

-THE MAKING OF MODERN CONSTITUTIONS- Constitutions and Constitutionalism in the Cradle of Constitutional History

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-Abstract-

The paper „The Making of Modern Constitutions- Constitutions and Constitutionalism in the Cradle of Constitutional History” elaborates the development of constitutions and constitutionalism throughout history. The paper analyzes different periods of the development of the constitutionality with particular reference to the most significant constitutions - constitutions that introduce constitutional innovations and new principles and values. The author outlines the historical struggle for the constitution that will limit arbitrary and voluntarist rule, as well as the effort to guarantee and protect the human rights.

A special focus in the paper is the constitutional history of England and the development of constitutionalism in the United States of America, as well as the constitutional history of European countries throughout different historical periods.

The development of constitutionalism is also represented through the elaboration of institutes, principles and values that represent constitutional innovations and novelty, and at the same time inspiration for new constitutional solutions.

Key words: constitution, constitutionalism, constitutional history, development of constitutionality.

I. INTRODUCTION

The Constitution did not appear all of a sudden in its modern form. On the contrary, the political history of society was interlinked with the ever-present idea of creating a certain text, which would contain appropriate rules that would initially limit the arbitrary and volutarist behaviour of the ruling entities.

The idea to systematize the rules of the state organization on the one hand and the rights and freedoms of people on the other, in one document that would be protected from excessive and frequent changes, appeared and was gradually modelled and matured throughout the entire history of humanity, until the end of the XVIII century, when the first constitutions in a formal sense were adopted.

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II. DEVELOPMENT OF CONSTITUTIONALITY IN ENGLAND

Continuity is a fundamental feature of English constitutional history. It seems that this feature precisely is the reason why the institutions of the modern constitutional system of the United Kingdom are in direct relation with institutions that preceded them, through a long historical development of the system. Unlike the rest of the countries that frequently changed the established order and introduced a new arrangement, usually through a revolution, the evolutionary path of the English constitutionality was straightforward and did not record such revolutionary, tectonic shifts. Namely, if we take into account the division into three constitutional periods, the first period until 1688, the second one from 1688 to 1832 and the third one after 1832, then the Glorious Revolution of 1688 and 1832 is a decisive historical moment when the Law on People's Representation was adopted, which started the reform of the House of Commons.

After the Norman Conquests, the English monarchy had the characteristics of an absolute monarchy. During the clash of the monarch with the feudal lords in 1215, the Great Charter of Freedoms (*Magna Carta Libertatum*) was adopted. With this act, for the first time in history, the authority of the monarch is limited. Namely, the Great Charter of Freedoms is the first and most famous document declaring the rebellious top of the feudal society, in order to take part in deciding on important state issues, such as the issue of taxes, and deciding on war and peace. Thus, the nobility, with its political, economic and military power, managed to tear a circle of freedoms and rights from the monarch John Lackland which they proclaimed and protected with the Great Charter of Freedoms. This Charter is considered to be the most significant political act in the history of parliamentarism and an act that represents the beginning of the constitution, as a new political and legal document in the history. For the first time in history, the charter guarantees the right of the people to rebel against the king, in case he does not comply with its provisions.

The period up to 1688, the year of the Glorious Revolution, is marked by numerous political manoeuvres, conflicts, compromises and revolutionary upheavals that end with the passing of the Bill of Rights of 1689. This represents a period of protracted and painful fights to limit the absolute power of the monarch. It is marked by the adoption of important legal and political documents, including the Petition of Right of 1628, the Agreement of People of 1647 and the Habeas Corpus Act of 1679. For the constitutional history, this time period will remain marked by the execution of King Charles I, the introduction of Cromwellian protectorate and the failed attempt to enact the first written constitution, the **Instrument of Government** of 1653. This constitution, although recorded in history as the only written constitution of England, never entered into force. Ever since, the English constitutional history does not record any attempt to enact a constitution in the formal sense. Although never implemented, Cromwellian constitution is considered to have played a significant role in the development of the idea of the constitution and constitutionality.

However, within all the aforementioned acts of this historical period, the ***Habeas Corpus Act*** of 1679 established the most significant system guarantying human rights before the police and the court. In constitutional history, it is the most significant human rights document that protects the individual from arbitrariness and arbitrary police action. For the first time ever, this document proclaimed the ideas that no one could be deprived of liberty for an act that was not incriminated by law, no one could remain in prison for more than three days without clear evidence of guilt, provided protection against various forms of torture during the investigation, protection against forced confessions, only a judicial and not a police authority can decide whether a person can be deprived of liberty, etc. Providing for an entire system of guarantees of personal rights and

freedoms, that provide protection in criminal proceedings to the individual, the Habeas Corpus Act is considered to be one of the most significant documents adopted in the English constitutional history.

The end of this constitutional period was marked by the enactment of the **Bill of Rights** of 1689. It marks the end of the first and the beginning of the second constitutional period in the development of English constitutionality. Many constitutional theorists point out that this is a period of development of the English constitutional history that marks England as a country of freedom, but not as a country of equality of citizens. Namely, personal freedoms were guaranteed by a series of documents adopted in the previous period, but the people still did not have the opportunity to take part in the exercise of power. In this manner, the power was essentially divided between the monarch and the aristocracy, the parliament was the body that exercised the legislative power, and the executive power belonged to the monarch whose powers were significantly reduced. In the period of about 140 years, the Parliament represented a central institution in the state organization system. The monarch's powers were reduced, transforming the monarch into a nominal head of state with prerogatives that represent a remnant of former sovereign and discretionary powers. "His Majesty's servants" became subordinate to the parliament, so the cabinet began to depend on his will. Namely, the enactment of the Bill of Rights of 1689 marked the end of the absolute monarchy and the transition to a limited parliamentary monarchy. It is considered to be one of the most significant sources of the English constitutional law since for the first time in history the monarch had a defined constitutional position of a *King in the Parliament*. The Bill of Rights limited the possibility of introducing new taxes or changing taxes and other duties by the monarch, without the consent of the Parliament. The Bill of Rights seems to be as important to the English constitutional history as the Great Charter of Freedoms. This is especially due to the fact that, if the *Magna Carta Libertatum* is identified with the foundation of England's medieval constitutional development, the *Bill of Rights* lays the foundations of the constitutional institutions of the modern constitutional order.

The English constitution has a heterogeneous structure. It consists of two dominant groups of elements: constitutional rules (*law of the constitution*) and constitutional conventions. The basic difference between constitutional rules and constitutional conventions is not in the form and the fact that the former are written and the latter are unwritten constitutional rules. On the contrary, the basic difference between these two elements of the English constitution is in the fact that the court, as an authority, recognizes the constitutional rules and it can compel legal entities to observe them. In contrast, constitutional conventions are outside the jurisdiction of the courts.

Constitutional rules consist of four basic elements.

The first group of constitutional rules are the rules contained in certain historical documents that were of great importance for the development of the idea of constitutionality and constitutionalism, so today they are considered to be the foundations of English constitutionalism. These include the Great Charter of Freedoms (*Magna Carta Libertatum*) of 1215, the Petition of Rights of 1628, and the Bill of Rights of 1689. Today, these positive legal texts are considered to be the "founders" of English constitutionality.

The second element of the English constitution includes the laws enacted by the Parliament, which govern and regulate constitutional matters. This group of laws regulating constitutional issues includes the *Habeas Corpus Act* of 1679, the *Act of Settlement* of 1701, the *Act of Union* of 1707, the *Representation of the People Act* of 1832, 1867, 1884, the *Parliament Acts* of 1911 and 1949, the *Ministers of the Crown Act* of 1937, and the *Life Peerages Act* of 1958. This group of laws

represents a very significant element of the English constitution, usually because of the advantage of the written over the unwritten legal rules that regulate the constitutional legal matter, as well as because of their certainty, conciseness and precision.

The third group of constitutional rules represent court decisions (*case law*) that determine the limits or meaning of the laws or historical documents regulating constitutional matter.

The fourth group of rules covers the principles and rules of the so-called Common law. These rules arise as a result of customs. They have been established by the courts, but have never been legislated. They are considered an important element of the English constitution, as they lay the foundations of the country's overall constitutional system.

The second group of elements of the English constitution includes the constitutional conventions. Constitutional conventions, on the one hand, and laws regulating constitutional matters, on the other, are considered to be the most important segments of the constitution. In their essence, constitutional conventions represent unwritten rules of conduct, established customs and established practice of behaviour and action in certain legal situations. These rules regulate issues related to state institutions, and the role, competences, actions and mutual relations of the highest state authorities. Ordinarily, constitutional conventions regulate matters relating to the conduct of the monarch, cabinet and parliament. The absence of a legal sanction that will force the legal entities to respect the constitutional conventions is the *differentia specifica* of the constitutional conventions. On the contrary, their application is due to the general agreement to respect the constitutional convention by those to whom it refers. The obligation of the monarch to give his assent to the law passed in the parliament, the joint liability of the government to the House of Commons, etc. are examples of constitutional conventions.

Finally, bearing in mind all the aforementioned elements of the English constitution, it can be concluded that the flexibility and the ability to adapt to changes in the constellation of social relations is its basic feature

III. CONSTITUTIONALITY –CONDITIO SINE QUA NON FOR ESTABLISHING STATE POWER

The end of the XVIII and the beginning of the XIX century was marked as the period of the emergence of written constitutionality. On the new continent, the adoption of the first constitutions of the colonies was originally intended to protect and guarantee human rights and freedoms. Unlike North America, the adoption of the first European constitutions was aimed at limiting the power of the monarch in absolute monarchies. This wave of development of the world constitutionality, for the first time in history, includes and introduces the basic elements of constitutionalism into the constitutions. Namely, the adoption of the first constitutions is a consequence of the effort to implement the idea with legal instruments, means and mechanisms to limit the unlimited, voluntaristic, absolute and irresponsible power on the one hand, as well as to implement the vision of the protection and guarantee of human rights and freedoms, on the other. The idea of human rights and freedoms, their necessity and their meaning has been translated into two historically very significant documents - the American Declaration of Independence passed in 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789.

The US Constitution was adopted in 1787 and is one of the oldest written constitutions in the world constitutionality. This constitution is the first federal written constitution in the world. In the constitutional legal theory, it has been emphasized that the Constitution of the USA as a subject of

interpretation, probably something less unique than the holy books¹, represents an extremely long-lasting act that simultaneously influenced and was an eternal inspiration for a large number of constitutions in the world. The innovative constitutional solutions of the United States will be taken and translated into the constitutions of Latin American countries, but it seems that in none of these countries they will achieve the desired results. The analysis of the constitutions of Latin American countries leads us to the conclusion that some of these solutions have been almost completely adopted or represent a variation on a theme, although none of these countries will have such a positive experience of their application as the USA.

The text of the US Constitution is composed of a preamble, a normative part and 27 constitutional amendments. The preamble of the Constitution is short and solemn text that has not been systematized in the form of articles and indents, and whose diction is free, solemn and oratorical. The preamble begins with the sentence "*We the people of the United States of America...*", which refers to the fact that the people appear as the source of the constitution, and constitutional arrangements are based on the principle of popular sovereignty. The normative text of the constitution is composed of 7 articles marked with Roman numerals. Compared to almost all constitutions in the world, the US Constitution is very short. Only Vatican and Monaco have shorter constitutions.

Longevity is one of the fundamental features of the US Constitution. Its longevity and legal force for a period longer than 230 years is due to several elements. Namely, if the provisions for its revision are being analyzed, the US Constitution is categorized in the group of solid constitutions. However, despite the fact that nothing has changed in the content of the text, it cannot be concluded that the Constitution of the USA today is identical to the time of its adoption. Among other things, it is also due to the adopted constitutional amendments that supplemented the constitutional text, without changing its original structure and content. With the an bloc adoption of The Bill of Rights of 1791, and the insertion of the first 10 constitutional amendments, the technique of amending the constitutional text by adopting constitutional amendments was accepted and is still retained today. In relation to the aforementioned, it should be pointed out that the "founding fathers" envisaged a difficult procedure for the amendment of the constitution. Thus, the Constitution provides for that the amendment of the constitutional text must be voted by a two-thirds majority in both houses of the Congress, and then be accepted by the legislative bodies of $\frac{3}{4}$ of the federal units. Another modality for amending the constitution is provided by Article 5, according to which "Congress, at the request of the legislative bodies of $\frac{2}{3}$ of the states, will convene a constitutional assembly, for the purpose of proposing constitutional amendments"². Constitutional history emphasizes that this way of amendment of the US Constitution has not been used. An additional element that enabled the longevity of the US Constitution is the judicial interpretation of constitutional norms by the Supreme Court of the United States, by which it is actually amended. Therefore, in its essence, the contemporary constitutional law of the USA includes not only the text of the Constitution of 1787, but also the decisions of the Supreme Court that is often considered by the constitutional science to have created a "behind-the-scenes constitution". This is supported by the anecdote about a French gentleman who declared on the docks of New York that it was great to breathe "the sweet air of legitimacy", not knowing that he was actually breathing the breath of the Supreme Court of the United States³. Finally, the

¹See more: Брајс.Џ „Савремене демократије”. Том 3. Београд. 1933.стр. 84.

²Constitution of USA of 1787 Article 5

³Bickel, Alexander., „*The Least Dangerous Branch- The Supreme Court at the Bar of Politics*”. Yale University Press. 1986. p.29

constitutional customs are the last element that has also influenced the longevity of the US Constitution. Constitutional customs represent an excellent way and means of adapting the constitution to modified historical relations and circumstances. Namely, the constitutional custom does not formally amend the text of the constitution or any specific constitutional norm, but only adapts it to the de facto changed relations and circumstances, in a way that the norms are applied differently from what the constitution originally provided for.

During this period of time, the first written constitutions were also adopted on the European continent. This group of constitutions includes the Constitution of Poland of 1791, which introduced a constitutional monarchy for the first time in the constitutional history of Eastern Europe. The constitutions that were adopted in the social and political conditions that arose after the French Bourgeois Revolution, are evaluated as advanced constitutions and constitutions that were initially based on the Declaration of the Rights of Man and of the Citizen. It is being considered that these, especially French constitutions adopted in this historical period, have their conceptual bases in the theoretical legal opinions elaborated by the French political theorist Emmanuel Sieyes. According to him, the constitution represents a solemnly proclaimed, highest act of the country. It should represent the work of a constitutional assembly and must be adopted in a special procedure different from the procedure for the adoption of ordinary laws. „The Constitution represents the legal basis of all future legislation, the source of all the rights of the citizens and the source of the powers of the executive authorities and representative bodies“⁴. The constitutionalization of power in Europe was carried out as a constitutional monarchy following the model established by the French Constitution of 1791 and the Constitutional Charter of 1814.

The Constitution of France of 1791 abandons the feudal arrangement of the country, proclaims national sovereignty and the principle of separation of powers. From this time period, some constitutional solutions of **the Constitution of France of 1793** (the Jacobin-Montagnard constitution) were particularly inspiring. It seems that this constitution, although it never came into force, exerted a strong influence on later constitutionality. This is due to the fact that it establishes a republican form of government, establishes forms of direct democracy, establishes a system based on the principle of unity of power and proclaims some new rights such as the right to work and the right to education. It is considered that these constitutional provisions exerted a strong influence especially on the development of the Soviet constitutionality, and it is considered that some of them were directly adopted in the German Constitution of 1919.

Finally, in terms of the constitutions adopted in Europe after the French Bourgeois Revolution, it can be concluded that their main theoretical inspiration was the *idea of separation of powers*. It is considered that the implementation of this idea towards the end of the XVIII and the first half of the XIX century was the most powerful mean of limiting the powers of the monarch in absolute monarchies.

IV. DEVELOPMENT OF THE CONSTITUTIONALITY UNTIL THE WORLD WAR I

Until the beginning of the World War I the liberal democracy constitutionality was typical of the Western Europe countries, for the development of which the revolution of 1848 was decisive, as

⁴See more: Политичка енциклопедија. Група аутора. Савремена администрација. Београд. 1975.p.213

well as the former British colonies that gained independence in the period of the XIX century, including Australia, Canada and New Zealand.

This historical period will remain marked by the revolutionary year of 1848 in Europe, when the last attempts were made to finally abolish the remnants of feudalism. The second feature of this period is the division of the bourgeoisie into high and middle bourgeoisie, which is counterbalanced by the petite bourgeoisie, the working class and the peasants. The first ones, using their economic, political power and influence, tried to completely take over the political power, pushing out or reducing to a minimum the remnants of the feudal state system. The latter acted for the purposes of strengthening their social status, improving their economic position and democratization of political life, which should enable them greater participation. As a result of the revolution of 1848, the monarchical form of government gradually began to be abandoned, and the republic was introduced. In the constitutional history, this time period will also remain marked for the expansion of the right to vote as well as the abandonment of the decisions to limit it based on property, age, gender, education, etc. In such a constellation of social relations, the **French Constitution of 1848 and the Constitution of the Third French Republic of 1875** were adopted. Article 1 of the French Constitution of 1848 provides for that "sovereignty belongs to the French citizens as a whole". It seems that this formulation of popular sovereignty will remain the eternal inspiration for many later constitutions in the world constitutionality. The Constitution of the **Third French Republic** of 1875 was created upon the same ideological basis. The structure of the Constitution is its specificity, which classifies it in the group of uncoded constitutions. Namely, this Constitution consists of three constitutional laws: the Law on the Organization of Public Authorities, the Law on Relations between Public Authorities and the Law on the Organization of the Senate. In terms of the established constitutional system, in relation to its predecessor, this constitution did not offer any particularly innovative solutions. An exception to this is the bicameral structure of the National Assembly, which consists of the Senate and the House of Representatives. The amendments to this constitution of 1884 are considered to be extremely important, since for the first time in history they provide for the ban on changing the republican form of government, as well as the ban for the members of the families that ruled France in the past on running for president of the Republic.

Finally, this group of constitutions includes the constitutions of Spain of 1869 and 1876, the Constitution of the Netherlands of 1887, the constitutions of Denmark of 1849, 1866 and 1915, the Constitution of Canada of 1867, the Constitution of Australia of 1900, etc.

V. DEVELOPMENT OF THE CONSTITUTIONALITY BETWEEN THE TWO WORLD WARS

The end of the World War I marked the beginning of a new wave in the development of constitutionality. The end of international and national conflicts between countries, as well as the emergence of new social, political and economic relations, led to the disintegration of some old counties and the creation of new countries. This caused the start of a completely new cycle in the development of constitutionality, marked by the adoption of new constitutions, adding new constitutional categories in them and a different regulation of the existing ones. The data indicate that from the 32 constitutions existing before the World War I, the new wave of constitutionality is marked by the existence of more than 50 constitutions in the world⁵. The intellectual view of the constitutions from this time period presents a colorful variety of different constitutional solutions,

⁵Gjorgjevic, Jovan. „Ustavno pravo”. Savremena administracija. 1976. p.55

some taken from the existing constitutions, and some completely innovative and new. Some of the constitutions adopted in this constitutional cycle leave an impression of progress regarding the way they regulate certain issues of the constitutional matter. Thus, this period will be marked by the introduction of universal suffrage, the abandonment of the "census" category and equalization of citizens in terms of the enjoyment of political rights. On the other hand, some countries that did not have a constitution until then, adopted their first constitutions (Bulgaria, Romania, Poland) after the end of the World War I. This picture includes the constitutions that were adopted in this period, and they represent a kind of copy of the solutions that were in force in the previous period of the development of constitutionality, that is, a copy of the constitutions adopted after the French Bourgeois Revolution, enriched with elements of social-reformist phraseology.

The first Soviet constitution of 1918, the Constitution of Germany of 1919 (the Weimar Constitution), the Constitution of Spain of 1931, the Constitution of the USSR of 1936 were particularly important for the development of constitutionality in the period between the two world wars.

In constitutional history, the **Weimar Constitution** of 1919 holds a special place in the group of constitutions adopted after the World War I. As a work of Professor Hugo Preusse, in terms of the innovative solutions contained in it, this constitution has been considered one of the most advanced constitutions that existed until then. Therefore it should not come as surprise that the Weimar Constitution inspired many constitutions, including the Constitution of Austria of 1920, the Constitution of the Kingdom of Serbs, Croats and Slovenes of 1921, the Constitution of Romania of 1923, and the Constitution of Poland of 1923. Under the influence of this constitution, constitutional revisions of the Danish, Swedish, and Dutch constitutions of this time period were also carried out. The reason for the great importance of this constitution for the constitutional history should be sought in the promotion of a large number of democratic principles contained in the constitutional text. The constitution of Germany of 1919 provides for that the parliament is the central institution in the system of government organization, the executive power is bicephalic, and the head of state and the government are responsible to the parliament. The Constitution expands the corpus of constitutionally guaranteed rights from the political to the social and economic sphere. In the context of human rights and freedoms provided for by the constitution, the intention of the constitutor to guarantee them and that no one can limit or take them away, unless the Constitution itself is amended should be emphasized. The introduction of the system of economic representation, as well as the so-called social function of ownership, on the basis of which it can be subject to restrictions for the general interest is a constitutional novelty hitherto unknown to constitutional history. However, in the constitutional and legal literature, it is often stated that behind the exceptionally skilfully, expert and staff-drafted constitutional text of the Weimar Constitution, there is an opportunity for the fulfilment of malicious intentions. Unfortunately, this is most appropriately expressed through the provisions that regulate the matter of decrees as legal acts, which are enacted in a state of emergency and when the country is in danger, the so-called "necessity decrees". The Weimar constitution of 1919, provided for "if in the German Reich, public safety and public order are disturbed or threatened, the President of the Reich may take the necessary measures for their reintroduction⁶. This undertaking of certain measures also meant temporary partial or complete suspension of constitutionally guaranteed rights (personal freedom, inviolability of the home, secrecy of correspondence, etc.). The constitutional solution of the Weimar Constitution referring to the introduction of these legal acts as a constitutional category is probably the most appropriate example of disrupting the

⁶Constitution of Germany of 1919 (Weimar Constitution) Article 48

organization of the state government and the romantic understandings of the principle of separation of powers, in favour of the executive power, but not so much to the detriment of legislation as to the detriment of the Constitution itself. It seems that precisely these constitutional provisions made it possible to suspend the constitution and to promote the undemocratic forces and the ideology of fascism behind the scenes.

The group of so-called professorial constitutions, in addition to the aforementioned Weimar constitution, also includes the **Constitution of Austria of 1920**. The work of the Austrian professor Hans Kelsen, the Constitution of Austria, has a special significance in the constitutional legal history. Namely, for the first time in constitutional history this constitution introduces the institute of constitutional judiciary, as a form of control of the constitutionality of legal acts. If we bear in mind that the region of Central Europe is generally characterized by a cherished tradition of functioning of a public law court system as well as the views of German judges, especially the view of the German judge *Hiersemenzel* that "the dignity of legal protection and the management of justice is ensured only where the judge can exercise control of the constitutionality without limiting the basis of the question of whether a law is unconstitutional"⁷, then it will inevitably be concluded that the introduction of this institute represents a real constitutional novelty. It is worth noting that during the creation of the constitutional text of the Constitution of 1920, the main goal of the constitutors was to create a creation that would resolve the conflict between the union and the federal units. Namely, the control of the constitutionality of laws and the legality of acts at the federal level and at the level of federal units was a mechanism originally designed to preserve the balance between the federal power and the power of the federal units. It is precisely for this reason that the Constitutional Court in Austria takes on the role of "guardian of the constitution and guardian of the dualistic conception of state organization in the republic"⁸. Conceived in this way, the Constitutional Court of Austria had a narrow and limited competence tied exclusively to the resolution of disputes between the union and the federal units. Thus, the basic function of this body seems to have been the protection of the state organization. The protection of constitutional rights was of secondary importance until the adoption of the constitutional amendments of 1929.

Influenced by the constitutional decisions of the Weimar Constitution, in 1931 Spain adopted its first republican constitution, marking the end and dissolution of the clerical-feudal monarchy. Namely, the end of the monarchist dictatorship of General de Rivera was enabled thanks to the progressive forces in the state, inspired by the democratic ideas contained in the Weimar Constitution. **The Constitution of Spain of 1931** (a constitution written according to the ideas and theoretical opinions of the Roman law Spanish professor Melquiades Posada) proclaims the solidarist conception of the institution of property, and defines Spain as a democratic republic of all classes and a free community of all workers, peasants, intellectual workers and entrepreneurs⁹. This constitution introduced the institution of civil marriage and divorce as well as the right to free and secular education of all citizens. However, despite the inspiring solutions of the constitutor, this constitution failed to overcome the polarized social situations and the antagonistic social structure, which in its essence was not based on solidarity of all classes.

Inspired by the European constitutions, in the period between the two world wars, a large number of countries from Africa and Asia adopted their first constitutions. These include the

⁷H.Haller. cit.p.14 *Die Prüfung von Gesetzen –Ein Beitrag zur Verfassungs-gerichtlichen Normenkontrolle*, Wien 1797. Taken from: Вичић, Оливера. „Аустријско уставно судство”. Београд.. 1995. p. 147

⁸Kulić, Dimitrije. „Ustavno sudstvo u svetu”. Nis. 1969. p. 40

⁹Constitution of Spain of 1931 Article 1

Constitution of Egypt of 1923, the Constitution of Ethiopia of 1931, the Constitution of Iraq of 1925, the Constitution of Lebanon of 1926, etc.

VI. DEVELOPMENT OF THE CONSTITUTIONALITY AFTER WORLD WAR II

With the end of the World War II, a new wave of the development of constitutionality begun. Namely, the new constitutional cycle was a consequence of the global change in social relations that the countries of the world were facing. There are views that this period of modern constitutionality was marked by a number of contradictions, of which probably the division of the world into two blocks and two spheres of influence (the USA and the USSR), on the one hand, as well as the tendency to preserve peace and further development of constitutionality and human rights, on the other hand, is the most dominant. The increase in the number of constitutions in the world, which was due to the establishment of new countries, as a result of the successful national liberation and revolutionary movements and the struggle for independence was the second particularly significant feature of this period of the development of constitutionality. The development of constitutionality on the European continent was characterized by the adoption of completely new constitutions in some countries (the Constitution of France of 1946, the Constitution of Italy of 1948 and the Constitution of Germany of 1949), the implementation of major constitutional amendments to the existing constitutions (The Constitution of Denmark of 1953, the Constitution of Belgium of 1970, the Constitution of Sweden of 1974), as well as the implementation of constitutional revisions on a smaller scale that do not foresee tectonic changes in the state system (the Constitution of Norway of 1814, the Constitution of Switzerland of 1874, the Constitution of Finland of 1919).

The constitutional theory emphasizes that in order to present a complete picture of constitutionality in this time period, we need to classify the four dominant directions:

A) **The first direction** of the development of the post-war constitutionality covers the adoption of new republican constitutions that replace the existing constitutions, which were in force before the beginning of the World War II. This direction in the development of constitutionality after the end of the World War II includes the constitutions of the countries that were freed from fascism or tried and made an attempt to carry out a serious, more extensive revision of the existing constitutions. The attempt to modernize the traditional liberal-democratic model of constitutionality is *differentia specifica* of this direction from the development of constitutionality after the World War II. This is done by inserting new constitutional solutions in the area of social and economic freedoms and rights, as well as in the matter referring to the relations between the legislative and executive authorities, usually with mechanisms for balanced rationalization of the parliamentary political system. The insertion of the term "welfare state" in the provision referring to the definition of the country is a special feature of this group of constitutions. The Constitution of France of 1946 (Constitution of the Fourth French Republic) and the Constitution of Italy of 1948 are probably the most specific constitutions from this direction of the development of constitutionality.

B) **The second direction** of the development of post-war constitutionality includes the adoption of constitutions that strengthen national sovereignty in some countries that gained their independence after the World War II. Namely, this direction in the development of constitutionality is due to the victory won by the national liberation forces in the former dependent states, and the liberation from the tutelage of the imperialist forces. Large number of new countries

were created with the collapse of the colonial empire of France and Britain, such as Ceylon, Laos, Indonesia, Pakistan, India, Congo, Senegal, Mali, Madagascar, Chad, Cameroon, Somalia, etc.

The **Constitution of India** adopted in 1949 is the most characteristic constitution in this direction of the development of constitutionality. Two years after the declaration of independence in 1947, India adopted its first Constitution, which is marked as the longest constitution in constitutional history, amended 104 times, and whose constitutional text today includes 470 articles systematized in 25 parts and 12 appendices. There are two basic reasons for the structure and length of the Indian Constitution. The first one should be sought in the state organization of India, which is a federation, but in which the federal units - the states - do not have their own constitution. It practically caused the entire matter for which it is customary to be regulated by the constitutions of the federal units, to be the subject of regulation of the federal constitution. The application of the Anglo-Saxon legal technique is the second one, which is characterized by a pragmatic approach to the regulation of the matter, a casuistic method of regulating legal situations (determining basic legal rules and exceptions to them) and extremely detailed regulation of the constitutional legal matter. The analysis of the historical context in which the Constitution of India was created, such as the inequality between ethnic, linguistic and religious groups, the existence of castes and huge social differences between the population, the existence of different races and tribes, the size of the population, the size of the country which is divided into more than 500 different territorial-political units ruled by princes and maharajas, the inherited colonial regime, points to the fact that the Constituent Assembly of India was faced with a serious challenge. It seems that all the mentioned elements further contributed to a creation of a constitution that is large, extensive and long. If the provisions of the Constitution referring to the form of state organization are being analyzed, it will inevitably be concluded that the creator of the constitution for creating these constitutional norms was inspired by the models of complex countries - USA, Australia and Canada. On the other hand, the constitutor was inspired by the example of British parliamentarism for the conceptualization of the political system established by the constitution. Finally, the Indian Constitution represents a very specific positive document extremely important both for the development of Indian constitutionality and for the development of world constitutionality in general.

C) The increase in the number of so-called socialist constitutions in the world is a **third direction** in the development of constitutionality after the World War II. This direction covers the three constitutional waves, the first one from 1945 to 1948, the second one from 1948 to 1954 and the third one from 1954 to the end of the eighties of the last century.

The three federal constitutions of Yugoslavia (the Constitution of the Federal Republic of Yugoslavia of 1946, the Constitution of the SFRY of 1963 and the Constitution of the SFRY of 1974) as well as the three republican constitutions of Macedonia are of particular importance for the constitutional and legal history of Macedonia from this time period.

D) **The fourth dominant direction** of the development of constitutionalism after the World War II covers the adoption of constitutions in countries that were under military or other forms of control by the great powers. This group includes the Constitution of Germany of 1949, the Constitution of Japan of 1946, and the Constitution of Vietnam of 1979.

The defeat of Germany in the World War II led to the division of the country into 4 occupation zones (British, American, French and Russian). In 1949, two separate German countries were formed, eastern - Democratic Republic of Germany for the Soviet occupation zone and western - Federal Republic of Germany for the three occupation zones of the western countries. These two countries adopted their constitutions in 1949, but both constitutions were drafted and adopted in a short period of time and without the participation of the citizens, that is, the representative body.

The constitution of Democratic Republic of Germany contains elements that lean towards the second wave of development of the Soviet constitutionality. This constitution is modelled upon the USSR Constitution of 1936 and the Weimar Constitution. On the territory of the Federal Republic of Germany, each of the occupying forces started with the arrangement of the federal units, so that in 1949, the ten organized federal units were united in the Federal Republic of Germany. Then the Constitution of the Federal Republic of Germany, the so-called **Basic Law (Grundgesetz)**, i.e. the Bonn Constitution, was adopted. The Weimar Constitution served as the basis for the adoption of the so-called Bonn Constitution of 1949. The Constitution establishes a complex form of state organization - a federation, with a high degree of autonomy of the federal units. In terms of the established political system, the Constitution of the Federal Republic of Germany introduces the so-called rationalized parliamentarism by introducing the institute *constructive vote of no confidence (konstruktives Misstrauensvotum*^{10).}

VII. ABANDONMENT OF SOCIALIST CONSTITUTIONALITY AND RETURN TO THE CLASSIC LIBERAL DEMOCRATIC CONSTITUTIONALITY

The development of world constitutionality in the period after 1989 will be marked by the abandonment of socialist constitutionality and a return to the roots of classical liberal-democratic constitutionality.

Marković emphasizes that "from the point of view of constitutionality, the former socialist countries can be divided into three groups"¹¹:

The first group of countries includes the former federal countries, which cease to exist and from which new countries have been created. This group includes the USSR, SFRY, Czechoslovakia and Democratic Republic of Germany. With the collapse of the USSR, 15 new independent countries were created. Twelve of these countries formed a weak community of independent countries, and three (Latvia, Lithuania and Estonia) remained aloof and were not part of this community¹². The Constitution of the Russian Federation of 1993, the Constitution of Latvia and the Constitution of Lithuania of 1992, and the Constitution of Estonia, which reinstated the Constitution of 1938 are the most significant for the development of the constitutionality of this group of countries.

With the breakup of SFRY, four out of six republics from the former union adopted new constitutions, while Montenegro and Serbia remained as a federal country in which they changed the constitutional form and established their own state organization. Croatia adopted its Constitution in 1990, Slovenia and Macedonia adopted new constitutions in 1991, while Bosnia and Herzegovina got its own Constitution with the Dayton Agreement of 1995.

The Czech Republic and Slovakia, as former member states of Czechoslovakia, established by the Constitution of 1969, constituted their new countries by agreement when the Constitution of the Czech Republic and the Constitution of the Slovak Republic were adopted in 1992.

The second group of countries includes the countries that essentially retained the existing constitutions, significantly purged of the hallmarks of socialist constitutionality. The amendments to which these countries approach and the constitutional solutions they introduce are in the

¹⁰The lower house of the federal parliament, the Bundestag, can vote no confidence in the federal government only if it elects a successor to the federal chancellor with a majority vote of its deputies. See Art. 67 of the Basic Law of the Federal Republic of Germany.

¹¹Марковић Ратко, *Уставно право и политичке институције*, ИП Јустинијан, Београд, 2004, р. 89.

¹²ibid.

direction of incorporating characteristics and features of the western liberal-democratic constitutionality. These include the Constitution of Poland of 1991, later replaced by a new Constitution of 1997, the Constitution of Hungary of 1990, and Albania, which revised the Constitution of 1976, and adopted a new Constitution in 1998.

The third group of countries includes the countries that completely adopt new constitutions, with which they completely abandon the socialist constitutionality. This includes Bulgaria with the Constitution of 1991 and Romania also with the Constitution of 1991.

Finally, the complete revision of the way in which economic relations are arranged, the constitutional amendments that refer to political life and a complete change of the political systems that existed until then is specific to all these countries and the development of the constitutionality in this period of time.

The constitutions that are adopted with the abandonment of the socialist constitutionality also provide for new, completely innovative solutions in the political life in general. This includes the introduction of the multi-party system, i.e. political pluralism and free, immediate and democratic elections. Such constitutional solutions point to the conclusion that the intention of the constitutors was to abandon the concept of the existence of one dominant political party and ensure a struggle of political ideas. Political pluralism, the ban on declaring a state ideology, the possibility of citizens' participation in the decision-making and policy-making process, free and democratic elections, the expansion of the core of political freedoms and rights and their guarantee were the basic guiding ideas of the constitutors. They are mostly included as basic values or fundamental values of the newly established constitutional systems. There are views that all the aforementioned instruments, categories and constitutional solutions are not democracy by themselves, but each of them is a necessary condition and assumption for democracy.

Finally, the complete change of the political system that existed until then, understood in a narrower sense, is the last feature of the constitutions adopted in the countries that leave the socialist constitutionality. In essence, the changes that occur with the introduction of new constitutional solutions, which refer to the organization of the state authorities, imply the complete replacement of the political systems in force until then with new ones. Namely, the abandonment of the concept of unity of power and the establishment of the principle of separation of powers is the basic feature of these constitutions. The acceptance of the principle of separation of powers, as a fundamental principle on which the organization of state power in the new countries is based, actually represents a radical and essential change. The analysis of the constitutional texts points to the conclusion that they represent a cocktail of a large number of completely new constitutional solutions, solutions taken from some other constitutions that served as a model, as well as solutions that are relapses from the previous system of organization of power. However, it seems that the largest number of countries abandoning socialist constitutionalism replace the previously existing parliamentary system and establish mixed political systems.

V. CONCLUSION

The purpose of every constitution should be limitation of the state power and protection of the human rights. The essence of the constitution is fulfilment of the moral imperatives and values declared and guaranteed by this lex superior. These imperatives and values in their essence represent values on which the entire society is based.

However, all basic constitutional principles, values, institutes, mechanisms and concepts do not appear at once in their contemporary form. On the contrary, they are result of the historical

struggle for limiting the state power, banning its voluntary and arbitrary exercise, and guaranteeing and protecting human rights. The development of constitutionalism is always conditioned by the clash of retrograde and progressive forces in the society in a given historical period. However, constitutional history confirms that the leading thought and goal of action has always been the introduction of concepts that would represent a true constitutional novelty and as such an inspiration for new solutions that would enable better protection of human rights and realization of the concept of constitutionalism.

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