TEME, Vol. XLIX, Nº 3, July – September 2025, pp. 567–580

Original research paper https://doi.org/10.22190/TEME240729038P
Received: July 29, 2024 UDC 342.4:316.32
Accepted: September 24, 2024 342.22:316.32
342.1:341

THE CONSTITUTION IN LIGHT OF THE GLOBALISATION OF NATIONAL LAW

Irena Pejić*

University of Niš, Faculty of Law, Niš, Serbia

ORCID iD: Irena Pejić https://orcid.org/0000-0002-0722-2373

Abstract

The issue of constituent power in the current phase of the international community's globalisation can be considered in two aspects. First, one can consider whether the constituent power loses its legitimacy, i.e., becomes fictitious due to the creation of the so-called global norms (in which case the constituent power is entirely reduced to the normative expression of a formal constitution, devoid of genuine power). Second, one can consider whether there is a threat to national sovereignty, as this process indicates a creeping loss of competence of national states and their constitutional bodies. In the context of sovereignty, the traditional constitutional role of constituent power as a constituent subject of the state is also re-evaluated. It is increasingly discussed as 'diffused and relativised, decentralised and fragmented,' contributing to the theory of global constitutionalism. However, the assertion that the constituent power can be nullified due to the influence exerted by international legal sources is untenable. Under these conditions, it is possible to reconsider the understanding of the relationship between constituent power and international law.

Key words: constituent power, constitution, globalisation, international law.

УСТАВ У СВЕТЛУ ГЛОБАЛИЗАЦИЈЕ НАЦИОНАЛНОГ ПРАВА

Апстракт

Питање конститутивне власти у савременом процесу глобализације међународне заједнице може бити посматрано са два аспекта. Прво, можемо разматрати да ли конститутивна власт губи легитимитет, односно да ли она постаје фиктивна због стварања тзв. глобалних норми (у ком случају конститутивна власт је у потпуности сведена на нормативни израз формалног устава, лишеног стварне моћи). Друго, можемо разматрати да ли је савремени процес претња националном суверенитету, јер он указује на пузећи губитак надлежности националних држава и њихове уставотворне власти. У контексту суверенитета, треба преиспитати тра-

* Corresponding author: Irena Pejić, University of Niš, Faculty of Law, Trg kralja Aleksandra Ujedinitelja 11, 18105 Niš, Serbia, irena@prafak.ni.ac.rs

диционалну улогу уставотворне власти као конститутивног субјекта државе. О њој се све више говори као о „дифузној и релативизованој, децентрализованој и фрагментисаној“, што доприноси ставовима у оквиру теорије о глобалном конституционализму. Међутим, неодржива је тврдња да се уставотворна власт може поништити због утицаја који врше међународни правни извори. У тим условима може се преиспитати разумевање односа између конститутивне власти и међународног права.

Кључне речи: уставотворна власт, устав, глобализација, међународно право.

INTRODUCTION

Understanding the constitution from the perspective of globalisation requires various approaches that include modern conceptions of national sovereignty and the significance of international norms for national legal systems. Changes in the understanding of sovereignty have led states to no longer see themselves as entirely independent units, but as part of a broader system within the international community. Based on this, there has arisen a need to reassess how constituent power functions and how it attains its legitimacy. Firstly, the traditional concept of sovereignty as absolute power within the territory of a state has been significantly corrected by international norms and agreements that limit the actions of states. This 'pooled' or 'shared' sovereignty, where states voluntarily limit their sovereignty by entering into international agreements, must somehow be reconciled with the traditional role of constituent power. Secondly, the increasing influence of international norms on national legal systems necessitates a re-examination of the relationship between international and national law. While international law initially functioned as an external constraint on the state, it is now increasingly integrated into national legal orders. This process of integration raises questions about the role of national constitutions and constituent power in ensuring the implementation of international norms in accordance with national legal traditions and democratic principles.

The question of constitutional legitimacy and the ability to implement the power of the people, the traditional general will (*volonté générale*), in accordance with the original principles of state sovereignty arises again in the modern state. The adoption of the first constitutions is represented in theory as the initial act of constituent power, which should functionally justify the existence of a national community and its identity. However, in contemporary conditions of globalisation, the traditional function of the constitution is retained only in a procedural sense.[1]

[1] B.N. Son says "The world is globalizing constitutionally." Also, he quotes prof. Sarah H. Clevelend who "describes the U.S. Constitution as an 'international constitution' in the sense that the U.S. Supreme Court cites international sources in its constitutional interpretation" (Son, 2017, p. 463);

The constituent power retains the role of the constituent power solely to provide a normative framework for the functioning of the state. The substantial aspect of creating the legal order has gradually changed, significantly weakening under the conditions of the constitutionalisation of international law and the globalisation of the international order. The original function of constituent power, embodied in the 'creation' of the constitutional order, ceased to be *in rerum natura* of constitution-making, as the constitution is now created by 'borrowing' legal solutions considered tested and acceptable where there has long been practice in their application.

The dilemma is arising in modern times and is likely to be the subject of discussions in both constitutional and political theory in the twenty-first century.[2] The national coordinates within which constituent power operated, relatively stable and without significant shifts for two centuries of civic constitutionality, have significantly changed under the influence of new currents of constitutionalisation at the international, supranational, and inter-state levels. Hence, two questions are posed here: what happens to constituent power when it exhausts its potential in a single instance and enacts the first or new constitutional act of the state, and secondly, does the same power lose its source of legitimacy as it has left it to constitutional bodies to interpret legal principles and create the so-called living constitution. The need arises to re-examine the originality of constituent power, not only in the initial phase when enacting the first constitution but also its power in conditions where a global framework prevents the creative ability of its original function. Although international sources are hierarchically below the constitution in the national order (although there are examples where they have constitutional rule strength), they determine legislative policy and the dynamics of legislation, and can even go against the original intent of the constituent power. It can so happen that international legal sources, even when this is not a formal constitutional assumption, lead to constitutional changes to regulate a specific area of social relations in a 'globally' acceptable manner. This greatly contradicts the traditional view (Sieyès, [1789] 2003) that every nation is entirely free from any formal constraints regarding the establishment of its state order. Contrary to the traditional view, today, necessary corrections in the process of constitutionalising the state are highlighted as a consequence of the loss of decision-making power of constitutional bodies, with real decisions being made elsewhere. On the other hand, these new 'decision-making powers,' such as international institutions, suffer from a lack of legitimacy and

[2] G. Teubner adds impulses from constitutional sociology to the debate about nation-state constitution vs. global constitution. According to him "... the constitution is too important to be left to constitutional lawyers and political philosophers alone. In opposition to the two sides of the debate, a third position must be staked out – and not just a middle position – that casts doubt on the premises of the first two and formulates the new constitutional question in a different way" (Teubner, 2012, p. 3);

mechanisms for their control (Archibugi, Held, Köhler, 1998, p. 229). This seriously questions the values of the rule of law, primarily the ideal of politics within the bounds of law and the principle of the separation of powers.

CONSTITUTIONALISM IN THE NATIONAL STATE

Unlike the dogmatic understanding of the constitution, which has its formal and material expression, constitutionalisation should be understood as a process in which constitutional values are created and developed. The currents of modern constitutionalism have significantly contributed to emphasising the importance of the constitution as a barrier to arbitrary power in states without a tradition of practicing democratic constitutionality. However, under globalisation, shifts in the theoretical understanding of the constitution have occurred even in systems with a constant development of liberal constitutionality, which found the source of the national constitution in constituent power as the embodiment of everything that represents the history and political tradition of a nation.[3]

Constitutionalism, as the foundation of the civic idea for two centuries, entered a new stage of understanding and re-evaluation after socialism, its main ideological competitor, disappeared from the global scene, and former socialist countries in Europe and the world began adopting traditional patterns of Western constitutionality. The process of constitutionalising the so-called new democracies was 'supervised' and developed under the patronage of international law. Simultaneously, international law experienced a surge as new institutions emerged, including judicial authorities, which were to ensure the realisation of common values in the international order (Krisch, 2010, p. 4).

Following the processes occurring globally, the constitutional state underwent changes that led to the introduction of the 'post-national' state and 'post-national' law in place of the classical national state. In the last decade of the previous century, theory (Habermas, 2001)[4] began to reassess the classical understanding of state belonging, especially issues of 'citizen-

[3] According to Jürgen Habermas, citizens of a nation often use constitutional discourse as a means to "explain the way they wish to understand themselves as citizens of a specific republic, as residents of a specific region, as heirs to a specific culture whose tradition they wish to continue and which they wish to break with, and how they wish to deal with their history" (Habermas, 1992, pp. 1–19);

[4] This perspective is also called 'transformationalist,' as it tries to find a balance between opposing traditionalist views and the idea of a world government. Thus, it speaks of 'international domestic politics' that enjoys democratic legitimacy within the conditions of the global political arena. Some authors (David Held, Anthony McGrew, David Goldblatt, Jonathan Perraton) do not claim that sovereignty has experienced a 'complete collapse,' but rather speak of instruments that lead to the interdependence of state authorities and the conditionality of rights (Held, McGrew, Goldblatt, Perraton, *1999;* Archibugi, Held, Kohler, 1998; Risse, Ropp, Sikkink, 1999; Lynch, 2000);

ship' and 'membership,' given that the ties between citizen and state do not necessarily have to be based on belonging to a national community. Additionally, in modern conditions, the centre of political decision-making is no longer confined to the framework of the national state, so the future of the political community is no longer viewed exclusively through the lens of national state borders (Archibugi, Held, Kohler, 1998, p. 22). National resources for achieving the goals of effective governance have become insufficient, pushing for connections with other states, which, along with the achievements of the global community, lead to the creation of a post-national state.[5]

However, despite the growing need and serious intention to legitimise the process occurring internationally, bearing characteristics of the constitutionalisation of the international community, there are opinions that this process is not yet global. Creating a post-national state is possible only in countries that have developed or, more precisely, exhausted all the advantages of the national state during the eighteenth and nineteenth centuries.[6] The reality is that the rest of the world is still 'battling' to establish national law and the national state, and this rest of the world is territorially and demographically much larger than the developed regions of Europe and America. The constitutionalisation process in these states requires starting from the beginning, i.e., first establishing fundamental constitutional values such as the rule of law, separation of powers, equality, freedom, and the protection of human rights, presupposing stable assumptions of the national state (sovereignty and limited power).[7] Hence, the hypothesis of a post-national state must be viewed through the relationship between the developed centre and the periphery, as the latter still needs to establish national constitutionality with traditional liberal state characteristics. Even if we agree that the process of creating a post-national state in the global community is inevitable and irreversible, it must be admitted that there is still an 'interim space' where political communities and territories do not have developed traditional constitutional values. If the legal order loses the constitution as a distinguishing feature of the 'solar' system and the law as its anchor, the question arises of what has the legitimating basis to replace them in international law and the international order.

[5] Outside the theory of Western civilization, there are opinions that this way of justifying and legitimizing the process of globalization and the justification of the need for a post-national state is the result of the other side of the same process, which is the process of neo-colonial hegemony. This process has ultimately succeeded in enslaving or subordinating not only the political will but also the culture of the colonized states (H. Hanafi, "Globalization between Reality and Delusion", according to Lynch, 2000, pp. 91–101);

[6] There are opinions that these are only OSCE countries and that the theory unjustifiably equates the positions of countries with different levels of development;

[7] The nation-state, based on the Westphalian idea, developed in accordance with the view of territorial sovereignty by Bodin and Hobbes, as well as the views on limited government by Locke and Montesquieu (Hertig, Cottier, 2003, pp. 121-122);

Therefore, there are opinions that in the vocabulary of the post-national it is "easier to explain where we come from than where we are going" (Krisch, 2010, p. 23), indicating that abandoning the traditional understanding of constitutionalism and its values is impossible precisely due to the uncertainty of their future foundation.

RE-EXAMINING TRADITIONAL CONSTITUENT POWER

The inevitability of constitutionalism flows in the modern state and internationally opens the need to re-examine classical theories of constituent power as the original power ensuring the functioning of the state within the boundaries of the law, with the consent of the citizens as the original holders of power. This problem becomes evident in the globalisation process of the international order, where citizens, as power holders, are not called to express themselves, directly or indirectly, on the adoption of rules, yet they are expected to adhere to those same rules. In this sense, two significant questions arise about contemporary trends in the constitutional state: first, the growing 'global constitutionalism,' and second, the defence of 'state constitutionalism' (Dimitrijević, 2015, pp. 230-231). At the first level, the practice and 'law' of supra-national organisations are scrutinised through the basic principles of democracy, while at the second level, the demand for strengthening "the legitimate supremacy of constitutional democracy within the state concerning its territory and citizenry and reinforcing the position of the state as the main actor of international law" is emphasised (*Ibid*).

To reconcile these currents, the idea of 'constitutional pluralism' emerged, which aims to reassess the traditional principles of the constitutional state, such as sovereignty and constituent power.[8] One view is the theory of dualism in the world order, wherein this order consists of an international community of states and a global political community where human rights and global institutions influence the law, politics, and culture of sovereign states (Cohen, 2012, pp. 66-76). This view on the constitutionalisation of global institutions could fit within the framework of constitutional pluralism. In the post-Westphalian era, it is believed, there is no longer mutual exclusivity of people, territory, and jurisdiction as symbols of the "original Westphalian constitutional form" (N.Walker, in Avbelj, Komárek, 2008, p. 8). Emphasising constitutional pluralism marks the beginning of a new constitutional theory that seeks to highlight the characteristics of the modern state, wherein new mechanisms for interpreting con-

[8] Criticism of the so-called state constitutionalism, that is, the original function of the nation-state and its sovereign authority to independently adopt its constitution, is increasingly present. The criticisms address various aspects of constitutionalism, not just the capabilities of the constituent power, hence various responses have been offered pointing to the existence of so-called constitutional pluralism in the modern state (Walker, 2002, p. 321);

stitutional norms arise as a consequence of globalisation in law and judicial practice. Global constitutionalism, as a condition of constituent power's transformation, must be viewed through the lens of the state in order to make necessary 'corrections' in its legal order. However, despite the development of modern constitutionalism, in which constituent power is functionally weakened, the need to preserve the contextual legitimacy of constituent power in the process of constitutional revision must be emphasised.[9] Given the diversity of the international community's evolution towards universalism, the question of constituent power's survival or loss arises, just as it does with the traditional values of the national state (Avbelj, Komárek, 2008, p. 8).

THE INFLUENCE OF GLOBALISATION ON LAW

The sociological perspective on globalisation and its impact on law indicate a process resulting from the economic dominance of major powers (e.g., aid agencies created by powerful systems like the USA, the United Kingdom, or the European Union, as well as UN agencies and even private foundations). National subjects are left to find a way to implement the goal of the global powers, entirely excluding the possibility of defending uniqueness on the periphery, i.e., on the territory of a sovereign state (Teubner, 2012). Compared to the era of colonisation, it could be said that the impact of globalisation has similar implications for law. Thus, the legal act is 'presented' as autonomous, universal, impersonal, superior and transferable from system to system (Halliday, Osinsky, 2006, p. 455). Just as adherence to fundamental principles regarding private property as a sacred right, and similarly to how civil and political rights were considered a reflection of modernity during the Enlightenment, so in the era of globalisation, the fulfilment of certain legal principles is expected as a reflection of rationality and the potential for a state to become part of the global community. Certain studies, both legal and sociological, point to parameters that could ensure legal 'transplantation' from one system to another: (1) if the chosen models are voluntarily adopted after the thorough consideration of alternative solutions, (2) if there is a similarity between the legal systems of the countries being emulated and the 'respected' examples, (3) if the host country itself seeks solutions rather than having them imposed, (4) if legal intermediaries are sufficiently familiar with the law and can adapt it

[9] The meaning of constituent power varies depending on whether it is viewed through the lens of law, politics, or history. A legal examination is what creates the dogma of constituent power, abstracting from time and circumstances, and thus finds itself in a sort of real vacuum. (Pejic, 2018, p. 67) Hence, there arises a need to reconsider constituent power because the constitution-maker is no longer the same as 'the people.' Instead, it is a collection of various political 'powers' that participate in forming the community both within and beyond sensitive political boundaries (Oklopcic, 2012, p. 81);

to local conditions, (5) if there is an established institutional structure that can implement the adopted solutions, and (6) if citizens have some experience with applying legal principles (Berkowitz, Pistorc, Richard, 2003, p. 165). If these conditions are neglected, the 'transplantation' in law will not have a successful outcome. Based on these studies, three waves of legal 'transplantation' are discussed. The first wave resulted from imperialism and covers the period between 1890 and 1914, when there was a significant reception of French and English law in Latin American, Asian, and African countries. The second wave developed after World War II, particularly emphasising the influence of the United States, although their legal model could not simply be adopted, and countries continued to rely on their earlier models. The third wave is a consequence of the collapse of real socialism when many Eastern European countries and former Soviet Union states sought their models in Western European and American legal systems (Berkowitz, Pistorc, Richard, 2003).

CONSTITUENT POWER AND THE GLOBALISATION OF CONSTITUTIONAL PRACTICE

The adoption of the first national constitutions of liberal states represented an expression of the need to ensure not only a legitimising basis but also moral satisfaction for the newly established authorities. Their legitimising framework acquired a 'moral halo' embodied in the constitution adopted by the citizens. The same happened in countries that had undergone revolution and liberated themselves from authoritarian regimes, as the constitution needed to establish the fundamental principles on which the power derived from the revolution was based.[10] Substantively, the declaration of human freedoms in terms of limiting power was set as the primary goal, and the idea of the rule of law and governance by law, even where constitutions were 'granted' by the victors, represented a fundamental value to be strengthened in the process of constitutionalisation.

However, in contemporary conditions of globalisation, the traditional function of the constitution has been retained only in a procedural sense. Constitutions today arise from 'borrowing' legal solutions considered tested and acceptable in so-called traditional constitutional democracies. Therefore, the term 'migration of constitutional ideas' has emerged in comparative constitutional law to explain the processes in modern states when adopting new constitutions (Choudhry, 2006; Schauer, 2005, p 907). One could speak of two directions of 'migration': the first, relating to the aforementioned substantial side of the constituent power, which has been

[10] That happened in Portugal and Spain in the 1970s, and similarly in South Africa, which freed itself from oppressive subjugation and secured freedom for the dominant population.

reduced to adopting legal principles in a 'buffet' model, and the second, concerning the application and interpretation of constitutional norms by regular and constitutional courts, increasingly considering the experience and jurisprudence from comparative systems and the rules of international law. The viewpoint of the 'migration of constitutional ideas' is complemented by the view that states with an established constitutional identity have incomparably stronger barriers in the process of 'borrowing' than those that have failed to build their constitutional identity (Schauer, 2005, p. 907). In this sense, it seems that normative research of the constitutional act (Constitution with a capital 'C') must be replaced by research into constitutional practice (constitution in reality - with a lowercase 'c'), (Law, Versteeg, 2011, p. 1169.). Symbolically, this also indicates an increasing degree of the functional erosion of the constituent power. The process of unification in the domain of constitutions can have its advantages, such as establishing guarantees of human rights, while on the other hand, there are less successful examples, i.e., when 'required' models, such as decentralisation in the vertical organisation of power, are artificially transplanted and cause various outcomes ranging from expected positive to undesirable consequences.

New constitutions adopted in the era of globalisation are uniform – isomorphic, indicating the global influence of democracy, the ideology of human rights, and economic neoliberalism (Go, 2003, p. 71). The constitutions of countries in transition are mostly made 'a la carte' (like a meal composed of different dishes) because legal mechanisms are adopted without considering whether they can function as a whole in a specific legal environment (Elster, 1992, p. 15). Adopting 'tested' solutions, often under the influence of the 'international' factor, constitutions are built from 'ideal' normative constructions which, from a legal theory perspective, cannot be criticised, except that they lack a foundation in social reality. Therefore, such constitutions cannot defend themselves even from minor shocks in political life, let alone withstand serious social shifts.

Another shortcoming within the constituent power framework is the weakening of its functional capacity. Namely, national constitutions under the pressure of globalisation and its processes transfer classic governmental functions, such as the protection of human rights, to a higher level, even to non-state actors who can act 'cross-border, interstate, or internationally.' Hence, the notion of 'compensatory constitutionalism' has emerged as a consequence of the global strategy to 'compensate for deconstitutionalisation' at the internal level (Peters, 2006. p. 580). This has led to national constitutions, founded on traditional principles, becoming dysfunctional because governance and administration are carried out outside or beyond traditional constitutional functions (Peters, 2006). Additionally, there is talk of "multi-level constitutionalism" (Hertig, Cottier, 2003, p. 299), which suggests that all levels of government should be viewed as a whole

and that constitutionalism should focus on ensuring the realisation of constitutional functions, regardless of who will perform them, whether it is the responsibility of national or international bodies. These views point to the functional weaknesses of the constituent power, which lacks the capacity to sovereignly and comprehensively regulate the legal order, as it does not have the power for independent governance and the realisation of the original functions of the nation-state. New levels of decision-making at the interstate or international level have the capacity to limit or set standards for traditional constitutional bodies in exercising their autonomous constitutional competences. International law, which establishes new protection mechanisms and regulates areas directly affecting human rights, has certain mechanisms for controlling constitutional authorities regarding the implementation of international obligations.

The globalisation of practice in contemporary constitutionalism represents a new force that must be taken into account when interpreting constitutional norms. Many examples can be found where courts use comparative jurisprudence during constitutional interpretation. This is significantly evident in the practice of constitutional courts, which are inherently authorised to interpret and apply constitutional provisions. Constitutional courts in the continental system or regular courts in the Anglo-Saxon system have the task of legitimising acts issued by political authorities, legislative and executive. In this sense, the legitimacy framework of public authority and the justification expected from public authority acts can be reexamined (Choudhry, 1999, p. 819). This leads to the question of interpretive fairness, i.e., the interpretation of constitutional norms when the main argumentation during interpretation is sought either in comparative law or international law, and the practice of international institutions. This approach to judicial interpretation is not exclusively characteristic of so-called new constitutional democracies, considered as blank slates into which the achievements of developed democracies are introduced. The same issue is equally relevant in systems with old or 'unwritten' constitutions, where, for example, historical or originalist interpretation (applied by American courts) has its purpose if, after the adoption of the constitution and the passage of time, in addition to the original goals of the constitution-maker, good experiences from other systems are taken as a basis for interpretation, considering the practice and international law (Choudhry, 1999).

Therefore, the influence of globalisation in the domain of constitutional law can be viewed through the lens of legal interpretation by the judiciary, as well as through the actions of political authorities, legislative and executive. In the legislative field, when implementing legislative policy, it has become evident to follow 'trends' in the implementation of certain constitutional legal principles. This raises the question of why it is important to distinguish formal constitutional changes from changes occurring in the process of interpretation by courts and the constitutional court,

as well as in the development through laws enacted by parliament. The answer to this question lies in the principle of popular sovereignty, which should be the cornerstone in a system where the constituent power has its full expression. When developing the so-called living constitution, mechanisms available to the established authorities, legislative and judicial, are used with the aim of developing principles, and even the very idea of the constitution. On the other hand, when a formal constitutional change is made, the contextual legitimacy, i.e., the procedure for revision, is the main expression and confirmation of the sovereignty of the constituent power (Lutz, 1994, p. 357). The constitution should be subject to formal revision whenever conditions are met, i.e., the people as the bearer of sovereignty should exercise their function and should not leave it to so-called extra-constitutional elements to fill legal gaps through interpretation. However, this does not happen in reality because informal revisions allow for the relativisation of the constituent power by introducing new binding rules into national constitutional law, not adopted by constitutional bodies, but implemented during the acceptance of international obligations or through judicial interpretation of fundamental constitutional principles in line with new values in the process of the globalisation of law.

CONCLUSION

The contemporary understanding of law and politics experienced one of its greatest crises at the end of the twentieth century. This dilemma emerged with the latest wave of constitutionalisation, and it can be confidently asserted that it will be the subject of debates in both constitutional law and political theory in the twenty-first century. Specifically, the national coordinates within which constituent power operated, relatively stable and without significant shifts for two centuries of constitutionality, have significantly changed under the influence of new currents of constitutionalisation at the international, supranational and intergovernmental levels. We are talking about post-national constitutionalism, which is a product of the modern age, where the Western model of the constitution prevailed at the end of the last century and then entered a kind of crisis because the international level of decision-making became dominant and influential. On the one hand, national constitutionalism is threatened because decision-making on numerous issues is being extracted from national constitutions and transferred to the level of international institutions. On the other hand, although international law is gaining more importance, its decisions lack a basis of legitimacy, hence there is an attempt to introduce constitutionalism into this sphere of decision-making as well.

The key consequence of the globalisation process on the constituent power is the uncritical adoption of principled solutions, regardless of whether the constitutional bodies are functionally capable of realising them

in a specific social environment. Therefore, constitutional law can no longer be compared solely normatively by comparing constitutional texts but primarily based on the so-called living constitution, as well as the rules of the political game dictated by the actors of political processes. The circumstances under which contemporary constitutionalism operates have considerably limited the power of constituent authorities, and this must be taken into account in the development of the constitutional and legal state. However, despite the functional erosion that has reduced the possibilities of the constituent to 'choose' solutions from comparative law or under the 'patronage' of international institutions, the legitimacy of the constituent authority in the traditional sense has not been challenged nor diminished. Therefore, in the process of constitutional revision, it is necessary to insist on the characteristics of rigidity that are the original features of the formal constitution, and that protect the original holder of sovereignty and constituent authority, even in the newly arisen circumstances. If the reality and the degree of development of the legal state at a given moment are taken into account, we believe it is important to strengthen contextual legitimacy in the process of constitutional revision. The participation of citizens, first in a broad public debate about the act of changing the constitution, and then in making a referendum decision, must be the central pillar in strengthening the contextual legitimacy of constituent authority within national frameworks.

REFERENCES

Avbelj, M., & Komárek, J. (2008). Four visions of constitutional pluralism. *European Constitutional Law Review*, *4*(3), 524-527.

Archibugi, D., Held, D., & Köhler, M. (1998). *Re-imagining political community: studies in cosmopolitan democracy*. Stanford University Press.

Berkowitz, D., Pistar, K., & Richard, J.F. (2003). "Economic development, legality, and the transplant efect". *European Economic Review.* 47. 165 – 195.
https://doi.org/10.1016/S0014-2921(01)00196-9

Cohen, J.L. (2012). *Globalization and sovereignty – Rethinking Legality, Legitimacy and Constitutionalism.* Cambridge University Press.

Choudhry, S. (1999). Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation. *Indiana Law Journal.* 74. 820-892.

Choudhry, S. (ed.). (2006). *The Migration of Constitutional Ideas.* Cambridge University Press.

Go, J. (2003). A Globalizing Constitutionalism? - Views from the Postcolony, 1945-2000. *International Sociology.* 18(71). 71-96.

Grimm, D. (2010). The Achievement of Constitutionalism. In M.Loughlin, J.P.McCormic, N.Walker, eds., *The Twilight of Constitutionalism?*. Oxford Constitutional Theory, Oxford University Press, 3-23.

Dimitrijević, N. (2015). Constitutional theory in times of crisis: Power, law and morality. *Philosophy and Social Criticism.* 42(3). 227-245.

Elster, J. (1992). Making sense of constitution-making. *East European Constitutional Review*. 1(1). 15-17.

Habermas, J. (1992). Citizenship and National Identity: Some Reflections on the Future of Europe. *Praxis International*. 12(1). 1–19.

Habermas, J. (2001). *The Postnational Constellation: Political Essays*. Cambridge, MA: MIT Press.

Halliday, T.C., & Osinsky, P. (2006). Globalization of Law. *Annual Review of Sociology*. 32. 447-470.

Held, D., McGrew, A., Goldblatt, D., & Perraton, J. *(1999). Global Transformations: Politics, Economics and Culture, Stanford University Press.*

Hertig, M., & Cottier, T. (2003). The Prospects of 21st Century Constitutionalism, In U. Marti & G. Kohler (eds.), *Konturen der Neuen Weltordnung: Beiträge Zu Einer Theorie der Normativen Prinzipien Internationaler Politik*. De Gruyter. 120-162.

Krisch, N. (2010). *Beyond Constitutionalism: The Pluralist Structure of Postnational Law.* Oxford University Press.

Law, D.S. & Versteeg, M. (2011). The Evolution and Ideology of Global Constitutionalism. *California Law Review*. 99. 1163 – 1258.

Lutz, D.S. (1994). Toward a Theory of Constitutional Amendment. *American Political Science Review*. 88. 355–70.

Lynch, M. (2000). Globalization and International Democracy. *International Studies Review*. 2(3). 91–101.

Oklopcic, Z. (2012). Constitutional (Re)Vision: Sovereign Peoples, New Constituent Powers, and the Formation of Constitutional Orders in the Balkans, *Constellation*. 19(1). 81–101.

Pejić, I. (2018). Ustavna revizija: procedura u kontekstu ustavotvorne vlasti. (Constitutional Revision: Procedure in the Context of Constituent Power). *Zbornik Radova Pravnog Fakulteta u Nisu*, (*Collection Papers Fac. L. Nis*). (80). 65-84.

Peters, A. (2006). Compensatory constitutionalism: the function and potential of fundamental international norms and structures. *Leiden journal of international law*, *19*(3), 579-610.

Risse, T., Ropp, S.C., & Sikkink, K. (1999). *The Power of Human Rights: International Norms and Domestic Change*. Cambridge University Press.

Schauer, F. (2005). On the Migration of Constitutional Ideas. *Connstitutional Law Review*. 37. 907-919.

Sieyès, Emmanuel Joseph. (2003). 'What is the Third Estate?' [1789], *Political Writings*. Hackett Publishing Company. Inc.

Son, B. N. (2017). Globalization of constitutional identity. *Washington International Law Journal*, *26*, 463-534.

Teubner, G., (2012). *Constitutional Fragments: Societal Constitutionalism in the Globalization*. Oxford University Press.

Walker, N. (2002). The Idea of Constitutional Pluralism. *The Modern Law Review*. 65(3). 317-359.

УСТАВ У СВЕТЛУ ГЛОБАЛИЗАЦИЈЕ НАЦИОНАЛНОГ ПРАВА

Ирена Пејић
Универзитет у Нишу, Правни факултет, Ниш, Србија

Резиме

Разумевање устава из перспективе глобализације захтева различите приступе који укључују модерно схватање националног суверенитета, као и значаја међународних норми за правне системе националних држава. Промена у схватању суверенитета довела је до тога да државе више не виде себе као потпуно независне јединице, већ као део ширег система међународне заједнице. На темељу наведеног, дошло је до потребе за преиспитивањем начина на који конститутивна власт функционише и како стиче своју легитимност. Прво, традиционални концепт суверенитета као апсолутне власти на територији једне државе значајно је коригован међународним нормама и споразумима који ограничавају деловање држава. Овај „удружени" или „заједнички" суверенитет, где државе добровољно ограничавају своју суверену власт склапањем међународних споразума, мора се некако помирити са традиционалном улогом конститутивне власти. Друго, све већи утицај међународних норми на националне правне системе захтева преиспитивање односа између међународног и националног права. Док је међународно право на почетку његовог стварања деловало као спољно ограничење државе, оно је сада све више интегрисано у национални правни поредак. Овај процес интеграције отвара питање функције националних устава и могућности конститутивне власти да обезбеди имплементацију међународних норми у складу са националним правним традицијама и демократским принципима.