THE SOCIAL (WELFARE) STATE IN MODERN CONSTITUITIONALISM

E. TANCHEV,
Head of Chair of Constitutional Law at Sofia and New Bulgarian Universities, Former President of Constitutional Court of Republic of Bulgaria, Ph.D., professor

The article researches the content and the institutionalization of the concept of the social state and the welfare state (prosperity), which are the opposites of the minimum (previously -liberal) state, on the one hand and the paternalist-totalitarian state, on the other hand. The analysis of the evolution and the constitutionalization of the French and German concepts of the social state is held in the article. Special attention is paid to the disclosure of the content of the debates in creating the current constitution of the Republic of Bulgaria 1991. These debates are the key to understanding why the welfare state proclaims only in the preamble the Constitution while other characteristics and constitutional principles declared in the rules of the constitution. The connection of social state with the second generation of social and economic rights is covered in the article.

Keywords: constitution, social, state, principle, fundamental rights, Bulgaria, Germany, France, Spain, the European Union, the European Convention on Human Rights, the Charter of Fundamental Rights.

The welfare state is a vast topic. This report looks at the content, the scope and the institutionalization of the concept of the welfare state in several contemporary constitutions, including the constitution of Bulgaria, as well as the implications and the options for legislative implementation of the principle. Parallel to that, the correlation between the liberal and the welfare state deserves special attention and even new interpretation, since in contemporary Western democracy the welfare state is the emanation of the liberal state and not its antipode, as the dogmatics, overlooking reality, schematize.

The basic laws of the fourth constitutional generation, adopted after the Second World War in Western Europe, expressly proclaim or implicitly contain provisions, which institutionalize the concept of the welfare state.

Creating each of these constitutions, their drafters reached some common views, which followed the evolution of the legal and political doctrine, although being rather motivated by national constitutionalism.

According to Art. 2 of the Constitution of the Fifth Republic of 1958 France is an indivisible, secular, democratic and social Republic.

The Basic Law of the Federal Republic of Germany of 1949 in its Art. 20, par. 1 defines the state as a democratic and social federal republic. The constitutional order in the Länder must conform to the principles of republican, democratic, and social government, based on the rule of law, within the meaning of the federal Basic Law (Art. 28, par. 1).

The Constitution of Spain, drafted in 1978, proclaims in its Art. 1 that the Spanish republic is constituted as a social and democratic state.

Three other constitutions – those of Italy, Portugal and Sweden – go even further. According to its basic law of 1946, Italy is a democratic republic, based on labor. The state recognizes and guarantees the inviolable rights of the person and ensures the performance of the unalterable duties of political, economic and social solidarity (Articles 1 and 2).

Thirty years later, in the constitution adopted after the fall of the despotic regime Portugal is defined as a sovereign republic, based on the dignity of the person and on the will of the people, committed to building a free and fair society that unites in solidarity. The achievement of economic, social and cultural democracy and the development of participatory democracy are proclaimed as core values, which the Constitution steps on and guarantees (Art. 1 and 2).

„The form of government», adopted in 1976 in Sweden, does not introduce the notion of the welfare state. But the world-famous state of common welfare, strengthened during the long rule of the social democrats, is established in par. 2 (2) of the Constitution. The personal, economic and cultural welfare of the individuals should be the fundamental aim of public activities. The state is bound to secure for everybody the right to work, housing and education, as well as contribute to the social security, safety and good living environment. Society should strive for the democratic ideas to become guidelines in all spheres of society.

The evolution of the idea and the institutionalization of the principle of the welfare state in the theory and practice of French and German constitutionalism deserve special attention.

In one of the most authoritative commentaries of the Constitution of the Fifth French Republic the idea of the welfare state is seen in the context of expanding democracy, which permeates the social sphere, along with politics and culture. In a more abstract sense the notion is mainly related to the principles of social justice and solidarity.[1]

The development of social solidarity is an original French contribution in sociology and jurisprudence. The concept of social solidarity was developed to its fullest in the doctrine of E. Durkheim.[2] Looking at the different forms of division of labor and cooperation among social groups, he established the need for social solidarity, which is to ensure the preservation and progress of society. According to L. Duguit, who developed further and introduced social solidarity into legal theory, it does not oppose individualism, but combines with it to guarantee equality before the law and the rights of citizens in the local, national and world community. Law should be based on social solidarity and its norms should be consonant with the commandment to not do anything, which would harm social solidarity.[3] L. Bourjois established the need for expanding state intervention to curb the fatal game of the economic powers. He saw social solidarity as a mechanism, able to ensure social cohesion by combining democracy and economic progress.[4] In neotomism the welfare state was explained by the need for expansion of state functions as a result of industrial progress to compensate the disregard of social solidarity and justice.[5]

Post-Second World War French constitutionalism developed further the principles of the welfare state, whose ideologic bases were found in solidarism and state interventionism, protecting the freedom of vulnerable social groups. In a practical sense social legislation appeared as early as after the First World War, although the two organic laws, forming the Constitution of the Third French Republic, did not proclaim the principle of the welfare state.[6]

In Germany the constitutional principle of the welfare state is found in many different forms. That is why we need to look deeper into its emergence, evolution, nature and institutionalization. The welfare state is organically related to the principle of the rule of law and has its roots back in 19th century.

Sometimes the creation and development of this concept is, too primitively, attributed to Marxism. By explaining historical development by class struggle, K. Marx and his followers actually advocated the destruction of the unjust system of relations of production. The new state of the political rule of the proletariat would, according to them, establish the idea of class justice on the ruins of the capitalist society. In this sense the totalitarian state is neither a product of the natural evolution of the system, where the principle of the welfare state emerged, nor even a surrogate of the contemporary welfare state, based on market economy and functioning under liberal political democracy. Moreover, the demise of the political systems of the states of the so called real socialism happened not because of the establishment of the welfare state, which is not theoretically impossible, although not seen in history, but because they could not sustain the competition of the modern welfare state.

In German constitutionalism the categories of the welfare state and the social market economy are seen as a product of the neo liberal, social-reformist and catholic doctrine.[7]

Back in the middle of the last century Lorenz von Stein predicted the emergence of the welfare state as the only model to guarantee the social peace between the rich and the poor classes. The stability of social order and democracy was conditioned on the reality of social rights.[8] And if at the end of last century constitutionalists saw the expansion of basic political rights and especially of the universal suffrage as means to politically integrate the poor classes,[9] von Stein's prediction was a guarantee for the modernization of market economy and the stabilization of democracy.

The modern concept of the welfare state is following up on the tradition in German constitutionalism, stemming from the Weimar Constitution of 1919. It was one of the first basic laws, which expanded the catalogue of people's fundamental rights, including a number of economic and social rights.[10] Health, family, maternity, youth and labor were placed under the special protection of the society and the state (Articles 119, 120, 121, 157). It is the second generation of constitutional freedoms – the social rights – that made possible the proclamation of the principle of the welfare state. Section V of the Constitution, regulating economy, is of particular interest. In a sense in contains the basic pre-requisites, from which the principle of the modern welfare state crystallizes. The organization of economy should reflect justice and guarantee dignified human existence (Art. 151). Apart from proclaiming the inviolability of private property, the Constitution established that property carried certain obligation and its usage should serve the interests not only of the owner, but also of society (Art. 153). The Basic Law also provided for stimulating cooperatives, legislative incentives and protection from oppression of the independent middle class in agriculture, industry and commerce (Art. 164). The state created a general system of social security for the protection of health, workforce and pensioners (Art. 161). The Weimar Constitution not only proclaimed employer-employee cooperation in regulating the conditions of labour and the wages, but also provided for a German initiative in the international regulation of conditions of labour and the minimum catalogue of social rights (Art.165 and 162). The progressive ideas of the Weimar Constitution did not find its way into constitutional practice of a modern welfare state primarily because of the economic crisis in Germany after the First World War. Moreover, this was such a catastrophe that the Constitution could not ensure the self-preservation even of a minimum of the liberal state. The tradition, which led to the strengthening of the principle of the welfare state, was severed by the totalitarian Third Reich which messiahnistically claimed to be sending the mature political democracy of Weimar Germany to history, but soon ended up as a historic phenomenon itself.

Post-war constitutionalism in Germany strengthened the principle of the welfare state. In discussing the content and scope of the concept, the representatives of the various legal and political doctrines not only did not refute the principle, but rather strived to clarify its nature so that it could be introduced in the legal system. State intervention in the social and economic sphere of civil society was justified by the growing need to regulate the ever complicating socioeconomic relations in the

[1] Luchaire, F., G. Conac. La constitution cle la republique francaise. Paris, 1980. P. 85.

[2] Durkheim, E. The Division of Labour in Society. London, 1964. P. 70-233.

[3] Дюги, Л. Конституционное право. М.,1908. С. 18.

[4] Буржоа, Л. Обществената солидарност. С., 1919. Interestingly, this work was translated by Stoycho Moshanov, who noted in the preface that he filled in a gap in the literature of the Democratic Party, which declared in its programme, the report of the Supreme Party Council and its election platform of 1919 that "the sound basis of state life should be grounded on social solidarity».

[5] Maritain, J. Man and the State in Political Older and the Plural Structure of Society. Atlanta, Emory University, 1991. P. 185-187.

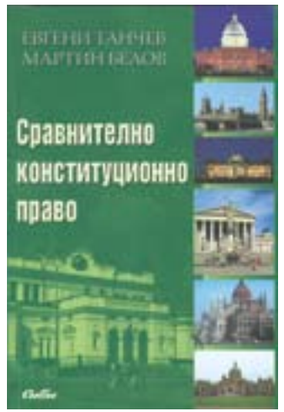
[6] As early as 1919, the Parliament adopted the Clemenceau government law, providing for a working day of 8 hours, while the next decade saw the drafting of laws, providing for unemployment, sickness, disability, maternity benefits, etc.

[7] Kommers, D. The Constitutional Jurisprudence of the Federal Republic of Germany. Duke University Press, 1989. P. 247.

[8] „…. if the rich classes conduct the government in accordance with the interests of the poor, offering them education and opportunities to gain capital, although gradually, this class will attain a higher level of indifference towards the constitutional form of the state… What the form of government will be – monarchy, dictatorship or democracy – does not make a difference since obtaining property makes non-freedom impossible, consequently property guarantees freedom» (L. von Stein. Geschichte der sozialen Bewegung in Fraureich von 1789 bis Tage Darmstadt, 1959, vol. 3. P. 206).

[9] Мейеръ, Г. Избирательное право. Т.II. М. С. 8-9.

[10] Stark, C. Die Grundrechte in Deutchland, Rechstwissenschaft und Rechtsentwicklung., Gottingen, 1980. S . 98.



process of industrialization and urbanization and the diminishing importance of the traditional forms of care for relatives.[11] The discussion about the limits and forms of state intervention in the private and public sphere seemed most heated.

According to one of the more extreme views, the welfare state would mean assessment, ensuring and change in the economic relations and the other relations they stipulate and would stand against them to guarantee dignified human existence, to limit the differences into people's welfare and eliminate or at least control the relations of dependence.[12]

Others think that the constitutional principle of the welfare state creates an obligation and legitimizes the executive and legislative branches' meeting the requirements of the rule of law while formulating the basic principles of social policy.[13] The forms of state intervention, through which the principle of the welfare state is applied, also find different interpretations.

According to the strongest supporters of the idea, the state should, through legislation and government, plan, re-distribute and compensate so that it could, through its sovereign power, reduce social tension and inequality and prevent society from self-destruction.[14] Others attribute to the state power much more limited possibilities for impact by claiming that the constitution only phrases a requirement towards political institutions to take into account and act within social conditions.[15]

Despite the wide spectrum of opinions in the discussion the welfare state is always seen within the context of Western democracy. The idea that the principle of the welfare state may legitimize the establishment of totalitarianism was totally alien to German constitutionalism after the end of the Second World War.

Such an evolution or transition was refuted not only in the theoretic constructs, but was also excluded by the very Basic Law of the Federal Republic of Germany, because it violated fundamental principles and norms, which regulated people's rights and the functions of political institutions.

The constitutional principle of the welfare state is implemented by the citizens' social rights and by the actions of the political institutions, which adopt special social programs, establish a just tax policy, regulate the labour market and introduce well-developed labour and social security legislation.[16]

The Constitution of the Republic of Bulgaria of 1991 proclaims the welfare state expressly in its Preamble and implicitly by regulating a number of fundamental rights of citizens in the social sphere.

The institutionalization of the principle of the welfare state met a number of objections during the drafting of the Constitution. Under the previous regime the welfare state was either deemed a poor copy of the socialist state because of the "impact and attractive example of the socialist regime», or was rejected as a revisionist fabrication, masking the doomed capitalism, which could not be changed. During the transition period of the emerging democracies the idea of the welfare state provoked negative reactions and was criticized on other grounds. Primarily in a propaganda sense and partly because of etymology, the term social state was claimed to be a surrogate of the socialist state, which was sufficient basis for vigorous rejection by anybody, who supported the transition to a democratic regime. Formal logic-wise, the welfare state was defeated as a mere tautology. Once the notion of the welfare state was taken out of the context, in which it was used in the developed Western democracies, all abstract semantic exercises were not only justified, but also gave fruitful grounds for speculations. Under one of the reasoning options, one logically reaches the conclusion that the mere notion of the welfare state is a logical misconception. As long as each state supports welfare, the idea of the welfare state is redundant.[17] The same validity was attributed to the statement that since the state is an unique sovereign union of community of human beings it by definition cannot exist outside the public social sphere and in this sense all of the states by presumption are social.

The arguments around the drafting of the Bulgarian Constitution of 1991 left the express proclamation of the principle of the welfare state only in the Preamble, while the rule of law was also provided for in the basic law's text (Art. 4, par. 1). This was undoubtedly done with the conviction that the Preamble did not and could not have the same binding force as the constitutional provisions. And, indeed, the opinion that the preamble has not other force than moral, is well established among constitutionalists. Whether

[13]Хессе, К. Основы конституционного права ФРГ. М., 1981. С. 112; K o m m e r s, D. German Constitutionalism: A Prolegomenon, Emory Law Journal, v. 40, 1991. P. 837, 865.

[14]Bocken for de, E. W. State, Society and Liberty. Oxford, 1991, 165-168. The Federal Constitutional Court mentions numerous times the principle of the welfare state, while at the same time avoiding to formulate directions for the development of social legislation, "since in this field Parliament has full discretion» (D. Kommers. Constitutional Jurisprudence of West Germany, 1989, P. 248).

[15]Carpen, V. The Constitution of the Federal Republic of Germany. Baden Baden. P. 189.

[16]State protection and the responsibility of private citizens should be combined in such a way so that the social net could save the individual from poverty, but at the same time not allow anybody to get stuck in it and lose his/her freedom of action (G. A. Ritter. Op. cit. P. 203).

[17]The organic theory of the state, supported as early as the ancient times by Plato and Menenius Agrippa, and later developed by Otto von Gierke in the context of the associations in the historic development, offers a vast array of arguments in this sense (see Г. Еллинек. Общее учение о государстве. СПб., 1908. С. 107-114; and also Political Order and Plural Structure of Society, ed. J. W. Skillen and R. M. McCarthy. Atlanta, 1991. P. 82-96).

this is so could be a subject of a separate discussion, but, in my opinion, only two examples would be sufficient to challenge the axiomatic rejection of the binding force of the constitutional preamble.

The Constitution of the Fifth French Republic of 1958 does not contain a section on citizens' fundamental rights and freedoms. But they are observed pursuant to the short preamble, which precedes the constitutional text. „The French people solemnly proclaim their attachment to the rights of Man and the principles of national sovereignty, as formulated by the Declaration of 1789, affirmed and complemented by the Preamble to the Constitution of 1946.[18] Since 1971 the French Constitutional Council has always used the Preamble of the Basic Law, when it has proclaimed draft laws or other acts, infringing upon citizens' fundamental rights, unconstitutional.[19] Therefore, despite the initial view of the drafters that the Preamble does not have the legal force of the constitution, nowadays it is deemed an organic part of the basic law, having the binding effect of the constitutional provisions.[20]

After the unification of Germany the Basic Law of the Federal Republic of Germany of 1949 was automatically extended over the eastern Länder of the former German Democratic Republic. The legal basis for this act is contained in the preamble of the constitution, according to which the Basic Law of the Federal Republic of Germany "is in force also for those Germans who were denied the opportunity" to take part in the adoption of the constitution.

Apart from the Preamble, the Constitution of the Republic of Bulgaria implicitly upholds the principle of the welfare state through proclamation and protection of fundamental social rights such as the right to labour (Art. 48), the right of citizens to form professional associations and syndicates (Art. 49), social security and health insurance (Art. 51, Art. 54), etc. The fundamental rights of citizens, through which the principle of the welfare state is implemented, do not belong to the circle of natural human rights. The Constitution and the social legislation have a constitutive effect for the emergence of the third generation of rights. Under some reserve, they could also be classified under the positive status of the citizen, according to the classic construct of G. Jellinek.[21]

Thus the nature of the constitutional principle of the welfare state is clarified primarily in the second generation of constitutional rights, as well as through a system of legal guarantees for their implementation and the requirements of the basic law, regarding competences, procedures and acts of state authorities.

The problem about the implementation of the constitutional provisions has at least two aspects. The first looks at the possibility of implementing the constitutional provisions, depending on their place in the basic law and the degree in which they are supported by other legal norms in the normative system. On the other hand, implementation has a totally different side – whether social reality itself allows for the constitutional stipulations to be fulfilled. Although at first sight this second approach can be classified as meta-legal, it is extremely important to take it into account, because to a large extent it is that approach, which pre-determines the fictionality or reality of the constitutional regulations. Of course, the ultimate result is based on the combination of legal and factual aspects of the application of law.

The legal side in the implementation of the principle of the welfare state is constitutionally protected and can be introduced by the respective social, labour and social security legislation.

The actual implementation of the principle of the welfare state in emerging democracies in their transition period was problematic. The crisis in the economic potential of those democracies, being a core pre-requisite for the actual implementation of the principle, was a much stronger argument against the proclamation of that principle, which is and will be valid for a certain period of time.

The welfare state seemingly contradicts the liberal state. That is why the supporters of the old liberalism, and modern conservatism, which leans on the long-abandoned views of classic liberalism of the XVIII and XIX century, totally reject the welfare state.

The antinomy between the liberal and the welfare state is valid and even undisputed only when liberalism itself is reduced to one of its core, but not only postulate – the limitation of state interference in the private and public sphere. This principle of the liberal doctrine is notorious.

And still the primary good, in the name of which and based on which the liberal thinkers develop their whole system of reasoning constructs, principles and values, is not the limits of the state interference, but the freedom of the citizen.

The limitation of the government intervention in the private and public sphere is called upon to guarantee freedom, but when freedom itself is threatened, state interference and legal regulation are justified for the same reason – the preservation of individual freedom as a higher social value.

One primitive trend of thought sees the difference between the liberal and the welfare state mainly as a difference between the weak and the strong state power. In fact, such views could hardly find support even among the most prominent representatives of classic liberalism, who expressly differentiate among the narrowing of the limits of state interference, the constitutional limitations of government and the shrinking of state functions by the power of the state.[22]

The practical implementation of the idea of the welfare state or its various elements has always followed the opposition among the different political powers and has reflected a certain stage in the economic status of the civil society. The limited government formula has always involved introduction and observance of constitutional limitations on the state, seen mainly as apparatus and as legitimate monopoly on violence, in the sense in Max Weber, and not as a free association of the members of civil society.

The presence of the concept of the welfare state in the value system of modern liberalism, having found its evolution in social liberalism or liberal democracy, is an indisputable fact.[23] But the roots of the idea

[18]This is the Declaration of the Rights of Man and of the Citizen as the first constitutional act of the Great French Revolution. While the Declaration formulated the classic fundamental rights, the Preamble of the Constitution of the Fourth Republic supplemented the catalogue of rights, adding the equality between men and women, the right to strike, the freedom of association in professional unions, the labor safety, social security, equal education rights in state education, right of asylum, the duty to work, etc.

[19]Luchaire, F. Le Conceil constitutionnel. Paris, 1980. P. 173-186.

[20]Вж. Люшер, Ф. Конституционная защита прав и свобод личности. М., 1993. С. 30, 42 – 47.

[21]The passive status contains the obligations of citizens, the negative status guarantees that part of citizen freedoms, where the state does not fit, the positive status includes the rights, through which the citizens can require the state to fulfill its obligations, while the active status gives the citizens the opportunity to produce impact on the state (G. Jellinek. System der Subjectiven Offentlichen Rechte. Tubingen, 1905. S. 81).

[22]Alexis de Tocqueville is extremely logical and convincing in this sense – according to him the liberal party involves "vigorous government within the established sphere of activity» (A. de Tocqueville. Selected Letters on Politics and Society. Berkley, 1985. P. 113).

[23]Leonard Hobhouse in his short, but cornerstone work Liberalism was probably the first of the impressive army of liberal thinkers, who explained at the beginning of our century the increase of state interference in the economic and social sphere for the protection of freedom and the obligation of the state to provide conditions for citizens' self-sustenance (L. T. Hobhouse., Liberalism. Oxford, 1964. P. 74-109).

of the welfare state could be found in liberal political doctrines, which preceded or ran in parallel to the limitation of royal absolutism.

Although undeveloped, this construct is contained in the concept of the social contract. The consent to be associated in a state, the transfer of some natural rights, which turn into positive, the separation of civil society from the state are called upon to guarantee civil freedom, security and mutual protection of individuals. In this sense the social nature of the state stems from the social contract itself and implies regulation of individual freedom to avoid the danger of disintegration or violation of peace in society.[24]

Although undeveloped, state intervention as a guarantee for freedom is present even at the initial stages of development of liberal constitutionalism. And this is no accident. Along with guaranteeing security, the state intervenes in the private sphere also to preserve freedom. The fact that the laissez faire policy reflects the tendency for limiting royal absolutism and rejects the patriarchal and patrimonial state does not totally exclude state intervention. Even the strongest supporters of the minimal state do not give political institutions only the role of passive observers of the spontaneous development of society. The link between freedom and the rudimentary forms of the welfare state is seen in several aspects. Through positive law the state sets the limits of individual freedom, since the exercise of rights should not infringe upon the freedom of other citizens.[25] On the other hand, the passion of the liberal theoreticians towards the principles of the rule of law explains their position about the interdependence of the legal equality and freedom . Finally, due to functional dependency among the various spheres of freedom,[26] expressed in the different rights, liberal doctrine does not ignore or isolate the expansion of social freedom from the democratization of political rights.

The expansion of political freedom necessarily determines the development of democracy in other spheres of social life and the increase in the social functions of the state.[27] That is why it is not surprising that back at the beginning of the 19th century one of the, undoubtedly, most famous classic liberal constitutionalists, B. Constant,[28] introduced and used many times the notion of the welfare state, although giving it a meaning, very different from the one of the modern state of the "common welfare".

Thus freedom, justice, security and later on social solidarity are those building elements, which, although underdeveloped, prepared the evolution of liberalism. Following industrial development, the doctrine developed the principle of the welfare state in modern constitutionalism. That is why the traditional antinomy between the liberal and the welfare state is largely relative. It is much more precise to distinguish between the minimal state and the state, which, as a result of over-etatization and violation of the basic principles of political democracy, may degenerate into totalitarianism. Practically, there is a vast array of state formations between the minimal and the totalitarian state. Somewhere in-between are the various degrees and forms of the liberal and the welfare state, but neither of them is replacing one of the two extremes. Besides, the practice of constitutionalism in the various national states during the different stages of historical development is much richer than the two poles of a scholastic dichotomy, where only two distinctions are possible between the liberal and the welfare state.

Without any claims to be exhaustive, even less so irrefutable, we could differentiate several varieties of state depending on the intensity of the intervention in the life of the civil society and in the sphere of civil liberty. Parallel to that, the degree of autonomy between liberty and state authority should be taken into account when differentiating types of states. The tendency towards etatization in a democratic regime is balanced by extending the impact of citizens' political liberty on the formation of political institutions and on what they do. Thus the extension of the functions of the state goes hand in hand with participatory democracy, which substantially changes the functioning of the institutions of political representation.

The minimal state is one of the extremes of the proposed distinction. Created at the end of the 18th century and survived in some countries until the dawn of the 20th century, it formed as a negation of royal absolutism and could exercise only most limited intervention in the life of the civil society and in the sphere of civil liberty.[29] Political rights were not universal, political freedom was a privilege of a relatively narrow circle of citizens, which determined the nature of representative government.

At the beginning of the 20th century and especially after the First World War the state of political etatization and economic liberalism emerged, which was characterized with participatory democracy and extensive etatization of political life. The welfare state with participatory democracy, exemplary for which are Italy and the Scandinavian states, is a product of the evolution of constitutionalism after the Second World War.

The welfare state, which is liberal in its political sphere, involves a combination of participatory democracy and developed economic and social functions in the economic relations of the civil society and legal guarantees for the third generation of fundamental rights. The authoritarian state reflects the limitation of democracy in the political sphere and cannot exercise certain social functions. The paternalistic state has well-developed social functions, but the excessive intervention in the sphere of civil liberty leads to its limitation and falls into authoritarianism.[30]

The totalitarian state, which consumes the civil society, limits political freedom and destroys the political sphere, is the other extreme of the possible distinctions.

The welfare state itself has various degrees of development in the constitutional practice of different states. The institutionalization of the principle of the welfare state can be done through constitutional proclamation, legal regulation of the social sphere and guarantees for the social rights. In some cases the principle may include forms of centralized, but not overall planning in the economic and social sphere. Finally, a state could be deemed social, because, contrary to the minimal state, it possesses substantial social functions. In all its variations and nuances it should be seen within the context of modern Western democracy. In this sense the welfare state is based on individualism, as long as it recognizes and guarantees individual rights, while every individualistic state is also a state of welfare, since it is based on the social contract and should ensure public welfare.

Due to the unprecedented character of the transition to democracy, constitutionalism in emerging democracies shows a number of unexpected deviations from the classic principles and functions of the state. On one hand, the opening of politics, the lifting of the limitations on political freedom and the affirmation of participatory democracy meet the modern requirements and standards of international law and the best constitutional models. On the other hand, due to the economic crisis and the difficulties of transition to market economy the social functions of the state in the former communist countries seem to be at a stage, which Western democracies are far ahead of. The state cannot be social, but it is even less minimal. The state has to intensively intervene in the economic sphere, although in a completely different manner from the consumption of the civil society and the direct administration of economy under the old regime.

Due to the old stereotype that the individual welfare depends not on the individual initiative, but on the benevolence of the state and due to the expectations towards that same state to eliminate the difficulties of transition, the application of the principle of the welfare state may deform. Due to collectivistic attitudes and egalitarian illusions instead of equal chances in life to individuals, different in their capacities, the principle may hypertrophize the re-distribution functions of economy in the name of elimination of the differences in the results, which are so natural for the market economy. Another possible deviation, which profanes the principles, would be the substitution of the social for a paternalistic state. Thus the welfare state can be deformed even without introducing totalitarianism or authoritarian regime. While a paternalistic state, which lifts all limits to etatization in the name of freedom is actually a bigger evil than the one it tries to overcome.

Despite all reservations, stemming from the state of the economic potential and the psychological particularities of the emerging democracies, which sometimes turn the principle of the welfare state into a constitutional fiction or lead to deformations in the underdeveloped forms of its application, the future market economy and political democracy will strengthen it. In the national states, as well as in the European Union as an association of welfare states. It will outlive the ideologic arguments not because it is a reminiscence of the socialist state, but because the security of society, the social justice, the freedom and democracy could hardly be preserved, if the future state of the rule of law is not also a state of welfare and the community of national states in the European Union is not an association of welfare states.

In conclusion, the principle of the welfare state should always be analyzed in accordance with the other basic principles of constitutional democracy under globalization and European integration within the context of the multi-level constitutionalism and constitutional pluralism. One of the trends in constitutional analysis and the exploration of the community law is the study of the correlation between the national and the supranational guarantees of social rights, on one hand, and the content of the rights in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Charter of Fundamental Rights of the European Union.

[24] Локк, Джон. Соч. в трех тома х. Т. 3, М., 1988. С. 336.

[25] It is back in Art. 4 of the famous French Declaration of the Rights of Man and the Citizen of 1789 where it is proclaimed that "[l]iberty consists of the freedom to do anything, which injures no one else, hence the exercise of the natural rights of each man has no limits except those which assure to the other members of society the enjoyment of the same rights «. Following Montersquieu's formula, the drafters of the Declaration define that the limits of freedom are determined only by law. Montesquieu himself notes that "[l]iberty is a right of doing whatever the laws permit, and if a citizen could do what they forbid he would be no longer possessed of liberty, because all his fellow-citizens would have the same power." (Ш. Монтескьо. За духа на законите. С., 1984, P. 225). In his report to the Constitutional Committee of 21 June 1789 Seyes noted that the limits of individual freedom are where it would not harm the freedom of others (see Великата френска буржоазна революция, Избр. документи, С, 1989, с. 160). In the United States Justice Holmes used the graphic formula that "[t]he right to swing my fist ends where the other man's nose begins." (M. C. Cummings, D. Wise, Democracy under Pressure. Lexington, 1977. P. 94).

[26] As K. Von Rotteck notes, "[t]he concept of social association and its imminent collective will involves further the concept of equality and freedom of every participant in this association. Respectively, the constitutional system stimulates the equal right of participation in the benefits of the state association, the equal legal and judicial guarantees for individual freedom and the right to own and acquire property …» (K. von Rotteck. Konstitution, Staatslexikon. Altona, 1843, v. III, 767-768; see also for one of the most perfect statements on the correlation between equality and freedom in liberalism Alexis de Tocqueville in Democracy in America. V. II. New York, 1945. P. 99-100).

[27] Norberto Bobbio successfully illustrates this interdependence through the gradual introduction of the general suffrage. „When only the owners had the right to vote, they naturally required from the political power to fulfil one basic function – the protection of property. At the moment the illiterate gained suffrage, they obviously demanded the state to create free schools. When suffrage was given to those, which did not own anything except their manpower, they demanded the state to protect them from unemployment and give them social security for illness, pensions, protection of maternity, opportunities to acquire affordable housing, etc.» (N. Bobbio. Il futuro della democrazia. Torino, 1985. P. 24).

[28] Of course, the principle of the welfare state is seen through the prism of historical development. Constant saw the welfare state first and foremost in the guarantees for freedom, in the extension of the general suffrage, the equality among all types of property and the exclusion of monopolies. Besides, with his inherent sense of dynamics in the historical development he concluded that „. … many of the things, which seem well needed, will become obsolete, while many of those, which seem problematic, paradoxical or even criminal, will become needed « (B. Constant. Oeuvres, ed. A. Roulin. Paris, 1957. P. 838).

[29] One of the best descriptions of the minimal state was given by W. von Humboldt (В. фон Гумбольдт. Идеи к опиту, определяющему граници деятельности государства. – В: Язык и философия культуры, Москва, 1985. С. 25-141.

[30] Paternalism involves, first and foremost, limitation of individual freedom by the state, using arguments about personal, group or social welfare, needs and interests. „Paternalism always includes limitation of the freedom of some individuals in their own interest, but can also involve an intervention in the freedom of others, whose interests are not taken into account» (G. Dworkin in Philosophy of Law, ed. J. Feinberg and H.Gross. Belmont, 1992. P. 232).

Е. Танчев: Қазіргі конституционализмдегі әлеуметтік мемлекет.

Мақалада бір жағынан минималды (бұрын-либералды) мемлекеттің антиподтары болып табылатын және екінші жағынан, патерналистік-тоталитарлық мемлекет әлеуметтік мемлекет пен әлеуметтік игілікті (гүлденген) мемлекет тұжырымдамасының мазмұны мен институционализациясы зерттеледі.

Әлеуметтік мемлекеттің француз және неміс ұғымдарының эволюциясы мен конституционализациясына талдау жасалады. 1991 ж. Болгария Республикасының қолданыстағы конституциясын жасау кезіндегі пікірталастардың мазмұнын ашуға арнайы көңіл бөлінген. Бұл пікірталастар басқа сипаттамалар мен конституциялық қағидаттар конституция нормаларында мағлұмдалғанда, неге әлеуметтік мемлекет тек конституцияның қосымшасында жария етіледі дегенді түсінудің кілті болып табылады. Әлеуметтік мемлекеттің адамның әлеуметтік және экономикалық құқықтарының екінші буынымен байланысына тоқталады.

Түйінді сөздер: конституция, әлеуметтік, мемлекет, қағидат, негізгі құқықтар, Болгария, Германия, Франция, Испания, Еуропалық Одақ, адам құқықтарын қорғау туралы Еуропалық конвенция, негізгі құқықтар Хартиясы.

Е. Танчев: Социальное государство в современном конституционализме.

В статье исследуется содержание и институционализация концепции социального государства и государства социального благоденствия (процветания), которые являются антиподами минимального (ранее -либерального) государства, с одной стороны и патерналистско-тоталитарного государства, с другой стороны. Проводится анализ эволюции и конституционализации французского и немецкого понятий социального государства. Специальное внимание уделено раскрытию содержания дебатов при создании действующей конституции Республики Болгария 1991 г. Эти дебаты являются ключом к пониманию того, почему социальное государство прокламируется только в преамбуле конституции в то время как другие характеристики и конституционные принципы декларируются в нормах конституции. Прослеживается связь социального государства со вторым поколением социальных и экономических прав человека.

Ключевые слова: конституция, социальное, государство, принцип, основные права, Болгария, Германия, Франция, Испания, Европейский Союз, Европейская конвенция о защите прав человека, Хартия основных прав.