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A historical-legal overview of constitution as the highest political-legal act of a State¹

INDEX: 1. Introductory remarks – 2. A legal-historical outlook of the early beginnings of constitution – 3. Concluding remarks

ABSTRACT: The constitutional history is a constituent and very important segment of the science of constitutional law. From the beginning of the political history of the society, several legal acts have been enacted to regulate different social issues, including those concerning the behavior of the rulers. The first elements of constitution, as well as the first scientific premises that are significant for its content as legal act, are introduced in the Greco-Roman world. This period is the beginning of history of the constitution in formal sense as well as in material sense even though in a rudimentary form. Even though, there is considerable data that certain states have enacted written acts with highest legal force before the end of 17th century, the science of constitutional law considers that the emergence of written constitutionalism is related to first written constitutions of American states in the 18th century.

KEYWORDS: Legal act - Constitution - State

1. Introductory remarks

All knowledge and theories are built on the basis of notions/concepts. What are notions? According to the theory, in a general meaning, notions are means and instruments for understanding developments. The theory also considers notions as “tools” for thinking, criticizing, explaining and analyzing. As a consequence, every notion or concept has its own history, and no concept can be understood unless one has a minimum of elementary and general legal-theoretical knowledge about its background and historical development². In accordance with this, for a scientific treatment of the constitution as a legal category it is necessary to make an overview to its historical background.

The constitutional history, as a specific legal discipline, deals with the study of the historical aspects of the creation of the notions, institutions and acts that have constitutional value and importance from the antiquity to the contemporary period, namely, from their beginning as political ideas, through their normative shaping in constitutional norms and finally their implementation in practice³.

1.1. In all scientific endeavors in the process of studying the notion of constitution, a key component is its historical aspect. In modern sense, the constitution as a legal-political act with highest legal force that systemizes or codifies the norms and principles which have crucial legal-political value and relevance and which regulates the fundamental and most important social-political relations (the area of freedoms and rights of a human

¹ “Historia et ius” welcomes the contribution of two young Macedonian scholars who, instead of a fully-fledged article, present an excerpt of their research programme. The Journal wishes them a bright future in their studies and academic career.

² A. Heywood, *Political Ideas and Concepts*, New York 1997, p. 37.

³ See N. Pobric, *Ustavno pravo*, Mostar 2000, p. 22.

and citizen, and the organization and function of state power in a specific state) as part of the legal system of a certain state has appeared very late, namely, from the late eighteenth century and in the nineteenth century, as a result of the triumph of constitutional theory and the liberal democracy⁴. In relation to this, it is worthy to mention that the legal-constitutional theory on the modern liberal democracy is mainly based on these following postulates:

First, the sovereignty of the people, which means the omnipotence of the people as a entirety of citizens who decide for their fate, for the main issues that have to do with their country, for the direction of state politics, the structure of the state power, the control of their activities, etc.;

Second, the guarantees of the fundamental rights, which require the function of a legal state, the enforcement and respect of the principle of the rule of law;

Third, constitutionalism, which includes on one side the duty of everyone to subjugate to the constitution, and on the other hand, the duty of state power to subjugate itself to the control of constitutionality and legality of their acts from an independent judicial body;

Fourth, free elections, which include the right to be a candidate and create political parties, the freedom to vote and equality of the vote, secrecy of the vote and the equality of the conditions on information and propaganda during the election campaign;

Fifth, the exercise of power by the majority, the respect of the minority, which includes the freedom to criticize and the principle of peaceful alternation of power”;

Sixth, the separation of state power and the control and mutual balance between the branches of the state power (legislative, executive and judiciary). Its objective is to prevent the concentration of political power in one body, or to prevent any branch to exercise unlimited power;

Seventh, the independent and autonomous judiciary power, i.e., the existence of courts as special state bodies, organizationally separated from other state bodies, who exercise their duties independently according to the Constitution, laws and international treaties ratified in accordance with the constitution. As a matter of principle, no other state body (parliament, head of the state, government) can interfere or have any impact on the activities of courts when they take their decisions;

Eighth, the existence of the civil society, which includes non-state and nonprofit organizations and associations created on a voluntary basis, through which citizens in an organized manner can make pressure on centers of political decision-making, manifest legitimate claims on issues of public interest and institutionally engage in their implementation, and,

Ninth, the principle of the lay status of the state; lay status means that the issue of faith and religion is treated as a personal freedom and as a right of every citizen to believe or not, to change his religion or to manifest his religious views in various forms⁵.

⁴J. Gjorgjevic, *Ustavno pravo*, Beograd 1976, p. 27.

⁵ See: J. Maclure & Ch. Taylor, *Secularism and Freedom of Conscience*, Cambridge Mass. 2011, pp. 19-16; L. Zucca, *A Secular Europe: Law and Religion in the European Constitutional*, Oxford 2012, pp. 177-178. The state guarantees this as a personal freedom, but does not recognize an official religion. This concept is typical for the liberal democracy model, where faith and religion are individual issues. The religious belief is determined by constitution as fully free and religions are equal. Along with the guarantee of the freedom of religion and belief, secular states prohibit with their constitutions the involvement of religion and faith in the public and political life. There are two constitutional examples of the secular state. According to article 8 of the Constitution of the Republic of Kosovo of 2008: “*The Republic of Kosovo is a secular state and*

1.2. Objectively seen, the constitution as a legal act in formal sense, i.e., as a written and codified legal act, with supreme legal force, which regulates the constitutional issues within the legal system of a certain state, is an expression and creation of democratic and progressive forces which after maximal efforts succeeded in overthrowing the absolute monarchy and the feudal order. As a result this, it maximally limited and disciplined the absolute and unlimited power of the king, who in the absence of a constitution behaved arbitrarily and voluntarily. This is illustrated in the famous juridical maxims that describe the emperor as “*legibus solutus*” (not bound by law) or “*quod principi placuit legis habet vigorem*” (that which pleases the emperor has the strength of law)⁶. This struggle has to do with the demand for a written constitution, which would determine the legal limits of the state power and would ensure the sovereignty of the people, i.e., the democratic political regime⁷. In accordance with this, constitution is “the expression of the will of the sovereign people”, because it directly derives from the people. It is the constitution that limits the sovereignty of the state. It adheres to the social contract theory, which is the basis of conceptual inspiration of the modern liberal constitutionalism. The leitmotif of the social contract theory, which has inspired this movement and constitutional struggle, is that the state had been created according to a consensual act of the people, in the form of a social agreement or contract. Man as rational and conscious being was aware how harmful was the war of all against all (*bellum omnium contra omnes*) and with his will decided to end this condition. People through a social contract (which in essence is a hypothetical and imagined contract and not a real one - a legal fiction or construction), created the state, which ended this general and mutual war⁸.

According to the contract theory, a man from his birth has some natural rights, but these rights could not be enjoyed and secured on conditions of such an unlimited war. The lone individual is not able to secure his rights, such as freedom and property; this situation of uncertainty impels people to create an institution, the state, which serves the common interest and protects their natural rights and freedoms. People undertook the obligation to subjugate to the state, which on the other hand, undertook the duty to protect and guarantee their natural rights. According to the contract theory, man sacrifices part of his rights and freedoms, with their conveyance to the state in order to exercise other rights and freedoms more securely⁹. This means that people and individuals were created before the state, they created the state and for this reason they are older than the state.

The legal expression of the social contract, which is created on the basis of sovereignty of the people, is the constitution as an act that legitimates the state power. The first

neutral in the issues of religious beliefs”; according to article 10, paragraph 1 of the Constitution of the Republic of Albania: “*In the Republic of Albania there is no official religion*”.

⁶ See: R. C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge 1995, p. 89.

⁷ John Locke articulated the old idea that the state should be governed according to certain laws and not arbitrarily. According to the dominant opinion of the illuminists the best form of governance is that in which the individual is subjugated to known and clear laws; this ideal excluded the arbitrary and uncontrolled despotism that characterized absolute monarchies. – See: J.M Kelly, *A Short History of Western Legal Theory*, Oxford 1992, p. 282.

⁸ L. Omari, *Parime dhe institucione të së drejtës publike*, Tiranë 2006, pp. 17-18.

⁹ J. Israel, *A Revolution of the Mind: Radical Enlightenment and the Intellectual Origins of Modern Democracy*, Princeton NJ 2010, pp. 37-40.

written constitutions, such as those of the USA and France, are a product of democratic revolutions, and this origin is expressively mentioned in their preambles. A logical consequence of this kind of approach about the origin and the character of the constitution is its legal supremacy over other laws. The constitution creates the state and it is an act of the original and supreme power which is exercised indirectly by the representatives of the people¹⁰. In fact, all constitutional acts as general normative acts that have supra-legal power, define people as “bearer of sovereignty”. The exercise of sovereignty made by the people is realized in various forms. They are in essence the forms of peoples’ participation on governing the country. In principle, people exercise sovereignty “through their representatives”. By electing their representatives in the Parliament, people “delegate the power to them” for enacting laws and determining the public politics of the state. Nor the enactment of laws, nor the determination of the politics of the state can be alienated from the Parliament. This democratic and progressive concept which stands on the foundations of the social contract theory (and which has motivated and encouraged the fighters for the independence of the American colonies and the creation of their federal state, as well as the leaders of the French revolution), has been fused with a highly skillful legal-professionalism by Emmanuel Joseph Sieyès in his constitutional theory on the constituent power (*pouvoir constituant originaire*) as an original, constitutive and supreme power that adopts and amends the constitution and the legislative power (*pouvoir constituant dérivé*) as a constituted, derived and secondary power, organized on the basis of the constitution¹¹. This means that the legislative power and the executive and judicial powers are constitutional powers, because the constituent power creates them through the constitution. A line of demarcation should be drawn between the constituent power, i.e. the power that adopts the constitution, and the constitutional power, i.e. the power that is created by the constitution.

A logical and obvious conclusion that could be reached is that the political will of the people is the moral substrate of the state and a source of the constituent power, through which the state is created. Moreover, the constitution is not an emanation and creation of the state, but on the contrary, the state power is emanation and creation of the constitution. This is best illustrated and explained by one of the founding fathers of the American Constitution of 1787, Thomas Paine who says:

A constitution is not a thing in name only, but in fact. It has not an ideal, but a real existence; and wherever it cannot be produced in a visible form, there is none. A constitution is a thing antecedent to a government, and a government is only the creature of a constitution. The constitution of a country is not the act of its government, but of the people constituting its government. It is the body of elements, to which you can refer, and quote article by article; and which contains the principles on which the government shall be established, the manner in which it shall be organized, the powers it shall have, the mode of elections, the duration of Parliaments, or by what other name such bodies may be called; the powers which the executive part of the government shall have; and in fine, everything that relates to the complete organization of a civil government, and the principles on which it shall act, and by which it shall be bound. A constitution, therefore, is to a government what the laws made afterwards by that government are to a court of judicature. The court of judicature does not make the laws, neither can it alter them; it only acts in conformity to the laws made: and the government is in

¹⁰ N. Pabrić, *Ustavno pravo*, 2000, Mostar p. 11.

¹¹ P. Nikolić, *Ustavno pravo*, Beograd 1997, p. 61.

like manner governed by the constitution¹².

In accordance with this, constitution is an act of the sovereign people's will; it is the law above all laws, the supreme law, a political contract through which the state is created and that every state institution should observe. An indicative and striking example is the French Declaration of the Rights of Man and Citizen of 1789, according to which: *A society in which the safeguarding of rights is not assured, and the separation of powers is not established, has no constitution* (Article 16). Nevertheless, the contractual theory an individualist theory, was based on the ideas of the natural law¹³, and its starting point is the man and his natural rights.

With the justification that the state was created as a result of a contract, the state is explained as a social phenomenon. In this way, the contractual theory was a typical product of its time, when the individualism and rationalism of the school of natural law dominated the explanation and interpretation of the world in general and the state in particular.¹⁴ The main exponent who advocated that sovereignty of the people should be transformed from idea to a political postulate is without doubt the French political philosopher Jean Jacques Rousseau. Other authors who contributed to the social contract theory and the School of natural law during 16th and 17th centuries were Hugo Grotius, Thomas Hobbes and John Locke.

For a long time before the emergence of the first written constitutions, "the omnipotence of the king" was based and justified in theocratic and autocratic theories that developed the idea that the power of the king derives from God and he is accountable to none except Him. The king is God's vicegerent on Earth and he could not

¹² A.W. Bradley, K.D. Ewing, *Constitutional and Administrative Law*, Edinburgh 2003, p. 5.

¹³ The main events that enabled the practical realization of the ideas of the natural law were the revolutions of the late 18th century in North America and France. Although there were structural differences between the American and French model, the influence of the Virginia Declaration of Rights of 1776, United States Declaration of Independence of 1776 and the Constitution of the USA of 1787 in the process of constitutionalism in France was great. The normative constitutional concept in article 16 of the French Declaration of the Rights of Human and Citizen of 1789 reflects the American model, because it stipulates the protection of human rights and the separation of state power as minimal elements that a real constitution should contain. On the other side, the French Declaration of the Rights Human and Citizen and the Constitution of France of 1791 reflect the French philosophy, especially the doctrine of Montesquieu for the separation of state power and the theory of Jean Jacques Rousseau for the social contract and peoples' sovereignty. Revolutionaries in general do not consider the existing order as given; on contrary they see the state and society as entities that are human creature. According to Emmanuel Sieyès, the claim of citizens to be *pouvoir constituant* and *pouvoir constitué* is created only by the constitution which adopted by people. As a consequence, every power except of that of peoples not only is organized and limited by the constitution, but it is created by them. This self-confidence was a result of the emergence of emancipated and educated bourgeoisie which requested political independence as they had earlier achieved economic autonomy. See: J.M Kelly, *A Short History of Western Legal Theory*, Oxford 1992, p. 277-282. The constitutional monarchy established in France with the Constitution of 1791 in a decade was followed by the creation of the Republic in 1792, promulgation of the Jacobin Constitution in 1793, the Constitution of Directorate in 1795 and finally the Constitution of the Consulate in 1799. After the abdication of Napoleon Bonaparte and the restoration of the Bourbon monarchy in 1814, Luis XVIII enacted the Constitutional Charter which transformed France into a constitutional liberal monarchy. The Constitution of Poland of 1791 is considered the first written modern constitution in the European continent. In the meantime, its shortcoming is that the Polish bourgeoisie did not codify the human rights in its content. See more: W. Pauly & A. Nieschlag "Constitution", *The Oxford International Encyclopedia of Legal History*, Oxford 2009.

¹⁴ See: F. Agani, *Studime sociologjike dhe politologjike*, Prishtinë 2008, pp. 69-78.

do any wrong! He was considered as a special man with public personality and the whole state was his own. He was accountable only to God¹⁵. According to medieval conceptions, when the religious worldviews dominated, the ultimate power of the king was supported with divine origin of this power¹⁶. This leads to the conclusion that the essence of the theocratic and autocratic theories is that the sovereignty and authority of the king derived from God, that the king governed according to the laws of God and that he was accountable only to God. The reality is that this is the principle of the absolute power of the king.

2. A legal-historical outlook of the early beginnings of constitution

2.1. From the beginning of the political history of the society, several legal acts have been enacted to regulate different social issues, including those concerning the behavior of the rulers.¹⁷ Seen from a historical perspective, the oldest legal documents that contain norms with constitutional value are: The Code of Hammurabi, *Lex duodecim tabularum*-The law of twelve tables, *Constitutiones principum*-acts of Roman emperor; Laws concerning Israel's Kings; and the Constitutional Charter of King Taishi Shotoku from Japan.¹⁸ On the other hand, the first elements of constitution, as well as the first scientific premises that are significant for its content as legal act, are introduced in the Greco-Roman world. This period is the beginning of the history of the constitution in a formal sense as well as in material sense even though in a rudimentary form. In the works of classical Athenian philosophers like Plato and Aristotle there are some observations on the constitutions of Greek city-states, poleis¹⁹. In his *Laws*, Plato makes a comparison of the laws of the Greek city-states; he not only describes them, but also tests them against the ideal constitution he constructs out of them. Prior to writing his *Politics*, Aristotle also examined the constitutions of no less than 153 city-states, though only the portion devoted to Athens and Sparta has come down to us. This work can be described as philosophical speculation on the basis of comparative law²⁰. Original copies of the Constitutions of Athens and Sparta are kept in the Library of Alexandria, as other copies of these documents are available for the scientific auditorium²¹. It is worthy to be mentioned that Aristotle was the first to use the term *politeia* (constitution) in his book *Politics* in order to designate the foundations on which the whole state regulation is based, the entirety of primary legal norms on the organization and function of state power. He used the term *nomoi* (laws) to designate the entirety of secondary legal norms, through which the primary legal norms (*politeia*) are implemented. Prime example of the

¹⁵ C. Morris, *The Papal Monarchy: The Western Church from 1050 to 1250*, Oxford 1989, pp. 14-21.

¹⁶ See: R.C. van Caenegem, *An Historical Introduction to Western Constitutional Law*, Cambridge 1995, pp. 17-18.

¹⁷ K. Saliu, *E drejta kushtetuese*, Prishtinë 1998, p. 63.

¹⁸ S. Shkariq, *Sporedbeno i makedonsko ustavno pravo*, Skopje 2004, pp. 91-94.

¹⁹ The main idea of what can be called the spirit of the history of Ancient Greece is its constitutionalism. According to Isocrates, the constitution is the spirit of the state, whereas according to Aristotle the constitution is the state. It should be noted that for ancient Greeks the term constitution (*politeia*) is used as synonym to express the city-state (*polis*) and they represent all public life inside the city-state. - See: A.H.J. Greenidge, *A Handbook of Greek Constitutional History*, New York 2005, p. 5.

²⁰ K. Zweigert & Hein Kötz, *An introduction to Comparative Law*, Oxford 1998, p. 49.

²¹ Aristotel, *Aristotelov Ustav Atenski*, Zagreb 1948.

works of great legislators are the *Laws of Lycurgus* in Sparta and the *Laws of Solon* in Athens which regulated certain issues of the constitutional area²².

Analogically to Ancient Greeks, the Romans made a clear technical distinction between the primary legal norms and the secondary ones. They differentiated between two types of higher authorities: the authority that creates the state (*rem publicam constituere*) and the authority that enacts laws (*leges scribere*).²³ In this way, the power that creates the state is an authentic or primary authority, whereas the power that enacts laws is a derivative or secondary power. The word '*constitutio*' was created to designate the power that constitutes the state (*rem publicam constituere*). As a consequence, it can be concluded that etymologically the origin of the word constitution is from the Latin word "*constitutio*", which was used for the first time by the famous Roman lawyer Cicero. In the classical Roman law the term '*constitutio*' meant the obligatory legal norms that were created by the Roman emperor, in order to regulate some of the most important legal issues in the state.²⁴ In various periods of the development of Roman state, '*constitutio*' served to express different legal notions of the public law, such as: decree, regulation, order, organization, structure and position or status.²⁵

Later, the term '*constitutio*' was used in England during the reign of King Henry II to designate expressly solemn and important laws. The Constitutions of Clarendon of 1164²⁶ was a result of the need of conversion/transformation of the customary law into written law. Furthermore, the Constitution of Clarendon codified and sanctioned the existing customary norms. It was written in 16 articles and it regulated the relationship between state and church in England²⁷. During the feudal state, the Catholic Church accepted from the Roman law the term '*constitutio*' and used it to refer to the highest act that regulates the organization of the church²⁸. Moreover, in the feudal state there were other laws that had legal-constitutional value and importance, and higher legal force compared to ordinary laws. For example, in France during the 17th century, before the adoption of a written constitution, the phrase "laws of the kingdom" (*les lois du royaume*) or fundamental laws (*les lois fondamentales*) was used for fundamental legal norms that had been in a considerable amount unwritten, and later they would be used to designate the constitution in formal sense. Along with them, there were the so-called 'laws of the king' (*les lois du roi*). While king had the right to independently and unilaterally enact and amend ordinary laws (*les lois du roi*), 'the laws of the kingdom' (*les lois du royaume*) or the fundamental laws (*les lois*

²² M. Jovičić, *O ustavu*, Beograd 1977, p. 30.

²³ G. Mousourakis, *A Legal History of Rome*, London 2007, pp. 107-108.

²⁴ V. Mratović, Nikolla Filipović, Smiljko Sokol, *Ustavno pravo i političke institucije*, Zagreb 1986, p. 24.

²⁵ B. Z. Tamanaha, *On the Rule of Law*, Cambridge 2004. p. 11-14

²⁶ Constitutions of Clarendon – Statutes enacted in 1164, during the reign of Henry II, by which the jurisdiction of the ecclesiastical courts was limited and the cleric's exemptions from secular jurisdiction were greatly narrowed. During the first half of the twelfth century the claims of the church were growing, and the duty of asserting them passed into the hands of men who were not mere theologians but expert lawyers. Then, as all know, came the quarrel between Henry and Becket. In the Constitutions of Clarendon (1164) the king offered to the prelates a written treaty, a treaty which, so he said, embodied the "customs" of his ancestors, more especially of his grandfather. Becket, after some hesitation, rejected the constitutions. The dispute waxed hot; certain of the customs were condemned by the people. The murder followed ... From Henry time onwards the lay courts, rather than the spiritual, are the aggressors and the victors in almost every contest". – cited from *Black's Law Dictionary*, St. Paul Minn. 1999, p. 307.

²⁷ R. Marković, *Ustavno pravo*, Beograd 1982, p. 51.

²⁸ K. Trnka, *Ustavno pravo*, Sarajevo 2000, p. 29.

fondamentales), could be enacted or amended by the king only with the agreement of *Etats généraux*²⁹. These fundamental laws were mandatory, as they regulated some basic issues of the state (e.g. the succession of the crown, the property of the king, etc.) and were considered more important than the ordinary laws, although these fundamental laws were not written, but had customary character³⁰.

In the theoretical aspect, it is interesting to point out that Jean Bodin made a distinction between the fundamental laws of the state (*leges imperii*) and the ordinary laws of the state (*leges*), in which case the fundamental laws of the state (*leges imperii*) were mandatory even for the holder of state sovereignty, and that the ordinary laws should always be in accordance with them³¹. Besides this, it should be pointed that John Locke, as one of the most prominent representatives of natural law theory, made a distinction between two basic types of contract: the main contract and the supplementary contract (trust). The former creates the state as a stable and permanent community, whilst, the trust sets organs of the state which are temporary and changeable, as are individuals who carry out duties as organs of the state. Constitution is the main contract, as the legal act with the highest legal force, the supplementary contract includes laws with lesser legal force than the constitution³².

2.2. In the science of constitutional law, there are considerable data about certain states which have enacted written acts with highest legal force before the end of 17th century, i.e., before the historical period that is considered as the beginning of written constitutionalism. For example, the Republic of San Marino adopted its Statute – the first constitution in 1263, whereas Sweden in 1634 adopted the so-called constitution *Regerungsform* – Form of government (it included 65 articles which regulated the relations between the king and specific classes of population, and this in essence reflected the feudal relations of that period) – it is the predecessor of the complete written constitution, which has adopted in 1719 (after this constitution, Sweden adopted new constitution in 1772). It was under English colonial rule, when an autonomous act of constitutional character which was named “*Fundamental Order*” was adopted in 1639 in one of American states, Connecticut³³. Nonetheless, the science of constitutional law considers that the

²⁹ In the late middle ages, in France the expression ‘*lois fondamentales*’ was used to designate legal acts which regulated issues related to the succession of royal crown. In the period of the Holy Roman Empire, the expression ‘*leges fundametales*’ was used to designate the provisions that were part of Peace of Augsburg (1555) and the Peace of Westphalia (1468). – See: R. Lesaffer, *European Legal History: A Cultural and Political Perspective*, Cambridge 2009, pp. 307-310.

³⁰ E. Zoller, *Introduction to Public Law. A Comparative Study*, Leiden 2008, p. 41-50. With the customary law in the general sense, it is meant the rules stipulated and accepted in practice, which in absence of specific written norms gain the value and importance of legal norms including state sanctioning. Constitutional customary rules often came to consideration after the end of revolutions and in the period when constitutional norms that would reflect the new reality and situation have not been adopted. – cited according to: J. Sruk, *Ustavno Uregjenje Socijalističke Federativne Republike Jugoslavije*, Zagreb 1976, p. 6.

³¹ R. Llukić, *Istorija političkih i pravnih doktrina*, Beograd 1973, p. 316.

³² S. Gordon, *Controlling the State. Constitutionalism from Ancient Athens to Today*, Cambridge Mass. 2011, pp. 25-28.

³³ For more see: S. Kurtović, *Ustavi i ustavni akti doneseni u svijetu prije Ustava SAD*, Beograd 1990, pp. 17-31; From 1776 to 1787 all thirteen American states adopted their constitutions, while the US Constitution of 1787, which is the first federal constitution in the world, accepted and refined the spirit and content of earlier constitutions of American states and the American Declaration of Independence. These constitutions are the first modern written and complete constitutions in the modern constitutionalist

emergence of written constitutionalism is related to first written constitutions of American states in the 18th century (such constitution was adopted by Virginia in 1776; Massachusetts in 1780), respectively the federal constitution of the USA in 1787³⁴.

Aside from the abovementioned topics, other names have been used to designate the constitution as the fundamental and highest legal act: “*Basic Law*”³⁵, “*Statute*”³⁶,

history. Objectively seen from a historical perspective, the first written constitution in the American continent in 29 June, 1776, as the Declaration on the Human Rights of 12 June 1776 was adopted by the American state of Virginia (it was written by the democrat statesman and thinker, Thomas Jefferson) before the enactment and proclamation of the Declaration of Independence in 4 July, 1776, according to which the thirteen united colonies decided to split from England and proclaim their freedom and independence. Inspired from this constitution, the same was done in all newly independent states in North America. However, although the English colonies of America formally declared independence, the war between them and England continued for five consecutive years. In the meantime, colonies that called themselves as the United States of America, projected an agreement, which united them as “one state”. The Agreement which was named “Articles of confederation and Perpetual Union”, in 1777 was adopted by a congress of states and in July 1788 it was officially signed. But, on the other hand, articles became obligatory when they were ratified by the thirteenth state, Maryland in March 1781. In the end, all this constitutional activity in the American soil was crowned with the adoption of the Constitution of the USA on 17 September 1787, in which case the confederation as a union of independent American states became a federation as unique state community. In accordance with Article VII of the Constitution of the USA, there was requirement that 2/3 of the constitutive federal units, i.e. 9 from 13 states, ratify it in order to enter into force. The ratification was completed in the timespan of ten months and the Constitution entered into force on 4 March, 1789. In the same year George Washington was elected as the first president of the USA. As a matter of fact, before the abovementioned constitutions of American states and the Constitution of the USA, there were some other written and complete constitutions, such as the Instrument of governance known as the Constitution of Cromwell in 1653, the Constitution of Sweden in 1719 and the Constitution of Connecticut in 1638. However, because of the certain characteristics of these constitutions and the historic conditions and circumstances in which these constitutions were adopted, they are not considered as the first modern constitutions. The Constitution of Cromwell never entered into force, the Constitution of Connecticut was not a constitution of an independent and sovereign state, and the Constitution of Sweden was more a constitution of an absolute monarchy than a constitution in modern sense which would be based on the sovereignty of the people, human rights and freedoms and democracy. – See: F. G. Cullop, *The Constitution of the United States*, New York 1999, p. 5-6; R. E. Lee, *A Lawyer Looks at the Constitution*, Provo Ut. 1981, pp. 33-35.

³⁴ A. T. Von Mehren & P. L. Murray, *Law in the United States*, 2nd ed. Cambridge 2007, pp. 104-108.

³⁵ *Basic Law for the Federal Republic of Germany*, 1949, Text edition, Status: December 2000.

³⁶ The denomination Statute is one that is used in the comparative constitutional law and designates the constitutional act of a certain state, howsoever this denomination is not natural from the perspective of classical legal nomenclature of legal acts, for signifying the fundamental and supreme legal-political act of a state. Nevertheless, it should be mentioned that in constitutional history there are examples of statutes that in essence from their structure and content, have had the role and quality of a constitution in certain states on given historic moments. Examples are: *Statutae Republicae Sancti Marini* – The Statute of San Marino of 1600; *Statute of Autonomy of Catalonia* of 1979 and 2006; the Organic Statute of Albania of 1914 and Albanian Statutes of 1920, 1922, 1925 and 1928. In this context, it should be given a panoramic overview on the Statute of Shkodra. Shkodra, the medieval Albanian city is supposed to have adopted its Statute in 1346 and continued to amend it until 1469. The only copy of the original manuscript in Latin of the Statute of Shkodra is located in the Correr Archive in Venice. The Statute of Shkodra is without doubt a magnificent legal document which has a visibly constitutional character. This Statute has a range of procedural guarantees, which embody the fundamental rights and freedoms of the citizens and foreigners. The content of this Statute shows the high level of the cultural and legal development of the city of Shkodra in comparison with other Albanian or foreign cities such as Durrës, Tivar, Kotor, Ragusa, Venice, Florence, etc. The constitutional character of the Statute of Shkodra can be clearly seen in the wording of chapter 6 named “On the anti-statutory acts”: “*Acts which are contrary to the Statute are null and*

“*Constitutional Law*”³⁷, “*Constitutional Framework*”³⁸, “*Constitutional Charter*”³⁹. Hence, we can conclude that the constitution as a legal act in different times and states has had numerous names. Nevertheless, above mentioned acts with constitutional value and importance, even if they did not have the designation and form of a constitutional act, they had the internal substance of a constitutional act and represented the role of constitutions in respective states in given historic moments. So, even though in this case the importance of the terminology cannot be excluded, it is decisive and determinative that they have thematic content that is constitutional, and as such, they represent the constitutional acts of these states in a specific stage of their historical development.

There is no equivoque that a standard and universal legal term to indicate the constitutive and supreme legal act of an independent and sovereign state is the term constitution. From this, it results that the constitution in the original meaning of the word, is a term that is exclusively reserved to show the constitutive and highest legal-political act of independent and sovereign states, on which on a certain state the power is organized, functions and exercised. However, it is interesting to point out the fact that some state entities as constitutive units within the federal states have had their constitutions. For example, the federal units in the USA, lands in Germany and cantons in Switzerland and Bosnia and Herzegovina have their constitutions⁴⁰, complementary to

invalid”. Other provisions with constitutional character that should be mentioned are chapters 89, 90, 91, 93, 97, 98-107. They stipulate some of the most important bodies in the city and the method of their election and function in the same manner as the modern constitutions that stipulate the main constitutional organs and all state apparatus. Other norms with constitutional character are especially chapters 110-151 which stipulate a range of norms which in their entirety create a framework of procedural guarantees on the right of due process in a independent and neutral court, and somewhat stipulate the organization and function of the judicial power in almost same way as the modern constitutions including the actual Constitution of Albania. All these norms and many others make the Statute of Shkodra without equivoque a genuine modern and democratic constitution. – See more broadly: J. Daci, *Karakterit kushtetues dhe garancitë procedurale në Statutin e Shkodrës*, Revista *E drejta*, Nr. 1/2011, Prishtinë pp. 37-44.

³⁷ For example, in Albania, the Law for the basic constitutional provisions of 1991, which was gradually supplemented by a number of other constitutional laws, substituted temporarily the Constitution of Albania until the adoption of a new complete constitution in 1998. Another example is the Constitution of France in 1875 which consisted of three constitutional laws: The Law on the organization of the Senate (24 February, 1875); the Law on the organization of public authorities (25 February, 1875); and the Law on the relationship between public authorities (16 July, 1875). A similar example is the Constitutional Law of the Socialist Autonomous Province of Kosovo of 1969.

³⁸ Constitutional Framework of Interim Self-government in Kosovo as an UNMIK Regulation, 2001/9, (22.05.2001).

³⁹ The denomination “Constitutional Charter” is used rarely in the comparative constitutional law. It was used in the French and Japanese constitutional legal history. In France, the constitutional Charter was adopted in 1814 and 1830, whereas in Japan it was adopted in 1889. However, the Constitutional Charter reemerged in the beginning of 21th century. Such an example is the constitutional Charter of Serbia and Montenegro. This act lost its legal force, when Montenegro was constituted as independent and sovereign state on the basis of the referendum held in 2006.

⁴⁰ From constitutional perspective, Bosnia and Herzegovina does not have a unique constitutional system. The constitutional system of this state consists from three main constitutions: *first*, the Constitution of Bosnia and Herzegovina as common federal constitution, *two*, the Constitution of Federation of Bosnia and Herzegovina as constitution of constitutive federal entity, and; *third*, the Constitution of Republika Srpska as constitution of constitutive federal entity) and ten other constitutions of cantons. – A. Bajrami, *Demokracia parlamentare*, Prishtinë 2005, p. 262.

federal constitutions. In these cases, the federal constitution regulates its legal supremacy over the constitutions and laws of federal units, cantons, etc. Likewise, in former Socialist Federal Republic of Yugoslavia and USSR, the republics and autonomous provinces, had their own constitutions that were positioned under the federal constitution on the hierarchy of legal acts, and as a rule they always had to be in compliance with the federal constitution.

The term constitution is used by various international organizations, such as the World Health Organization or International Labor Organization to designate their main constitutive, organizational and functional legal act⁴¹. One of the dilemmas for the parties of European Convention who worked on the compilation of the constitutional treaty was whether to denominate that document ‘constitution’ or ‘constitutional treaty’. There were manifestations of terminological disagreements between different authors on how this constitutional act of EU should be named. Instead of the adjective “constitutional”, different authors, proposed several denominations for the European constitutional document. The majority considered this is as a new founding treaty of the EU, although there were others who defended the denomination constitution. Michel Barnier, since 2001 manifested his dilemmas on the denomination “constitution”, with the justification that the EU is not a state, but a sui generis international organization, and as a consequence it can not have a constitution⁴². Finally, it should be warned that ‘constitution’ is a legal notion of internal law and not of international law, therefore it is unfair and unjust the use of the term “constitution” to show constitutional acts of various international organizations. This is because in the legal nomenclature of international law for constitutive legal acts of international organizations is used the denomination “Charter” or “Statute”⁴³ as more suitable and specific denomination.

3. Concluding remarks

From the legal-historical remarks regarding constitution as the fundamental and supreme normative-political act in accordance with analytical-legal approach, we can draw these conclusions:

First, every notion or concept has its own history, even though concepts cannot be understood without a minimum of elementary and general theoretical knowledge about their background and historical development;

Second, constitutional history is “a constituent and very important segment” of the science of constitutional law, which studies historical-legal aspects of the creation of notions, institutions and acts with constitutional value and importance from the antiquity until the modern period, especially from their beginning as political ideas, through their normative shaping in constitutional norms and finally their implementation in practice.

⁴¹ See: *Constitution of the International Labour Organization*; <http://www.un-documents.net/iloconst.htm>; *Constitution of the World Health Organisation*; http://www.who.int/governance/eb/who_constitution_en.pdf

⁴² F. Snyder, *The Unfinished Constitution of the European Union: Principles, Processes and Culture* in J.H.H. Weiler & M. Wind, *European Constitutionalism Beyond the State*, Cambridge 2003, pp. 55-58.

⁴³ Charters and Statutes represent agreements on the creation, organization and determination of competences of international organizations or organs. In fact, Charters or Statutes are international collective acts with constitutional character. E.g. the Charter of the UN, the Charter of the Organization of American States, the Statute of International Court of Justice, the Statute of the Council of Europe, etc. – A. Puto, *E drejta ndërkombëtare publike*, Tiranë 2010, p. 364; Z. Gruda, *E drejta ndërkombëtare publike*, Prishtinë 2007, p. 290.

Third, the revolutionary and national-liberation processes constitute historical sources for the adoption of new constitutions and installation of constitutionalism. In fact, in the modern world, the emergence of a constitution is the result of the creation of a large number of new states, as a product of decolonization, or dissolution of federal states (ex-SFRJ, ex-USSR, etc.) or the creation of a new state from the unification of two or more independent states. Generally, a constitution reflects the ideological, philosophical and political beliefs and aspirations of those individuals that prepare and draft the constitutional act in a given historical moment;

Fourth, England is the first country where the term ‘constitution’ was used as synonym of the modern constitution, during the debate in the House of Communes of the English Parliament in the beginning of 1688, and;

Fifth, there is no doubt that a standard and universal term to designate the constitutive, organizational and functional legal-political act in an independent and sovereign state is the term constitution. As a consequence, the constitution in the original meaning of the word is term that is reserved exclusively to designate the fundamental and highest legal-political act of independent and sovereign states, in accordance to which the activities and work of state organs is exercised. However, it is interesting to point the fact that some state entities as constitutive units within the federal states have had their constitutions. Therefore, it should be warned that constitution is a legal concept of the internal law and not of international law, therefore it is inadequate and unnatural the use of the term “constitution” to designate the constitutive legal acts of various international organizations. This is, because in the legal jargon of international law for designating the constitutive legal acts of various international organizations is used the term “Charter” or “Statute” are used as more adequate and specific denominations.