end of socialism. Depending on the governmental system, the head of state was installed as a part of the executive power (e.g. Articles 54–66 Czech Constitution (1993), Article 10(2) Polish Constitution (1997)) or as a neutral institution outside or, more precisely, above the classical power branches (e.g. §§ 77, 86 Estonian Constitution (1992), Article 9(1) Hungarian Constitution (2011)).

Another typical feature of a liberal constitution are independent integrity and control institutions that did not exist in socialism and therefore had to be established from zero. Most post-socialist countries installed a constitutional court as the supreme watchdog of the constitution, sometimes within the judicial system (Articles 83–89 Czech Constitution (1993), Article 125 Russian Constitution (1993)), sometimes as an institution of its own, outside the traditional power branches (Articles 64–67 Mongolian Constitution (1992), Articles 142-147 Romanian Constitution (1991)). A constitutional court is not a necessary institution in modern liberal constitutionalism. Especially old democracies with a long-established

[8] In most states, the presidency of the supreme Soviet was at the time a collective head of state, as in Mongolia the Presidium of the Grand Khural (Articles 33–36 Constitution (1960)).

tradition of the rule of law do not have such a court but rely on political rather than judicial control. Among these states are the United Kingdom, the Netherlands, Switzerland, most Scandinavian countries and, slightly differently, France. Therefore, a modern liberal state can exist without a constitutional court. If, however, a post-socialist country decides to install a constitutional court, this court needs to be truly independent and needs to have substantial powers of control. Where the government punishes the constitutional court for individual judgements that the government did not like, like in Bulgaria in the early 1990s (Schrameyer 1993) or in Hungary since 2010, the rule of law suffers considerably. Therefore, the former President of the Hungarian Constitutional Court qualified the ongoing curtailment of the powers of the Hungarian court as "an incurable wound in the Constitution" (Sólyom 2011, p. 13–14).

Other examples of integrity institutions endowed with the constitutional guarantee of independence are ombudspersons (e.g. Article 58 Romanian Constitution (1991), Article 103(1)(e) Russian Constitution (1993)), Courts of Audit (e.g. Articles 202-207 Polish Constitution (1997), Article 101(5) Russian Constitution (1993)), independent national banks (e.g. Article 227 Polish Constitution (1997), Article 75(1)–(2) Russian Constitution (1993)), independent election authorities or broadcasting supervision boards (e.g. Chapter XII Kosovo Constitution (2008): "Independent Institutions"[9]).

In some cases, the end of socialism permitted states to revive traditional institutions which the Soviet rule had abolished. Examples are the Grand National Assembly in Bulgaria (Articles 157–163 Constitution (1991)), the Chancellor of Justice in Estonia (§§ 139–145 Constitution (1992)), or the Legislative Council in Romania (Article 79 Constitution (1991)).

All these institutions defy the classical trinity of state powers and are placed outside their system. Insofar, every post-socialist state had to, and did, find its own answers to the question where to place these new institutions in the constitutional structures. Thus, the "way from Marx to Montesquieu" did not only lead to the introduction of true checks and balances between the classical power branches but also to a greater diversity between the institutional settings in the constitutions of the formerly socialist world.

V. From a planned economy to a market economy

Socialist economies were to a large extent planned economies, as was set out, e.g., in Articles 8 and 15–17 Mongolian Constitution (1960). In their transition "from Marx to Montesquieu", the post-socialist states wanted to

[9] This chapter contains the specific rules concerning the Ombudsperson, the Auditor General, the Central Election Commission, the Central Bank, the Independent Media Board as well as the general rules on independent agencies.

replace the planned by a market economy. Liberal constitutionalism does not favour one certain economic system as such but its stress on individual rights is better compatible with a market-based than with a state-organised economy.

On a constitutional level, the abolition of the rules on state planning created the space for a market to evolve. Only few post-socialist constitutions prescribe a market economy (e.g. Article 11(1) Albanian Constitution (1998); Article 20 Polish Constitution (1997); Article 55(1) Slovak Constitution (1992)) whereas most constitutions in the post-socialist world are silent about the economic system, giving the government and the law-maker a wide discretion in their economic politics. A good example is Article 6 Mongolian Constitution (1992).

A country's economic system is shaped not only by 'economic system'-clauses. Many constitutional provisions have an influence on the economy. On the one hand, there are economy-related basic rights, e.g. in connection with property, labour, or interest representation. Many constitutions contain certain objective state goals many of which have an economic effect. Finally, certain integrity institutions mentioned above are important for the functioning of the market, e.g. independent courts, national banks or courts of audit.

V.1. Basic rights

In the field of basic rights, the property-related constitutional texts had to be rewritten entirely. The privileges for state and organisational property had to be replaced with a uniform property the status of which does not depend on the proprietor. Good examples of the re-definition of property on a constitutional level can be found in Article 6(1)–(2) Mongolian Constitution (1992) or Articles 8(2) and 9(2) Russian Constitution (1993). Such clauses are important for the transition from the socialist into a liberal property system because they set out very clearly the new structures. Their main importance lies in the time of transition, and they will lose much of their function when the liberal property system takes deeper roots in the population. Furthermore, the classical basic individual freedom of property had to be written into the new post-socialist institutions, as happened, e.g., in Article 16(3) Mongolian Constitution (1992). Some texts such as Article 16(8)2 Mongolian Constitution (1992) have special provisions on the guarantees of intellectual property.

At the same time, property is an essential means to influence social and economic relations. Many states therefore do not only guarantee the freedom of property but also enshrine in their constitutions the social responsibility that goes with the property. The classical example is Article

14(2)1 German Constitution (1949) which reads: "Property obliges." This simple phrase was adopted by, e.g., Article XIII.(1)2 Hungarian Constitution (2011). Mongolia chose a different way to anchor the social responsibility of property in its post-socialist constitution, a way adapted to Mongolia's special situation of a pasture economy. The pertinent constitutional text encompasses state protection of the livestock in Article 5(5), state property of land and water resources and the special status of pasture resources in Article 6(1)–(3) or the land owner's responsibility in Article 6(4).

In the field of labour, socialist constitutions guaranteed everybody a workplace. This is a promise that a liberal constitution cannot keep. Therefore, the right to work had to be re-written into the freedom to chose one's work. This liberal freedom includes the negative freedom not to work which is a breach with the socialist duty to work. Both the positive and negative freedom to work is expressed in Article 16(4) Mongolian Constitution (1992). On the other hand, Article 17(2) Mongolian Constitution (1992) sets out a "sacred duty for every citizen to work" which is in contrast to the negative freedom in Article 16(4)2 (Sanders (1992), p. 516).

Not all post-socialist states managed to take this step. Some constitutions preserved the socialist-style right to work (e.g. Article 48(1)1 Bulgarian Constitution (1991), Article 41(1)1 Romanian Constitution (1991), Article 60(1) Serbian Constitution (2006)). After several decades of socialism, the expectations of the populations did not allow to cancel it. Of course, these states, too, have unemployment. Their constitutional practice[10] re-interprets the right to work into a right to social protection in case of unemployment, alongside with an objective state duty to achieve the highest possible employment.

Another important economy-related basic right is the freedom to create professional and similar associations and interest representations (e.g. Article 16(10) Mongolian Constitution (1992), Article 30(1) Russian Constitution (1993)). Socialist trade unions were not based on the workers' free will and did not act as their interest representations but were a part of the political system designed to transport the CP's will into the work-places, even if some constitutions like Article 82(1) Mongolian Constitution (1960) pretended that trade unions were a product of the exercise of a basic right. In order to create a liberal system, true freedom must be given to both the employers and the workforce to organise freely and create their respective institutions to represent their interests. Since trade unions existed in socialism but play a completely different role in liberal constitutionalism, it is helpful if the pertinent constitutional text

[10] In Slovakia, the constitutional text itself gives this re-interpretation in Article 35(3) Slovak Constitution (1992).

stresses the essence of the new role of interest representation, as in Article 16(10)1 Mongolian Constitution (1992) or even more explicitly in Article 43 Croatian Constitution (1991).

V.2. Objective state goals

Most liberal constitutions are not limited to set out the rules of the political game but do contain some values and political objectives. These are in some cases laid down in the constitutional text as objective state goals. Some of the objective state goals refer to, or have an effect on, the economy. This is true for post-socialist liberal constitutions as well.

The Mongolian Constitution (1992) enumerates a number of economy-related objective state goals, e.g. national economic security and a balanced economic and social development (Article 5(4)), the protection of the livestock as one of the backbones of Mongolian economy (Article 5(5)), state policy towards private ownership of land (Article 6(3)–(5))[11], or the state's responsibility for certain economic and social provisions (Article 19(1)). The fact that a larger number of these provisions concentrate on the land, its ownership and its use is a Mongolian speciality and reacts to the particularities of nomad pasture economy. Other post-socialist objective state goals with view to the economy encompass, inter alia, the social state bearing responsibility for the social well-being of its citizens (Article 7 Russian Constitution (1993)), the state's obligation to create an appropriate standard of living for the citizens (Article 47 Romanian Constitution (1991)), the single economic space on the entire state territory (Article 8 Russian Constitution (1993), Article 82(2) Serbian Constitution (2006)), the state's tasks to preserve a healthy environment (Article 59(1) (d) Albanian Constitution (1998)) or to protect the economic competition and rights of the consumers (Article M)(2) Hungarian Constitution (2011)).

The effect of objective goals on the economy is rather indirect. They may create direct obligations for the state, but these cannot usually be enforced. In practice, the state furthers the objective state goals by enacting laws and executing policies to that effect. As a constitutional framework, state goals form an outer limit for legislation because the laws on, e.g., land ownership, social security, or consumer protection have to conform to the pertinent constitutional clauses which, however, grant the legislator a wide margin of appreciation. Where the constitutional court has the power to establish unconstitutionality not only of enacted laws, but also with view to the lack of the laws the constitution prescribes, it may use objective state goals as the constitutional source of the state's duty to enact laws of a certain standard. The Hungarian Constitutional Court held on

[11] Under a doctrinal point of view, Article 6(3)–(5) is a mixture of subjective rights and objective state goals.

several occasions that the laws on land purchase fell short of the objective constitutional protection of the soil in Article P) Constitution (2011) and called upon the legislator to fill this unconstitutional lacuna within a given deadline[12].

Socialist constitutions contained extensive text on economic goals and the role of the state in the economy (Articles 8–17 Mongolian Constitution (1960); Articles 10–18 Soviet Constitution (1977)). In contrast to these socialist norms which set out a comprehensive compulsory economic and social organisation, liberal constitutions elevate some public interests onto a constitutional level where they can interact, e.g., with the human rights. In some cases, objective state goals and human rights reinforce each other, e.g. in the field of social protection. In other cases, they may limit each other, e.g. in the field of land property or in fair competition (e.g. Article 34(2) Russian Constitution (1993)). Whereas 'Marx' made the ideological ideas of a proper economic system compulsory, 'Montesquieu' identifies certain issues and gives them constitutional protection, leaving the details to the law-maker and government of the day.

V.3. State institutions

Post-socialist countries have wanted to install a market economy. Classical economic theory teaches that the market does not arise by itself but is an institution that can only be created and upheld if the state provides for an adequate regulatory framework, including adequate institutions. Post-socialist constitution-makers therefore had to create the institutions necessary to keep a market economy going.

One very important factor are functioning courts. They are needed to enforce individual rights among market participants. As laid out in ch. 3.1, court systems continue to be highly dysfunctional in most post-socialist countries. This is not only a grave flaw in the rule of law (see ch. 6) but also a considerable burden for the market economy.

Other institutions necessary for, or favourable of, the markets are an independent national bank, a court of audit, a competition authority, etc. These institutions may be included in the constitution (see ch. 3.2) but this is not compulsory. The Mongolian Constitution (1992) does not mention these institutions, yet they exist and are regulated by law, e.g. the Law on the Central Bank (Bank of Mongolia) (1996). Their practical functioning is more important than a constitutional status. However, since all these institutions contribute to functioning markets only if they are independent from the government and their economic policies, it may be advisable

[12] Decisions of the Hungarian Constitutional Court 27/2017. (X. 25.) AB and 28/2017. (X. 25.) AB, both of October 25, 2017.

to enshrine their autonomy in the constitution. Thus, the government of the day and the law-making simple majority cannot interfere with that autonomy.

VI. From state-granted basic (civic) rights to inherent human rights

Most socialist constitutions contained a chapter on basic rights. Many of them were, on the surface, similar to liberal human rights. In some cases, however, the ideology either did not accept certain basic rights such as the right to form political parties (ch. 2), or required considerable modifications compared to the liberal right, e.g. in the case of property rights (ch. 4.1). Many other classical liberal rights could be found in socialist constitutions, too. Apart from these, socialist constitutions enumerated a vast number of social rights, e.g. the rights to work, certain social standards at the work place (e.g. paid vacations), housing, education, health care and, in later years, a healthy environment.

In liberal constitutionalism, individual rights are a corner-stone of the system. What did this mean for the transition from socialist to liberal constitutionalism? Was it enough to just keep the socialist catalogues of basic rights and add or adapt those few rights that socialist constitutions had denied or regulated in a non-liberal way?

First of all, the socialist and the liberal idea of basic rights are diametrically different. Socialist constitutions saw basic rights as a concession that the state granted to the individual and therefore could take away from the individual at any time. Furthermore, their exercise was permitted only in harmony with the Marxist-Leninist ideology, i.e. only if it pleased the CP (Jakab/Hollán (2005), pp. 25-28; Küpper (2005), pp. 440-444). Liberal constitutionalism, in contrast, holds that these rights do not stem from the state but are inherent to every human being. Therefore, liberal constitutions call them “human rights” and qualify them as inherent or innate (e.g. Article 15(1) Albanian Constitution (1998), Article 17(2) Russian Constitution (1993)) which means that the state cannot take them away but is bound to respect them at all time, even and especially when their exercise does not please the government.

Second, socialist basic rights were of a programmatic and propagandistic nature but could not be enforced by their bearers. They were paternalistic in the sense that their realisation was not pursued by the individual but by the state. The classical wording of socialist basic rights can be found in Article 87 Mongolian Constitution (1960): section 1 sets out certain rights in the parlance of individual rights, but section 2, speaking of “material guarantees”, transfers the initiative to exercise these

rights into the hands of the state. Thus, individuals could exercise their basic rights only under the tutelage of the state and its organs, which is a classical example of state paternalism. Liberal constitutionalism, however, sees human rights as the empowerment of the individual. The bearer of the rights decides whether or not and if so, when, how and to which extent to exercise them. In terms of constitution-making from Marx to Montesquieu, it sometimes sufficed to abolish section 2 of the socialist texts. The paternalistic "guarantees" were deleted, and the pure liberal freedom in section 1 could unfold its effect. In other cases, socialist basic rights had to be re-worded into liberal human rights in order to eradicate socialist paternalism and create individual empowerment. This required a wording that enabled the individual to enforce these rights in courts including constitutional courts. Where the post-socialist constitution continued the socialist wording, even a liberal constitutional court risked interpreting the basic right in a paternalistic way[13].

VII. From 'legal nihilism' to the rule of law

It has been a matter of debate whether legal nihilism constituted a feature of socialist legal systems (see Introduction). Even if we do not accept the verdict of legal nihilism, it is safe to say that the role of socialist law was merely instrumental and law was not attributed a value of its own. This held even more for constitutions which were not even law but mere propaganda (Küpper (2005), pp. 429-432).

In stark contrast, Montesquieu-based liberal systems attribute to the law a central role in their concept: they rely on the rule of law. Socialism which embraced at least verbally concepts like democracy or basic rights, fundamentally rejected the idea of the rule of law. Therefore, a post-socialist constitution can express the breach with the socialist system by defining the new order as a rule of law, as the Mongolian Constitution (1992) does in Article 1(2), and as all other post-socialist constitutions do.

However, it is not enough to write the words "rule of law" into the constitution. The rule of law is not a status once achieved, but an every-day process to which all public power must contribute continually. In this sense, it is a continuous goal rather than a status or momentary situation. On a constitutional level, this requires several elements. As a basic foundation of the rule of law, some post-socialist constitutions contain express text on the normativity of the law in general (e.g. Articles 7, 87

[13] Hungarian Constitutional Court, decision 54/2004. (XII. 13.) AB of December 13, 2004: The state's responsibility to protect and promote the individual's right to health authorised and even obliged the state to punish unhealthy behaviour of the self-same individual. What seems to be a right is converted into a duty – even more so: a duty the violation of which ensues criminal responsibility of the bearer of the 'right'.

Polish Constitution (1997)) or the constitution as the supreme layer of the legal system (e.g. Article 8(1) Polish Constitution (1997), Article 15(1)1 Russian Constitution (1993), Article 194(2) Serbian Constitution (2006)). Such text is important before the background of the socialist past with its depreciation of the law.

Many other elements of liberal constitutionalism, which were discussed above, help form or uphold the rule of law. Core elements are the separation of powers and its checks and balances (ch. 3), the binding nature of the law for all activities of the public sphere, and enforceable individual rights (ch. 5) protected by independent courts (ch. 3.1). As was pointed out before, the dysfunctionality of the courts is a heavy burden in many post-socialist countries.

On the way from Marx to Montesquieu, laying the foundations of the rule of law is probably the most demanding task for the constitution-maker. The difference between socialist and liberal constitutionalism becomes most obvious in the rule of law. The rule of law influences many different parts of the constitution. This is well expressed by Article 3(2) of the Serbian Constitution (2006) which says: "The rule of law is realised by free and immediate elections, by the constitutional guarantees of human and minority rights, by the separation of powers, by an independent judicial power and by subjecting public power to the Constitution and the laws".

The constitutional foundations of the rule of law are, however, not enough. The cultural precondition of a functioning rule of law is a high prestige of, and deep respect for, the law which is seen not as an instrument of those in power but as a common good designed to achieve justice. In Western Europe, a long development has created such a cultural role of the law. In other parts of the world, we find other traditions. In Orthodox Eastern Europe or Confucian East Asia, the law tends to be seen as a tool of the state power but not as an embodiment of justice. It is difficult to establish a rule of law in such a cultural environment. Constitutional change needs to be accompanied by a re-definition of the role of the law and its societal acceptance.

VIII. Continuities?

Socialism lasted several decades. In Mongolia, e.g., the first socialist constitution was enacted in 1924. These decades of socialist constitutionalism have created traditions, have formed mentalities and the opinion of what is 'normal' in a constitution. Therefore, it is natural that post-socialist constitutions, despite the political wish to create liberal constitutionalism, continue to contain elements of socialist constitutionalism. This is especially true for parts of socialist constitutional

culture where the ideological content is not obvious.

Does, e.g., Mongolia preserve some elements of socialist constitutionalism in its essentially liberal Constitution of 1992?

On a textual basis, Article 19(1) may be read in the light of socialist paternalism rather than liberal empowerment. Depending on the exact interpretation of that clause, Article 19(1) may be understood either as an authorisation for the state to impose its idea of the realisation of a given human right on its bearer (socialist), or as a state task the fulfilment of which is a democratic duty, and the decision-makers in the state answer in the general elections to the people for how they enabled individuals to make use of their rights (liberal).

The "sacred duty for every citizen to work" is another continuity of socialist constitutional thinking (Article 89(a) Constitution (1960) – Article 17(2) Constitution (1992)). This expression of the manipulative socialist work ethos is alien to liberal constitutionalism and conflicts with the freedom of labour in Article 16(4) Constitution (1992) (ch. 4.1).

The clause that Parliament is "the highest organ of state power" (e.g. Article 18 Mongolian Constitution (1960) – Article 20 Mongolian Constitution (1992)) is a typical socialist survivor in post-socialist constitutions (Küpper 2007). The idea of one supreme organ, this being the organ that represents the people, is rooted in Rousseau (ch. 3) but is alien to Montesquieu. In Montesquieu's separation of power, the legislative, executive, and judicial branches each have their powers and control each other. It is true that Parliament has the highest degree of democratic legitimacy and that its laws bind upon the other power branches, but in Montesquieu's system this does not make it "supreme". The very idea of checks and balances is alien to declaring one organ "supreme".

There are, of course, more continuities between the Mongolian constitutions of 1960 and 1992. These do not affect the transition from Marx to Montesquieu but relate to Mongolian specifics. Examples are the basic structure of territorial administration (Article 46 (1960) – Article 57(1) (1992); Narangerel (2005), p. 42), a monocameral parliament (Article 21 (1960) – Article 21(1) (1992)) or the capital city (Article 92 (1960) – Article 13(1)2 (1992)).

IX. Conclusion

In constitution-making, the "way from Marx to Montesquieu" is not an easy one. We can differentiate between three different strategies:

– Socialist constitutional institutions that have no role in liberal constitutionalism are abolished. Examples are the monopoly of Marxism-

Leninism and of the CP.

– Existing socialist constitutional institutions have to be re-interpreted and converted from socialist into liberal ones. Examples are basic resp. human rights, democracy, Parliament, government, or the courts.

– New liberal institutions have to be created. This sometimes requires the abolition of parallel socialist institutions. In other cases, the new liberal institutions are created from zero because socialist constitutions had nothing similar. Examples are the rule of law, the separation of powers, constitutional courts, local autonomy, objective state goals, or the market economy.

It is obvious that the second strategy to reform and re-interpret pre-existing socialist institutions is the more dangerous one. Here, there is a grave danger that elements of socialist constitutionalism are continued, either consciously or unconsciously. In Mongolia, this happened with respect to the state's role in the realisation of human rights (Article 19(1)) or the supreme position of the Parliament (Article 20). Apart from that, the change from Marx to Montesquieu, with respect for Mongolian specifics, has worked out quite well. The principal task of the present decision-makers in Mongolia is to create and uphold a living liberal constitutionalism based on the liberal text of the Constitution. Given the many decades of socialist rule in Mongolia, the strongest obstacle against a liberal constitutional and legal order are old ideas lingering in peoples' heads. It may be a question of generations to overcome this socialist legacy.

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