

# 1991 – The acquired rights of Kosovo

Europe's machinations and injustices towards Kosovo

by Christian Staub

*After the UN General Assembly granted a corresponding request from Serbia, the International Court of Justice in The Hague will deal with the question, on which expert opinion is divided, whether the unilateral secession of Kosovo, on 17 February 2008 accorded 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, until the final collapse of Yugoslavia in 1991, and the resulting consequences.*

The Yugoslav constitution of 1974 brought very significant changes in the whole state organization of Yugoslavia and 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 of Yugoslavia was described as co-operative federalism. On this basis, the Yugoslav Constitution devolved the members of the Federation extensive rights and obligations 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 full-fledged in the Yugoslav constitutional order of 1974. Kosovo was placed on an equal footing with the other seven members of the Federation (Croatia, Serbia, Macedonia, Slovenia, Bosnia-Herzegovina, Montenegro 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 on 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 its consent. In comparison with the units in other European states, the constitutional autonomy of the Federation members was so extensive that they could largely determine independently their internal organization. The importance which has been 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 the Federation members were independent from those of the Federation itself, and that basically there was no subordination relationship between them in either direction. In the field of law-making the federal Constitution left virtually all the policy areas of regulation to the legislature of the member states, and largely entrusted to the federal legislator only areas of com-

mon interest, i.e. the classical, first-rank ones. In the area of foreign policy all eight members of the Federation enjoyed an even stronger position, as within the framework of their limited responsibilities they operated abroad not through the agency of 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 the principle of equality. The 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. These include participation of the 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, the Kosovar and the Serbian Constitution 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 the other Federation members according to the relevant normative-legal constitutional provisions, it was not the case in its denomination nor in those provisions which didn't 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 like prior to 1974; or in other words, other Federation members were not described as autonomous provinces, but as republics. Furthermore in the non-normative provisions of a descriptive nature, Kosovo had a minor position compared to other federation members. While the Federal Constitution described the 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 as part of Serbia.

Had one relied on the normative constitutional provisions, 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 one relied on the designations republic or autonomous province and was thus forced to arrive at 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 denominations are being 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 whether Yugoslavia or its eight members were sovereign, i.e. 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 noted that the eight members on their respective territories made decisions which had the same validity in relation to each other.

### **The period after 1974**

Legal life in Yugoslavia took place in the following years in the context which the Federal Constitution had fixed in its normative provisions according to its purpose, to ensure the orderly co-operation and coexistence of the different peoples and the eight members within the Federation.

After Tito's death in May 1980, the Yugoslav state presidency automatically assumed all the rights and obligations the Yugoslav constitution had granted it. The Presidency was designed as a real collegial organism, to which each Federation member sent a representative. The Presidency elected the President and the vice-President from among its members for one year according to a pre-determined order. In the name of the Presidency the President led 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. His representative in 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 Chairman of Kosovo's Presidency. Like his predecessors, the representative of Kosovo visited European and other capitals in his capacity as Kosovar president of Yugoslavia, and participated in many multilateral encounters.

### **Partial revisions of the Yugoslav constitution**

After the minor constitutional revision which was performed in 1981 and affected neither the constitutional and legislative autonomy of the Federation's members nor their participation in Yugoslavia's state power, the Federal Constitution of 1974 was revised for the 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, which affected almost all areas of the normative-legal part of the Federal Constitution, and it was first supposed to improve the Yugoslav economy, the sorry state of which was a threat.

Contrary to widespread belief that the revision of the Federal Constitution of 1974 would be done at the expense of Kosovo, nothing happened in matters of the normative-legal position of the eight Federation members in the Yugoslav constitutional order. With respect to the normative-legal equality in 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 in 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 the Serbian "foreign policy" when the Serbian Constitution provided for it. 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, in fact 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 Pristina in March 1989 (but the Constitution of Serbia). As a consequence, neither could Serbia have been in a position to take away their Federal Constitution-based Kosovar "state citizenship" from the citizens of Kosovo. The Federation members Kosovo and Serbia could no more cancel the other's autonomy, defined and guaranteed by the Federal Constitution than, for example, the Federation member Croatia could legally revoke the autonomy of Slovenia. This 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, for instance those of 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 which wanted to implement its own claims without regard for the constitutional statuses of the other federal units, the Federation members Slovenia and Croatia declared themselves independent in 1991. In step with Macedonia, but ahead of Bosnia-Herzegovina, supported by a constitutionally compliant referendum held previously, the population of Kosovo declared in the same year the sovereignty and independence of Kosovo and, via official letters from the Kosovar Government – also in step with the other now existing Yugoslav states – requested formal recognition of Kosovo as a sovereign state from the then chairman of the conference on Yugoslavia, and from the twelve EC foreign ministers. The official document which requested the formal recognition of the Republic of Kosovo as a sovereign and independent state, was never received by the Badinter Commission.

Afterwards, 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 incessantly canvassed in return for the 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 with a success to the extent that the territory of Kosovo, as had been defined by the Yugoslav and the Kosovo's Constitutions, was completely freed. Yet, following the example of other European countries which had to put up with severe restrictions on their sovereignty from other states in the distant past, foreign institutions were also established in Kosovo, which until now have been meant legally or de facto to constrain its state sovereignty.

Like other former Federation members Kosovo has been established as a state through the proclamation of independence and sovereignty in 1991 after the collapse of the Yugoslav constitutional order. A 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 nine principles of the Preamble of 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, it only regulated changes of state borders to the effect that all the members of the Federation had to approve any changes in external borders. The wording of the non-normative sentence where the right of self-determination was mentioned, also related to a closed historical process and 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 Federal Republic of Yugoslavia, i.e. as the Federal Constitution came into force in 1974.

From the point of view of international law the right to self-determination and secession are not identical with one another. The right to self-determination which belongs to all peoples, only devolves into a right to secession in particular circumstances. The main legal problem lies in the question of what circumstances 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. As it is eager to preserve the sovereignty of existing states and their territorial integrity, International law gives a people or an identifiable part thereof a right to break the former state association only in exceptional cases, that is when a State machinery becomes a terror apparatus, which persecutes specific population groups, because under the jurisdiction of such a state, those groups can not be held to an obligation to remain loyal. Genocide is the greatest of all international crimes. Any government which indulges in genocide, loses its right to expect and demand obedience of the citizens it has targeted. Because if International law wants to remain true to its own basic premises, it must allow actual victims a means to live in dignity. In addition to the 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 which justify the right of 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 an exceptional situation, be it interpreted in a narrow or a wider sense, at least from 1989 to 1991 (and, if Kosovo was not considered a sovereign state after 1991, particularly in the years 1998/99).

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