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FROM THE SRETENJE TO MITROVDAN CONSTITUTIONS WITH REFERENCE TO THE DEVELOPMENT OF DEMOCRACY AND HUMAN RIGHTS

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Abstract: *Constitutions are complex and substantively important documents, and at the same time they contain necessary characteristics that are a reflection of the existing type of society, that is a constitution is an act of state, the highest normative - legal regulation, which is a fundamental law, but also a declarative act and an ideological political act. The Constitution is also the highest legal act of the state, since the Constitution determines the legal force of other general legal acts. Today, the constitutional development of Serbia does not lag behind the strongest contemporary constitutional development of other countries. We could say that the constitutional beginning and development begins with Dušan's code in 1349. The aforementioned constitution contains a number of constitutional elements, and in Dušan's empire there was no higher law than the aforementioned Code. Other, later constitutions of Serbia as an independent state were encompassed by the growth of human rights. In this context, this paper will focus precisely on the beginning of constitutionalism in the Republic of Serbia, but also on other later constitutions that were conditioned by the socio-economic circumstances in which they existed. A comparative-legal analysis can be used to perform a comparative-legal review of the constitutions in Serbia in relation to other constitutions that appeared at a certain time. This also applies to contemporary constitutional orders in the countries of the European Union, Russia, and other countries in relation to constitutionality in the Republic. Serbia. This paper presents the view that a change to the constitution as the highest legal act in a certain state can be expected, when it no longer has its purpose, that*

is, when it becomes a brake and a limiting element in itself, being in contradiction with the social circumstances in which it exists. Apart from this, our goal is to present the basic and fundamental characteristics of the development of constitutionalism in the Republic of Serbia.

Key words: *Constitution, human rights, democracy, Dušan's Code, democratic constitution, Oktroisani constitution.*

1. INTRODUCTION

The constitutional development of Serbia begins after the first Serbian uprising in 1804. Under the pressure from Russia and the Ottoman Empire, Miloš Obrenović votes, that is, passes the so-called Sretenje Constitution in 1835. The Constitution established fundamental constitutional principles, limited the power of the ruler, established the National Assembly and regulated fundamental civil rights. In what was then Constantinople in 1838 the fourth Hatisherid was passed, which mandated that the ruler's power be limited. The emergence of constitutional defenders is also linked to this constitution. A few years later, Serbia becomes a constitutional monarchy. The role of the legislative body was assigned to the National Assembly, and the specificity associated with this period is the freedom of the press and the introduction of judicial bodies, in such a way that they became independent. In 1918, an artificial creation was established - the so-called Kingdom of Serbs, Croats and Slovenes, whereby Serbia was no longer an independent state, but transferred its legitimacy to the aforementioned newly formed state of interest. The first Constitution of the Kingdom was implemented, that is, adopted in 1921, and the second Constitution of the Kingdom was adopted by King Aleksandar Obrenović on September 3, 1931. After the Second World War, Serbia, as part of the federal state, adopted constitutions in 1947, 1953 and 1963. The latest state constitution was adopted in 1974. The wars in the former SFRY that followed in the 90s of the last century ultimately led to the disintegration of the union of Serbia and Montenegro. In 1990, the Serbian Parliament re-enacted a constitution with comprehensive guarantees of established civil rights. Current Mitrovdan Constitution was passed on November 8, 2006 and belongs to the category of "modern" constitutions. It was finally adopted at the session of the National Assembly of Serbia on September 30, 2006. Bearing in mind the aforementioned review of the historical development of constitutionalism in the Republic of Serbia, hereinafter we provide a broader explanation of the above, through the prism of their origin, development and abolition.

1.1. Dušan's Code, the foundations of the Serbian state, government and rule of law

At the court of Emperor Dušan, a code had been drawn up for 15 years, which during that time was verified by the Imperial Assembly, and adopted in 1349. It gave the Emperor

a guarantee that strengthened the power in the Serbian land. Even before Dušan's code, some forms of legal rules had already existed since Stefan's time. The vagueness and transcendent character of these definitions motivated their adoption. After the law was passed, Emperor Dušan said: "I wanted this to be in my possession." This code contains basic and elementary human rights. Dušan's code emphasizes that no one should be harmed, that power or authority should never be abused to the detriment of another person, etc. The general setting is the following: "do not do unto others what you would not do unto yourself." The Code also contains norms related to religious and church regulations, which determine the obligations of concluding a religious marriage. A way to protect cultural heritage had also been introduced. A large part of the provisions regulated criminal cases, such as sanctions for criminal acts against a person (contempt and murder). Provisions on asylum and amnesty had been listed as well. There was neither a state framework nor a social environment in which the law was created and which should have been applied. As early as the lifetime of Dušan's successor, the decline of the state began. The importance of the code for the organization of the Serbian language and the state is great, it limits the arbitrariness of the ruler and orders the actions of certain bodies, especially the courts (Radiša, 2008, p. 28). Most theoreticians believe that the code should have its place in Serbian and world public opinion. It consisted of two parts, a textual part and a normative part. With the consent of the emperor and the parliament, the courts had been organized as independent and separate bodies from the state administration, and in the legal system there was no legal act that is superior to the code (Bubalo, 2010. str. 23).

1.2. The issue of constitution in the uprising Serbia

Along with military successes, an insurgent state was created in a specific way. This form of state organization had the character of a military despotism with oligarchic aspirations, that is, a monarchical system of government. Mateja Nenadović and Boža Grujović gave the idea of creating a supreme body, which established the *Praviteljstvujušči soviet* in 1805, which had the role of limiting Karađorđe's power. The problem with this body was that the most prominent elders were not part of it. The Soviet did not have the strength to become the supreme authority, either in terms of professional or secondary capacities. Only after 1808 and the agreement between Karađorđe and the elders did the Soviet gain a serious role in the administration of the state, and in addition to the Supreme Leader and the Soviet, there were other bodies such as the National Assembly (actually the Elders' Assembly).

2. THE CONSTITUTIONS OF THE PRINCIPALITY AND KINGDOM OF SERBIA

The Sretenje Constitution proclaimed the principle of power sharing between the legislature (Bartulović, 2009, p. 28). An important part of the Sretenje Constitution for

our paper is the eleventh chapter on the general rights of Serbs, which is the forerunner of civil rights and freedoms. It determines the inviolability of the person, the inviolability of personal freedoms, the right to a fair trial, the freedom of movement and residence, the inviolability of the home, the right to choose a career. Apart from the fact that it was short-lived, only six weeks, it was suspended due to pressure from Russia and other powers, but it gave birth to democracy and the establishment of some human rights and served as a foundation for their establishment and protection. Thanks to this constitution, Serbia became a constitutional monarchy. In the area of human rights, the principle of individual responsibility, that is, the ability to answer for illegal actions, was introduced.

In order to adapt the status of Serbia to the circumstances in which it existed, in 1838, the sultan issued a hatisherif which adopted the Serbian resolution on various issues and freedom of religion, supported by Miloš Obrenović. The hatisherif stated that Turkish officials would not interfere in the internal administration of Serbia as an independent state. Serbs can establish schools, hospitals, replace Soviet members, and if the Serbs commit a crime against the Porte, they cannot be forced to serve the Turks. We see that Serbia's autonomy was achieved in this period. Thanks to this, Serbia received the status of vassal principality and Prince Miloš received the title of heir to the throne.

The end of stormy periods in the political history of Serbia, internal unrest and conflicts, as well as the national emancipation took place in 1868, when Prince Mihajlo Obrenović actually passed away (Radojević, 2010, str. 5.).

The Grand National Assembly was held under the Viceroyalty, and on the feast of the Holy Trinity, on June 29, 1869, it passed the Constitution. The Constitution has 133 articles arranged in harmonious units.

Serbia becomes a hereditary constitutional monarchy with people's representation.

The Constitution declares some of the personal rights, but at the same time allows the law to limit and narrow them. For the first time, the freedom of expression of thought is being expressed, and that is the only political right recognized by the Constitution. The government could temporarily suspend some personal freedoms (right to personal freedom, inviolability of obitalists, freedom of speech, right to trial, etc.). We can see that the Constitution is not a protector of human rights and freedoms, nor of democracy. However, from this constitution onwards, Serbia itself prescribes its own internal regulation (Radojčić, 2008, p.28)

-Serbia gains independence at the Berlin Congress, so it turns to organizing its internal life. In 1881, the Law on Associations and Assemblies was passed. The People's Radical Party, which demands decentralization and the transfer of central administration to self-governing municipalities and counties, especially demands democratic and political freedom and stands out among the new ideas.

Radicals had a majority in the constitution-making Grand Assembly, and in December 1888 a new Constitution popularly known as the Radical Constitution was adopted. Advanced ideas were developed so that the people's representative became an equal participant in the legislation with the monarch; furthermore the parliament gets budgetary rights, the right of interpellation, and others.

The government is responsible to the parliament, elections are direct, civil rights are precisely defined by the Constitution and guaranteed by the Constitution, the judiciary is independent, district, county and municipal self-government was introduced as well.

The Constitution represented the victory of civil democratic rights and principles. Serbia is a hereditary constitutional monarchy with a People's Representative. Legislative power belongs to the king and the People's Representative. The king has executive power and exercises it through ministers. The king is the head of the state and his personality is inviolable, he confirms and promulgates the laws.

The National Assembly represents the legislative body, and the Great National Assembly has been retained. Special attention is paid to the rights of citizens. Arrest without resolution is prohibited, the death penalty for political criminals is abolished, the inviolability of the apartment is guaranteed, the expulsion of Serbian citizens from the country is prohibited, religion and freedom of the press are guaranteed, and a number of other civil rights are guaranteed (Bubalo, 2010, p.24)

- The crisis over the viceroyalty was resolved by the *coup d'état* of King Alexander on April 1, 1893. With the victory of the radicals, they are trying to restore the Constitution of 1888 with the necessary adjustments and changes.

- On May 9, 1894, King Aleksandar Obrenović suspended the Constitution from 1888 and reinstated the Constitution from 1869. This time, the *coup d'état* was carried out only by proclamation. The laws that stemmed from the provisions of the Viceroyalty's Constitution were restored.

The Grand National Assembly is responsible for adopting a new constitution, and the constitution was ratified on April 6 1901, therefore it is called the April Constitution. It represented a combination of the wishes of the king, progressives and radicals and a combination of the Constitution of 1888 and the Constitution of 1869. Serbia is a hereditary constitutional monarchy with a People's Representative (it is foreseen that in the event of the king's death, the regent power is exercised by the king's widow, and if she is not available, by the first member of the Royal House).

The Constitution guaranteed personal freedoms, freedom of assembly and agreement, inviolability of housing and property, freedom of expression and public presentation of thoughts. (These rights can be limited by special laws). Freedom of the press is guaranteed by the provision prohibiting the introduction of censorship. The People's Presidency consists of the Assembly and the Senate. The Assembly consists of 130 deputies (Bartulović, 2009, p.28)

- The reign of King Aleksandar Obrenović was ended by a military coup in which the royal couple was killed. A provisional government was established and Karađorđe's grandson Petar Karađorđević was brought to the throne. A new constitution was quickly adopted and it was essentially the constitution of 1888 (Radojević, 2010, p 5.)

- By joining the state union made up of Serbia, Croatia and Slovenia, Serbia lost its independence, and the Vidovdan constitution from 1921 and the *oktroisani* constitution from 1931 were in force. At the end of the Second World War, the constitution of 1946

was adopted, and the member states had their own constitutions in accordance with the federal constitution, the constitutional law of 1953 and the constitution of 1974.

The Federal Republic of Yugoslavia, made up of two states, adopted the Constitution in 1992, and the State Union of Serbia and Montenegro adopted the constitutional charter on February 4, 2003.

2.1. New modern constitutions of the Republic of Serbia

In the 1990s, the process of the disappearance of the Socialist Federal Republic of Yugoslavia and the emergence of new states began. The Republic of Serbia adopted a new constitution in 1990. The Constitution of Serbia is completely different in its conception from the Constitution of the SFRY (which Serbia accepted). As far as human rights are concerned, it should be noted that the Constitution retains the death penalty in the provision on "death". There are freedoms and rights of citizens, which are valid in accordance with the constitution and their abuse is prohibited, according to Art. 11. of the Constitution of Serbia, which projects the following: "The freedoms and rights of man and citizen are limited only by the equality of freedoms and rights" of others, when this is stipulated by the constitution. The Constitution distinguishes between a private person, a political person and economic entities as economic and social legal entities (Bartulović, 2009, p. 94). Discussions are currently underway on changes to the existing constitution of the Republic of Serbia. "The fundamental argument for changes to the Constitution in terms of judicial power is the fact that the current Constitution leaves too much room for the influence of the legislative and executive powers in the selection of persons to perform judicial functions." The influence "which can lead to undesirable politicization of the judiciary" is also reflected in the constitutional provisions on the election of judges. According to the current constitution from 2006, judges are elected by the members of the Serbian Parliament for the first three-year term. It is actually the so-called probationary term/period. When adopting the constitution, this decision was criticized by a part of the Serbian professional and scientific public, as well as international institutions such as the Venice Commission. The Venice Commission is an advisory body of the Council of Europe (CoE) and gives opinions on the constitutions and laws of countries that aspire to become members of the CoE. The opinions of the Venice Commission do not have legally binding force, but are respected in the member states of the Council of Europe and the European Union. Also, through the prism of the evaluations of the Venice Commission, the European Union determines, among other things, the progress of the candidate countries in terms of legislative reform in the accession negotiations. The characteristics of the constitution as the highest legal act are: that it must include all other legal acts, and in the first place, laws, and respect for the Constitution must be reflected. The Constitution obliges the legislature to rely on itself. State and social organization can be broken down and concretized, but only in accordance with the Constitution.

2.2. Constitutional determination of citizens' participation in the exercise of power in Serbia

The term “democracy” has existed for more than two millennia, and it holds had its appearance forms since ancient Greece. In the meantime, that term had different definitions, e.g. to whom it answered, and it also depended on the state, because they all declared themselves democrats. Each new agreement determined its own arguments, and the problem is that legal and political theory did not establish stable criteria, which would be measurable in the application of the principles of democracy. Aristotle defines democracy “as the rule of an unorganized mass, i.e. the rule of the minority over the majority”. As a rule, democracy is understood and implemented at a certain time and in a certain public space, legally designated as the state, but it also has a broader meaning, in relation to the concept of the state. According to prof. Rajko Kuzmanović “Democracy is a form of social organization that includes government and applies to the majority of people. In other words, democracy is a state and social order in which power comes from the people, and belongs to them. It is true that in all other definitions, the relationship between the state of the nation, that is, the nation and the government, is determined, and the most important element of democracy is the political will of the people. Perfection is difficult to achieve because every new age brings new knowledge, new achievements and new human needs. Democracy is classified according to forms, types, models and typologies, although it is difficult to achieve a perfect classification. From the point of view of realizing the will of the people towards the state, there exists the following: an intermediate form of democracy, a form of direct or immediate democracy, but also a form of indirect democracy. Direct democracy is also representative, because citizens elect their representatives (deputies, city councilors, etc.). It is believed that the will of the people can be implemented best in this way, that is, it ensures that citizens work for themselves. All of the above implies that citizens personally participate in the exercise of power (without intermediaries). All of the above finds its basis in the constitutions, which are the basis for the birth of democratic processes and their implementation.

A semi-direct form of democracy represents the participation of the people and their representatives in decision-making processes. This happens when people's representatives in the assembly make decisions that are subject to adoption. First of all, it is about the people's will, referendum, etc. The limits of democracy become obvious when the rights of judicial bodies are violated, but not democratic principles. This happens when the government does not respect the constitution and laws, even if there are limiting factors, the most common of which are: the strengthening of state power, primarily in party states, and when the popular leadership loses its civic influence and is lost in political representation. One-party systems and large centralized parties are factors that limit democracy, and it is manifested and visible primarily during election processes in a country. An important novelty is the limitation of voting rights as a form of democracy. In addition, it should be noted that the most common forms of direct decision-making in Serbia are decisions on

changes to the constitution (Art. 203, paragraph 7). In the abovementioned cases, the assembly cannot independently make an important decision without the participation of voters. According to Art. 203. Art. 6 of the Constitution, an optional referendum is also possible when the Assembly decides. For example, it is about changing parts of the constitution. It is up to the assembly to decide whether changes would be introduced into the Republic Referendum Art. 182 Par. 4 which foresees the possibility of state voting (on issues). Art. 191 Par. 1 point 2 of the Constitution foresees the possibility of calling a municipal referendum. This matter is governed by the provisions of the Law on Local Self-Government and municipal statutes. People's initiative is the foundation or base of democracy through which a certain number of voters propose the adoption of a specific act or decision on a specific matter to the representative body. In that case, the state is obliged to do so. If a certain number of citizens (voters) submit a written initiative, the People's Representative Office is obliged to take the initiative and start the procedure for passing the law. The Constitution of Serbia provides that at least 150,000 voters may submit a proposal to change the Constitution. A two-thirds majority is required for the adoption of the law in the Assembly. At least 30,000 voters are necessary in order to make an initiative to propose a new law. If the National Assembly does not accept the request, they can submit it again, and in the case of a constitutional initiative, the request remains and can be submitted within one year. Initiatives can be submitted to municipalities and cities. The number of voters on the Statute is at least 5% of all voters, and the initiative for the National Assembly requires 15% of voters. All issues are regulated by the Law on Referendum and People's Initiative (Kuzmanović, 2006, p 237.).

CONCLUSION

The Constitution is the highest legal act and all other laws must be incorporated into it and according to it. If it is considered that Dušan's code has a constitutional connotation, that is, the value, as claimed by prof. Kuzmanović, then we can say that Serbia also has a long constitutional tradition compared to other countries. We can say that it has one of the oldest constitutional traditions. Formally, constitutional development begins with the Sretenje Constitution, which divides power and organizes the first government bodies, although this constitution was in force for a very short time. Apart from the organization of government, the Sretenje Constitution foresees "general national rights of Serbs", which represents a very large progress in the development of human rights. Later constitutions of Serbia also included provisions on human rights and freedoms for the protection of citizens from the "arrogance of the government". An individual ceases to be a subject of government and becomes a citizen, which means that he assumes rights as well as duties. If constitutions are responsible for short-term politics, the constitution requires political awareness and maturity. After the Second World War, the process of internationalization began with the introduction of general international documents, ie the Declaration on Human Rights (which will eventually become binding for all countries). Together with

the fundamental protective function, the constitutional courts have also become defenders of the realization of human rights, but also of the constitution and laws and the consistent application of the principles of constitutionality and legality. Today, modern Serbian constitutions offer a greater scope of rights and a guarantee of the protection of human rights, as well as legal protection against the abuse of the fundamental principles of human rights.

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