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CONSTITUTION AND LEGITIMACY
Proclamation, changes to and validity of the constitution, with emphasis on the question of legitimacy as one of the principal concepts in the theory of constitution and constitutional law theory

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Abstract. *Legitimacy of constituent power is here not taken to be a pre-positive legitimacy (accorded with "natural law"). The very fact that there are nine groups of theories of natural law and that, especially in international law, "natural law" is today used as a means of arbitrariness, speak against the construction of legitimacy based on the allegedly "suprastate" law. For us, legitimacy has an empirical, thus alternative character. In our view, the most correct is M. Weber's theory of three types of legitimacy of authority: traditional, charismatic, and rational, to which one may add two more ideas: that of "social justice" and that of "common welfare". Central to this discussion is the difference between the constitution as a multitude of constitutional laws and constitution as the totality of constitutional decisions (C. Schmitt), i. e. principles based on which legitimizing ideas are concretized. Constitutional decisions define the identity of the constitution; as long as they are the same, the constitution remains the same, irrespective of the change of particular constitutional laws. Constitutional reform includes the cancellation of the previous constitution as a whole, or in parts, where constituent power remains the same. Need for constitutional reform arises mostly due to the involution of the constitution – the ever deeper constitutional crises which may end in the actual inability of the state, in both internal and external affairs. Constitutional reform can stem from certain forms of dictatorship. As dictatorship is in general one of the fundamental issues related to constitution and legitimacy, a substantial part of this paper is dedicated to comprehending this phenomenon.*

Key words: *constitution, legitimacy, constituent power, constitutional laws, constitutional decisions, sovereignty, revision of constitution, constitutional reform, dictatorship.*

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Originally, the concept of the constitution was immersed in the concept of the system of government or form of rule, and thus equalized with it. A typical ancient representative of such a universalist view was Aristotle with his conception of "politeia"[1]. In the 20th century, the position would be reintroduced by Carl Schmitt, as "constitution in the absolute sense", whose definition reads: "The state **does not have** a constitution in accordance with which the will of the state is formed and functions; rather, the state **is** the constitution, that is – by being the condition present, a **status** of unity and order".[2] At the beginning of the modern period, Bodin, in the same sense, made a distinction between "the system of states" (estats des Republiques), defining who is sovereign in the state, and "the government and state administration" (gouvernement & administration d'icelle), ways in which power in the state is exercised, the "rules of police" (regle de police).[3] Here, too, matters in question are existential conditions, "statuses", and not norms that simply apply.

This view of things radically changed in the 18th century, upon the victory of the conception, which received its ultimate expression in the French and, a bit earlier, North American revolution, that both system of government and "government and state administration" can be reformed through positive statutes without limitations. These positive statutes began to be called "constitutions", the term remaining to the present day. Originally, the Latin word "*constitutio*", which found its way to many European languages, means a statute or decree; it assumed the meaning of "principal legal act" undoubtedly through Freemasons, who, as an organization, and for some of their Lodges, had "constitutions". It is beyond doubt that Freemasons were principal supporters of constitutionalism, yet their contribution to contemporary political practice is also seen in the fact that major political parties of certain western countries relate to one another in the way similar to the lodges of one and the same national masonry. The Slavic word for constitution, "*ustav*", also means a law, decree, or statute; the Church Slavic words "*ustavnik*" and "*ustavopoložnik*" translate as "legislator".[4] Legal science has also, though not fully justifiably, begun to reduce constitution in universal sense, the system of government and form of rule, to the subject matter of the constitution as a positive statute. However, this possibility for, in principle, limitless changes to the constitution immediately opened up the question which power is **legitimate** for proclaiming the constitution, that is, who is **the bearer of constituent power.**

In the 19th century, "the century of constitutionality", the answer to this question boiled down to two possible bearers: the hereditary monarch or the people that had established itself as a nation, i.e. the hereditary monarch and the people-nation as joint titulars of constituent power. Apparently, the bearer of constituent power thus coincided with the bearer of sovereignty, since, in the dispute on sovereignty, a choice of alternative was available – between the monarch's (ruler's) and people's (national) sovereignty. Even more so, since already the originator of Western European state sovereignty theory, Bodin, established the relation between sovereignty and legitimacy: for him, every state can be either "legitimate", "the Lord's" or "tyrannical" (legitime, Seigneurial, ou Tyrannique). Yet, an equation between the bearer of constituent power and the bearer of sovereignty

[1] Aristotelous Politikon biblia okto, 1286[b] sqq.
[2] C. Schmitt, Verfassungslehre, 5. Aufl., Berlin 1970, 4 (underlined in the original).
[3] J. Bodin, Les six Livres de la République, Paris 1583, 2-e réimpression, Aalen 1977, 251 sqq., 272.
[4] S. Petkovic, Dictionary of Church Slavic Language, Belgrade 2002, 298.

hides a substantial inaccuracy. Sovereignty, of which so much is spoken, with and without justification, is a necessary term only in international law.[5] The holder of sovereignty is the one who possess **actual (naked, effective) power** in the state so as to undertake actions on behalf of this state which produce legal effect with regard to other states, specifically to conclude **treaties (covenants etc.)** which bind or authorize this state with respect to other states.[6]

On top of this, constituent power must also be legitimate. For instance, a revolutionary crowd or a "war lord" can grab effective power in the state and hold this power for a certain period. The acts of this crowd or individual who rule in the state may result in obligations of this state with regard to other states, according to international law. Yet, the power of this group or individual still does not need to be legitimate, constituent power. However, since a power which is only factual can also proclaim a constitution, this means there may be **just, legitimate** and **unjust, illegitimate constitutions**. (Further discussion will show that there are certain clearly delineated exceptions here). Legitimacy is thus one of the **fundamental concepts** of constitutional theory and positive constitutional law. Its extraordinary practical importance is seen in the fact that formally unconstitutional legal acts or actions may become legally valid if they are legitimate. And the other way round, legal acts or actions accorded with the word of the constitution become unconstitutional if they are illegitimate. Examples from the history of state and law that will be presented here provide substantial documentation for such situations.

The question of constitutional legitimacy was rarely posed in traditional science of public law, which reached its peak just before World War One. It commonly rejects this issue as "unscientific", and thus "disallowed".[7] This exegetic positivism is confronted by the North American constitutional theory, one of whose major authorities is the German immigrant Karl Loewenstein, with his theory of "normative", "nominalist", and "semantic" constitution.[8] A normative constitution is the constitution of a "constitutional state", such state in which the political process is subjected to constitutional norms; this is, actually, the realised ideal of liberalism that "laws, and not men, rule", whose breeding place we find in western representative democracy. On the contrary, a nominalist constitution is unable to take control of the political process: conflicts between the constitutional norm and constitutional reality are resolved in favour of the latter. However, there is "good will" of both bearers and addressees of power to make the constitution normative in the near or more distant future, and therefore this constitution is justified as a means of political education. Countries of Latin America, Burma, Pakistan and Indonesia are the most remarkable examples of constitutional nominalism. In a semantic constitution, there is no disaccord between the constitutional norm and constitutional reality. Yet, the constitutional form here is no limitation to power, but the contrary: an instrument of use only to the one holding power: a dictator, junta, committee, assembly, or party. Plebiscitary Cae-

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[5] See, for instance: J. L. Kunz, Die Staatenverbindungen, Stuttgart 1929, 35 sqq.

[6] Our concept of sovereignty represents a narrowed, and thus qualitatively new, understanding of sovereignty as factual power, as found, for example, in Duguit. (B.: L. Duguit, Traité de Droit constitutionnel, 3-e éd., III, Paris 1930, 73 sq.

See for instance: G. Anschütz, Die Verfassung des Deutschen Reichs vom 11. August 1919. Ein Kommentar für Wissenschaft und Praxis, Neudruck der 14. Aufl., Berlin 1933, Aalen 1987, 6 sq.

[8] K. Loewenstein, Verfassungslehre, Tübingen 1959, 252 sqq.

sarism of the two Napoleons in the past, and today strong presidential regimes, Islamic regimes, and totalitarian fascist or communist dictatorships belong to the framework of the semantic constitution. The author suggests that only normative and nominalist constitutions are legitimate, since semantic constitutions are just "apparent constitutions".

However, Loewenstein fails to state the reason for which representative democracy should be a right, and, say, plebiscitary democracy a wrong form of rule. In relation to this, one should recall the words of the prophet of direct democracy Rousseau: "The English people believes itself to be free; it is gravely mistaken; it is free only during election of members of parliament; as soon as the members are elected, the people is enslaved; it is nothing".[9] Yet, the answer to the question of legitimacy of parliamentary "rule of law, and not men" was given by the well-known 19th century French historian, statesman and advocate of parliamentarism, G. Guizot. The rule is legitimate if and only if it occurs as the "sovereignty of reason".[10] This way the question of legitimacy of a constitution, as posed by Loewenstein, flows into the "natural law" theory.

Having attracted western thinkers and been equal to the philosophy of law, in mid 19th century, the study of "natural law" lost its attractiveness and gave way to the positivist "general theory of law (and state)". However, after World War Two, mainly influenced by neo-Thomistic, Roman Catholic philosophy, it soared again, replacing, wherever this was possible, the legal scientist with a legal minister and mystagogue. A typical contemporary advocate of the view that constitution and positive law in general are based on natural law, of natural law as "the constitution of the universe" is Austrian author René Marcic.[11] Still, today, the use of the term "natural law" is mainly avoided. For instance, only when German Federal Constitutional Court and German constitutionalists speak of the rights of man as constituent parts of a "pre-given, over-positive legal order"[12], it is obvious they have in mind something akin to "natural law".

Reasons why supporters of natural law theory are renouncing this term are quite obvious. Erik Wolf, a distinguished scholar, managed to define no fewer than 9 concepts of nature and 9 concepts of law corresponding to eighteen basic readings of the expression natural law![13] These are: natural law as the totality of legal existence; natural law as a historical source of order; natural law as a pre-state social order ("status integritatis"); natural law as "natural legal code"; natural law as a philosophical study of "absolute" law; natural law as a theological study of "relative" law; natural law as letting go of selfish, irrational and emotional powers; natural law as a principle of reform; natural law as an objective "*lex*"; natural law as a folk, pre-scientific view of law; natural law as subjective "*ius*"; natural law as individual (or collective) experience of law; natural law as the "idea" of law; natural law as the "right to happiness"; natural law equal to "positive" law; natural law taken as "historical law"; and natural law as a sociological law.

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[9] J.-J. Rousseau, Du Contrat social; ou, Principes du Droit politique, liv. III, ch. XV, in: Oeuvres complètes, III, Paris 1966, 351 sqq.
[10] Quoted in: Schmitt, op. cit., 8.
[11] R. Marcic, Vom Gesetzesstaat zum Richterstaat, Wien 1957, 145 sqq. et passim.
[12] E. Benda, in: Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, herausg. von E. Benda/W. Maihofer/H.-J. Vogel, unter Mitw. von K. Hesse, I, Berlin/New York 1984, 108.
[13] E. Wolf, Das Problem der Naturrrechtslehre, 2. Aufl., Karlsruhe 1959, 21-153.

However, this multitude of "natural laws" does not at all mean that natural law is a mere fiction, fantasy of some authors, as claimed by **certain (not all)** positivist schools. There are, certainly, ideal norms of human behaviour – as proposed by "analytical jurisprudence", a school close to positivism (Austin, Somló).[14] However, in the empire of **ideal monads** one finds reigning not only order and hierarchy, but also disorder and anarchy, which means there are many types of mutually conflicting "natural law systems". N. Hartmann in his "Ethics" also speaks of irresolvable antinomies of ideal ethic "values" (that we call "ideal ethic monads").[15] Yet, recall that the great Christian mystic J. Böhme calls God himself "the eye of the abyss" ("das Auge des Ungrundes") and "eternal chaos".[16]

Starting from there, our view, that we label "scientific transpositivism", resolves the problem of relationship between positive law and different "natural law" systems with the help of **legal politics**. Various "natural law" systems cannot serve as a **direct** source and basis of positive law due to their numerous contradictions. Yet, "natural laws" are *apriori* postulations of a variety of alternative legal policies, by means of which they become part of positive law, thus setting its basic norms, naturally, only by the moment by which the corresponding legal policy has binding power. "Natural law" does becomes a logical part of the "philosophical theory of political parties" (philosophische Parteienlehre), as outlined – and only outlined – by Radbruch and Emge.[17]

This essential alternativeness of "natural laws" and, accordingly, legal policies, is the best grounds for the conclusion that there also must be a variety of, equally alternative, types of legitimacy of the constitution and constituent power.

Obviously, one here primarily has in mind the substantial legitimacy theory of Max Weber.[18] He differentiates between three types of legitimate power: **traditional authority,** which becomes legitimate by the faith or "consciousness" the subjects have of the righteousness of an order that has existed "from times immemorial", and also in the authority of persons called upon to rule in such an order; **charismatic authority**, which becomes legitimate by the belief of the subjects that the right of the one holding this power comes from his "charisma", i.e. his extraordinary, even "supernatural" abilities; **rational-legal authority**, which becomes legitimate either by the belief of the subjects that the power in question is exercised in accordance with certain norms that "apply absolutely" (Weber says "natural law" is the purest form of this validity, although other types of legitimacy are also related to an interpretation of "natural law"), or by the subjugation of subjects because the power in question is exercised under rules which are formally correct and established in a customary way.[19] In addition to this, Weber explicitly allows that

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[14] See: J. Austin, Lectures on Jurisprudence or the Philosophy of Positive Law, 4th Ed. by R. Campbell, London 1879, Reprinted, Bristol 2002, I, 88, 106 sqq.; F. Somló, Juristische Grundlehre, Leipzig 1917, 58 sqq., 67 sq.

[15] N. Hartmann, Ethik, 4. Aufl., Berlin 1962, 294 sqq.

[16] Christliche Mystik. Texte aus zwei Jahrtausenden, herausg. von G. Ruhbach/J. Sudbrack, München 1989, 340.

[17] G. Radbruch, Rechtsphilosophie, 3. Aufl., Leipzig 1932, 58 sqq.; C. A. Emge, Philosophie der Rechtswissenschaft, Berlin 1961, 151 sqq.

[18] M. Weber, Wirtschaft und Gesellschaft, herausg. von J. Winckelmann, I, Köln/Berlin 1964, 22 sqq., 157 sqq.

[19] N. Luhmann, Legitimation durch Verfahren, Neuwied a. Rh./Berlin 1975, reduces the entire legitimacy issue in modern representative democracy to the experience of procedures being carried out (electoral and legislative, before all). In science, this view is rightly deemed a "simplification of the problem". See: H. Hofmann, Legitimität und Rechtsgeltung, Berlin 1977, 22 sq. (n. 49).

different forms of legitimacy could intermingle.[20] However, even Aristotle must have had in mind alternative types of legitimacy when proposing his theory of three correct and three corrupt forms of government (kingdom versus tyranny; aristocracy versus oligarchy and plutocracy; moderate republic versus democracy).[21]

Apart from formal legality, which is related to bureaucratic rule of law, other types of legitimacy Weber is presenting have an almost universal historical reach. However, there are two additional types of legitimacy whose historical assumptions, each in its own way, are more concrete.

The modern welfare state, state of public services, proclaims "social justice" as the main type of legitimacy, as a "situational natural law", a "natural law with changeable contents". With regard to this state, Ripert claims: "Providing fortune, the state replaces Christ in consoling the desperate. Its way is to extort from people payment for the fortune it has promised, in exchange for the obedience it imposes on them".[22]

The idea of common welfare is the only necessary goal of state activity.[23] As such, it is the **fundamental-norm of the legal system and state order**. Called upon as a salvation of the state, an existential form for the people, this idea lies at the basis of the legitimacy of both extraordinary powers and authority and "historic" constitutional decisions. Only if one starts from the postulate of the common welfare and salvation of the state can one find an answer to the question of how legitimate are breaches of law so grave as coup d'etats and some forms of dictatorship.

A fact often neglected is that Weber dedicated a significant portion of his principal text (Wirtschaft und Gesellschaft) to the consideration of **illegitimate authority**,[24] obviously so because this does not fit in his "positivist" image (that he himself constructed, for that matter). Forms of this authority include, first of all, regimes of medieval and renaissance city-states of north Italy, from the phase of "revolutionary democracies".[25] The idea of revolutionary, purely majority-based democracy, "arithmocracy", as an illegitimate form of power, is actually found already in Plato and Aristotle, and Weber only builds on the idea, providing new examples and evidence. It is crucially important, however, that he is not alone in this matter, when compared with relevant authors. In 1835, A. de Tocqueville, who did not conceal his favour of the political system of the United States of America, labelled this system "the tyranny of the majority",[26] and the same judgment on this political system was given in 1894 by J. Bryce, yet another of its great admirers.[27] It is relevant to notice here that the first doctrinarian commentary and apology to the United States Constitution, "The Federalist" (which came out as a series of articles in 1787 and 1788) makes a distinction between the "republican" and "democratic" form of government, and stigmatizes "pure democracies" as "spectacles of turbulence and contention".[28]

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[20] Op. cit., I, 27.
[21] Op. cit., 1279[a] sqq.
[22] G. Ripert, Les forces créatrices du droit, Paris 1955, 188 sq.
[23] See, for example: M. De la Bigne de Villeneuve, L'Activité étatique, Paris 1954, 19 sqq.
[24] Op. cit., II, 923 sqq.
[25] Op. cit., II, 984 sqq.
[26] A. de Tocqueville, De la Démocratie en Amérique, Notes par A. Gain, I, Paris 1951, 384 sqq.
[27] J. Bryce, The American Commonwealth, II, 3rd Ed., New York 1901, 335 sqq.
[28] The Federalist, by A. Hamilton/J. Madison/J. Jay, Ed. by B. F. Wright, Cambridge, Mass. 1966, 133 sqq.

Therefore, the legitimacy of the Constitution of the United States of America does not lie in democracy "in itself", but primarily, on the one hand, in its relatively dynamic individualist natural law, whose primacy is derived from the fiction of the "social contract",[29] and, on the other, in the Caesarist charisma of the, then acting, President of the Union.[30]

The question of proclamation of and changes to the constitution cannot be studied any deeper without disentangling one of the most difficult issues in legal science: the relation between the legal norm and the legal relationship. According to views we could deem "normativist", legal norms are more important in the legal system. According to positions we could call "realist", the primacy in the legal system lies with legal relationships (legal entities and their relations). In our opinion, the answer to this question should not be singular, but differentiated. In some branches of positive law, for instance civil, administrative, criminal law, it is the norms which, as a rule, determine legal relationships. In constitutional law (and also international law, but that is not our subject here) things are quite different. In it, legal relationships mostly determine legal norms, so that any significant change in the constitutional reality inevitably leads to the change in the contents of constitutional norms related to the changed portion of constitutional reality. For this reason, in constitutional law the following maxim is utterly important: *Cessante ratione legis, cessat lex ipsa*.

The constitution is most often made and proclaimed as a joint decision of constituent power on the type and form of political unity. This is the constitution in the "positive" sense, as defined by C. Schmitt.[31] To this definition, which justifiably entails the difference between constitutional decision and (ordinary) constitutional legal act, we would add a remark that constitutional decisions contain legal principles in accordance with which political system as a whole is formed and which, at the same time, make legitimizing ideas more concrete. This principle would be parliamentary rule as a prerequisite for passing "correct" laws, or a catalogue of rights of men and citizens. On the contrary, the constitutional law regularizes details of constitutional principles, never interfering with their essence. The remark remains that constitutional principles can be unwritten, too, usually established through customary practice.

The great German constitutional theoretician also connected the difference between constitutional decisions and constitutional acts with the difference between **passing a constitution and formal changes (revisions) of the constitution**. In his words, only constituent power can pass a new constitution, make a complete (total) revision of the constitution, i.e. change a constitutional decision: on the contrary, the power the constitution defines as the power to change the constitution, a revisional power, is only authorized, keeping the constitution (equal to its decisions), to provide changes, additions, deletions, etc. of the provisions of constitutional laws. Revisional authority thus cannot legally turn a monarchy into a republic and the other way round, and it also cannot legally change provisions on changes to the constitution, as they occur in the basis of its authority.[32] Later on, this position would be taken over by the reputed French constitutionalist and political scientist Burdeau.[33]

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[29] See: Wolf, op. cit., 123 sqq.
[30] Weber, op. cit., I, 198 sqq., II, 1094 sq.
[31] Op. cit., 20. sqq.
[32] Schmitt, op. cit., 102 sqq.
[33] G. Burdeau, Traité de science politique, IV, 2-e éd., Paris 1969, 257 sqq.

Constitutional texts usually make no distinction in terms of the legal effect of constitutional decisions and that of other constitutional provisions, and therefore do not differentiate between total and partial revision of the constitution. However, some constitutions do contain provisions that prohibit revision of certain constitutional principles. With regard to this, typical is the provision prohibiting the change of the form of rule – republic or monarchy.[34] Far-reaching prohibitions of revision were proclaimed in the Fundamental Law of the Federal Republic of Germany of 23 May 1949, Article 49, Paragraph 3. This provision disallows changes to this Constitution that would pertain to the segmentation of the Federation into federal provinces, principled participation of federal provinces in legislature, principles of human rights, and also the principles: that FR Germany is a democratic, welfare and federal state; that all power comes from the people and that it is exercised through the Legislature, Executive, and Judiciary; that the Legislature is bound by the constitutional system, and that the Executive and the Judiciary are bound by the legal rules and the law; and that all Germans have the right to resist to anyone who attempts to disrupt this order, on condition there is no other help. The 1982 Constitution of Turkey goes even further than this, more of which will be given in further discussion.

The answer to the question whether the revisional body is authorized to change constitutional decisions and, in general, constitutional laws whose change the constitution forbids, produces significant practical effects. If we take the position it is not authorized, then its representatives who have exceeded their authority could stand trial for treason. This is why, in any individual case of revision of constitutional decisions, it is wise to question whether the revisional body has a clear approval of **legitimate constituent power** for this action. However, even a subsequent approval of this power can be considered legally valid. The very viewpoint of limited revisional power, exercised by a particular established body, and unlimited revolutionary constituent power of the people, was the subject matter of significant dispute in the period of the French Revolution that started in 1789.[35] The view is absolutely correct, but not in the sense that constituent and revisional power have different authorities, but in the sense that constituent power is hierarchically higher, which is a consequence of its legitimacy; when constituent power starts effectively acting – either directly or via its representatives – its will is the strongest. An apostle to the theory of constituent power of the nation and prominent constitutional writer of the French Revolution, Sieyès, contended that the nation could 'wish' only through its representatives.[36] However, we would add to this that in those states in which there is constituent power of the people-nation, even when the constitution prescribes only representative bodies as revisional bodies, a constitutional revision that the people-nation would carry out, say in a constitutional referendum, is also legitimate. This is the theory of the people as a "reserve creator of the constitution" found in contemporary German national law .[37] From this segment already one understands how important legitimacy theory is for positive constitutional law, as well.

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[34] See: M. Jovicic, O ustavu (On Constitution), Belgrade 1977, 66 sqq.
[35] E. Zweig, Die Lehre vom Pouvoir Constituant, Tübingen 1909, 277 sqq.
[36] E. Sieyès, Qu'est-ce que le tiers état? Par E. Champion, Paris 1888, 71.
[37] See: U. Steiner, Verfassunggenbung und verfassunggebende Gewalt des Volkes, Berlin 1966, 188 sq.

The prevalent view in science is that absolute prohibitions of or changes to the constitution do not produce legal effect as such. [38] Legal regulations which cannot be legally discontinued are actually a property of the **corporate state**. They particularly include **estate privileges**, which could not be discontinued even by a joint act of the sovereign and the estates.[39] However, Duguit showed that absolute prohibitions of change to constitutional decisions could be legally pulled down: a revisional body should first cancel the constitutional provision which forbids the applicable change of the constitution, and then conduct the change, which is no longer prohibited.[40]

One should distinguish between the change (revision) of the constitution and **evasion of the constitution**. The constitution is evaded when in one or a number of individual cases a constitutional law is offended, but this is an exception, which means that the evaded constitutional provision remains valid, i.e. it is not abrogated, either indefinitely or temporarily, in other words, it is neither abolished nor suspended. Evasion of the constitution may follow either in accordance with or contrary to the constitution. For instance, it is accorded with the constitution if the act that has been passed during the procedure for the change of the constitution, and which therefore has constitutional effect, singularly extends the term in office to the current President of the Republic. In this way, on 27 October 1922, the German Parliament passed the constitutional act containing the following provision: "The President of the Empire that has been elected by the National Assembly will continue his term in office by 30 June 1925".[41] Evasion of the constitution is not accorded with the constitution, for instance, when the President of the Republic dismisses the Parliament, although the constitution does not allow him to proclaim such a "governance act". Whether such a constitutional evasion is a mere breach of the constitution resulting in the liability of the perpetrator, or it is, to the contrary, allowed, is a matter that can be solved only from the standpoint of legitimacy. Thus the French Constitution, proclaimed on 4 November 1848, allowed in its Article 68 that the dismissal of the National Assembly by the President of the Republic was an "act of treason", which would deprive the President of his position. In 1851 it so happened that the Parliament, due to the interrelations of its political parties, was able to pass only "negative measures", i.e. it discontinued its legislative activity proscribed by the Constitution. The President, Louis Napoleon, dissolved the Parliament on 2 December 1851 and came out victorious from the short civil war that followed (the coup of Louis Napoleon). However, immediately after this, Louis Napoleon addressed the French people and asked for plebiscitary support for his actions. Indeed he got it: with 7,481,000 votes in favour of the act, and only 647,002 against it,[42] - which gained legitimacy for the evasion of the constitution by means of the act of constituent power. A different example of an unconstitutional, but legitimate, and thus allowed evasion of the constitution, is also found in the legal history of Serbia. The

[38] See: Jovicic, op. cit., 69 sqq.
[39] Fr. Tezner, Technik und Geist des ständisch-monarchischen Staatsrechts, in: Schmollers Forschungen, Bd. XIX, H. 3, Leipzig 1901, S. 13 et n. 3, 4; S. 59.
[40] L. Duguit, Traité du Droit constitutionnel, 2-e éd., IV, Paris 1924, 540.
[41] On the historical and political background of this act, see: H. Pohl, in: Handbuch des Deutschen Staatsrechts, herausg. von G. Anschütz/R. Thoma, I, Tübingen 1930, 469 sq.
[42] Ch. Seignobos, Histoire politique de l'Europe contemporaine. Évolution des partis et des formes politiques 1814-1896, 4-e éd., Paris 1905, 156 sqq.

King's proclamation of 10 June 1914 dismissed the Serbian National Assembly, originally elected for a four year term in office on 1 April 1912. Parliamentary elections were called for 1 August the same year. However, the murder of the Austro-Hungarian crown prince in Sarajevo on 28 June, and the imminent war between Serbia and Austro-Hungary imposed on the Serbian leadership the following unconstitutional solutions, which were still legitimate for reasons of state emergency. Through regent Alexander's proclamations, the old convocation of the National Assembly gathered and had a sitting on 14 July 1914 in Nis, while all electoral actions for the new Assembly were halted. Such a case – in which there would be a return to the previous condition – was not allowed by the 1903 Constitution. The re-activated Assembly henceforth had a not quite unimportant legislative activity in its refugee status, on Corfu.[43] And its mandate by far extended its constitutional, four-year term in office: it was dismissed two days after the elections for the Constituent Assembly of the Kingdom of Serbs, Croats and Slovenes, as proclaimed by the Regent on 30 November 1920, although its activities had rested by the end of 1918.

There is also a difference between the change (revision) of the constitution and the **suspension of the constitution**, which consists in a temporary condition in which certain constitutional laws, constitutional decisions, and even, more rarely, the constitution as a whole are not applied. Suspension of the constitution can be both accorded and disaccorded with the constitution, and, independently of this, legitimate and illegitimate.

Certain constitutions allow suspension in case of some form of **state emergency.** A state emergency usually leads to certain mechanisms of dictatorship. More detail on dictatorship will be given at the end of this paper. Here we are interested only in the initial part, the act of suspension.

The Constitution of the Republic of Serbia of 28 September 1990 also recognizes the institute of suspension caused by state emergency. The President of the Republic is empowered to limit certain human and civil rights and freedoms and change the organization, composition and authority of the Government and ministries, of courts and prosecutors' offices by means of acts proclaimed during the state of war (Art. 83, Par. 7). A very difficult issue of the constitutionality of the suspension may emerge if there is suspicion that a formally correct suspension act has an underlying purpose different from the one for which the authority for suspension has been allowed – this is the so-called "abuse of power" (détournement de pouvoir).

The Constitution of the German "Weimar Republic", proclaimed on 11 August 1919, defined in its Article 48 that, if in Germany "public security" and "order" were significantly disturbed or jeopardized, the imperial president had authority to "undertake measures for re-establishing public security and order", and for this purpose "temporarily" suspend, in part or as a whole, practically all fundamental rights. Hereby, the imperial president was due to immediately notify of these measures the Imperial Assembly (Reichstag) and abrogate them upon the Reichstag's request. On 27 February 1933, fire was set up in the Reichstag building. The National Socialists, who formed the Government at the time, but did not have the majority in the Parliament, immediately accused the German Communist Party of arson and requested that the imperial president proclaim appropriate acts in accordance with Article 48 of the Constitution so as to protect the country from

[43] See, for instance: N. Randjelovic, The Serbian Parliament on Corfu, 1916-1918, Nis 2003, passim.

communist violence. The next day already, the imperial president granted this request, passing the "Decree on the protection of the people and state", which suspended fundamental rights guaranteed by the Constitution (Articles 114,115,117, 118, 123, 124, and 153). This emergency decree was used by the National Socialists to crack down not only on the Communists (subsequent judicial proceedings showed that German Communist Party was not at all responsible for Reichstag arson) but also on all other regime opponents because the decree, though "temporary" according to the Constitution, remained valid all the way to 1945, i.e. for the entire duration of the National Socialist government. A reputable historian writes that the decree was the "decisive legal foundation of the National Socialist order and system, and undoubtedly the most important legal act of the Third Reich in general; instead of rule of law, it introduced permanent state of emergency".[44] This emergency decree was thus objectively part of the concept of abuse of power. The reach of judicial control of emergency decrees is quite another matter. The principal interpretation in the period of Weimar Republic was that judicial courts were not authorized to question the suitability of and need for such decrees, but that the issue could be a matter of a constitutional litigation before the State Court (Staatsgerichtshof für das Deutsche Reich).[45] However, in the period of national socialism, constitutional litigation was considered "incompatible with the very essence of the people's state".[46]

During the peak of the French Revolution, the Convent (a revisionary assembly or constituante), which held session from 20 September 1792 to 26 October 1795, passed a substantially democratic Constitution on 24 June 1793, whose authors were the Jacobins, the radical-proletarian wing of the revolution, and offered it to the nation for approval. As officially stated on 9 August the same year, the electorate accepted the Constitution with outstanding majority – the Constitution that would later become a sort of a "gospel of democracy".[47] Out of 44,000 municipalities, only one dared demand that the monarchy be reestablished[48]. According to the law, the Convent now had to call elections for members of the regular National Assembly and transfer power back to its hands. However, on the one hand, there was civil war raging in France, while foreign powers had occupied some parts of the country. On the other, the Constitution was incomplete; without necessary organic laws, its employment would lead to anarchy. The only viable solution was that this Constitution should be suspended, and the legitimacy of this suspension would lie in its inevitability. The condition of state emergency was obvious. On 10 October, only two months after the all-out constitutional euphoria, a decree was proclaimed that "the provisional Government of France [would be] revolutionary until the settlement of peace". This way, indefinitely, the employment of the 1793 Constitution was postponed. It was never later applied, actually. Already in 1794 the Constitution was forgotten. And after the overthrow of its authors, the Jacobins, the sentence for its supporters was death. One of the paradoxes that each revolutionary history abounds in.

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[44] J. C. Fest, Hitler. Eine Biographie, Frankfurt/Main-Berlin 1973, 548.
[45] Anschütz, op. cit., 281 sq., 294 sqq.
[46] E. R. Huber, Verfassung, Hamburg 1937, 210.
[47] A. Aulard, Histoire politique de la Révolution française, 5-e éd., Paris 1921, 307.
[48] Les Constitutions et les principales lois politiques de la France depuis 1789, par L. Duguit/H. Monnier, Paris 1898, XLI.

We term an unconstitutional suspension of the constitution "**political revolution**".

An illegal, but not necessarily illegitimate kind of constitutional suspension is **conservative dictatorship**. It usually proceeds as follows: the army takes over power in a coup, suspends the constitution and conducts "political revolution" in a "non-constitutional state", which consists in the removal of undesirable politicians or parties. After the purges and party reorganization, the army retreats from political life and restores the validity of the constitution. We shall return to this type of dictatorship when discussing the issue in more detail later.

In a monarchy, suspension of the constitution is unconstitutional when, through a coup d'etat or rebellion, the monarch or the dynasty are overthrown, and their position occupied by a new monarch or dynasty, while the constitution of the country is not changed. When the authority of the monarchy is reestablished, the suspension of the constitution ceases. One finds a similar example in contemporary republics in which the head of state or government is forced to leave the office, for either actual or alleged misconduct.

A constitution does not come into being only through a decision of constituent power. Hegel was among the first to point out: "For a constitution is not a matter simply made: It is a work of the centuries, an idea and consciousness of tremendous power if it is developed in the people. Thus, the constitution is not simply made by subjects"[49]. However, even more often, the constitution is not changed even through decisions of constituent power.

Revolution or **overthrow** represents both a destruction of the constituent power and constitution, as they have existed by that moment, and the establishment of a new constituent power. The distinction between revolution and **counterrevolution**, sometimes relevant to political science, has no importance to legal science, since there is no legal criterion for making a difference between the two. Indeed, in reality one sometimes cannot claim for sure whether an event is a revolution or counterrevolution (for example, the National-Socialists' takeover of power in Germany in 1933, or the collapse of European communist regimes in late 1980s and early 1990s).

In earlier periods, revolution was an extraordinary event; in 19th and 20th centuries it became almost a rule in political life: first in Europe, and then worldwide. Some of the revolutions have been turbulent, occurring as civil wars and coup d'etats, while others have been more peaceful, when the old bearer of constituent power would simply retreat with no fight; in the given period, some countries experienced two and even more revolutions. Legal introduction of the general census in England – which occurred in phases, from 1832 to 1918, turned this country from an aristocratic-parliamentary monarchy into a plebiscitary-parliamentary regime with the nominal ruler. Except in Romania, where the anticommunist revolution started with a coup in 1989, and in Russia, where the self-deconstruction of communism ended by the populist president's firing from guns onto the Parliament (still controlled by reformatory communists) in October 1993, other anticommunist revolutions in Europe were largely peaceful. It was usually the "civil society" that would use passive resistance and demonstrations in order to isolate the ruling Communist Party and force it to a "round table discussion". The purpose of this body would be to

[49] G.W.F. Hegel, Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse. Nach der Ausgabe von E. Gans herausg. von H. Klenner, Berlin 1981, § 274. Zusatz.

prepare multi-party elections for Constituent Assembly, where the elections would mark the end of the revolution.[50]

Quite different in nature are **totalitarian, permanent revolutions**. Totalitarianism is a dictatorship of a **state within the state** (the "avant-garde" of class, race, religion) and the aim of this dictatorship is to fight against the ideological internal enemy, and the external "**total enemy**".

Due to failure in the battlefield in the war against Germany, in the period 27 February – 12 March 1917, a revolution that would crush the imperial regime broke out in Russia. The new head of state was the provisional government, which prolonged the war on the side of the allies, and took over the commitment to hold democratic elections for the Constituent Assembly. However, opposing the provisional government, there were communists ("Bolsheviks", or "maximalists"), who supported immediate peace with Germany and its allies. At the same time, soldiers, workers and peasants organized themselves as "soviets", a parallel form of government, which fell into communist control in the summer of 1917. This structure performed a coup in the period 25 October – 7 November 1917 ("October Revolution"), toppled the provisional government, and made its own "soviet of people's commissaries". To be sure, this Government immediately called elections for a multi-party Constituent Assembly, where the Assembly was to convene and the revolution end. However, when the Constituent Assembly refused to support the Communist Government, it was immediately dismissed by that Government on 6 January 1918. The justification was that the only purpose of such an assembly would have been to "justify bourgeois counterrevolution in order to topple the Soviet Government".[51] This act against the free will of the people of Russia sparked a permanent revolution of "proletariat avant-garde" which, along with similar revolutions worldwide, eventually dragged tens of millions of victims in its whirlpool.[52]

Revolutions can also be legitimate and illegitimate. Due to the sheer number of casualties, it is difficult to grant legitimacy to totalitarian revolutions, except if in the particular case they are the lesser of the two evils, which was, for instance, the situation with old or new colonial occupation. Yet, the originally legitimate revolution can lose this legitimacy in one of its later stages, while the other way round is equally possible: where the originally illegitimate revolution could become legitimate later on.

Creators of totalitarian revolutions are fully aware of the need for legitimacy that lies behind any revolution. Propaganda which strives to maximally mobilize the sentiment against the "total enemy" suggests that totalitarian dictatorship is trying to find a significant source of its legitimacy in **danger** from the "total enemy". Along with this, there is also a "positive" source, which can be nothing but the **charisma of the revolutionary**

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[50] See.: U.K. Preuss, Revolution, Fortschritt und Verfassung, Berlin 1990, 59 sqq.

[51] The Blackwell Encyclopedia of the Russian Revolution, Ed. By H. Shukman, Oxford/New York 1988, 141.

[52] See: St. Courtois, in: St. Courtois/N. Werth/J.-L. Panné/A. Paczkowski/K. Bartosek/J.-L. Margolin, Das Schwarzbuch des Kommunismus, 4. Aufl., München/Zürich 1998, 16. Data given in this book, much praised in the media, cannot actually be taken as fully reliable. For instance, in the part dedicated to the civil war in Yugoslavia during World War Two, written by St. Courtois and J.-L. Panné, almost all casualties, about a million of them, are ascribed to the conflict betwee D. Mihailovic and Tito. Nothing is said on the nationality of most of these victims, who were mainly Serbian. The Ustasha regime was responsible only for "massacring Jews and Gipsies". (Ibidem, 356.)

teacher, leader and martyr. Thus, there is no communist revolution without a "personality cult" and "legends" surrounding the "heroes" of the movement. Even some open-minded communist historians speak of Stalin's Caesarism in the USSR,[53] although this Caesarism had existed before, in the time of Lenin's Government (1917-22). It is most likely that rapid deterioration of his health actually prevented him from constructing his own "personality cult". The collapse of totalitarian dictatorship in USSR began exactly at the moment in which the "total enemy", the West, became an "unavoidable partner", and when, instead of revolutionary charismatics, liberal reformers took over as heads of state.

When the old constitution is no longer valid, and a new one cannot be passed quickly, lack of legitimacy is often spanned by the proclamation of a **provisional constitution** (or **interim constitution**). This way, two goals are achieved: on the one hand, the state is given the legal organization it needs and, on the other, the question of legitimacy of the constitution is put off until the proclamation of the intended, full constitution. However, in order for abuse of public authority to be avoided, the provisional constitution must be limited to urgent, necessary solutions. If the contrary is the case, this constitution, too, would suffer criticism from the standpoint of legitimacy.

The German Revolution, which started on 3 November 1918 was up to a point similar to the Russian "October" revolution, but also showed some important differences. The principal cause of the revolution was again military defeat, now that of Germany in the war with the western allies ("Entente"). Equally in all areas of federal Germany, power was taken over by labour and military (in some places peasant) soviets. Only, this revolution was completely peaceful: upon the proclamation of the republic, the emperor, on the one hand, and dynasties which had ruled German constituent states, on the other, renounced power with no resistance, while administrative and judicial bodies went on normally working under new authorities, whose leaders comprised the new German Government – The Soviet of People's Representatives. The country was officially renamed as "The Socialist Republic of Germany".[54] Equally from the very start, principal actors in the soviets included both advocates of elections for the Constituent National Assembly, vouching for the end to the revolution ("majority socialists") and extreme left wingers, who requested the extended power of the soviets, "dictatorship of the proletariat", modelled after the Soviet Russia. Eventually, the position of the former was victorious. The conference of governments of German constituent states voted in favour of the National Assembly on 25 November 1918. More importantly, on 19 December the same year, the "General Congress of Labour and Military Soviets of Germany" voted in favour of the same decision with outstanding majority – 344 delegates voted for the National Assembly, and only 98 for the preservation of soviets as bearers of legislative and executive power. The communist uprising that followed ("Spartacus Alliance") was easily crushed by the army.

On 19 January 1919, "Constituent National Assembly of Germany" was elected as a parliament with formally unlimited power. In this process it turned out that the drafting of the new Constitution of the "German Empire" (the name was preserved in the new federal state) would be a painful task, but also that constituent republics were too fearful of unita-

[53] For example: G. Boffa, History of the Soviet Union, I, Opatija 1985, 323 sqq.
[54] W. Jellinek, in: Handbuch des Deutschen Staatsrechts, I, 120 n. 3.

rism and centralism. In order not to halt the activities of the National Assembly, unitarists and federalists reached compromise in a kind of **provisional constitution**. This was, first, the Act on the Provisional Government of the Empire of 10 February 1919. Its § 1 and § 4, section 1, sentence 1 read: "The Constituent National Assembly of Germany has for its task to proclaim the future Constitution of the Empire, and to pass other urgent imperial legal acts." "The future Constitution of the Empire will be resolved by the National Assembly". However, in the case of regular acts, the National Assembly shared its authority with the "Council of the States", made up of representatives of governments of German republics, where the number of representatives depended on the size of the corresponding republic. "Imperial affairs" were conducted by the "imperial president", who was elected by the absolute majority of votes in the National Assembly. The imperial president appointed Imperial Ministry to head the Imperial Government, and it had under its authority all imperial offices and supreme military command. Imperial ministers had to be accepted by the National Assembly. One of them was the prime minister. As part of the provisional constitution we also find the Provisional Act of 4 March 1919 which resolved the issue of old and new law in only five paragraphs. All old acts, including the 16 April 1871 Constitution of the German Empire, remained valid as long as they were not in disagreement with the Provisional Act or Act on the Provisional Government of the Empire; acts of the revolutionary Government were also confirmed. Instead of the old Imperial Assembly, the National Assembly was now the chief legislative body, while the function of the old Imperial Council (congress of members of government of German constituent states) was taken over by the Council of States. Instead of the Emperor, there was now Imperial President, and instead of the Imperial Chancellor – the Imperial Ministry. This way, Germany became a constitutional state with rule of law again – and remained so until the National-Socialists took over in 1933.

Our country has significant experience with provisional constitutionality.

After the military collapse of the Austro-Hungarian monarchy, looking for a way for Croats and Slovenes to shift from the losing to the winning party, having won for themselves part of Serbs across the Sava and Danube over the Yugoslav idea (Vojvodina with Montenegro directly united with the Kingdom of Serbia), via the National Council in Zagreb as supreme representative body, the Croat and Slovene intellectuals declared secession from Austria and Hungary on 29 October 1918, and proclaimed the "common people's sovereign state of Slovenes, Croats, and Serbs on the entire ethnographic area of this people". This semi-revolution, however, lacked the seriousness and persistence of true revolutions. Thus, the overthrow of the Habsburg Dynasty was not proclaimed, but it was declared that the supreme power in all "Yugoslav countries" now lay with the Presidency of the National Council, where its president would be chief executive officer. In this "state of Slovenes, Croats and Serbs", therefore, one of the principal constitutional questions remained unsolved: whether this was a republic or a monarchy. The "state of SCS" did not have any reliable military force, and thus no effective organization of government. At that time, the Austro-Hungarian army had dissolved, returnees and deserters were largely affected by communist and republican ideas, while some of them were mere criminals. Most Croats, especially the predominant peasantry, found the idea of Yugoslav union

alien.[55] "The State of Slovenes, Croats and Serbs" was not recognized by any major power – winner in the war. The claim that only the Kingdom of Serbia recognized the new country is erroneous: Serbia recognized only the "National Council in Zagreb as the legal Government of Serbs, Croats and Slovenes living on the territory of the Austro-Hungarian Monarchy".[56]

The answer to the question whether the "State of SCS" was indeed a state has to be negative. A territorial organization which had not resolved the issue of head of state, which had neither a full nor a provisional constitution, no effective legal system, which was not recognized by the powers which, in the forthcoming peace conferences could decide on its borders, if not even on its survival – simply did not have enough properties typical of a state in the full sense of the word, the state as a full of international law. Croatian authors, most notably Culinovic, claim the opposite, obviously with political tendentiousness.[57] However, in the same book, Culinovic contradicted himself by saying that the "state of SCS" was a "provisional state".[58] For that matter, in the 1 December unification address, the Deputation of the National Council says: "Slovenes, Croats, and Serbs, who conducted a overthrow on the territory of the former Austro-Hungarian monarchy and provisionally constituted an independent national state…"[59] "Temporariness" and "statehood" are not, however, elements that could go hand in hand. Therefore, the position of Slobodan Jovanovic is more correct, as he claims that "the State of SCS" was made up of the "seceded territories" of Austro-Hungary, without "recognition by international law".[60] This view can be completed this way: after the secession of the "State of SCS" from the Austro-Hungarian monarchy, the entire constitutional law of Austria and Hungary ceased to be valid on this territory. On its, largely disputable, territory, only the National Council vouched to act as national state authority. Thus, one could call the "State of SCS" an "emerging state", similar to principal dominions (Canada, Australia, New Zealand, and South Africa) of the British Empire in late 19th and early 20th centuries. Thus, the government in the "State of SCS" could not be legitimate, but there was a serious possibility that it should *become* legitimate in the forthcoming period.

Even if it did not have its own – provisional or permanent – constitution, the "State of SCS" had a clear program: union with the Kingdom of Serbia at all costs, for, if the contrary was the case, if it should survive at all, it would suffer tremendous territorial losses. The first attempt of a union, the so-called "Geneva Agreement" (or "disagreement") of 9 November 1918, proclaimed a union based on international law: It would be achieved by means of an international treaty to establish a confederation of the separate states, "State of SCS" and the Kingdom of Serbia. The Serbian Government refused such a union. A new form, acceptable to Serbia, was carried out as follows: on 24 November 1918, the National Council in Zagreb accepted the conclusion announcing the union of the "State of SCS" and the Kingdom of Serbia and Monte-

[55] D. Simovic – to Supreme Command on 14 November 1918, in: B. Petranovic/M. Zecevic, Yugoslavia 1918-1988, Thematic Collection of Documents, 2nd Edition, Belgrade, 1988, 123; J. Horvat, Political History of Croatia, ed. H. Matkovic, II, Zagreb, 1989, 118 sq.
[56] F. Sisic, Documents on the Creation of the Kingdom of Serbs, Croats, and Slovenes, Zagreb 1920, 233.
[57] F. Culinovic, History of State and Law in Yugoslav Countries in 19th and 20th Centuries, II, 2 ed., Zagreb, 1959, 198 sqq.
[58] Culinovic, op. cit., 189 sqq.
[59] Petranovic/Zecevic, op. cit., 135.
[60] Sl. Jovanovic, Constitutional Law of the Kingdom of Serbs, Croats, and Slovenes, ed. M. Buzadzic, Belgrade, 1995, 44.

negro, to form "a united state of Serbs, Croats and Slovenes, electing a committee of 28 members, with full authority, who would make an agreement with the Government of the Kingdom of Serbia and representatives of all parties in Serbia and Montenegro, so as to immediately start organizing the united country according to instructions enclosed…"[61] This conclusion represents an unequivocally constitutional resolution on the disappearance of the "State of SCS" and its merger with the Kingdom of Serbia "uno actu" into a **united** (therefore unitary, and not federal) **state**, through which act any interposition of international law of contract was evaded. The mentioned Deputation of the National Council submitted this conclusion in the form of an address to the regent of the Kingdom of Serbia on 1 December 1918. Accepting it in his speech, the regent declared the "union of Serbia and the lands of the independent state of Slovenes, Croats and Serbs into a unified Kingdom of Serbs, Croats and Slovenes".[62] The parallel between the conclusion (address) and the regent's reply is complete. The regent also pronounced a constitutional decision by which the Kingdom of Serbia ceased to exist, as it became part of the union with the "State of SCS", forming the unitary Kingdom of SCS. The regent then accepted the positions from the address that the ruling authority in the new country would still be conferred upon the King, i.e. regent of Serbia, and that the new parliamentary government and provisional national representative body should be formed, so they could function until the election of the Constituent Assembly, based on the general right to vote.

The legal nature of the 1st December Act (as the address and the regent's proclamation taken together are often called) represents a very difficult task for legal science, which requires some digression here. Slobodan Jovanovic was satisfied with the statement that this was no international treaty, since, after the 1st December Act, both the "State of SCS" and the Kingdom of Serbia ceased to exist.[63] This is true, but still not enough. Not able to restrain his nationalism, Culinovic first concluded that the 1st December Act had been an "international treaty", but also an act "which contained elements of a coup of a kind".[64] The elements of a coup d'etat come from the fact that the 1st December Act was not ratified by either the National Council of the "State of SCS" or by the National Assembly of the Kingdom of Serbia, in accordance with its 1903 Constitution.

As such, a **coup d'etat**, usurpation of supreme power by force or by manifestation of supremacy of a state organ, is a form that can be realized through various kinds of substance. A coup can be a revolutionary act. In 1917, Russian "October" revolution was carried out by means of a coup d'etat carried out by the soviets, led by the Bolsheviks. Communist revolutions in the countries previously occupied by the Soviet army, were essentially coups because they were conducted by the bodies of occupational authorities – thus these revolutions only had a seemingly "national" character. As we have seen, a coup d'etat can also be used for the evasion of the constitution. Significant forms of dictatorship also begin with a coup. Suspension of the constitution can also be achieved through a coup d'etat. A bizarre example of such a coup is the suspension of the 24 March 1903 Serbian Constitution, from 11:15PM to midnight, i.e. for only 45 minutes, where in this "unconstitutional period", the king replaced a number of high officials.

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[61] Sisic, op. cit., 275 sq.
[62] Petranovic/Zecevic, op. cit., 136 sq.
[63] Jovanovic, op. cit., 48 sq.
[64] Culinovic, op. cit., 214 sqq.

As pointed out already, in monarchies, coups often overthrow certain rulers or dynasties, when new leaders or dynasties are introduced, but where the constitution is not interfered with. Here is another example from Serbian history. The so-called "St Andrews" National Assembly (12 December 1858 – 12 February 1859) toppled Prince Alexander Karadjordjevic and reintroduced the Obrenovic dynasty to the throne. In the "May Overthrow" 1903, the conspirators, mostly army officers, killed the last king from Obrenovic dynasty and proclaimed as new ruler the son of prince Alexander, Peter Karadjordjevic (which was immediately sanctioned in the new Constitution). On 27 March 1941, in Belgrade, once again, army officers toppled the Regency and brought to the throne the minor king, which resulted in Yugoslavia entering the war with England, against the Axis Powers, and ultimately in the establishment of Titoist totalitarian dictatorship in 1944-45. Obviously, those "political revolutions" inevitably open up the question of legitimacy, since, as a rule, they result in a major change in national or international policy, which can influence the fate of the people and the country, i.e. the common welfare, much more than the very constitutional system.

The claim of Culinovic that the Kingdom of SCS originated in a "coup d'etat" is a remark with far-reaching political implications, since it means that the foundation of the first Yugoslav state was illegal. (Instead of the words "coup d'etat", this national-communist does not use the more accurate term "revolution", because revolution is always allowed and justified for a communist). However, was the ratification indeed the condition for the validity of the 1st December Act? As for the "State of SCS", based in Zagreb, there is no question on any need for ratification. Before the union, this "state", as we have seen, which was in any case "provisional", had decided that it should cease to exist. How can a "state" which is no more, which is therefore not capable of taking legal or any other action, ratify an international treaty? True, the National Council provided some instructions to its Deputation under which the union was sanctioned. But instructions are not legally binding, especially not in external relations, and this fact is especially stressed by the formulation from the conclusion of the National Council that the Deputation of the Council had full authority ("is fully empowered") to "immediately carry out the organization of a unified state". That its ratification of the 1st December Act was quite unnecessary was the position of the National Council itself; already on 3 December 1918, its Presidency announced that, upon the act on the union, "… the function of the National Council as supreme sovereign authority of the State of SCS on the territory of the former Austro-Hungary has ceased."[65]

The question of ratification is, however, different with regard to the Kingdom of Serbia, since its National Assembly had not provided prior approval of the union. However, when the Serbian Assembly was called, and when in it, on 29 December 1918, the Prime Minister of the Kingdom of SHS provided information on the 1st December Act, after a short discussion, out of 97 members of parliament present, 95 voted in favour of the declaration of the Prime Minister, and only two persons were against it. Was this a ratification of the 1st December Act – as proposed by Culinovic?[66] By no means. If this had been

[65] Sisic, op. cit., 283 sq.
[66] Culinovic, op. cit., 212.

a ratification – since its effect is constitutive[67] – the union would not have commenced on 1st December, but on 29 December 1918. The Kingdom of SCS would not have been a new state, but an extension of the Kingdom of Serbia. Finally, the Constitution of the Kingdom of SCS, proclaimed on 28 June 1921 (the "Vidovdan Constitution"), would have had to be proclaimed in accordance with the Constitution of the Kingdom of Serbia from 1903. However, not one of these three conditions was met.

The regent's proclamation on the union was an **act of constituent power**. In discussing the evasion of the constitution, we saw that the Serbian regent had already passed some acts from the jurisdiction of constituent power, where the state of emergency provided legitimacy to such acts. The 1st December Act actually shows that what emerged was **a custom based on constitutional law** that, in extraordinary circumstances, the Serbian ruler could exercise constituent power, where people's representatives could later on accept or deny the legitimacy of his constituent activity. However, only **declaratorily**. If by any chance the Serbian National Assembly had refused to accept the union, then the state founded on 1 December 1918 would have ceased to exist, not *ab initio*, but as of 29 December the same year.

This kind of reasoning obviously troubled the regent and his legal advisors, so that, before the 29 December session, they held consultations with members of parliament, in order to learn whether the MPs would accept the union. This was openly admitted by the Prime Minister of the Kingdom of SCS, Stojan Protic, in his address to the Serbian National Assembly on 29 December: "This grand historic act… was completed without your formal participation… dictated by the political situation and quick sequencing of events… We were convinced that you were with us, we knew your secret and public convictions… For this reason, with full trust in you… we submit to you these two major and important historic acts, so you should vote in favour of them."[68]

The 1st December Act was not just an act of state union; as it has not been noticed by now, it also acted as a **provisional constitution** – in the sense of constitutional decisions – of the Kingdom of SCS. These are the decisions: a unitary monarchy ruled by Karadjordjevic dynasty; parliamentary government; people's house of representatives (a temporary body, until the Constituent Assembly is elected). These decisions would later be accepted by Vidovdan Constitution, through which act they became permanent and normatively completed.

However, the Provisional People's House of Representatives, the Government, and the Regent also dealt with a "provisional constitution" but in a quite different meaning of the word; this should have been the Serbian 1903 Constitution, whose jurisdiction would now be extended to the new country.[69]

The Provisional Constitution of Yugoslavia (as it was also called by scientists) was actually the Act on Royal Authority and Supreme State Administration,[70] adopted on 6 January 1929, followed by the royal Proclamation on the Cessation of Validity of the Constitution of 28 June 1921 and dismissal of the National Assembly. We shall get back

[67] G. Dahm, Völkerrecht, III, Stuttgart 1961, 75.
[68] Sisisc, op. cit., 295.
[69] See: Neda Engelsfeld, The First Parliament of the Kingdom of Serbs, Croats and Slovenes – Provisional People's House of Representatives, Zagreb, 1989, 50 sqq., 103 sqq.
[70] M. Yovanovitch, Le Régime Absolu Yougoslave, Institué le 6 Janvier 1929, Paris 1930, 96 sq.

to this so-called "6 January Dictatorship" towards the end of the paper, in the discussion on dictatorship.

On 29-30 November 1943 in Jajce, the self-elected partisan parliament, "Anti-Fascist Council of the People's Liberation of Yugoslavia" (AVNOJ) made a resolution creating the new "federative Yugoslavia" on the one hand, and proclaiming "provisional constitutional system" of this "state", on the other.[71] By means of this decision, during the "war for national liberation", AVNOJ declared itself "supreme legislative and executive people's house of representatives of Yugoslavia", (beyond any doubt, Russian soviets served as a model here), in addition to which, there was a "National Committee of Yugoslav Liberation" (NKOJ), as the "people's government". However, entire authority actually lay in the hands of the Yugoslav Communist Party Secretary General, the newly-proclaimed "marshal" Tito. All those AVNOJ decisions were actually revolutionary acts of an emerging totalitarian dictatorship. AVNOJ announced the following with regard to the legal Yugoslav government in exile: "This 'government' was in a constant dissolution process. Its current makeup includes the sternest supporters of greater Serbia, led by Draza Mihajlovic and Petar Zivkovic, even though the latter is not formally minister in the government (!). This is the government that supported all-out civil war among brethren and chauvinist terror, a government serving fascist occupiers, a government extremely nondemocratic, which works on the breakup and dissolution of Yugoslavia with full awareness of what it is doing." The disqualifications from the last sentence could largely be used in describing AVNOJ itself. It was only on 11 February 1945, after the Crimea Conference of leaders of major anti-fascist powers "recommended" that the partisan "marshal" appoint a provisional Yugoslav Parliament where all AVNOJ acts should be submitted to the Constituent Assembly for approval – which was accepted reluctantly, with numerous attempts at evasion – that the country ended up with an appearance of a provisional constitution. However, AVNOJ's resolution on the cancellation and discontinuation of validity of legal acts, passed on 3 February 1945, was the **true provisional constitution**. In its Article 2, legal regulations (Statutes, decrees, orders, regulation books, etc.) which had been valid at the moment of enemy occupation, on 6 April 1941, were now "discontinued if they stand in opposition to the results of the struggle for people's liberation…" This decision indeed made a legal discontinuity and vacuum where totalitarian terror became unhindered, and was left to operate in any framework it found fit. Related to this, the remarks of the British Prime Minister, pronounced at Potsdam Conference on 19 July 1945 are quite accurate: the Yalta Accord was not "implemented because there were no elections; the Parliament (AVNOJ) was not reorganized; the judiciary is not reestablished; Tito imposed a strict party organization with control by the police, and the press which was controlled as strictly as it was in fascist countries".[72]

Elections for Constituent Assembly, the one that proclaimed the "Federative People's Republic of Yugoslavia" on 29 November 1945, were not free at all; viewed by people participating, the Constituent Assembly was a mere replica of AVNOJ.[73] Accordingly, the

[71] J. Stefanovic, Yugoslav Constitutional Law and Comparative Law, I, 3rd ed, Zagreb 1965, 241 sqq.
[72] Petranovic/Zecevic, op. cit., 760.
[73] See: B. Gligorijevic, King Peter II Karadjordjevic in the Whirlpool of British Policy or How Monarchy in Yugoslavia was Abolished, Belgrade 2001, 256 sqq.; V. Kostunica/K. Cavoski, Party Pluralism or Monism, Belgrade 1983, 87 sqq.

Constitution of this country, passed in 1946, was not legitimate, nor were any subsequent constitutions in Titoist dictatorship, including its last one, declared in 1974. However, some legitimacy to state authorities was given by the charisma of the "marshal", "president", and "comrade" Tito. From that viewpoint, it is quite natural that the breakup of the "federative Yugoslavia" had to start after his death in 1980.

Constitutional reform represents the cancellation of the parts or entirety of the constitution that has been valid by that moment, where constituent power remains the same. Revolution sometimes results in the creation of a new state. This happens when revolution coincides with secession (the independence of the former republics of the Soviet Union, of the Socialist Federative Republic of Yugoslavia, many instances of colonial liberation). Furthermore, this happens when a revolutionary act coincides with the exercise of one's right to self-determination (the foundation of the Kingdom of SCS). In principle, totalitarian revolution – as it establishes the ruling "avantgarde" as a state within the state, and also introduces legal discontinuity - also changes the condition in the field so much that what occurs is the emergence of a new state. A proof to this is the refusal of the Government of Soviet Russia, in May 1922, to pay back the debts of the Imperial Russia and retain the rights of the "people's government"; the situation in China in 1949, where the Government made its own decision which international treaties of the previous government it would accede to, and which it would abstain from; or the long refusal of a series of countries, led by the United States and Canada, to recognize the totalitarian People's Republic of China. It is true that many theoreticians of international law support the view that the state stemming from a totalitarian revolution is still not a new state[74]. However, one should seek reasons for this in the fact international law often mistakes reality for fiction. On the contrary, in a constitutional reform, state continuity is unquestionable.

A typical prerequisite for constitutional reform is **constitutional involution**. There have been texts on the involution of law, though not many.[75] Constitutional involution begins when institutions and public offices relevant to the system (the parliament, government, political parties, the army) start acting in a way resulting in a quicker or slower loss of **legitimacy** of constitutional decisions. What comes out of this is an ever deeper constitutional crisis, ending in the inability of the country to act, in internal or external affairs.

The normal remedy in such a situation is to establish regular constituent power, and reform the constitution (or pass a new one) in a way that would ensure renewal of legitimacy.

For instance, the constitutional position of the king and people's house of representatives, made after the model of German constitutional monarchies, available in Serbian 1869 Constitution, started producing irreconcilable clashes between two principal political stakeholders: the King and the Radical Party, which had a huge majority of supporters. The dispute was resolved by a deal between the King and the parties. The 1888 Constitution, proclaimed in accordance with this deal, fully accepted a parliamentary regime and free elections; the role model for these decisions was the unwritten English Constitution.

The Constitution of the French 3rd Republic – made up of three constitutional acts of 1875 and Constitutional Act of 14 August 1884 – lost its legitimacy for a quite different

[74] See, for instance: G. Dahm, Völkerrecht, I, Stuttgart 1958, 87 sqq.
[75] G. Del Vecchio, Studi sul diritto, II, Milano 1958, 79 sqq., is one of rare scholars to have covered this issue.

reason, due to excessive republican parliamentarianism. The parliament of two houses did not only have unlimited legislative and constituent power. The government was also fully subjected to it. The President of the Republic only nominally held executive power; the Parliament grabbed the right to appoint and topple the Council of Ministers upon its own, free choice. Numerous parties whose representatives won seats in the Parliament could not harmonize their positions. The consequence was that neither could the Parliament pass acts, nor could the Ministers govern. Instead of powerless constitutional institutions, "factual authorities" took over. Legal science is reluctant to analyze who these authorities indeed were.[76] However, in the political literature between the two world wars we find the claim that this was freemasons, cartels of certain professional politicians, and political police[77]. A series of mysterious political assassinations and "suicides", including the assassination of President of the Republic Doumer in 1932, and that of the Yugoslav king Alexander in 1934, provide credibility to this claim.

After World War One, an exit from emerging crises was sought in the institution of "decret-lois": the Parliament would empower the Government to provide norms for a wide variety of legal domains, retaining the right to ratify these norms at a later point. However, this form lacked content; in particular, it failed to prevent the military defeat in the war with Germany in 1940.

The regime of the 3rd Republic ceased to exist when, on 10 July 1940, the Parliament passed the Constitutional Act effectively introducing constituent dictatorship of marshal Pétain, who opted for collaboration with Germany – where the military defeat of Germany meant an end to his government. A new person on the political stage, General de Gaulle, having found refuge in England, proclaimed from there the continuation of the war against Germany on 18 June 1940. With the help of anti-fascist powers, part of French colonies and the resistance in France, he managed to end this war victorious. Strictly legally speaking, the general's rebellion was illegal. However, success in the war provided legitimacy to his actions.[78]

The French 4th Republic was established by the Constitution adopted by the National Constituent Assembly on 29 September 1946, and later confirmed in the referendum organized on 13 October the same year. Until that moment, a provisional constitutional system had been valid, according to the act confirmed in the 21 October 1945 referendum: there was the Constituent Assembly, which appointed the Provisional Prime Minister of the Republic.

Constitutional decisions were almost equal to those found in the constitutional texts of the 3rd Republic. A significant novelty was the strengthening of democracy: women and military officers were given the right to vote; as was the case with inhabitants of territories overseas. France had until that moment been a unitary colonial empire. Now, when it was no longer a global power, it attempted to use the constitutional institute of "French Un-

[76] G. Burdeau, Droit constitutionnel et institutions politiques, 8-e éd., Paris 1959, 284 sqq.
[77] L. Daudet, La police politique. Ses moyens et ses crimes, Paris 1934, passim.
[78] Burdeau, Droit constitutionnel, 287, claims that Marshal's government was "legal, but illegitimate", while the General's government was "legitimate, but illegal". It is not true in the sense that the French people in 1940 wanted an unconditional peace with Germany. (See: W. Rings, Kollaboration und Widerstand. Europa im Krieg 1939-1945, Zürich 1979, 87 sqq.) The actual truth is that legitimacy was gradually conferred from one government upon the other.

ion" so as to exchange this empire for a kind of federation, in which colonial peoples would be equal in rights with the French, but in which France would retain its hegemony. Finally, the authentic Right, having lost its reputation due to collaboration with the Germans, was now practically destroyed. The Senate, now "The Senate of the Republic" was no longer a legislative body equal in authority to the National Assembly, so that the supremacy of the Parliament over the Government became even stronger. Old problems began to reemerge: the Parliament did not pass legislative acts, and the practice – now unconstitutional – was reinstituted in which decrees were allowed the effect of Statutes[79], while governments, due to the rivalry of coalition partners, were dismissed one after the other. No matter how much his authority in the country was important, the President of the Republic was both the president of the French Union and the legislator for the territories overseas.

The year 1954 marked the failure of the "French Union" project. That year, an anti-colonial rebellion broke out in Algeria, an event that would drag France itself to the verge of civil war. Due to the long dissatisfaction with the "regime of sporadic authority",[80] there was now unrest among the people. It was clear to political strategists that the organization of government in the 4th Republic had lost its legitimacy. The founder of this Republic, General de Gaulle, who had left office voluntarily in 1946, dissatisfied with the decision of the political parties to appoint weak executive government, was called once again. Through the Constitutional Act of 3 June 1958, the Parliament conferred upon the general a constitutional dictatorship. One cannot deny some similarity between this act and the conferment of constitutional dictatorship to marshal Pétein in 1940. However, back then, France had been in a much graver situation, where, due to the defeat from Germany, the very survival of the state was at stake. To the contrary, now the core of the possible collapse was situated outside the territory of the country. The Constitution of the 5th Republic, that de Gaulle submitted to the referendum on 28 September 1958, which was sure to be accepted by the voters, established a strong President of the Republic as the true guardian of state unity, who was allowed, in times of emergency, to rule without the Parliament; and also a Parliament whose legislative authority boiled down to a pre-defined set of important legal issues. By exercising his dictatorial power, de Gaulle, as the first undeniable President of the 5th Republic, without any doubt made serious mistakes, too. His Algerian policy ended in a total, in the military sense quite unnecessary, catastrophe of the Algerian French, who had to flee the country, leaving all their property behind, and head for the native land.[81] However, in so ruling, he still managed to do what most French expected him to – get France out of global politics in order to lay foundations to European integration. To sum up, by "restoring the idea of the state" (Burdeau)[82] the 1958 Constitution transferred the focus of legitimacy from society onto the state; the French revolutionary prejudice of a "good society" and "bad state" was thus definitely buried by means of this Constitution.

A constitution can be changed through **customary law**; it can change not only a provision of the constitutional act (which we have already mentioned), but also a constitu-

[79] See: J. Soubeyroul, Les Décrets-Lois sous la quatrième République, Paris 1955, passim.
[80] Burdeau, Droit constitutionnel, 372.
[81] E. Nolte, Deutschland und der Kalte Krieg, 2. Aufl., Stuttgart 1985, 461.
[82] Droit constitutionnel, 385 sqq.

tional resolution. It is not a matter of dispute, not even in more recent science, that custom is a universal source of constitutional law.[83] In general, customary law is made through a longer repetition of a certain activity or lack of activity. A typical such constitutional custom, which does not just contain a constitutional norm, but a decision, would be the transformation of the dominions of the British Empire – from self-governing colonies into independent states.[84] However, as rightly noticed by C. Schmitt, in constitutional and international law, contrary to other branches of law, a single precedent is often enough to make customary law.[85] This peculiarity comes from the fact that the rule of customary law emerges when a common belief in its necessity and need for it to be legally mandatory is recognized, which means the need for it to be mandatory by coercion (*opinion juris seu necessitatis*). In the words of Toma Zivanovic: "There is a legal custom as soon as the aforementioned common belief **has come into being**. Thus, it is not necessary for someone to act as a prosecutor or defendant before a court of law, and for the court to pronounce its sentence based on the custom, or for the custom to be **practically applied** by any authority. In other words, it is not necessary to transfer the common belief of those who believed in the custom 'onto the government, and be seen in the decision of the government'. Even without that, it is still positive law, so the practice of a legal custom does not have any **constitutive**, but only **declarative** relevance."[86]

A custom in constitutional law is, therefore, a tacitly expressed will of a disorganized constituent power. This is why the custom has primacy over written constitutional law only in those cases in which the people-nation is the bearer of constituent power. Seen that way, we reach the correct concept of **unwritten constitutional law**. In fact, it is not a coherent phenomenon. It is partly made of constitutional decisions and norms that a particular written constitution implies, and partly of constitutional legal customs.

A constitutional custom sometimes appears as the subject of constitutional reforms. Thus in the practice of the Supreme Court of the Union in the United States customs were often established, such that they could append, and even change the federal Constitution, where the guise was the usual phrase that this was just an interpretation of the Constitution. The USA has a comparatively old constitution (proclaimed in 1787) with a rather difficult procedure for its formal revision. However, as of 1803, the Supreme Court won the right for itself to question the constitutionality of acts of all other authorities, primarily of Statutes as legislative acts. This position was widely accepted. In relation to this, reputable American authorities conclude: "Our people has, therefore, accepted, even acclaimed this."[87] At the same time, as in subsequent judgments with constitutional force, it is unimportant whether the Supreme Court has originally proclaimed the already existing custom, or whether it has itself started creating it. In any case, its famous "doctrines" – say of "implied power", "commerce power", "due process of law", "preferred freedoms" – represent the cornerstones of political and economic development of the United States, from mercantilism (by 1856), over social-Darwinist liberalism (by 1933), to the substantial regulation of the economy with a strong collaboration of the financial capital, em-

[83] M. Prélot/J. Boulouis, Institutions politiques et droit constitutionnel, 11-e éd., Paris 1990, 207 sqq.
[84] Kunz, op. cit., 779 sqq.
[85] C. Schmitt, Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954, 3. Aufl., Berlin 1985, 237 sq.
[86] T. Zivanovic, System of Synthetic Philosophy of Law, Belgrade 1959, 114 sq. (underlined in the original).
[87] Ogg and Ray's Introduction to American Government, by W. H. Young, 11th Ed., New York 1956, 396.

ployers' associations and trade unions, which started with the famous "New Deal".[88] These cornerstones were achieved by building upon meager constitutional provisions entire treatises on the foundational legal and political principles of American life (the so-called "broad construction" of the Supreme Court).[89] In an earlier text we wrote: "Thus, basically, the Supreme Court of the USA is the supreme legal authority of the country, less a guardian of constitutional legality, and much more a protector of the legitimacy of the foundations of civil society."[90]

However, reforming a constitution through customs established by the court is typical only of the United States of America. "The American people" is a racial, ethnic, cultural and religious conglomerate, and fifty federal units have broad legislative authority. Therefore, any emergence of a constitutional issue that could divide the nation into conflicting camps could lead to the dissolution of the country, as shown in the experience of the Civil War between North and South 1861-65. The principal purpose of customary creation of constitutional law, through the work of the Supreme Court, is to be found exactly there: the goal is for all social crises to be solved based on the Constitution, and not in opposition to it. Those instructed into matters openly stress this fact: "No one can read the history of the Court without admiring the immense effect it has produced on the political development of the nation, and without concluding that the nation owes most of its strength to the decisiveness of the Justices to protect the supreme authority of the nation…"[91]

Some forms of **dictatorship** can also lead to constitutional reform.

The institution of dictatorship is one of the greatest inventions of the constitutional law of Ancient Rome, and it is still very much present in more modern times.[92] In the old Republic, the dictator was appointed by the consul for a six-month period, and this person was usually one of the former consuls, when the state of war required so; in relation to this, the dictator was the supreme military commander supplied with royal imperium (*magister populi*) and his strongest power was to pronounce the death penalty, against which there was no legal remedy. It is important, however, that the dictator was not allowed to change old laws, or proclaim new ones. As nicely noticed by Rousseau, who dedicated an entire chapter of his "Social Contract" to dictatorship, a dictator could "silence all the laws" and "do everything but proclaim laws".[93] However, he could not make the Senate and magistrates vanish, because such an action would be the crime of coup against the republican constitutional system.[94] Although they were not allowed to confront the dictator, these bodies of the Republic supervised his actions by their very continuous presence. Therefore, and Rousseau noticed this already, such a dictatorship was **commissarial.** This original form of dictatorship began to fade around 300 BC, because it was becoming subject to people's tribunes and assemblies, and because its six-month term was

[88] H. Ehmke, Wirtschaft und Verfassung, Karlsruhe 1961, 91 sqq.
[89] J. R. Schmidhauser, The Supreme Court as Final Arbiter in Federal-State Relations, Chapel Hill 1958, 28 sq.
[90] M. Petrovic, Revision of the Constitution and Invalidation of Constitutional Provisions as a Means to Change the Constitution, Marksisticke Teme, XII, 3/1988, 49.
[91] Ch. Warren, The Supreme Court in US History, I, 2nd Ed., Boston, Mass. 1947, Preface.
[92] In our view, an unsurpassed legal-theoretic study of dictatorship based on western European laws and doctrines in the historical perspective was given by C. Schmitt, Die Diktatur. Von den Anfängen des modernen Souveränitätsgedankens bis zum proletarischen Klassenkampf, 2. Aufl., München/Leipzig 1928.
[93] Du Contrat social, liv. IV, ch. VI.
[94] Th. Mommsen, Römisches Strafrecht, Nachdruck der Ausgabe von 1899, Berlin 1955, 549 sqq.

getting to short for waging wars outside Italy. Instead of it, the *Senatus consultum ultimum* introduced an institution which is labelled "quasidictatorship" in more recent science.[95] It was originally introduced in 133 BC, during the reign of Tiberius Gracchus, and was enforced up to 40 BC. Its purpose was to destroy internal enemies. The Senate would reach the conclusion containing the formula: "*Videant consules ne quid res publica detrimenti capiat*" (Let the consuls see to it that no harm comes to the Republic) – and confer upon the consuls the protection of state security. Through this conclusion (or by means of the additional act of the Senate) internal enemies would be **outlawed**, and consuls would be authorized to treat them as enemies in the war. "Quasidictatorship", a form of limited dictatorship, is also classifiable under the heading of commissarial dictatorship.

Equally corresponding to this concept we find: the commissaries of west European rulers in the period 16th – 19th century, through which feudal institutions weakened and centralist absolute monarchy strengthened, in other words, through which the contemporary state was being made; the commissaries of the National Convent ("representatives of the Nation") who suppressed counterrevolution and created modern bureaucracy in the decisive period of the French Revolution (1792-95), as they had in their hands the entire administration; the political state of emergency and martial law of the 19th century, which entailed suspension of fundamental constitutional rights; the presidential dictatorship, say accorded with Article 48 of the Constitution of Weimar Republic and Article 16 of the French Constitution, which actually represented a blend of political martial law and power to proclaim extraordinary normative acts (decrees with the effect of Statutes or emergency decrees), which is why one may call this type of dictatorship **extended commissarial dictatorship**. Commissarial dictatorship does not change the valid constitution: it rather creates actual preconditions for the constitution to remain valid. Hence its immense relevance to constitutional law which science, unfortunately, does not fully recognize.

However, Roman law created another type of dictatorship, first emerging with the appointment of Sulla, based on a specific act of 82 BC, for the dictator "*legibus scribendis et rei publicae constituendae*", for an indefinite time period. Not only was this dictatorship unhindered by any legal acts or subject to any control, but it also made its bearer a constitution maker. Using such power, Sulla strengthened the position of the Senate as Rome's government and narrowed down democracy, depriving people's tribunes, among other things, of the right to provide legislative initiative and judge in political trials (*quaestio maiestatis*), at the same time transferring this power to a jury-based court where only senators could be members of this jury; abuse of tribune rights also became punishable. In return, he acknowledged Roman citizenship to all Italics. Believing he had completed his term for restoration, Sulla voluntarily cancelled dictatorship and spent the rest of his life as an ordinary citizen. Equal in terms of legal nature, but quite different in its purpose, was the life-long dictatorship (*dictator perpetuus*) of Julius Caesar, in 45 BC. Caesar, who had been dictator and "*consul sine collega*" before this, strived for a revolutionary change: establishment of a military monarchy – which, it is known, was eventually pulled off by his successors. This genial statesman reinstituted the royal decree with the effect of a legislative act, which was valid as long as the person proclaiming it held

[95] See: Schmitt, Die Diktatur, 3 n.2.

power. We call this type of dictatorship **constituent dictatorship.**[96] Let us mention that, since he has unlimited supreme legislative power, the bearer of this dictatorship does not necessarily need to use the means of a commissarial dictatorship (suspend legislative acts, etc.) in order to accomplish the goal of his dictatorship. Constituent dictatorship is usually legitimized by the fact that the dictator calls a referendum to approve of the text of the constitution that he has made.

Still, dictatorship usually results from **illegal** activities, through a coup d'etat, usually carried out by the army. Substantially, illegal dictatorships mostly match either commissarial (extended commissarial) or constituent dictatorship. We should immediately stress that these can be both **legitimate** and **illegitimate.**

Illegal quasi-commissarial dictatorship was common in 20th century – in Asia, Africa and Latin America. These were, usually, young countries, packed with serious ethnic, cultural-religious, and economic contradictions, with a political class which unscrupulously abused its position, or failed to retain even the most fundamental order, where, for instance, gangs, the mafia or guerillas would flourish. Then the army, as the **only efficient guardian of the constitution available**, would declare dictatorship, remove politicians most responsible for the situation in this period (often in court martial), and, after restoring order and performing the most urgent reconstruction of state bodies and public services, gave power back to civilians. Such a dictatorship is quite certainly legitimate. As rightly put by Mommsen, talking of the end of the Republican Rome: "But if a Government cannot govern, it is no longer legitimate, and the one who has power also has the right to topple it."[97] We could label this dictatorship **conservative**. In all this, before giving over its power, the army can impose the condition that the new constitution be proclaimed – importantly: a constitution in the sense of constitutional laws, and not constitutional decisions. The main reasons for this are: to prevent the restoration of the condition before the coup; formally legalize the coup; award persons who deserved particular merit in the coup. However, in time, this dictatorship can become illegitimate. Such a loss of legitimacy is obvious if it turns out that the old, civilian tyranny was only exchanged for a new, military one. Especially in Africa, successive tyrannies have attempted to become legitimate through the use of the magical word "revolution".

A rare example of the state with frequent conservative military dictatorships, whose legitimacy is unquestionable, though, is Turkey. Modern Turkey is the legacy of the army, and the army took over the function of custodian of constitutional decisions Turkey is founded on. So far, it has managed to defend them from the continual attempts at reversal made by forces deprived of constitutional recognition.

The Ottoman Turkey, along with Germany and Austro-Hungary, was one of the major powers to suffer defeat in the First World War in 1918. After this, the Turkish Empire was divided by the British Empire, France, and Greece; the rest of Turkey remained governed by the Sultan in Constantinople, a mere puppet of the British military command. Pretending he wished to carry out an inspection of the remaining troops, the charismatic leader Mustafa Ali-Pasha, soon to be named "Ataturk" (father of the Turks) by the Grand

[96] Also in: Prélot/Boulouis, op. cit., 129 sq. The term of C. Schmitt (Die Diktatur, 3, 97 sqq., 130 sqq.) "sovereign dictatorship" is too vague.
[97] Th. Mommsen, Römische Geschichte, III, 6. Aufl., Berlin 1875, 93.

National Assembly, was transferred to Anatolia. However, instead of this, on 19 May 1919, in the Black Sea port of Samsun, first unofficially, and then officially aided by the Bolsheviks (Kemal's Turkey would sign a treaty on "friendship and brotherhood" with the Soviet Russia on 16 March 1921), he initiated the national and revolutionary Turkish uprising, aimed against both foreign invaders and the Sultanate. On top of his military success – eventually the entire Turkish national territory would be liberated – there came a political feat, too: Turkish Grand National Assembly convened in Ankara on 23 April 1920 as bearer of constituent power, with Kemal as the Prime Minister. The following year, on 20 January, a provisional Constitution was proclaimed, "The Constitutional Act", and, on 29 October 1923, the Republic was declared. The next day, Kemal was elected President of the Republic. Immediately after this, he took off his marshal uniform and turned civilian. Finally, on 22 April 1924, the Parliament bestowed upon Turkey its first Republican Constitution. However, it was an "authoritarian republic". Kemal's People's Republican Party was the only legal party in the country.

Kemal used his position of undeniable national leader for conducting a series of Europe-oriented, modernizing reforms: Islam was separated from the state, politics, and education, although it remained one of the building blocks of Turkish national consciousness; Gregorian calendar was introduced; the Arabic script was replaced by Latin alphabet; fez and veil were forbidden; equality of men and women was instituted. In 1937 constitutional amendments introduced six major principles from the program of the People's Republican Party as fundamental constitutional decisions: republicanism, nationalism, populism, etatism, secularism and reforms. Kemal was successful in another diplomatic matter: on 9 February 1934 he concluded a treaty with Yugoslavia, Romania, Greece, and Bulgaria – the Balkan Pact – where he ensured that Turkey would be granted the status of a Balkan, therefore also European country.

Following World War Two, with a partial liberalization, multi-party pluralism was allowed, too. For the first time after Kemal's death in 1938, a very capable, charismatic statesman Adnan Menderes rose to power. At the first multi-party elections, in 1950, his Democratic Party won over People's Republican Party. The fact that as the Prime Minister he started changing strict Ataturk's course to Islam and national minorities would ultimately cost Menderes his power, and life. The new position on Islam secured him a lot of popularity among the peasantry, a layer faithful to Islamic fundamentalism. However, for all these reasons, Kemalists decided to remove him at any cost. In April 1960, major antigovernment student demonstrations started, to which the Government responded on 1 May by proclaiming state of emergency in Istanbul and Ankara. While part of military commanders backed up the Government, decisive in this conflict would be the threat of the former President of the Republic and Kemal's collaborator Inönü that "an oppressive regime can never be safe from the army". The army toppled the Government and President of the Republic on 27 May 1960, and also dismissed the Democratic Party. A court martial, before which the accused had no right to defend themselves, sentences Menderes to death. (Today, this first Turkish democratic leader rests in a mausoleum in Istanbul).

The new Constitution was passed quickly – on 9 July 1961, although military dictatorship based on People's Republican Party ceased only in October 1965. This constitution contained certain measures against unlimited party democracy. Another house of the Parliament was instituted, the Senate of the Republic, with elected, appointed, and life-time

members; the last group included the former Presidents of the Republic and heads of the 1960 "revolution". Constitutional Court was also introduced as a new institution.

After a failed attempt at a new coup d'etat with "guided democracy", which started in 1971 and consisted in the army appointing governments from within the members of the Parliament, not interfering further in their work, i.e. acting as a "parliamentary monarch" (and this failed because the two strongest parliamentary parties protected extremism, the Party of Justice – which succeeded the Democratic Party – vouched for right-wing extremism, and the People's Republican Party – safeguarded left-wing extremism), which brought the country to the verge of complete anarchy, on 12 September 1980, there was another coup. The dictator, General Kenan Evren, proclaimed as a program of the new regime restoration of civil order, national unity and secular state based on social welfare and human rights.

The Constitution, approved at the 7 November 1982 referendum, did not allow for the Senate of the Republic any more. The Parliament was once again the single-house "Turkish Grand National Assembly". However, the National Security Council, indeed a military junta (Chief of General Staff, commanders of the army, navy and aviation, and the general commander of gendarmery), was extended so as to admit civilian politicians. This body was superior to the Council of Ministers in "measures… indispensable for the preservation of survival and independence of the state, integrity and indivisibility of the country, and peace and security in the society" (Art 118, Par 3 of the Constitution). Again, Article 4 of the Constitution forbids (even a draft of) the change of provisions that Turkey is a republic, provisions pertaining to the principles of the system (including the entire ideology of the Preamble), to the unitary nature of the country, to the flag, the anthem, the fact that Turkish is the only official language and that the capital is Ankara. We have shown that constitutional provisions forbidding the change of constitutional decisions and laws cannot be legally binding for the body that revises the constitution. However, the provision from Article 4 of the Turkish constitution carries another meaning: it tacitly points to the military authorities as the legitimate custodian of fundamental constitutional decisions.

An illegal dictatorship which corresponds to the type of constituent dictatorship is labelled **Bonapartist dictatorship**.

Both Napoleons, I (1769-1821) and III (1803-73) won unlimited power in a coup, neither of them in order to preserve, but rather to overthrow the constitutional system which was valid at the time. Both sent their constitutions to plebiscitary vote in order to make them legitimate. Later on, they also asked the nation in plebiscites of important constitutional issues. Therefore, these two, very similar, regimes could be labelled **plebiscitary monarchies (empires)**. However, the plebiscites less confirmed the constitutions as such, and more bore out the **charisma** of those national leaders. This is why, after their loss of power, their constitutions also vanished without a trace.

The **6th January dictatorship** of King Alexander Karadjordjevic, which started on 6 January 1929 and ceased with the proclamation of the Constitution of the Kingdom of Yugoslavia, on 3 September 1931, is also a form of Bonapartist dictatorship. The history of constitutional struggles in the Yugoslav Kingdom was marked by the clash between Serbian unitarism and Croatian federalism. In the Constitution of the Kingdom of Serbs, Croats and Slovenes, proclaimed on 28 June 1921, the unitarist option had won, because the majority Serbian nation had been united in all parts of the country, so that this homogeneous Serbian majority managed to outvote Croatian (and other) federalists. In 1928 this was no longer so. After the death of Nikola Pasic, Serbian parties broke down into

smaller organizations, and also the political leader of Croatian Serbs, Svetozar Pribicevic, until recently the pillar of the regime, was in coalition with Croatian Peasant Party since 1927 (later on, furthering his anti-Serbian activities, he would also ally with the Communists). When a Radical Party MP's assassination of Croatian leaders in the National Assembly on 20 June 1928 resulted in the eruption of Croatian separatism, the King declared his 6th January Proclamation, abolished the Vidovdan Constitution and dismissed the Parliament. The Proclamation reads: "Parliamentarism, the political means entrenched in the tradition of My Father, whom I have not forgotten, has remained my ideal too. However, blinded political passions have started abusing it so much, that it now represents a hindrance to any fruitful activity in the country… Instead of strengthening the spirit of national and state unity, parliamentarism – in its current form – starts leading to spiritual chaos and national disunity. My holy duty is to preserve State and National unity by all means. And I will resolutely carry out this duty to the very end." On the same day, Act on Royal Power and Supreme State Administration was passed. It had the properties of a provisional constitution: its Article 2 reads that the King bears all power in the country, including legislative. The same day, Act on Protection of Public Security and Order was proclaimed. Its Article 3, Paragraph 2 forbids and dismisses all political parties with "religious or tribal" distinctions (i.e. national parties). The absolute regime immediately started imposing order and rule of law – the reign was strictly by the law, and numerous Statutes were passed, which had previously been impossible due to the disunity in the parliaments. Major political parties and peasantry accepted dictatorship with relief; its achievements at that period allow us to claim that it could be deemed successful.[98] The only ones to resist, in the form of terrorist activities, were Croatian fascist, the Ustasha, and the Communist Party, which, moving its seat from Belgrade to Zagreb, called for an "armed rebellion" against the "greater-Serbian military and fascist dictatorship".

The September Constitution, as granted by the King, introduced a People's Council of Representatives, with two houses – the Assembly and the Senate. However, Government Ministers were not directly responsible to these two bodies. Yet, here too, as in other Bonapartist regimes, legitimacy was charismatic in nature. After the King's tragic death in France, on 9 October 1934, the incapable Regency and irresponsible military commanders quickly squandered the political legacy of the people's king and pushed the country towards its certain doom.

One should include here the **military government** of the United States of America after World War Two, especially in parts of Germany and in Japan, occupied by the American army. Although the issue here is a military occupation of enemy territories, which is covered by international treaties, the question of military government is still largely a constituent matter. Before us, Carl J. Friedrich also defined the US military government as a kind of "constitutional dictatorship".[99] However, let us add immediately that

[98] See: B. Gligorijevic, King Alexander Karadjordjevic in European Politics (Biography Part III), Belgrade 2002, 181 sqq. It is peculiar that this reputable historian entitled the part of this book dedicated to the proclamation of 6th January dictatorship "Failure of a Personal Regime". To gain a realistic insight into the policy of 6th January dictatorship and circumstances in the country at that time, which is quite different from the image based on well known anti-Serbian and anti-monarchist patterns, one should find the following book very useful: Records from the Sessions of the Council of Ministers of the Kingdom of Yugoslavia 1929-1931, edited by Lj. Dimic/N. Zutic/ B. Isailovic, Belgrade 2002.

[99] C. J. Friedrich, Der Verfassungsstaat der Neuzeit, Berlin/Göttingen/Heidelberg 1953, 688.

this definition is not correct. What he mainly views as "constitutional dictatorship" would correspond to our conception of an "extended commissarial dictatorship". We shall see, however, that the military government is a bit more than that, and that it actually corresponds to the idea of **constitutional dictatorship**, a concept unknown to Friedrich.

The **legality** of the military government in Germany emerges from this country's unconditional capitulation on 8 May 1945 and the corresponding **temporary** cessation of existence of the German state. Politics and science in FR Germany denied the cessation of the state, claiming that indeed FR Germany provided its continuity; this country did not cease to exist because the winning countries that occupied Germany: USSR, USA, the UK and France – did not have any intention of annexing it.[100] However, if a government in a state completely ceases to exist, even for a short while, and the state turns into a "state fragment", then the old state is no more. This is why, in case of Germany, the issue is no longer that of continuity, but of succession. This view was supported by jurists from those countries that occupied Germany.[101] Thus, explaining why International Military Tribunal in Nuremberg was not competent to decide on the criminal responsibility of the German state, the French judge in the court, professor H. Donnedieu de Vabres, stated as a reason for this – the loss of legal subjectivity of the German state due to its unconditional surrender, which resulted in the allies taking over supreme power in Germany.[102] Indeed, the old and more recent history of diplomacy testifies of a number of cases in which a territory was under supreme authority of another country, without becoming its part, without being incorporated into this state. Let us only mention "B" and "C" mandates of the League of Nations as examples.

On 5 June 1945, representatives of four victorious nations, supreme commanders of occupational forces, made public a statement on taking over supreme authority in Germany. Decisions for Germany as a whole were made by the Allied Control Council, gathering the four supreme commanders of allied forces, who had to vote unanimously. After 20 March 1948, this council never convened again. Differences in opinion between the USSR and the western allies had already grown so much that unanimous vote became impossible. However, there is crucial legal importance in Act No. 1 of the Control Council, proclaimed on 20 September 1945, which discontinued national-socialist Statutes. This Act explicitly listed 25 Acts that were abrogated, and added to the list the ban on any injustice or inequality that could stem from "somebody's injury due to race, nationality, confession, or opposition to the National Socialist German Worker's Party and its teachings". Germany was first divided into three, then four occupation zones plus Berlin area (as of 26 July 1945). In each occupation zone supreme authority was in the hands of the allied supreme commander, a military governor, i.e. the head of the military government. Even before the 5 June proclamation such authority had been exercised. Thus in Act No. 5, proclaimed on 31 May 1945, the military government of the United States of America had ordered the dismissal of the National Socialist Party, whose all official positions were closed down as of the moment of proclamation of this act.

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[100] Dahm, op. cit., I, 92 sq.

[101] See, for instance: H. Kelsen, Principles of International Law, New York 1952, 75, 263; G. Schwarzenberger, A Manual of International Law, 5th Ed., London 1967, 215; P. Reuter, Droit international public, 5-e éd., Paris 1976, 174.

[102] Odile Debbasch, L'occupation militaire, Paris 1962, 387 sq.

Legitimacy of military government emerged from its **provisional** nature. From various guidelines and official documents[103] one notices that the main purpose of the military government of the USA in Germany was to prevent the outcome in which Germany would again become "a threat to world peace". However, one of the main means to be used for this goal was to "reconstruct German public life on democratic grounds". Eight conditions for the democratization of the German political regime were listed: 1. It must be acknowledged that all political power comes from the people and must be subject to its control. 2. Those exercising political power must receive their mandate in frequent general elections, that would test their programs and leadership. 3. People's elections must be based on the principle of competition, including at least two effectively competitive parties with their programs and candidates appearing before the electorate. 4. Political parties must be essentially democratic and recognized as free citizen associations that can clearly differ from governmental instruments. 5. Fundamental rights of individuals, including the freedom of speech, freedom of religious affiliation, right to convene, right to political association, and other equally fundamental rights of free man, must be acknowledged and guaranteed. 6. Control of instruments of public opinion, such as radio and press, must be diffuse and protected from state domination. 7. Rule of law must be recognized as the ultimate protection provided to the individual from the self-will of the government. 8. Political decentralization must be carried out.

Along with "denazification", i.e. removal of all relevant National Socialists from public life, there started appointment of the most reputable anti-fascists to positions in the newly-established government bodies. Already in 1946, American military government organized multi-party elections for constituent assemblies in "states" (the term they used for present-day German federal provinces) in their occupation zone: Bavaria, Wurttemberg-Baden and Greater Hesse (in 1947 in the city of Bremen, too). Constituent authority of the newly-elected parliaments was substantial, including matters once within the jurisdiction of the joint German state. However, this "granted" statehood and constituency had for its borderline the absolute primacy of occupational law. German authorities had the right to undertake action only in those cases in which the military government required, allowed something or did not intervene. Military dictatorship was not subject to any legal norm "downwards".[104]

In the first half of 1948, western allies agreed to create one west German state that would encompass the territories of their occupation zones and which could rearm again, contrary to the original intentions of the allies. They decided to take this step eventually due to justified fear they had that there might be a communist invasion from East Germany, a "war for people's liberation", that would soon occur in China, Korea, Vietnam. This is why the Constitution of the Federal Republic, "German Fundamental Law", which came into force on 23 May 1949 in Bonn, was not a mere dictate of military governments, but a true deal between west German political parties and military governors of western powers.[105] The latter had to yield to the Germans in two important respects: First, FR Germany and its Fundamental Law were defined as a "provisional" state and "provisional" constitution – so as not to prejudice the question of German reunification and German

[103] C. J. Friedrich and Associates, American Experiences in Military Government in World War II, New York 1948, Appendices, 381 sqq.
[104] See: K. Hesse, in: Handbuch des Verfassungsrechts, I, 6.
[105] See:Nolte, op. cit., 203. sqq.

eastern borders. This is why the constitution was named "Fundamental Law", not proclaimed by the Constituent Assembly, but by a "Parliamentary Council", whose members had not been elected by the people, but by parliaments of the provinces. Let us only mention that this "provisional nature" of statehood and constitutionality did not only refer to conditions **within,** but also to affairs **outside** the borders of FR Germany, which is why this is a different situation as compared with "provisional" constitutions and states that we have mentioned earlier in this paper. Second, FR Germany was established not as a loose, but as a rather centralized federation. The process in which the military government was discontinued went hand in hand with such a development. The authority of allied military commanders in FR Germany was limited and made much more precise already in the Occupational Statute of 12 May 1949, revised on 6 March 1951. Constituent dictatorship indeed ceased with the approval of the Fundamental Law (also on 12 May 1949),[106] by which act the "correctional, re-educational" role of this dictatorship ended. The treaty signed on 5 May 1955 by FR Germany and three western powers abolished the occupational regime. In accordance with its Article 1, Paragraph 2, FR Germany "has the full authority of a sovereign state over its internal and external affairs".

USTAV I LEGITIMITET
Donošenje, promene i važenje ustava s težištem na pitanju legitimiteta kao jednog od osnovnih pojmova teorije ustava i ustavnog prava

Milan Petrović

Legitimitet ustavotvorne vlasti ovde se ne shvata kao prepozitivni ("prirodnopravni") legitimitet. Već same okolnosti da postoji devet grupa prirodnopravnih teorija i da se, naročito u međunarodnom pravu, "prirodno pravo" danas upotrebljava kao opravdanje samovolje, govore protiv konstrukcije legitimiteta na temeljima tobož "naddržavnoga" prava. Legitimitet ima za nas empirijski te prema tome alternativan karakter. Za nas je s toga u osnovi najispravnija teorija M. Weber-a o tri vrste legitimiteta vlasti: tradicionalnom, harizmatskom i racionalnom, kojima bi se mogle dodati još dve: ideja "socijalne pravde" i ideja "opšteg dobra". Za ovo izlaganje od ključnoga je značaja razlika između ustava kao mnoštva ustavnih zakona i ustava kao ukupnosti ustavnih odluka (C. Schmitt), to jest principa na osnovu kojih se konkretizuju legitimišuće ideje. Ustavne odluke opredeljuju identitet ustava; dok one ostaju iste i ustav je isti, bez obzira na promene određenih ustavnih zakona. Ustavna reforma je odstranjivanje do tada važećeg ustava u celini ili delimično, pri čemu ustavotvorna vlast ostaje ista. Potreba ustavne reforme nastupa najčešće usled involucije ustava – sve produbljenije ustavne krize čiji je mogući kraj akciona nesposobnost države kako u unutrašnjim tako i u međunarodnim odnosima. Do ustavne reforme mogu voditi i određeni vidovi diktature. Pošto je diktatura i inače jedna od žarišnih tačaka ustava i legitimiteta, njenom poimanju posvećen je zamašan deo ovoga rada.

Ključne reči: *ustav, legitimitet, ustavotvorna vlast, ustavni zakoni, ustavne odluke, suverenitet, revizija ustava, ustavna reforma, diktatura*

[106] J. Abr. Frowein, in: Handbuch des Verfassungsrechts, I, 32, 57.