

Author: Christian Staub

Uploaded: Tuesday, 02 June, 2009

Brief article based on the author's substantial 'Kosovo - a legal analysis', recently published in German

Since the UN General Assembly granted a request on the matter from Serbia, the International Court of Justice in The Hague will now consider the question - on which expert opinion is divided - as to whether the unilateral declaration of independence by Kosovo on 17 February 2008 was in accordance with international law. In this context, the author of the following contribution considers it useful to recall the status of Kosovo in the Yugoslav constitution of 1974, and until the final collapse of Yugoslavia in 1991, and the resulting consequences.

The Yugoslav constitution of 1974 brought about very significant changes in the whole state organization of Yugoslavia. It expressed roughly the then prevailing opinions, as well as the desire of each people to lead its own national, political and even economic existence within a prosperous Yugoslav state. The organizing principle which was implemented in order to guarantee an orderly and equitable coexistence of individuals and peoples within Yugoslavia was described as co-operative federalism. On this basis, the 1974 Constitution devolved extensive rights and obligations to members of the Federation, and established between them a mutual cooperation based on equal rights.

The legal status of Kosovo

Few people know about the status of Kosovo as a unit distinct from the other Federation members, and normatively fully fledged, under the Yugoslav constitution of 1974. Kosovo was placed on an equal footing with the other seven members of the Federation (Bosnia-Herzegovina, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Vojvodina) in all constitutional parts and provisions which had a normative quality; it enjoyed the same extensive constitutional and legislative autonomy, and the same participation rights in the Federation. The whole territory under the Kosovo constitution, which had been adopted by virtue of the Federal Constitution upon which it was based, could not be altered without Kosovo's consent. Even a change in the external borders of Yugoslavia, guaranteed by international law, required the consent of Kosovo. In comparison with units in other European states, the constitutional autonomy of the Federation members was so extensive that they could largely determine their own internal organization independently.

The importance attached to the Federation members, or more precisely to their constitutions within the Yugoslav legal system, appeared for example in the fact that the institutions of Federation members were independent from those of the Federation itself, so that there was basically no relationship of subordination between them in either direction. In the field of law-making, the Federal Constitution left virtually all regulative policy areas to the legislatures of member states, by and large entrusting to the Federal legislature only areas of common interest, i.e. the classic, first-ranking ones. In the area of foreign policy, all eight members of the Federation enjoyed an even stronger position, since within the framework of their limited responsibilities they operated abroad not through the agency of the Federal institutions, but independently through their own 'foreign ministries'. The normative-legal provisions also bore on the participation rights of the members in the Federation, and on the principle of equality. Such participation rights were extensive and substantial, i.e. the volition of the eight members had a decisive influence on decision-making in the various Federal institutions. Such rights included participation of members in the constitution- and law-making of the Federation, as well as in the conclusion of certain international conventions, and the election of their own delegates in the various Federal institutions.

In the field of equality, Kosovo enjoyed a privileged status within the Federation, where its citizens on the basis of the Federal, Kosovar and Serbian constitutions held a kind of 'dual citizenship'. Thus they could take part in their own law- and constitution-making as well as in those of Serbia. That did not mean, however, that Serbia could interfere with the constitutional order of Kosovo: on the territory of

Kosovo, Serbia had no authority. While Kosovo enjoyed equality with other Federation members according to the relevant normative-legal constitutional provisions, this was not the case in its denomination, nor in those provisions which did not have a normative character, i.e. were qualified as not legally binding because of their descriptive, programmatic or declaratory nature. While a full-fledged Federation member according to the normative provisions, Kosovo was not described as a republic in the constitutional text, but as an autonomous province as prior to 1974; or, to put it differently, the other Federation members were described not as autonomous provinces, but as republics. Furthermore, in non-normative provisions of a descriptive nature, Kosovo had a lesser position as compared to other federation members. While the Federal Constitution described those Federation members which it called republics as independent states, the Federation member Kosovo - which it called an autonomous province - was described in the non-normative constitutional provisions as a community and a part of Serbia. Had the normative constitutional provisions been relied on when describing the eight Federation members and their autonomy within the Federation, that would logically have led to a single, identical definition for all Federation members. Instead the designations 'republic' or 'autonomous province' were relied on, leading inevitably to two different definitions. In jurisprudence, what is of the utmost importance in a constitutional text is not the designations, which are unimportant, nor how those unimportant designations are interpreted, but only the normative constitutional provisions.

In view of the strong position of the Federation members within the Yugoslav constitutional structure, the question was raised on several occasions of whether Yugoslavia or its eight members were sovereign: i.e. of whether, based on the normative legal provisions, the decisions of the Federation or those of its members had precedence. That question was never answered. But it was noteworthy that the eight members on their respective territories made decisions which had the same validity in relation to each other.

The period after 1974

In the following years, legal life in Yugoslavia took place in the context that the Federal Constitution had fixed in its normative provisions, in accordance with its intention to ensure the orderly co-operation and coexistence of the different peoples and of the eight members within the Federation. After Tito's death in May 1980, the Yugoslav state Presidency automatically assumed all the rights and obligations granted to it by the 1974 constitution. The Presidency was designed as a genuinely collegial organism, to which each Federation member sent a representative. The Presidency elected the President and Vice-president from among its members, for one year, according to a pre-determined order. In the name of the Presidency, the President headed the high command of the Yugoslav armed forces, and represented the country at home and abroad. Formally Yugoslavia had no president; rather, the Presidency as a collective was the head of state. In the spring of 1986, it was the turn of Federation member Kosovo. The latter's representative on the state Presidency became its legal president, and thus the symbolic President of Yugoslavia. He exercised the function for one year without interruption. Had he for any reason been disabled for a substantial period, he would have been represented by the president of Kosovo's own Presidency. Like his predecessors, the representative of Kosovo visited European and other capitals in his capacity as the (Kosovar) president of Yugoslavia, and participated in many multilateral encounters.

Partial revisions of the Yugoslav constitution

After a minor constitutional revision carried out in 1981, which affected neither the constitutional and legislative autonomy of Federation members nor their participation in Yugoslavia's state power, the Federal Constitution of 1974 was revised for a second time by the members of the Federation in November 1988. This second partial revision was the last before the final break-up of the Federative Republic of Yugoslavia. It was a major constitutional revision, affecting almost all areas of the normative-legal part of the Federal Constitution, and was above all supposed to improve the Yugoslav economy, the sorry state of which was a threat. Contrary to a widespread belief that this revision of the Federal Constitution of 1974 would be at the expense of Kosovo, nothing in fact happened so far as the normative-legal position of the eight Federation members in the Yugoslav constitutional order was concerned. With respect to its normative-legal equality under the Federal Constitution, neither the constitutional autonomy of Kosovo, nor its wide-ranging legislative autonomy - i.e. its independence in the setting of provincial regulations and the determination of the province's policies - were restricted or eliminated. Nor did its equal participation in Federal power suffer any restriction. After all, the Federal Constitution granted Kosovo one more extended competence in the area of Serbian 'foreign policy'. Apart from the performance of a 'foreign policy' of its own, Kosovo was also allowed to take part in Serbia's 'foreign policy' when the Serbian Constitution provided for this. Besides purely Kosovar delegations which appeared outside of Yugoslavia, there were purely Serbian delegations and also, when determined by the Serbian Constitution, Serbian delegations with officials from the Federation member

Kosovo.

Interference with the constitutional orders of Montenegro, Vojvodina and Kosovo

After Milošević - de facto the sole ruler of Serbia since September 1987 - had interfered with the constitutional orders of Montenegro and Vojvodina, he managed to do the same in Kosovo in the spring of 1989. Yet, contrary to widespread opinion, Milošević did not repeal the constitutional and legislative autonomy of Kosovo. On the one hand, the Yugoslav Federal constitution provided no basis for this; on the other hand, the Constitution of Kosovo was not the subject of the vote in Prishtina in March 1989 (but rather the Constitution of Serbia). As a consequence, Serbia could not have been in any position to take away from the citizens of Kosovo their Kosovar 'state citizenship' based on the Federal Constitution. The Federation members Kosovo and Serbia could no more cancel each other's autonomy, defined and guaranteed by the Federal Constitution, than could Federation member Croatia, for example, legally revoke the autonomy of Slovenia. That would be as absurd as if the *Land* of Hamburg were in a position to revoke the constitutional and legislative autonomy of another member of the German federation, e.g. Bavaria.

Kosovo's declaration of independence and application for recognition as a state

As a consequence of Serbia's policy in the years 1989/90, designed to implement its own claims without regard for the constitutional status of other Federal units, the Federation members Slovenia and Croatia declared themselves independent in 1991. In the same year, in step with Macedonia but ahead of Bosnia-Herzegovina, and supported by a previously held constitutionally valid referendum, the population of Kosovo declared the sovereignty and independence of Kosovo. Via official letters from the Kosovar Government - also in step with the other existing Yugoslav states - it requested formal recognition of Kosovo as a sovereign state from the chairman of the international Conference on Yugoslavia, and from the twelve EC foreign ministers. However, the official document requesting formal recognition of the Republic of Kosovo as a sovereign and independent state was never received by the Badinter Commission.

After this, and until the Dayton Agreement of late 1995, Kosovo decided to follow the path of non-violent resistance in the struggle for the liberation of its territory, while the Kosovar government ceaselessly canvassed European governments to recognize the sovereignty and independence of the democratically constituted state. The subsequent war in Kosovo, which NATO entered on the Kosovo side, ended in success, insofar as the territory of Kosovo - as defined by the Yugoslav and Kosovo Constitutions - was completely freed. Yet, following the example of other European countries which in the distant past had been obliged to put up with severe restrictions on their sovereignty from other states, foreign institutions were also established in Kosovo, which until now have been intended - legally or de facto - to constrain its state sovereignty. Like other former Federation members, Kosovo was established as a state through the proclamation of independence and sovereignty in 1991, after the collapse of the Yugoslav constitutional order. Recognition of Kosovo as a state by all European countries and the world community on the basis of the Yugoslav constitution of 1974 would, therefore, be a product of the rule of law, democracy and freedom.

On the rights of self-determination and secession in constitutional and international law

The right of secession was mentioned in the first of the nine principles set out in the Preamble to the Yugoslav Constitution of 1974. Yet those constitutional principles had no normative character. In the normative provisions and parts of the Federal Constitution, a right to leave the Federation was not mentioned; the Constitution regulated changes of state borders only insofar as all members of the Federation had to approve any changes to the external borders. The wording of the non-normative sentence where the right of self-determination was mentioned likewise related to a closed historical process, not to the fact that a new right to secede would have to be established. Thus the right to self-determination, including secession, was effectively dealt with at the time of the creation of the Federative Republic of Yugoslavia, i.e. as the Federal Constitution came into force in 1974.

From the point of view of international law, the rights to self-determination and to secession are not identical with one another. The right to self-determination, which belongs to all peoples, devolves into a right to secession only in particular circumstances. The main legal problem lies in the question of what the circumstances are, in which a right of secession arises for a people or an ethnic group to secede from a state association, as a consequence of its right to self-determination being denied. Being anxious to preserve the sovereignty of existing states and their territorial integrity, international law grants to a people - or an identifiable part thereof - a right to break the former state association only in excep-

tional cases: when a state machinery becomes a terror apparatus that persecutes specific population groups, because under the jurisdiction of such a state such groups can not be held to an obligation to remain loyal.

Genocide is the greatest of all international crimes. Any government which resorts to genocide loses its right to expect and demand obedience from the citizens it has targeted. For, if international law wishes to remain true to its own basic premises, it must allow actual victims a means to live in dignity. In addition to a threat to the existence of a people, or its actual destruction, at the hands of the sovereignty holders of the territory in which it lives, the unusual, extreme circumstances justifying exercise of a right to secession should also include intolerable discrimination against a people because of its identity, or the denial of cultural pluralism. Of all eight members of the Federation, only Kosovo and its population were to experience such an exceptional situation, whether interpreted in a narrow or a wider sense, at least from 1989 to 1991 (and, if Kosovo is not considered as a sovereign state from that time on, after 1991 it continued to experience such an exceptional situation, most particularly in the years 1998/99).

Christian Staub (christianstaub.com) is the author of several books. This article is based on his recently published work Kosovo. Eine rechtliche Analyse (Kosovo – a legal analysis), Books on Demand 2009, Hünig, 328 pp, which also provides a comprehensive insight into the history of Kosovo.