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Elements of Constitutionality in Medieval Serbian Law*

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The modern science of constitutional law, in defining a constitution, differentiates between the conception of the constitution in a formal sense and the conception of the constitution in a material sense. The latter starts from the position that each state has a constitution, that is to say, that there is no state without a constitution. Due to the close connection between state and law, there have been certain generally obligatory rules. The system of such rules is based on what is called the constitution of a country. Sometimes this may be a single rule, as for instance that all power belongs to a ruler and that the ruler is hereditary. This would sufficiently characterize certain social systems, and other rules would have been unnecessary. In practice such instances are rare, almost exceptional, but in that sense each state undoubtedly has its own constitution.

Naturally, from today's primarily democratic point of view, it is more significant to determine the features of a constitution in a formal sense, because, in modern usage, it has become a synonym for a constitution in a general sense. But in a constitution in a formal sense it is necessary to differentiate its content from its formal features. The content of a constitution in a formal sense, similar to the constitution in a material sense, is composed of basic rules which regulate a certain state and social order. Besides, a constitution in a formal sense has some formal features which differentiate it from the constitution in a material sense. There are three such features. First, that the constitution in a formal sense is a written document; second, that it is a unique document, in which all constitutionally relevant material is concentrated; and third, that this is a document of the utmost judicial strength. In this way we come to a definition of a constitution, that it is a written document of the utmost judicial strength which regulates the foundations of state order of a particular country.¹ As such, the constitution is arrived at by a particular procedure, announced ceremoniously, with a guarantee that it

* Translated by Z. Minderović-Ordon (text) and S. Šarkić (notes)

¹ For more details about this question, see M. Jovičić, *O ustavu*, Beograd 1977, pp. 9 - 28.

would not be easily and frequently changed. Its special task is to limit the prerogatives of the ruler and to secure the basic rights of the citizens.

Modern constitutions came into being at the end of the 18th century as an accomplishment of the bourgeois revolutions, and in the science of constitutional law there is an opinion that mankind has exclusively lived under the regime of the constitution in a material sense since ancient times till the end of the 18th century.² "With the exception of a few texts, very precious because they were rare, like *Magna Charta* (1215), the *Bill of Rights* (1689) or the *Act of Settlement* (1701) in England, political organization of the individual states was established by the end of the 18th century exclusively through custom."³ England has been considered the cradle of modern constitutionality, and the above-mentioned documents have been quoted as examples in almost all textbooks and tractates on constitutions. In this way a great 'injustice' has been done to some medieval states which, frequently wrongly, have been considered absolutist and despotic, but in which the elements of constitutionality were certainly present. First of all we think of Byzantium, whose numerous law texts contained the ideas which even today would have belonged to a constitution. The aim of this article is to examine elements of constitutionality in medieval Serbian law and to attempt to find from where these elements were derived. We are not going to discuss whether there was a Byzantine 'constitution' (we are firmly convinced there was), except in so far as it was connected with Serbian law.

As we have already determined what we think a constitution is, we must now pose the question whether there were elements of constitutionality in medieval Serbia, or, more concretely: can *The Code of Stephan Dušan* be considered as a kind of constitution of the medieval Serbian state? Historians at the end of the 19th and beginning of the 20th century gave an affirmative answer to the second part of this question. According to D. Mijušković⁴ in 1895, the Code of Stepan Dušan is "a kind of constitution of our medieval state" (neka vrsta ustava naše srednjovekovne države) and a few other historians agreed with him.⁵ Of

² V. JOVIČIĆ, op. cit. p. 14.

³ G. BURDEAU, *Traité de science politique*, tome IV, *Le statut de pouvoir dans l'Etat*, II éd. Paris 1969, p. 12.

⁴ D. MIJUŠKOVIĆ, *Sistem Dušanova Zakonika*, *Srpski pregled* 1895, no. 4,5,6, especially p. 160.

⁵ J. GERASIMOVIĆ, *Staro srpsko pravo*, Beograd 1913, pp. 3, 66 – 67; S. DORIĆ, *Osnovo pitanje o Dušanovom Zakoniku*, *Arhiv za pravne i društvene nauke* 1914, book XVII, no. 3, p. 204; D. ALIMPIĆ, *Upravne oblasti u staroj srpskoj carevini*, Beograd 1921, p. 9; T.

a similar opinion was S. Novaković, who says that "according to all Byzantine laws, translated earlier or at that time, the *Code of Stephan Dušan* is a constitutional imperial document which affirms them and protects them from all present and future abuses..." (prema svima vizantijskim zakonima, preveadenim iz ranije ili u to isto vreme, *Dušanov Zakonik* stoji kao ustavni carski akt koji ih utvrđuje i štiti od svih dotadašnjih ili budućih zloupotreba...).⁶ Contrary to this, according to J. Prodanović, "Dušan's laws have no character of genuine constitutional laws, because Serbia was an absolutist monarchy" (Dušanovi zakoni nemaju karakter pravih ustavnih zakona, jer je Srbija bila apsolutna monarhija), but at the same time the author recognizes that some of the articles of the Code of Stephan Dušan could be put into today's constitution or constitutional law, concluding: "But in an absolutist monarchy there is no place for a constitution. Not only executive, but also legislative, and to a certain extent, judiciary power belonged to the ruler" (Ali o ustavu ne može biti reči u apsolutnoj monarhiji. Ne samo upravna, nego i zakonodavna, pa donekle i sudska vlast pripadala je vladaru).⁷

The articles of the Code of Stephan Dušan, which, from the modern constitutional-legal view, are of the utmost validity and which have caused such thinking are 171, 172 and 105, which is connected with them.⁸

TARANOVSKI, *Načelo zakonitosti u Zakoniku cara Stefana Dušana, Spomenica pedesetogodišnjice profesorskog rada S.M. Lozanića*, Beograd 1922, p. 146, where besides accepting MIJUŠKOVIĆ's opinion he says that "the Code should have been seen as one of those fundamental laws (*leges fundamentales*) that also existed in the Middle Ages..." and most recently M. KOSTRENIĆ, *Dušanov Zakonik kao odraz stvarnosti svoga vremena, Zbornik u čast šeste stogodišnjice Zakonika cara Dušana I*, Beograd 1951, p. 41, and B. BLAGOEVIĆ, *Primat zakona u Dušanovom Zakoniku, Anali Pravnog fakulteta u Beogradu*, 2-3, 1961, pp. 177-184.

⁶ *Matije Vlastara Sintagmat*, edited by S. NOVAKOVIĆ, Beograd 1907, p. XXVIII.

⁷ J. PRODANOVIĆ, *Ustavni razvitak i ustavne borbe u Srbiji*, Beograd 1936, p. 7. In this case we do not intend to discuss the character of the medieval Serbian state, but Prodanović's conclusion that Dušan's Serbia was an absolutist monarchy certainly is not correct. For more details about the character of the Nemanjić's state v. D. JANKOVIĆ, *Istorija države i prava feudalne Srbije*, Beograd 1953, pp. 77-81.

⁸ The numeration and the text of all the articles quoted in this paper are according to the edition of S. NOVAKOVIĆ, *Zakonik Stefana Dušana, cara srpskog 1349 i 1354*, Beograd 1898. The English text of all the articles quoted in the paper is according to the translation of MALCOLM BURR, *The Code of Stephan Dušan, tsar and autocrat of the Serbs and Greeks, The Slavonic (and East European) Review*, 28, 1949-50, pp. 198-217 and 516-539.

Art. 105 from the first part of the Code, proclaimed in 1349, says: "Knjige careve koje prinose pred sudije za što ljubo, tere ih potvori zakonik carstva mi, što sam zapisal koju ljubo knjigu, one-zi knjige koje potvori sud, te-zi knjige da uzmu sudije i da ih prinesu pred carstvo mi" (Imperial charters which are produced before the judges in any matter which my Code contradicts, and which the court finds invalid, shall be brought and submitted to me).⁹ Article 171, established in 1354, changes the provision of article 105 and provides that the emperor's order contrary to the law shall immediately be abandoned, and that the judges should judge according to justice. "Ješte poveleva carstvo mi. Ašte piše knjigu carstvo mi ili po srdžbe, ili po ljubvi, ili po milosti za nekoga, a ona-zi knjiga razara zakonik, ne po pravde i po zakonu kako piše zakonik, sudije tu-zi knjigu da ne veruju, takmo da sude i vrše kako je po pravde" (A further edict of my Majesty. If I the Tsar write a writ, either from anger or from love or by grace for someone, and that writ transgresses the Code, and is not according to right and the law as written in the Code, the judges shall not obey that writ but shall adjudge according to justice).¹⁰ And article 172 provides that the judges should judge by law, but not from fear of the emperor: "Vsake sudije da sude po zakoniku, pravo, kako piše u zakoniku a da ne sude po strahu carstva mi" (Every judge shall judge according to the Code, justly, as written in the Code, and shall not judge through fear of me, the Tsar).¹¹

The provisions of these articles are relevant for the judiciary, but they are, from the constitutional-legal aspect, of great importance because they restrict the prerogatives of the ruler as a supreme organ of power, and put the law above the emperor, which was undoubtedly at least a constitutional element. How did they come into the Code of Stephan Dušan? Were they the result of the independent development of Serbian medieval law, or were they taken from somewhere else?

Although even Bogišić was very hesitant as to the independence of these articles of the Code of Stephan Dušan,¹² Zigelj was firmly convinced that they were independent,¹³ and Novaković¹⁴ and the majority of

⁹ NOVAKOVIĆ, *Zakonik*, pp. 80 and 209 – 210; Burr, p. 517.

¹⁰ NOVAKOVIĆ, *Zakonik*, pp. 134 and 249; Burr, p. 533.

¹¹ NOVAKOVIĆ, *Zakonik*, pp. 135 and 250; Burr, p. 533.

¹² V. BOGIŠIĆ, *Pisani zakoni na slovenskom jugu, I. Zakoni izdani najvišom zakonodavnom vlašću u samostalnim državama*, Zagreb 1872, p. 55.

¹³ F. ZIGELJ, *Zakonik Stefana Dušana I*, SPB, 1872, pp. 92, 117. According to the author (p. 33), "the Code expresses better and more clearly those things that already existed in the customs."

¹⁴ NOVAKOVIĆ, *Zakonik*, p. XLVII.

the researchers of the Code of Stephan Dušan agreed with him.¹⁵ It never crossed the minds of our historians to connect the articles 171 and 172 with Byzantine law because at that time they considered the Eastern empire as despotic, in which the emperor's will was always the supreme law. "Medieval religious intolerance relying on the ancient schism between the Hellenistic and Roman worlds, left to the new world the legacy of a completely distorted picture of Byzantium as a sleepy, stagnant state in a long process of disgusting decay. It was impossible to think that such a state might have had laws of such great ethical value and great statesmanship as were the laws in *Dušan's Code*. As its supreme achievement, the articles 171 and 172 were appreciated . . . and it was believed that they were the result of the Serbian legislature, or maybe the reflection of the Tsar Dušan's own opinion."¹⁶ Besides, the second half of the 19th century was a period of violent constitutional struggles in Serbia, and a middle class in a new state proudly emphasized the ethically high norms of the Code of Stephan Dušan as a result of the independent development of Serbian medieval law. If the foreign influences were ever mentioned, or if the similarity with the other medieval laws was investigated, then, under the influence of panslavic romanticism, it was with the Slavonic, primarily Czech and Polish law.¹⁷

Romantic fallacies and prejudices were shattered by N. Radojčić. Accepting the view of the great English Byzantine scholar J.B. Bury about Byzantium as a legal state and about the existence of a Byzantine unwritten but established constitution,¹⁸ Radojčić pointed out, in two treatises,¹⁹ the great dependence of the Code of Stephan Dušan on Byzantine law, specially the *Basilica*, and in another treatise he showed that articles 171 and 172 were taken directly from Byzantine law.²⁰ Star-

¹⁵ M. VESNIĆ, *Justinijanovi zakoni i staro srpsko pravo*, Branič III, 1889, pp. 137 – 148 and 221 – 230, making reference to S. Bošković, says (p. 230): "We can positively say that Dušan's Code was 'the result of national and historical development' (St. Bošković), and not at all the supplement or simple translation of Justinian's and other laws of medieval Byzantium . . ."

¹⁶ N. RADOJČIĆ, *Vizantijsko pravo u Dušanovu Zakoniku*, *Istorijski časopis*, book II, 1949 – 50, p. 14.

¹⁷ The Czech historian F. PALACKÝ and Pole MAČEJOVSKI and many others think the same way. The review of the literature about the comparison of *Dušan's Code* with the laws of the other slavonic states quotes N. RADOJČIĆ, *Snaga zakona po Dušanovu Zakoniku*, *Glas SAN*, CX, drugi razred 62, Sr. Karlovci 1923, p. 104, n. 1.

¹⁸ J.B. BURY, *Constitution of the Later Roman Empire*, Cambridge 1910, pp. 7, 9, 29 – 30.

¹⁹ N. RADOJČIĆ, *Vizantijsko pravo u Dušanovu Zakoniku*, *Istorijski časopis*, book II, 1949 – 50, pp. 10 – 17 and *Dušanov Zakonik i vizantijsko pravo*, *Zbornik u čast šeste stogodišnjice zakonika cara Dušana I*, Beograd 1951, pp. 45 – 57.

²⁰ N. RADOJČIĆ, *Snaga zakona po Dušanovu Zakoniku*, *Glas SAN*, CX, drugi razred 62, Sr. Karlovci 1923, pp. 100 – 139.

ting from the *Codex Theodosianus*, and going on to the decrees (novellae) of Emperor Andronicus III, Dušan's contemporary, he convincingly showed that in Byzantium law was above the emperor's orders. Among the decrees of that kind, very prominent were the provisions of *Basilica* VII, 1, 16 and VII, 1, 17, as well as the decree (novella) of the Emperor Manuel I Komnenos in 1159, which might be considered as a model for articles 171 and 172.²¹ It cannot be established with certainty from where these articles were taken, but most probably they were taken directly from the *Basilica*. The text of the *Basilica* which corresponds to article 171 of *Dušan's Code* is VII, 1, 16 and reads:

“Πᾶς δὲ δικαστὴς . . . τηρεῖτω τοὺς νόμους καὶ κατὰ τούτους φερέτω τὰς ψήφους, καί, κἂν εἰ συμβαίῃ κέλευσιν ἡμετέραν ἐν μέσῳ κἂν εἰ θεῖον τύπον, κἂν εἰ πραγματικὸς εἴῃ φοιτήσας λέγων τοιῶσδε χρῆναι τὴν δίκην τεμεῖν, ἀκολουθεῖτω τῷ νόμῳ. Ἡμεῖς γὰρ ἐκεῖνο βουλόμεθα κρατεῖν, ὅπερ οἱ ἡμέτεροι βούλονται νόμοι . . .” The text which corresponds to article 172 is VII,1,17 and reads: “Θεσπίζομεν . . . κατὰ τοὺς γενικοὺς ἡμῶν νόμους τὰς δίκας ἐξετάζεσθαι τε καὶ τέμνεσθαι· τὸ γὰρ ἐπὶ τῇ τῶν νόμων κρινόμενον ἐξουσία οὐκ ἂν δεηθεῖν τινὸς ἐξωθεν διατυπώσεως.”²²

Although the content of the above mentioned provisions from the *Basilica* was identical with the content of articles 171 and 172 of the Code of Stephan Dušan, the Serbian translator did not translate the Greek text literally. This fact led M. Kostrenčić to develop a hypothesis in a paper on Radojčić's treatise, *The strength of the law according to Dušan's Code*, that such provisions might have originated independently in Serbia as a result of Serbian legal development.²³ To support this thesis Kostrenčić says that the position of a ruler in Byzantium, and

²¹ Considering that Radojčić was right, T. TARANOVSKI, *Istorija srpskog prava u Nemanjičkoj državi I*, Beograd 1931, pp. 229 – 230, (as a possible source of article 171), besides the *Basilica*, also quotes one of the provisions of Kotor's statute, which foresees a case in which a citizen of Kotor received a charter from the king which would exclude the opposite party from the competent legal court who would be sentenced by the ruler to pay a fine to the ruler (si aliquis ex nostris civibus praesumeret facere aliqua cum dominatione, per que poena aliqua cadat dominationi, cum carta vel sine carta seu povella, quae a dominatione portata fuerit). That sort of case would be answered with violence and would be punished with a public fine of 500 perpers, and the damaged party would get indemnification. It is obvious that the illegal charter had been proclaimed as null and that the court punished illegality (contra consuetudinem civitatis).

²² *Basilicorum Libri LX*, series A, volumen I, textus librorum I – VIII, ed. H.J. SCHELTEMA et. N. VAN DER WAL, Groningen 1955, p. 303. As far as the article 105 is concerned, it is also based on the *Basilica*, but on several titles such as II, 6, 6; II, 6, 16; II, 6, 23. For More details about this v. N. RADOJČIĆ, *Snaga zakona*, p. 136, n. 1.

²³ *Narodna starina*, 7, pp. 100 – 102.

especially his attitude towards laws, was different from the position of a ruler in Serbia, which, according to him, was more similar to the position of a ruler in Hungary. He especially draws attention to some provisions in the *Golden Bull* of Andrea II from 1222, in which the similarities with articles 171 and 172 could be found. That text from the *Golden Bull* says: (31,1) "And so having (palatin) this text (*Golden Bull*) always before his eyes, let him never withdraw from anything said earlier, and never let the king or nobleman or others agree to withdraw; and let them themselves enjoy their freedom, and because of that let them always be faithful to us and our successors and let them never deny their due obedience to the king's crown." (31,2) "If we or any of our successors ever try to work against this decision, let them, on the basis of this, be free forever, and never be considered unfaithful, the bishops, villeins and the noblemen of the kingdom, all of them, and each of them, present and future, who will come, to oppose us and to resist us and our successors."²⁴ Answering Kostrenčić's remarks, Radojčić tried to prove (and I think he did) that the position of the Hungarian king Andrea II was not identical with the position of a ruler in Serbia in Dušan's time, and that the above mentioned excerpts from the *Golden Bull* could not be considered identical with articles 171 and 172. Hungary was to get laws identical to articles 171 and 172 in 1471, during the rule of Mathias Corvinus.²⁵ The text of these provisions says: (3) "If our writing were issued against the law and the old customs of the kingdom, let it be worthless." (4) "The judges of our kingdom shall not be considered guilty if they do not observe such writing."²⁶

Regardless of the polemics about the similarity between medieval Serbia and Hungary, it seems evident that articles 171 and 172 were taken from Byzantium. To support this it is necessary to quote a fragment

²⁴ *Golden Bull of Andrea II*: (Art. 31, 1) "Ita quod ipsam scripturam pre oculis semper habens (sc. palatinus), nec ipse deviet in aliquo predictorum, nec regem vel nobiles seu alios consentiat deviare, ut et ipsi gaudeant sua libertate ac propter hoc nobis et successoribus nostris semper existant fideles, et corone regie obsequia debita non regentur." (Art. 31, 2) "Quod si vero nos vel aliquis successorum nostrorum, aliquo unquam tempore huic dispositioni nostre contraire voluerit, liberam habeant harum autoritate, sine nota aliquius infidelitatis, tam episcopi quam alii iobagiones ac nobiles regni universi et singuli praesentes et futuri posterique, resistendi et contradicendi nobis et nostris successoribus in perpetuam facultatem."

²⁵ N. RADOJČIĆ, *Sudije i zakon u srednjovekovnoj Srbiji i u Ugarskoj, Letopis Matice srpske*, 305 – 306, 1925, pp. 53 – 68, especially p. 67

²⁶ *Corpus Iuri Hungarici*, Art. XII of the third decree of king Mathias Corvinus from 1471: (3) "Nec etiam tales literae nostrae, si quae contra leges, et antiquam consuetudinem Regni nostri emanatae essent, vires habeant." (4) "Praeterea non imputetur Iudicibus Regni Nostri, si tales literae non observabuntur in iudiciis."

from the *Syntagma* of Matheas Blastar, translated and accepted in Serbia from Byzantium precisely in Dušan's time, which speaks about the emperor's power: "The emperor (tsar) is the lawful ruler, the common good of all subjects; he does not do good out of partiality, nor does he punish out of antipathy, but according to the virtues of the subjects, and like a judge at a trial, gives the awards equally, and does not give the benefit to any one to the detriment of others. The emperor's goal is to preserve and foster existing values, and to re-establish with care those lost, and to acquire by wisdom and righteous means and enterprises those which are missing. The task of the emperor is to do good, for which he is called a benefactor; when he stops doing good, then, according to the opinion of the ancients, it is considered that he has perverted the tsar's mission. The emperor (tsar) must distinguish himself in orthodoxy and in piousness and be renowned in his favour before God."²⁷ Such solemn ideas about the emperor's rule in no way could be the result of the independent legal development of the medieval Serbian state. Those ideas can only have come to Serbia from Byzantium, where for many years there was a state-legal continuity based upon the principles of the Roman law. It is certain that the emperor's absolutism was carried out in the concrete political situations with more or less difficulty, but Byzantine emperors were always restricted by the laws (*alligatum legibus*) and with the other norms of the Byzantine unwritten constitution.²⁸

Besides articles 171 and 172, which restrict a ruler, and from the constitutional-legal view represent the most interesting provisions in the Code of Stephan Dušan, there are many other interesting passages which regulate the foundations of state and social order, and which

²⁷ *Matije Vlastara Sintagmat*, edited by S. NOVAKOVIĆ, Beograd 1907, pp. 127 – 128, B. 5. It is not difficult to recognize the text taken from the *Epanagoge* (II, 1, 2 and 3), ed. J. ET P. ZEPOS, *Ius graecoromanum II*, Athenis 1931, pp. 240 – 241:

"Βασιλεὺς ἐστὶν ἔννομος ἐπιστάσια, κοινὸν ἀγαθὸν πᾶσι τοῖς ὑπηκόοις, μήτε κατὰ ἀντιπάθειαν τιμῶρων, μήτε κατὰ προσπάθειαν ἀγαθοποιῶν, ἀλλ' ἀνάλογός τις ἀγωνοθέτης τὰ βραβεῖα παρεχόμενος.

Σκοπὸς τῷ βασιλεὶ τῶν τε ὄντων καὶ ὑπαρχόντων δυνάμεων δι' ἀγαθότητος ἡ φυλακὴ καὶ ἀσφάλεια, καὶ τῶν ἀπολωλότων δι' ἀγρύπνου ἐπιμελείας ἡ ἀνάληψις, καὶ τῶν ἀπόντων διὰ σοφίας καὶ δικαίων τροπαίων καὶ ἐπιτηδεύσεων ἡ ἀνάκτησις.

Τέλος τῷ βασιλεὶ τὸ εὐεργετεῖν, διὸ καὶ εὐεργέτης λέγεται, καὶ ἡνίκα τῆς εὐεργεσίας ἐξατονήσῃ, δοκεῖ κιθαρῳδεῖν κατὰ τοὺς παλαιοὺς τὸν βασιλικὸν χαρακτήρα."

²⁸ The well known expression "princeps legibus solutus est" (D, I, 3, 31) is rare compared with many others expressions which put the law above the emperor's power. We cannot enumerate all the latter here, but the famous expression "quod principi placuit legis habet vigorem" was often abused. The complete text of Ulpian says: "Quod principi placuit legis habet vigorem utpote cum lege regia quae de imperio eius lata est, populus ei et in eum omne suum imperium et potestatem conferat." (Inst. I, 2, 6; D, I, 4, 1). The emperor is said to be a mandator of the Roman people.

would belong to the constitution according to the definition of a constitution which we provided at the beginning of this article. The Code insists in many of its provisions that obligations are executed in accordance to the law and that nothing is done against the law (*prez zakon*). Such provisions could be classified in three groups: 1) Provisions about the judiciary; 2) Regulation of the relations between classes of people, and 3) Regulation of governmental activities.²⁹

Article 84 belongs to the first group. It abolishes the old forms of individual judgment and prescribes that everyone should be judged only by law (*takmo da se sude po zakonu*). Article 30 prescribes that no one should be persecuted without a trial, and if someone has done an injustice to someone, they should appear before a court. Article 182 prescribes the competence of the judges, who, each in his region decides according to law. The absence of a plaintiff before the court frees the defendant of any responsibility if he spent the time determined by law at the court (art. 89). For the village boundaries the witnesses are determined by law (art. 80). Articles 132, 152 and 154 regulate the jury by law (*sakletvenici*).³⁰ According to article 180, the payment of the fine is also determined by law. And to this group also belong articles 171 and 172, which have a broader significance as already mentioned.

To the second group, which regulates the relations between classes, belongs article 42, which determines the obligations of the noble landowners (*vlastela baštinici*) such as taxes (*soće*) and military service. Articles 31 and 65 provide the village priest with necessary land (three fields – *tri njive*). Article 159 prescribes that the governors of villages should, by law, let the merchants into the village. Articles 142 and 139 protect the dependent inhabitants from the noblemen's despotism and determine the villein's obligations towards their masters if the masters violate their authority as prescribed by law. According to article 139, a

²⁹ Cf. TARANOVSKI, *Istorija srpskog prava* I, pp. 224 – 225.

³⁰ Article 152, which is similar to article 39 of *Magna Carta*, is especially interesting. *Dušan's Code*, art. 152 (NOVAKOVIĆ, *ZAKONIK*, p. 238): "Kako jest bil zakon u deda carstva mi, u svetago kralja, da su velijim vlastelom veliji vlastele a srednjim ljudem protivu ih družina, a sebrdijam ih družina da su porotnici. I da nest u porote rodima i pizmenika." (Burr, p. 527: "As was the law under the Sainted King my grandfather, so let great lords be jurors for a great lord, for middle persons their peers, and for commoners their peers. And on a jury there may be neither kinsman nor enemy." The Sainted King is King Milutin, 1282 – 1321, Dušan's grandfather.). *Magna Carta*, art. 39 (ed. J. HOLD, London 1976, pp. 326 and 327): "Nullus liber homo capiatur, vel imprisonetur, aut disseisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum vel per legem terre." (No free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgement of his peers or by the law of the land").

villein can sue his master regardless of who he is, whether the emperor, the empress, the Church or some other nobleman. If a judge issues a verdict in favour of a villein, it is the judge's duty to provide a procedure whereby the master should not be able to take revenge. Article 139 is connected with article 68 which equalized the obligations of all villeins (merophom zakon po vsoj zemlji). It is forbidden to take from a villein anything which the law forbids (a ino, prez zakon, ništo da mu se ne uzme). It should be mentioned that the rights of the upper classes were guaranteed by special privileges, by *hrisovouljas* and *prostagma* which were accorded to the noblemen and to the cities probably before the proclamation of the *Code*, and which the emperor Dušan confirms in articles 39, 40, 124 and 137.

In the administrative area should be mentioned article 63, which regulates the income of the kefalias (lit. "headman", the governor of a city). Article 187 regulates some police measures taken when the emperor and the empress travel, and article 176 determines the regulation of the cities.

In a more detailed analysis probably some additional provisions could be found which belong to constitutional law, but we consider that even the above will suffice as a proof of the existence of some elements of constitutionality in the Code of Stephan Dušan.

It remains to pose the question whether these provisions were applied, and to what extent, particularly articles 171 and 172, that is to say, whether the proclaimed principle of lawfulness was really respected. There are different opinions about this question. N. Radojčić thought that "undoubtedly the emperor was very serious about his order in articles 171 and 172, borrowed from Byzantium, and respected them, but I think it was more so in newly conquered regions which had belonged to Byzantium till recent times than in the old Serbian parts."³¹ In his treatise *Judges and law in medieval Serbia and Hungary*, Radojčić maintains that the reasons for taking over articles 171 and 172 were political and that Dušan "wanted through them to make the difficult transition to the new Serbian power easier for his new subjects from Byzantium. These articles were not an internal requirement of Serbian develop-

³¹ N. RADOJČIĆ, *Snaga zakona*, p. 138. Arguing this opinion, the author quoted a passage from the Byzantine writer Nicéphoros Gregora, who discusses Dušan's proclamation for the emperor, the division of the empire into Serbian and Greek countries and about the motives of that division (NICEPHORI GREGORAE, *Historia Byzantina*, Bonn II, pp. 746 – 747).

ment.”³² To Taranovski it seemed that Radojčić was suspicious about the application of articles 171 and 172 and he drew Radojčić’s attention to it, stating how he could not agree with such an opinion.³³ Radojčić answered that this was a misunderstanding, that he did not hold this opinion, and that he had always pointed out that the articles were undoubtedly respected by the old Serbian judiciary.³⁴

Contrary to these opinions, D. Janković in his dispute about the application of articles 171 and 172, as well as about some other provisions of the Code of Stephan Dušan (136, 137, 139, 140, 141 and 142) writes: “It is another question to what extent those measures were really applied or realised. Taking into account the real relations in a feudal society, particularly the position of a ruler and landed gentry in medieval society, we can claim that the provisions about lawfulness stated in articles 171 and 172 of *Dušan’s Code* most probably were only declarative and that, as a rule, were not applied in practice.”³⁵

The question of the application of the articles 171 and 172 is connected with the question of the application of *Dušan’s Code* in general. The second part of the Code of Stephan Dušan, which contains the above mentioned articles, was promulgated in 1354. In the next year (1355) Dušan died, and very soon the Serbian state disintegrated. It is difficult to believe that in such circumstances it was possible to apply *Dušan’s Code*. In times when central power was weak, there was no real authority which could have guaranteed the application and execution of the provisions of *Dušan’s Code*. Besides, even today in modern states there is a great discrepancy between the proclaimed provisions and those realised in practice.

It is an unacceptable opinion that in the Middle Ages the situation could have been different in that respect. As far as Serbia is concerned, the problem lies in the lack of additional, relevant legal sources (verdicts), which could serve as evidence of the application of *Dušan’s Code*.

However, we cannot accept the opinion that articles 171 and 172 were only declarative. Their introduction into Serbia belonged to Dušan’s programme of creating the Serbian empire in place of Byzantium. In Byzantium there was a conception that all states were not equal and

³² N. RADOJČIĆ, *Sudije i zakon*, p. 55.

³³ T. TARANOVSKI, *Njeshkoljko idiograficheskikh čert starago serpskago prava, Livre de la Conférence des historiens des Etats de l’Europe orientale et du monde slave*, Varsovie 1928, p. 254.

³⁴ N. RADOJČIĆ, *Dušanov Zakonik i vizantijsko pravo*, p. 65, n. 33

³⁵ D. JANKOVIĆ, *Istorija države i prava feudalne Srbije*, Beograd 1953, pp. 118 – 119.

never were considered as such. As Ostrogorski pointed out, in Byzantium there was created a system of "hierarchy of states" headed by Byzantium, legitimate carrier of the idea of the universal empire. All other Christian states were on lower levels. Being such an empire, only Byzantium was able to make laws of universal character, while other states made only local laws (or provisions).³⁶ Dušan's intention was to replace the decaying Byzantine empire by a Serbian empire³⁷. But it is certain that Dušan was fully aware that from the Byzantine state-legal point of view his proclamation of himself as emperor was usurpation.³⁸ Precisely because of this, his intention was to give respectability to his empire, to introduce in it as many Byzantine elements as possible. This is why articles 171 and 172 were included in his *Code*, and other provisions about the emperor's power and the law being above the emperor. Dušan's sudden death destroyed the idea of the replacement of the Byzantine empire by Serbia. In addition, the development of political events in medieval Serbia probably made practically impossible the application of articles 171 and 172. However, at the moment of their introduction the emperor probably had different intentions.

Let us finally go back to the question posed in this article. Is the Code of Stephan Dušan a constitution from the modern point of view? Although it contains a number of elements mentioned in our definition of a constitution (written document, document with the supreme legal power which regulates the foundations of the social and state order of a state), an interpretation which would accept it as a constitution would undoubtedly be too forced, and we do not wish to engage in arguments of

³⁶ G. OSTROGORSKY, *Die byzantinische Staatenhierarchie, Seminarium Kondakovianum* 8, (1936), pp. 41 – 61 = *Sabrana dela G. Ostrogorskog*, book 5, Beograd 1970, pp. 238 – 262.

³⁷ M. DINIĆ, *Dušanova carska titula u očima savremenika, Zbornik u čast šeste stogodišnjice Dušanova Zakonika*, pp. 87 – 118.

³⁸ The best evidence of that is the letter of the patriarch Antonius of Constantinople to the great Muscovite prince Vasili I, from 1393: "My son, you are wrong in saying, 'We have a church, but not an emperor'. It is not possible for Christians to have a church and not to have an empire. Church and empire have a great unity and community; nor is it possible for them to be separated from one another . . . Hear what the prince of the Apostles, Peter, says in the first of his general epistles: 'Fear God, honour the Emperor'. He didn't say 'Emperors', lest any man should think that he had in mind those who are called emperors promiscuously among the nations: he said 'The Emperor', showing thereby that the universal emperor is one . . . For if there are also others in the world of Christian men who assumed for themselves the name of emperor, all such action is unnatural and illegal, the result rather of tyranny and force. What are the fathers or the councils that speak of them? He of whom they speak – nay, cry aloud up and down – is the natural King: The King whose enactments and ordinances and commands are accepted in all the universe; the King of whom, and of whom alone, Christians everywhere make mention . . ." Quoted from E. BARKER, *Social and Political Thought in Byzantium*, Oxford 1961, p. 195 – 196.