A View on the Customs and the Constitutional Conventions as Subsidiary Sources of the Constitutional Law

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Abstract *The aim of this research article is "developing the topic" which is being analyzed. The treated issues in this research article, with constitutional – juridical thematic, lay and focus in analyzing the customs and the constitutional conventions as subsidiary sources of the constitutional law, as a branch of the law, it presents illustrative and concrete examples from the practice of the comparative constitutional law. This article shows special interests, mainly and firstly, in the development of theoretic and juridical – constitutional thought, and also treats professional and applicative issues. The juridical norms, if we use a figure of speech, are "the spinal cord" or "the essence" of the constitutional law as a branch of the law. As a matter of fact, the juridical norms constitute the content of the constitutional law. The juridical norms that regulate the social relations, which compose the object of the constitutional law are called constitutional – juridical norms, and this is how they diverge from the juridical norms that regulate other social relations, which on the other side, are included in other branches of the law (in the administrative law, in the criminal law, in the civil law etc)[1]. The constitutional – juridical norms are juridical sui generis norms (norms of a special kind), that are "regulated or sanctioned by the state" for the juridical regulation of the social relations which are created during the activity of the highest and most important organs of a given state.*

Key words: *juridical sui generis norms, political relations, certain state organs*

1. Introduction

The constitutional – juridical norms, which are comprised in the positive constitutional law of a certain state, from the technical – juridical view are created and expressed in the constitutional acts (as general normative juridical acts that have superior juridical power), like the constitution, the constitutional law, the constitutional amendment or the constitutional annexes, these some examples that regulate the constitutional – juridical matters. There are other juridical normative acts, that have lower juridical power compared to the constitutional acts, but that regulate issues in the field of the constitutional law: certain legal acts, the regulation for the work of the certain state organs (parliament, government, constitutional court), the decisions of the constitutional courts etc. The constitutional – juridical norms are the most important norms in the juridical system of a state.

These norms are important because they regulate the fundamental political relations, as a social relations with special and extraordinary worth in the entire complexity of social relations, that are related, mainly, with constituting, organizing and the function of the state power, as well, as the juridical position of

[1] *Dhimo Dhima, The Constitutional law of the Peoples Republic of Albania, Tirana 1963, page 19.*
[2] *Dragan M. Stojanoviç, Ustavno pravo, Nish, 2004, page 3.*

the individuals in a state and in the society which is manifested by assuring and protecting the fundamental freedoms and the rights of the individual and citizen.

1.1 Juridical acts and "contra – constitutionem"

This is why the constitutional - juridical norms have juridical supremacy compared to the other juridical norms. These juridical norms mainly are summarized and included in the constitution as the supreme and fundamental juridical act in the hierarchy pyramid of the juridical acts[2], in order to display and manifest the supremacy of this norms compared to all the other juridical norms. Each juridical norm that disagrees with the juridical and constitutional norms is unconstitutional (contra constitutionem), and as a result, is worthless, that is why that juridical norm must be removed (with ex nunc or ex tunc) [3] by the justice institutions, by constitutional courts[4] and all the juridical consequences in the field of social relations must be discussed. The norms of the constitutional law as branch of the law are displayed both in written form and in the unwritten form. The written juridical norms are denominated as "primary or formal sources". The unwritten rules that may be half-juridical or extra-juridical are denominated as "secondary or subsidiary sources" [5]. The primary or formal sources of the constitutional law are the general normative acts, that are expressed in the written form and that have a supralegal juridical power which regulate the constitutional – juridical matters, as well, as they are integral part of the positive national law.

This normative acts are used to regulate the constitutional – juridical matters, that can be formed as a result of the volition of the state organs, that are legitimated by the Constitution as authority subjects and that are the juridical base for the construction and the function of the constitutional order in a given state. Concerning the subsidiary or secondary sources of the constitutional law, they are half-juridical (non-juridical and unwritten) sources, that are applied in a given state as an alternative, only in the cases of juridical gaps, when there are no formal sources of the constitutional law, when there are lacks of norms and juridical acts in the written form that have constitutional - juridical nature. Like the formal or primary sources, the subsidiary or secondary sources of the constitutional law may differ. The most popular formal sources are the constitutional acts, concerning the subsidiary sources that are custom popular are the constitutional customs and the constitutional conventions[6].

1.2 Constitutional Law and Albania Fundamental Statute

The constitutional acts are the formal and the most important source of the constitutional law, because they have superior juridical power compared to all the other juridical acts. The constitutional acts regulate the most important issues of constitutional – juridical matters, like organizing the state power and the freedoms and the fundamental freedoms and rights of the individuals. These acts are displayed in different forms and denominations like Constitution (or another juridical act like "The Fundamental Statute" in Albania since 1914), constitutional law, constitutional amendment, constitutional annex etc[7]. The Constitution as a juridical written act, never displays a perfect document, that is complete and has no defects, or that is clearly formulated without ambiguities, and that is precise and well defined. This is why the constitutional customs

[3] *Citation from Dr. Kurtesh Saliu, The constitutional law (E drejta kushtetuese), Prishtinë, 2004, page 198 – 200.*

[4] *For more inf. Consult the sources of the constitutional law Dr. Kurtesh Saliu, E drejta kushtetuese, Prishtinë, 2004, page 163 – 200; Dr. Kristaq Traja, Drejtësia Kushtetuese, Tiranë, 2000.*

[5] *For more inf. Consult the sources of the constitutional law see: Dr. Pavle Nikoliç, page 22 –29.*
Dr. Kasim Trnka, page. 14 – 18; Dr. Kurtesh Saliu, page 35 – 44; Dr. Luan Omari, Dr. Aurela Anastasi, page 14 – 22.

[6]. See : Dr. Svetomir Shkariq, cit. at page 17 – 18

[7] Dr. Kurtesh Saliu, cit. at page 37

and the constitutional conventions are considered as a subsidiary or a secondary source of the constitutional law[8].

2. Literature Review and Hypotheses

From an historical perspective, the customs and the constitutional conventions are older sources of the constitutional law than the Constitutions and the laws as formal sources. Until the XVIII century, the constitutional customs were the main sources and a dominant way for the regulation of the constitutional – juridical matters, this customs may exist even nowadays in countries like England, where the major part of the relevant constitutional institutions (state institutions)[9] are regulated with constitutional customs[10]. After the presentation of the first written constitutions and after the evolvement of the juridical modern systems with formal sources, the customs lost their importance as a source of the law in general and especially as a source for the constitutional law. The customs are a main source of the law in general and especially of the constitutional law[11] only in the countries where radical changes do not happen, where there are no frequent changes of the social relations for long periods of time (duly this are countries with e stable and consistent juridical system) for instance, in countries like England and in the countries which have formed their juridical system under the influence of the specific Anglo-Saxon juridical tradition (Common law legal system). On the other side, the countries that accepted and that apply the European continental juridical system (Civil law legal system), the customs are considered as a subsidiary or as a secondary source.

*H 1. The countries (that apply Civil law legal system), want to consider the customs as a source of the constitutional law, must fulfill two conditions: **first**, when there are gaps in the Constitution or in another formal source (in the written form) of the constitutional law.*

For instance, if an important constitutional issue is not regulated neither by the constitution neither from another formal source (in the written form) of the constitutional law.

*H 2. The **Second** condition to fulfill is that the custom must not disagree or be against the principles of the constitutional order in power*[12].

The customs in general and the especially the constitutional customs are based in respecting a given conduct (longa consuetudo) that is followed by the conviction that the conduct is also "juridical obligation" [13]. There are two elements that constitute a constitutional custom: 1 the external element (material) and 2 the internal element (psychological). The constitutional custom is made from the precedents (frequent repetition) and from the consciousness to behave in a certain manner (opinio iuris sive necessitatis). According to this practice, the standard and constant behaviors repeated in longer periods of time turn into customs under the action of material and psychological factors.

H 3. The material factor is the frequent repetition (regular and continuous) that displays and testifies the existence of a general practice, which was accepted as fair.

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[8] Dr. Miodrag Joviçiç, *O ustavu*, Beograd, 1977, fq. 253.

[9] Constitutional institutions are all the state bodies, in the Constitution there are provisions that define their building, competences and functioning.

[10] Dr. Jovan Stefanoviç, *Ustavno pravo*, Zagreb, 1956, page 8 – 9. Dr. Kasim Trnka, *Ustavno pravo*, Sarajevo, 2000, page 18.

[11] Dr. Kasim Trnka, Ustavno pravo, Sarajevo, 2000, page 18.Dr. Arsen Baçiç, Ustavno pravo i politiçke institucije, Split, 2006, page 19.

[12]. Dr. Arsen Baçiç, Ustavno pravo i politiçke institucije, Spleit, 2006, page 19; Dr. Nurko Pobriç, Ustavno pravo, Mostar, 2000, page 16.

[13] Dr. Nurko Pobriç, Ustavno pravo, Mostar, 2000, page 16.

The subjective factor is the consciousness that by acting or not acting in a given manner in given circumstances is acceptable by the custom rules. When these two conditions are fulfilled simultaneously they show and testify that a practice is transformed into a constitutional custom[14]. At this point the constitutional customs display social unwritten rules which can regulate issues from the constitutional - juridical sphere[15]. In the major part of the democratic countries, the constitutional custom can be taken under consideration in two cases. The first case – when there are no provisions in the constitution neither in another formal (written) source that can regulate an issue partially or completely determined by the constitutional - juridical matters. The second case – when in the provisions of the constitution or of another formal source a constitutional – juridical issue is partially or completely not clear, when it is not treated properly or enough, in order to express the contain of the constitutional written norm.

The constitutional customs can contribute to make clear the volition of the constitution-maker and to avoid further ambiguities in the formal and written source, it also eases the implementation of the constitution or any other formal source. In both cases the repetitive and continual behavior within a long period of time may create the conviction that acting in a given manner in given circumstances creates also the conviction to behave in a given manner in a state organ or in any other political subject[16]. We can conclude by saying that the constitutional customs play a double and auxiliary role, their role can be expressed in two main directions: in the concretization or in clearing the meaning of a written norm, and in the enrichment of the written constitution or of another formal source, in case of juridical gaps and of course when the constitutional custom isn't against the principles of the constitution or of another formal source (secundum constitutione et praeter constitutione)[17].

2.1 An overview of the historical developing of constitutional stable system

This is important especially for the countries that have a very short and generalized constitution, that have an aged constitution and a constitutional stable system, for instance U.S.A, Switzerland, Belgium, Sweden, Norway etc[18]. It is important to give instances. Some of them are: members of the Congress, more precisely of the Chamber Representatives that must reside in their electoral area (while the Constitution requires that the candidates must be citizens of the country where they want to be elected); the president must appoint in the Cabinet representatives of the most important regions of the U.S.A (even though in the Constitution there are no provisions relevant to this issue); the Cabinet as a consultative organ, as a counseling organ that is made from the Department Chiefs (The Constitution does not recognize The Cabinet as a constitutional - juridical institution); not allowing the members of the presidential Cabinet to speak in the séances of the Assembly Chambers of the U.S.A (even though it is not regulated in the Constitution); in the European Parliamentary Monarchies[19]

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[14] Dr.. Miodrag Joviçiç, cit at., page 253 – 254.

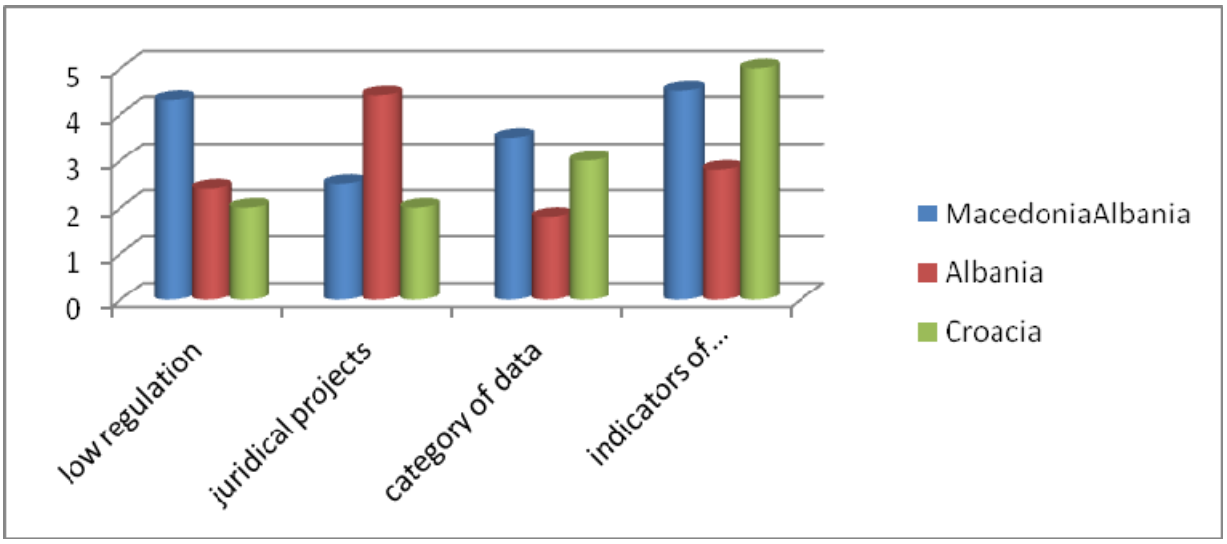
[15] Dr. Kurtesh Saliu, cit.at, page 40.

[16] Dr. Josip Sruk, Ustavno Uregjenje Socijalistiçke Federativne Republike Jugoslavije, Zagreb, 1976, page 6; Dr. Branko Smerdel, Dr. Smiljko Sokol, page 20.see: Dr. Arsen Baçiç, Ustavno pravo i politiçke institucije, Split, 2006, page 19.

[17] See: Dr. Arsen Baçiç, Ustavno pravo i politiçke institucije, Split, 2006, page 19

[18]. Dr. Kurtesh Saliu, page 40.

[19] Parliamentary monarchy – the reignition of the state, which is characterized by choosing the chief of the state on the principle of the power heritage, and the "essential role of the parliament within the that sort of governing a state" – for more inf. Consult Palriamentary Democracy – citated by Dr. Arsim Bajrami, Demokracia Parlamentare, Prishtinë, 2005, page 84.



Tab1. The indicators and retroactive effect of low

(Denmark, Norway, Sweden, Belgium and Holland) the monarchs never use the right of the suspensive veto, even if it is foreseen by their Constitutions; in France the constitutional customs are created under the influence of the France Constitution of year 1875, especially not using the right of the Chief of the Republic to dissolve the parliament and the right to the suspended veto relevant to the approved laws from the parliament (even though this authorizations were according to the Constitution), also preventing the retroactive effect of laws (that is not part of the Constitution of 1875) [20]; in Switzerland the Federative Council reflects the number of the members of three linguistic communities (it isn't required by the Constitution); in Bosnia and in Herzegovina the six members of the of the Constitutional Court of Bosnia and Herzegovina, which are chosen from the parliaments of the ethnics of Bosnia and Herzegovina, will be chosen in order to put the ethnical balance "of the people that constitute", in the Constitutional Court (two Bosnians, two Croatians and two Serbians)- even though this is not expressed in the Constitution in power of Bosnia); the Chairman of the Council of Ministers in Bosnia and Herzegovina must belong to different ethnic parts every new mandate- the rotation- (this is not formally regulated in the Constitution) [21]

2.2 The principles and ethnical culture communities

In both cases, of Switzerland and of Bosnia and Herzegovina its treated the principle of equality in the democracy that "forbids the people to dominate on other people" by creating a consensual mechanism that would diminish the possibility of the ethnical communities to become "a majority". This is a principle for the countries with heterogenic ethnical culture or that are multiethnic [22]. There is no doubt that the implementation of the constitutional customs depends on the constitution-maker organ that can also in the juridical aspect sanctioned the existence and their implementation or that can categorically suspend the existence and the implementation, or can have a neutral position. For instance, The Grand Popular Assembly of Turkey, during the rule of Kemal Ataturk, interdicted wearing the fez as a "non-civil custom".

But the constitution-maker may have a dualist attitude to the custom: firstly, respect the existence of the custom and secondly violate the existence of the custom. For instance the U.S.A for more than 140 years

[20] *Dr. Miodrag Joviçiç, page 255 – 259; Dr. Kasim Trnka, page 81; Dr. Svetomir Shkariq, page 46 – 47.*
[21] *See : Dr. Kasim Trnka, page 18 – 23 and 46 – 49.*
[22] *See : Anali Pravnog fakulteta u Beogradu - Časopis za pravne i društvene nauke, nr. 2/2005, Vojislav Stanovçiç, Demokratija i Vladavina Prava, page 55 – 56.*

respected the constitutional custom of not electing the same candidate for president more than twice. This constitutional custom was not violated from any American president, except the president Frenklin D. Ruzvelt which candidate for the third time in 1940 and in 1944 for the fourth time. In 1951 the constitutional-maker legitimated this constitutional custom, and transformed it in a constitutional written norm in Amendment XXII in the Constitution of the U.S.A: - *"No person shall be elected to the office of the President custom than twice"* [23]. It is important to mention the fact that this constitutional norm written since 1951 and in power until nowadays is still respected.

2.3 Constitutional – juridical practice and functional duties

When the constitution-maker is not satisfied with a given constitutional custom, can regulate and adapt that custom in order to implement it. During the constitutional – juridical practice in the Croatian Constitution in 1990 was amended a constitutional custom, because there was a juridical gap relevant to the incompatibility of exertion of two functional duties as a depute and as a minister. By sharing the state power, the ministers had the possibility to be elected as deputies of the Assembly.

3. Conclusions and Recommendation

This constitutional custom was implemented until the Law for the election of deputies in the Parliament (Sabor) of Croatian Republic sanctioned the institute of the incompatibility, by anticipating in article 6 that *"a depute can't be a chairman, vice-chairman, minister and member of the Croatian government…"*[24]. The Prime-Minister (James Callaghan) refused the demand for the resignition of the gouvernment and constated that the convent for minister responsabilities is vis major[25]. The Chamber of Regions accepted this interpretation and the convent was created with a new exception[26]. To conclude we can say that: the constitutional conventions are not juridical norms, but they have constitutional nature in their content, this is why the convents are treated as subsidiary sources of the constitutional right. The constitutional convents differ from the constitutional customs for three reasons. Firstly, the constitutional convents are implemented only under the activity of the crucial and most important state organs – parliament & government, the constitutional customs are implemented broadly in the whole constitutional – juridical – matters. Secondly, the constitutional convents have lower influence compared to the constitutional customs because they are not enforced or recognized by the courts, in fact, their application depend from the will of the state organ that is addressed the constitutional convention. Thirdly, the constitutional conventions are extra-juridical rules (non-legal rules) that are more dynamic and flexible than the constitutional customs because the convents can be changed easily.[27]

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Parliamentary monarchy- the reignition of the state , which is characterized by choosing the chief of the state on the principle of the power heritage, and the "essential role of the parliament within the that sort of governing a state" – for more inf. Consult

[23] *See: Dr. Miodrag Joviçiç, page 261.*

[24] *Dr. Branko Smerdel, Dr. Smiljko Sokol, Ustavno pravo, Zagreb, 2006, page 20.*

[25] *Vis maior (supreme power).*

[26] *Dr. Branko Smerdel, Dr. Smiljko Sokol, Ustavno pravo, Zagreb, 2006, page 70.*

Palriamentary Democracy- citated by Dr. Arsim Bajrami, Demokracia Parlamentare, Prishtinë, 2005, page 84. Dr. Miodrag Joviçiç, vep. e cit., 255 – 259; Dr. Kasim Trnka, page 81; Dr. Svetomir Shkariq, page 46 – 47.

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Dr. Kasim Trnka, page. 14 – 18; Dr. Kurtesh Saliu, page 35 – 44; Dr. Luan Omari, Dr. Aurela Anastasi, page14 – 22

Dr. Miodrag Joviçiç, page 255 – 259; Dr. Kasim Trnka, page 81; Dr. Svetomir Shkariq, page 46 – 47.

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(Kristo Floqi, E drejta themelore, Shkodër, 1920),while in 1920-1924 as "The constitutional law" (Stavro Vinjau, E drejta konstitucionale, Tiranë, 1923). – cited by Dr. Luan Omari, Dr. Aurela Anastasi, E drejta kushtetuese, Tiranë, 2008, pg. 10 – 11.

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