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## THE INFLUENCE OF SERBIA’S HISTORICAL CONSTITUTIONS ON ITS MODERN CONSTITUTIONAL IDENTITY

– 30 YEARS SINCE THE RETURN OF THE  
LIBERAL-DEMOCRATIC CONSTITUTIONALITY –

### 1. INTRODUCTION

In this paper, the basic features of Serbian historical constitutions are analyzed, with the special reference to the Constitution of 1990, since it sets a milestone and a starting point for the return of the liberal-democratic constitutionality in Serbia. In the literature dealing with the concept of constitutional identity, it has been established that one of the main sources of constitutional identity is national constitutional history. In our opinion, four of the “old” (historical) Serbian constitutions could be perceived as relevant factors for the establishing of the constitutional identity of modern Serbia – the constitutions of 1835, 1869, 1888 and 1990. After explaining key features of these constitutions (especially the Constitution of Serbia of 1990), we will try to offer a new periodization of Serbian constitutional history – according to the criterion of relevance to the definition of contemporary constitutional identity.

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At the very beginning, we would like to mention that the period of constitutionality of the First and the Second Yugoslavia will not be in our focus. The Kingdom of Serbs, Croats and Slovenes was constituted on December 1<sup>st</sup> 1918 and later changed its name into “the Kingdom of Yugoslavia” (in 1929). It has had two constitutions – the Constitution of 1921 (the so called “*Vidovdan Constitution*”<sup>2</sup>) and the Constitution of 1931 (“*September Constitution*”). Their features, especially when it comes to the Vidovdan Constitution (because the September Constitution was essentially a typical example of the authoritarian constitutionality), were deeply rooted in Serbian constitutionality from before 1914, though within all the circumstances of the newly formed, First Yugoslav state.

As for the constitutionality of the Second Yugoslav state (the Socialist Federal Republic of Yugoslavia), which lasted for almost half a century, it is without any question that it had some impact on the post-socialist constitutionality of all its member states – the former Yugoslav republics, that have emerged as a sovereign states, after the collapse of the Second Yugoslavia. However, if we exclude the institution of the constitutional judiciary, which was introduced by the federal Yugoslav Constitution of 1963, that influence was rather to be felt at the level of legal and political consciousness and culture in general, in comparison to some specific constitutional solutions, that rarely outlived the demise of socialism.

At the time of the First and the Second Yugoslavia, Serbia did not exist as a sovereign state. It began to regain elements of its statehood only with the break – up of the Second Yugoslavia and the enactment of the 1990 Constitution.

The current Constitution of 2006 is in this context important only because of the fact that it fully re-constituted Serbia as an independent and sovereign state. However, it is in fact not substantially the new constitution *per se*, but content-wise more of a somewhat revised Constitution of 1990 (though not considerably). Some changes, such as the expansion of the human rights’ list or the introduction of constitutional complaint, certainly do not present innovations significant enough and hence do not suffice for the conclusion that this Constitution is content-wise to be treated as considerably different compared to its predecessor of 1990. For this reason, the Constitution of 2006 (which still remains in power) is also not within the prime focus of this paper.<sup>3</sup>

<sup>2</sup> Vidovdan Constitution got its name after the date of its enacting, 28<sup>th</sup> of June – Vidovdan (St. Vitus day), which is an important national and religious holiday in the Serbian tradition. Apart from Serbia, the same holiday is being revered and celebrated in Bulgaria as well (*Vidov den*).

<sup>3</sup> Serbian constitutional history is long and complex. If only those constitutions which were enacted at times when Serbia was fully independent and sovereign were taken into account, much of the

## 2. SEVERAL PERIODIZATIONS OF THE MODERN CONSTITUTIONAL HISTORY OF SERBIA

The modern Serbian constitutional history can be divided into several periods according to a number of different criteria. In this paper, we will start by using four different criteria and accordingly present four periodizations. The beginning of the modern constitutional history of Serbia is set to its first constitution, which at least declaratively proclaimed the division of powers and protection of some human rights (*Sretenje* Constitution of 1835).

### 2.1. The periodization according to distinctive periods of modern world constitutionality

The first periodization follows the development of modern world constitutionality, which starts with the adoption of the first written, formal constitutions. In essence, there are three great “waves” in the development of modern written constitutionalism, which brought significant qualitative changes along. Ideologically, normatively and practically it had influenced and led to the redefinition of the constitutional order of nation states in the period starting at the end of the 18th century and up to the first decades of the 21st century.<sup>4</sup>

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Serbian nineteenth-century constitutionality would have to be left out (e.g. everything before the Congress of Berlin in 1878). Some of the most influential constitutions emerged in periods of Serbian quasi or semi-independence. The Constitution of 1990 was, likewise, still enacted during the formal existence of SFRY, but it was practically written for an independent country and with the clear anticipation of future disintegration of the federal Yugoslavia. In addition, state union of Serbia and Montenegro was more of a union of states than the independent, sovereign state *per se*. This issue remains debatable (and complex), but undoubtedly, the Constitution of 2006 cannot be considered a milestone as it presents a more or less ‘bad copy’ of the 1990 constitution.

- <sup>4</sup> 1) The beginning of the first “wave” of modern constitutionalism is linked to the US Constitution of 1787, which is based on the principle of separation of powers. It has introduced a presidential system and modern federalism. On the other hand in 19th century Europe, parliamentarism and a unitary state became the constitutional standard. What remained common for both these variations is that the foundation on the formal division of powers, as well as the constitutional proclamation of a relatively narrow circle of personal and political rights.
- 2) The second “wave” is the liberal-democratic constitutionality sprung from the civil revolutions and national struggles for liberation beginning in 1848/1849. The principle of people’s sovereignty was added to the principle of separation of powers. Suffrage was evolving from limited and unequal to universal and equal. A necessary between constitutionalism and democracy was starting to be established, and later become the guiding idea of modern constitutionality. Hence in the second “wave”, democracy and people’s sovereignty as fundamental constitutional principles took precedence over the supremacy of the constitution. However, in the 1920s, the crisis of parliamentary democracy began. In the 1930s, in most European states, liberal democracy was replaced with the authoritarian constitutionality.
- 3) The third “wave” of modern constitutionalism “rose” on the “ruins” of totalitarian regimes. Peace, freedom, equality and justice as universal values were to be defended from the position

The idea of constitutionality was not unknown to medieval Serbia at the time of its greatest power. The provisions of Emperor Dušan's Code of 1349 (amended in 1354) on the independence of the judiciary were a kind of a Serbian "pre-constitution".

The so called "Sretenje constitution" of 1835 (also named after the date of its enacting – Candlemas – 15<sup>th</sup> of February) had, in terms of its content, all the features of a true constitution. The division of power was not yet clearly and unambiguously set, but its contours were undoubtedly present. The intention of Dimitrije Davidović, the creator of this constitution, is already quite clear from the very title of the act – "the constitution" (*Ustav*), a term that in Serbian language derives from the words "to stop, limit, put boundaries" (to the power of the state "against" the individuals).<sup>5</sup> This intention could have been achieved primarily through the institution of the State council, whose members were though appointed by the Prince himself. The National Assembly also existed – as a representative body, but its function did not include legislative competences – its primary duty was to regulate taxes and other duties following the principle "*no taxation without representation*".<sup>6</sup> The Sretenje Constitution was however short-lived and almost immediately put out of force under the severe pressure of the great powers of the time. Its destiny served in a way a sort of prediction of the future constitutional life of Serbia – one would not be wrong to say that all the constitutions of Serbia were more of a "stillborn" than "real" or "living" constitutions. This also applies to the Constitution of the Kingdom of Serbia from 1888 (so called "Radical's Constitution" – after the Radical political party), which is usually regarded as "the best Serbian constitution", *inter alia* because of the introduction of the parliamentarism and a proportional electoral system,<sup>7</sup> political mechanisms that were completely new and practically unknown in Europe of the time. Still, this constitution was

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of a universal legal order. This legal order was created under the auspices of the United Nations. It was based on the UN Charter from 1945 and the Universal Declaration of Rights from 1948. The internationalization of human rights began. The post-war constitutionality, firstly in the Western Europe states, was also marked by the establishment of a constitutional judiciary. The constitutional judiciary, in various modalities, is a confirmation that the supremacy of the constitution is an essential principle of a modern constitutional state. The era of the new constitutionalism, i.e. constitutional democracy, had started.

<sup>5</sup> Snežana Savić, *Liberalno prirodno pravo u istoriji srpske ustavnosti, Dva veka srpske ustavnosti*, Beograd: SANU, 2010, p. 84.

<sup>6</sup> Miroslav Đorđević, *Istorijat izbora u Kneževini i Kraljevini Srbiji, Izbori u domaćem i stranom pravu*, Institut za uporedno pravo, Beograd 2012, p. 278.

<sup>7</sup> "With the proportional system, which was introduced by the Constitution of 1888, the biggest change was introduced. The proportional system was a new, theoretical, unproven experience in Europe. Except for Denmark and some Swiss cantons, the system was not introduced or

a “bud” of liberal-democratic constitutionality that could not “flourish” in either the first (1888-1894) or its second period of being in force (1903-1914).

The third big “wave” of constitutionality, after the Second World War, in which the constitutional judiciary became the “supporting pillar” of the rule of law, unexpectedly quickly “flooded” the Socialist Federal Republic of Yugoslavia and its republics. The constitutional judiciary within the system of unity of power and the one-party system could not have the role and significance that it had in the Western European states of the time (Italy, Germany). Its very existence, however, was clearly influencing the concept of constitutional judiciary three decades later, in the period of post-socialist constitutionalism.<sup>8</sup> This came to full expression and comprehension in the 1990 Constitution of Serbia.

## 2.2. The periodization of the constitutional history of Serbia in the works of Serbian eminent constitutional scholars

The second periodization of the modern constitutional history of Serbia was partly created by probably the greatest constitutional lawyer that Serbia had in the first half of the 20th century, professor Slobodan Jovanović. The other part is the work of perhaps the greatest constitutional scholar of the second half of the 20th century, professor Ratko Marković. Both authors gave periodizations of constitutional history according to the two criteria mixed – the normative features of the constitutions and constitutional reality. The first criterion was however more dominant.

Slobodan Jovanović offered the periodization of the constitutional history of the Principality and the Kingdom of Serbia, which existed in 19<sup>th</sup> and the beginning of the 20<sup>th</sup> Century (1808-1914). According to Jovanović, there were 7 distinctive periods: 1) the age of creation of the state power (1808-1838); 2) the age of the bureaucratic oligarchy (1838-1860); 3)

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implemented anywhere else at the time.” Marko Pavlović, Narodna skupština u ustavima Kneževine i Kraljevine Srbije, *Dva veka srpske ustavnosti*, Beograd, SANU, 2010, p. 111.

<sup>8</sup> The institute of constitutional judiciary was not alone in this sense. Socialist Yugoslavia also had other institutions (unlike most of other countries of the eastern bloc) reminiscent to the ones of the western democracies – e.g. the „Social self-management protector“ as an independent body – closely resembling western Ombudsman institution. Some authors argue that while it was professedly “communist” in philosophy, Yugoslavia was increasingly “democratic in practice, as it recognized that the agreed state interests did not necessarily mean a lack of attention to the individual rights. – Walter Gellhorn, *Ombudsman and others*, Harvard University Press, Cambridge 1967, p. 256. See also: Miroslav Đorđević *et al.* Historical Development of Corruption Prevention Mechanisms in Southeast European Countries, *Legal Mechanisms for prevention of Corruption in Southeast Europe*, Institute of Comparative Law, Belgrade 2013, p. 21-23

the age of the police state (1860-1869);<sup>9</sup> 4) the age of constitutionality (the “Regent’s Constitution” from 1869); 5) the age of parliamentarism (the first period of the “Radical’s” Constitution of 1888 being in force); 6) the age of reaction (1894-1903 – the second period, “the return” of the Regent’s Constitution); 7) the age of the restored parliamentarism (from the entry into force the Constitution of the Kingdom of Serbia of 1903 until 1914 – the beginning of the First World War).

The periodization offered by the professor Ratko Marković covers the period of two Yugoslavian states (from 1918 until the creation of the two member states federation – Federal Republic of Yugoslavia in 1992). He divided the constitutionality of the first Yugoslav state into four periods: 1) the age of temporary constitutionality (from 1918 until 1921 – the Vidovdan Constitution’s entry into force); 2) the age of monarchical parliamentarism (1921-1929, ending with the suspension of the Vidovdan Constitution); 3) the age of absolute monarchy (1929-1931, until the entry of the September Constitution of 1931 into force); 4) the age of indirect parliamentarism (1931-1939); 5) the age of the executive (non-representative) government (on the eve of the Second World War). Ratko Marković divided constitutionality of the Second Yugoslavia into two periods: 1) the period of state socialism (1946-1953), which was characterized by the copying of the Constitution of the USSR of 1936 – Stalin Constitution; and 2) the period of self-governing (socialist self-managing) constitutionality (1953-1992, until the dissolution of the SFRY).<sup>10</sup> The self-governing constitutionality was in a way a unique Yugoslav experiment – in essence it implies the socialist constitutionality with some modified features of the liberal western constitutionality. The dissolution of the Second, socialist Yugoslavia represents, in fact, the beginning of the new, practically sovereign state of Serbia (though still within the “smaller” – Federative Republic of Yugoslavia, together with Montenegro) that started its life with the Constitution of 1990 (the so-called “Milošević Constitution” – after the first president of Serbia after dissolution of the Socialist Yugoslavia – Slobodan Milošević).

### 2.3. The periodization from the standpoint of state sovereignty

From the standpoint of state sovereignty, it is possible to classify four distinctive periods. The first covers the constitutionality of Serbia as

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<sup>9</sup> The second and the third period covers the time when the “Turkish” Constitution of 1838 was in force.

<sup>10</sup> Ratko Marković, *Ustavno pravo*, Pravni fakultet Univerziteta u Beogradu, Beograd 2014, p. 139.

an autonomous province in the Ottoman Empire. It begins with the first acts of constitutional character enacted at the time of the First Serbian uprising (1808, 1811) and ends with the full international recognition of the state independence in 1878. There are two essential characteristics of this period: the struggle for national liberation and the establishment of a functional state organization. Thus, the constitutional acts and constitutions adopted in this period had primarily three basic functions: to constitute the state and state power (*constitutive function*), to establish a system relatively independent from the Turkish administration (*organizational function*) and to clearly express the ultimate goal – full completion (regaining) of the Serbian statehood (*symbolic function*). Therefore, constitutionalism, in the sense of separation of powers and the protection of human rights, in that period, was a mere proclamation. The constitutionality of the sovereign Kingdom of Serbia is to be considered as the second period. Perhaps if the Kingdom's Constitution of 1888 (as aforementioned – later reinstated in 1903) had lasted longer, a true parliamentary democracy would have been established. However, the First World War extinguished the independent Serbian constitutionality. After the war it evolved into the constitutionality of the first Yugoslav state. The third period of the Serbian constitutionality therefore hence lies within the Yugoslav constitutional framework. Three distinct phases can be distinguished: 1) the “drowning” of the authentic Serbian constitutionality within the centralist-unitary system of the first Yugoslav state (until the beginning of the Second World War); 2) the constitutionality of Serbia as one of the six republics, i.e. federal units in the Second Yugoslavia (SFRJ); 3) the revival of the authentic features of Serbian constitutionality in the quasi-federal framework of “small” Yugoslavia (FRY 1992-2003, later State union of Serbia and Montenegro 2003-2006).

Finally, the current period of constitutionality begins with departure of Montenegro from the state union and enacting of the Constitution of Serbia in 2006, which still remains in power. This last period can be considered as the age of sovereign constitutionality of the Republic of Serbia.

The aforementioned periodizations may be useful to a reader in order to become more familiar with the Serbian modern constitutional history. However, from the standpoint of the topic of this paper, we find it most suitable to create the periodization according to its very title – the criterion of the influence of Serbia's historical constitutions on its modern constitutionality. Previous periodizations of Serbian constitutional history originate either from other authors or present the result of combining several different criteria while trying to find common denominators to serve as support



for such approach. No one in the Serbian constitutional doctrine has even offered the periodization from the standpoint of constitutional identity, as the one that we provide here. This periodization arose as a result of several of our papers in which we analyzed the impact of reference national constitutions on the creation of a modern constitutional identity.<sup>11</sup>

Before subjecting the particular historical constitutions of Serbia to analysis, in order to establish which of the principles, values and concrete solutions from these constitutions still remain relevant for defining Serbia's modern constitutional identity, one has to address the very concept of the constitutional identity first.

### 3. SOME CHARACTERISTICS OF THE CONCEPT OF CONSTITUTIONAL IDENTITY

At the end of the 20th century, constitutional identity was being written about firstly in political philosophy and constitutional theory. Consequently, constitutional identity has been constituted more as a philosophical-legal than as a normative-legal concept. Its primary characteristics are uncertainty and vagueness. There is no agreement about what is the normative "minimum" that it should encompass.<sup>12</sup>

There are two basic sources of the concept. The first one is the European integration. For several decades, there have been persistent attempts to define the European Union as a community that is more than a loose (political) union of the member states, and less than a state itself. These attempts resulted in a difference even conflict or contradiction between the two types of constitutional identity – the European constitutional identity and the national constitutional identity. Some at first glance new questions arose that the traditional theory of the constitutional law could not answer. Those are, for example: redefining the sovereignty concept and transferring jurisdiction from member states to the EU institutions, creating the European constitutional law, building a particular type of European federalism, etc. However, the old western democracies were not ready to renounce the substantial

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<sup>11</sup> Miroslav Đorđević, "Legitimitet Vidovdanskog ustava – idealizam bez uporišta", *100 godina od Vidovdanskog ustava* (ur. Srđan Đorđević i Jelena Vučković), Pravni fakultet Univerziteta u Kragujevcu, Kragujevac 2021, p. 27 – 42; Miroslav Đorđević, Istorijat izbora u Kraljevini SHS i Kraljevini Jugoslaviji, *Strani pravni život*, 3/2013, p. 293–308; Miroslav Đorđević, Istorijat izbora u Kneževini i Kraljevini Srbiji, *Izbori u domaćem i stranom pravu* (ur. Oliver Nikolić i Vladimir Đurić), Institut za uporedno pravo, Beograd 2012, p. 275–288.

<sup>12</sup> See: Michel Rosenfeld, „Constitutional Identity“, *The Oxford Handbook of Comparative Constitutional Law* (ed. M. Rosenfeld, A. Sajó), Oxford 2012, p. 756-757.



features of their national constitutionality for the sake of supranational creation of the member states. Therein lays the second source of constitutional identity – in an effort to preserve the core of the national constitution, the constitutional principles and values that have been created for decades and even centuries. As for the former real-socialist countries, they had even a more complex task – to reconcile the European and national constitutional identity when enacting new constitutions. In the first decades after the break of real-socialism, they did it more in favor of ‘European’, and to the detriment of the national identity. In the last couple of years, some of the countries did a lot in order to strengthen the national constitutional values even when those constitutional solutions were not completely in accordance with sometimes only virtually constructed European values (Poland, Hungary). In some cases, it turned out that the interventions of the national constitution-makers did not necessarily weaken the European constitutional identity, but that they favored the harmony of relations, and even the unity of identity. As a rule it happened in the states with the strong and relatively developed national constitutional tradition (Poland, Hungary). It proves the thesis that there should be a harmony not a concurrence between two set of values and principles – the European and national.

The vagueness of the concept is by the rule its weakness. For the purposes of this paper, we use one of a variety of the possible meanings of constitutional identity, that is, the set of constitutional principles and values that are the foundation and essence of every constitution. The concept of (national) constitutional identity emerged from the jurisprudence of European Constitutional Courts (firstly in Germany, France, Italy, Spain, then in Poland, Hungary). At first, it looked like its goal was to preserve national state sovereignty threatened by the process of the European integration. Its substantial purpose is different. Constitutional identity is the ‘heart’ of the constitution, its essence, which cannot be changed or is hard to change. As Dieter Grimm explains: „Constitutions entrench the principles of the political and societal order and shield them from rapidly changing majorities and situations. Rather, they provide the lasting structures and guidelines under which an adaptation of the legal system to new challenges or altered preferences can take place.“<sup>13</sup> Constitutional identity is doubtless an amalgam

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<sup>13</sup> The concept that is clearly and precisely defined has higher chances to succeed in practice. Otherwise, it stays on the level of abstract theoretical reasoning. However, in law and politics, the vagueness of terms and concepts sometimes serves a purpose. Here come two examples. One is about constitutional customs and (or) constitutional conventions, while the other is about constitutional principles. Both types of rules are known to be part of what is called an un-codified constitutional law in theory. What exactly are these rules, where is their source,

of the highest achievements of European legal civilization and of the most valuable national features. This concept should reflect unity of common principles and values, that is, the European principles and values interpreted and implemented in “the national way” – interpreted and implemented in accordance with national legal and political culture and circumstances.

If we consider the substance of the European identity, then it could be summarized in the expression “the unity in diversity”.<sup>14</sup> It means that European standards and European values are neither in advance “given solutions”, nor the abstract categories that could be implemented without taking legal and political culture of a national political community into account.

In substance, there should be no concurrence between the national and the European constitutional identity. National constitutional identity should be the European constitutional identity that takes it into account specific national values and circumstances, those which define the title of sovereignty (nation, people or citizens), the state organization (simple or compounded state), forms of government (monarchy or republic), types of government (parliamentary system with a strong or weak head of state), territorial organization (one or more levels of a local government, as well as potential existence of territorial autonomy), etc. In other words, the division or even tension between the European and national constitutional identity is opposed to the very nature of constitutional identity. If identity is the essence of the constitution, then a state cannot have two essences being two identities.

The above statement is supported by the Article 1 of the Constitution of Serbia from 2006: „Republic of Serbia is a state of Serbian people and all citizens who live in it, based on the rule of law and social justice, principles of civil democracy, human and minority rights and freedoms, and commitment to European principles and values“. Based on this article,

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how are they formulated, is their violation resulting in some legal or similar sanctions, those are all questions that cannot be given reliable answers. Nevertheless, it does not question their meaning and role in the life of the constitutional order. The constitutional customs in stable constitutional democracies allow the codified constitution to function better and last, to ‘live’ longer, and not be formally changed too often. Certainly, these rules apply also to interpreting the constitution. Constitutional principles give basic criteria and guidelines for interpreting the constitution, for understanding better and correctly the constitutional norms that are general and insufficiently clear, sometimes even mutually contradictory. Therefore, the vagueness of the constitutional identity concept does not need to be endangering the interpretation and application of the constitution but can contribute to constitutional stability as one of the core values of a modern constitutional democracy. See more: Federico Fabbrini, Andrés Sajó, „The Dangers of Constitutional Identity“, *European Law Journal*, 2019, p. 457-473. <https://doi.org/10.1111/eulj.12332>.

<sup>14</sup> Dieter Grimm, „The Basic Law at 60 – Identity and Change“, *German Law Journal*, Vol. 11, No. 01, 2010, p. 33.

Serbia is bound to respect European values and principles and make them an integral part of its own constitutional identity. Therefore, the European identity is legally rooted in the core of the modern Serbian constitutionality even though Serbia is not an EU member state.<sup>15</sup>

Despite the vagueness of the concept, certain sources of constitutional identity could be identified with certainty. First one is national and European constitutional history (national and European constitutional heritage). The second is the interpretation of the constitution by national constitutional courts and the “dialogue” between them and supranational courts such as the European Court of Human Rights and the European Court of Justice (for the EU member states). The third source is the internationalization of constitutional law – particularly the crucial role of the Venice Commission in that process. The constitutional doctrine can be added (although not everywhere and not equally) as an ‘additional source’ as a tool for joining the action of all the above sources into a single unity.

#### 4. FOUR CONSTITUTIONS – FOUR “MILESTONES” IN SERBIAN CONSTITUTIONAL HISTORY

According to Ratko Marković, “Serbia is a country that has its own constitutional identity, nothing less important for its overall national identity than other European countries with the greatest constitutional traditions, such as France and Germany”, while “in Serbian constitutions, especially those from the 19th century, the certain provisions are to be found that remain “*de facto* in power” even though they are nowadays strictly speaking no longer binding for anyone, because the constitutions that they were part of ceased to be in force a long time ago”.<sup>16</sup> Therefore, to a question where the constitutional identity lays, Marković answers that it is to be found in exemplary provisions of the old Serbian constitutions from the 19th century, the same ones that are “binding” even nowadays due to the extraordinary solutions they offer rather than by their legal force.

The search for the roots of Serbia’s modern constitutionality should focus especially on four historical constitutions that have at least two common denominators – particular normative quality and, above all, a certain degree of authenticity. We will give a brief overview of the three major

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<sup>15</sup> The extent to which the constitution of Serbia from 2006 implemented this concept into most of its provisions is a different matter.

<sup>16</sup> Ratko Marković, „Ustavnost Srbijina“, *Spomenica akademiku Gaši Mijanoviću*, Banja Luka 2011, p. 14.

milestone constitutions that were in force in 19<sup>th</sup> century and afterwards focus more on the last constitution from “the big four” – the Constitution of Serbia of 1990.

#### 4.1. Three “milestones” in the 19<sup>th</sup> Century

The first constitution that could be characterized as a “milestone” of Serbian constitutional history was its first “real” constitution (rather than the “act of a constitutional character”) – the Constitution of 1835 – “Sretenje Constitution”. In the history of modern Serbia, it had marked the beginning of true modern, written constitutionality. Enacted at the Great Assembly in the city of Kragujevac on 2 February 1835 (Julian calendar), the Sretenje Constitution was the first complete Serbian constitution, although it was not the work of a sovereign constitutional authority because Serbia was still not an independent state at that time but an autonomous province of the Ottoman Empire.

The Sretenje Constitution was more of a symbol than a sincere normative expression of the effort to lay the foundations of constitutionality based on the division of power and guarantees of personal and political rights. However, “whether they called it the first Serbian constitution or not, there is no doubt that the Sretenje document established the Serbian constitutionality”<sup>17</sup>.

In practice, the Sretenje Constitution was a “stillborn”<sup>18</sup>. It was written in two weeks and suspended after only six weeks from the entry into force. One of the reasons (though to a lesser extent) for its short life should be sought in the fact that it did not correspond to the socio-political reality of Serbia at that time. It was more of a “constitutional imagination” of its main author, great scholar Dimitrije Davidović. As aforementioned, this will become the “fate” of most Serbian constitutions, some of which were linguistically and stylistically very well-groomed, but all without real contact with social reality. However, “the real cause of the suspension of the Constitution should be sought exclusively in international relations and the interests of the great powers”<sup>19</sup>.

The second „milestone” of the Serbian constitutional history is the Constitution of 1869 – the so called “Regent’s Constitution”. According to Article 1 of the Constitution, the Principality of Serbia is a “hereditary constitutional

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<sup>17</sup> Sima Avramović, „Sretenjski ustav – 175 godina posle“, *Anali Pravnog fakulteta u Beogradu*, 1/2010, p. 40.

<sup>18</sup> Milovan Milovanović, *Državno pravo i druge ustavnopravne studije*, Beograd 1997, p. 282.

<sup>19</sup> Sima Avramović, p. 48.

monarchy” with the people’s representation “ . In this way, not only is there a certain form of government – constitutional monarchy, it has already been clearly stated that the Prince will share state power with the representative body. No matter how prosaic in practice it might have been, this provision had, bearing in mind the circumstances at the time, the exceptional importance for the development of a constitutionality based on the limitation of monarchical power. The Prince was the holder of the executive power and he shared the legislative power with the National Assembly. The right of the legislative initiative was however only in the hands of the Prince, and he also had the right to appoint some of the MPs. On the other hand, the proclamation of the free mandate of MPs was a big achievement at the time and well as the regular holding of parliamentary sessions. The independence of judiciary was guaranteed and expressed in a manner that may serve as an inspiration even for a modern constitution-maker: “Justice is pronounced in the name of the Prince. In the administration of justice, the courts are independent and do not stand under any authority other than the law” (Article 109); “No state power, neither legislative nor administrative, can exercise judicial functions, nor can courts again exercise legislative or administrative power.” (Article 110).

The Constitution of 1869 also contained, in addition to some controversial provisions from the perspective of modern constitutionalism, a whole series of solutions that could still stand almost unchanged, essentially and stylistically, in some contemporary Serbian constitution.<sup>20</sup>

The Constitution of Kingdom of Serbia from 1888 („the Radical’s Constitution“), often qualified as “the best Serbian constitution ever”, was the first constitutional act of the sovereign state of Serbia, after gaining full independence at the Berlin Congress in 1878. It had formally introduced parliamentarism, broad local self-government, proportional electoral system and relatively rich list of human rights and freedoms. According to its normative characteristics, it is a fine representative example of liberal-democratic constitutionality.

However, the Constitution from 1888 failed at finding and establishing the right balance between striving for modern, advanced solutions and the real needs of the Serbian society of the time. On one hand, the provisions in this Constitution incorporated the highest achievements of constitutional law theory, but on the other hand, it also represented the constitutional discontinuity, constitutionality based on experiment and constitutional misconceptions, in some parts – even delusions. Even though this constitution

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<sup>20</sup> More on the Constitution of 1869 see: Vladan Petrov, Pouke i poruke Namesničkog ustava iz 1869., *Pravni život*, 12/2019, p. 551 – 564.

failed at the main task of modern constitutionality, which is finding and keeping the constitutional balance, its content is still full of ‘traces’ necessary for conceptualizing the modern constitutional identity of Serbia. They can be found in the provisions related to the position of the Parliament; the free mandate of Parliament members; judicial independence; strong and developed local governments, etc. More than 130 years later those fundamental constitutional questions remain for the Serbian constitution-maker to answer to: 1) how to properly empower the position and the role of a body representing the electorate; 2) what is the best type of government – especially in the light of the role of a head of the state; 3) How to find the right balance between the freedom of thought of MPs and their inevitable connection to the political party to which they practically ‘owe’ their representative mandate to; in other words, how to properly ‘empower’ the still very much needed principle of a free mandate of MPs; 4) how to define a judicial independence in order for it to truly serve justice as well as how to increase its reputation among citizens and in the society; 5) what is the right measure for territorial decentralization of Serbia, the right scope of local government autonomy etc.

#### 4.2. The fourth „milestone“: the Constitution of 1990 – one missed opportunity to resolve some of the important identity issues

The major features of the 1990 Constitution were the following ones: 1) disputed democratic legitimacy, given the procedure for its adoption; 2) democratic definition of the state based on the rule of law; 3) determination of citizens as bearers of sovereignty; 4) acceptance of the organic concept of state functions; 4) proclamation of the standard catalog of human rights and freedoms; 5) proclamation of free economy; 6) a parliamentary system with the President of the Republic whose constitutional powers has been interpreted differently; 7) proclamation of the independence of the judiciary and the permanence of the judicial function; 8) enhanced centralization, with two autonomous provinces without the essential feature of territorial autonomy – legislative power; 9) positioning of the Constitutional Court in the system of division of power; 10) extremely firm and complex revision procedure that was neither rational nor justified; 11) ambivalent attitude towards the SFRY (federal) Constitution.<sup>21</sup>

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<sup>21</sup> See more: Vladan Petrov, Ponovno rađanje liberalno-demokratske ustavnosti u Srbiji i ustavni identitet – uz tri decenije od donošenja Ustava Srbije iz 1990, *Arhiv za pravne i društvene nauke*, 4/2020, p. 11–35.

This constitution was adopted by the socialist, one-party assembly on September 28, 1990. In the debate that took place before the adoption, two major objections were basically pointed out. First, the break up with the previous constitutional and political system required the Constitution to be adopted by a constitutional assembly elected by the people. Second, a constitution enacted by a one-party assembly would have no democratic legitimacy to establish the foundations of a new society. That is why, before the Constitution, the first democratic, multi-party elections had to be held. The Constitution of Serbia from 1990 was adopted by the Assembly of the system which was dying out. The SFRY was falling apart.

According to the Article 1, Serbia was: 1) democratic; 2) civil state (“state of all citizens living in it”); 3) based on the rule of law; 4) and on social justice. Therefore, the constitutional definition of Serbia itself already represented a clear break up with the socialist order. This constitution, at least declaratively, belonged to the type of democratic-social constitutionality. Article 9 regulated the division of power into legislative, executive and judicial (although without explicitly naming it). According to the Constitution of 1990, Serbia had become a civil parliamentary democracy.

The creators of the Constitution opted for the concept of civil, rather than national or people’s sovereignty. Civic sovereignty is theoretically more suited for multinational societies. “Sovereignty belongs to all citizens of Serbia. – Citizens exercise sovereignty through a referendum, a popular initiative and through their freely elected representatives.”<sup>22</sup>

The catalog of human rights (“Freedoms, rights and duties of man and citizen”) included internationally recognized personal and political rights, as well as basic economic and social rights. Instead of the state planned economy, the Constitution proclaimed a free market.

The system of government was basically parliamentary – a system based on a soft division of power, characterized by two basic mechanisms: 1) the right of the executive to dissolve parliament; 2) political responsibility of the government before the parliament with the ultimate political sanction – the possibility for the parliament for a vote of no confidence. According to the Constitution, the President of the Republic could dissolve the National Assembly only on the reasoned proposal of the Government. Collective and individual responsibility of the government and its ministers (before the National Assembly) was established (“The Government and each of its members are accountable to the National Assembly for their work”<sup>23</sup>).

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<sup>22</sup> Art. 2, Constitution of the Republic of Serbia of 1990.

<sup>23</sup> Art. 91 para. 1, Constitution of the Republic of Serbia of 1990.



The position and role of the President of the Republic caused significant controversy. While most scholars claimed that the President of the Republic was too strong and that his constitutional powers were the basis for establishing of an authoritarian regime, other pointed out to the exaggeration and political motives of such assessments and conclusions. In fact, the weakest point of the constitutional position of the President of the Republic was the constitutional regulation of his responsibility, at least for two reasons: 1) "Violation of the Constitution" is an extremely vague basis, which indicates political rather than constitutional (legal) responsibility; 2) the procedure for enforcement of the responsibility of the President of the Republic by the system of "recall by the citizens" was regulated in the way that the President was made practically irremovable.

The constitution proclaimed the independence and autonomy of the judiciary. In a comprehensive manner, it defined the role of courts in terms of content: "Courts protect the freedoms and rights of citizens, the rights and interests of legal entities established by law and ensure constitutionality and legality" (Article 95). The permanent tenure of the judicial function was absolute. The grounds for the termination of the judicial office, as well as for the dismissal against one's will, were determined by the Constitution itself.

The provisions on territorial autonomy, along with the norms regulating the position and the powers of the President of the Republic, were the most criticized. With the enacting of the Constitution the autonomous provinces lost their features of quasi-federal units that they had according to the SFRY Constitution of 1974. It was a (political) step backwards, which could not (and did not) lead to the positive result. After the test of time, now it seems that the positive outcome maybe could have been achieved if the process of reintegration of the Albanian national minority in Kosovo and Metohija and their inclusion in the institutional life at the republican and provincial level had been more supported (though some constant opposition to active participation was also present among some Albanians, even before the dissolution of SFRY).

The Constitution of 1990 moved the Constitutional Court out from the system of unity of power, to which, by the nature of things, it does not belong, to the system of division of power. Constitutional judges were elected to a permanent tenure. The Constitution did not stipulate special conditions for the election of judges of the Constitutional Court. The incompatibility of the function of a judge of the Constitutional Court with other functions and professional activities was however absolute. All the judges

of the Constitutional Court were elected by the National Assembly on the proposal of the President of the Republic.

As for the revision procedure, the Constitution was formally extremely firm. An extremely complex procedure for its change was envisaged: 1) two votes in the Assembly and a two-thirds majority of the total number of deputies for the change of each constitutional provision; 2) the mandatory constitutional referendum in which a majority of all the registered voters opted “yes” was necessary the change the Constitution to be successful. Theoretically, the reason for such extreme rigidity of the Constitution could be found in the need to consolidate the emerging democratic political institutions. Practically, the “protective function” of the Constitution within the revision procedure was definitely inappropriately complex.<sup>24</sup>

The Constitution of Serbia from 1990 was adopted with a definite tendency to finally solve the question of identity. Professor Miodrag Jovičić wrote that through the entire constitutional history, “Serbian citizens had to express and prove their identity by creating and defending their own country, as well as by conquering and exercising rights of organizing the system on their own. None of the fights were easy because they happened under the hardest historical circumstances.”<sup>25</sup> Such circumstances were also present at the time when the Constitution of Serbia of 1990 was adopted. This Constitution was created in discrepancies between a tendency for a complete rupture with the old socio-political system and establishing grounds of a new socio-democratic order on one hand, while maintaining some kind of a relationship with the federal state (SFRY) on the other. It strived for something that was incompatible – choosing statehood to protect its territorial integrity and constitutional dignity damaged by the resolutions of the SFRY Constitution from 1974, while maintaining the common state that was created more than 70 years ago thanks to the military merits of the Kingdom of Serbia. Therefore, the Constitution from 1990 had to tackle certain questions related to identity, to open and address them in the content itself, but could not answer almost any of them from the objective standpoint. It is not the fault of neither the constitution writer, nor of the formal constitution-maker, but of political and historical circumstances that could not provide the right constitutional moment. However, there are undoubtedly ‘traces’ of the modern constitutional identity of Serbia in this Constitution.

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<sup>24</sup> See: Vladan Petrov, „Ustavotvorne i revizione procedure u postkomunističkoj Srbiji – bilans i pogled unapred“, p. 16-18.

<sup>25</sup> Miodrag Jovičić, „Kakve nam poruke upućuje ustavna istorija Srbije“, *Anali Pravnog fakulteta u Beogradu (Annals of the Faculty of Law in Belgrade)*, 5/1989, p. 562.

First of all, it was a completely new constitution content-wise. Secondly, the Constitution from 1990 defined fundamental principles and values correctly – the basic elements of constitutional identity: the rule of law, civil democracy, and the social role of a state. Unlike the current Constitution (of 2006), this Constitution understood better the multinational character of Serbia as a country, which was defined as “a civil state” and not a “state of Serbian people and other citizens” even though this difference can be perceived as a more formal and symbolic than fundamental and real. Thirdly, the Constitution from 1990 remained more as a constitutional declaration of constitutional principles and values than as a clear and credible strategic plan for accomplishing and protecting them. It might be the most obvious in the provisions related to territorial autonomy that were ‘lifeless’ as they represented an attempt to return to the state that must had been known to be irreversible. Tending to complete its protective role, the Constitution was too narrow and rigid, thereby being almost unchangeable, in the period when it had to be exactly extensive, flexible, and easy to change because of the changes in the content and structure that Serbian society had to go through. Finally, the Constitution of Serbia from 1990, as well as the Constitution from 1888, was written with a fine use of Serbian normative language and clear style. This should be also the quality of the modern constitutional identity of Serbia.<sup>26</sup>

Although the constitutional history of Serbia can be considered as substantial and rich, there were few real constitutional moments in which the most favorable objective and subjective conditions for the success of constitutional construction are present. Internal circumstances as well as external influences seem never to have been supportive or suitable for our constitution-makers. On the contrary – almost all the constitutions of Serbia were somewhat “forced” – failed to be enacted at the right constitutional moment.

This review of the constitutional history of Serbia, with an emphasis on reference points in the construction of a modern national constitutional

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<sup>26</sup> No foreign influences, globalization, and ‘internationalization’ can be considered as the legitimate reasons for the national constitution-maker to ‘spoil’ the Serbian language with the use of foreign words and formulations. Serbia has enough ‘treasure’ in its previous constitutions in this sense (as well as in the Constitution from 1990), so it does not have the need to damage its constitutional identity with the use of ready-made sentences and phrases from international legal acts, no matter how important and exemplary these acts are. See more about the historical constitutions as the sources of national constitutional identity: Vladan Petrov, „Ponovno rađanje liberalno-demokratske ustavnosti u Srbiji i ustavni identitet – uz tri decenije od donošenja Ustava Srbije iz 1990“, *Arhiv za pravne i društvene nauke (Archive for Legal and Social Sciences)*, 4/2020, p. 27-32.

identity, purposely did not include the period of Yugoslav constitutionalism. The first Yugoslavia, in which the Serbian constitutionalism and statehood “drowned”, is completely uninteresting from the standpoint of potential influence on the constitutional identity of modern Serbia. In the Second Yugoslavia, real-socialist constitutionalism was on the completely opposite pole from the classical, liberal-democratic constitutionality and is hence not applicable as well. One of the few exceptions could be the institute of the constitutional judiciary (introduced within the system of unity of power), that could not be really functional or effective, but the very fact of its existence did somewhat influence the concept of the constitutional judiciary in the post-socialist period.

## 5. CONCLUDING REMARKS – A PERIODIZATION OF SERBIAN CONSTITUTIONAL HISTORY FROM THE PERSPECTIVE OF THE NATIONAL CONSTITUTIONAL IDENTITY

The “bumpy road” of the Serbian constitutional development did not prevent the creation of a constitutional tradition. It is however somewhat incoherent, full of beautiful constitutional “pearls”, but also some worthless, failed attempts, on which the idea of liberal and democratic constitutionalism stumbled. However, in that indisputable wealth of constitutional development, there are elements for creation of a modern constitutional identity of Serbia.<sup>27</sup>

If we start from the “milestones” of Serbian constitutionalism, the four constitutions, whose key features have been presented in this text, and take into consideration both of their normative value and their lasting “reach” (in one wider sense), the periodization should be as follows: 1) The era of laying the constitutional foundations (from the Sretenje Constitution of 1835 to the Regent’s Constitution of 1869); 2) the era of authentic constitutionalism (Regent’s Constitution of 1869); 3) the era of declarative parliamentarism (from the Radical’s Constitution of 1888 to the First World War, with a break between 1894 and 1903); 4) the era of non-independent constitutionalism of the authoritarian type (constitutionality of the First Yugoslav State); 5) the era of non-independent constitutionalism of the specific socialist type (Second Yugoslav State); and finally: 6) the era of finding a new authentic

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<sup>27</sup> See more: *Srpski ustavi, knjiga prva, Ustavi Kneževine i Kraljevine Srbije sa ustavnim aktima od prvog srpskog ustanka* (eds. V. Petrov, D. Simović, M. Radojević), Beograd 2021.

constitutionality on the heritage of the European constitutional heritage (from the Constitution of Serbia from 1990 until today).

This periodization leads to conclusion that in order for Serbia to resolve its constitutional issue more permanently, it is necessary to: a) find a system of balanced division of power; 2) determine realistic scope of protection of human rights and freedoms, according to European standards; 3) determine the right meeting point (“sweet spot”) between parliamentarism and presidentialism; and 4) to strategically resolve the Kosovo and Metohija political issue by organizing *sui generis* system of its “sovereign rights”, on the principle of territorial decentralization (in which territoriality as a classic component of sovereignty will be put in the background in relation to human rights protection as basic prerequisite for the rule of law).