

Prof. dr *Dragoljub Popović**

ARDUOUS PATH TO CONSTITUTIONALISM

Serbian constitutional developments in the first half of the nineteenth century

Abstract: *Serbian nation building began in 1815, with the achievement of home rule. The Sultan granted autonomy to the Serbs in 1830 and the first constitutional ideas emerged immediately within the framework of designing autonomous institutions by the Serbs themselves. Those ideas were prevalingly modern, although the authors of the constitution drafts for the Serbian vassal state, who remain unknown to date, did not properly understand some western concepts. That was evident in the contacts with foreign diplomats.*

The National Assembly adopted the first constitution in 1835. It was a mixture of the liberal ideas of its drafter with the aspirations of the Prince who favoured unchecked exercise of power. The foreign powers were dissatisfied with the 1835 Constitution and urged the Prince to suspend it only a month after the adoption. In 1838 the Sultan gave a constitution to the vassal state of Serbia. It provided for oligarchy as the form of government and remained in force for decades.

Neither of the two constitutions relied on a liberal settlement. However, the ideas were slowly developing as regards the pillars of constitutionalism – the separation of powers, fundamental rights and the rule of law. When teaching of law set foot in Serbia in the 1840s the constitutional concepts exposed in the university were far ahead of the provisions of the constitution in force.

Key words: Serbia, human rights, separation of powers, rule of law.

1. CONTROVERSIES OF HISTORIOGRAPHY

Serbian historiography concerning constitutional developments, and especially liberalism and parliamentary government has been split into two main streamlines, one being mostly romantic and the other critical in interpretation of historical facts and processes. Within the time frame

* Attorney-at-Law and a former judge at the European Court of Human Rights
e-mail: dragoljub.popovic@gmx.net

of eighteen years the author of this text had the opportunity to sit in the juries of the two among the most important theses that have marked the critical school of thought in Serbian historiography. The first was the thesis of Olga Popović-Obradović, defended at the Law School of Belgrade University in 1995, under the title *The Parliamentary System in Serbia 1903–1914*. Its author endeavoured to show the deficiencies of the parliamentary government in the period, which was usually considered to be the “golden age” of Serbian democracy. The other thesis was defended in 2013 at the University Paris X – Nanterre, under the title *L'influence de la théorie du droit social française sur la pensée juridique serbe durant le XXe siècle*. Its author was Marko Božić, who undertook the task of deconstruction of the romantic myth consisting of the belief in the existence of a democratic national spirit among the Serbs.¹ Both theses analysed the developments in the twentieth century, finding their origins in the second half of the nineteenth.

The first half of the nineteenth century as regards Serbian constitutional developments has not had such comprehensive analysis so far. One of the focal points of legal historians' interest for that period of constitutional history was the first Serbian constitution adopted in 1835. It was in 2010 in a speech in Novi Sad in Matica Srpska, celebrating the 175th anniversary of the first Serbian constitution that the dean of the Law School of Belgrade University, prof. Sima Avramović, summarised in a scrutinising manner all the stereotypes regarding the first Serbian constitution. His invaluable contribution only partly filled the gap still existing in Serbian historiography on constitutional developments in respect of the first half of the nineteenth century. Many controversies exist to date and important questions remain open. To illustrate those it suffices to quote one of the historians of the critical school of thought, Latinka Perović, in her preface to the second edition of the above mentioned thesis of Olga Popović-Obradović. She wrote: “The first liberal ideas were brought to Serbia by its young people who studied in the West between the 1830s and the 1850s.”² This statement is not basically wrong, but it can by no means display the whole of the complicated and burdensome developments that took place in Serbia in the first half of the nineteenth century, as regards constitutionalism. The lines to follow will therefore try to shed some more light on the subject.

1 Mr. Božić's thesis has not been published so far, whereas the thesis of Olga Popović-Obradović, who passed away very young, has two editions to date, the second being in English; cf. Popović-Obradović, O., 2013, *The Parliamentary System in Serbia*, translated by Branka Magaš, Belgrade, Helsinki Committee for Human Rights in Serbia.

2 Perović, L., Preface, in: Popović-Obradović, O., 2013, p. 15.

2. THE ORIGINS

At the beginning of the nineteenth century the Serbian people inhabited territories of two great empires of the time – Austria and Turkey. The Serbs living in Austria, besides being professional soldiers, launched themselves to other careers and managed to form a middle class of merchants and craftsmen. The first Serbian intellectuals of the modern age came out of that class. The Serbs living in Turkey remained under feudal bonds. However, some among them engaged in commerce, apart from merely cultivating the land. That was mostly the case in the frontier regions, close to Austria. The Serbs living in Turkey lacked education and turned to the Serbs in Austria as to a source of modern ideas. The situation of the two parts of the Serbian people, living in different empires, in respect of education can be illustrated by a passage from the memoirs of a Serbian priest. Matija Nenadović, whose origins were in the vicinity of Valjevo in Western Serbia, was one of the prominent leaders of the Serbian uprising against the Turks and the national revolution. Towards the end of the eighteenth century, after he had managed as a boy to learn from a local priest how to read and write, he went to a Serbian teacher, on the Austrian territory, for further education. When the teacher asked him what he actually knew, his response was, “I know everything”. The little boy was proud of himself for having collected all the knowledge he could find in his country of origin.³

An oppressive regime installed by the members of the Turkish military *corps d'élite* in the pashalik of Belgrade provoked in 1804 an uprising of the Serbs inhabiting that region, which represents the central part of Serbia today. The leaders of the uprising were mostly those who were engaged in trade with Austria, selling pork and cattle. At the beginning the insurgents, remaining faithful to the Sultan, declared their goal was to remove the oppressive regime within the pashalik. However, throughout the years of fighting against the Turkish armed forces, the Serbs developed a clear tendency to lay down foundations of a Serbian nation-state. The leaders of the uprising had elected a prince (*vožd*), to be the head of the people.⁴ Some time later a body called governing senate (*praviteljstvujušči sovjet*) was founded. It included ministers (*popečitelji*), who were in charge of certain sectors of government. Elements of a political power structure, independent from the imperial government of Turkey were thus posed.

3 Cf. Nenadović, M., 1969, *Memoari*, Novi Sad – Beograd, p. 62.

4 The title could also be translated by the word duke, since the Serbian word refers to someone who is in the lead of an army.

Karadjordje was elected prince. He was one of the farmers involved in trade who led the rebellion and had previously had some military experience as a volunteer in the Austrian army, fighting the Turks towards the end of the eighteenth century. Among the members of the governing senate, there were Serbs who had come from Austria, such as, for instance, the famous writer, Dositej Obradović, who became the first minister of education in the modern history of Serbia. Both the prince and the governing senate started functioning like proper government organs.

The Serbs managed to install their government in the Belgrade fortress, which used to be the seat of the Turkish pasha at the time. Their rule lasted until 1813 when the Turkish army defeated the Serbian troops, putting an end to the first Serbian uprising. It was in 1813 that the insurgent leaders divided in two groups. Many of them, including Karadjordje, the prince, went into exile in Austria. Others remained on the Turkish territory despite the terror and in 1815 led a new uprising against the Turkish rule. Another prince was then elected, it was Miloš Obrenović that time. However, in 1815 the Sultan changed tactics and opted for a compromise with the Serbian rebels. An agreement was concluded between Miloš Obrenović and Marashli Ali Pasha, the commander in chief of the Turkish troops committed to fight the rebels. Although never put in writing, the provisions of the agreement introducing a Serbian home rule proved to be binding for both parties to it. As it was explained by a contemporary, the Turkish pasha and the Serbian Prince then shared the power in the pashalik of Belgrade in such a way, that the pasha ruled over the Turks, while Miloš was competent for the Serbs.⁵

The Sultan, who opted for a compromise with the rebels, had a problem with the Treaty of Bucharest of 1812, he had concluded with Russia. The provisions of the treaty put an obligation on him to introduce autonomy for the Serbs in the pashalik of Belgrade, as well as to grant amnesty to the Serbian rebels. Concluding a compromise with Miloš Obrenović the imperial government of Turkey attempted to prove fulfilled the obligation originating in the treaty of 1812, but the international pressure persisted.

The Serbian elected prince, for his part, was in a position to develop a structure of government, within the limits of the home rule granted by the compromise above mentioned, which had put an end to the armed conflict. His main policies were then to achieve recognition of his title

5 Cf. Karadžić, V., 1969, *Prvi i drugi srpski ustanak; Život i običaji naroda srpskog*, Novi Sad – Beograd, p. 300: “The pasha then remained master of the Turks and muslims in the cities, and Miloš ruled over the people and knezes.” Muslims were Turkish officials and knezes (in singular: knez) traditional Serbian local authorities in villages. All translations in this paper stem from its author.

of a prince, as well as to lay down the Serbian home rule on more solid grounds, compared to those posed in 1815, by his agreement with a Turkish pasha. The foundations of modern Serbia were posed in the developments that followed. The turning point of the evolution was the legal foundation of autonomy in 1830. However, even before that date the earliest ideas on the structure of Serbian government had already emerged.

3. EVENTS AND DOCUMENTS

I. EMERGENCE OF THE EARLIEST IDEAS

The earliest ideas on the structure of Serbian government in times of the home rule emerged after 1815 in a diplomatic correspondence between Miloš Obrenović and the Russian ministry of foreign affairs. The subject of the correspondence was a Serbian draft memorandum on questions of autonomy prepared for submission to the Ottoman Port. The Turkish Sultan had undertaken to introduce autonomy for the Serbs, by the provisions of the Treaty of Bucharest.⁶ The main concern of both the Russian diplomacy and the Serbian Prince was the form of government. Weak traces of the idea of fundamental rights were collective rights of the Serbs, such as for instance, the freedom of the Christian Orthodox religion, or the right to education in Serbian language and the right to foundation of schools and hospitals.

The organisation of power was nevertheless a matter of a more profound and detailed approach. Three state organs were envisaged — the Prince, the Senate, and the National Assembly. The Russian diplomacy agreed to the idea of introducing a hereditary prince title in the Obrenović family. The ideas concerning Senate were however vague. The main task of the Russians was to put limits to the power of the Serbian Prince, by introducing a body, which could enjoy both executive and legislative competence. The modern idea of separation of powers was by no means among those that were favoured by the Serbian Prince either. Nevertheless, some of the proposals the Prince put forward in his correspondence with the Russians tended to introduce some sort of responsibility of the senators.

Miloš was an ordinary man, illiterate and patriarchal type of person, but at the same time capable of performing good contacts with the masses of peasants. Today he would probably be characterised as a populist. That

6 Gavrilović, M., 1908, *Miloš Obrenović, knj. I*, Beograd, pp. 450–471; 523–542; Prodanović, J., 1936, *Ustavni razvitak i ustavne borbe u Srbiji*, Beograd, pp. 24–25; Popović, D., 1996a, *Prapočetak srpskoga parlamentarizma*, Beograd, pp. 9–18.

is why he promoted the idea that the senators should be accountable to the National Assembly. The latter was a customary institution in Serbia at that time. The custom of holding assembly sessions, developed during the first Serbian uprising against the Turks, relied on patriarchal feelings of the population. The people lived in large families and the assembly sessions that were held not exclusively at the national, but also at regional levels, reminded of family councils rather than of a political representation in the modern sense of the term. Miloš could therefore steer the National Assembly much easier than the senators whom he regarded as possible competitors in the exercise of power. The National Assembly from his perspective seemed to be a lever against the disobedient, which made him favour the concept of senators' accountability. Some of the ideas developed by the Russian diplomats and the Serbian Prince were reflected in the Turkish act on Serbian autonomy.

II. AUTONOMY OF 1830

The autonomous regime for the Serbian vassal state was introduced by the Sultan's act, *Hatti-sharif* of 1830. The vassal state of Serbia was to pay a unique tribute to the Ottoman Port. All obligations of the Serbs were thus aggregated and the feudal bonds were terminated. Miloš Obrenović was recognised by the Sultan to be the Prince of Serbia, and the title of a prince became hereditary in his family. The Serbs were granted certain fundamental rights on a collective basis. Among those were the freedom of religion, the freedom of commerce, as well as the rights to found and run their own schools, hospitals and the post office.⁷ The vassal state of Serbia was granted "independence of its internal government", which was a vague formula, provoking divergent interpretations.

The provisions of the 1830 *Hatti-sharif* laid foundations of political institutions of the Serbian vassal state. According to para. 2 of the Act the Prince was to perform "the internal government of the country, while the execution of affairs shall be done concordant with the assembly of notables of the country". Para. 15 provided for accountability of notables, stating that "as long as those members of the senate shall not commit an act of high treason towards the Ottoman Port, or towards laws and regulations of the country, they shall not be either removed from or deprived of their office".

Both paragraphs provided for one and the same state organ, which was once identified as "assembly" and on the other occasion as "senate". A Russian project of Serbian autonomy submitted to the Turkish govern-

7 Popović, D., 1996a, p. 18.

ment some months before the 1830 *Hatti-sharif* provided for “a senate... composed of notables of all regions of Serbia, to be chosen among the most eligible and the most dignified”⁸. The Sultan seemed to have been ready to meet some of the suggestions of Russian diplomats, but the provisions of his act of 1830 were however ambiguous and called for interpretation. The text left open hands to the Sultan, so that he could at any moment act as arbiter in case of Serbian internal disputes.

III. FIRST CONSTITUTIONAL DRAFTS

Soon after obtaining the autonomous status the question of adopting a Serbian constitution came to the agenda. The Serbs were interpreting the formula of “independent internal government” as entitling the vassal state of Serbia to pass its own constitution. Two documents of the year 1831 preserved in the Archives of Serbia, are formal constitutional drafts. Their authors remain unknown to date.⁹ One document was called *Plan of a Constitution (Plan Konstitucije)*, being shorter than the other, which was simply called *Constitution (Ustav)*.

The shorter document provided for a Senate, composed of eight senators, besides the Prince and ministers appointed by him. The National Assembly was also envisaged. The main provision on senators provided for inviolability of their tenure of office, except in cases of “their guilt, old age, provoking their inability to act, and death”. The National Assembly was competent to appoint the senators. The draft favoured the power of the Serbian Prince, and went in line with Miloš’s suggestions expressed in his diplomatic exchange with the Russians. The National Assembly could not challenge the Prince’s power, the only danger was the Senate. If the senators were to be appointed by the National Assembly and moreover threatened to be accountable for some “guilt”, the power of the Serbian Prince was to remain unchecked, given the Prince’s skills to steer the work of the National Assembly and influence its decisions.

The longer draft of 1831 (*Ustav*) provided for a separation of powers. According to its provisions the legislative power should be “vested in the Prince and the Senate”, while the executive power should be “vested in the Prince, who shall exercise it through cabinet secretaries”. We do not know today whether there were any connections between the two drafts,

8 Gavrilović, M., 1908, p. 247 et seq.; Popović, D., 1996a, p. 19.

9 Academics commenting the documents were not numerous; cf. Kandić, Lj., 1972a, Neobjavljeni nacrti ustava u Srbiji u prvoj polovini XIX veka, *Anali Pravnog fakulteta u Beogradu*, 5–6, p. 773 et seq.; Ljušić, R., 1986, *Kneževina Srbija (1830–1839)*, Beograd, pp. 114–115; Popović, D., 1996a, pp. 20–34.

whether they were simultaneous or one preceded the other. We do not even know whether there was only one author for both drafts.

The longer draft envisaged the same state organs as the shorter one. Those were the Prince, the Senate, the National Assembly as well as the cabinet ministers or secretaries. In one of the provisions the secretaries were said to form a Cabinet Council. The number of senators should be nine, compared to eight in the shorter draft. The people were to elect the senators, but the draft provided at the same time that the Prince could veto their election. It seems therefore that the provisions of the longer draft also favoured the power of the Prince. There was no express provision on any sort of accountability of senators, but the Prince could nevertheless prevent those who were not sympathetic to his policies from holding the office.

One gets the impression that Miloš Obrenović wanted to overcome the ambiguities of the 1830 *Hatti-sharif* by passing a constitution for the vassal state he was the head of. A constitution should in his perception be an act enabling the prince to rule. On the one hand, it will not be an enormous mistake to say that Miloš looked upon a constitution as upon an organic statute. On the other hand, the opposition to the Prince, although pre-modern, tended to put limits to the Prince's power, or to introduce some balance at least. The opposition opinions may have influenced the author of the longer draft insofar as to provide for a separation of powers. However the provision would have probably remained inefficient for the Prince could influence the formation of the state organ aimed to balance his power.

IV. TRACES OF ENLIGHTENMENT THROUGH COMPARING CONSTITUTIONS

Circumstances changed in 1832, when Prince Miloš became much less enthusiastic about constitutional matters. In April 1832 one of his exiled opponents, the famous language reformer Vuk Karadžić, wrote his prominent letter to the Serbian Prince, exposing to criticism the Prince's style of governance in Serbia, and labelling it to be highly arbitrary.¹⁰ Vuk Karadžić took a constitutional stand in the modern sense of the term. He wrote, among other things, that “the people should be given justice, or as they say in Europe today, a constitution”. He demanded further on, “that every man should find secured his life, possessions and dignity”, so that “everyone knows what he is entitled to do in order not to fear either you (i.e. the Prince; DP) or anyone else”.¹¹

10 Cf. Karadžić, V., 1985, *Istorijski spisi*, Beograd, p. 215 et seq.

11 Karadžić, V., 1985, p. 217.

The Prince received with anger the critical stances, rooted in liberal concepts and ideas. In June 1832 one of his former collaborators, Jovan Simić Bobovac, expressed in public the opinion that everything in Serbia would become calm and everybody would be satisfied if the ruler of the country passed a constitution. The poor man had to face a terrible destiny, for he was beaten to death by unknown offenders, while the public at large remained convinced that an order of Prince Miloš himself stood behind the tragic event.¹²

Although despotic, Miloš's personality was rather complex and controversial. Occasionally he showed traces of some sense of enlightenment. He gave shelter to Dimitrije Davidović, a patriot and a liberal, who was the founding father of the Serbian press. After having failed in business in Vienna, where he was publishing the first Serbian newspapers of all times, Davidović came to Serbia and became one of the Prince's secretaries. A press was purchased after a while, and Davidović started editing the first Serbian newspaper to appear in Serbia. The first number of *Novine Srbske* was published on 5th January 1834. Davidović was the editor in chief and the only journalist. Notably, one of the first steps Davidović took as the editor was to introduce the public at large to constitutional issues. Davidović started a special column, under the title of *Short Description of Foreign Countries (Kratko opisanije strani zemalja)*. The column didn't inform on geography, as the words might suggest. Its task was comparing constitutions of various countries, and it was appearing from January to April 1834.¹³

The column informed on foreign countries as regards constitutional law. Davidović showed skills in treating questions of comparative constitutional law in a country without educated lawyers and even lacking legal terminology.¹⁴ For instance, he hesitated whether or not to translate the words like monarchy or republic. He was inclined to translations, and introduced Serbian words for both terms, which were afterwards rejected. There were no references in the newspaper texts, so that it remains difficult to assess the influences Davidović had received, as well as his sources. Davidović had no formation in law but his essay in legal comparison, the earliest ever made in Serbian language, followed a pattern to expose on forms of government in a sequence, guided by their substance. Therefore one might say, without too much exaggeration, that the approach was theoretic in character.

12 Miličević, M. Đ., 1888, *Pomenik*, Beograd, pp. 37–38.

13 Cf. *Novine Srbske*, n^o 4, 5, 6, 10, 11, 13, 14, 15 and 17.

14 For a more detailed comment on the column cf. Popović, D., 1996a, pp. 40–48.

Davidović posed definitions of a monarchy, as well as of its two types – absolute and limited monarchies. The definition of absolute monarchy was given in line with the ideas of enlightenment. In such a form of government the monarch is in possession of the three branches of power – legislative, executive and judiciary – but he is supposed to exercise those powers in respect of welfare of his subjects.¹⁵ In the absence of the latter an absolute monarchy inevitably transforms into a mere despotism. A limited monarchy was defined as a form of government in which the monarch shares “the supreme power and especially the legislative power with the people”.¹⁶ Davidović also explained the system of representative government, exaggerating by drawing a parallel between the Serbian National Assembly of the time and the parliaments of Great Britain and France.

A definition of a republic was also given. It was a form of government in which the people were in possession of the supreme power.¹⁷ Types of republics were for Davidović democracy and aristocracy. There was an inconsistency in defining aristocracy as a regime in which several families had the supreme power. That definition did not fit the one of the republic in general, where the people as a whole were powerholders, but the author made no comment in that respect. Davidović explained to the public at large the modern political ideas, which were slowly gaining grounds in the emerging nation, still lacking trained lawyers.

The Serbian elite of the time had nevertheless already started promoting foreign political ideas and concepts. A well informed contemporary left a relevant testimony on the matter. An Italian, Bartolomeo Cunibert, a medical doctor in the service of the Serbian Prince, lived in Serbia for several years. He mentioned in his memoirs an opinion of the elite, saying: “Those who were so educated that they could read foreign newspapers demanded for the government in Serbia a pattern of the most advanced states of the world, disregarding the fact that they were still living in a barbaric country, which had just got rid of the unbearable slavery, that lasted for four centuries.”¹⁸ The task undertaken by Davidović to disseminate knowledge on foreign institutions and comparative constitutional law in such circumstances tended to scatter the opinion of the elite and make modern political concepts acceptable to broader circles of the Serbian society.

15 *Novine Srbske*, n° 10 and 40.

16 *Novine Srbske*, n° 10 and 40.

17 *Novine Srbske*, n° 11 and 44.

18 Cunibert, B., 1901, *Srpski ustanak i prva vladavina Miloša Obrenovića 1804–1850*, Beograd, p. 351.

V. AN IMMEDIATE FOREIGN INFLUENCE

In 1834, the year in which the press appeared in Serbia, prince Miloš introduced certain reforms in the structure of Serbian government. He appointed ministers for the first time, thus creating a cabinet, to act apart from the Prince's own chancery. He also introduced a new territorial division of Serbia, creating five regions.¹⁹ The interest in constitutional matters had meanwhile reappeared with the Serbian Prince. Reports of a French diplomat, who visited Serbia in June 1834, corroborate that stance.

Bois-le-Compte was a career officer in the French diplomatic service. He had served in Vienna, Sankt Petersburg and Madrid as well as in Egypt.²⁰ The French diplomat was reporting from Belgrade and Kragujevac in the first part of June 1834. On the 4th June he reported that the Serbian prince was of opinion that he should give the country "a constitutional regime and a complete administration".²¹ In the same report he stated that the Prince had already prepared a draft constitution, which was being discussed in view of adoption by the National Assembly scheduled autumn 1834. The diplomat however added a remark to his minister, that a fear was rising in someone who was faced with the mode of proceeding of the Serbian government "in such complicated combinations, whose influence and outcome are always difficult to predict".²²

From the report of the 11th June we learn that the Prince asked the French diplomat to make comments on a Serbian constitutional draft.²³ The report contains a sketch of Serbian institutions as drafted at that time. According to the report the Serbian prince wanted to create a Senate, which would consist of senators and six immovable ministers. That body was supposed to exercise all state powers – legislative, executive and judiciary. Its legislative decisions should be subject to approval of the National Assembly, but the latter could only vote, and not open a debate on a matter presented to it. The organisation of power, as reported by the French diplomat, seemed to be relying on the 1830 *Hatti-sharif*, aiming to put the Serbian institutions in compliance with its provisions. The existence of both Senate and National Assembly was envisaged and some of the senators, i.e. ministers sitting in the Senate, would be immovable. The provisions of paragraphs 2 and 15 of the 1830 *Hatti-sharif* seemed to be satisfied.

19 Popović, D., 1996a, pp. 48–49.

20 Novaković, S., 1894, Srbija u 1834 – pisma grofa Boa-le-Konta De Rinji ministru inostranih dela o tadašnjem stanju u Srbiji, *Spomenik SKA*, XXIV, Beograd, p. 2.

21 Novaković, S., 1894, p. 28.

22 Novaković, S., 1894, p. 30.

23 Novaković, S., 1894, pp. 44–46.

It was easy for a learned diplomat to mark the weak points of the draft and explain them to the Prince and his councillors. His main point was that the draft created a confusion of powers, by combining a court of law with an upper house of a legislative body, to which it added six ministers, who were also to sit in the Senate.²⁴ Further on the diplomat reported to the French foreign minister on three main critical remarks he had made, and on which he had informed the Prince. Firstly, he expressed the opinion that the National Assembly would have an enormous portion of power, secondly, that both political and administrative competences were vested in a body, being judiciary in character, and thirdly, the target of his criticism was the immovability of ministers.²⁵

The first remark was right in theory, but the French diplomat must have been unaware of Miloš's populism. Therefore his fear that the National Assembly might rival the Prince was probably ill founded. The second remark was the one each and every trained lawyer would have put. The draft ran counter to the concept of separation of powers. The third remark was perfectly founded and clearly showed the situation of a country lacking learned lawyers. Notably, such a provision represented a step back if compared to the constitutional drafts of 1831, mentioned above. The ministers in those drafts were not immovable. We do not know today which was the draft shown to the French diplomat. If it was based on those made in 1831 they must have been further elaborated meanwhile.

Asked by the Prince, the French diplomat sketched a counter-draft of a Serbian constitution, exposed it in eight particular items, and of course, reported on the subject to his minister in Paris.²⁶ In short, he suggested the separation of powers, and the independence of the judiciary with immovable judges of the highest court of law. As to the other state powers he suggested that the legislative power should be conferred to the Prince, together with a Senate of notables and the National Assembly. The Prince should appoint members of the Senate, an upper house of a legislative body. The executive power should be vested in ministers appointed by the Prince himself. This seemed to be a scheme of a representative government in a European constitutional monarchy of those days. The French diplomat tried to make his proposals suitable to the Serbian Prince and his councillors, but they were not willing to follow the advice, and rather pursued on their own.

24 Novaković, S., 1894, p. 44.

25 Novaković, S., 1894, p. 45.

26 Novaković, S., 1894, p. 46.

VI. THE 1835 CONSTITUTION

The National Assembly adopted the first Serbian Constitution in February 1835. The assembly session was opened on the Presentation Day, and the constitution was adopted a day after, in its second sitting. Following Serbian customs the assembly was called the Presentation Day Assembly, and accordingly the constitution was named the *Presentation Day Constitution (Sretenjski ustav)*. Dimitrije Davidović prepared its draft. He was a devoted patriot and a convinced liberal.²⁷ The patriotism made him remain faithful to the Serbian Prince, the head of the emerging Serbian state, born in the national revolution. At the same time drafting a constitution provided him opportunity to introduce liberal ideas in the text, which he thought might be accepted by the Prince. The outcome was a compromise character of the first Serbian constitution, tending to reconcile Miloš's style of running the country with liberal ideas. As regards the form of government, along with the adoption of the separation of powers, as a principle, the Constitution provided for a confusion of powers and a domination of the Prince.²⁸

The 1835 Constitution provided in Article 5 that the state powers were three: legislative, executive and judicial. It was a proclamation of principle. The Constitution vested the legislative and executive powers in the Prince and the State Senate (*Državni sovjet*). The National Assembly was competent only to propose legislation, except in financial matters, in which it was to legislate together with the Prince and the State Senate. The judiciary power was also vested in the State Senate. The latter was composed of an undefined number of senators (*sovjetnici*) and six ministers (*popečitelji*). The idea of ministers sitting in the Senate existing in previous constitutional drafts, was thus maintained.

The Prince was entitled to appoint senators as well as ministers. He could even remove senators from office or provoke their removal in various ways. According to Art. 55. Const. if the State Senate as a whole accused one of its members, the Prince himself should try the latter. Art. 74. Const. provided that either the Prince or any of the senators could accuse a senator, who should then be tried by the State Senate as a whole. Eventually, Art. 90. Const. provided that the National Assembly could accuse either a senator or the Senate as a whole, in case of breach of constitutional

27 On Davidović's liberal ideas cf. Popović, D., Dimitrije Davidović – od narodne k pojedinačnoj slobodi, in: Trkulja, J. and Popović, D., 2001, *Liberalna misao u Srbiji, prilozi istoriji liberalizma od kraja 18. do sredine 20. veka*, Beograd, pp. 36–42.

28 Cf. Popović, D., Sretenjski ustav – oruđe vladavine i vesnik slobode, in: SANU, 2004, *Ustav Knjažestva Srbije*, Beograd, pp. 73–78; Popović, D., 1996a, pp. 83–92.

rights, and in such a case the Prince should act as arbiter. The Prince was given competence to judge senators' guilt, which made him master of their destiny. The Prince's entitlement to veto the bills completes the image. Davidović left the Prince's power unchecked. Miloš could appoint and remove senators and ministers; he could even give a judgment on their guilt according to the Constitution. The separation of powers proclaimed by Sec. 1. Art. 5. Const. was indeed not effective. The separation of powers was mentioned in a rather timid way: "Serbian powers are three – the legislative, the executive and the judiciary." The same article provided in the next section that the legislative and executive powers were vested in the Prince and the State Senate, while the judiciary was omitted, for the sake of unknown reason.

Provisions on fundamental rights represent almost one fifth of the text of the 1835 Constitution.²⁹ Fundamental rights found their place in Section 11 of the Constitution, out of 14 that the text as a whole consisted of. The fundamental rights provided for were not political rights. For those it was too early in Serbia in 1835. The citizens should be equal before the law (Art 111). The Constitution provided also for *habeas corpus* (Art. 112 and 113) and *nullum crimen* (Art. 114). The slavery was prohibited in Serbia (Art. 118) and the property of land, essential for survival of families and their production, was guaranteed (Art. 128). Besides, the property as such was protected (Art. 119), and its peaceful enjoyment found place among constitutional guarantees of fundamental rights.³⁰

Davidović tried to express his liberal opinions by inserting provisions on fundamental rights in the constitutional text. Those must have been of a modest interest for the Prince, because Miloš looked upon a constitution as upon an organic statute legitimating his own power³¹. Davidović for his part was fully aware of the necessity of introducing means of checking the Prince's power. That is why he introduced provisions on fundamental rights, besides mentioning the separation of powers as a principle.

Davidović had drafted the Constitution; the draft was submitted to the National Assembly that adopted it without any deliberation. Prince Miloš had been fully content at the moment, but the troubles soon followed. The

29 Popović, D., 2001, p. 38. They represent 24 provisions out of 142.

30 Cf. Popović, D., *Položaj građanina u srpskim ustavima (1835–1903)*, in: Obradović, K. and Paunović, M., 1996b, *Pravo ljudskih prava – nove teme*, Beograd, pp. 189–191; Popović, D., 2014, *Les droits fondamentaux dans les deux premières constitutions serbes (1835 et 1838)*, *Etudes balkaniques*, 19–20/2013–2014, pp. 290–292.

31 The Prince's opinion echoed in the German press. *Augsburger Allgemeine Zeitung* in March 1835 first reported on the adoption of a *statute (Statut)* in Serbia, which was later on called *Verfassungsurkunde*. Cf. Popović, D., 1996a, p. 99 (n. 6).

European powers involved in the Balkans were dissatisfied with the political developments in Serbia. Miloš tried to maintain the Constitution, giving himself so many advantages when exercising the power, but the foreign powers, aiming to put limits to his rule in Serbia, reacted.

The Russian and Austrian diplomats claimed the first Serbian constitution was too liberal, which of course was inadmissible from their conservative standpoints. Miloš tried his best to preserve the Constitution; he sent a capable diplomat to Constantinople in order to convince the Sultan and the diplomats residing there to let it remain in force, but all was in vain.³² The Serbian Prince had to suspend the 1835 Constitution only a month after its adoption. Constitutional provisions on fundamental rights probably served as solid grounds to develop theses of conservative diplomats of a liberal character of the first Serbian constitution. However, the immediate motives of their criticism were different, for they did not want the Prince's power to remain unlimited.

VII. CONSTITUTIONAL CRISIS

The suspension of the 1835 Constitution led to a crisis. The Prince was of opinion that the main trouble was the text. He was angry with Davidović, who was not allowed participation in matters concerning constitution. However, if the text was the problem, the easiest way to cope with it was to alter the wording. For that purpose Miloš formed a special committee to draft another document, starting from the 1835 Constitution. The committee was formed in a haste in April 1835, almost immediately after suspending the Constitution. The Prince relied on the thesis that the vassal state was entitled to adopt its own constitution. This provoked a reaction of foreign powers, particularly Russia, that sent a special envoy to Serbia in July 1835, to treat the constitutional question with the Serbian government.³³

The Serbian authorities were persistent in their efforts to pass a constitution for the vassal state, as well as in their belief that some sort of a rectified text would be acceptable both for the Sultan and the foreign powers. Three constitutional drafts emerged as an outcome of such an attitude. Two of those have been poorly treated by scholars so far. One of the drafts has not been preserved. It was made hastily during negotiations with the Russian envoy and it probably was only a slight adaptation of another draft, attributed to the Prince. The text of the latter has been pre-

32 Cf. Gavrilović, M., 1926, *Suspendovanje prvog srpskog ustava, Iz nove srpske istorije*, Beograd, pp. 190–209.

33 Popović, D., 1996a, pp. 102–104 (n. 6).

served in Russia. Radoš Ljušić, a historian, commented on the draft.³⁴ Out of his uncomplete report we learn that the draft was shorter than the 1835 Constitution. It contained 7 chapters with a total of 102 articles, while the 1835 Constitution had 14 chapters with 142 articles. Notably, a chapter on fundamental rights was preserved, containing, according to Ljušić, more than 20 articles.³⁵

The third draft, aiming to revise the text of the first Serbian constitution, represents the most interesting piece of work, and fairly reflects the Serbian constitutional crisis of the mid 1830s. Its author was Stefan Radičević, the secretary of the small committee of six, whose task was to draft a revised text of the constitution. The text of the draft has been preserved in the Archives of Serbia in Belgrade.³⁶

At the beginning of May 1835 the committee had a session in the presence of the Serbian Prince and some distinguished political persons, in order to discuss the draft prepared by Radičević. It was rejected at the end of a somewhat feversih and rather unpleasant exchange of opinions. This draft was probably closer to the text of the suspended 1835 Constitution than it was the case with the other two above mentioned. It contained 11 chapters with 136 articles, which was pretty close to the text of the 1835 Constitution (14/142). What lacked in the Radičević's draft, compared to the constitutional text, were provisions on constitutional revision, as well as those concerning finance and legislative procedure.

Radičević introduced some novelties, as far as the composition of the text is concerned. A chapter on the Serbian Orthodox church was put forward, being number nine in the 1835 Constitution, and number three in its revision draft. The fundamental rights were also put forward, being chapter eleven in the 1835 Constitution and number two in the revision draft. However, instead of 24 articles of the constitutional text on fundamental rights, there were only 14 in the Radičević's draft.

Radičević tried to avoid the compromise character of Davidović's approach when drafting the text of the 1835 Constitution, and boldly opted for separation of powers. In the fourth chapter of his draft he rectified the ambiguities of the constitutional text of 1835. Radičević's rectification was completed in four short articles under the title "On Serbian Powers", which read:

34 Ljušić, R., 1986, p. 151.

35 For both drafts cf. Popović, D., 1996a, pp. 105–106 and 114–116.

36 For Radičević's draft cf. Kandić, Lj., 1972a, pp. 775–777 (n. 9); Kandić, Lj., 1972b, *Položaj sovjeta po ustavnim projektima i ustavima u prvoj polovini XIX veka do ustavobranitelja*, *Istorijski glasnik*, 1, pp. 16–18; Ljušić, R., 1986, p. 150; Popović, D., 1996a, pp. 106–114.

- “Serbian Powers are three: the legislative, the executive and the judiciary.
- The legislative power is vested in the Prince, together with the Senate.
- The executive power is vested in the Prince.
- The judiciary power is vested in men learned in law, appointed by the Prince to various courts of law, in order to administer justice in Prince’s name.”

This went along with some proposals and advices given to Serbian authorities in 1834 by the French diplomat, Bois-le-Compte. The discussion of the Radičević’s draft, as it can be reconstructed in the sources, showed that Davidović had had a good reason to omit clear cut definitions and stick to a compromise. The author of the draft was insulted by the Prince during the committee session, while one of the conservative dignitaries went even further and threatened Radičević with evil. The prevailing opinion was against the separation of powers, and some other modern provisions, which Radičević tried to introduce. Among those was the counter-signature, but also the ministerial responsibility, which was shaped with some pedantry, and with a certain inspiration coming from the French constitution of 1791. Such ideas were premature in Serbia in 1835, like for instance the provision forbidding the Prince to grant pardon to a minister who was sentenced by a court of law. Whether and how Radičević was informed on the provisions of the English Act of Settlement of 1701, that obviously inspired him, remains unknown to date.

The conservative opinion was by far prevailing in Serbia in spring of 1835. Miloš was persistent in his endeavour to conceive a constitution as an act merely legitimizing Prince’s power. His intention to rule the country unchecked remained unchanged. The only lesson learned in times of constitutional crisis, after suspending the 1835 Constitution was that the Serbian constitutional question had international implications.

VIII. THE 1838 CONSTITUTION

The compromise character of the 1835 Constitution did not satisfy those who had a say in the affairs of the Balkans. Some liberal provisions, although most likely insufficient to limit the Prince’s powers, led to dissatisfaction of Russia, Austria and Turkey. Those provisions were used as a pretext for criticism, which was essentially rooted in the fact that the three foreign powers mentioned were not supportive of Miloš’s inclination to rule alone.

Serbian efforts to revise the text of the 1835 Constitution failed. Miloš made attempts to draft a new constitution for Serbia at the beginning of 1838. A draft made by Jovan Hadžić was rather conservative despite the fact that it was aiming at limiting of the Prince's powers. Hadžić was a Serb from Novi Sad, a lawyer who received formation in Budapest and Vienna, and supportive of the opposition to the Prince. He was the author of the Serbian Civil Code of 1844.³⁷ The Prince nevertheless preserved some of the governance structure introduced for the first time during his short constitutional rule in 1835. This applies to the Senate, which was first given the name of Administrative council, and afterwards Prince's council. The changes occurred in 1836/7. Towards the end of 1836, Miloš reshaped the administrative organisation of the country, introducing a system of fusion of civil and military authorities. The centralism and Prince's unlimited power were thus strengthened, while the Prince justified the new measures stating that, the Serbian people as a whole was "based on a military system".³⁸

As the constitutional question remained open the Prince realised it was inevitable to coordinate domestic efforts with those of the Turkish sovereign court, as well as with the European powers in order to solve the problem. The British diplomacy instigated an action of the Ottoman Port in that respect. Miloš himself also preferred turning to the sovereign court in order to avoid direct intervention of foreign factors with Serbian constitutional matters.³⁹ A Serbian deputation of three persons was sent to Constantinople in order to negotiate the constitutional question with the Turkish authorities. Its chief, Avram Petronijević, remained in touch with the opposition to the Prince. All those efforts eventually led to the settlement of the constitutional question. The Sultan, as the country's sovereign, passed a constitution for Serbia in December 1838. The people in Serbia called it Turkish constitution, the name was admitted by the scholars, remaining in use to date. The 1838 Constitution had a special form, for it represented a letter, issued by the Sultan, as a sovereign, addressed to the Prince of Serbia, the Sultan's faithful vassal. The text contained no chapters. With its 66 paragraphs it was much shorter than the one of the 1835 Constitution.

Notably, almost one sixth of the text of the 1838 Constitution provided for fundamental rights. As in the previous constitutional text there

37 Jovanović, S., 1990, Jovan Hadžić, *Političke i pravne rasprave I–III*, Beograd (original edition of 1908), pp. 288–289. Jovanović reports that the original of the Hadžić's draft is preserved in Viennese archives.

38 Cf. Jevtić, D. in: Jevtić, D. and Popović, D., 2003, *Narodna pravna istorija*, Beograd, p. 102.

39 On the development preceding the constitution in detail cf. Ljušić, R., 1986, pp. 165–183; cf. also Jevtić, D., 2003, p. 103.

was no trace of political rights. The 1838 Constitution guaranteed the independence of the judiciary (par. 44), the right of appeal (par. 36), freedom of the orthodox religion (par. 57), the writ of *habeas corpus* (par. 65). The peaceful enjoyment of property was also guaranteed (par. 46), as well as the freedom of trade (par. 45). The constitutional text provided for a due process of law in its last paragraph. The Sultan wrote to the Serbian Prince:

“I also order Thee to respect the status, dignity, rank and services of everyone; and above all to look after that paragraphs and conditions exposed above shall be fully and for ever executed.”⁴⁰

The organisation of power, differed in the 1838 Constitution, if compared to the one of 1835. The structure of government relied on two state organs – the Prince and the Senate. The National Assembly, although a customary institution in Serbia at that time, found no place in the constitutional text. The legislative power was vested in the Prince. The executive power was vested in the organ consisting of ministers and named Central Government, but was somehow merged with the Senate. The judiciary was to be independent.

The number of senators was fixed to seventeen in the 1838 Constitution and the Prince was entitled to appoint them. There was confusion of powers, because the ministers were to sit in the Senate sessions. The ministers were four in number and the Prince was entitled to appoint them. The main obstacle to the Prince’s unlimited rule was the provision of par. 17. Const., providing that the members of the Senate could not be deprived of their office, “unless proven guilty before my Highest Port of some offence or breach of laws and decrees of the country”. The Prince could appoint senators, but he could not destitute them, once appointed the senators were accountable exclusively to the Sultan. Additional trouble for the Prince was introduced by an act passed soon after the 1838 Constitution. It provided that the Prince could appoint ministers only among persons who were already sitting in the Senate. His choice was thus limited to those who were not responsible to him. Such a provision was introduced into the Act of 17th April 1839 under the direct influence of Jovan Hadžić, sympathetic to the opposition to the Prince.⁴¹

The provisions of the 1838 Constitution introduced a system of oligarchy. The power sharing between Prince and Senate led in practice to the domination of the latter. The National Assembly found no place in the structure of government. In such circumstances it became clear to Miloš he

40 On fundamental rights in 1838 Constitution cf. Popović, D., 2014, pp. 294–299.

41 Cf. Jovanović, S., 1990, pp. 294–295.

could not rule in his own authoritarian way. Paradoxically a constitution which was neither modern nor liberal, put an obstacle to the Prince's unlimited rule. The 1838 Constitution achieved the main goal of those who were trying to put the Prince under some sort of constitutional checks and balances. The constitution could therefore not be perceived as an organic statute merely legitimising Prince's power. The oligarchy showed enough strength and the Turkish constitution for Serbia, passed in 1838, remained in force for more than twenty years.

The aftermath of those events came in June 1839. Aware of the fact that he could not govern in his authoritarian style Miloš abdicated and left the country, leaving the throne to his son, Mihailo, who also abdicated in September 1842. The power of Serbian oligarchy was at its peak. The Senate invited the son of the leader of the first Serbian uprising against the Turks in 1804, Aleksandar Karadjordjević, to come to the country and made him the Prince of Serbia. That was contrary to the constitutional provisions of 1838 which designated the hereditary title in the Obrenović family, but the Sultan made no protest.

IX. ATTEMPTS TO REFORM THE 1838 CONSTITUTION

In the course of time the 1838 Constitution showed deficiencies. The attempts to amend it came from some educated persons who neither took an active part nor played an important role in Serbian politics. Those attempts remained without result because they were not supported by real political forces. That is probably the reason why the constitutional historians did not pay much attention to the respective documents. An exception to the rule is the professor of the author of this text, Ms Ljubica Kandić, the only legal historian to have taken the drafts in consideration.⁴²

Matija Ban was the author of a constitutional draft of 1846.⁴³ An ex-franciscan monk from Dubrovnik he left the order and came to Belgrade where he became educator of the Prince's daughters. Besides he was a diplomat and university professor, also teaching in the Military Academy. Matija Ban was conservative and as regards the reform of the 1838 Constitution his main effort consisted in advocating bicameralism. In his opinion it could lead to an improvement in functioning of Serbian political institutions, although his ideas remained somewhat unclear. He suggested introduction of another chamber which actually would not have been a real parliamentary chamber in a two house parliamentary

42 Cf. Kandić, Lj., 1972a, pp. 773–787 (n. 9).

43 Kandić, Lj., 1972a, p. 778.

system. He envisaged instead some sort of a small consultative body, consisting of the elite.⁴⁴

Another draft was made in 1847. Its author was a Czech, living in Serbia, whose name was Franja Zah. He had come to Serbia as an agent of the Polish emigration, gathered around prince Czartorisky. Having graduated law from Vienna University, he studied military sciences in France and never pursued a career in law. In Serbia he became Army general, war minister, chief of General Headquarters and a director of the School of Artillery.⁴⁵ Zah drafted a much more complex document than the one concocted by Matija Ban. The draft has been preserved in the Archives of Serbia in Belgrade in the fund of Ilija Garašanin.⁴⁶ The text resembles a treatise on the form of government, rather than a proper constitution draft. Legal provisions are combined with explanations, but the ideas are clearly put forward. The author of the text envisioned formation of a cabinet as the main executive body.⁴⁷ He advocates ministerial responsibility when displaying “the main foundations of the constitutional system”.⁴⁸ Following the ideas of parliamentary government the draft treated the issue of ministerial crisis in case of dispute between the cabinet and the national representation.⁴⁹ As to the latter, the author was in favour of a bicameral system. The National Assembly was to consist of 417 deputies in the lower and 42 in the upper house. The members sitting in the upper house would not be elected, but sit of their own right, e.g. the president of the Court of Appeals or the university rector.⁵⁰ Notably, the author of the draft expressed his attitude towards fundamental rights, enumerating three among those to be the most important. These are personal liberty, equality before the law and security of estate.⁵¹

It is difficult to assess the importance of this draft today. It remained without a proper echo in Serbian political life, but is nevertheless significant for introducing ideas of parliamentary government. The fact that it was preserved among the documents of an active politician of those times – Ilija Garašanin, raises the suspicion that the text might have reflected

44 Kandić, Lj., 1972a, pp.779–780.

45 Kandić, Lj., 1972a, p. 778.

46 The document, IG 225, contains more than 50 pages. It is dated February 1847 and bears the title *Basic Thoughts*.

47 IG 225, pp. 16–18.

48 IG 225, p. 33. At the same place the author also considered personal freedom and equality before the law to be fundamental for the constitutional system.

49 IG 225, pp. 38–41.

50 IG 225, pp. 47–48.

51 IG 225, p. 51.

some of the ideas that Garašanin was willing to consider. The document may have been prepared as a sort of “working paper” for a politician, who at least partly shared the ideas of the author of the draft. Although without echo, it nevertheless provides testimony for the history of ideas.

X. TWO SERBIAN ENTITIES

The events of 1848 brought significant changes to the political situation of the Serbian people as a whole. The Hungarian uprising in Austria resulted in creation of a separate Hungarian state consisting of all territories belonging to the Saint Stephen’s crown. The Serbs and Croats inhabiting those territories reacted against the Hungarian revolution, siding with the cause of Habsburgs i.e. the Imperial court of Vienna. While fighting against the Hungarians the Serbs created a structure of their own government and elected a duke to lead them. The Serbian term for duke – *vojvoda* remained as a denomination of the territory under his rule, representing the northern part of Serbia today, called *Vojvodina*. The Austrian Emperor granted autonomy to the duke’s territory in December 1848 and the metropolitan bishop of the Serbian Orthodox Church, residing in Sremski Karlovci was proclaimed to be the patriarch. The title had been vested in the Serbian orthodox dignitary which had led the Serbs move from the south, coming to inhabit the Emperor’s lands, but it disappeared further on. In that way another Serbian political entity was created, the fact which led to opening of another constitutional question, concerning a government structure of the autonomous territory. A draft constitution was then prepared for Serbian Vojvodovina.⁵²

The history of the second Serbian entity was short. The autonomy was abolished in 1849 and it has never been reintroduced within the Habsburg monarchy. This did not represent an obstacle however to the growing of constitutional ideas. The most important person in the history of drafting a government structure of the second Serbian entity was one of the personalities already mentioned. It was Stefan Radičević, who had been trying to draft a revision of the 1835 Constitution. Stefan Radičević was related to the one of the greatest Serbian poets of romanticism, Branko Radičević, also a Serb from Austria, who died very young. Stefan Radičević had come to Serbia in 1830 and became a civil servant. He was

52 Cf. Krkljuš, Lj., Proekt Ustava za Vojvodovinu Srbsku Stefana Radičevića, in: SANU, 1990, *Ustavni razvitak Srbije u XIX i početkom XX veka*, zbornik radova, Beograd, pp. 77–84.

close to Prince Mihailo, and was justice minister who left the country with the Prince when the latter abdicated in 1842. After the restoration of the Obrenović family to the Serbian throne he returned to Serbia towards the end of the 1850s. He died in Belgrade in 1871.⁵³ Radičević drafted a constitution for the Serbian Vojvodovina in 1848. The draft was published in 1849 in Zemun, together with author's short comments.⁵⁴ The provisions were formulated clearly, encompassing seventeen chapters, consisting of 215 articles. Since the life of the autonomy was short the draft could not have a proper impact on political developments. However, it preserves a value in the history of ideas. Its composition is significant. Having provided in the first three chapters for the relations of the Serbian autonomous entity towards the Austrian Empire, the author of the draft put fundamental rights in Chapter IV of the draft constitution. The Chapter contains 16 articles, providing for personal liberty (Art. 33), security (Art. 34), right to property (Art. 39–40), equality before the law (Art. 41), then forbidding capital punishment for high treason (Art. 44), and granting freedom of the press (Art. 45).⁵⁵ The draft provided for the equality of all Christian religions – orthodox, Roman catholic, evangelic and reformed churches (Art. 178). The drafter was aware that the population inhabiting the territory of the Serbian autonomus entity was religiously heterogeneous, which called for a provision on the equality of religions.⁵⁶

As regards the organisation of power, the Serbian autonomous entity was supposed to introduce a sort of presidential form of government, given the fact the people were to elect both the head of administration – *voivoda* and the national representation. *Voivoda's* resembled the one of Governor General in British dominions. He was to represent the Emperor of Austria (Art. 47), but at the same time he was elected by the people (Art. 50). Some of *voivoda's* entitlements went beyond the classical pattern of the presidential form of government. For instance, besides disposing of the right of veto in the legislative procedure (Art. 95) *voivoda* could also introduce legislative bills (Art. 93). Notably, the draft provided for ministerial responsibility before national representation (Art. 118), which would qualify the system envisaged to find its place among semi-presidential forms of government.⁵⁷

53 Krkljuš, Lj., 1990, p. 77.

54 Radičević, S., 1849, *Proekt ustava za Vojvodovinu Srbsku sa državoslovnim primetbama*, Zemun.

55 Radičević, S., 1849, pp. 32–40.

56 Radičević, S., 1849, pp. 77–80.

57 Radičević, S., 1849, pp. 41–65.

4. PILLARS OF CONSTITUTIONALISM

The review of events and documents leads to the topic of the emergence of concepts and institutions, representing the pillars of constitutionalism. Three of those are of particular interest: *fundamental rights (i)*, *separation of powers (ii)* and *the rule of law (iii)*.

I. FUNDAMENTAL RIGHTS

At the beginning fundamental rights were perceived as collective rights of the Serbian people, being oppressed by a feudal regime of an empire, whose religion was different from the one of the Serbs. To some extent the whole idea of a national revolution in the beginning of the nineteenth century was inspired by an effort of a community trying to constitute itself as a nation to achieve group rights. It put forward the question of self-determination, which led to complex political developments, both within the Turkish Empire and at the international level.

The Serbian society of the first half of the nineteenth century was for the most part composed of large families living in villages and depending on the agricultural production. There was no industry, the cities were small and few, the roads were not developed enough. There was neither a university, nor high schools in the country until 1840, and most of the intellectuals were Serbs from Austria. Serbian intellectuals made efforts to understand the idea of fundamental rights as the one of individual rights instead of those belonging to a group of persons. The idea was visible in Davidović's attitudes. He was under the impact of Western political concepts, although the influences he had received cannot be properly established in the sources. Davidović wanted to put individual freedom on solid grounds. That is why he introduced provisions on fundamental rights into the 1835 Constitution. He was aware of the fact that a nation was composed of individuals, and his patriotism should be considered together with his liberalism. He was fond of his nation because his compatriots loved freedom and had fought for it in the national revolution. At the same time he was of opinion that freedom of an individual could only rely on a written document and should be legally based.⁵⁸

However, the time was not ripe for fully liberal attitudes in a small vassal state, a country with a patriarchal social structure. Davidović took account of the fact and refrained from introducing political rights in the 1835 Constitution. In 1848 in the draft Constitution of Voivodovina Srbska, a step was made towards political rights. For instance, the draft

58 Popović, D., 2001, p. 39.

provided for the freedom of the press. Serbian liberal intellectuals mostly adopted Central European ideas, but they were also exposed to the Western European influence. Their attitudes sometimes confronted the reality. Thus, an independent judiciary, which was to secure protection of fundamental rights, although envisaged by constitutional provisions and drafts, only remained an ideal.

II. SEPARATION OF POWERS

The separation of powers can be traced back to the early documents, which provided that the executive branch of government should be vested in the head of state, while the latter should share the legislative power with a representative body. The idea probably emerged for the first time in the larger of the two constitutional drafts of 1831. It was repeated by the French diplomat who sketched a structure of Serbian government in 1834.

The author of the text of the 1835 Constitution stopped half way in respect of the separation of powers. Davidović put forward the principle of the existence of the three branches of government, but nevertheless provided for a confusion of powers in the constitutional text. However, his failure to state that the judiciary was vested in the Prince, goes along with his effort to introduce provisions on fundamental rights in the text of the 1835 Constitution. Both speak of his liberalism.

An attempt made to revise the text of the suspended constitution went further on following the path of embracing the idea of separation of powers. Radičević introduced clear provisions on separation of powers and independent judiciary in his revision draft. It cannot be established whether that followed the ideas expressed by the French diplomat in 1834. Notably, in the 1848 draft Constitution Radičević persisted in his adherence to the concept of separation of powers. It was present in the Serbian legal thought, although the constitutional practice under the 1838 Constitution was different.

III. RULE OF LAW

The rule of law is a complex concept, consisting of various institutions, procedures and even convictions, which were fairly undeveloped in Serbian thought in the first half of the nineteenth century. That is why the real question is, whether some traces or at least basic ideas of the rule of law emerged in Serbian legal mind at the time when the country lacked learned lawyers and intellectuals in general.

It is again the larger draft of the year 1831 that contains germs of an idea of the rule of law. The draft provided in its Art. 36 for an independent

judiciary, sketching its three level pyramidal structure. The advice given to the Serbs in 1834 by the French diplomat in visit went in the same direction. The problem becomes more complex with the 1835 Constitution. It contains an express provision (Art. 48), stating obligation of the State Senate to “see that law rules over the Serbian people”. The whole effort Davidović made to achieve a compromise between the Prince’s wishes and his own liberal ideas was an attempt, although somewhat naïve, to make Miloš Obrenović a constitutional monarch. He nevertheless had to face the reality of an authoritarian psychological structure of the Serbian prince. Davidović was so optimistic as to believe that once put into frames of constitutional provisions Miloš might agree to act according to those, provided his own will should be enforced. It was a noble belief of the Prince’s secretary, but authoritarian persons are rarely inclined to follow such patterns of behaviour. They go beyond provisions and procedures, and that was also the case of the Prince of Serbia. The whole idea of constitution in his view was simply to legitimise by such an act his own power that would remain unchecked.

Radičević, who undertook the task to rectify the ambiguities of the 1835 Constitution, made a further step forward in advocating modern institutions. His draft, discussed in May 1835, provided for independent judiciary, and introduced elements of the rule of law. The draft provided for ministerial accountability, for the ministers were to respond before a court of law. Such a responsibility presupposed a countersignature, which also found place in the draft. Eventually, the 1838 Constitution put forward the idea of the rule of law in the very last provision and in its own peculiar way, sounding like a mere proclamation, although the document nevertheless contained a provision on independent judiciary.

Modern ideas were penetrating Serbia in the first half of the nineteenth century. They were confronted with the reality. The country was economically underdeveloped and had a patriarchal social structure. It was ruled by an authoritarian monarch and later on by conservative oligarchy, both hostile to power checks and balances. The country suffered scarcity of intellectuals and last but not least, had the vassal status, with a complicated international position. That was the milieu in which legal education set foot in Serbia.

5. LEGAL TEACHING AND CONSTITUTIONALISM

I. TEACHING PUBLIC LAW

Teaching of law appeared in an embryonic form in the time of the First Serbian uprising against the Turks. Lazar Vojnović, a Serb from Austria trained in law, started lecturing on Public law in 1808 at the High

School, which was founded by the Serbs almost immediately after installing their rule in Belgrade.⁵⁹ Vojnović died at the age of twenty nine, before the end of the First Serbian uprising, and did not make a proper impact on the development of ideas. He nevertheless published a manual for students to accompany the lectures in Public law.

The manual has not been preserved in the original form, but the source we dispose of today can nevertheless serve the purpose of its reconstruction to a satisfactory level. Vojnović lectured before the stabilisation of Serbian legal terminology, his lectures were consecrated to public law, but his attitudes can nevertheless be well traced, so as to reveal his stance in favour of the rule of law interpreted within the framework and in terms of the theory of natural law.⁶⁰

II. TEACHING NATURAL LAW

Teaching of law, which had started in 1808 ended in 1813 with the defeat of the Serbian troops and the Turkish return to the Belgrade fortress. It was in the period of autonomy that the first high school in Serbia, *Licej*, which was to become the first Serbian university in the course of years, was founded in 1840 in Kragujevac. The school moved to Belgrade in 1841, and teaching of law represented a part of its curriculum. In 1840/41 a prominent Serbian intellectual from Austria, Jovan Sterija Popović, was one of the professors. Sterija remains to date an important person in the Serbian literature, as one of the best comedy writers of all time. He had formation in law and he was teaching Civil proceedings as well as Natural law.

Sterija's lectures on Natural law were preserved in a manuscript, which practically fell into oblivion until 1957. In that year, commemorating one hundred years after the death of the famous comedy writer, one of the most distinguished professors in the School of Law of Belgrade University, Radomir Lukić, lectured on that special occasion on Sterija.⁶¹ Lukić analysed the manuscript of Sterija's *Natural law*, which had not yet been published at that time. Its publishing had to wait until the 1990s.⁶² The language of the manuscript was old fashioned and preceded the re-

59 On Lazar Vojnović and his work cf. Popović, D., *The Dawn of Human Rights in Serbian Legal Thought*, in: Simon, T. (ed.), 2017, *Konflikt und Koexistenz – Die Rechtsordnungen Südost Europas im 19. und 20. Jahrhundert, Band II*, Frankfurt am Main, pp. 216–222.

60 Popović, D., 2017, pp. 221–222.

61 Lukić, R., 1957, *Jovan Sterija Popović – profesor prirodnog prava na Liceju, Anali Pravnog fakulteta u Beogradu*, vol. V, n° 1, januar–mart.

62 Popović, J. S., 1995, *Prirodno pravo*, Novi Sad.

form introduced by Vuk Karadžić. It had to be adapted to the modern orthography and many words used in the manuscript had to be explained to a modern reader, so that a glossary was attached to the volume.⁶³ Sterija had legal formation in German and he used that language along with Latin in numerous footnotes in the manuscript.

Sterija's work represented a thorough review of the contemporary legal scholarship. Lukić expressed the opinion that Sterija's standpoints were not original, but found his attitudes liberal, and open to a certain criticism of the natural law.⁶⁴ Sterija made a tremendous effort to inform his students on the academic works on natural law. He lectured on classical scholars, such as Oldendorp, Aemming or Alberti, along with Grotius, Pufendorf, Thomasius and Wolf, but also on the opinions of authors of the eighteenth and the nineteenth centuries. Among those he mentioned Warenkönig, Glafey, Hufeland, Neidenitz, Zachariä, Maass, Welker, Schmelzling, Krug, Borst, Lange, Hans, Gerlach, Fischhaber, Pölitz, and also Schelling, Hegel, Thanner, Nibler, Meister⁶⁵...

Notably, Sterija recommended to his students the academic works falling within the scope of constitutional law. Sterija was faithful to the German language and scholarship. He did not use the expression Constitutional law, but used the expression State law (*državno pravo*, *Staatsrecht*) instead.⁶⁶ He exposed briefly on classical writers, such as Plato and Aristotle, Grotius, Hobbes and Machiavelli, as well as Pufendorf, Wolf and Rousseau, adding some of the most important scholars of his time, like Schletzer, Schmalz, Pölitz, Krug or Rottek, among others.

Sterija remarked that the American revolution was a milestone which made the state law (*Staatsrecht*) autonomous, while underestimating the French revolution rendered that area of law backward. Admitting that there were numerous French scholars whose works were worth of consulting, he nevertheless situated his lectures within the framework of the German academic streamline.⁶⁷ Teaching on constitutional topics Sterija quoted most frequently Pölitz and Rottek, but also Schmid and Schlötzer, besides classical authors.⁶⁸

Sterija lectured on Natural law and made no comments on Serbian constitutional law of his time, i.e. the 1838 Constitution. Thus there was a

63 Cf. Popović, J. S., 1995, pp. 175–188.

64 Cf. Lukić, R., 1957, pp. 12–13.

65 Popović, J. S., 1995, pp. 30–33, exposing on academic literature on natural law in general.

66 Popović, J. S., 1995, pp. 105–170.

67 Popović, J. S., 1995, p. 104.

68 Popović, J. S., 1995, pp. 105–170.

cleavage between theory and practice in Sterija's approach, for it was purely theoretic, completely neglecting the positive law. However, if compared to the noble, but anyway rather modest efforts made by Davidović to treat the constitutional law in the press, Sterija's lectures showed enormous advantages. Those were lectures of a learned lawyer, thoroughly founded on scholarly discussions with the prominent contemporary academics.

III. TEACHING CONSTITUTIONAL LAW

The first professor of Constitutional law in Serbia started teaching several years after Sterija's pioneer work. It was Dimitrije Matić, who lectured at the Licej of Belgrade between 1848 and 1851. Matić was also a Serb from Austria, who studied in Germany, with a support of a grant of the Serbian government. Unlike Sterija, who eventually returned to Austria, Matić remained in Serbia and made a career in the administration and the judiciary. He also was a minister and speaker of the National Assembly.⁶⁹

Matić published two manuals for his students. One was a short commentary of the positive Constitutional law.⁷⁰ Matić used the term Public law (*javno pravo*, *öffentliches Recht*) instead of Constitutional law. The other manual was the first Serbian theoretical school book on Constitutional law.⁷¹ Matić explained in the preface to his school book that his aim was to expose first the theory of the State law (*Staatsrecht*, *državno pravo*) and then the positive Public law.⁷² The cleavage between theory and practice was maintained because of splitting the whole of the constitutional law in two books. However, Matić did not neglect the positive law for the sake of pure theory. In his theoretical approach Matić followed Heinrich Zöpfl, his German professor from Heidelberg. Matić's volume indeed represented an abbreviated and adapted version of his professor's book.⁷³

Serbian constitutional history thus showed some of its considerable achievements at the very beginning. Sterija and Matić lectured in the period in which the 1838 Constitution was in force. The former made no

69 For a biography cf. Marković, B. S., 1977, *Dimitrije Matić – lik jednog pravnika*, Beograd.

70 Matić, D., 1851a, *Javno pravo Knjažestva Srbije*, Beograd.

71 Matić, D., 1851b, *Načela umnog državnog prava*, Beograd. There is also a modern version of the volume published in Belgrade in 1995.

72 Matić, D., 1851b, preface.

73 Cf. Zöpfl, H., 1841, *Grundsätze des allgemeinen und des konstitutionel-monarchischen Staatsrechts*, Heidelberg.

comments to it, while the latter started lecturing on positive law as well, which was a step towards legal positivism. Sterija's manuscript was subject to oblivion, whereas Matić left teaching turning to other issues in his successful career and could not influence the Serbian legal thought for a long time. Decades will pass before the Serbian scholarship of Constitutional law will become able to reach the levels where Matić and Sterija, teaching in the first half of the nineteenth century, managed to place it.

6. AN OVERVIEW

Serbian constitutional developments in the first half of the nineteenth century traversed a long path in the time of nation building. In approximately a quarter century the state of Serbian legal mind evolved from misunderstanding of some crucial constitutional concepts to the level of teaching of those by Serbian professors with regard to the most recent contemporary scholarship. Constitutional ideas developed under two political regimes, one authoritarian, and the other oligarchic. Since neither was favourable to the rule of law, separation of powers or fundamental rights, the constitutionalism had an arduous path to follow.

In such circumstances the three pillars of constitutionalism had separate lines of evolution. The separation of powers was mostly focused, attracting the attention among politicians and constitution drafters. Fundamental rights were at first perceived as collective rights. They were later on understood as individual rights, but for a long time remained limited to civil and did not include political rights. The rule of law was the most complex of the three and evolved poorly. The scarcity of learned lawyers explains its slow pace, but a cleavage between theory and practice was also important. However, the evolution of theoretic constitutional concepts was ahead of the implementation of the constitution in force.

BIBLIOGRAPHY

1. Cunibert, B., 1901, *Srpski ustanak i prva vladavina Miloša Obrenovića 1804–1850*, Beograd.
2. Gavrilović, M., 1908, *Miloš Obrenović, knj. I*, Beograd.
3. Gavrilović, M., 1926, *Suspendovanje prvog srpskog ustava, Iz nove srpske istorije*, Beograd.
4. Jevtić, D., Popović, D., 2003, *Narodna pravna istorija*, Beograd.
5. Jovanović, S., 1990, Jovan Hadžić, *Političke i pravne rasprave I–III*, Beograd.

6. Kandić, Lj., 1972a, Neobjavljeni nacrti ustava u Srbiji u prvoj polovini XIX veka, *Anali Pravnog fakulteta u Beogradu*, 5–6.
7. Kandić, Lj., 1972b, Položaj sovjeta po ustavnim projektima i ustavima u prvoj polovini XIX veka do ustavobranitelja, *Istorijski glasnik*, 1.
8. Karadžić, V., 1969, *Prvi i drugi srpski ustanak; Život i običaji naroda srpskog*, Novi Sad–Beograd.
9. Karadžić, V., 1985, *Istorijski spisi*, Beograd.
10. Krkljuš, Lj., Proekt Ustava za Vojvodovinu Srbsku Stefana Radičevića, in: SANU, 1990, *Ustavni razvitak Srbije u XIX i početkom XX veka*, zbornik radova, Beograd.
11. Lukić, R., 1957, Jovan Sterija Popović – profesor prirodnog prava na Liceju, *Anali Pravnog fakulteta u Beogradu*, Vol. V, n^o 1, januar–mart.
12. Ljušić, R., 1986, *Kneževina Srbija (1830–1839)*, Beograd.
13. Marković, B. S., 1977, *Dimitrije Matić – lik jednog pravnika*, Beograd.
14. Matić, D., 1851a, *Javno pravo Knjažestva Srbije*, Beograd.
15. Matić, D., 1851b, *Načela umnog državnog prava*, Beograd.
16. Milićević, M. Đ., 1888, *Pomenik*, Beograd.
17. Nenadović, M., 1969, *Memoari*, Novi Sad – Beograd.
18. Novaković, S., Srbija u 1834 – pisma grofa Boa-le-Konta De Rinji, ministru inostranih dela o tadašnjem stanju u Srbiji, 1894, *Spomenik SKA, XXIV*, Beograd.
19. *Novine Srbske*.
20. Popović, D., 1996a, *Prapočetak srpskoga parlamentarizma*, Beograd.
21. Popović, D., Položaj građanina u srpskim ustavima (1835–1903), in: Obradović, K. and Paunović, M., 1996b, *Pravo ljudskih prava – nove teme*, Beograd.
22. Popović, D., Dimitrije Davidović – od narodne k pojedinačnoj slobodi, in: Trkulja, J. and Popović, D., 2001, *Liberalna misao u Srbiji, prilozi istoriji liberalizma od kraja 18. do sredine 20. veka*, Beograd.
23. Popović, D., 2004, Sretenjski ustav – oruđe vladavine i vesnik slobode, in: SANU, *Ustav Knjažestva Srbije*, Beograd.
24. Popović, D., 2014, Les droits fondamentaux dans les deux premières constitutions serbes (1835 et 1838), *Etudes balkaniques*, 19–20/2013–2014.
25. Popović, D., The Dawn of Human Rights in Serbian Legal Thought, in: Simon, T. (ed.), 2017, *Konflikt und Koexistenz – Die Rechtsordnungen Südost Europas im 19. und 20. Jahrhundert, Band II*, Frankfurt am Main.
26. Popović, J. S., 1995, *Prirodno pravo*, Novi Sad.
27. Popović-Obradović, O., 2013, *The Parliamentary System in Serbia*, translated by Branka Magaš, Helsinki Committee for Human Rights in Serbia, Belgrade.
28. Prodanović, J., 1936, *Ustavni razvitak i ustavne borbe u Srbiji*, Beograd.
29. Radičević, S., 1849, *Proekt ustava za Vojvodovinu Srbsku sa državoslovnim primetbama*, Zemun.
30. Zöpfl, H., 1841, *Grundsätze des allgemeinen und des konstitutionel-monarchischen Staatsrechts*, Heidelberg.

TEGOBAN PUT KA USTAVNOJ VLADAVINI

Srpski ustavni razvitak u prvoj polovini devetnaestoga veka

Dragoljub Popović

REZIME

Srpski ustavni razvitak u prvoj polovini devetnaestoga veka bio je kompleksan i odvijao se naglo. Početak procesa seže u vreme sredinom tridesetih, kad je Srbima u beogradskom pašaluku sultanovim aktom bila zajemčena autonomija. Srbi su pojam „nezavisimog vnutrenjeg pravlenija“, koje im je bilo podareno, protumačili tako da su ovlašćeni da sebi donesu ustav. Miloševa okolina je počela da se bavi tim pitanjem u okolnostima kad u vazalnom knjaževstvu nije bilo obrazovanih pravnika. Počelo se ugledanjem na strane uzore, ali su nam ti uzori, kao i način na koji su prilagođavani srpskim prilikama do danas ostali nepoznati. Pored sačuvanih srpskih dokumenata ostalo je i svedočanstvo jednog francuskog diplomate, koji je opravdano primetio kako oni koji su zaduženi za rad na ustavnim nacrtima u stvari nedovoljno razumeju materiju kojom se bave.

Takav početak razvitka, koji pada u tridesete godine devetnaestoga veka, stoji u snažnom i upečatljivom kontrastu sa situacijom u četrdesetim godinama, kao i onom s početka pedesetih istoga stoleća, kad se u Srbiji ustalila pravna nastava. Profesori prava, koji su bili korifeji srpske pravne nauke, prenosili su svojim slušaocima, makar i za kratko vreme koliko su se bavili profesurom, saznanja i zaključke do kojih je tad dolazila evropska nauka. Njihovo podučavanje nije se povodilo za pozitivnim srpskim pravom, niti je bilo zasnovano na tekstovima ustava koji su važili u Srbiji. Pravna misao je htela napred i bila je ispred pozitivnog prava.

Između ova dva ekstrema stoji komplikovana pripovest o donošenju dva ustava u Kneževini Srbiji i sačinjavanju jednog ustavnog nacrta za Srpsku Vojvodinu. Ideje koje su među srpski narod, a posebno u njegove obrazovane slojeve, dolazile sa Zapada ostavljale su trag koji se može pratiti ako se kao putokaz uzmu najvažniji ustavni koncepti kao što su osnovna prava, podela vlasti i vladavina prava. Za svaki od ovih se može ustanoviti posebna linija razvitka, ma koliko da su se one među sobom preplitale. Osnovna ili ljudska prava su najpre posmatrana kao kolektivna, da bi se docnije razvilo shvatanje o individualnim pravima. Do kraja proučavanog razdoblja u srpske ustavne tekstove nisu prodrle politička prava. Podela vlasti je najviše zaokupljala duhove zbog značaja toga koncepta za organizaciju vlasti. Vidljiv trag ideje o podeli vlasti nalazi se već u prvom ustavu za Kneževinu Srbiju od 1835. godine da bi 1848, u nacrtu ustava

za Srpsku Vojvodovinu, ta zamisao došla do zaokruženog izraza. Najzad, vladavina prava je najkomplikovaniji koncept, koji predstavlja srž konstitucionalizma. Iako izrekom predviđena u ustavnim tekstovima, vladavina prava je najteže krčila put i u prvoj polovini devetnaestoga veka nije uspevala da se ustali i postavi na sigurne temelje.

Članak ima zadatak da pruži sintetički pogled na razvitak srpske ustavne misli i prakse u prvoj polovini devetnaestoga veka i zbog toga je smešten u postojeće stanje razvitka naših istraživanja ustavne prošlosti srpskoga naroda. U tom okviru se javlja sučeljavanje dvaju osnovnih stavova, od kojih bi se jedan uslovno rečeno mogao zvati romantičnim, a drugi kritičkim. Autor članka je sticajem okolnosti bio u prilici da u razmaku od osamnaest godina, jednom u Srbiji, a drugi put u Francuskoj, bude član komisija za odbranu doktorskih teza koje su u kritičkoj misli o srpskom ustavnom razvitku označile prekretnicu.

Ključne reči: Srbija, ljudska prava, podela vlasti, vladavina prava.

Dostavljeno Uredništvu: 28. maja 2019. godine

Prihvaćeno za objavljivanje: 14. juna 2019. godine