The Political concept of the Constitution and the Concepts of Hidden Constitution, Modest Constitution and, Behind –the-Scenes" Constitution

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Abstract

The political concept of the constitution is bound with the theory of constitutionalism. The political concept of the constitution, in defining the constitution, starts from its purpose. The supporters of this understanding of the constitution, advocate the thesis that the constitution is the principal act or set of principles that limit the state power. Thus the constitution is only one of the elements of constitutionalism, which provides limited power. As the highest act in the legal system, the constitution institutionalizes and objectifies the exercise of state power, and thus restricts it. Understood in this way, the basic goal of the constitution is to determine and institutionalize means, mechanisms and instruments for limiting and controlling political power.In this paper, the attitude of this understanding of the constitution will be elaborated vs. the notion of a hidden constitution", a „modest constitution", a „constitution in exile" and a „behind-the-scenes" constitution as modern views of the constitution. The indicated terms for designating the constitution are in relation to the role of the institutions for control of the constitutionality of legal acts. These authorities realize their role as "the guardian of constitutionality" through the process of interpreting the weak, unclear and modest constitutional provisions. In the process of interpreting unclear constitutional provisions, they often face the temptation to act as a provision-maker.

Viewed from this aspect, their actions outside the constitutionally prescribed competencies, and under the veil for the need for control of the constitutionality, is contrary to the request for framing the powers of the state, contrary to the request for action within the constitution and contrary to the idea of limited and controlled power, i.e constitutionalism.

Keywords: Constitution, Constitutionalism, ,,Modest constitution", ,,Behind- the- Scenes Constitution", Constitutionality.

Introduction

The concept of the constitution is one of those concepts that are discussed, debated and for which there are various theoretical views that they are trying to define. Constitutional and legal literature is extremely rich in various definitions of the constitution, and almost every author tries to express his understanding of what constitutes the constitution. In the context of this, there are the legal, political, sociological-phenomenological notion of the constitution, which seek to define it from various aspects.

The emergence of the concept of a solid and written constitution in the 18th century is a consequence of the ideological, philosophical and historical, social and political circumstances (Jovicic Miodrag.2006).

The constitution is an indissoluble link between the state and the law on one side, and the state and society on the other. The Constitution is often an act of creating the mechanism of power and confirmation of basic social relations (Gjorgjevic Jovan 1976). Namely, the constitution is established as a basic principle of the established order. It is the basic act of constituting the state and the highest legal act in one country. Therefore, regardless of whether the integrity of the constitutional rules will be in a written or unwritten form, the basic goal of the constitution

should probably be sought in an effort to establish an order that will be stable, an order in which the behavior of the entities will be predictable, and the constitutional rules will be the standard in which this behavior will be evaluated.

In the attempts to define the constitution, constitutional and legal literature encounters definitions that see it as a collection of rules for the state, the totality of rules of law (lex fundamentalis), a set of rules for political institutions, a conservation of the real forces in one country (Lassalle), a set of rules that provide effective restrictions on state power.

Traditional notions of constitutionalism, on the other hand, as an idea, ideology and awareness of limited and controlled power, have their foundations in the existence of the constitution. The constitution is the basis, element, and at the same time the goal of constitutionalism. These conceptions of constitutionalism are equated with the political notion of the constitution. However, the constitution as a basic written act with the greatest legal force in the legal order cannot be identified with constitutionalism, nor is it a guarantee. It is only one of its elements and in this context it will not be wrong if the premise is accepted, that the constitution as an act regulates the basic instruments, measures and means for limiting and controlling the state power.

The Political Concept of the Constitution

In the attempt to define the constitution in constitutional and legal literature, the political term of the constitution appears.

In a political sense, the constitution exists if there are effective instruments for limiting state power in the system. Thus, the supporters of this theoretical point of view, advocate the thesis that a constitution in a political sense can only be spoken if the subjectivity, arbitrariness and abuse of the holders of state power is inhibited. Deskoska points out that "the main goal of the constitution is to limit the power, especially in relation to man and his rights" (Treneska-Deskoska Renata 2015).

The constitutions are the basic element of the limitation of power. However, although the constitution is seen as the totality of instruments, measures and means of limiting power, it is of utmost importance not only the declarative limitation of power, but also its effective limitation with effective mechanisms. Sartori, emphasizes that "the constitution is the basic law, a basic set of principles and the totality of institutional solutions that will prevent the arbitrary authority and provide limited power (Giovani Sartori 1962). For Friedrich Haek, the constitution is nothing but a device for limiting the power of government, whether unelected or elected (Hayek Fridrich 1993). Hence, the political notion of the constitution approaches the theory of constitutionalism perceived in the widest sense, as the ideology of limited power.

In the political sense, the constitution exists when the subjectivization in the exercise of state power has been avoided. It establishes the abstract will of objective law, against the subjective or personal will of those who exercise power.
Karl Lowenstein defines three basic elements of the political notion of the constitution:

- Separation of state power;
- Guaranteed freedoms and rights;
- A rationalized method of changing the constitution, by which one side will provide its longevity, on the other, it will allow its adjustment to the constellation social relations (Lowenstein Karl 1957).

According to Karl Friedrich, a country has a constitution only if its state power is effectively limited (Fridrich Karl 1996). Hence the constitution is seen not as an act that defines and systematizes the elements of restraint of power, but as a political process of its effective limitation. That is why, the existence of the constitution itself, per se, does not constitute a guarantee of limited state power, neither the constitution as a written legal act guarantees the existence of a political process of restraining power.

Finally, we can conclude that the basic binding points, of the political notion of the constitution and the concept of constitutionalism are, the internal principle of restraint of power and the external principle of limiting state power. The first, is the principle of power sharing incorporated in the role of the constitution to specify a power map, defining the structure of government, articulating the pathways of power and specifying the procedures for lawmaking. The external principle of limiting state power is the corpus of guaranteed human freedoms and rights. The way in which these two principles will be incorporated in the constitutional creation, will determine the ability of the constituent to regulate the constitutional substance on the one hand, while at the same time ensuring its flexibility and longevity.
A constitution is therefore a form of political engineering, to be judged like any other construction by how well it survives the test of time (Giovani Sartori 1962).

The Constitution as an Element of Constitutionalism

If we start from the premise that the constitutionalism is a doctrine, ideology and finally a state of mind for the necessity of controlled and limited government, then the constitution undoubtedly presents its basic element and its essence. The constitution is just one, very important element without which modern constitutionalism cannot be imagined. Although, the set of rules that provide the limitation of the state power, may be in an unwritten form, expressed through the established constitutional conventions, with the emergence of the concept of written

constitution in the 18th century, there is an insistence on these mechanisms and instruments of restraint of power, to be foreseen and established by the constitution.

The constitution seen as not only legal but also a political act including basic instruments, measures and mechanisms for limitation of political power, is the core of the constitutionalism.

This set of elements which per se are basic mechanisms for limitation of government, and which are essentially constitutional matter are actually the basic elements of constitutionalism. If we take into consideration that there are many definitions of the notion of constitutionalism, we will not make a mistake if we try to define this concept by argumenting his elements. They primarily include:

- Human rights and freedoms,
- Principle of separation of powers,
- Supremacy of the constitution,
- Status constitutionality – establishment of institutions pursuant to the constitution,
- Functional constitutionality – determining their competences and functions pursuant to the constitution,
- Guaranteed constitutionality – the existence of a special authority (the Constitutional Court) that will perform the function of a guardian of the constitution and protection of the principle of the constitutionality.
- The principle of the Rule of law.

Hence, it must be concluded that it seems that in the modern constitutional systems the constitution is a starting point in the implementation of the constitutionality. The constitution is an element of constitutionalism per se, but it is also the highest legal act by which the system provides for and establishes instruments for restraining power. In this way, it seems that the constitution incorporates the other element of constitutionalism. Therefore, the dilemma arises, is

the constitution a synonym for constitutionalism and whether equality can be placed between these two terms.

On the other hand, one very important quaestion arises, whether the constitution itself, is a guarantee that there will be limited and controlled political power in the real sense of the word, in the existing system.

Finally, Deskoska point out that the constitutions may also exist without constitutionalism, provided they are political means and instruments for meeting short-term party interests (Treneska-Deskoska Renata 2006). If we add to this, the fact that constitutions can be mystifying, completely unharmonized with the concrete constitutional momentum, simply put "programme pamphlets" or according to F. Lasalle "a simple piece of paper", in that case the question whether these constitutions represent guarantee for the constitutionalism, arises.

The other side of the coin shows the example of the United Kingdom. The constitutional history of UK points out that the written form of the constitution or the constitution in a formal sense, does not guarantee the existence and fostering constitutionality. In the aforementioned case when the constitution is regulated by unwritten legal rules (constitutional conventions or constitutional customs) that are fostered for a long historical period and seem to become not only part of the historical past of the people, but are incorporated in its identity, their amendment is far more difficult than the amendment of the written legal norm. However, these unwritten legal rules for limiting state authorities fostered throughout the historical past are a sufficient guarantee of maintaining the idea of constitutionalism and its practice in reality.

Finally it can be concluded that the constitution is the core of the constitutionalism. However constitution and constitutionalism cannot be equated. The implementation and fostering of the constitutionalism in practice seems to be conditioned by a number of other factors such as political culture, constitutional history, political, social and legal certainty and economic stability. The constitution may project the idea of achieving constitutionalism, but whether it

will be implemented in the real sense of the word in practice finally depends on the state and the will of the society.

The Concepts of Hidden Constitution, Modest Constitution and, Behind the Scene Constitution"

Modern constitutional concepts completely accept the definitions of constitution in formal and material sense, as well as the classifications of constitutions made according to different criteria. In contemporary constitutional law it is common to expect the entire *materia constitutionis* not to be covered by an act, which means that, the part of the usual constitutional materia does not have to be found in the constitutional text. However, today the concepts of limited constitution, symbolic constitution and the idea of constitution behind the constitution, given the dilemmas these categories open in relation to the constitutional and judicial control of constitutionality, are a growing challenge for the constitutional law.

Constitutions are no more self- implementing than they are self -made. That is why, there must be and institution in the established system, that will have an authority to strike down laws and other legal acts that are not constitutional. This review power of control of the constitutionality, has fallen to the judiciary and a specialized court (in the european systems the constitutional court). Because of the possibility every act to face the challenge for control of constitutionality and the danger of individual interest (interest of constitutional judges) to dominate the expectations and the needs of the society, the role of the constitutional court is not negligible. With the capacity to override the decisions and laws produced by democratic governments, unelected judges occupy a unique position both in and above politics (Rod Hague &Martin Harrop 2010).

Basically, with this capacity, the judiciary may interpret the constitutional provision not only when there is a real necessity of adjustment of the constitutional provisions with the real constellation of the real social relation (according to Bickel- real constitutional momentum), but also judicial interpretation may produce the concept of living constitution. In the radical

extension of this thesis, constitutional court literature faces the danger of converting the (constitutional) courts into the continuous constitutional convention.

In this context, it seems that the concepts of limited constitution, modest constitution and „behind the scenes constitution", look at the constitution from a completely different perspective.

Thus, the idea of *limited constitution* indicates to the position of the court in the system of organisation of powers. In its essence the concept refers to a constitution that provides for clear limitations of the legislature. These limitations of the legislature should not only be provided for and guaranteed, but must also be practiced by the courts in such form to refuse the application of the unconstitutional laws. The problem arises when, by rejecting the unconstitutional law, the court opposes its opinion for unconstitutionality with the opinion of other branches of the state authorities or, according to *Cliteur*„ not elected and not responsible before any entity, the element of the state authorities, annuls the conclusions of constitutionality of two elected and responsible authorities" (Cliteur.P.B.1993). While trying to find solution for the "unlimited" powers of the legislator, the concept of "Limited Constitutionality" produces new problem connected to the "limited" powers of judges. Namely, while trying to ensure the principle of constitutionalism, the aforementioned concept of limited constitution, by limiting the legislator in the creation of the unconstitutional laws, encourages the conditions for "government of judges (Bernhard Rudolf 1991).

The terms, *symbolic constitution* or *„behind the scenes constitution"* are not less important. The symbolic constitution refers more to a constitution which remains silent for many issues from the constitutional matter. It transforms the act of control of constitutionality in "an art accomplished in the interspace of strict analysis of the constitutional norm on the one hand and the imagination, on the other hand" (Thomas J Higgins 1981). The essence of the problem consists in the possibility of creating new constitutional rule, new constitutional norm, and the lack of

special rules that would limit the "interpretative community" of the constitutional judges in the creation of the new constitutional rule. It produces a dilemma on the mechanisms that would limit the judges in the act of control of constitutionality. The legal mechanisms established by the constitution, other acts regulating this matteriae, will certainly help if the act of control of constitutionality is rationalized on a level of interpretation of the written constitutional provisions, but in case there is no such provision, the doctrine of self-restraint of judges is the only possible mechanism that can be used. This in fact implies that only the self-restraint theory can provide avoidance of the risk of abuse of the so-called invisible

constitution, that is, abuse of the situation when the constitution remained silent regarding certain issue.

Thus, the theory faces several questions: Does reconstruction of the constitutions in the process of interpretation of its "mischievous phrases", jeopardize the political concept of the constitution, i.e is the reconstruction of the constitution by the judges *contradictio in adjecto* to the concept of effective limitation of the branches of the government? Does taking away the "traditional" constitution from the constitutional judges really jeopardize the concept of constitutionalism? And finally, is constitutional revolution by the constitutional judges possible?

Finally, if the aforementioned categories of limited constitution, ,,constitution behind- the – sceenes" and symbolic constitution obtain a radical extension in the direction: the need to limit the legislation and executive in the process of creating unconstitutional acts; a hidden background of the constitutional provisions that leaves space for different interpretations; constitutional gaps that allow the creation of new rules, and if constitutional judges are considered as guardians of the constitution, then the dilemma *qius custodiet ipsos custodies* justifiably imposes.

Conclusion

The political concept of the constitution and constitutionalism as an idea of ideology and doctrine for the denial of state power are very close. A common point of attachment to both concepts is the need to limit state power. However, the doctrine of constitutionalism seems to be broader and more comprehensive. It covers not only the primary purpose of the constitution (limitation of state power), but also the elements and mechanisms through which it should be provided.

On the other hand, the concepts of living constitution, modest constitution and "behind the scenes constitution" seem to contradict the notion of constitutionalism. They refer to a constitution for which there is a need to adapt to changes in social relations, mischiefs and unequal constitutional provisions, constitutional gaps that need to be filled with interpretation by judges. This leaves an opportunity to assess the constitutionality of the legal norms, the competent authorities to manifest an open will outside of rational legal thinking and to get involved in the sphere of right distribution in the realm of creation. This open occurrence of judicial activism, realized in the interpretation of constitutional rules as the highest legal norms, seems to be contradictio in ajdecto with the idea of constitutionalism and the political concept of the constitution.

Finally it can be concluded that the constitution is the core of the constitutionalism. However constitution (even the political concept) and constitutionalism cannot be equated. The implementation and fostering of the constitutionalism in practice seems to be conditioned by a number of other factors such as political culture, constitutional history, political, social and legal certainty and economic stability. The constitution may project the idea of achieving constitutionalism, but whether it will be implemented in the real sense of the word in practice finally depends on the state and the will of the society.

References:

1. Jovicic Miodrag. *Constitution and Constitutionalism*. Sluzbeni glasnik. Belgrade.2006
2. Jovan Gjorgjevic. *Ustavno pravo.* Savremena administracija. Beograd 1976
3. Treneska –Deskoska Renata. Constitutionalism. Skopje.2015
4. Giovani Sartori. *Constituttionalism: A Preliminary Discussion*. 56 American Political Science Review. 1962.
5. Hayek Fridrich. *The Constitution of Liberty.* London1993
6. Lowenstein Karl. *Political power and the Government Process*. Chigago.1957
7. Fridrih Karl. *Konstitucionalizam (ogranicavanje I kontrola vlasti).* CID. Podgorica.1996
8. Giovani Sartori. *Constituttionalism: A Preliminary Discussion*. 56 American Political Science Review. 1962.
9. Treneska-Deskoska Renata. The Constitutionalism and the Human Rights. Skopje.2006
10. Rod Hague and Martin Harrop. *Comparative Government and Politics an Introduction* 8 edition. PalgraveMc Millan. 2010
11. Cliteur.P.B. *Traditionalism, Democracy and Judicial Review*. Constitutional review-theoretical and comparative perspectives. Boston 1993
12. Bernhardt Rudolf. *Different Concepts of Modern Constitution*. General reports from the First Congress of IACL in Belgrade. Fribourg.Switzerland.
13. HigginsThomas J. *Judicial review unmasked*. The Christopher Publishing House. West Hanover. Massachusetts.1981

Helpful Bibliography:

1. GragliaLino.A. *Its Not Constitutionalism, Its Judicial activism*. Harvard Journal of Law and Public policy.1996.vo.19.issue 2
2. Kelzen Hans. *The General theory of the Law and the State.* Belgrade.1951
3. Schauer Frederick. *Judicial Supremacy and the Modest Constitution.* California Law Review vol.92 issue 4. 2004
4. Smith Eivind. *Constitutional Justice under Old Constitutions.* Kluwer Law International. The Hague. 1995
5. Thomas J Higgins. *Judicial review unmasked*. Massachusetts.1981
6. Tushnet Mark. *Two Versions of Judicial Supremacy.* William and Mary Law Review vol.39 issue 3. 1998.
7. Tushnet Mark. *Weak Courts on Steroids: Improving Weak – Form Judicial Review.* Texas Law Review vol.87. 2009.
8. W.J.Wittevee. *The Symbolic Constitution*. Constitutional review-Theoretical and Comparative perspectives. Boston.1993.