Dr. jur. Damir Juras, Innenministerium, Split
Diana Jakšić, dipl. Jur., Polizeiverwaltung Split-Dalmatien

WAFFENRECHTLICHE ERLAUBNIS

Zusammenfassung

In der Arbeit werden die gesetzlichen Voraussetzungen für die Herausgabe der waffenrechtlichen Erlaubnis für eine natürliche oder juristische Person angeführt und geklärt, sowie das Verfahren der Wegnahme von Waffen, Munition und Waffenurkunden von einer natürlichen oder juristischen Person, die aufgehört hat, einige der vom Gesetz vorgeschriebenen Voraussetzungen zu erfüllen.

Neben den bestimmten Gesetzesinstituten wird auch die relevante, größtenteils unveröffentlichte Gerichtspraxis dargestellt. Die in einem Verwaltungsverfahren zur Herausgabe der Waffenbesitzkarte oder – wegnahme zuständige Körperschaft ist die Polizeistation, bzw. Polizeiverwaltung, je nach dem Wohnort oder Wohnsitz des Antragstellers. Die Antwort auf den Antrag ist ein Verwaltungsakt, über welchen in zweiter Instanz ein Beschwerdenausschuss entscheidet, der von der Regierung der Republik Kroatien ernnant wird.

Die Autoren sind der Meinung, dass der Besitz von Waffen gefährlich ist, und der Gesetzgeber absichtlich Folgendes vorgeshrieben hat: strenge Voraussetzungen für den Waffenbesitz und die Bestimmungen, die eine schnelle Reaktion der zuständigen Körperschaft ermöglichen, um Missbrauch von Waffen zu verhindern. Die in der Arbeit veröffentlichten statistischen Daten bestätigen, dass eine große Anzahl der Personen die Waffen gesetzmäßig besitzt, sowie dass eine bestimmte Anzahl der Personen die Voraussetzungen für die waffenrechtliche Erlaubnis nicht erfüllt, bzw. dass eine bestimmte Anzahl der Personen mit der Zeit die Voraussetzungen für Waffenbesitz zu erfüllen aufhört.

Schlüsselwörter: Waffen, die Waffenbesitzkarte, die Polizei, der Verwaltungsakt

PhD Candidate Blerton Sinani[1]
Assistant-Professor at the Department of the Public Law
Faculty of Law of the South East European University, Tetovo

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A CRITICAL-LEGAL OVERVIEW OF THE CONCEPT OF CONSTITUTION AS THE HIGHEST LEGAL-POLITICAL ACT OF THE STATE IN THE LIGHT OF CONSTITUTIONAL-JURIDICAL DOCTRINE

Abstract: *Constitution is a set of rules which governs a nation state. It is considered a government's antecedent because it gives legitimacy to the government and defines the powers under which a government may act. As such, the constitution sets constraints both to the powers which can be exercise and to manner in which they may be exercise. Hence, the constitution defines the legality of power and that is the reason why it can be defined as a legal and political act. Two fundamental concepts (meanings) of the constitution represented in the constitutional legal theory are formal and material notion of the constitution. Author have focused on elaborating and explaining the constitution as a fundamental and a supreme legal-political act in general and on the comparison of the formal and material concept of the constitution in particular. The extent of the correspondence between this two concepts and their relation with the notions of written/unwritten and rigid/flexible constitution is also analyzed.*

Key words: constitution, formal concept of the constitution, material concept of the constitution, written and unwritten constitution, rigid and flexible constitution, contents relation between constitution in formal and material sense.

I. GENERAL CONSIDERATIONS

There are certain topics and issues that for a long time concern a human intellect and arouse its scientific curiosity and attention. Facing this challenge, in a front of every new scientific researcher stands the "Hamlet's dilemma", to write or not about the treatment of a particular theme, no matter how much it is already theoretically treated. Even if the topic is theoretically treated, it is never finished nor perfected. This kind of dilemma faced author of this article: accept or not the challenge of the theoretical-legal treatment of the constitution as a substantial juridical doctrinal concept, that in contemporary conditions and circumstances is not of any less interest and importance than earlier conceptions and issues in the constitutional legal theory. Although scholars have already analyzed and explored this issue, it will always be interesting because of the specific value and crucial social relevance of the constitution as a main fundamental legal and political act of the state.

1 Ilindenska n.335, Tetovo, Republic of Macedonia. Phone: 00389 44 356 142;
Fax: 00389 44 356 000; Corresponding author: blerton.sinani@seeu.edu.mk

The study treatment of the theme presents a special interest, in the first place, for a development of both the constitutional theory and constitutional practice because the constitution is a "fundamental" and not an "ordinary" law. As a fundamental law, the constitution is a legal act with a stronger legal force than other legal acts. In fact, the constitution represents the basic political - legal act that plays an important role in building of a state. On the other hand, it represents a supreme normative act within the legal order of a certain state. Behind this, the constitution is the main legal regulator of the most important fundamental social and political relations within the state.

The adoption of the constitution as the main and "primary" legal act has, realistically and practically, a number of consequences: *firstly*, political and legal subjectivity of an independent and sovereign state are expressed in a certain territory; *secondly*, it sets the cornerstone of national legal order; *thirdly*, it inaugurates and reflects the sovereignty of the people; *fourth*, fundamental freedoms and rights of man and citizen are proclaimed, guaranteed and realized (they are natural, inalienable and not accorded by the state). Therefore, the constitution represents an initial legal and political substrate on whose adoption depends the building of the state and of the law. The state and the national legal system could not exist without the constitution because of its role as an "interlocutory" or a "bridge connection" between the state and the law. In the most ideal case, the constitution is contributing to "sublimation" of the relationship between the state and the law. On the one hand, the constitution establishes the basis of the organization and functioning of the state itself and, on the other hand, it determines entities that generate and create "law", regulates procedures and legal form of expressing the law. Hence, it is correct the assertion that the constitution is a legal fundament and framework for building, developing and functioning of the state and its legal system. [2]

The "central axis of a consideration" in this article is the notion of the constitution as the capital legal notion of the science of a constitutional law. Before presenting a panorama of views regarding the notion of the constitution, it is interesting to note that it does not exist a "constitutional definition of the constitution", in a contrast to a large number of other legal concepts and categories whose definitions can be found within the framework of a legal system. The vast majority of constitutional texts, former and existing, do not contain the integral definition of the constitution.[3] However, most constitutions contain a substrate, i.e., immanent elements for the definition, so we can identify formulas or phrases that can be qualified as an attempt to define the constitution. Thus, for example, the Constitution of the Republic of Albania of 1998 states: "The Constitution is the highest law in the Republic of Albania" (article 4, paragraph 2);[4] the Constitution of the Republic of Bulgaria of 1991, states: "The Constitution shall be the supreme law, and no other law shall contravene it" (article 5, paragraph 1);[5] the Colombian Constitution of 1991, states: " The Constitution is the supreme law" (article 4, paragraph 1).[6] Such concise definitions on the notion of the constitution, as it is expressed within its normative textual content by creators of the constitution, are qualified as "juridical authentic positive definitions of constitution".[7] Otherwise, such constitutional

2 Jovičić, M., *O ustavu*, Beograd, 1977, p. 7 – 8.

3 *Enciklopedija političke kulture*, Beograd, 1993, p. 1217.

4 *The Constitution of the Republic of Albania of 1998*,http://www.ipls.org/services/kusht/cp1.html.

5 *The Constitution of the Republic of Bulgaria* of 1991, http://www.parliament.bg/en/const.

6 *The Colombian Constitution of 1991*, http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.

7 Vračar, S., *Osnovni problemi konstruisanja naučne i pozitivno-pravne definicije ustava*, Arhiv za društvene i pravne nauke, 3-4/1962, Beograd, p. 228.

norms that make an explanation or give a definition of a certain constitutional notion are qualified as interpretative constitutional norms.[8]

In the most general sense, within the constitutional legal theory, the constitution represents "a fundamental and a supreme normative legal-political act of a certain state that regulates and determines the organization and functioning of the state power, as well as fundamental freedoms and rights of man and citizen". In fact, the constitution is a legal form (act) with an important content, because it "dresses the main legal norms", norms that "regulates the most important social relations in a certain state".[9] Expressed in the simplest possible way, the constitution represents a supreme and "leading" law over state power and determines and guarantees a wide spectrum of fundamental freedoms and rights of man and citizen. This might be one of the simplest, but also the most general definition of the constitution.

The constitution, in the encyclopaedic sense, represents a legal act that has a specific juridical attributes, namely an act with a supreme legal force, approved and amended according to the special procedure, containing norms that regulate fundamental social and political relations in general and determining the organization of state power and a legal status of citizen in relation to the state throughout fundamental freedoms, rights and duties of citizens in particular.[10]

In the classic constitutional doctrine is affirmed that there are two fundamental concepts (meanings) of the constitution as a legal act: formal and material notion.[11] These two concepts, emphasizing the norms of the constitution as a legal act form the so-called normative notion of the constitution.[12] Even though the "common denominator" of the material and formal sense of the constitution is that the constitution is exclusively observed as a specific legal normative phenomenon.

2. FORMAL CONCEPT OF THE CONSTITUTION

In a formal sense, the constitution represents "a unique legal act, written and codified, with the highest legal force, approved by the highest organ or special state body, according to the special procedure that differs from the procedure of enacting laws and other legal acts".[13] From this definition we can separate the elements (attributes) that define the constitution in its formal meaning. In general, there are three elements, which put together, according to the constitutional legal theory, summarize the constitution's formal notion: the constitution's written form, codified form and the highest legal force.

The specificity of the constitution in a formal meaning is a form as the main instrument in the creation of the legal-normative act by which the law is expressed. In fact, the form of the legal-normative act *a priori* defines the very essence of it. This is best proven with the Latin legal maxim: *Forma dat esse rei* (form determines the content of a legal act). This allows the abil-

8 Visković, N., *Teorija drzhave i prava*, Zagreb, 2001, p. 174.

9 Dhima, D., *E drejta kushtetuese e Republikës Popullore të Shqipërisë*, Tiranë, 1963, p. 28.

10 Fira, A., *Ustavnost i politika*, Novi Sad, 1984, p. 13 – 14.

11 Observation and treatment of constitution in the formal and material sense stems from a traditional defining of any juridical act by formal and material sense.

12 Vračar, op. cit., p. 223.

13 Vidaković Mukić, M., *Opći pravni rječnik*, Zagreb, 2006, p. 1251.

ity to understand that the form of the legal – normative act determines and conditions its own content. While drafting constitutional norms, creators of the constitution are actually transforming a socio – political reality into a juridical reality.[14] Unlike the constitution in a material sense, the constitution in a formal sense exists only if it has a written form.[15] A written form makes transparent the content of the constitution as a fundamental and a highest legal act.

The main purpose of a written form is informing citizens with the content of the constitutional norms which are considered as the strongest guarantee of their own liberty and autonomy. Insisting on a written form also relates to the constitutional-legal education of citizens and officials concerning a democratic decision-making process and resolving the conflict of interest. Well-formed constitutional norms significantly facilitate the interpretation of their meaning and thus is avoided potentially ambiguously interpretation of the constitution. A written constitution provides basic rules. But, for understanding of the whole "constitutional picture" it is also necessary to examine subsequent interpretation of the constitution contained in case law and the political practices.[16] Finally, the written form is the main prerequisite for legal safety and equality, which are one of the most significant principles of the constitution and the rule of law.[17] The organization of the central and local government, relations and cooperation between them, as well as a legal position of citizens are realms of the highest importance and, as such, require a regulation in a written form.[18]

Second element of the constitution in a formal sense is the codification of legal norms that regulate the constitutional matter. The written constitution is a unique and a singular (only) legal act (codified or homogeneous constitution) where a normative matter with a fundamental constitutional value and relevance is compiled and systemized, i.e. in a framework of one legal act are concentrated the most important constitutional norms.[19] Codified constitution is more consistent by its legal nature and more coherent by its content what makes its implementation easier and more efficient. As an exception, the constitution may consist of a number of various legal acts, as was the case with the French Constitution of 1875, which consisted of three constitutional laws: the Law on the organization of the Senate, the Law on the organization of public powers and the Law on the relationship between public powers.[20] This is the case of the so–called non-codified or heterogeneous constitution. The codification is not a monopolistic element that belongs to the constitution only, but may also be a feature of laws, especially laws with special value and importance (criminal code, civil code, the electoral code, etc.). Therefore, codification is not identifying but still a very important element of the constitution in a formal sense.[21] It should be warned that the written and codified forms are the constitutive elements of the constitution in a formal meaning according to the assumption of the highest degree of generality and the supra legal force of constitutional norms. Seen from a strictly formal perspective, United Kingdom has no constitution in a formal sense. In other words, the United Kingdom does not really have a constitution; there is no text or document

14 Lukić, R., *Metodologija prava*, Beograd, 1979, p. 213-218.

15 Kelsen, H., *Opšta teorija prava*, Beograd, 1951, p. 130.

16 Barnett, H., *Constitutional and administrative law,* Oxon/New York, 2006, p. 9.

17 Trnka, K., *Ustavno pravo*, Sarajevo, 2000, p. 30.

18 Stefanović, J., *Ustavno pravo*, Zagreb, 1956, p. 21.

19 Hejvud, E., *Politika*, Beograd, 2004, p. 546.

20 Stojanović, D., *Ustavno pravo*, Niš, 2004, p. 39.

21 Đurđev, A., Pajvančić, M., *Ustavno pravo*, Novi Sad, 1991, p. 33.

which can clearly be identified as having that status. Although there are many laws which in terms of their content have a constitutional character, they have never been incorporated or codified in a single authoritative text. Moreover, it is probable that the United Kingdom Parliament is always free to amend laws which in other countries would be found in the constitutional text and which, therefore, could not be changed by ordinary legislation. This is one aspect of the principle of parliamentary supremacy or sovereignty, that Parliament is always free to make any law it likes. Besides this, parliamentary legislative supremacy as the most fundamental constitutional principle in the United Kingdom means in practice that the constitutional checks on government are feeble. The United Kingdom constitution fails to provide that balance of power between different institutions which, albeit in different forms, is to be found in the constitutions of France, Germany, and the United States of America.[22] Instead of a written constitution, a sovereign legislative body represents the ultimate law making power in the state. The written form dominates in the world, while codified form emerges as a result of the need for the existence of a unique and singular constitutional document that should be formulated in a good technical and legal point of view, in a clear and accurate way, in order to be useful for a longer time.[23]

The supreme legal force of the constitution is the third element determining the constitution in its formal meaning. In fact, the highest legal force is an immanent attribute and a prerogative that belongs only to the constitution. That gives the constitution a special, supreme status in the hierarchy of legal acts, but also, differentiates it from laws and other legal acts. Where does the higher legal force of constitutional norms (comparing to other acts) derive from? There are at least two reasons highlighted: *first*, it derives from the position and quality of the state body that posses the power to enact or amend the constitution, and *second*, it derives from special and more complex procedure by which the constitution is adopted or amended (particularly, the qualified majority vote or the popular sanction, if the constitution is approved by a referendum).[24] This is also related to another classification of constitutions. We can distinguish rigid and flexible constitutions. Rigid constitutions, may only be amended by a particular procedure set out in the constitution itself, such as a referendum or the vote of a special majority, perhaps two-thirds, of the members of each house of the legislature. Flexible are constitutions that can be revised following ordinary legislative procedure, i.e. there is no difference between ordinary and constitutional laws. In most cases creators of the constitution will seek to protect its constitutional provisions from subsequent repeal or amendment. Therefore, the constitution will stipulate stringent procedures to amend its provisions. For example, the federal Commonwealth of Australia Constitution Act can be amended only by specified majority in at least one House of Parliament and endorsed in a referendum which approves the proposed amendment by an overall majority in at least four of the six states. The United States' constitution amendments may be proposed by a two-thirds majority of both Houses of Congress or by two-thirds of the States. To be accepted, proposed amendments

22 Barendt, E., *An introduction to constitutional law*, New York, 1998, p. 1. A draft constitution for the United Kingdom prepared by the Institute of Public Research in 1991 has 136 pages. These differences are explicable in terms of both the range of topics covered and the degree of detail of their regulation. Some set out only the most important principles, leaving the legislature to implement the,. While others attempt comprehensive regulation of a range of diverse matters such as the conduct of elections, parliamentary procedures, public finance, and the court structure. On the whole, short constitutions are preferable. They are easier to understand, and they are more likely on that account to enjoy widespread acceptance.

23 Shkariq, S., *Ustavno pravo*, Skopje, 2007, p. 158.

24 Omari, L., Anastasi, A., *E drejta kushtetuese*, Tiranë, 2008, p. 43.

must be approved by three-quarters of the States. On the other hand, the United Kingdom's constitution is very flexible. Parliament is the supreme law making body and can enact laws on any subject matter by a simple majority vote.[25] Constitutional matters are regulated by the law as a legal act with the highest legal force. Hence, flexible constitutions can be amended in the same legislative procedure as other ordinary laws.

Among the general legal acts, the constitution is a unique legal act that, on the one hand autonomously determines its own legal force and on the other hand, the legal force of other legal acts. This is because the constitution is an initial (preliminary) normative act in the entire legal system. That is the reason why no other legal act has a higher legal force, except the so-called constitutional laws if they appear as a substitution for the constitution, as is the case in some countries.[26] This means that, all of the laws and other legal acts should be consistent (not contradictory) with the constitution. Accordingly, written constitutions worldwide contain the provision on the invalidity of unconstitutional legal acts. For example, the Constitution of the Republic of Croatia in 2001, expressed: "*In the Republic of Croatia laws shall conform with the Constitution, and other rules and regulations shall conform with the Constitution and law*" (article 5).[27] Alexander Hamilton, one of the "founding – fathers" of the U.S. Constitution, in 1788 declared: "*No legislative act contrary to the Constitution can be valid. To deny this would mean to affirm that the dependence is greater than the superior, that the servant is above his master ... The interpretation of the laws is the proper and special function of courts. A Constitution is viewed in fact, and must be viewed by judges as fundamental law. So far they should be the one specifying its meaning, and the meaning of every particular act, enacted by the state organs. When the will of the legislature, expressed in its laws, is contrary to the will of the people, expressed in the Constitution, judges should be guided by the latter and not the laws. They must give their decisions on the basis of the Basic Law, before they give them according to laws that are not essential*.[28] This is expressed by two principles: *one*, the principle of hierarchy, it means that the legal norm with lower legal force is subordinate and should be in an accordance to the norm with a higher legal force, and *two*, the principle of validity, it means that the validity of the legal norm with a highest legal force serves as a legal basis to transmit (give) validity to legal norms with a lower legal force.[29] The fundamental criteria for evaluating democratic processes and a qualification of a country as a state of law are compliance of laws and regulations to the constitution and existence of the institutionalized control of a constitutionality realized by a special court. In other words, an important instrument of ensuring the supremacy (primacy) of the constitution is the existence of a constitutional justice.[30] Constitutional justice is the institution and techniques that guarantee and supervise respecting the hierarchy of sources of law and the supremacy of constitutional norms as superior legal norms within a legal order.[31]

There is a variety of viewpoints regarding a formal meaning of the constitution. According to Burdeau, the constitution in its formal meaning constitutes rules that the state body sets within a specific procedure established for enacting and amending of the constitution. The

25 Barendt, E, *An introduction to Constitutional Law*, New York, 1998, p. 8 – 9.

26 Vračar, S., op. cit., p. 225.

27 *The Constitution of the Republic of Croatia*, Official Gazette No. 85/2010 (consolidated version).

28 Sadushi, S., *Kontrolli kushtetues*, Tiranë, 2004, p. 6.

29 Omari, L., Anastasi, A., op. cit., p. 43.

30 Omari, L., *Shteti i së drejtës*, Tiranë, 2004, p. 24.

31 Traja, K., *Drejtësia kushtetuese*, Tiranë, 2000, p. 13.

constitutional character of norms derives exclusively from the position of its creator, which is a supreme power within the state. Therefore, constitutional norms are set on the top of the hierarchical pyramid.[32] Kelsen considers that the constitution in a formal sense is a set of legal norms that can be changed only if proceeding (acting) by accordance to "special" norms. The purpose of these "special" norms is to make more difficult the procedure of amending constitutional norms. This procedure differs from the "ordinary" legislative process.[33] Đorđević claims that the constitution in a formal sense is a public act or a document that presents fundamental and the highest law of the state.[34] Another well-known author that deals with the theory of state and law, Radomir Lukić, considers the constitution as the highest legal act, i.e., an act which has the highest legal force and, therefore, can not be amended with any other legal act. It should be adopted by a special state body and a special procedure. Again, the constitution in a formal meaning is determined with two elements: *first*, the jurisdiction of the entity authorized to enact it, and *second*, the special procedure for its adopting and amending.[35]

According to a viewpoint presented by Jovičić, the constitution in a formal sense represents a written legal act with the highest legal force that regulates basis of social relationships and state order.[36] Similarly, Smerdel defines it as a unique, written, general legal act that contains all of the fundamental and the most of other provisions that regulate the constitutional matters.[37] Nikolić has defined the constitution as following: "observing from the formal point of view, the constitution is a written legal act, solemnly proclaimed, adopted and modified according to a special procedure that is more rigid and more complex than the procedure for enacting laws and other acts". The constitution is adopted and changed by a special constitutional convention, but that is not a general rule considering the fact that it can also be approved and changed by another state body or a popular referendum.[38]

Based on the above stated, can be concluded that the constitution, in formal sense, highlighting and differential characteristic has the position of the constitutional norms in the legal order of the certain state. In conformity with the formal sense, it results that constitution consists of only those legal norms that are "located at the top or pedestal" of the hierarchical pyramid of legal order of a certain state. This means we are dealing with norms that have a prevalent-superior legal force and represent a base for valuing other legal norms, although they are not adopted on the basis of any other legal norms. In fact, the Constitution, in the formal sense, means the legal hierarchy and the supremacy of the Constitution over all other legal acts within the internal or national legal order.

The study of the constitution in a formal sense does not pay any attention to the ontological (substantial) aspect of constitutional norms, to be precise not pay any attention to the relationships and issues that are object to regulation of constitutional norms, but the center of attention has formal elements (attributes) of the constitutional norms, such as, *first*, competences of the authorized subjects – state organs that approved constitutional norms; *second*, extraction procedure of the constitutional norms; and *third*, their supreme legal force.

32 loc. cit.

33 Kelsen, H., op. cit., p. 129.

34 Đorđević, J., *Ustavno pravo*, Beograd, 1975, p. 18.

35 Lukić, R., *Ustavnost i zakonitost*, Beograd, 1966, p. 19.

36 Jovičić, M., op. cit., p. 29.

37 Smerdel, B., Sokol, S., *Ustavno pravo*, Zagreb, 2006, p. 22.

38 Nikolić, P., *Ustavno pravo*, Beograd, 1997, p. 38 – 39.

3. MATERIAL CONCEPT OF THE CONSTITUTION

The constitution in a material sense can be defined as a set of rules or norms that regulate basis of legal and public order of a certain state.[39] Of course, this definition is too general, so a further elaboration is required. For the treatment of the constitution in a material sense it is not important whether the constitution has a written form or not and whether it is codified or not. This view is based on the premise that each country has a constitution, because there is no state without a constitution, irrespective of its form. Setting up a legal order implies the existence of some obligatory rules that constitute the foundation for its creating, developing and implementing. With the development of a state, basic rules are transformed into a complex system of rules. These rules represent an expression of the "will of the state" and, as such, are proclaimed as constitutional rules.[40] The constitution is an integral part of the national legal system and a reflection of the unity between the state and its law.[41] It turns out that a material meaning of the constitution is based on substantial aspects. The content of these rules and norms are issues of a particular importance for the state and society. In fact, the material meaning of constitution focuses on the content of the relationships that are object regulation by the constitutional norms, i.e. constitutional matter content sanctioned by constitutional norms.

Smerdel emphasizes that constitution in a material sense includes all sources of constitutional law (both material and formal) as a branch of the law, regardless of the fact if it comes to the constitution as a general normative act, an organic law, an ordinary law, a by laws or a constitutional custom.[42] This allows the understanding that the constitution in a material sense is defined as a unique whole of unwritten rules and written legal norms that regulates constitutional matters within the legal system of a certain state.

It follows that all modern states have constitution in the material sense. One conclusion that can be drawn in this regard, fair, logical and consistent, is that the constitution, in the material sense, has a inclusive nature, because at the same time includes as unwritten non-legal/meta-rules, as well as written legal norms that regulate constitutional matter regardless of the form they have (written norms or unwritten rules) and their legal power. In fact, the constitution in a material sense consist of a set of rules that determine and regulate basis of a state order, form of state rule/governance, manner of creating and organizing the highest organs of state power, correlation between them and their scope, form and substantive framework of general normative acts, particularly laws, limitations of a state power by fundamental freedoms and rights and by the rights of local government units, and other issues important to the state. This extensive definition contains different views affirmed by various authors (Georg Jellinek, Maurice Duverger, Joseph Barthelemy, Jacques Cadart, Hans Kelsen) in order to create a unique understanding of the constitution in a material sense.

39 Mratović, V., Filipović, N., Sokol, S., *Ustavno pravo*, Zagreb, 1986, p. 72.

40 Lukić, R., op. cit., p. 22.

41 Vračar, op. cit., p. 232.

42 Smerdel, B., Sokol, S., op. cit., p. 21.

4. CONTENT CORRELATION BETWEEN FORMAL AND MATERIAL SENSE/MEANING OF THE CONSTITUTION

It is possible that the constitution in a formal and material meaning correspond. Theoretically seen, constitution in a formal sense may contain basic legal norms that regulate all the relevant bases complex of the state and social order, or it may include all those relationships and issues that are inherent and fundamental for the constitutional matter in the legal system of the given state. The congruence between formal and material meaning of the constitution exists, if what is essential and fundamental for the social and state order of certain state, are incorporated in the constitution in a formal sense.[43] Practically and realistically seen, it is very difficult to achieve the congruence of the constitution in formal and material sense. Indeed, in order to be consistent these meanings to each other, constitutional maker should be as alert and sober, as well as attentive and careful, not to "transpose" or incorporate provisions that has nothing to do with constitutional matter and vice versa, there are written legal norms that regulate constitutional matter, but are not included in the constitution as general legal normative act with supra legal force.[44]

There are numerous and a variety of examples of the constitutions of different countries of the world, that within the constitutional normative text have transposed provisions whose content absolutely do not have nothing to do with classic/traditional constitutional matter.

Thus, for example, the U.S. Constitution of 1787, XVIII Amendment, adopted in 1919, contains the provision on "*banning the production, sale and transportation of alcoholic beverages for consumption purposes in the United States, their importation into and their export outside the United States, as well as to all the territories that are under their jurisdiction*". Also, the Constitution of New York prohibits cutting the wood for construction in the area of national forests. Finally, the Louisiana Constitution contains provisions that regulate a highway area and a payment of fees for their use (it even includes the map of highways)! [45]

Objectively seen, "clothing" these relevant issues with a "constitutional costume" by constitutional maker of respective states is in an absolute discordance with the constitutional logic. Therefore, constitutional regulation of mentioned issues is inappropriate. A better solution would be if they are regulated by legal acts, not by constitutional acts.

The above demonstrate, that the constitution in formal sense can regulate a mosaic of issues, and also shows how omnipotent is, constitutional maker. In other words, having available and using constitutional form as a powerful instrument in accordance with his view, will and freedom conceives normative content of the constitution, perchance under the "constitutional umbrella" may establish whatever provision from the substantive point of view.

Seen from a formal aspect, the above mentioned provisions are constitutional norms because they are formulated within the framework of the constitutional normative text and therefore, positioned at the top of the hierarchic pyramid within the legal order of those countries. But, seen from a material aspect, namely the object of a constitutional law, such provisions are not constitutional norms, because they do not regulate a constitutional matter.

On the other hand, the French Constitution of 1875 represents an example of a constitution that misses to regulate a constitutional matter, which has not dedicated any constitution-

43 Nikolić, P., op. cit., p. 36.

44 loc. cit.

45 Jovičić, M., op. cit., p. 162 – 163.

al norms to the judicial system leaving it to be regulated by norms of the legal act. It is about the *de iure* and *de facto* deconstitutionalisation of the judiciary as a standard constitutional-juridical field, although traditionally, even in comparative constitutional law prevails the attitude that both organizational and functional dimension of the judiciary is regulated within the normative composition of the constitution as a fundamental act with a supra legal force and not by legal act.[46]

Moreover, the constitution-maker everywhere during the constitution-making process can and should extend the scope of their normative regulation to core legal principles of the organization and functioning of the judiciary as a "constituent segment and a very important component" of every state. Meanwhile, the law as a general normative act regulates more closely and more detailed issues relating to the scope of the judiciary in a certain state. Furthermore, it is an undisputable fact that the judiciary has a constitutional character, because it is guaranteed by the constitution, and, consequently it is category of constitutional law.

The leading example of the lack of constitutional matters is the Constitution of France of 1875, which the issues concerning the judicial system does regulate with statutory norms rather than constitutional norms.[47] According to this Constitution, the number and mandate of members/representatives of the French parliament, as well as the conditions for their election, are determined by the electoral law and not by the constitution, as it is common for other states. Regulation of these issues in France is regulated by law, as a general normative legal act with lower legal force than the constitution.[48]

Seen from a material perspective, the electoral law is constitutional norm, because elections are constitutional matter. However, from the formal perspective, the electoral law is not constitutional norm, because the law has lower legal force than the constitution, and from the formal point of view as well as from the material point of view it is subordinate to the constitution.

5. CLOSING REVIEWS

From the theoretical and legal review of the formal and material concept of the constitution and their interrelationship several conclusions can be made:

First, constitutionalism is more concerned with the organization of political structures to prevent the exercise of authoritarian power by any individual, group, or political party. Most of the time, the constitution is considered an "agreement/contract" which is concluded between citizens and the bearer of the state power. Observed as an "agreement/contract", the purpose of constitution is to guarantee freedoms and rights of citizens;

Second, having in mind various points of view expressed in the constitutional legal theory regarding the definition of the constitution, we finally present our authorial definition about the constitution according to which constitution is a unique legal act, written and codified, with the supreme legal force, adopted by the sovereign or a special state body within a special procedure different from the "ordinary" law-making process that regulates basic and the most

46 Stefanovic, J., Ustavno pravo, 1965, Zagreb, p. 60 – 63.

47 Compare: *Constitution of the Republic of Macedonia* (1991) articles 62, 63, 64, 65, 66; *Constitution of the Republic of Croatia* (2001) articles 71, 72, 73, 74, 75, 76; *Constitution of the Republic of Montenegro* (2007) articles 83, 84, 85, 86, 87.

48 Duhamel, O., *Ustavno pravo*, Skopje, 2004, p. 21.

important social-political relations and issues referring primarily to the institutionalization of the organization and the functioning of state power and the guarantee of freedoms and rights of the citizens, and, as such, it is an instrument for limiting the political power of the bearers of state power;

Third, constitution as a normative act with the superior legal force is not an act through which law is applied, but is an act through law is created, because there is no higher legal act above the constitution which must be implemented. On contrary, statutes are based on the constitution and with the aim of its implementation;

Fourth, the constitution as the supreme, fundamental law of a certain state lays down the foundation stone of a legal order. Figuratively expressed, a legal order without constitution is like a "rooftop without foundation" in which it could rely and stand. Consequently, the constitution is the main instrument for the assurance and implementation of justice, it is the base for the harmonization of different normative acts and a legal expression and guarantee of the existence and realization of constitutionality in a certain state;

Fifth, the key element of the constitution is its supra legal force, its supreme privilege, its trademark, because only constitution determines in a autonomous manner its legal force and the legal force of other normative acts. Expressed in the simplest possible way, the supra legal force is "the emblem of the constitution";

Sixth, the supra legal force of the constitution derives from two legal-formal relevant factors. The first is the position and the quality of the state body empowered to adopt and revise the constitution. The second is a specific and complex procedure for adopting and amending of the constitution (qualified majority vote or the popular sanction, if the constitution is adopted by a constitutional referendum). Moreover, the greater legal force of the constitution derives from another factor with considerable relevance: the regulation of constitutional issues, i.e., the most important political-social relations within the legal system of a certain state, more exactly, it regulates the organization of a state power and determines and guarantees the protection of fundamental freedoms and rights of man and citizen. Moreover, norms on fundamental freedoms and rights of man and citizens and norms that regulate the organization, structure and powers of the central state bodies have a decisive importance and value in giving "the physiognomy of constitution" as a legal act and justification of its superior legal force in legal-logical aspect;

Seventh, the constitution as the main formal and the most important source of constitutional law, but also of every branch of law in general and of the legal system in particular, regulates the most relevant issues related to constitutional law in an original and authentic manner (well correlated with the influence of the international law). Therefore, within the framework of the substance of the constitution only crucial legal norms and legal principles of the constitutional matter are systematized and incorporated, because otherwise it would be too extensive and voluminous from normative quantity and as a consequence too inadequate and impractical. The key mission or the leitmotif of the constitution is not to regulate directly and tightly all groups of social relations, but to determine only "basis and framework of legal regulation of all social relations". So, the constitution "forms the skeleton of the legal order", but this skeleton should get life, first of all, by normative legal acts;

Eighth, seen from the perspective of comparative constitutional law, all states have a constitution in formal sense. Only 4 (four) states have constitution in a material sense: England, Israel, Singapore, and New Zealand;

Ninth, as more extensive notion, the constitution in a material sense "includes" the constitution in a formal sense. It is illusory and objectively impossible for a written legal act to include all constitutional norms. Besides the written constitution, constitutional matters are regulated by legal acts, by laws and many customary rules that enable the adaptation of the constitution to the dynamic social variable conditions and circumstances. Legal acts and customary rules change easier than formal constitutions. Indeed, with their change the need for formal constitutional change is reduced, perhaps even political tensions that follows the change of constitution in the formal sense;

Tenth, constitutionalism is more concerned with the organization of political structures to prevent the exercise of authoritarian power by any individual, group, or political party. The essence of the constitution consists of mutual limitation between state power and freedom of the individual: state power is limited by the freedom of the individual and vice versa, the freedom of the individual is limited by the state power. It is about establishing the balance between state power and individual freedom within the framework of state organization. In this regard, the balance between individual freedom and state power is very delicate issue. This is because individual freedom without state power becomes chaos, anarchy, and state power without the freedom of the individual becomes oppressive or totalitarian power. From this it can be concluded that deep substantial and social understanding of constitution and its inherent democratic importance is that within the state, is to organize the peaceful and harmonious coexistence between state power and freedom of the individual;

Eleventh, in comparative constitutional law prevails the idea that every constitution must necessarily regulate two principal issues: *first*, fundamental freedoms and human rights and, *second*, the organization and functioning of the state power. This is because the fundamental human rights and freedoms of citizens as well as the organization and functioning of state power traditionally are constitutional standard matter, and, as such, constitute its backbone. Furthermore, the reason and the fundamental intention of drafting and adopting the constitution is to regulate them in the normative-juridical plan.

Closing Reviews in this article will be concluded with two aphoristic:

1) "WHERE IS THE STATE AND THE LAW THERE IS THE CONSTITUTION";
2) "THE CONSTITUTION WITHOUT CONSTITUTIONAL COURT IS LIKE A BRAIN WITHOUT SKULL."

BIBLIOGRAPHY

a) Books and articles

1. Barnett, H., *Constitutional and administrative law,* Oxon/New York, 2006.
2. Barendt, E., *An introduction to constitutional law*, New York, 1998;
3. Dhima, D., *E drejta kushtetuese e Republikës Popullore të Shqipërisë*, Tiranë, 1963.
4. Đorđević, J., *Ustavno pravo*, Beograd, 1975.
5. Duhamel, O., *E drejta kushtetuese*, Skopje, 2004.
6. Đurđev, A., Pajvančić, M., *Ustavno pravo*, Novi Sad, 1991.
7. *Enciklopedija političke kulture*, Beograd, 1993.
8. Fira, A., *Ustavnost i politika*, Novi Sad, 1984.
9. Hejvud, E., *Politika*, Beograd, 2004.
10. Jovičić, M., *O ustavu*, Beograd, 1977.
11. Kelsen, H., *Opšta teorija prava*, Beograd, 1951.
12. Lukić, R., *Metodologija prava*, Beograd, 1979.
13. Lukić, R., *Ustavnost i zakonitost*, Beograd, 1966.
14. Mratović, V., Filipović, N., Sokol, S., *Ustavno pravo*, Zagreb, 1986.
15. Nikolić, P., *Ustavno pravo*, Beograd, 1997.
16. Omari, L., Anastasi, A., *E drejta kushtetuese*, Tiranë, 2008.
17. Omari, L., *Shteti i së drejtës*, Tiranë, 2004.
18. Ostrom, V., *Politička teorija složene republike,* Zagreb, 1989.
19. Sadushi, S., *Kontrolli kushtetues*, Tiranë, 2004.
20. Shkariq, S., *Ustavno pravo*, Skopje, 2007.
21. Smerdel, B., Sokol, S., *Ustavno pravo*, Zagreb, 2006.
22. Stefanović, J., *Ustavno pravo*, Zagreb, 1956.
23. Stefanović, J., *Ustavno pravo*, Zagreb, 1965.
24. Stojanović, D., *Ustavno pravo*, Niš, 2004.
25. Traja, K., *Drejtësia kushtetuese*, Tiranë, 2000.
26. Trnka, K., *Ustavno pravo*, Sarajevo, 2000.
27. Vidaković Mukić, M., *Opći pravni rječnik*, Zagreb, 2006.
28. Visković, N., *Teorija drzhave i prava*, Zagreb, 2001.
29. Vračar, S., *Osnovni problemi konstruisanja naučne i pozitivno-pravne definicije ustava*, Arhiv za društvene i pravne nauke, 3-4/1962, Beograd, p. ?-?

b) Constitutions

1. The Constitution of the Republic of Albania (1998), http://www.ipls.org/services/kusht/cp1.html.
2. The Constitution of the Republic of Bulgaria (1991), http://www.parliament.bg/en/const.
3. The Colombian Constitution (1991), http://confinder.richmond.edu/admin/docs/colombia_const2.pdf.
4. The Constitution of the Republic of Croatia, *Official Gazette* No. 85/2010 (consolidated version).
5. The Constitution of the Republic of Macedonia (1991), http://www.uni-graz.at/opv1www_ustav_makedonija_mak.pdf.
6. The Constitution of the Rpublic of Montenegro (2007), http://www.skupstina.me/cms/site_data/ustav/Ustav%20Crne%20Gore.pdf.

Blerton Sinani, PhD candidate, assistant professor, Department of Public Law, Faculty of Law of the South East European University, Tetovo, Republic of Macedonia

A CRITICAL-LEGAL REVIEW OF THE CONCEPT OF CONSTITUTION AS THE HIGHEST LEGAL POLITICAL ACT OF THE STATE IN THE LIGHT OF CONSTITUTIONAL-JURIDICAL DOCTRINE

Summary

Constitution is a set of rules that govern a nation state. It is considered a government's antecedent because it gives legitimacy to the government and defines the powers under which a government may act. As such, the constitution sets constraints both to the powers which can be exercised and to manner in which they may be exercised. Hence, the constitution defines the legality of power and that is the reason why it can be defined as a legal and political act. Two fundamental concepts (meanings) of the constitution represented in the constitutional legal theory are formal and material notion of the constitution. The paper focuses on elaborating and explaining the constitution as a fundamental and a supreme legal-political act in general and on the comparison of the formal and material concept of the constitution in particular. The extent of the correspondence between these two concepts and their relation with the notions of written/unwritten and rigid/flexible constitution is also analysed.

Key words: constitution, formal concept of the constitution, material concept of the constitution, written and unwritten constitution, rigid and flexible constitution, contents relation between constitution in formal and material sense.

Blerton Sinani, Doktorand, Assisstent am Lehrstuhl für Öffentliches Recht der Fakultät für Rechtswissenschaften, Südost-Europa-Universität Tetovo, Republik Mazedonien

RECHTSKRITISCHE ERÖRTERUNG DES VERFASSUNGSKONZEPTES ALS OBERSTEN RECHTSPOLITISCHEN AKTES DES STAATES IM LICHTE DER VERFASSUNGSRECHTLICHEN DOKTRIN

Zusammenfassung

Die Verfassung ist eine Sammlung von Bestimmungen, die den gesamten Zustand eines Staates regelt. Sie wird als Vorgänger der Regierung betrachtet, weil sie diese mit der Legitimität versieht und deren Befugnisse bestimmt. Als solche, schränkt die Verfassung die Zuständigkeiten, die durchzuführen sind, sowie die Formen und Weisen deren Durchfüchrung ein. Die Verfassung definiert die Legalität dieser Zuständigkeiten und aus diesem Grunde kann sie als ein rectspolitischer Akt bestimmt werden. Es bestehen zwei grundlegende Konzepte der Verfassung in der Rechtstheorie: formelles und materielles Kozept. Der Autor fokussiert sich weiter auf die Erörterung und Erklärung der Verfassung als grundlegenden und obersten rechtspolitischen Aktes im allgemeinen, und insbesondere auf die Komparation des formellen und materiellen Konzeptes der Verfassung. Derüber hinaus werden die Übereinstimmungen dieser Konzepte analysiert, sowie ihr Verhältnis mit den Begriffen geschriebene/ ugeschriebene bzw. rigide/flexible Verfassung.

Schlüsselwörter: die Verfassung, formelles Verfassungskonzept, materielles Verfassungskonzept, geschriebene/ ugeschriebene bzw. rigide/ flexible Verfassung, inhaltliches Verhältnis zwischen der Verfassung im formellen und der Verfassung im materiellen Sinn.