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SEVERAL THEORETICAL ASPECTS ON CONSTITUTIONAL DYNAMICS ADOPTION AND AMENDMENT OF A CONSTITUTION

Abstract

The paper "*Several Theoretical Aspects on Constitutional Dynamics - adoption and amendment of a constitution*" analyzes one very important issue of constitutional law- constitutional dynamics.The paper analyzes several theoretical aspects of two significant phenomena that represent *materia constitutionis*. These two phenomena reveal many dilemmas and issues to which constitutional law pays due attention, especially the latter one, because the stability of the constitution as a construction depends on the constitutional dynamics, and therefore the stability of the established system as a whole.The paper analyzes the issues related to the procedure for adopting the constitution - the first constitution in a country and a new constitution in an existing state. The paper provides an overview of the basic ways of adopting the constitution supported by examples from constitutional history.The paper also elaborates on the issue of constitutional revision. Special attention is given to the matter of meaning and conditionality of constitutional revision, the factual and formal change of the constitution. Finally, the paper provides a comparative overview of constitutional solutions about the prohibitions against constitutional revision, their meaning and significance.

Key words: *constitution, adoption of the constitution, revision of the constitution, amendments, prohibitions against the revision of the constitution, revision models.*

I. ADOPTION OF A CONSTITUTION

The idea of a constitution in a formal sense began to be materialized just over 200 years ago. The existence of a constitution in a material sense only was, in fact, an immanent condition for humanity that lasted until the appearance of the first written constitutions. Since the end of the XVIII century, the constitution has become conditio sine qua for every state system.

Hence, in the field of studying the science of constitutional law, the issue of adoption and amendment of the constitution is of particular importance. These two phenomena, although seemingly simple, reveal many dilemmas and layers of issues to which science pays due attention, and especially the latter one because the stability of the constitution as a construction

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depends on the constitutional dynamics, and therefore the stability of the established system as a whole.

1. Adoption of the First Constitution in a Country

In the context of the question "When is the constitution being adopted?", science detects two basic cases: the first one, when the first constitution is adopted in the country and, the second one, when a new constitution is adopted in the country.
The first situation is about adopting the first constitution in a country. In addition, the country adopting its first constitution may be an old, already created and existing country. On the other hand, it is also possible that the country creating its first constitution is a newly created i.e. newly formed country.
In light of the aforementioned, constitutional history seems to romanticize the story of the adoption of the first constitutions, through the examples of the French Constitution of 1791, the Constitution of the Netherlands of 1815, amended in 1848, the Constitution of Denmark of 1849, the Constitution of Japan of 1889, the Constitution of Australia of 1900, and the Constitution of Ethiopia of 1931. The fact that all the aforementioned constitutions were adopted for the first time in already existing countries, and not in newly created and newly formed countries, is a common thing to all the aforementioned constitutions. Regardless of the motives for the adoption of these constitutions, nor the circumstances under which they have been adopted, the emergence of the true constitutional momentum and the willingness to act and make a big step towards establishing a system based on a written constitution, finally results in the inclusion of these countries in the list of constitutional countries. The romantic or dystopian trains of thoughts about the motives for adopting the first constitutions in the already created countries, often interwoven with the different philosophical and theoretical views of the constitutors, guided by the idea of creating "the new order of the ages", seem to remain to be part of the constitutional folklore and mystification, who skilfully wrap up the story of the adoption of the first constitutions.
However, such legal situations are historically outdated, because, with the exception of the United Kingdom and Israel, it seems that there are no existing countries that have not adopted their first constitution yet.
The adoption of the first constitution by the newly formed i.e. newly created countries is specific for the second situation. Probably the most historically prominent example is the adoption of the Constitution of the United States of 1787 that led most of the newly created countries to adopt their first constitutions in the 19th century, such as the Constitution of Poland of 1791, the Constitution of Belgium of 1831, the Constitution of Greece of 1822, the Constitution of Brazil of 1824, the Constitution of Argentina of 1859, the Constitution of Czechoslovakia of 1920 and so on. The wave of newly formed countries after the end of the First World War, the Second World War, as well as the period of the 90s, when many new countries were formed, sets the rule that every new country adopts its first constitution for a short period of time after it has declared its independence.

2. Adoption of the New Constitution in a Country

The constitutional history indicates that the adoption of a new constitution in a country is much more common in modern times. This means that the country adopting the constitution already had a constitution.

In addition, **the new constitution may also be adopted to replace the existing constitution whose legal force has been forcibly terminated**. It is mostly the result of social revolutions, changes in the socio-economic order, coups d'état, cessation of wars or hostile occupations. What is specific of this legal situation is that when a completely new constitution is adopted in a country the complete severance of ties with the previous constitution and the termination of the previous constitutional continuity. This means that the new constitution behaves as if the previous one did not exist at all, so the new constituent power adopts the constitution completely unrelated to the provisions of the previous constitution. The constitutions adopted after the coups d'etat in Latin America, as well as those adopted in the African countries after the change of the state government by military means, are examples of this. The Weimar Constitution of 1919 adopted after the First World War in Germany and the Constitution of France of 1946 adopted after the many years of German occupation are examples of this kind of European constitutions.

A new constitution in a country can be adopted peacefully, without the influence of some external circumstances or by the use of physical force. In this case, the constitution will be adopted when it will be the right constitutional moment and when the conditions for the adoption of a completely new constitutional text will have matured. The reason for that can be the "maturity" i.e. social transcendence of the constitutional norms or simply the establishment of a completely new constitutional order different from the previous one. Unlike the previously mentioned case, in such circumstances, although it is a matter of adopting a completely different and new constitutional text, its adoption is achieved by respecting the provisions of the previous constitution. Such are the Constitution of France of 1958, the Constitution of Switzerland of 1874, and the Constitutions of SFRY of 1963 and 1974.

3. Ways of Adoption of a Constitution

If we commence from the premise that sovereignty belongs to the people, and the adoption of the constitution is an expression of that sovereignty, then it can be concluded that the people can exercise their right to adopt a constitution in any way. Of all the types of constitutions classified according to the adopter, only constitutions that represent a unilateral act of the people and an expression of their will are in compliance with the principle of national sovereignty. It is emphasized that "when the people want something, it is enough to wish for it, all forms are good and their will is always the supreme law[1]."

The state authorities adopting the constitution are called the constituent power. **The constituent power** is original (first, paramount) and unlimited. It means that there are no norms that would limit it in any way. It is a constituent power *(pouvoir constituant)*, and all the powers (legislative, executive and judicial) that it has established are referred to as constituted powers. Namely, the constituent power is the power that establishes the constitutional order.

As of the end of the XVIII century, ***three basic ways*** of adopting constitutions have been established.

[1] Taken from A. Esmein, "*Eléments de Droit constitutionnel français et compare*".Paris, 1914, p. 571.

The principle of popular sovereignty in its autochthonous and purest form is presented when the constitution is adopted through the forms of **direct democracy**. It is considered that in this way the will of the people will not be distorted and deformed and will be most appropriately presented through the gathering of citizens and the referendum, as forms of direct democracy. Constitutional history gives the adoption of the colonial statutes of Rhode Island and Connecticut, as well as the maintenance of the so-called *Landsgemeinde* according to which the constitution was directly adopted in the Swiss cantons as an example of this. In modern conditions, this form of direct democracy is used only in 3 Swiss cantons (Appenzell, Glarus, Innerrhoden). Unlike citizen's rallies, holding of a referendum is a more commonly used technique as a form of direct democracy. After all, the application of a referendum is a combination of two dominant techniques. It involves preparation and adoption of the constitutional text by a special body and its confirmation by the citizens in a referendum. The use of referendum, as a form of direct democracy, in the procedure for adoption of the constitution for the first time occurs with the adoption of the first constitutions of Massachusetts and New Hampshire, where the text of the constitution was first adopted at a constitutional convention and then adopted in a referendum. The idea of accepting a referendum in the process of adoption of the constitution was also acceptable to the French legal thought. So, although the first Constitution of France of 1971 was adopted by the third class Assembly, the technique for its confirmation in a referendum was accepted for the Constitution of 1973. However, it seems that France abandoned this technique of adopting the constitution via a referendum until the adoption of the Constitution of 1946. The de Gaulle's Constitution of 1958 is also included in this group of constitutions. In Switzerland, both the federal and the cantonal constitutions are adopted by way of a referendum.

The second way of adoption of the constitution - by a **special constituent assembly (convent, constituent, convention)** is much more applicable and, it seems, it is the prevailing technique. The constituent assembly is a special body that is constituted with the sole purpose of adopting the constitution. Namely, the citizens entrust the task of the members of the constituent assembly to prepare the constitutional text and to adopt the constitution of the country. If we take into account that the constituent assembly has a mandate, directly assigned by the citizens, to adopt the constitution on their behalf, it is understandable that the constituent assembly is a constituent power and, as such, it is the constitutive power of all other powers in the country. Although the constituent assembly represents the will of the citizens, by its essence it is sovereign in the process of adopting the constitution. After the adoption of the constitution, the constituent assembly ceases to exist. This is how the Constitution of the United States of 1787, the Constitution of France of 1848, the Constitution of Italy of 1948, and the Constitution of Yugoslavia by 1946 were adopted.

Finally, the third model represents an adoption of the constitution by **the regular legislative body**. This model implies the adoption of the constitution by the regular parliaments, and not by the constituent assemblies formed specifically for that purpose. This technique seems to be more applicable to the procedure of amendment of the constitution than to the procedure of adoption of the first or a new constitution in a country. Usually, this procedure for adoption of the constitution conducted by the regular legislative body is more complicated than the regular legislative procedure, it covers a number of stages, it differs in terms of the majority required for the adoption of the constitution, it has been created in such a way to ensure greater participation of citizens in the process etc. The Constitution of France of 1875 and the Constitution of the Republic of Macedonia of 1991 are examples for a constitution adopted in this way.

II. AMENDMENT (REVISION) OF A CONSTITUTION

1. About the Term Revision of the Constitution

Constitutional norms are created and constitutions are adopted in order to last for a longer period of time. However, as a result of the change in the constellation of legal, political, economic and other social relations that inevitably occurs, there is a need to change the constitution and its adaptation to the newly occurred and changed circumstances and relations. Failure to amend the constitution, when there is a need for it, as well as the appearance of discrepancy and imbalance between the real social relations and the way the constitution regulates them, makes the constitution a "dead letter on paper" i.e. it makes the constitution inapplicable. Therefore, the issue of revision of the constitution has been covered in all modern constitutions.

It seems that starting from the historical periods of domination of the established authoritarian regimes to the creation of modern democracies, the process of constitutional revision takes place in parallel and is accompanied by the demands for constitutionalism and the rule of law. Namely, the constitutional amendments are usually related to the introduction of additional measures and instruments aimed at protecting human rights and improving the established political systems.

Therefore, starting from the adoption of the first written constitutions, the issue of constitutional revision as a legal phenomenon is one of the basic issues in the study of the constitutional science. The issue of constitutional revision i.e. the body, the manner and the procedure for amending the constitution is a standard constitutional matter. Only the constitution as an act can regulate and govern the issue of its amendment and supplement. Constitutions use different terms to denote constitutional revision. Constitutional history landscapes a picture of different constitutions that use different terms to denote this constitutional category, but often testifies to the existence of constitutions that use different terms in the text to denote the same constitutional issue. Although most constitutions use the term revision, there are examples such as the Constitution of the United States of 1787 which referred to the term constitutional amendments. The first Constitution of France of 1791, on the other hand, used the term constitutional reform. The Constitution of France of 1793 used the terms total de rèvision and changement in its text, with the former emphasizing the complete amendment of the constitution and the latter referring to the amendment of some constitutional provisions.

The French constitutional doctrine seems to be more committed to the distinction between the terms "relative-partial modification (retouching)" versus a complete "amendment" of the constitution. However, regardless of the terminological difference, both categories refer to and relate to an amendment in the constitutional text.

This terminological inconsistency in constitutional science raises the dilemma of whether the terms "amendment", "reform", "revision", "modification" have the same meaning and whether the constitutors indicate the same category by their use. Therefore, the science of constitutional law points out that the meaning of each of these terms in the constitutions can be most appropriately determined from the context of the constitutional norm itself where the term is used from the specific constitutional text.

This issue seems to be another aspect of analysing the term "constitutional revision". In different countries, there are various revision systems especially as a result of the diversity of constitutional and political history nurtured by the countries. Such revision systems, among other things, differ in the terms they use to refer to the term constitutional revision.

2. Meaning and Conditionality of Constitutional Revision

The issue of amendment of the constitution is extremely important for every society and for every established constitutional system.
The Constitution and society are mutually conditioned. The way the relationship between them exists and develops, as well as their mutual conditionality and influence, seems to be a real art, and especially the latter, because the constitution as construction should not impede social development in the future, nor should be transformed into the constitution of a future society whose constellation of relations is currently non-existent and futuristic. Society and constitutional norms should be developed simultaneously and in parallel. Finding the right balance and Aristotle's "middle ground" between them is a formula that can be an indicator of the longevity of the constitution, but also a formula that reflects the skillfulness, vision and creativity of the constitutor at the time of creating the constitutional text.
Once adopted, the constitution lasts for a certain period of time. Whether it will be for a longer or shorter period of time depends on a number of factors: the changed social relations that impose the need for its amendment, procedure provided for its amendment, the prohibitions on amendment of the constitution that the constitutor inserted in the constitutional text, ability and vitality of the constitution to adjust the changed relations, established and nurtured constitutional practice to resort to a factual amendment of the constitution, and finally the (non)existence of a will to approach a constitutional revision, etc. Regardless of all these factors, which to a greater or lesser extent determine the duration of the constitution, the amendment of the constitution will be inevitably imposed as a necessity at one constitutional moment. Namely, although the constitution as an act has been adopted to last for a longer period of time, although the intention was for the constitution not to be subject to frequent amendments and supplements when the constitution "collides" with "life" and its norms deviate from the relations that they need to regulate, then the process of its amendment should begin.
The constitutional science generally distinguishes between a factual amendment of the constitution and a formal amendment of the constitution.

3. Factual Amendment of Constitution

The factual amendment of the constitution is its amendment by retaining the original text of the constitution and not using the formal amendment of the constitution, by giving new meaning and sense to the constitutional norms. This is made possible in three ways: through judicial interpretation of constitutional norms, by the way of constitutional custom or by enacting laws or some other legal acts.
A) In certain legal systems, the factual amendment of the constitution is enabled **through judicial decisions.** This is the case with the constitutional systems establishing a system of assessment of the constitutionality of the legal norms by the courts, i.e. systems in which the constitutional courts or all courts in the judicial system have jurisdiction to control the constitutionality of the legal acts. Thus, assessing the conformity of the legal acts with the constitutional norms, the courts, through their decisions, determine the meaning of the constitutional norms and conduct their factual amendment. The factual amendment of the constitution in this way occurs as a result of "the conflict of a certain constitutional norm with a provision of another legal act when the court gives preference to the later and thus changes the

meaning of the constitutional norm, i.e. interprets it in a way that does not derives from the text of the constitution"[2].

The factual amendment of the constitution through judicial interpretation of the constitutional norms enlivens the constitution, breathes life into the constitutional norms and adapts the constitution to the changed social relations and circumstances. The most adequate example of this way of factual amendment of the constitution is the example of the United States whose Supreme Court, as of the judgment in the case *Marbury vs. Medison* of 1803 still ensures the longevity of the Constitution of the United States of 1787.

B) In conditions when there is a deviation of the existing constitutional text from the objective reality, the bridging of the resulting discrepancy will be overcome **by establishing the constitutional customs.**

The occurrence of a constitutional custom is not fundamentally different from the occurrence of any other custom. Its occurrence requires the repetition of certain behaviour, certain periods and general consent. Unlike other customs, it is expected for the constitutional customs to be associated with shorter periods, due to the dynamics of social relations and the need to regulate them. The second condition related to the occurrence of the constitutional custom is a certain pattern of repetition of appropriate behaviour. Incidental acting in a certain way in a particular case does not create a constitutional custom. It could be a precedent. On the contrary, the repetition of the appropriate action and the establishment of the practice of acting identically, in all the same cases and circumstances in the future, create the constitutional custom. Finally, the emergence of the constitutional custom is also linked to the requirement of general opinion (*opinio communis*). This general opinion refers to the entities that should take action according to the established pattern of behaviour in the same circumstances and cases in the future. These are usually the holders of legislative and executive power or, more broadly, political entities that participate in the creation of political decisions. Accepting and not opposing the established constitutional custom is actually respecting it.

One of the functions of the constitutional custom is to enable the adaptation of the constitutional text to the newly created relations and circumstances, without resorting to a formal amendment of the constitution. In this way, the constitutional custom enables a factual amendment of the constitution. In addition, the constitutional custom can: if there is a constitutional gap, fill it, supplement it, concretize it, develop an existing constitutional norm, amend an existing constitutional norm or abolish the effect of a certain constitutional norm.

The constitutional custom does not formally amend the text of the constitution or any specific constitutional norm but adapts it only to the de facto changed relations and circumstances in such a way that the norms are applied differently from what the constitution provides for.

For these reasons, the establishment of constitutional customs in the function of the actual amendment of the constitution is controversial for constitutional science. Such constitutional customs are qualified as *contra constitutionem*. Especially the latter because the creation of such constitutional custom provides for different behaviour and regulation of relations in a way contrary to the original ideas and goals of the constitutor, at the time when the constitutional text was adopted. Namely, this means that the constitutional custom provides for regulating the constitutional matter differently from the original idea woven into the constitutional text.

The issue of distinguishing these constitutional customs (*contra constitutionem*) from the violation of the constitution is especially inspiring for constitutional science. Bared to their essence, the constitutional customs *contra constitutionem* are contrary to the constitutional text

[2] Јовичић, Миодраг, „*Устав и уставност*", Службени гласник, Београд, 2006, p. 65.

and constitute a violation of the constitution. However, the constitutional doctrine points out that, even in the case when the appropriate action seems to violate the constitution when it receives support and general consent from the competent entities, this behaviour acquires the character of a constitutional custom. Namely, the previous implies that, although the action is contrary to the constitutional norm, when the competent entities accept it, give its consent (*opinio communis*) and are ready to "tolerate" it in the future, such action becomes a constitutional custom through which the actual amendment of the constitution is conducted.

C) The factual amendment of the constitution without resorting to formal intervention in the constitutional text is possible **by adopting laws or other legal acts.** Although the legal doctrine is explicitly against amending the constitutional text in this way, in practice it is not excluded that the legislative authority or some other body adopts an act whose norms are not in accordance with the constitution. This could be expected if we take into account that a constitution is an act that only regulates the constitutional matter in principle and framework, leaving the possibility, by law and other legal acts, for it to be subject to more detailed governing and regulation. Namely, in such a case, it is possible that a certain constitutional norm or institute to be regulated by law in a completely different way from what the constitution provided for. As a consequence, the newly created legal norm is contrary to the constitution.

Unlike the previous cases of actual amendment of the constitution, this way of amendment of the constitution, by adopting laws or other acts contrary to the constitutional text, is unacceptable for the legal doctrine. In constitutional systems in which the system of (constitutional) judicial review of constitutionality has not been established actual amendments to the constitution of this kind are more frequent. Namely, constitutional science advocates for the theoretical view according to which this action is inadmissible and contrary to the principle of constitutionality. The constitutional norm is a basic norm and it is the basis for the materialization and creation of the law. The law and all other norms have their basis in the constitution and derive from it, and not vice versa. Therefore, the factual amendment of the constitution, by adopting laws or other legal acts contrary to it, is inadmissible.

4. Formal Amendment of the Constitution (Revision Models)

The "living constitution" changes and develops gradually by establishing constitutional conventions or through court interpretation and interpretation of the constitutional text. Contrary to this form of adjustment and amendment of the constitution of the objective reality, the constitutions in the standard constitutional matter cover and regulate the issue of the ways and the procedure of constitutional revision, i.e. the issue of the formal amendment of the constitution. Namely, all constitutions regulate the matter that refers to the established revision model. Given the importance of the constitution as an act, all the features (differentia specifica) of the revision models have been established for **two basic purposes**: firstly, to make the constitutional revision **more difficult and complex** than the amendment of ordinary laws, and secondly, to provide **citizens** with a modus to declare for the revision of the basic law of the country - the constitution.

Comparative constitutional law indicates various modalities, solutions, ways and procedures for amendment of the constitution. Namely, the "variations on a theme" are so diverse that they present a picture of the incredible creativity of the constitutors in an attempt to complicate the procedure for amendment of "their work". However, all these solutions could be classified into

several basic models. At the same time, the model of constitutional revision corresponds to the model of adopting the constitution.

A) Model of constitutional revision conducted by the constituent assembly - The constitutional history indicates that this model of constitutional revision, which is conducted in a special procedure before the constituent assembly, is gradually being abandoned. The constituent authority is the dominant decision for the procedure of adoption of the constitution, but not for the revision procedure. However, the first written federal constitution, the Constitution of the United States of 1787, provided for this manner of the amendment. Namely, Art. 5 of the Constitution stipulates that "the Congress, at the request of the legislative bodies of 2/3 of the states, will convene a constituent assembly to propose constitutional amendments."[3]. Constitutional history emphasizes that this kind of amendment of the Constitution of the United States has not been used, and the adoption of the 27 constitutional amendments was made when Congress proposed an amendment to the Constitution at the request of 2/3 of its two legislative chambers. The aforementioned constitutional solution was inspiring for the constitutors of Argentina and Costa Rica. Thus, the Constitution of Argentina stipulates that "the need for a constitutional amendment must be determined by a 2/3 majority of the members of the Congress, but the amendment will not be adopted unless a constituent assembly is convened".[4] The Constitution of Costa Rica also provides that a constitutional amendment shall enter into force only if it has been previously adopted by the constituent assembly.[5]The basic intention of introducing a decision that envisages entrusting the constitutional revision to the constituent assembly is the effort of the citizens to indirectly, through their elected representatives in this authority, express their will on the amendment of the constitution and the proposed constitutional amendment.

B) The model of constitutional revision implemented by the regular legislative body, compared to the previous model, is a much more frequent constitutional solution. In the comparative constitutional law, variations of different solutions have been landscaped, which provide for conducting a constitutional revision procedure by the regular legislative body, and which differ from each other according to the degree of rigidity of the constitution, the majority required for revision of the constitution, number of successive readings of the proposed amendments to the constitution, the mandatory time period between them, etc.

- Thus, it is usually the solution that provides for an amendment of the constitution by the regular legislative body with **a two-thirds majority**. This model provides for a very little opportunity for the citizens to influence the amendment of the constitution. For these reasons, the procedure for constitutional revision in the regular legislative bodies is significantly complicated, covers a number of phases and stages of its implementation, and the majority required for the adoption of the constitutional amendment is higher than the majority required in the regular legislative procedure. Such solutions are provided for by the Constitution of the Republic of Macedonia of 1991, the Constitution of Spain of 1978, the Weimar Constitution of 1919, the Constitution of the USSR of 1977, etc. However, in addition to the aforementioned qualified majority needed to adopt the amendment

[3] Constitution of the United States, 1787, Art. 5.
[4] Constitution of Argentina, 1994, Art. 30.
[5] Constitution of Costa Rica, 1948, Art. 196.

of the constitution, comparative constitutional law points out examples of a larger majority. Such is, for example, the Constitution of the Czechoslovak Socialist Republic of 1960, which provided for that the National Assembly will adopt an amendment for amending the Constitution by a three-fifths majority of the total number of members[6]. The Constitution of the Kingdom of SCS provided for a three-fifths majority to vote on the proposal to amend the constitution, for the adoption of the proposed constitutional amendment to be achieved by an absolute majority of the total number of MPs[7]. Quite contrary to the constitutional solutions that provide for that large majority is needed to implement the amendment of the constitution, there are such solutions that equate the amendment of the constitution with the adoption and amendment of the ordinary laws. Such is the example of the Constitution of the Federal People's Republic of Yugoslavia of 1946, which provided that an absolute majority of the members of each of the two legislative chambers was sufficient to amend the constitution[8]. An identical solution in terms of the required majority has been provided for by the Constitution of Panama of 1972[9].

- Differentia specifica of another type of revision models is the request for **two successive votings** on the constitutional amendment, at a certain time interval. Namely, for these revision models, the majority required for the adoption of the constitutional amendment is not so specific as a predetermined period of time needs to elapse between the two successive votings of the constitutional amendment. Thus, the constitutions of France of 1946[10] and Italy of 1948[11] provide for that at least 3 months must elapse between two successive readings (votings) of the proposal to amend the constitution. The Constitution of Italy of 1928 also provided for that a period of not less than 3 months must elapse between two successive votings on a constitutional amendment[12]. It can be assumed what was the basic intention of the constitutor to insert such a specific solution. Namely, the established time period between the two consecutive adoptions (readings) of the constitutional amendment is to enable the members of the legislative bodies a time in which they can calm down from the passionate debates to reconsider the reasons for the amendment of the constitution, the proposed new constitutional solutions and the possible effects of their adoption.
- Another type of specific constitutional solution is the one that provides for the implementation of the procedure for amendment of the constitution by **the two legislative chambers**, which should be convened at a joint assembly. Thus, the Constitution of France of 1875 provided for a decision according to which the decision to amend the Constitution will be made by the National Assembly (Congress) by an absolute majority of votes of the total number of members, and by a prior decision of the two legislative chambers. Namely, the National Assembly, which is competent for deciding on constitutional amendment, consists

[6] Constitution of the Czechoslovak Socialist Republic, 1960, Art. 51, p. 3.
[7] Constitution of the Kingdom of SCS, 1921, Art. 126.
[8] Constitution of FPRY, 1946, Art. 72, p. 4.
[9] Constitution of Panama, 1972, Art. 313.
[10] Constitution of France, 1946, Art. 90.
[11] Constitution of Italy, 1948, Art. 138.
[12] Constitution of Italy, 1928, Art. 138.

of the members of the two legislative chambers at a joint session. Such a model of constitutional revision is possible only in countries with a bicameral parliament.

- The amendment of the constitution by the **regular legislative authority in two consecutive parliamentary compositions (convocations - sessions of the legislative body)** is a special group of revision model. Namely, such decisions stipulate that the current composition of the legislative authority first decides on starting with the amendment of the constitution, after which, if the proposal for starting with the constitutional revision is adopted, the legislative authority will be dissolved. After the expiration of the constitutionally provided deadline, the regular legislative body will be reconvened in a new composition and at the next session, it will decide on the proposed constitutional changes in the form of amendments. The time period between the two consecutive sessions is differently regulated in different constitutions. Thus, the Constitutions of the Kingdom of SCS of 1921[13] and the Kingdom of Yugoslavia of 1931[14] provided for a period of at least 4 months between the two successive sessions, and the Constitution of Belgium of 1831 - a period of at least 3 months[15]. The theses that are found in the constitutional literature, which indicate that after the dissolution of the regular legislative body and the call for elections for a new parliamentary composition that should decide on the amendment of the constitution a kind of "covert referendum" will be organized are interesting. Especially the latter because the citizens in this way indirectly, by electing their representatives in the new parliamentary composition, express their opinion about the constitutional revision. The newly elected parliamentary composition is often seen as a constituent assembly, which proceeds to vote on constitutional amendments.
- The constitutional science finds it interesting the decision to start with the constitutional revision made by the regular legislative body but **based on a previous (non-binding) opinion of another authority**. Thus, in 1928 Italy introduced the category of constitutional laws, as one of the techniques of amending the constitution, the adoption of which provided for a previously non-binding opinion of the Great Fascist Council.

All the aforementioned constitutional solutions are a reflection of the importance given to the issue of the procedure, manner, conditions and the majority for amending the constitution, on the one hand, as well as the inventiveness of the constitutors in the modelling of the procedure for amending the constitution, on the other hand. Finally, different constitutions establish different constitutional solutions in which the aforementioned qualified procedures for constitutional review are mutually combined, supplemented and intertwined.

C) A special form of revision model is the model that provides for direct and immediate participation of the citizens, by the way of a **referendum**, in the procedure for amendment of the constitution. If in the models that establish a constituent assembly for constitutional revision, indirect participation of the citizens in the revision procedure is enabled through their representatives, this model enables the direct expression of the will of the citizens for the proposed constitutional amendments. Namely, this revision model provides for an opportunity

[13] Constitution of the Kingdom of SCS, 1921, Art. 126.
[14] Constitution of the Kingdom of Yugoslavia, Art. 115.
[15] Constitution of Belgium, 1831, Art. 195 and Art. 46.

for the citizens to express their opinion on the amended constitutional text by confirming it or rejecting it.

The referendum is an instrument of direct democracy through which the support of the citizens for important social and institutional issues is enabled. According to Rousseau, "any act that citizens will not ratify is considered to be null and void.[16]“ The reflection of Rousseau's thesis is evident in the constitutions which provide for the direct involvement of citizens by the way of a referendum in the revision procedure. In this way, they directly approve or reject the constitutional amendment, which was previously adopted by the regular legislative body. The referendum that is part of the revision procedure may be mandatory or optional.

A mandatory referendum has been provided for in Switzerland, both for the amendment of the federal constitution and for the amendment of the cantonal constitutions[17]. The Austrian revision model also provides for a mandatory referendum if a full constitutional revision is to be carried out. On the other hand, if a partial constitutional amendment is being implemented, the referendum will be held only at the request of 1/3 of the members of one of the two legislative chambers. A mandatory referendum has also been provided for by some African countries that have been influenced to some extent by the French legal thought. Thus, the Constitution of Chad of 1996 provided for that "with the exception of some constitutional amendments of a technical nature, all other forms of revision of the constitution shall be legally valid only if they are accepted in a referendum."[18] The Constitution of Mali of 1992 provided for a similar solution according to which "the constitutional amendment shall be possible only if it is accepted in a referendum."[19] The constitutions of Algeria, Liberia, Japan, the Philippines and Australia also provide for a mandatory referendum as a segment of the established revision models.

Unlike the previous constitutional solutions, the introduction of the optional referendum is much more common as a segment of the established revision models in comparative constitutional law. Namely, the constitutors are more inclined towards the solution providing for the possibility, but not the obligation, for the adopted constitutional amendment to be presented at the direct vote of the citizens in a referendum. This form of a referendum in the models for constitutional revision has been provided for in the Constitution of Weimar Germany of 1919 and the Constitution of SFRY of 1963. In France, the constitutional category of "referendum" is a direct expression and consequence of the accepted theory of the sovereignty of the people. The Constitution of France of 1958 provided that "a proposal to amend the constitution must be adopted by both legislative chambers in an identical procedure. However, the amendment to the constitution may be considered final only after it will be accepted by the citizens in a referendum." Nevertheless, the same article provides for that the proposal to amend the constitution will not be put to a referendum if the National Assembly (the Congress), consisting of the members of the two legislative chambers united in one body, adopts the proposed amendment by a three-quarters majority[20]. The constitutional provision indicates that it was inappropriate for the constitutor of the Fifth French Republic to impose an obligation to hold a mandatory referendum, especially when the amendment to the constitution refers to certain technical and legal aspects or when the request for constitutional revision is urgent. The African French-speaking countries, which were directly influenced by the French legal and political thought and were inspired by the French

[16]Bertram, C., "*Rousseau and The Social Contract"*, London: Routledge, 2004.
[17] Constitution of Switzerland, 1874, Art. 192–195.
[18] Constitution of Chad, 1996, Art. 224.
[19] Constitution of Mali, 1992, Art. 118.
[20] Constitution of France, 1958, Art. 89.

constitutional experience, accept the decision to hold an optional referendum as an element of the established revision models in their constitutions. Such are the Constitution of Burkina Faso of 1997[21], the Constitution of Senegal of 1996[22], the Constitution of Sudan of 1998[23], etc.
Finally, of all the aforementioned it can be concluded that the need to protect the constitution as an act from its frequent amendment directly leads to the introduction of complex procedures for its revision. Namely, the requirements for observing the procedure for amendment of the constitution, which incorporates various solutions related to the authorities, instruments, deadlines, majority required for constitutional revision, are a result of the need to essentially avoid the trivialization of the constitutional reform. Thus, the protection of the constitution is guaranteed, inter alia, when the conditions to be met and the procedures to be carried out are complex. Otherwise, it can be expected and assumed that the constitution will be an act that will be subject to change depending on the subjective assessment and will of certain entities often to meet some undemocratic goals. Therefore, it seems that the combination of solutions of a complex procedure for amendment of the constitution and certain constitutional restrictions or prohibitions for amendment of the constitution, introduced by the constituent authority, represents a guarantee for the strength of the constitution, as well as for the security and stability of the established constitutional system.

III. PROHIBITIONS AGAINST THE REVISION OF A CONSTITUTION

1. Types of Prohibitions against the Revision of the Constitution

The analysis of the constitutional texts in the part referring to the matter of constitutional revision raises the question of prohibitions against amending the constitution. If we take into account the fact that the constituent power created the constitution in order for it to survive and be applied for a longer period of time, the possibility of the text of the constitution to contain provisions that provide for prohibitions on its amendment cannot be excluded. These prohibitions against the amendment of the constitution can be classified into two basic groups: absolute and temporary prohibitions against the amendment of the constitution.

A) The absolute prohibitions against the amendment of the constitution are a radical extension of the demands of the constitutor to preserve the constitution in its entirety or some of its provisions and to prevent the constitutional revision.
Namely, these absolute prohibitions against the amendment of the constitution may refer to the constitutional text as a whole or to certain constitutional provisions. In the first case, the absolute prohibition essentially excludes the possibility to start with the amendment of the constitution, i.e. the constitutor ruled out the possibility of adopting a new constitution. The motive for the introduction of such prohibitions should be sought in the efforts of the constituent power to preserve the constitutional construction in the form in which it has been adopted. Namely, the constitutor estimated that such constitutional construction corresponds best to the existing social relations and circumstances and consequently it should be everlasting. However, the constitutional history testifies that the absolute prohibitions against the amendment of the constitution are essentially inexpedient because after a certain period of time

[21] Constitution of Burkina Faso, 1997, Art. 164.
[22] Constitution of Senegal, 1996, Art. 124.
[23] Constitution of Sudan, 1998, Art. 139.

the constitution will have to be subjected to its amendment. There are few examples of absolute prohibitions against the amendment of the constitutional text as a whole, such as the Constitution of Greece of 1911, which provided for that "a complete revision of the Constitution shall be prohibited."[24] An identical solution has been provided for in the Constitution of Greece of 1952. A similar solution has been provided for by the Constitution of Bolivia of 1945 according to which "this constitution may only be amended partially."[25]

The second type of absolute prohibition against a constitutional revision is the absolute prohibition against the amendment of certain constitutional provisions. Unlike the former ones, the constitutor more often resorted to the introduction of provisions that provided for a prohibition against the amendment of concrete constitutional norms. Usually, such absolute constitutional prohibitions are related to the provisions of the constitution that guarantee a certain constitutional value. The absolute constitutional prohibitions of this kind are also an indicator of what constitutional value the constitutor considered to be the most important and tried to preserve it with the prohibition. The first such absolute prohibition on the constitutional amendment has been provided for in the Constitution of France of 1958[26], which provides for that "the republican form of government may not be subject to revision." An identical constitutional solution and imposing of this type of prohibition against the amendment of the republican form of governing have been provided for in the later French constitutions of 1946 and 1958. Such provisions were contained in the Constitutions of Turkey of 1924 and 1982[27] and Italy of 1947[28]. Some countries that provide for a monarchical form of government forbid amendments of the constitutional provisions addressing this issue. The Constitution of Iran of 1906 contained a provision prohibiting the amendment of the established monarchy. The Constitution of Morocco of 2011 provides that "no constitutional amendment may apply to the provisions relating to the monarchical form of governing[29].

In addition to the form of governing, the constitutors have often resorted to prescribing prohibitions against the amendment of provisions that guarantee some other constitutional values. The established form of governing, form of state organization, secular character of the country, territorial integrity of the country, etc. are the values that were often prohibited to be amended. The Constitution of Norway of 1814 provided for a prohibition against constitutional amendments that would be contrary to the constitutional principles and that would violate the spirit of the constitution[30]. The German Constitution of 1949 provided for a prohibition on any constitutional revision that would refer to the provisions on the organization of the federation and the participation of the countries in the legislature, the dignity of human beings, the provisions that define Germany as a federal, democratic and social country, and so on.[31] In the Constitution of Iran of 1906, the constitutor provided for an absolute prohibition against the amendment of the constitutional provisions declaring Islam as a state religion.[32] Other examples of constitutions providing for a prohibition against the amendment of certain constitutional provisions are the Constitution of Congo of 1992, which "prohibits the amendment of the

[24] Constitution of Greece, 1911, Art. 108.
[25] Constitution of Bolivia, 1945, Art. 171.
[26] Constitution of France, 1958, Art. 89.
[27] Constitution of Turkey, 1924, Art. 1.
[28] Constitution of Italy, 1947, Art. 139.
[29] Constitution of Morocco, 2011, Art. 175.
[30] Constitution of Norway, 1814, Art. 112.
[31] Constitution of FR of Germany, 1949, Art. 79.
[32] Constitution of Iran, 1906, Art. 20–21.

republican form of the country, the secular character of the country and the provisions on the term of office of the President of the Republic"[33]. The Constitution of Algeria of 1976 and the Constitution of Cameroon of 1972 preserved the provisions referring to the territorial integrity of the country and provided for an absolute prohibition on their modification[34].

B) The second type of prohibitions against the amendment of the constitution is the so-called ***prohibitions against the amendment of the constitutional text ratione temporis.*** Contrary to the absolute prohibitions against the amendment of the constitution which completely, at all times, disable the constitutional revision, the temporary prohibitions on a revision of the constitutional text are valid for a certain period of time.

Prohibitions against the revision of the constitution before the expiration of a determined period of time since its entry into force are a special form of *ratione temporis* prohibitions. The essence of these prohibitions is to allow the application of constitutional provisions before starting with their amendment for a certain period of time. The intention for including this type of prohibitions should be required in the striving of the constitutor to ensure the duration of the established constitutional construction for a certain *pro futuro* period of time. Constitutors may predict this type of prohibitions in the constitutional text especially in cases where a completely new constitutional order is being established, and in order to ensure overall social stabilization of relations. The first written constitutions provided for this type of *ratione temporis* prohibition. Thus, the Constitution of the United States of 1787 forbade the amendment of certain provisions (paragraphs 1 and 4 of Article 9) before 1808. The Constitution of France of 1791, adopted after the French bourgeois revolution, provided for a prohibition to amend the constitutional text before the expiration of 4 years since its adoption. The Constitution of Greece of 1968 also provided for this kind of prohibition, preventing its amendment within 10 years of its adoption[35]. The Constitution of Portugal of 1976 also contained a prohibition on its amendment before the expiration of 5 years since the publication of the last act of revision[36]. The constitutor of Paraguay followed similar constitutional logic, which combined these *ratione temporis* prohibitions in one constitutional provision providing impossibility to begin with the revision of the constitution as a whole before the expiration of 10 years since its publication, as well as a prohibition on partial modification of the constitutional text before the expiration of 5 years since its publication[37].

On the other hand, the prevention of constitutional revision in conditions and time periods when citizens are not able to freely decide on the amendment of the constitution is one of the basic motives for introducing the *ratione temporis* prohibitions. It is usually about the time periods when due to specific circumstances, the normal implementation of the procedure for amendment of the constitution is not possible. In constitutional science, it has been emphasized that the basic intention for introducing this type of prohibitions should not be looked for in the frenetic intention to preserve the constitution as originally adopted, but in the intention to provide appropriate conditions for its revision.

Various constitutors had different perceptions of when there is no need to begin with the constitutional revision. Namely, in the comparative constitutional law there are various

[33] Constitution of the Republic of Congo, 1992, Art. 178.
[34] Constitution of Algeria, 1976, Art. 195 and Constitution of Cameroon, 1972, Art. 64.
[35] Constitution of Greece, 1968, Art. 136, p. 2.
[36] Constitution of Portugal, 1976, Art. 284.
[37] Constitution of Paraguay, 1967, Art. 219.

solutions on when constitutional revision should not be started, that is, the circumstances when the procedure for amending the constitution could not be consistently carried out *lege artis*. Thus, the Constitution of Brazil of 1946 provided for a prohibition on its amendment in military conditions.[38] The de Gaulle's Constitution of 1958 provided for an impossibility to implement the procedure for amendment of the constitution "at times when the territorial integrity of the country is endangered"[39]. A similar constitutional solution has also been provided for in the constitutions of Spain[40] and Portugal[41], which provide for an impossibility to amend the constitution in times of war, state of emergency or state of siege.

Finally, of all the given examples, it can be concluded that the basic intention of the constitutor for introducing this type of *ratione temporis* prohibitions should be looked for in the intention for the constitutional and political stability of the country as the condition sine qua non. Only in this way, the democratic legality and legitimacy of the procedure for the amendment of the constitution that needs to be implemented could be expected.

2. Of the Purposefulness and Legal Basis of the Prohibitions against the Constitutional Revision

In relation to the matter referring to the prohibitions against the amendment of the constitutional text, the issue of their justification and legal basis is a special aspect. In this context, two dominant views are differentiated in constitutional science. The former one, which refers to the full inappropriateness of the prohibitions against the constitutional revision (especially the absolute prohibitions against the amendment of the constitution as a whole) and their legal groundlessness, and the latter one, which is based on the strict distinction of partial and full revision of the constitutional text.

Thus, in terms of absolute prohibitions against the complete revision of the constitution, it seems that constitutional science has a unique attitude. Namely, in addition to the intention of the constitutor to disable and prevent the amendment of the constitution, with the claim that it can happen only by a revolution, science evaluates such aspirations as completely inexpedient and without any legal importance. The claim that the following constituent power has the same importance and is of the same degree as the one that has adopted the constitution that is subject to revision is an argument in favour of this thesis. On the other hand, the basic legal principle that later norms may amend or abolish the previous legal norm with the same force is another argument in favour of this thesis. The fetishism of legal, especially constitutional norms, should be understood *cum grano salis*, because it is true that the constitution as an act cannot be amended as and when desired, but it is, however, an act that is not untouchable and must be amended when it is incomplete or historically outdated. "[42] Jovicic points out that "not neglecting the significance of the actual restrictions of the constitutor in the process of constitutional revision, it must be emphasized that the constitutor, however, is not subject to legal constraints."[43] All the aforementioned is a premise from which the conclusion that the

[38] Constitution of Brazil, 1946, Art. 215.
[39] Constitution of France 1958 Art. 89 p. 4.
[40] Constitution of Spain, 1978, Art. 169.
[41] Constitution of Portugal, 1976 Art. 289.
[42] Kuzmanovic,R.„„Znacaj prava i pojave koje narušavaju pravni sistem".https://www.anurs.org/sajt/doc/File/govori_besjede/2011-05-31_znacaj_prava_predsjednik_spanija.pdf , p. 10.
[43] Јовичић, Миодраг, „Устав и уставност",Београд, 2006, p. 399.

prohibitions against the amendment of the constitution and restrictions of the constitutor "cannot have a mandatory character, but the only political significance and political value"[44].
The theoretical view of G. Burdeau is in relation to the legal basis of the prohibitions against the constitutional revision and is worth mentioning. His initial premise leads to the question "what is the purpose of the constitution when his provisions would not have legal value and when they could harm the authorities that the constitution had created".[45]The distinction of the partial from the full revision of the constitutional text and the delimitation of the constituent power *(pouvoir constituant)* from the revision power established by the constitution *(pouvoir constituè de rèvision)* is at the heart of his theoretical understanding. Namely, Birdo emphasized that when the constitutor creates the constitutional text, it creates "a coherent constitutional building" with an intention to last for a longer period of time. This coherent constitutional building has important and less important parts. When it comes to the less important parts, the constitutor authorizes the revision power established by the constitution *(pouvoir constituè de rèvision)* to amend the concrete constitutional provisions. When it comes to the amendment of the basics of the entire established constitutional system, the regular revision authority does not have such authorizations. For Burdeau, if the need for amendment of the constitutional grounds and the complete constitution rises again, then the activities should be awarded to the same original constitutor. These theoretical understandings of Burdeu, especially in the part for the different importance of separate constitutional norms in the same constitutional text, are debatable for constitutional science. Their non-argumentativeness was probably the reason why the author had concluded in the later period that "after a mature thinking, he was not right"[46].
Political theoretical views also have a negative attitude towards the practice to introduce prohibitions on its amendment in the constitution. These theoretical views indicate that the introduction of prohibitions against the constitutional revision under the veil that their goal is to disable the established system by a revolution, ultimately result exactly in this. Therefore, the political views come down to the requirement for enabling first-degree constitutional revision whenever necessary and when historically determined constitutional decisions will be overcome. It is the only way to avoid the complete discrepancy of the constitution and reality and with this the revolutionary amendment of the established constitutional system.

IV. CONCLUSION

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. The issue of adoption and amendment of the constitution is of particular importance.
Constitutional norms are created and constitutions are adopted in order to last for a longer period of time. The constitution is an indissoluble link between the state and the law on one side, and the state and society on the other. However, as a result of the change in the constellation of legal, political, economic and other social relations that inevitably occurs, there is a need to change the constitution and its adaptation to the newly occurred and changed circumstances and relations. Failure to amend the constitution, when there is a need for it, as well as the appearance of discrepancy and imbalance between the real social relations and the way the constitution regulates them, makes the constitution a "dead letter on paper" i.e. it makes

[44] Климовски, Саво, Дескоска, Рената и Каракамишева, Тања,„Уставно право“. Скопје, 2009, p.103.
[45]Burdeau, G, "*Traite de science politique*", t. 4, Paris, 1969, p. 257.
[46]Burdeau, G., "*Droit constitutionnel at institutions politiques*", 11. ed., Paris, 1965, 84.

the constitution inapplicable. Therefore, the issue of revision of the constitution has been covered in all modern constitutions.

The process of constitutional revision takes place in parallel and is accompanied by the demands for constitutionalism and the rule of law. Namely, the constitutional amendments are usually related to the introduction of additional measures and instruments aimed at protecting human rights and improving the established political systems.

Finally, the requirements for observing the constitutional dynamics, which incorporates various solutions related to the authorities, instruments, deadlines, majority required for adoption or constitutional revision, are a result of the need to essentially avoid the trivialization of the constitutional reform. Thus, the protection of the constitution is guaranteed, inter alia, when the conditions to be met and the procedures to be carried out are complex. Otherwise, it can be expected and assumed that the constitution will be an act that will be subject to change depending on the subjective assessment and will of certain entities often to meet some undemocratic goals.

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