

The Features of the Modern Concept of Separation of Powers as an Element of Constitutionalism

- “The Garden of Eden” or “The Dark Side of the Moon ”?

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1. Introduction

The term Constitutionalism has no clear definition. It is used in multiple connotations and it is so general that invokes arguments for all of its aspects. The constitutionalism expresses the necessity of limiting the state powers by means of the law. It is a conviction that no government should have unlimited power to do whatever it wants, because every government can relapse into arbitrary rule, unless precautions are being taken”¹.

Hereby, two basic aspects of constitutionalism can be underlined:

1. The first aspect concerns the formal constitutionalism - refers to the organisational function of constitutionalism. “Power is proscribed and procedures prescribed”.
2. The substantial aspect of constitutionalism - refers to the idea of protection of individual rights and freedoms from governmental actions and interference.

Treneska- Deskoska stresses that “*the term traditionally means limited authority and is defined as a system of legal limitations of the state power*”. Its opposite is arbitrary, absolutist, authoritarian or totalitarian government². The constitutionalism is a doctrine which governs the legitimacy of the government action. It is a concept of conformity of actions not only with the written or unwritten constitution, but more important, conformity with the broad philosophical values within the state. *Hilaire Barnett* emphasizes that the doctrine of constitutionalism suggests the following:

- a) That the exercise of powers should be within the legal limits and those who exercise the powers should be accountable to law,
- b) That the exercise of powers must conform to the notion of respect for individual and individual citizens rights,

- c) That the powers conferred on institutions within the state - whether legislative, executive or judicial - be sufficiently disperse between the various institutions so as to avoid the abuse of power.
- d) That the government, in formulating policy and the legislature, in legitimating that policy, are accountable to the electorate on whose trust power is held³.

The Constitutionalism is an ideal and ideology for limited and controlled government. The way to reach this ideal are the legal mechanisms, means and instruments which limit the power. Hereby, to understand to constitutionalism you should embrace all its elements. *Treneska* determines that there are many definitions for the term constitutionalism, but its substance may be described through the following elements:

- a) Separation of powers (separation between different branches of the government and separation between different levels of authority)
- b) Consent of the governed.
- c) Existence of higher law" (collection and system of written and unwritten rules regulating the government in the state
- d) Protection of human rights
- e) Rule of law⁴.

To summarize, it is very difficult to isolate and point to only one definition of the term constitutionalism. The term is multilayered and its true meaning can be perceived only if all the above mentioned elements are being analysed.

1. The Principle of Separation of Powers as an Element of Constitutionalism

People have one serious enemy – their government, *Saint Just*

The government must be limited! The constitutionalism, as a request to limit the government by the way of legal means, achieves this through *the human rights principle* – as external principle and the *principle of separation of powers* – as internal principle.

The principle of separation of powers is a basic idea, general objective and a constant of the modern legal order. The principle of separation of powers which actually means that the legislative, executive and judicial power must be separated, is in service of another higher idea, i.e. disabling the arbitrariness of the government, obstruction of the unwanted concentration and misuse of powers, and finally and most importantly – preserving and securing the personal freedom of the individual.

In the constitutional literature the new situation in the relations between the branches of the government and the adaptation of the principle of separation of

powers to the new circumstances, is known as contemporary constitutionalism. *The “tectonic” shift of the focus of decision making towards the legislative – executive – judicial power, and the unhidden and manifested will, ambition and activity of the courts to control the action of political authorities is its feature.* So, although it has been emphasised that “to appoint the judges to be last and ultimate arbiter of all constitutional matters, as an extremely dangerous doctrine which may lead to despotism and oligarchy”, the final conclusion is that the judicial supremacy is the new form of control of the constitutionality of the laws (judicial review).

The principle of separation of powers should not be absolute since it experiences a kind of evolution in the modern country. It seems that the principle of separation of powers modelled according to the ideas of Locke and Montesquieu was not immune to the modern trends of the constitutionalism. The feeling that the principle loses its romantic and authentic part, becomes stronger. It seems that the trends of equipoise of the executive power according to the will of the citizens transposed into the legislator are more and more oriented towards the constitutional courts. Today the fear of “*new separation of powers*” as a doctrine that provides possibility for secure positioning of the courts in the process of policy creation, is more justifiable.

3.Judicial Supremacy and Judicial Paramountcy, Elements of Modern Constitutionalism or Symbol of the Pathology of „The New Separation of Powers”

In terms of the Kelsen’s (Austrian) model of control of constitutionality of acts, it seems that the dilemma of the incompatibility of the control of the constitutionality by the constitutional court with the principle of separation of powers does not exist at all. Namely, if we take into account that the constitutional courts have clear constitutional position in the system of organisation of powers, which precisely separates them from the regular judiciary system, it seems that there is no violation of the above-mentioned principle. On the other hand, driven by the fact that the constitutional courts are not actual law makers and do not lay down the new rules of behaviour in the same way as the legislator, it can be concluded that this model of control of constitutionality removed the threat of direct intervention of the courts in the legislation area.

All of the abovementioned refutes the arguments of the authors who, referring to the principle of separation of powers, criticise the control of the constitutionality by the constitutional courts. Thus, frequently emphasised view of Karl Schmitt that the above-mentioned principle implies restraint of the judicial power of any interference and meddling in the work of the legislator, is relativised with Hans Kelsen’s argument according to which "the idea of separation of powers to different bodies is realised not so much for their mutual isolation, but for their mutual control". In the context of the above-mentioned, there are also the claims that the constitutional courts competent to perform cassation of laws have their own

grounds and justification in the principle of separation of powers, disabling the horizontal concentration of powers.

Unlike the Kelsen's (European) model of control of the constitutionality, the USA model of control of constitutionality faced at the very beginning the dilemma of his relation with the principle of separation of powers. It seems that the American authors are not concerned by the constantly present views on the incompatibility of the control of the constitutionality with the principle of separation of powers, primarily modelled according to Locke and Montesquieu in the same manner as the possibility for appearance of the "new separation of powers".

"The new separation of powers" is advocated by the resent constitutionalism, and the juristocracy and the court activism are its features. Namely, the historical facts that USA had periods when "the weakest" branch in the system of power simultaneously was the strongest court recorded in history will motivate the academic community to promote the modes and mechanisms for this condition to be avoided. This modern "pathology" of the system and efforts for its avoidance will become "academic obsession" of the 20th century in a certain manner.

The American constitutionalists, especially contemporaries, still try to find most adequate modus by which they will justify the position of the Supreme Court of the United States in the system, in relation to its competence to refuse the application of the unconstitutional laws. Finally, the conclusions of Leonard W. Levy on "the question was there genuine and original intention for introducing control of constitutionality, as well as whether the court should have authorisation to interpret "mischievous" phrases of the Constitution, which will result in "judicial supremacy," "judicial policy-making," or "judicial legislation", nowadays cause the literature for the Supreme Court of the United States to reflect the "raging bull" principle.⁵

Namely, in its simplified form, the issue of judicial supremacy comes down to the question: *Do the judges have legitimacy to decide on the constitutionality of the laws and Do the representatives of the citizens have the authorisation to adopt certain act with concrete contents which is not in compliance with the constitution, having in mind „we the people“ is a source of the political power.* In this manner, trying to explain the mystical function of the Supreme Court of the United States, succeeded more from the political manoeuvring than the legal elaboration of the judgement *Marbury v. Medison* from 1803, A. Bickel states the anecdote about a French gentlemen who stated that it is great to breath in "the sweet air of legitimacy" at the port of New York, not knowing that what he breathes in is the breath of the Supreme Court of the United States⁶. Finally, as Graglia Lino concludes, regardless of whether it is about social political engineering or conservative judicial activism, the final effect is that the fundamental rights of the citizens are not decided by voting in the authority representing the will of the

citizens, but they depend on the beliefs and the result of the decision making by persons are not elected by the citizens⁷.

The fear of idealising “*the brave new world*”, where the chronic commitment to the majority rule, conviction and belief that the majority will not violate the rights of the minority, the conviction that the citizens will demonstrate the behaviour capacity which will correct the made mistakes, encouraged Bickel and the modern constitutional-legal theory, to look for the exit of what has transferred the courts in the “*top of the mountain*” in the manners “to reconcile the judicial control of the constitutionality with the rule by the people, i.e. the will of the legislative body”.

3.1 Theoretical Justification of the Judicial Supremacy Institute

Although it is a stumbling block of the constitutionalism, today the judicial supremacy is a reality and generally accepted phenomenon. The American authors from *A. Bickel, Ackerman, Tushnet, Crowe, Green to Lipkin* have extremely critical view towards this “constitutional deviation”, however they accept it as existing, trying to find mechanisms through which the will of the citizens will be reflected in the court decisions. So “the judicial aristocracy” or “juristocracy”, unfamiliar phenomenon for most of the citizens, is the centre of the power whose decisions regarding the significance of the Constitution are being superior and are greater legal force than the decisions of the other branches of government directly elected by the citizens. The transformation of the self-government principle upon the rule of the elite, on the one hand, the rule of a group which has not been elected by the citizens, which is not responsible before any single entity, and judges with non-limited terms of office is final effect of this.

However, although diagnosed as a “*pathology of the system*”, it seems that the US scientific community is not ready to propose fundamental changes in the system, so today the judicial supremacy, as a replacement for the judicial control of the constitutionality, is considered as the guardian of the Constitution, guardian of the individual rights and guardian of the rights of the minorities. These are basically the values of which no one wants to give up, no matter how much the ambition of the judicial power and its involvement in the political gaps is being criticised. The Constitutional literature in the USA leaves an impression that the judicial activism is the price which is willingly paid in order to keep the values which the constitution protects and is based on.

Today, the science has several basic premises which are the starting point in the attempt to defend the need of judicial supremacy.

The first premise is the claim that *the Court is the guardian of the constitution, and the judges are portrayed as their promoters and protectors*. The basis for the claim that the judges are the guardians of the constitution, with the task to set up the new directions and trends of system development, has its roots in the notions,

ideas and proposals of the “founding fathers”. The following perceptions are in the essence of this thesis:

- the branches of the government elected by the citizens to adopt and apply laws with which the state policies should be implemented;
- the laws must be in compliance with the constitution as highest law;
- there must be a branch of the government which will take care for the respect of the principle of constitutional supremacy ;
- independent judiciary as special branch of the government is designed to conduct the so-called protective role.
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In the context of the above-mentioned it must be emphasised that the “protective role of the judiciary is the core of the judicial supremacy”. It puts the Court in the centre of the constitutionalism in USA since it should protect the constitutional document and provide difference between the hierarchically higher and hierarchically subordinate act.

If we begin from the assumption that the adopted law is always a result of negotiations and compromise and that in its essence it is a concentrated expression of risky political views, it is understandable that it cannot be expected from the legislation to take care principally of its constitutionality. Therefore, the court is assessed for the most adequate “constitutional stakeholder” which, when there is an issue about the constitutionality of the law, should make an assessment if the other branches of the government are within the frames of the established constitutional limits.

However, although the basis of the so-called *judicial supremacy* as a replacement for *judicial review* is in the abovementioned thesis, the following questions remain: *if the control of constitutionality of laws by all courts is the appropriate mechanism for protection of the constitution.*

The second premise for theoretical defence of the judicial supremacy is *the need of protection of the rights and freedoms of the citizens*. This premise is supported by the claim that only the court can decide whether the reached compromises in the legislative body translated into the adopted act violate the rights of the citizens. Namely, when the branches of the government, elected by the majority of citizens, are responsible for the interpretation of the constitutional norms, the rights and freedoms of citizens could be subject of constant violation because the individual rights are created to protect the individual against the thoughtlessness of the majority. Thus, the protection of the rights of the individual is a value to which it appears that the judiciary is traditionally inclined.

The third premise which is given to finally draw a conclusion that the phenomenon of judicial supremacy is justifiable, even desirable, is the thesis that *the independence and sovereignty of the judiciary per se is a democratic value*

which only makes the judiciary an only option to conduct the control of the constitutionality of the laws. The given thesis is confirmed by a number of arguments:

- The principle of separation of powers provides for independence of the judicial power from the other branches of the government, except when the Constitution itself makes an exception;
- The lack of independent judiciary endangers the commitment of the principle of rule of law;
- Finally, in order for the judges to say what is right and what is wrong, and to try to reach the justice as a value with their decisions, they must be independent when deciding.

However, the abovementioned premise on the independent court function per se and in cumulation with the aforementioned is only a principle response to the question what entity could appear as a guardian of the constitution and the constitutional norms. It is not appropriate response to the question why the judges who are not elected by the citizens would be included in the political decision making and why should they openly manifest their ambition of co-legislator or third legislative body.

3.2 The Principle of Separation of Powers and Alexander Bickel Theory of Prudence

The American constitutionalism is characterised by pluralism of legal philosophies, and the abovementioned difference is also reflected on the judicial activism as component part of the American constitutionality. The *concept of judicial supremacy and its contradiction with the principle of separation of powers* is what causes the problem. Thus, the fact that the decisions of the Supreme Court, which are adopted by the judges not elected by the citizens, are additionally occurring the issue how much the institute of judicial control of the constitutionality corresponds to the traditional idea of separation of powers, from the aspect of limitation and the mutual control of all branches of the government. Therefore, it seems that the task of the constitutional and legal science becomes even more difficult, not only because it needs to explain the legal basis of the so-called judicial review, but also due to the fact that it should find a modus to settle the abovementioned institute with the principle of rule of people, i.e. the rule of the legislative body.

The Bickel “theory on counter majoritarian difficulty”, based on Hamilton’s thesis “that compared to all state branches, the judiciary is the weakest branch”, is only one attempt to justify the Supreme Court as guardian of Constitution. The emphasis of the political function of the Supreme Court of United States has central position in Bickel’s theory of judicial surveillance on the work of the other functions of the government. The opportunity to conduct the constitutional audit makes the court to

act counter majoritarian. By establishing the unconstitutionality of the laws and other acts of the legislative and executive power, the Supreme Court opposes the will of citizens' representatives in given historical moment, which ultimately means that it acts not on the behalf of the majority, but against its will. However, its "theory on counter majoritarian difficulty" finds its justification in the argument that the court has the role to act in the capacity of a promoter and guardian of the permanent values of the system. While the legislative and executive power are interested in preserving those values, and the focus of their interest is the "immediate benefit", the court has greater responsibility since it acts on a long-term basis. He looks for the exit of the counter majoritarian difficulty, for which he admits that it is not in compliance with the "heart of the democracy" in the protection of the permanent values or as he concludes "good society is not only the one that wants to meet the immediate need of the majority but the one that intends to be a mainstay of the permanent social values and their realisation"⁸. In this manner he admits that the role of the court, even when its decisions have not been in accordance with the will of the majority, is to protect the rights and the interests of the individuals which finally represents a permanent system value. Therefore, "if the Constitution is a symbol of the nation, its continuity, unity and common objective, the role of the court is to objectify that symbol". However, all of the above-mentioned does not solve the dilemma and the tension for the relation of the court with the other branches. In the context of this conflict, Bickel emphasised that the solution should be looked in the "passive virtues" of the court and the need for self-restrain from the decision making without previous estimation of the concrete situation and all circumstances related to the case. As a variation of the self-restraint doctrine, *the passive virtue* essentially means restrain from the decision making in situations when the court estimates that the social conditions are not yet appropriate for its act. Therefore *Antony T. Kronman* states that "the most important element of the Bickel philosophy and the key to understanding of his entire opus is his belief in the value of the thoughtfulness and carefulness as political and judicial virtue"⁹. Although frequently criticised, and on the basis that it cannot be expected for the court to be asked to intervene only when its product is socially desirable, and especially due to the fear of the appearance of the "social imperialism", it seems that the Bickel's theory mobilised the academic community in USA to focus its study on the so-called "the new separation of powers".

The new separation of powers, as new condition in the relations between the branches of the government, essentially implies to a situation in which the courts determine or redefine the limits of actions by the other branches of government on the behalf of the constitutional principles. In this manner, *Ackerman* recognises that the system cannot be pictured without an institution that would perform the control of the constitutionality since its absence would "generate cynicism at the very thought the citizens to give them directions of taking actions to their representatives, and then to expect them not to meet them". However, he will establish that the creation of such institution is not a simple task and that it is determined by cumulated sociological, historical and legal factors on one side, and

the capacity of the constitutor and the general constitutional engineering on the other side. The dilemma set by A. Bickel in the 1960s and which is based on the thesis that “when the Supreme Court declares the law or the act of the elected executive power as unconstitutional, it disables the will of the representatives of the citizens – it performs control not on the behalf of the majority, but against it”, will inspire Ackerman to look for the exit of the enchanted circle in the so-called constitutional dualism. His constitutional dualism is composed of the continuous policy in which the citizens are not included and are relatively unengaged, so the process of decision making is left to their representatives i.e. legislative body on the one side and the constitutional policy on the other side in which there is intensive mobilisation of the citizens since the result of it is creation of the higher law i.e. adoption of the new constitutional principles. According to him, the control by the court is not an undemocratic phenomenon, as many will explain it, but an institute which will guard the interests of the citizens as far as “*We the people*” are not being reengaged in the constitutional policy.

Led by the above-mentioned we conclude that the American constitutional and legal theory from “*The Federalist Papers*” to the works of Bickel and Ackerman still faces the bitter feeling that there is something radically wrong with the judicial control of the constitutionality and that it violates the theory of separation of powers. This thesis still “tickles” the American legal doctrine, although the justification of the principle of separation of powers and its complete compatibility with the judicial control of the constitutionality is in the works of the “founding fathers”.

2. “The Doctrinal Concept of Unconstitutionality of the Constitutional Law” – Transformation of the Courts into Guardians of the Constitution and Constitutional Values or Plunging into the “Hemingway’s Garden of Eden”

In terms of the constitutional and judicial literacy the view that the constitutional acts and the constitutional amendments may be subject to a review of the constitutionality is very interesting. It seems that the answer to this question directly affects the modelling of the concept of separation of powers. This is because the especially careful adoption of the modern concepts of the constitutional norms brings into question the manner of implementation of the classical concept of separation of powers in the system. Thus, one theoretical perspective defends the thesis that the constitutional acts and constitutional amendments, having in mind the fact that they regulate *materia constitutionis* and according to it have the same legal power with the constitution, cannot be subjected to a review of constitutionality. The abovementioned theoretical perspective rigidly keeps to Kelsen’s doctrine of levels in the law (*Stoffentheorie*) and provides for the possibility for a review of the constitutionality of the lower level legal norms compared to those of higher level. The above-mentioned is a theoretical basis for the traditional implementation of the constitutional and judicial control of the constitutionality of the legal acts. On the other hand, a wider theoretical perspective represents the thesis that in order to realise a protection of the established order in

the true sense of the word, the constitutional court can evaluate the constitutionality of both constitutional acts and constitutional amendments. The doctrinal concept of *unconstitutionality of the constitutional law* is based on the perspective that all legal norms can be subject to control of the constitutionality solely in order to protect the values and the principles which the constitution appreciates as fundamental. In modern times, the concept of “fundamental constitutionality” is also marked as “absolute entrenching” whose task is to provide protection of the “spirit of the constitution”. Kelsen’s perspective according to which the constitution may prohibit the laws to have certain contents, therefore the legislator cannot adopt a law, even a constitutional provision which would have such contents, is the theoretical basis for the above-mentioned modern doctrine in the constitutional and judicial literature. Thus, the prohibition on change of the form of government or the prohibition on change of the democratic order with constitutional laws directly binds the legislator and does not leave a space for manoeuvring and eventual adoption of constitutional acts or amendments which would be contrary to the above-mentioned prohibitions. The above-mentioned “eternity clauses” or “eternity guarantee” can be interpreted as a presumption for conducting the assessment of the material constitutionality of the legal acts, i.e. presumption for the so-called unconstitutionality of the constitutional norms.

However, the doctrine of unconstitutionality of constitutional norms is primarily related to the review of the material constitutionality, not the formal one. Although the above-mentioned doctrinal concept (verfassungswidrigen Verfassungsrechts) has its origins in the Constitution of Norway from 1814, it has also been established and maintained as a practice of the Federal Constitutional Court in Germany. Nor the Basic Law nor the Federal Law on Constitutional Court contain provisions which expressis verbis provide authorisation to the Federal Constitutional Court to perform control of the constitutionality of the constitutional norms. The Federal Constitutional Court of Germany believes that the constitutional norms are subject to control of constitutionality solely because no constitutional norm should be out of the context and interpreted independently. Namely, in the explanation of the first decision from 1951 (Südweststaat-Streit), the Federal Court of Germany laid the foundations of the *doctrine of unconstitutionality of the constitutional norms* and emphasised that the individual constitutional provision cannot be isolated and interpreted individually because the constitution has internal unity and the importance of the single part is related to the importance of all other parts and the unity as general. *There are constitutional principles which are basic and which are reflection of the law in such amount that they have an advantage over the constitution and also oblige the constitutor.* Two years later, the doctrine was amended by the view that when one of the norms of the basic law will exceed the limits of the principles of fairness and over the positive law, the Federal Constitutional Court will be obliged to abolish this constitutional norm.

The doctrine of unconstitutionality of the constitutional norms was also established by the Constitutional Court of the Czech Republic through its practice, although the Constitution does not explicitly provide for such power. The Constitutional Court put the constitutional acts category under the category of acts and estimated that they are also a subject to control of constitutionality. Namely, in 2009, the Court believed that the exclusion of the review of the constitutionality of the constitutional acts from the competence of the Constitutional Court would completely eliminate its role as guardian of the constitutionality.

Finally, it must be pointed out that the implementation of this modern doctrinal concept represents powerful tool in the possession of the constitutional courts and for the use of which a capacity and so-called passive virtue are needed. The introduction of such practice hides the danger of transforming the constitutional courts into hidden constitutors and the possibility to practice enhanced judicial activism under the veil of the terms such as “symbolic constitution”, “living constitution” or “constitution behind the constitution”. Therefore, the implementation of this doctrinal concept by the constitutional courts implies well explained and elaborated decisions which will make evident the determination of the Court to preserve “the spirit of constitutionality” on the one hand, as well as consistent observance of the principle of separation of powers as powerful mechanism of the constitutionalism on the other hand.

5. Conclusion

The Constitutionalism is an ideal and ideology for limited and controlled government. The legal mechanisms, means and instruments which limit the power are the way to reach this ideal. The constitutionalism, as request for limited power with legal means, achieves this through *the human rights principle* – as external principle and the *principle of separation of powers* – as internal principle.

The principle of separation of powers is a basic idea, general objective and a constant of the modern legal order. The principle of separation of powers which actually means that the legislative, executive and judicial power must be separated, is in service of another higher idea, i.e. disabling the arbitrariness of the government, obstruction of the unwanted concentration and misuse of powers, and finally and most importantly – preserving and securing the personal freedom of the individual.

The principle of separation of powers should not be made absolute. In the contemporary political systems the principle is experiencing a kind of evolution. It seems that the principle of separation of powers modelled according to the ideas of Locke and Montesquieu was not immune to the modern trends of the constitutionalism. The feeling, that the principle loses part of the romantic and authentic feature, becomes stronger. It seems that the trends of equipoise of the

executive power according to the will of the citizens transposed into the legislator are more and more oriented towards the constitutional courts. Today the fear of “*new separation of powers*” which provided a possibility for secure positioning of the courts in the process of policy creation is more justifiable.

“The new separation of powers” is advocated by the resent constitutionalism, so the juristocracy and the court activism are its features. The new separation of power, as new condition in the relations between the branches of the state power, essentially implies to a situation in which the courts determine or redefine the limits of actions by the other branches of the government on the behalf of the constitutional principles. The fear of “a brave new world”, which skilfully intertwines the judicial activism and judicial paramontcy vs. the citizen as a source of the political legitimacy, appears to be completely justified. The contemporary concept of the new separation of powers in the recent constitutionalism carries, like a shadow, the threat to transform the principle in its own opposite. The new separation of powers provides exceptional position of the courts in the system of organisation of powers. The abovementioned positioning has not been expressis verbis constitutionally established, its roots are in the practice of decision making which the courts foster and through which they are actively included in the process of policies making. It seems that the interpretation of the “mischievous phrases” of the constitution, by introducing concepts for „symbolic constitution” and „constitution behind a constitution” on one hand, and the introduction of the doctrine for review of the constitutionality of the constitutional norms on other, overhangs the concept of separation of powers as The Sword of Leviathan.

Finally, the dilemma whether “the New Separation of Powers”, as an element of the constitutionalism, is „The new garden of Eden” or “The dark side of the moon” remains open.

References and notes:

- Carla M. Zoethout and Piet J. Boon. Defining constitutionalism and democracy: an introduction p. 5.<http://www.ancl-radc.org.za/sites/default/files/Constitutionalism%20in%20Africa%20pgs%201-17.pdf>
- Treneska -Deskoska Renata. Constitutionalism. Skopje. 2015. p. 3
- Barnett Hilaire. Constitutional and Administrative Law. Routledge Cavendish. 2006. p.5
- Treneska -Deskoska Renata. Constitutionalism. Skopje. 2015. p. 4
- Judicial Review, History, And Democracy: An Introduction.* Leonard W. Levy. Ctp.1 staffweb.wilkes.edu/kyle.kreider/Levy.doc
- Alexander Bickel. *The Least Dangerous Branch The Supreme Court at the Bar of Politics.* Yale University Press. 1986. P.29

- Graglia Lino.A. *Its Not Constitutionalism, Its Judicial activism.* Harvard Journal of Law and Public policy.1996.vo.19.issue 2 p.293
- Alexander M.Bickel *The Least Dangerous Branch- The Supreme Court at the Bar of Politics..* Yale University Press. 1986p.26
- Antony Townsend Kronman, *Aleksander Bickel's Philosophy of Prudence.* Yale Law School. Faculty Scholarship Series, paper1064. 1-1-1985.ctp.4
- Agresto. J. 1984.*The Supreme Court and Constitutional Democracy.* Cornell University press.
- Aharon.B. 2006. *The Judge in a democracy.* Pinceton University Press.
- Andrews. W.G.1963. *Constitutions and constitutionalism.* London
- Attanasio J. B. 1984. *Everyman's Constitutional Law: A Theory of the Power of Judicial Review.* Georgetown Law Journal.
- Attanasio John B. *Everyman's Constitutional Law: A Theory of the Power of Judicial Review.* Georgetown Law Journal. 1984.
- BaumLawrence. *The Supreme Court.* Ohio State University.1992.
- Bilder Mary Sarah. *Idea or Practise A Brief Historiography of Judicial Review.* The journal of policy history, vol,20, No.12008.
- Cane Peter. *Understanding Judicial Review and its Impact.* *Judicial Review and Bureaucratic Impact, International and Interdisciplinari Perspectives.* Cambridge University Press. 2004.
- Friedman B. Delamey.B.D. 2011, *Becoming Supreme: The federal foundation of Judicial Supremacy.* Columbia law review. Vol.100:2. Public law and legal theory research paperseries,no11-61.
- Green J. 2007. *Giving the Constitution to the Courts.* The Yale Law Journal. Princeton University Press. New Jersey.
- Hamilton A. „*The Judges as Guardians of the Constitution*“.- Federalist papers no 78
- Kelzen H. 1951. *General Theory of Law and State.* Belgrade.
- Lipkin. R.J. 2008. *What's Wrong with Judicial Supremacy? What's Right About Judicial Review?* Widener Law School Legal Studies Reasearch Paper Series n. 08-85 vol.14:1.
- Luban. D. 1998. *Justice Holmes and the Methafisics of Judicial Restraint.* Duke Law Journal. Vol.44:449.p 489 <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=3270>.
- McGinnis.J & Rappaport. M.B. 2009. *Ogirinal methods originalism: A NewTheory of Interpretatiot and the Case against Construction.* Northwestern University Law Review. Vol.103 no2.
- Posner.R.A .2012.*The Rice and Fall of judicial self-restraint.* California Law Review. vol.100. No3.
- Post R & Siegel R. 2004. *Popular constitutionalism, departmentalism and judicial supremacy.* Yale Law School Faculty Scholarship.paper n178.vol.92.
- Punnett R.M. 1992. *British Government and Politics. Fifth Edition.* Hampshire.
- Rawls J.2005. *A Theory of Justice.* The Belknap Press of Harvard University Press Cambridge, Massachusetts.
- Rehnquist W. H. 1976. *The Notion of a Living Constitution.* The University of Texas School of Law (lecture).
- Schauer F. 2004. *Judicial Supremacy and the Modest Constitution.* California Law Review vol.92 issue 4.
- Shapiro M, Sweet A.S. 2002. *On Law, Politics and Judicialization.* Oxford University Press.

- Shapiro M. 1990. *The Supreme Court from Early Burger to Early Rehnquist. The New American Political System.* The AEI Press Washington.
- Smith E. 1995. *Constitutional Justice under Old Constitutions.* Kluwer Law International. The Hague.
- Strauss D A. *The Living Constitution.* 2010.
<http://www.law.uchicago.edu/alumni/magazine/fall10/strauss>
- Sussman Cass R. 2008. *Beyond Judicial Minimalism.* Harvard Public Law Working Paper No. 08-40.2008
- Swisher C B. 1965. *The Supreme Court in Modern Role.* Greenwood Press Publishers.
- Tate C. N. 1992. *Comparative Judicial Review and Public Policy: Concepts and Overview.* Greenwood press, London.
- Thayer J.B . *The Origin and Scope of the American Doctrine of Constitutional Law,* 7HARV. L. REV. 129, 144 (1893)
- Treneska R. 2006. *Constitutionalism and Human Rights.*
- Tushnet M . 2009. *Weak Courts on Steroids: Improving Weak – Form Judicial Review.* Texas Law Review vol.87.
- Tushnet M. 1998. *Two Versions of Judicial Supremacy.* William and Mary Law Review vol.39 issue 3.
- Whittington E.K. 2007. *Originalism Within the living Constitution.* American Constitution society for law and policy paper.
- Witteveen W.J. *The Symbolic Constitution.* 1993. Constitutional review - Theoretical and Comparative perspectives. Boston.
- Zakrzewski W. 1083. *The Constitutional Review of Laws. Modern Constitution.* International Association of Constitutional Law. First World Congress.

Summary

The Features of the Modern Concept of Separation of Powers as an Element of Constitutionalism- “The Garden of Eden” or “The Dark Side of the Moon”?

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The focus of the contemporary constitutional law and the constitutionalism is the limitation of the government by the means of legal instruments and mechanisms. Therefore, the analysis of the relation between the concept of constitutionalism and the principle of separation of powers has the central position of this paper. The paper elaborates the concept of constitutionalism as an idea and ideology of limited and controlled power. At the same time it has been emphasised that the development of the constitutionalism as a doctrine is possible only with previous analysis of its basic elements. The principle of "separation of powers" is one of these elements. The second point of this paper refers to the principle of "separation of powers" as one of the basic principles and concepts of the contemporary constitutions. The principle of separation of powers is a basic idea, general objective and a constant of the contemporary legal order. However, the paper will point out that the new situation in the relations between the branches of the government and the adaptation of the principle of separation of powers to the new circumstances, in the constitutional literature is known as contemporary constitutionalism. The paper elaborates the concepts of judicial supremacy and judicial paramontcy as elements of the contemporary American constitutionalism, as well as the manners and attempts for their theoretical justification. On the other hand, the paper will elaborate the phenomenon of judicial juristocracy in the European continental systems for control of constitutionality. The paper highlights the implementation of the doctrine of review of the constitutionality of the constitutional norms (*verfassungswidrigen Verfassungsrechts*) in the practice of the European constitutional courts. It elaborates the dilemma does the interpretation of the "mischievous phrases" of the constitution, by introducing concepts for „symbolic constitution” and „constitution behind a constitution” on one hand, and the introduction of the doctrine of review of the constitutionality of the constitutional norms on other, overhangs the concept of separation of powers, as The Sword of Leviathan.

Finally the paper sets the dilemma whether the tectonic shift of *the focus of decision making towards the legislative – executive – judicial power, and the unhidden and manifested will, ambition and activity of the courts to control the action of political authorities* as a feature of the contemporary constitutionalism, is the so-called “the garden of Eden” or its opposite “the Dark Side of the Moon”.

Keywords: Constitutionalism, Separation of powers, Juristocracy, Judicial paramontcy, Judicial activism, Judicial supremacy, Symbolic constitution, Constitution behind the constitution.