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## THE CHEROKEE CONSTITUTION - THE ROAD TO A SOVEREIGN STATE

The native people of North America are often perceived through the story of the brave colonists fighting with the belligerent and barbaric Indians. All of us like to watch movies about the Wild West, some people dream of visiting Tombstone, but few people are really concerned about who the Indians really were, or whether they had a social or political structure. In fact most of the Indian tribes at the beginning of the Encounter era shifted from egalitarian societies of mobile, hunter-gatherer people to hierarchical sedentary or semi-sedentary chiefdoms. Some tribes developed complex social systems based on a corporation of several tribes or groups. The best example is the League of Five Nations. This religious and political organization of five Iroquois-speaking tribes organized itself as a semi-state organization. Today's American legal doctrine assumes that the Founding Fathers of the United States of America took the structure of the League as a foundation for the American state regime. The Iroquois League is not the only example of higher centralized authority among Indian tribes. The most significant and best-known is the state created by Cherokee Indians from Georgia. However, it is important to stress that the social and political organization of this tribe is different from the structure of the League. The 'Great League of Peace', another appellation of the League of Five Nations, had been founded by Dakanawidah and his disciple Hiawatha at the beginning of the 15th century. The Great Peace was not an overriding authority, but a jural community charged with maintaining the peace through religious ceremo-

nies.<sup>1</sup> The Cherokee state, meanwhile, was a constitutional organization, governed by an elected authority, under the law enacted by a sovereign government. They created their state in the long process of social and political changes of their society at the beginning of the 20th century. Comparing their tribal model of authority to the United States regime, they decided to reorganize their society to a similar structure.

The first signal of change can be noticed in early 1715, when all Cherokee towns and villages decided to accept the authority of the Chief of Tugaloo. At this time the Cherokee tribe was divided into four regions: Upper Town, Middle Town, Overhill Town and Down Town. In each region were about ten towns governed by the council. Some towns were called beloved towns, which emphasized their role in the society as a religious center. Seven such beloved towns are known, with the two most important being Chota and Tugaloo. In each beloved town the sacred fire of the Great Spirit was burned. During wars or ceremonies the chief from a beloved town became the leader of the region. What was special about Tugaloo at this time? First the personal charisma of the then Tugaloo chief, and second the state Carolina government,<sup>2</sup> which recognized the chief as the sole representative of the Cherokee tribe. When the chief died in 1720, Carolina officials asked the Cherokee to choose another main leader. When towns refused to do this in 1725 Carolina chose one of the marginal chiefs from one of the Overhill Towns. In opposition to enforced leadership, Chief Motoy<sup>3</sup> from Great Tellico (another beloved town) named himself chief of all Cherokee Indians. The State of Carolina accepted him as a leader only in 1738, when the Chota chief demanded this same position for himself. Moytoy commanded the Cherokee until his death in 1741, when he was killed by Choctaw warriors. After his death Carolina authorities appointed as his successor his underage son Ammonscozzittie, and as the regent chief Raven from Hiwassee town.

The political situation among the Cherokee seemed not to change until 1751. In this year a conflict arose between the two old enemies, the Cherokee and the Creek Indian. The Cherokee now spent much more time on the war, instead of hunting and farming. Lack of trade goods caused limited supplies from colonial governments. The Indians at this time came to rely upon European goods such as guns and ammunition, which were not only necessary to hunt deer, but more importantly were needed to win the war. This dependence led to the forfeiture of Tellico and Hiwassee by the Creek. Frustrated warriors attacked several warehouses owned by colonists. The Carolina government avenged this by banning all trade with the Cherokee.

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<sup>1</sup> O. P. Dickason, *Canada's First Nations*, Toronto–Oxford–New York 1997, pp. 40–51.

<sup>2</sup> The State of Carolina was at this time the main trade partner of the Cherokee tribe. They not only sold their goods there, but a lot of men were hired in factories and plantations.

<sup>3</sup> This was the name assumed by Christian Gottlieb Priber, a European of unknown origin, who came to the Cherokee country, learned the Cherokee language and called himself Chief of all Cherokee, trying to create a communist system; L. Hargrett, *A Bibliography of the Constitutions and laws of the American Indians*, Cambridge 1947, pp. 3–4.

The political situation was also bad: Ammonscozzittie, without consultation with the tribal elders, ceded some Cherokee land to the Virginia state, thus losing influence and power among the tribe. Into this vacuum of leadership and articles of commerce appeared the new main chief Old Hop. During the great council in February 1753 all Cherokee from Middle Towns handed power over to him, and the towns from the remaining Cherokee regions recognized his power during the meeting in Choctaw. The hitherto chief from Hiwassee, Ostenaco, put himself under his authority too. Old Hop was not only the first elected leader of the tribe, he also started the social and political revolution in the Cherokee tribe. After signing a trade treaty with the Carolina state,<sup>4</sup> he began working on widening the sphere of the main chief's power. The first chief from Chota was named First Warrior and First War Chief of the Cherokee Nation. The second chief of Chota was called Second War Chief of the Whole Nation, and the Second Warrior of the nation was the chief from Hiwassee. Chief Old Hop convoked regular assemblies of the elders and leaders from all Cherokee towns. During these meetings they discussed the main aims of foreign and local politics.<sup>5</sup>

In the middle of the 18th century the prime qualifications for leadership in the Cherokee world become possession of commercial connections and an ability to manipulate trade and colonist aspirations. However, the most important ability for a potential leader was to be held in the high esteem of the whole nation. It was on this assumption that Old Hop based his leadership. One of his most difficult tasks was to prevent clan revenge. The escalation of revenge into open warfare and blood feud was the main reason for the declaration of war by English in 1760.<sup>6</sup> External threats united the whole nation, especially when they realized that they could be defeated by a better-armed colonist. Local leaders organized community warriors to prevent assaults on colonists. Offenses against the colonists provoked retribution on the jeopardized community.<sup>7</sup> The American Revolutionary war was the beginning of the end of Chota authority. Amid the struggle for existence between the French, British and now Americans, young Cherokee chose to expel all white men from their land, and in 1776 there were several actions against colonial settlements. Chiefs from Chota distanced themselves from these acts of aggression which fructified drastically, reducing their influence among Cherokee. The leadership of Chota chiefs finally ended in 1788 during the Festival of Green Corn, when Little Turkey was elected the new leader of the Cherokee tribe.<sup>8</sup>

Until 1794 the demands of Hanging Maw for tribal leadership caused a lack of stability in tribes and for a while prevented further changes. After his death,

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<sup>4</sup> D. Champagne, *Social order and political change constitutional government among the Cherokee, the Choctaw, the Chickasaw and the Creek*, Stanford 1992, pp. 56–58.

<sup>5</sup> *Ibidem*, p. 58.

<sup>6</sup> *Ibidem*, p. 59.

<sup>7</sup> *Ibidem*, p. 58.

<sup>8</sup> *Ibidem*, pp. 76–77.

though, Little Turkey signed a peace treaty with the United States and started to prepare his nation for constitutional political order.<sup>9</sup>

Little Turkey had great support in society, and was known as “the beloved Man of the nation”, and from 1795 he started to use the title of Principle Chief. Some local chiefs refused to admit the validity of his power. Chief Doublehead, for example, started to negotiate a cession treaty with the US government, but when others found out about his betrayal they simply killed him. Another way of concentrating power was to put into the hand of the Principle Chief responsibility for treaty negotiations with the federal government. He was also at the head of the Nation Council. This main Cherokee tribe form of national assembly had developed from the meeting of the representatives of town councils under the threat of common war. The majority of Cherokee in one council decided on the major problems of the tribe and ratified a treaty with the colonists.<sup>10</sup> The procedure of government by council had been institutionalized by the end of the American Revolution. When Little Turkey died his successors Black Fox and Path Killer continued his work.<sup>11</sup>

Before beginning to present the main road to the Cherokee constitution it is worth explaining the political structure of the tribe before the creation of the sovereign state. Tribal organization was formed by the foundation of the state government system. As was stressed before, in each region the basic unit was autonomous towns and villages where political and social life was concentrated. Each particular town was governed by the town council, the source of all internal and external actions. The council made decisions about cooperation with strangers, public buildings, community agriculture or religious ceremonies. To it belonged all the dwellers of the town under the leadership of the three most influential groups of town elders. The principal group was led by the town chief-shaman and his assistants. The second voice belonged to the seven elders’ front men of the town clans. The last group constituted the rest of the elder men and women living in the town. Sometimes they were called ‘beloved people’ During council sessions<sup>12</sup> the respective participants sat only in the place ascribed to them. In the center of the gathering the chief shaman and his assistant always sat, around them there was room for seven elders, and next according to clan division: clan elders, mothers with children, and finally, on the edge, the rest of participants.<sup>13</sup>

Discussions in the council were conducted in this same order. Debate was always peaceful and without arguments. The main speakers were elders who consulted with their clans as to how to deal with a particular topic. They also explained the problem to other participants of the council and sometimes persuaded them of the

<sup>9</sup> J. P. Brown, *Old Frontiers*, Kingsport 1938, p. 444.

<sup>10</sup> R. Strickland, *Fire and the Spirits, Cherokee Law from Clan to Court*, Norman-London 1975, pp. 53–55.

<sup>11</sup> H. T. Malone, *Cherokee of the Old South: A People in Transition*, The University of Georgia Press 1956, pp. 74–75.

<sup>12</sup> There was a special town hall.

<sup>13</sup> H. T. Malone, *op. cit.*, p. 75.

best method to solve the problem. When a consensus was reached and most clans or divisions agreed on this same resolution the decision bound the whole town. In situations where one or two clans or fractions resolved solutions differently from the majority, they were not forced to accept their proposals. The most important thing was amicable cooperation.<sup>14</sup> This peaceful alliance ended in times of war, as did the structure of the town. Town councils elected war chiefs, who competed to call up to duty all warriors and organized a purity ceremony before fighting began. Their power was dependent on their personality and the influence of their family. The war chief would sit in the center of the town council during war, while in peacetime his place was among his clan followers.<sup>15</sup>

Encouraged by the colonists to form a national state from disorganized and scattered settlements, the Cherokee changed almost everything in their society besides some rules of criminal law. The old Cherokee tradition put the role of judges in the hands of clans; the town council executed clan verdicts. Deviations from the established norms which offended community expectations were tried in the court of the town. A significant part of Cherokee criminal law consisted of clan blood regulation of homicide. Clan court decisions depended mostly on the social positions of the defendant and victim. In situations where the chief or an important elder was killed, blood revenge required that someone of the same rank and class of the murderer's clan be killed. The Cherokee strongly believed that the ghost of a murdered clansman could not pass from the earth until the blood had been avenged. A slightly different situation took place when death was caused by accident; the killer could seek asylum in one of the white beloved towns.<sup>16</sup>

Town councils worked on the local level and were not interested in transition or creation of a state, but under the town council was the National Council. Representatives of town councils were delegates not of their clans but of the interests of their towns and regions. Clans were not involved in national politics, so they could not force delegate clansman to clan politics.<sup>17</sup> As it was free from external pressure, the National Council was able to work on the legal transition of the society. The first step was accumulation of financial funds similar to state financial resources.<sup>18</sup> At the XVIII century National Council, which functioned with the same rules as the town council, according to the general law all free members of the Cherokee tribe could participate in the National Council session, but by good chance this never happened. Sending representatives to the National Council was more effective, as decisions in the Council were made unanimously and too many participants could prevent compromise from being reached. Common practice was to inform each

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<sup>14</sup> D. H. King, *The Cherokee Indian Nation, a troubled history*, [in:] V. R. Persico Jr., *Early Nineteenth-Century Cherokee Political Organization*, Knoxville 1979, pp. 92–94.

<sup>15</sup> D. H. King, *Introduction, The Cherokee Indian Nation, A Troubled History*, Knoxville 1979, pp. 95–97.

<sup>16</sup> D. Champagne, *op. cit.*, p. 31.

<sup>17</sup> *Ibidem*, p. 43.

<sup>18</sup> *Ibidem*, pp. 31–32.

town of the reason for convoking a gathering, so the towns could assume a position before the session of the National Council.<sup>19</sup> There were a couple of weaknesses in the function of the Council, but the main reason for its ineffectiveness was lack of constraints. The aforementioned war in 1760 is such an example. The National Council had made the decision to cooperate with the English, when young chiefs and warriors went against the Council conclusion and attacked British soldiers. To prevent such situations in future the Council decided to allow war chiefs to participate in the decision-making process.<sup>20</sup> The division of the tribe at the beginning of the 19th century was also effected by disagreement over external Council politics.<sup>21</sup> Apprehensive of future trouble, the Council initiated policies of change. At the beginning of 1817 the makeup of the Council was changed; now young chiefs and warriors were given permission to speak during Council sessions. The towns were instructed to choose as their delegate a person who had respect not only among the population of his town but also in other towns and even tribes. Decisions made by the National Council were now accepted without opposition by the towns. The sphere of activity of the National Council was also changed: delegates were now careful about all external issues, war and persons outside the tribe living on Cherokee land. Town councils were no longer qualified to engage in external politics.<sup>22</sup> From 1808 the National Council was also responsible for internal affairs which were common to each town.<sup>23</sup> The Council made decisions in a similar way to a town council, but with stronger emphasis on the position of the Principal Chief. He would always in the center of the assembly, on the carpet. To his right on the same carpet was the place of the second chief, and the remaining chiefs sat on chairs in a circle around them, with other participants standing outside the circle.<sup>24</sup>

The Cherokee way to the constitution and sovereign state was not only social or organization changes, but also strong mental changes and a growth of patriotism and desire for national unity in society. The first time the tribe stood together in front of the colonist was at two actions in 1803: against the building of a road connecting Tellico Blockhouse with Athens, Georgia, and resisting the sale of land called Wafford road situated near Chattahoochee.<sup>25</sup> Another very significant example is the betrayal of Chief Doublehead mentioned earlier. In 1805 he was negotiating a land treaty with the Indian agent James Roberts. According to their establishments all land from the Tennessee River, Kingston neighborhood and region of Hiwassee River ought to be sold to Americans. To the general agreement was attached a classified document in which Doublehead was awarded land in the basin river

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<sup>19</sup> D. H. King, *op. cit.*, pp. 96–97.

<sup>20</sup> *Ibidem*, p. 97.

<sup>21</sup> *Ibidem*, pp. 97–98.

<sup>22</sup> *Ibidem*.

<sup>23</sup> *Ibidem*, p. 99.

<sup>24</sup> H. T. Malone, *op. cit.*, p. 82.

<sup>25</sup> J. P. Brown, *Old Frontiers*, Kingsport–Tennessee 1938, p. 449.

Clinch to Hiwassee River. When the National Council learned of this amendment it refused to ratify the treaty. Several months later Doublehead was killed, and his death ended the time of self-government of chiefs without approval from the tribe.<sup>26</sup> Three years later, in Brooms Town on 11 September 1808, the National Council of the Cherokee Nation passed the first written law in the history of the American Indian. The law was called the 'Law of the Cherokee Nation' and was approved by Principal Chief Black Fox, the second-in-command Path Killer and Chief Toochar, who was third in the hierarchy.<sup>27</sup> This new law called into existence the Light Horse agency, whose main task was to prevent horse theft. Agents were not only responsible for catching the thief, but could also punish and even kill them. When the owner of the horse caught the thief in the act, he was allowed to kill him without any consequence. Clan revenge to horse thieves was suspended. The Light Horse law also regulated compensation for the widow of agents killed in action.<sup>28</sup> Some historians claim that the Light Horse law was the first Cherokee written criminal code. In fact, though, this act served to legalize the local horse guard, in existence since 1797.<sup>29</sup> A crucial move on the way to self-government was a resolution passed in July 1809. About 42 Cherokee towns under the leadership of Chief Path Killer denied the right of the US government to support and pursue a policy of assimilation and eviction of the Cherokee people. The same year, in September, during the assembly of the National Council in Wills Town all chiefs and the main elders passed a pact of unity of all Cherokee towns and the beginning of the construction of a sovereign state. As leader of one society was chosen Black Fox, a chief who did not belong to any clan, and second-in-command was Chief Path Killer.<sup>30</sup>

1810 was an important date due to the occurrence of a few legal events in Cherokee politics. Having conducted a policy of unity and unification, during the National Council in Oostanallah on April 1810 all clans decided to put the law system in the hands of national government and criminal justices. The ancient clan power of revenge now passed to the central government. Until this year the criminal investigation was only concerned with the guilt of the perpetrator, especially in the case of murder.<sup>31</sup> The National Council wrote: "if one brother kills his brother at first he should be found guilty of murder, and next punished according to the law".<sup>32</sup> Only one exception was allowed: in act killer, he could not be a judge. The new law for all Cherokee was signed by the Speaker of the Council Turtle at Home, Principle Chief Black Fox and his deputy Chief Path Killer.<sup>33</sup>

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<sup>26</sup> *Ibidem*, p. 451, 453.

<sup>27</sup> E. Starr, *History of the Cherokee Indians, and the Legends and Folklore*, Oklahoma City 1921, p. 41.

<sup>28</sup> *Laws of The Cherokee Nation adopted by the Council at various periods*, Tahlequah 1852, pp. 3-4.

<sup>29</sup> H. T. Malone, *op. cit.*, p. 76.

<sup>30</sup> D. Champagne, *op. cit.*, pp. 99-101.

<sup>31</sup> *Laws of the Cherokee Nation...*, p. 4.

<sup>32</sup> J. P. Brown, *op. cit.*, p. 454.

<sup>33</sup> *Laws of the Cherokee Nation...*, p. 4.



The Cherokee started to think much more seriously about the national constitution on 6 May 1817, when the Little Cherokee Constitution was passed. According to the preamble of the new law representatives from 54 towns and villages had gathered in Amoah<sup>34</sup> to discuss the political and economic situation of the nation, especially the land cession treaty signed that year.<sup>35</sup> To prevent further cession they enacted a memorandum<sup>36</sup> in which the seven most important chiefs decided to stop selling tribal land to any government, and in fact never to start negotiation on this subject; they said “allow us to live on the land of our fathers, without any further cession”. The other most important issue placed in the preamble concerns the reorganization of the tribe into governments by central authorities’ state with constitution.<sup>37</sup>

In order to prepare the society for further change the Little Constitution established a new structure of central power. The legislative body consisted of two houses: the Upper House and the House of Commons. The Stand Committee and National Council were the legislative power, but they too were separate from executive power. Members of both executives were elected by the electors of the districts. At the head of the National Council stood the Major Officer. The first person elected to this function was the young chief John Ross.<sup>38</sup> According to the first article the Stand Committee was made up of thirteen members elected for 3 years with the possibility of reelection for the following period.<sup>39</sup> Of these members one was called the Clerk of the Committee and two were representatives of the Council and Commons House.<sup>40</sup> When a position in the Committee was vacated because of death or any other reason the Principal Chief filled the vacancies. The Stand Committee<sup>41</sup> was responsible only for public affairs<sup>42</sup> and meant to deal with cases which related to common activity. However, this reservation did not prevent ordinary people from laying complaints against the concerns of the Committee. For example Otter Lifter accused the owner of an escaped slave of fraud. The Committee was at this time the substitute of town councils.<sup>43</sup> It was also responsible for cooperation with the federal US Indian Agency.<sup>44</sup> The National Council had the power to pass a law. Before making any final decision the Council was obliged to consult

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<sup>34</sup> E. Starr, *op. cit.*, pp. 42–43.

<sup>35</sup> C. J. Kappler, *Treaty with the Cherokee, 1817 July 8, 1817.7 Stat. 156. Proclamation, Dec. 26, 1817, “Indian Affairs. Laws And Treaties”* 1904, Vol. 2, Treaties, pp. 140–144.

<sup>36</sup> Under the great influence of John Ross, the honorable Chief of Cherokee tribe and the first elected Principle Chief under the constitution.

<sup>37</sup> J. P. Brown, *op. cit.*, p. 472.

<sup>38</sup> J. Mooney, *Historical sketch of the Cherokee*, Chicago 1975, pp. 97–98.

<sup>39</sup> In fact reelection was mandatory.

<sup>40</sup> J. Mooney, *op. cit.*, pp. 97–98.

<sup>41</sup> From 1817 the name *National Council* was used interchangeably with Upper House or for both houses. Persico used the term General Council for the gathering of both houses.

<sup>42</sup> E. Starr, *op. cit.*, p. 43.

<sup>43</sup> *Ibidem.*

<sup>44</sup> *Ibidem.*



with the nation gathered in both Houses, and also all members of the Council were supposed to be unanimous on the new law.<sup>45</sup>

The Little Constitution normalized the extent of the power of the Cherokee tribe; according to article 3 each person who entered Cherokee land came under the tribal law. Tribal cognition ended at the moment of migration or leaving the Cherokee territory. The Little Constitution was a provisional law, passed to test whether the Cherokee society was ready for such changes. Chiefs and local authorities were asked to observe how people reacted to the new regime.<sup>46</sup> The time from the passing of the Little Constitution to the enactment of the major constitution was the only period in Cherokee legal history when the Principal Chief had less power over the people. The duties of the Principle Chief were now only as a figurehead.<sup>47</sup>

Very soon the National Council gathered that for the good functioning of the state they would need money. The National Council established a tax clerk to collect the tribute: 50 cents for each free man under sixty years old.<sup>48</sup> At the end of October 1819 the Council passed a new tax law and established new rules for getting licenses for small businesses. Special conditions of exemption from licensing were established for US citizens, to encourage them to settle among them.<sup>49</sup> In the same year the National Council decided that the Cherokee government was authorized to collect road tax.<sup>50</sup>

Another decisive year in the Cherokee transition was 1820. First the government enacted a law allowing teachers, miners, blacksmiths, boatman and a few other occupations free settlement on Cherokee land. There was one condition for them: they had to receive government permission to work on Cherokee land.<sup>51</sup> In the late fall of 1820 the National Council decided to reorganize the administrative structure of the tribe. After long-running consultations with clan elders and chiefs they managed to reach a compromise and decided to accept the American system of administration. The Cherokee tribe was divided into eight districts:<sup>52</sup> Coosawatee, Chickamaugee, Chattooga, Amohee, Hickory Log., Etowah (Hightower), Tahquohee and Aquohee.<sup>53</sup> The borders of the districts were strictly marked and eighth district courts were established. The new law also defined the court's sitting date and the place where a court would meet. Usually according to tradition court sessions were on the second Monday of May and September.<sup>54</sup> Under the district court was the circuit district as the higher court; there was one circuit court under

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<sup>45</sup> *Ibidem.*

<sup>46</sup> *Ibidem.*

<sup>47</sup> D. H. King, *op. cit.*, pp. 99–101.

<sup>48</sup> G. S. Woodward, *The Cherokees*, University of Oklahoma Press 1963, p. 145.

<sup>49</sup> *Laws of the Cherokee Nation...*, pp. 6–7.

<sup>50</sup> D. H. King, *op. cit.*, p. 103.

<sup>51</sup> E. Starr, *op. cit.*, p. 43.

<sup>52</sup> D. H. King, *op. cit.*, pp. 103–104.

<sup>53</sup> H. T. Malone, *op. cit.*, p. 79.

<sup>54</sup> "Cherokee Phoenix" 1828, No. 7, Vol. 1, p. 1.

two district courts. Judges in both courts applied ancient Cherokee law.<sup>55</sup> To the district court were brought cases of local matters, while the circuit courts dealt with infringement of national law.<sup>56</sup> Execution of the circuit court sentences belonged to the Light Horse agents, who were also responsible for the security of the judges, not only during session.<sup>57</sup>

After a few years of being in force, from 1817 onwards the law showed its weakness. At first the Council was about 200 to 300 delegates from 50 to 60 towns, and it was impossible to reach any consensus on the main policies drafted to make changes in the administrative organization.<sup>58</sup> The new legislative power under the law of 1820 belonged to two houses: the National Committee and National Council. From each district four representatives were sent to legislative organs, which were placed in Newtown or in the capital New Echota.<sup>59</sup> The National Committee (Upper House) consisted of thirteen members elected by the National Council, who were responsible for initiation of the legislative process and hearing the complaints of people about the government and National Council actions. The Nation Council was the lower house of 32 elected by the people's delegates; their main duties were to approve the Committee's decisions. The Principal Chief and second-in-command chief were elected by both houses. They exercised executive power, and also each new law was to be signed by them. On the regional level the district council was in place: this met twice a year to deliberate over local issues. Members of the local council were elected by the citizens of the district.<sup>60</sup>

Organizational changes in society also caused conversion of legal procedures and validation. New bills and acts were now printed and published in English. For example the acts from 1817 and 1820 were published in the Cherokee Law Collection public in Knoxville, Tennessee in 1821, and the printing was sponsored by the Cherokee Nation. From then on all new laws were published,<sup>61</sup> and from 1827 this took place in the Cherokee national printing house in New Echota and in the *Cherokee Phoenix* newspaper.<sup>62</sup>

A significant step in the Cherokee transition, and the final step before the enactment of the constitution of a democratic state, was the law established the Supreme Court in 1821. Creation of the Supreme Court was the answer to the problem of too many cases being put under the consideration of the National Committee by individual persons. The Cherokee did not admit the Supreme Court at the beginning and still preferred the Committee, but in 1823 there were so many cases for the

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<sup>55</sup> V. O. King, *op. cit.*, pp. 103–104.

<sup>56</sup> H. T. Malone, *op. cit.*, p. 78.

<sup>57</sup> G. S. Woodward, *op. cit.*, p. 145.

<sup>58</sup> D. Champagne, *op. cit.*, p. 136.

<sup>59</sup> New Echota was a place in the basin of the Conasauga river to Coosawatee river, near today's city Calhoun in the state of Georgia; J. Mooney, *op. cit.*, p. 98.

<sup>60</sup> D. Champagne, *op. cit.*, p. 135.

<sup>61</sup> L. Hargrett, *op. cit.*, p. 5.

<sup>62</sup> *Ibidem*, pp. 5–8.

Committee that the Council decided to postpone prosecutions until the next year. To avoid such a situation in future the Council ordered the Committee to devolve all individual cases to the Supreme Court.<sup>63</sup> Sessions of the Supreme Court were connected with assemblies of the National Council, with the sessions normally taking place once a year, in October and November. The Supreme Court solved not only the Committee cases but also appellations from the circuit courts.<sup>64</sup> All judges of the circuit belonged to the judicial composition of the Supreme Court. They were supposed to make decisions in the name of God, with honor and honest intentions.<sup>65</sup> The basic full bench in a case was four judges with a grand jury.<sup>66</sup> Anybody who wanted to take his cases to the Supreme Court had to pay the common treasury 6% of the value of the claim. Witnesses who did not obey the court summons were obliged to pay 10 dollars to the party who may have taken benefit from their testimony. Another payment was 50 cents per day from each witness who testified, money which was collected for the party who lost the trial. The rest of the money from the payment was given to the National Treasury.<sup>67</sup> The first session of the Supreme Court ran from 9 to 25 October 1823. During the session the court deliberated on 21 cases, out of which 13 cases were about debts, three compensation, two fraud and one each concerned a stolen hug, license to settle, emission and larceny.<sup>68</sup> Over the thirteen years of its existence the Supreme Court of the Cherokee Indian solved nearly 246 cases. Most charges were civil cases concerning: bigamy, larceny, robbery, land issue of Arkansas immigrants, illegal sale of 'spirit drinks',<sup>69</sup> debt cases, illegal employment of American citizens in the Cherokee country and the return of the river ferry.<sup>70</sup> The Supreme Court heard the cases of not only normal citizens but also important chiefs. In 1826 the Supreme Court commended Chief Path Killer to share with James Hughes the ownership of the river ferry.<sup>71</sup> The Court worked continuously until 1835, when the Cherokee were exiled from their homeland.<sup>72</sup>

General analyses of the Cherokee court system would be meaningless without discussion of court procedure and the criminal code. Judicial power is one of the significant parts of state power among the citizens of the country. When the state was able to perform judicial power it had internal sovereignty. Under the law passed on 8 November 1822 judges were responsible for preparing and saving the transcripts and evidence from each case they solved.<sup>73</sup> To help them in this work,

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<sup>63</sup> V. O. King, *op. cit.*, p. 102.

<sup>64</sup> *Ibidem*, p. 145.

<sup>65</sup> *Ibidem*.

<sup>66</sup> H. T. Malone, *op. cit.*, p. 83.

<sup>67</sup> *Ibidem*.

<sup>68</sup> *Ibidem*, p. 83.

<sup>69</sup> Alcohol.

<sup>70</sup> H. T. Malone, *op. cit.*, p. 83.

<sup>71</sup> *Ibidem*, pp. 83–84.

<sup>72</sup> G. S. Woodward, *op. cit.*, pp. 145–146.

<sup>73</sup> "Cherokee Phoenix" 1828, No. 8, Vol. 1, p. 1.

the National Council in 1825 established a court police made up of a marshal and sheriff.<sup>74</sup> Judges, provided with security by the court policemen, were obliged to use in their court a new law, passed by the Council, and dispose of the traditional code. For example under the new law abused or raped women could postulate for the offender a punishment of 50 lashes on the bare back and the cutting off of his left ear. On the occasion of the second conviction the punishment was a hundred lashes and removal of the other ear, and the third conviction resulted in execution. In the case of wrongful accusation the woman was punished by 25 lashes to the bare back.<sup>75</sup> The National Council also passed the same civil law as contract law and the procedure of repayment of debts and civil execution.<sup>76</sup> To explain the influence and significant role of the constitution in Cherokee society it is important to emphasize the transformation of the legal procedure after this major act was passed. The year after the constitution was in force, the National Council passed the rules of legal procedure in the circuit court. According to the new law the country was divided into two circuits, in which the circuit court would proceed. In each circuit court sat two judges elected by the National Council, with no division in cognition between them; both were working on civil and criminal cases. They only presided over major cases like murder, rape or larceny. This system was similar to the American system of criminal procedure, as illustrated by murder cases. When the sheriff was informed of homicide he secured the scene of the crime and notified the incident to the judge, and then decided whether to arrest a suspect. On the first day of the trial the sheriff chose 24 men, from which the defendant selected the 12 members of jury. The duration of the court trial was limited to 5 days. In a situation where the jury's decision was contrary to the law or obvious facts the trial was repeated by the judge. After the correct verdict the court clerk secured all court documents and sent them to the Supreme Court.<sup>77</sup> Murders caused by effect or accident were not punished at all; other homicides were punished by the death penalty, carried out five days after the sentence. Perpetrators of robbery or larceny were punished by lashing and fines. The law from November 1828 also regulated the rendition of court sentences.<sup>78</sup> Contrary to some statements about the lack of Cherokee legal practice alleged in the colonial period, Samuel Worcester wrote in his letters published in the *Cherokee Phoenix*: "as far as my knowledge reaches,<sup>79</sup> abidance to the law is on a high level of efficiency".<sup>80</sup> To sum up, before the enactment of the constitution the Cherokee had an effective legal system and a well-organized court

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<sup>74</sup> "Cherokee Phoenix" 1828, No. 11, Vol. 1, p. 1.

<sup>75</sup> "Cherokee Phoenix" 1828, No. 12, Vol. 1, p. 1.

<sup>76</sup> "Cherokee Phoenix" 1828, No. 13, Vol. 1, p. 1.

<sup>77</sup> "Cherokee Phoenix" 1829, No. 45, Vol. 1, p. 1.

<sup>78</sup> *Ibidem*.

<sup>79</sup> During his visit in Cherokee Country he visited almost every region.

<sup>80</sup> Samuel Worcester letter to Mr. William. S. Coodey, written 15 March 1830, published in "Cherokee Phoenix" 1830, No. 3, Vol. 3; *New Echota Letters, contributions of Samuel A. Worcester to the Cherokee Phoenix*, ed. J. F. Kilpatrick, A. Gritts Kilpatrick, Dallas 1968, p. 78.

structure. The government was sovereign on the Cherokee land, had full control of society, and was acclaimed by the whole of society.

The two final steps in the Cherokee transformation were two laws: first, the 1822 act forbidding private persons and individual chiefs from negotiating with the US government on land cession. In support of this law it was said that all land belonged to the nation, not to individuals.<sup>81</sup> Connected with this bill was the act of 1825 under which the National Council took over the ownership of the whole lands and public buildings in Cherokee Country.<sup>82</sup> The Principal Chief could not sign any cession treaty with foreign governments without approval of the National Council.<sup>83</sup> The Cherokee nation was also the exclusive owner of all minerals found in Cherokee ground, especially gold, silver, copper or coal. Explorers of the new deposit got one quarter of the profit from each new main.<sup>84</sup>

In the middle of 1825 the Cherokee tribe was ready to think about its own constitution and creation of the first demarcated Indian state, but the elders and chiefs decided to pass several new laws, which better prepared society for such significant changes. The Cherokee were a young nation learning how to cooperate on the national level under written law. The National Council made unceasing changes in administrative organization, but it not had been necessary to make them under the constitution. It was necessary to change the legislative procedure in the National Council and Committee; from 1825, before major bills like criminal and civil code were passed in both Houses a quorum was needed. Another substantial change concerned the social policy of the state. Until 1825, each citizen of the Cherokee Nation who had the capacity to return the money within six months and be underwritten by two honorable men could receive from the National Treasury a maximum 500-dollar loan. The recipient was obliged to pay 6 percent tax on the loan.<sup>85</sup>

As well as changing the legal system and administration of the country, the Cherokee modified their culture too. In 1825 the National Council passed another important law: a new tax for financing the National Academy, the opening of a national print office in New Echota and the publication of a national newspaper, the *Cherokee Phoenix* referred to above.<sup>86</sup> Finally in November the foundation act of the new capital of the Cherokee state, New Echota, was passed. The capital was built on the same place where the beloved town of Chota had stood. The bill envisaged the construction in the capital of public buildings such as the Supreme Court and National Council headquarters.<sup>87</sup> A further investment in cultural changes was the foundation of schools in Cherokee country. From 1808 the town council started in-

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<sup>81</sup> G. S. Woodward, *op. cit.*, p. 147.

<sup>82</sup> D. H. King, *op. cit.*, p. 101.

<sup>83</sup> G. S. Woodward, *op. cit.*, p. 150.

<sup>84</sup> *Ibidem*, p. 150.

<sup>85</sup> *Ibidem*, pp. 150–151.

<sup>86</sup> *Ibidem*, pp. 143–144.

<sup>87</sup> *Ibidem*, pp. 151–152.

viting missionaries to teach children in the religious or town school. The town offered financial support to such schools. In 1826 there were eighteen schools, in which as of 1821 children had been learning also how to read and write in the Cherokee language. This was possible thanks to Chief Sequoya, who invented the Cherokee alphabet. The National Council also founded the National Cherokee Seminary as a high school. Sequoya's invention allowed the government to publish laws not only in English but also in Cherokee.<sup>88</sup>

At the end of 1826 the National Council and Principal Chief decided that it was time for a major move, and passed the constitution of the Cherokee Nation. On 13 October 1826 the National Council and Committee enacted a resolution on convoking a constitution assembly the following year. According to the act each district elected three from ten delegates to the convention. The right to vote at the *viva voce* was held only by free men with Cherokee origin. Districts were divided into two or three circuits in which a voting house was appointed. The resolution indicated ten candidates from each district; for example John Ross was in first place in the Chickamauga district, or John Ridge was fifth in the Coosewaytee district.<sup>89</sup> The election was in May 1827, and the first meeting of the constitution convent took place on 4 August the same year. Before the debate about the constitution had been initiated, the assembly stressed the sovereignty of the Cherokee Nation by not allowing the American government to build a water canal on a Cherokee river.<sup>90</sup>

The Cherokee National Constitution was enacted at the assembly of the National Council on 26 July 1827, and published in English and Cherokee in the *Cherokee Phoenix* in February<sup>91</sup> and March<sup>92</sup> 1828.

The Cherokee constitution had one significant part which should be stressed at the beginning: the Bill of Rights. Under this regulation, Cherokee individuals and American citizens had a right to: possession of land, freedom of religion and trial by jury. Slaves and blacks were not allowed to possess land.<sup>93</sup> Nevertheless, from the creation of the Cherokee state power-sharing was enforced as the major rule of the legal system.<sup>94</sup>

The first Indian constitution comprised a preamble and six articles, divided into sections. In the preamble we can read that this constitution was enacted under the guard of the Ruler of the Universe to guarantee the Cherokee Nation protection of common welfare and liberty.

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<sup>88</sup> *Ibidem*, p. 143.

<sup>89</sup> *Laws of the Cherokee Nation adopted by the Council at various periods*, Tahlequah 1852, pp. 73–76.

<sup>90</sup> D. Champagne, *op. cit.*, p. 138.

<sup>91</sup> "Cherokee Phoenix" 1828, No. 2, Vol. 1, p. 1, art. IV and V.

<sup>92</sup> "Cherokee Phoenix" 1828, No. 3, Vol. 1, p. 1, art. VI.

<sup>93</sup> D. Champagne, *op. cit.*, p. 140.

<sup>94</sup> G. S. Woodward, *op. cit.*, p. 155.

The constitution established justice and rule for future generations.<sup>95</sup> Generally the constitution established the definite borders of the Cherokee country, without the possibility of changing them. All land in the limits set in section one was managed by the sovereign and legal government of the Cherokee Nation. According to section two, entire territories belonged to the nation. Citizens were awarded the right to possess and improve land, but not to ownership. The right of occupancy was countered by the prohibition of selling one's land, and especially prohibited was selling the right to Cherokee land to the American government and citizens. Members of the tribe who had lived there previously and now wanted to come back had to obtain a patent of selling from the General Council.<sup>96</sup> The power-sharing mentioned above was described in article two. Legislative power was exercised by distinct branches: the Council and Committee. The Committee and the Council constituted together the General Council of the Cherokee Nation. A particular district sent to the Committee two representatives and to the Council three delegates. The voting took place in each second year, counting from 1828. Only free Cherokee male citizens aged at least 18 could vote. Each free man of Cherokee maternal descent aged over 21 years, with the exception of Negro slaves, had the right to be elected.<sup>97</sup>

Sections 8 to 10 considered the rights and duties of members of the Committee and Council. Particular Houses chose from their representatives special clerks to coordinate the sessions. The new law also established the rules of disciplinary measures for members who broke the law. At the first session the elected members took an oath of loyalty and honesty in their work.<sup>98</sup> Under article 4 section 5 all civil servants in the Cherokee state were bound by the rules of the constitution and Cherokee law.<sup>99</sup>

The General Council held exclusive rights to deal in external affairs, especially with the government of the USA and all foreign countries. However, the National Council was responsible for treaty negotiation.<sup>100</sup> The disciplinary procedure, which could be initiated only by the Committee, was regulated in detail, but accusation was the domain of the Council. Financial matters were also put under the consideration of the Committee; all other legal propositions could come from both Houses.<sup>101</sup> The Constitution implemented a prohibition of enactment of the law with retrospective effect or to restrict contract law. International treaties were equated with the law enacted by the Cherokee government.<sup>102</sup>

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<sup>95</sup> *Constitution of the Cherokee Nation...*, p. 1.

<sup>96</sup> *Ibidem*, pp. 1–5.

<sup>97</sup> *Ibidem*, pp. 6–9, 11.

<sup>98</sup> *Ibidem*, p. 10.

<sup>99</sup> *Ibidem*, p. 17.

<sup>100</sup> *Ibidem*, p. 12.

<sup>101</sup> *Ibidem*.

<sup>102</sup> *Ibidem*, pp. 12–13.



Executive power was the domain of the Principal Chief. He was elected by the General Council for four years by unanimous vote. Candidates for Principal Chief had to be Cherokee citizens aged over thirty-five.<sup>103</sup> He was responsible for convocation of the General Council as a prime minister and the guardian of law and order in the state. Each new bill or act before entering into force had to be signed by the Principal Chief, but he could enter a protest to the law. One of the most important duties was visiting districts once every two years to get to know the problems of the local people.<sup>104</sup> He was also responsible for external relations but he acted through agents and delegates the Principle Chief, who acted through agents and delegates. It was the exclusive right of the Principal Chief to convoke the council as an executive government. Both Houses sent their delegates to council, three from each.<sup>105</sup>

The Cherokee Constitution also regulated the finances of the state. The National Treasurer was elected by the Principal Council for two years. He was responsible for allocation and official settlement of the money which accumulated in the treasury. Only the Principle Chief had the right to administrate public money.<sup>106</sup>

Article five of the Cherokee Constitution regulated the judicial power in the new state. Justice administration was exercised by the Supreme Court, circuit courts and local courts invoked by the General Council. Judges were independent and irremovable during their four-year term. Two out of three judges in the Supreme Court had to agree to pass the sentence. Criminal cases were in the hands of the Supreme and circuit judges. The sentences were announced in the name of the Cherokee Nation.<sup>107</sup> Section fourteen of article five regulated the rights of the defendant, whereas section fifteen contained the principles of respect of private ownership and human rights.<sup>108</sup> Nobody, who did not believe in any god could be the clerk in Cherokee state.<sup>109</sup> Also, under sections 8 to 10, Cherokee citizens had guaranteed economical and sociological rights.<sup>110</sup>

The Cherokee constitution was the first Indian written constitution. The Cherokee tribe chose this path to save their nationality, identity and land. When the American Revolution was over, the time of creation of the American dream of big state followed, the Cherokee living on rich soil where gold was found were an obstacle to American citizens. What bother the most american official lwas fact that the legal path to displace the tribe was closed by court rule. From this point of view the Cherokee won the battle of independence and sovereignty of their tri-

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<sup>103</sup> *Ibidem*, pp. 14–15.

<sup>104</sup> *Ibidem*, pp. 16–17.

<sup>105</sup> *Ibidem*, pp. 18–19.

<sup>106</sup> *Ibidem*, p. 19.

<sup>107</sup> *Ibidem*, pp. 20–22.

<sup>108</sup> *Ibidem*, p. 23.

<sup>109</sup> *Ibidem*, pp. 24–25.

<sup>110</sup> *Ibidem*, p. 26.

be. They created an effective state, governed by legal authority. The main process of transformation took only 20 years. It is amazing how in such a short term the tribal society became a democratic state. The development of this people was not a freak event, but a process considered carefully by the whole nation. It is widely agreed that the Cherokee constitution is to some degree similar to the constitution of the USA, but most of its regulations had sources in tribal tradition. The Principle Chief or the National Council were placed in the strong ancient culture of this tribe. Also, the foundation of the capital in the same place as the beloved town of Chota had been emphasized the influence of the past. From the legal point of view the Cherokee Nation was able to self-govern and maintain a self-sufficient existence. The whole nation supported the transformation, they participated in the voting and governance of local society. In fact the Cherokee were wealthy people in the 19th century, and trade developed along with farming and mine production. Education was at a high level, and the national treasury full. The only flaw in this well-oiled machine was the lack of a well-trained army to protect the borders from US invasion and betrayal of a small group of people. The Cherokee believed too strongly in the letter of law, and this is why they lost their battle. Few people under the command of Major Ridge signed the cession treaty in 1835. The National Council and Principal Chief John Ross had never ratified this treaty, but this was a great pretext for the US government to expel the Cherokee Nation from their homeland. They were given a few hours to pack and the army pushed them onto the 'Tears Trail', during which about 7000 Cherokee died. Perhaps surprisingly, those who survived soon started building a new state on land in Oklahoma.