

## On Law and Politics in the Federal Balance: Lessons from Yugoslavia

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### Abstract

In trying to build a supranational polity while paying heed to member states' autonomy concerns, modern supranational 'projects' such as the European Union find themselves where others have been before. This article explores a surprising but pertinent 'ancestor' that, albeit in sharply different societal arrangements, had grappled with the same challenges of balancing integration and autonomy: the former Yugoslavia.

The author starts by tracking the development of Yugoslav federalism through its several constitutional incarnations: from the meager federal features of the 1946 Constitution and the similarly centralistic constitutional developments in the 1950s and the 1960s to a stronger federalization of Yugoslavia that culminated with the 1974 Constitution. After a general outline of the constitutional development, the article focuses on the relationship between law and politics in maintaining the federal balance, highlighting the role of the federal Constitutional Court in achieving a proper balance between the centrifugal and the centripetal forces in the federation. Finally, the main theories on the dissolution of Yugoslavia and the role of the federal Constitutional Court are briefly analyzed.

In the conclusion, the author attempts to draw out the lessons that the Yugoslav experience may offer contemporary polities faced with the same challenges, focusing on the role of the judiciary and the relationship between law and politics in safeguarding the federal bargain.

### Keywords

constitutional courts, dissolution of states, European Union, federalism, judicial review, law and politics, Yugoslav federal order

### 1. Introduction

Yugoslavia was born out of a disintegration and died in a disintegration, with the years both immediately before and after her life marked by the brutality of a violent conflict. This fact largely directed both the political and the scholarly attention of the world: the former Yugoslavia has become a common and cherished case study in works dealing with the dissolution

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and succession of states,<sup>1</sup> a testing ground for the peacekeeping aptitude of the international community in the face of its unfortunate aftermath<sup>2</sup> and—through the functioning of its own International Criminal Tribunal in the Hague—an unwitting frontrunner in international criminal justice.<sup>3</sup>

It is thus unfortunate, in more ways than one, that its death overshadowed its life, for the latter offers lessons of its own.<sup>4</sup> This article attempts to revisit this life and offer some of these lessons to the international and, notably, the European debate. Specifically, I claim that the European Union could—and should—bear the Yugoslav experience in mind when devising its own schemes to maintain the ‘federal’ balance between the Union and its member states.

I will not enter into the watershed debate on whether the term ‘federal’ can appropriately be used in the context of the European Union. For the purposes of this article, it does not matter. Suffice it to say that the Union is a federal-like polity in the sense that makes its constitutional set-up and legal order amenable to comparisons with those of federal states.<sup>5</sup> A prime example—and one that will, likewise, I will not delve into the bulk of this article—is the United States of America.<sup>6</sup> One can hardly claim that such comparative analyses are devoid of merit, and it is in this vein that the former Yugoslavia should be included in the list—for it has shared many of the features and problems of the European Union.

<sup>1</sup> See generally, for example, Rein Mullerson, “The Continuity and Succession of States, by Reference to the Former USSR and Yugoslavia”, 42 *International and Comparative Law Quarterly* (1993), 473-493; Danilo Türk, “Recognition of States: A Comment”, 4 *European Journal of International Law* (1993), 66-71; Peter Radan, *The Break-Up of Yugoslavia and International Law* (Routledge, London, 2001); Carsten Stahn, “The Agreement on Succession Issues of the Former Socialist Federal Republic of Yugoslavia”, 96 *American Journal of International Law* (2002), 379-397.

<sup>2</sup> Ranging from Jeffrey S. Morton, “The Legality of NATO’s Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law”, 9 *ILSA Journal of International and Comparative Law* (2002), 75-101; to Linn Slattengren, “Lending a Hand: Minnesotans in Kosovo”, 61 *Bench and Bar of Minnesota* (2004), 19-23.

<sup>3</sup> See, for example, John Hagan, *Justice in the Balkans: Prosecuting War Crimes in the Hague Tribunal* (Chicago University Press, Chicago, 2003); Rachel Kerr, *The International Criminal Tribunal for the Former Yugoslavia: An Exercise in Law, Politics, and Diplomacy* (Oxford University Press, Oxford, 2004).

<sup>4</sup> In recent years, the lessons have usually flowed the other way. See, for example, Robert F. Utter and David C. Lundgaard, “Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative Perspective”, 54 *Ohio State Law Journal* (1993), 559-606.

<sup>5</sup> For an affirmative example close to the topic of this article, see Jean Mischo, “The Contribution of the Court of Justice to the Protection of the ‘Federal Balance’ in the European Community”, in David O’Keefe and Antonio Bavasso (eds.), *Judicial Review in European Union Law* (Kluwer, The Hague, 2000), 59 *et seq.*

<sup>6</sup> See, however, an excellent discussion in Ernest A. Young, “Protecting Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism”, 77 *New York University Law Review* (2002), 1612-1737. Compare Robert O. Keohane, “Ironies of Sovereignty: The European Union and the United States”, 40 *Journal of Common Market Studies* (2002), 743-765.

In spite of its relatively small size, Yugoslavia boasted a remarkable diversity that necessitated a significant effort in the maintenance of the federal balance, as is evident from its salient features: six republics and two autonomous provinces with at least as many nations and nationalities;<sup>7</sup> three official languages (Serbo-Croatian, Slovenian and Macedonian) and numerous minority<sup>8</sup> languages; three religions (Catholic, Orthodox and Muslim); two alphabets (Latin and Cyrillic); and, at least in appearance, one common idea on the organization of the federal polity. The United States had created “from many, one”; the European Union aspires to “unity in diversity”; and Yugoslavia cherished its “brotherhood and unity”.

There is another feature that, while distinguishing the US experience, likens the Yugoslav experience to that of the Union: the constant revisions of the fundamental constitutional arrangements. In an account on the various historic types of constitutionalism, Frankenberg talks of the socialist states perceiving a constitution as a *plan*:

“It comes as no surprise that this innovation was bound to join the authoritarian-socialist regimes on their way to the archives of history. Before their demise, plan-constitutions translated the ‘laws of scientific socialism’ into very general normative blueprints for socio-economic and political-cultural development. They define the socialist republic as the ‘State of the working class’ or of the ‘People’ and project stages of progress such as ‘the increase of the material and cultural standard of living on the basis of a high developmental tempo of the socialist production, the increase of the effectivity, of scientific-technological progress and growth of productivity’. As a matter of consequence, socialist constitutions become obsolete and need to be revised once the ruling cadres decide that a certain stage has been reached.”<sup>9</sup>

In what ways—except for their linkage to the misfitting political system and consequent vulnerability to a somewhat derisory description of the socialist states’ self-definition as the states of the “people”—are the listed features different from the case of the European Union? The Union is similarly built by a succession of constitutional refurbishments in an ongoing process of fostering an ever greater integration. This much is evidenced already by its symbolic foundations in the Schuman Declaration and offset in the regular amendments to its basic treaties. Is there really much difference between the programs described by Frankenberg above and the programs adopted by the ‘ruling cadres’ of the European Union, such as the Presidency Conclusions of the Lisbon Summit in 2000:

<sup>7</sup> The term ‘nationality’, distinguished from ‘nation’, was used to refer to the non-Yugoslav ethnic communities living in Yugoslavia, notably Albanians and Hungarians.

<sup>8</sup> The minority languages encompassed at least Albanian, Hungarian, Italian, Slovak, Bulgarian and Romanian. See Koča Jončić, “Les relations inter-nationalités en Yougoslavie”, in Belgrade Institute of Comparative Law (ed.), *Le fédéralisme yougoslave: Etudes coordonnées par l’Institut de Droit comparé de Belgrade* (Daloz, Paris 1967), 183-224, at 216.

<sup>9</sup> Günther Frankenberg, “The Return of the Contract: Problems and Pitfalls of European Constitutionalism”, 6 *European Law Journal* (2000) 257-276, at 263 (footnotes omitted).

“The European Union is confronted with a quantum shift resulting from globalization and the challenges of a new knowledge-driven economy. These changes are affecting every aspect of people’s lives and require a radical transformation of the European economy [...] Hence the need for the Union to set a clear strategic goal and agree a challenging program for building knowledge infrastructures, enhancing innovation and economic reform, and modernizing social welfare and education systems [...]

The Union has today set itself a *new strategic goal* for the next decade: *to become the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion [...]*

Implementing this strategy will be achieved by improving the existing processes, introducing a *new open method of coordination* at all levels, coupled with a stronger guiding and coordinating role for the European Council to ensure more coherent strategic direction and effective monitoring of progress. A meeting of the European Council to be held every Spring will define the relevant mandates and ensure that they are followed up.”<sup>10</sup>

All this does not mean that I would wish to equate the European Union with the Yugoslav experience. The European Union and notably the European Community—which has often been praised by distinguished European politicians and judges such as Hallstein or Everling as being foremost a community of law (*Rechtsgemeinschaft*) and even a creation of law—is firmly grounded in the rule of law and the modern understanding of the separation of powers. In contrast, the Yugoslav order was premised on a socialist concept of the *unity of powers*, vested and concentrated in the federal assembly as the representative of popular sovereignty, which precluded both the executive and notably the judiciary from fully performing their functions as free-standing branches of government.<sup>11</sup> Thus, for instance, the federal Constitutional Court could not itself repeal a legislative act if it found it to be unconstitutional but was formally required to call upon the parliamentary assembly to remove its unconstitutionality.<sup>12</sup>

In addition, one must appreciate the difference in the way that federal arrangements have come about or been reinforced in the cases of the European Union and Yugoslavia. The European Union, inasmuch as we

<sup>10</sup> Presidency Conclusions of the Lisbon Extraordinary European Council, 23-24 March 2000, paragraphs 1-2, 5 and 7, available at <[http://europa.eu.int/european\\_council/conclusions/index\\_en.htm](http://europa.eu.int/european_council/conclusions/index_en.htm)> (emphases in the original).

<sup>11</sup> The socialist idea of the unity of powers as well as the early Yugoslav partial departure from it is outlined in Winston M. Fisk, “A Communist *Rechtstaat*?—The Case of Yugoslav Constitutionalism”, 5 *Government and Opposition* (1970) 41-53, at 45-48.

<sup>12</sup> This does not mean, however, that the Court was devoid of any substantive power to declare unconstitutional acts invalid. There was a special procedure empowering the Court to enforce its judgments on the unconstitutionality of federal or members’ laws: if the relevant parliamentary assembly had not itself acted to remove the unconstitutionality within six or (upon request) twelve months of the judgment, the Court issued another declaratory judgment finding that the unconstitutional provisions were no longer operative. There was no delay in invalidating inferior measures. See, for example, Arts. 284 and 285 of the 1974 Constitution.

may already use the terminology, is an example of the classical aggregative, 'coming together' federal bargain where the previously independent polities voluntarily 'pooled their sovereignty' to form a federal polity. Yugoslavia, on the other hand, was—at least in its federal transformations if not its birth—a prime example of what Alfred Stepan saw as a major alternative: the devolutionary, 'holding together' federal bargain where a previously unitary state devolves some of the power to its constituent units in order to 'hold them together'.<sup>13</sup>

I do not wish to gloss over such differences between the two polities. My point is merely that even in the manner of functioning and devising of the federal arrangements, they are somewhat closer than an unsuspecting observer might think. For, while the clear-cut distinction as posited by Stepan is certainly valid as far as the *creation* of a federal polity is concerned, the *everyday functioning* of such a polity is a constant balancing act between the integrative pull of those in favor of more centralization and the devolutionary pull of those in favor of more autonomy. In other words, every federal arrangement is ultimately a mixed plane of the 'coming together' and the 'holding together' dimensions. The comparison between Yugoslavia and the European Union is apt because their experiences show that they were faced with a similar task of finding an acceptable balance between the idea of integration and the drive for the autonomy of their members, and that both tried to achieve this task by means of a phased constitutional reform.

As is well known, in the case of Yugoslavia, such phases turned first into a phase-out and then, ultimately, into a blow-up. However, the ultimate disintegration should not mean that the Yugoslav experience with the maintenance of a federal balance should be discarded; if anything, it should mean the opposite—that the tragic collapse makes it all the more relevant as a cautionary tale. It is undisputed that, as a peace project to overcome its internal strife, the Union has had unmitigated success. However, for the better part of its existence, it seemed that Yugoslavia had as well.<sup>14</sup> The Yugoslav experience should not be viewed merely as a

<sup>13</sup> If not the only, Stepan has been the most vocal proponent of the distinction between the 'coming together' and 'holding together' federal bargains and has devised the persuasive terminology. See, for example, Alfred Stepan, *Arguing Comparative Politics* (Oxford University Press, New York, 2001), 315–361.

<sup>14</sup> See, for example, Fisk, *op.cit.* note 11, 48–53, who practically raves about the "omnipresence of law in Yugoslavia" and calls it "a remarkable experiment in liberal communism". See, also, Mitja Žagar, "The Collapse of the Yugoslav Federation and the Viability of Asymmetrical Federalism", in Sergio Ortino, Mitja Žagar and Vojtech Mastny (eds.), *The Changing Faces of Federalism: Institutional Reconfiguration in Europe from East to West* (Manchester University Press, Manchester, 2005), 107–133, at 107, who notes that the former Yugoslavia had often been praised for its successful management of interethnic relations and wonders whether the mere existence of ethnic diversity thus precludes a successful federal arrangement. Also see a rather fond view of the

failed attempt at federalism but, primarily, as a unique way of constructing a federal polity. It is its main features—along with a look at the reasons for its failure—that I intend to present here.<sup>15</sup>

In doing so, I will focus on one particular element of its uniqueness that also strongly distinguishes the Yugoslav experience from that of the United States: while the judicial branch of government with the Supreme Court indisputably played an important role in defining and maintaining the US federal balance,<sup>16</sup> the judicature for the most part had a very limited role in this respect in the Yugoslav legal order. This is even more surprising if one considers the fact that Yugoslavia—as something of an exception among the East European states<sup>17</sup>—had known constitutional courts ever since 1963 and that federalism was considered by some to be one of the primary reasons for the establishment of the federal Constitutional Court.<sup>18</sup> In this light, the concluding remarks will briefly draw on the Yugoslav and US experiences to make a few critical remarks on the Union's approach to the relationship between law (the judiciary) and politics in maintaining its own 'federal' balance.

Yugoslav legal system in Frank R. Lacy, "Yugoslavia: Practice and Procedure in a Communist Country", 43 *Oregon Law Review* (1963), 1-41, at 2: "Certainly Yugoslavia seems a strange place to look for answers to our problems, but perhaps we could do worse."

<sup>15</sup> Fisk focused on the narrower issues of constitutionalism in his study but noted that another development would have to be "added in any more comprehensive study: the special and highly interesting variations Yugoslavia has given to federalism and decentralization". Fisk, *op.cit.* note 11, footnote 7 at 43.

<sup>16</sup> Which does not mean, however, that there is no debate on the desired scope of its involvement in protecting the states' federal prerogatives. A landmark academic opinion was offered in 1954 with a famous short essay on the political safeguards of federalism; see Herbert Wechsler, "The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government", 54 *Columbia Law Review* (1954), 543-560. For a recent revival of Wechsler's defense of the political safeguards and a critique of the Supreme Court's involvement, see Larry D. Kramer, "Putting the Politics Back into the Political Safeguards of Federalism", 100 *Columbia Law Review* (2000), 215-293, at 287-293. For a response arguing that the Supreme Court must fill an important gap in political safeguards see Lynn A. Baker, "Putting the Safeguards Back into the Political Safeguards of Federalism" 46 *Villanova Law Review* (2001), 951-973, at 972.

<sup>17</sup> Only later would some other states from the region—such as Czechoslovakia and Romania—institute similar institutions or procedures. See, for example, Jovan Đorđević, *Ustavno pravo [Constitutional Law]* (Savremena administracija, Belgrade, 2nd ed. 1986), 760. However, even those existed largely on paper, and true constitutional review was only deemed to have commenced there with the end of communism; see, for example, Georg Brunner, "Development of a Constitutional Judiciary in Eastern Europe", 18 *Review of Central and East European Law* (1992) 535-553, at 537-543. Poland, the second state to introduce a meaningful constitutional court, slowly clawed its way to a functioning constitutional tribunal in the eighties; see Zdzisław Czeszejko-Sochacki, "The Origins of Constitutional Review in Poland", *St Louis-Warsaw Transnational Law Journal* (1996), 15-31, at 24-29.

<sup>18</sup> Jovan Đorđević, *Društvo i politika: Prilog novoj demokratskoj političkoj teoriji [Society and Politics: A Contribution to a New Democratic Political Theory]* (Savremena administracija, Belgrade 1988), 127-128.

## 2. The Development of Federalism in the Former Yugoslavia

### 2.1. *The Birth of the Federal State with the Constitution of 1946*

One of the key failings of the Kingdom of Yugoslavia, prior to World War II, was not solving the so-called ‘national question’.<sup>19</sup> As later described by Edvard Kardelj, the foremost ideologist of the socialist Yugoslavia and one of the preeminent founders of its several constitutional orders,<sup>20</sup> the persistent hegemonic tendencies of the central government and the resistance of the various constituent parts against it only further entangled this “knot of contradictions”:

“Such a unitary Yugoslav construction was out of time and place [...] [The processes of the blending and welding of nations] have only been possible in the first stages of the national awakening of undifferentiated kindred peoples, when national communities have not yet been definitively constituted [...] In developed nations, such processes are impossible, and any attempt of a forced intervention in this direction must yield a reactionary result.”<sup>21</sup>

The fight for liberation during World War II was, thus, also a fight for a “peoples’ and democratic federation of equal nations in Yugoslavia, for only in such a state order may the unity of different nations, desiring to cohabit equally, be expressed”.<sup>22</sup> Such was also the view of the leader of the partisan resistance and later the revered lifelong leader of Yugoslavia in all its post-war incarnations until his death, Josip Broz-Tito.<sup>23</sup>

Yugoslav federalism did not begin only with the adoption of the post-war constitution; it started, at least,<sup>24</sup> with the later glorified second session of the Anti-Fascist Council of National Liberation of Yugoslavia

<sup>19</sup> Makso Šnuderl, *Ustavno pravo Federativne ljudske republike Jugoslavije, 1. knjiga: Družbena in politična ureditev* [Constitutional Law of the Federal People’s Republic of Yugoslavia, Vol. 1: Social and Political Order] (Pravno-ekonomska fakulteta v Ljubljani, Ljubljana, 1956), 241.

<sup>20</sup> On Kardelj’s general views on federalism, see Ciril Ribičič and Zdravko Tomac, *Sončne in senčne strani federacije* [The Sunny and Shady Sides of the Federation] (Komunist, Ljubljana, 1989), 243–248.

<sup>21</sup> See Edvard Kardelj, *Razvoj slovenskega narodnega vprašanja* [The Development of the Slovenian National Question] (Državna založba Slovenije, Ljubljana, 2nd ed. 1957), 329 and 348–349.

<sup>22</sup> Šnuderl, *op.cit.* note 19, 245.

<sup>23</sup> For an account of Tito’s and Kardelj’s influence on later constitutional development, see, for example, Jovan Đorđević, “The Creation of the 1974 Constitution of the Socialist Federal Republic of Yugoslavia”, in Robert A. Goldwin and Art Kaufman (eds.), *Constitution Makers on Constitution Making: The Experience of Eight Nations* (American Enterprise Institute for Public Policy Research, Washington, DC 1988), 199–204.

<sup>24</sup> Fira places the beginning as far back as 1941. See Aleksandar Fira, *Ustavno pravo* [Constitutional Law] (Privredni pregled, Belgrade, 4th ed. 1987), 343. Similarly, Šnuderl, *op.cit.* note 19, 42–43, argues that the 1943 Council only formalized a form that had already existed in fact but not in law.

on 29 November 1943, which adopted a solemn decision on the construction of Yugoslavia according to the federal principle:

“To realize the principle of the sovereignty of Yugoslav nations, to ensure that Yugoslavia truly constitutes a true homeland of all its nations and never again becomes the province of any hegemonic clique, Yugoslavia is built and will be built on the basis of a federal principle which will ensure a full equality of Serbs, Croats, Slovenians, Macedonians and Montenegrins, i.e. the nations of Serbia, Croatia, Slovenia, Macedonia, Montenegro and Bosnia and Herzegovina.”<sup>25</sup>

For Yugoslavia, this document was to serve as a symbolic precursor of great constitutional significance, on a par with Europe’s Schuman Declaration or the US Declaration of Independence. The formal beginning of a federal Yugoslavia, however, came about with the adoption of the Constitution of the Federal People’s Republic of Yugoslavia (FPRY) (as it was originally named)<sup>26</sup> in 1946. Formally, it brought about a true federal order that was constituted on the basis of the principle of free volition<sup>27</sup> on the part of all nations and their right to self-determination, including the right to secession,<sup>28</sup> and which was to safeguard both their equality and their national autonomy.<sup>29</sup> According to Šnuderl, an eminent Slovenian constitutional lawyer of the era, the FPRY was to be understood as a classical federal bargain of sovereign states.<sup>30</sup>

However, these principles were not reflected in the political reality. In part, the seed of doubt had already been planted in the Constitution itself, which sometimes spoke of the sovereignty and sovereign rights of the republics, at other times of the sovereignty of nations.<sup>31</sup> As underlined by the legal theorist Gorazd Kušej, such a construction made possible the interpretations that the federal state had “the status of a certain ‘super-state’, grounded in the integrated sovereignty of all the Yugoslav nations, *vis-à-vis* the people’s republics as its immediate territorial constituent

<sup>25</sup> Cited in Ribičič and Tomac, *op.cit.* note 20, 101.

<sup>26</sup> At the end of World War II, the newly formed state temporarily adopted as its name the Democratic Federal Yugoslavia. In 1946, with the passing of its first constitution, it settled on the Federal People’s Republic of Yugoslavia. Finally, in 1963 it changed its name to the Socialist Federal Republic of Yugoslavia.

<sup>27</sup> See Šnuderl, *op.cit.* note 19, 252-253: “[w]ithout free volition there can be no true federation”.

<sup>28</sup> Article 1 of the FPRY Constitution. See, also, Kardelj, *op.cit.* note 21, 375, who claims that the right to secession was adopted as “it is the sole guarantee that each nation will truly be free in deciding on a form of its life among other nations”.

<sup>29</sup> *Ibid.*, 390.

<sup>30</sup> Makso Šnuderl, *Ustavno pravo Federativne ljudske republike Jugoslavije, 2. knjiga: Družbeni in politični organizmi [Constitutional Law of the Federal People’s Republic of Yugoslavia, Vol. 2: Social and Political Bodies]* (Pravna fakulteta v Ljubljani, Ljubljana, 1957), 12.

<sup>31</sup> Arts. 9 and 10, FPRY Constitution.



units”.<sup>32</sup> However, even more than this, the constitution of a true federal set-up was hampered by the centralization of economic and political power outside of institutionalized structures. Following the example of the Soviet constitutional order of 1936, this led to a “centralized state unitarism”.<sup>33</sup>

One particular subject of criticism, from the early 1950s onwards, were the constitutional provisions on the transfer of sovereign rights and the provision whereby federal law prevailed in the event of a conflict with the law of a republic.<sup>34</sup> While the republics had formally retained their sovereignty, in practice all the important questions were dealt with at the federal level<sup>35</sup> and the role of the republics “shrunk to a political-executive activity”.<sup>36</sup>

### 2.2. *The Constitutional Developments in the 1950s and the 1960s*

Although the next twenty years saw the adoption of two more constitutions<sup>37</sup> and several amendments, the basic tenets of the federal order have not been changed, either at the principled level of declaring federalism or at the practical level of implementing centralism. In a special explanatory report to accompany the Constitutional Act of 1953, Kardelj reiterated the unacceptability of unitarism for Yugoslavia:

“[T]alking about a united socialist Yugoslav community does not make us supporters of the confusing theories of welding the Yugoslav nations into one large Yugoslav nation in the old meaning of this term. Had we dealt with such plans, we would show little sense of historic facts and objective societal laws.”<sup>38</sup>

Ten years later, Kardelj made almost identical statements while adopting the Constitution of 1963.<sup>39</sup> Tito himself, while a supporter of further

<sup>32</sup> Gorazd Kušej, “Preobrazbe jugoslovenskega federalizma skozi posamezna ustavna razdobja” [The Transformations of Yugoslav Federalism through the Constitutional Eras], 35 *Zbornik znanstvenih razprav Právne fakultete v Ljubljani* (1972) 155-181, at 159.

<sup>33</sup> *Ibid.*, 160; similarly, Fira, *op.cit.* note 24, 344, although he goes on to say that it was not a “historical error” but a “necessity” of the times.

<sup>34</sup> Art.46, FPRY Constitution. See, also, Šnuderl, *op.cit.* note 19, 259-260.

<sup>35</sup> Also stressed by Žagar, *op.cit.* note 14, 113.

<sup>36</sup> Kušej, *op.cit.* note 32, 160.

<sup>37</sup> Technically, the Constitutional Act of 1953 merely repealed or amended large parts of the 1946 Constitution but the change in the constitutional set-up it brought about was so great that it can functionally be referred to as a new constitution.

<sup>38</sup> Edvard Kardelj, “Ekspoze o ustavnem zakonu” [Statement on Constitutional Law], in *Ustavni zakon o osnovama društvenog i političkog uređenja Federativne narodne republike Jugoslavije i saveznm organima vlasti* [Constitutional Law on the Foundations of Social and Political Order of the Federal People’s Republic of Yugoslavia and on the Federal Bodies of Government] (NIP, Zagreb, 1953), 108.

<sup>39</sup> Edvard Kardelj, “Nova ustava socialistične Jugoslavije” [The New Constitution of the Socialist Yugoslavia], in *Ustava Federativne socialistične republike Jugoslavije: Predosnutek* [Constitution of the Federal Socialist Republic of Yugoslavia: A Pre-Draft] (Cankarjeva založba, Ljubljana, 1962), 97-211, at 193.

integration, also held the view that it did not and should not amount to national assimilation.<sup>40</sup> Jovan Đorđević, the leading Yugoslav constitutional lawyer for most of the post-war period, similarly stressed the federal nature of Yugoslavia as a multinational polity that strived to maintain the relationship between the federation and the republic as an equivocal relationship between two equal and codependent socio-political communities.<sup>41</sup> He understood this to be a novelty among the constitutional orders of federal states.

In terms of the practical functioning of the federation, however, many were not impressed. Both of these constitutions were heavily criticized by Kušej, for instance, who saw their favorable interpretations as empty theoretical schemes while the practical reality continued to show the more or less absolute primacy of the federation with a very limited secondary role for the republics.<sup>42</sup> Both constitutions saw the dwindling down of the federal element in the federal parliament, with a very weakened and sidelined Nations' Assembly in a multi-chamber parliament.<sup>43</sup> The Constitutional Act of 1953 also omitted any reference to the right to secession, which led some to believe that secession was no longer possible.<sup>44</sup>

A rare new token of decentralization was Article 31 of the 1963 Constitution that reinforced the equality of the languages and required the publication of all general acts of the federal authorities in all three official languages.

### 2.3. *The Federal System of the 1974 Constitution*

The Constitution of 1974 and the changed nature of the federal order it brought about were announced by several sets of constitutional amendments to the Constitution of 1963. There were a number of reasons for

<sup>40</sup> See "Zaključni govor tovariša Tita" [Concluding Remarks of Comrade Tito] in *ibid.*, 213-214.

<sup>41</sup> Although only in an edition of his treatise on constitutional law published after the constitutional amendments of 1967 and 1968. See Jovan Đorđević, *Ustavno pravo [Constitutional Law]* (Savremena administracija, Belgrade, 2nd ed. 1970), 104-107 and 299-300.

<sup>42</sup> Kušej, *op.cit.* note 32, 161-165. A rare constitutional change that reflected the importance of the relationship between the federation and the republics and not only the federation and nations, however, was the change to the national emblem, previously featuring five flames (representing the five nations), it now boasted six (representing the six republics as the constituent parts of the federation).

<sup>43</sup> *Ibid.*, 166. On the implications of the "self-management" doctrine for the federal parliament, see Milentije Popović, "Jedinstvo privrednog sistema—samoupravljanje—planiranje" [The Unity of the System of Economy—Self-Management—Planning], in *O ustavnom sistemu Socijalističke Federativne Republike Jugoslavije [On the Constitutional System of the Socialist Federal Republic of Yugoslavia]* (Komunist, Belgrade, 1963), 39-75, at 71; and Petar Stambolić, "O oblicima političkog sistema i o organizaciji federacije" [On Forms of Political System and on Organization of the Federation], in *ibid.*, 107.

<sup>44</sup> Šnuderl, *op.cit.* note 19, 301.

those amendments, including the deterioration in interethnic relations that occurred at the end of the 1960s.<sup>45</sup>

The first set of amendments in 1967 thus increased the competences and the representation of the republics in the rehabilitated Nations' Assembly. The second set in 1968 included further reinforcements of the various ethnic groups' language rights and the federal constitutionalization of the two autonomous provinces within Serbia.<sup>46</sup> Finally, the third and the most important set of amendments in 1971 introduced the new conception of the federal order.

According to this new conception, the federal state was taken to derive from its members and serve as "an agent to determine and fulfill their common interests".<sup>47</sup> A mechanism of compulsory cooperation between the federation and its members was put in place, including requiring a joint assent of the republics' and autonomous provinces' authorities in all matters of economy and their assent in concluding all those international agreements that would necessitate further legislative action on the part of the members.<sup>48</sup> However, this did not suffice to quell the ethnic conflict and nationalism was proclaimed the primary threat to the existence of the Yugoslav federation, while also used as an excuse in the internal Communist party reprisals against the liberal republic strands in Slovenia, Serbia and Croatia.<sup>49</sup>

A few words on the drafting and birth of the 1974 Constitution may be in order. According to the account provided by Đorđević, its principal intention was to strengthen the equality and the spirit of unity of the nations and nationalities but also to expand the rights of the republics and limit the competences of the federation as compared to the previous constitutions.<sup>50</sup> He believed that the question of the actual level of political decentralization—which brought about the dilemma between a federal and a confederal set-up—was not a political question but one that sprung up during the drafting of the text. Similarly, a Croatian constitutional

<sup>45</sup> Žagar, *op.cit.* note 14, 115.

<sup>46</sup> On the controversial status of the autonomous provinces, see Mića Carević, "Evolucija shvatanja i razvoja autonomije u Jugoslaviji" [Evolution of the Understanding and the Development of Autonomy in Yugoslavia], in Miodrag Jovičić (ed.), *Federacija i federalizam* [Federation and Federalism] (Gradina, Niš, 1987), 349-359; Kurteš Saliu, "Evolucija principa autonomije u Jugoslaviji" [Evolution of the Principle of Autonomy in Yugoslavia], in *ibid.*, 360-369.

<sup>47</sup> Kušej, *op.cit.* note 32, 170-172.

<sup>48</sup> *Ibid.*, 175-179; and Branimir Janković, "Federalizam i međunarodno pravo" [Federalism and International Law], in Jovičić, *op.cit.* note 46, 297-301, at 298-301.

<sup>49</sup> See, for example, Žagar, *op.cit.* note 14, 116.

<sup>50</sup> Đorđević, *op.cit.* note 23, 185-186. However, this also enhanced the opportunities for regional integration. On this, see Slavoljub Popović, "Federalizam i regionalizam" [Federalism and Regionalism], in Jovičić, *op.cit.* note 46, 87-98, at 96-98.

lawyer, Zdravko Tomac, later stated that the 1974 Constitution “was not a product of the cabinet mindset, nor was it a result of the influence of partial interests, but an upshot of long historic experience”.<sup>51</sup> However, the Constitutional Commission comprised both constitutional experts and politicians, and it was always acknowledged that its work was “both creative and political”.<sup>52</sup> Therefore, rather than attributing its content in this respect to an ostensibly apolitical expertise, it may be simply due to the fact that—compared with the previous constitutions—the republics and the two autonomous provinces were more equally represented in its drafting.<sup>53</sup>

The new Constitution brought about an accentuated equality of all members and shifted the federal balance—previously heavily slanted towards centralization—in favor of the republics. The first such shift came in a seemingly insignificant change in a constitutional principle from 1963, which stated that the working people and nations of Yugoslavia exercised their rights in the federation when in the common interest and in the republics otherwise: merely changing the order of the text<sup>54</sup> confirmed the new position that “the republics and the autonomous provinces were the original locus of the fulfillment of rights [...] and that the federation was built from the republics”.<sup>55</sup> It also set out the general principles regarding decision making in the federation, the cooperation, solidarity and equality of the republics and autonomous provinces, as well as their dual responsibility for their own development and for the development of the federation. In other words, it instituted a system of ‘cooperative federalism’, whereby the members enjoyed original competences of their own but also a shared responsibility for the development of Yugoslavia as a whole.<sup>56</sup>

The new Constitution also brought changes in the structure of the federal parliament, for the most part abolishing the classical bicameralism. Under the new set-up, as the norm, the Federal Assembly and the Assembly of the Republics and Autonomous Provinces (a refurbished Nations’ Assembly) independently decided on the issues falling within

<sup>51</sup> See Ribičič and Tomac, *op.cit.* note 20, 125.

<sup>52</sup> Dorđević, *op.cit.* note 23, 196.

<sup>53</sup> *Ibid.*, 189.

<sup>54</sup> The relevant provision of the 1974 Constitution (I/2) stated that the sovereign rights of the working people, the nations and the nationalities were to be exercised in the republics and—when so provided by the Constitution in the common interest—by the federation.

<sup>55</sup> See Majda Strobl, Ivan Kristan and Ciril Ribičič, *Ustavno pravo SFR Jugoslavije [Constitutional Law of SFR Yugoslavia]* (ČZ Uradni list SRS, Ljubljana, 1986), 305.

<sup>56</sup> Dorđević, *op.cit.* note 17, 136-137: “All that concerns the republic concerns Yugoslavia, and *vice versa*.”

their respective jurisdictions; on rare occasions, they still sat as two houses of a bicameral parliament; and, very exceptionally, they passed decisions in joint sessions of the two assemblies.<sup>57</sup> The other unique feature of the Yugoslav system was the equal representation of the members in both houses of the federal parliament, with the distinction made only between the republics and the two autonomous provinces: each of the former had thirty seats in the upper house and twelve seats in the lower house of the federal parliament, while the two provinces each had twenty and eight, respectively. The fact that the deputies were appointed by the assemblies of the constituent members in both cases led some to criticize the arrangement as having the republics and the provinces represented twice but the Yugoslav citizens not at all.<sup>58</sup>

The Constitution further enunciated the following as the basic functions of the federation in pursuing common interests: the fulfillment and development of socialist societal relations; national liberty and independence; the brotherhood and unity of the nations and nationalities; the common interests of the working class and the solidarity of the working people; the material, political and cultural possibilities of general and individual liberty; the joining and coordination of efforts to develop the material base of a socialist society and common welfare; a system of socio-economic relations and a political system to ensure the common interests of the working people, as well as the equality of the nations and nationalities; and the unified endeavors of the nations and the nationalities of the Socialist Federal Republic of Yugoslavia (SFRY) in synchronicity with the endeavors of other nations and the entirety of mankind.<sup>59</sup> The competences of the federal authorities were listed exhaustively, which further evidenced the presumption of competence in favor of the members: “whatever was not listed as an exclusive competence of the bodies of the federation was a matter for the bodies of the republics and provinces”.<sup>60</sup>

Yugoslavia had, thus, adopted a mixture of federal and confederal elements, which led some commentators to observe—in a more or less dissatisfied manner—that the latter, in fact, prevailed.<sup>61</sup> Špadijer, for instance,

<sup>57</sup> On this see, for example, Fira, *op.cit.* note 24, 382-386. The joint sessions were envisioned only for the proclamation of the election of the president and the presidency of the SFRY.

<sup>58</sup> Miodrag Jovičić, “Elementi konfederalizma u jugoslovenskom federalnom uređenju” [Elements of Confederalism in the Yugoslav Federal Order], in Jovičić, *op.cit.* note 46, 157-167, at 160.

<sup>59</sup> Đorđević, *op.cit.* note 17, 133.

<sup>60</sup> Strobl, Kristan and Ribičić, *op.cit.* note 55, 315.

<sup>61</sup> See, for example, Jovičić, *op.cit.* note 58, 166-167. However, see also Kristan’s comment at a conference on the role of the Yugoslav courts, in Miodrag Vučković (ed.), *Uloga i mesto ustavnog sudstva u društveno-političkom sistemu* [The Role and Placement of Constitutional Judiciary in the Socio-Political System] (Ustavni sud Jugoslavije, Beograd, 1986), 485, where he wonders about the reason for the pejorative use of the term ‘confederalism’.

attributed the reinforcement of the confederal elements to the fact that, due to the interests of the republics and the autonomous provinces, the federal principle of unanimity was transformed into the right of veto,<sup>62</sup> a feature that (albeit following an inverse logic) is reminiscent of the decision making in the European Community in the twenty years following the Luxembourg Accord.<sup>63</sup> Others, however, stressed that safeguarding the particular features and the autonomy of the constituent parts is not only permissible but one of the fundamental aims of the federation, which should strive to maintain an optimal balance between total centralization and total separatism.<sup>64</sup>

### 3. The Yugoslav Federal Balance Between Law and Politics

#### 3.1. *The New Legislative Balance*

From the mid-1980s onwards, most Yugoslav politicians and theoreticians were keen to acknowledge that Yugoslav federalism had entered into a crisis; they differed only in the professed reasons thereof. For some, the reasons lay primarily in the processes of disintegration and the inefficiency of the existing constitutional order;<sup>65</sup> for others, in the lack of “Yugoslav authorities” after the departure of “Tito, Kardelj and other giants of the Revolution”;<sup>66</sup> for yet others, not at all in the question of a federal balance but in the weakening of the “self-managed socialist social base”;<sup>67</sup> and, finally, for some, in the unsuccessful transposition of a correct constitutional vision into reality and in the failed role of the integrative elements.<sup>68</sup> The drafters of the 1974 Constitution hoped that two major forces of integration would develop—one stemming from a free economic integration based on the self-management of workers, the other

<sup>62</sup> Balša Špadijer, “Jugoslovenski federalizam: Problemi i perspektive” [Yugoslav Federalism: Problems and Perspectives], in Jovičić, *op.cit.* note 46, 263-69, at 268.

<sup>63</sup> Compare Joseph H.H. Weiler, *The Constitution of Europe: Do the Clothes Have an Emperor? and Other Essays on European Integration* (Cambridge University Press, Cambridge, 1999), 71, which states that the Accord’s significance “rested in the fact that practically all decision-making was conducted under the shadow of the veto and resulted in general consensus politics”.

<sup>64</sup> Ivan Kristan, “Federalizam i nacionalno pitanje” [Federalism and the National Question], in Jovičić, *op.cit.* note 46, 142-146, at 144.

<sup>65</sup> Radoslav Ratković, “Aktuelni problemi i razvojne tendencije federalizma u Jugoslaviji” [Current Issues and Developmental Tendencies of Federalism in Yugoslavia], in Jovičić, *op.cit.* note 46, 259-262, at 261.

<sup>66</sup> Ribičić and Tomac, *op.cit.* note 20, 228.

<sup>67</sup> *Ibid.*, 27-28.

<sup>68</sup> Špadijer, *op.cit.* note 62, 264 and 268.

from established socio-economic organizations such as the Communist Party, the Socialist Alliance and the unions—and attributed the frailty of Yugoslav federalism to the incompleteness of the success in achieving the cohesiveness of these forces.<sup>69</sup>

Whether it was the symbolic significance of the integrative ideology encapsulated in the slogan “brotherhood and unity”, the social significance of Tito and other integrative statesmen or the political significance of the integrative entities such as the Yugoslav army, in the 1980s all of these factors were replaced or overshadowed by a power struggle between the union and the federal units on the everyday political stage. The federation was no longer built or threatened by the exception(al) but by the norm, no longer by the giants of the revolution but by the common officials of the federation. Indeed, some saw the quest to find an ideal bureaucrat to be the order of the day:

“In imagining an ideal official of the federation [...] one would wish to find certain qualifications besides professional qualifications, such as the knowledge and desire to integrate the social-proletariat with the national in fulfilling their federal duties, rather than [setting them against one another]. The bearers of federal social functions that, if only by an ounce, tilt to the side of either unitarism or nationalism, the partial or the general denying the partial, such officials are not desired.”<sup>70</sup>

The search for the appropriate federal balance, as well as the tensions in the development from an ever greater centralization towards stressing the rights of the federal units, are evident from the distribution of legislative competences among the federal and the members’ legislatures.

The Constitutions of 1946, 1953 and 1963 all contained a variation on the common theme of dividing the federal legislative competence into three distinct groups of issues and complemented it with an appropriate nomenclature of federal legislation.<sup>71</sup> In the *first* group, the federation had an exclusive legislative competence and passed the so-called ‘full laws’ (*popolni zakoni*). In the *second* group of issues, the federation adopted the so-called ‘basic laws’ (*temeljni zakoni*) and the republics the so-called ‘complementary laws’ (*dopolnilni zakoni*). Finally, the *third* group comprised all other issues falling within the federal competence under the common interest rationale, wherein the federation could adopt the so-called ‘general

<sup>69</sup> See the comment of Pašić in Goldwin and Kaufman, *op.cit.* note 23, 223-224.

<sup>70</sup> Stojan D. Tomić, “Federativni nivo konstituisanja i razrješavanja konflikata” [The Federal Level of Constituting and Resolving Conflicts], in Jovičić, *op.cit.* note 46, 34-41, at 36.

<sup>71</sup> On this development, see Zlatija Đukić-Veljković, “Podela zakonodavne funkcije između federacije, socijalističkih republika i socijalističkih autonomnih pokrajina u razvitku jugoslovenske federacije” [The Partitioning of the Legislative Function Between the Federation, the Socialist Republics and the Socialist Autonomous Provinces in the Development of the Yugoslav Federation], in Jovičić, *op.cit.* note 46, 218-230, at 218-223; Šnuderl, *op.cit.* note 19, 281-283; and Dorđević, *op.cit.* note 41, 328-330.

laws' (*splošni zakoni*). It was this last group, vaguely defined, which enabled the most of the center's virtually unbridled legislative aggrandizement.

The Constitution of 1974 abolished the distinction between the different *types* of federal legislation and replaced it with a strict enumeration of the federation's legislative rights and duties. Article 281 introduced a system of seventeen (or, by some counts, even nineteen) distinct subject matter groups of federal legislative competence: from safeguarding the territorial integrity of Yugoslavia to the determination of the basic workers' rights and of the general law of obligations; from the areas of defense and foreign politics to the general provisions of criminal law, judicial proceedings and other similar areas.<sup>72</sup> Apart from the subject matter distinction, Article 281 also distinguished between those matters that the federation merely "regulated" (*i.e.*, where it only had the legislative competence) and those that it "regulated and safeguarded" (*i.e.*, where it had both the legislative and implementing competence).<sup>73</sup>

However, it was still possible to distinguish between different *forms* of legislative competence: the autonomous legislative competence of the federation (which was very rare and was still heavily influenced by the republics); the autonomous legislative competence of the republics and provinces; the concurrent legislative competence of both the federation and its members; and the competing legislative competence of the federation or its members.<sup>74</sup> The last two may warrant a clarification: the *concurrent* competence made it possible for both the federation and its members to pass laws in a given field, each within its sphere of competence, while the *competing* competence, a very rare occurrence in practice, made it possible for the members to adopt laws that fell within federal competence *if* that were necessary for the fulfillment of their rights and duties. Finally, an important implication of the new arrangement was also a partially reversed approach in the event of a conflict between the laws of federation and a member: until a final resolution of the issue by the Constitutional Court of Yugoslavia, temporary validity was now attributed to the law of the republic *unless* the federal authorities had both the legislative and implementing competences in the issue concerned.

It was in light of Article 281 that one of the more problematic disputes concerning the federal balance arose: namely, whether a provision contained in this Article—whereby the federation through its organs was charged with "maintain[ing] a system of socialist self-managed socio-eco-

<sup>72</sup> See Strobl, Kristan and Ribičič, *op.cit.* note 55, 314-317; Fira, *op.cit.* note 24, 371-374.

<sup>73</sup> Đukić-Veljković, *op.cit.* note 71, 225.

<sup>74</sup> See on this *ibid.*, 225-226; Đorđević, *op.cit.* note 17, 361-466; Strobl, Kristan and Ribičič, *op.cit.* note 55, 354.



conomic relations and the common foundation of a political system”—could serve as an independent constitutional basis for the adoption of federal laws. While proponents of the members’ rights advanced a more restrictive interpretation that required this provision to be used in conjunction with another provision of the Article,<sup>75</sup> the federal parliament adopted a broader interpretation and used this provision to adopt a number of laws that sparked a heated debate:

“The various approaches and the difficulties in the adoption of the more significant federal laws, and even in the interpretation of the Constitution, hamper, as is well known, the functioning of our system and lead to serious disruptions in its essential segments, the socio-economic and the socio-political. The consequences of these disruptions are ever more present in the last few years; their speedier abrogation is not only a condition in controlling the major economic difficulties but also more widely in preventing expressed disturbances in inter-ethnic relations.”<sup>76</sup>

In the United States, for instance, the resolution of such an issue of constitutional interpretation would primarily lie with the Supreme Court, which would—in accordance with its judicial review prerogative—provide an authoritative interpretation of the constitutional text. Why then, one might ask, should not a similar task in Yugoslavia be entrusted to a judicial body that had already been established in 1963 for the very task of safeguarding the constitutional order, thus placing Yugoslavia—as something of an exception among the socialist states—in the very vanguard of constitutional judicature and judicial review in Europe?<sup>77</sup>

To answer this question, one must appreciate the peculiar position of Yugoslav constitutional judicature in light of the principle of the unity of powers.

### 3.2. *The Development of the Yugoslav Constitutional Judiciary*

Yugoslavia already had a federal court before the conception of the Constitutional Court in 1963, namely the Supreme Court of the FPRY, which exercised control over the inferior courts to review the legality of their decisions in light of federal legislation.<sup>78</sup> However, when the federal Constitutional Court—along with its counterparts in the republics—was established with the Constitution of 1963, the idea of having such a Court

<sup>75</sup> Strobl, Kristan and Ribičič, *op.cit.* note 55, 317.

<sup>76</sup> Đukić-Veljković, *op.cit.* note 71, 229 (and generally 228-230).

<sup>77</sup> See, for example, Mauro Cappelletti and John C. Adams, “Judicial Review of Legislation: European Antecedents and Adaptations”, 79 *Harvard Law Review* (1966), 1207-1224, at 1214, which, in particular, praises Yugoslavia for envisioning the publishing of dissenting opinions. The significance of the Yugoslav experience was then also briefly reiterated in Mauro Cappelletti, “Judicial Review in Comparative Perspective”, 58 *California Law Review* (1970), 1017-1053, at 1038-1039.

<sup>78</sup> See Šnuderl, *op.cit.* note 19, 268.

was heavily criticized as running contrary to the principle of the unity of powers.

The establishment of the constitutional court was largely accredited to the support of Tito, who held the view that disputes and controversies in Yugoslav society should not be resolved politically but, rather, by means of “an objective and legal arbitration”.<sup>79</sup> The Constitutional Commission itself responded to the criticism with the argument that the Constitutional Court will “contribute to an effective protection of the constitutionality and the legality of all acts, including the acts of the Assembly”, thereby only reinforcing the principle of the unity of powers.<sup>80</sup> In the same vein, Kardelj stressed that the Constitutional Court was “more a part of the parliamentary system than a traditional judicial institution”.<sup>81</sup>

The competences of the Constitutional Court of Yugoslavia were initially moderately extensive but later somewhat reduced: one of the initial competences that was later removed was the protection of fundamental rights and liberties by way of a direct constitutional complaint;<sup>82</sup> another was a power to adopt a sort of authentic interpretation of the law; and the Court, initially reviewing whether the acts of the republics were *compatible* with the federal laws, could later only review whether or not they *conflicted* with them (which was understood as a much laxer standard).<sup>83</sup> In any event, this diluted duty of safeguarding legality and constitutionality was not reserved to the constitutional courts but fell on all social actors: the courts,<sup>84</sup> the authorities of socio-political communi-

<sup>79</sup> Cited in Đorđević, *op.cit.* note 18, 127 and 129. Tito would later speak to the judges of the new Court as they assumed office in January 1964 and reiterate the importance of their constitutional role: “[y]ou are responsible for the observance of the new Constitution, and it is within the sphere of your competence to prevent the infringement of the constitutional provisions, whether an individual, a collective body or any institution in our country is concerned [...] It is my wish, and the wish of us all, that your task in safeguarding our constitutional principles proves to be as successful as possible.” See the report by the Constitutional Court of Yugoslavia, *Deset godina rada Ustavnog suda Jugoslavije [Ten Years of the Functioning of the Constitutional Court of Yugoslavia]* (Ustavni sud Jugoslavije, Belgrade 1973), 27.

<sup>80</sup> Stambolić, *op.cit.* note 43, 112.

<sup>81</sup> Kardelj, *op.cit.* note 39, 190; a point that was repeated even twenty years later. See Ivan Kristan, “Federalizam in ustavno sodstvo v Jugoslaviji” [Federalism and Constitutional Judiciary in Yugoslavia], 44 *Zbornik znanstvenih razprav Pravnih fakultete v Ljubljani* (1984), 87-105, at 103.

<sup>82</sup> For an optimistic account of the first few years of constitutional judicature in this respect but with a warning against drawing premature conclusions on its eventual success, see Walter Gellhorn, *Ombudsmen and Others: Citizens’ Protectors in Nine Countries* (Harvard University Press, Cambridge, 1967), 273-278. For a criticism of the later reduction, see Đorđević, *op.cit.* note 17, 775-778.

<sup>83</sup> For an overview, see Strobl, Kristan and Ribičić, *op.cit.* note 55, 348-349.

<sup>84</sup> On the role of the regular judiciary, see Dušan Cotič *et al.* (eds.), *Ustavni položaj i ostvarivanje funkcije redovnih sudova* (Savezni sud, Belgrade, 1984), in particular 145 *et seq.* The Supreme Court of Bosnia and Herzegovina, for instance, stressed the problem of excessive legislation and the

ties, the organizations of self-management and of local self-government, and all those holding public office.<sup>85</sup>

The Constitutional Court was never short of work. In the first two years of its existence, until 30 June 1966, it had already received 4,141 applications. Most of them had been turned down for jurisdictional reasons—these largely concerned unsuccessful applications for judicial review of individual acts put forward by bereaved individuals, often before all regular remedies had been exhausted or after the preclusive period of three months from the adoption of the individual act in question.<sup>86</sup> Of the remaining docket, the vast majority (987 cases) concerned the harmonization of the legal system, while a significantly smaller number related to solving disputes between socio-political communities or between courts and the other branches of government.<sup>87</sup> In the first twenty-year period, all of the Yugoslav constitutional courts together handled over 37,000 constitutional cases, with the federal Constitutional Court handling 8,346 cases and the constitutional courts of the republics a further 29,376 cases.<sup>88</sup>

The Court's role was somewhat hampered by the initial constitutional arrangement, which neglected to provide for a general mechanism for the enforcement of its decisions and sometimes even failed to provide for an appropriate notification of their addressees. The Constitution of 1974 later introduced a political alternative by entrusting the Federal Executive Council with the task of ensuring the implementation of the Court's decisions whenever necessary.<sup>89</sup> One prominent early example concerned an opinion of the federal Constitutional Court in 1965 given to the Federal Assembly of its own initiative, in which it found a provision of the Croatian Constitution of 1963 to be inconsistent with the federal Constitution: the Federal Assembly did not act upon it, whereas the Croatian Assembly—the only body that could adequately respond (by amending the Croatian Constitution)—was not even informed of the opinion.<sup>90</sup>

consequent hypertrophied and unmanageable legal order. See *ibid.*, 148.

<sup>85</sup> Kristan, *op.cit.* note 81, 93.

<sup>86</sup> See Vjekoslav Žnidaršić, “Pet godina ustavnog sudovanja” [Five Years of Constitutional Adjudication], 6 *Zbornik radova Pravnog fakulteta u Splitu* (1968), 115–127, at 119–123. Žnidaršić adds that at the very outset of its existence, the Constitutional Court was deluged with the applications of individuals who were “subjectively or objectively wronged in their rights and perceived the Constitutional Court as the institution which, after the fruitless knocking on many other doors, will finally grant their demands”. *Ibid.*, 117–118. This description may strike one as quite apt for today's (perceived) role of the European Court of Human Rights.

<sup>87</sup> Žnidaršić, *op.cit.* note 86.

<sup>88</sup> Per the comment of Ivan Franko in Vučković, *op.cit.* note 61, 488.

<sup>89</sup> Art.294 of the Constitution; see Kristan, *op.cit.* note 81, 103.

<sup>90</sup> Žnidaršić, *op.cit.* note 86, 120–121.

However, the relationship between the constitutions of the federation and its members was one that cut most delicately into the fragile federal balance. For that reason, Ivan Kristan, a foremost Slovenian exponent in the Yugoslav federal constitutional debate, welcomed the fact that the federal Constitutional Court was not competent to *rule* on the constitutionality of the members' constitutions but to merely state an *opinion* on the issue to the Federal Assembly and that the issue ultimately had to be solved politically, not legally.<sup>91</sup>

In a similar vein, there was no hierarchical relationship between the federal Constitutional Court and its counterparts in the republics; rather, they were two parallel systems of constitutional adjudication with comparative competences.<sup>92</sup> This, of course, was also linked to the shift in the question of *Kompetenz-Kompetenz*: while the federation was initially able to “pre-empt” new substantive areas and transfer them within its own sphere of competence,<sup>93</sup> it was no longer able to do so with the adoption of the 1974 Constitution.<sup>94</sup> Of course, such a division of competences was not limited to the legislative branch: it was even more pronounced in the executive branch, where most of the federal acts had to be implemented via the authorities of the republics, but extended all the way to the regular judiciary. All judicial proceedings against individuals were to be concluded within a republic and an appeal to a federal court was only possible in the case of capital punishment—even fundamental rights, having been removed from the ambit of the constitutional judiciary, were to be protected at the level of the republics.<sup>95</sup>

### 3.3. *The Limits of Constitutional Adjudication in the Federal Balance*

Such were the circumstances in which the federal Constitutional Court was to play its role, a role that some saw as crucial in maintaining Yugoslav unity.<sup>96</sup> It would ultimately come to be criticized for failing to do so, with the blame partly lying with an inappropriate constitutional arrangement but partly also with those personally responsible for constitutional adjudication. As noted by Đorđević, the Constitutional Court of Yugoslavia

<sup>91</sup> Kristan, *op.cit.* note 81, 99.

<sup>92</sup> *Ibid.*, 97-98.

<sup>93</sup> On this, see Šnuderl, *op.cit.* note 19, 266 and 269.

<sup>94</sup> Kristan, *op.cit.* note 81, 91.

<sup>95</sup> Naturally, all this was welcomed by the proponents of the members' autonomy and criticized by the proponents of a strong federation. For a critical view of the constitutional arrangement lacking in the federal courts and other federal authorities throughout the country, see the comment of Vojislav Stanovčić in Goldwin and Kaufman, *op.cit.* note 23, 237-238.

<sup>96</sup> This much can be deduced from Đorđević' praise for the US Supreme Court's playing of such a role. See Đorđević, *op.cit.* note 18, 130.

and the constitutional courts of the republics “had not distinguished themselves in the specific struggle for the development of the understanding and practice of constitutional judiciary” because they did not fully understand their purpose, which should not be limited to a mechanical verification of constitutionality and legality.<sup>97</sup>

This criticism does have some force. In practice, the Yugoslav Constitutional Court was almost nothing like the modern constitutional judiciary in the successor states or its counterparts in liberal democracies. Most of its caseload consisted of applications that may have had important implications for the parties directly concerned and for the limited facets of the Yugoslav polity—notably in the area of safeguarding the common market,<sup>98</sup> where a number of applications were lodged by adversely affected companies—but had little or no bearing on the fundamental features of the Yugoslav constitutional order and the federal bargain. For most of its existence, the federal Constitutional Court simply played no significant role in the Yugoslav constitutional debate.

Partly, this was the inevitable consequence of the doctrine of the unity of powers: members of the judicial branch—who would be perceived as trumping the popular sovereignty manifested in the federal parliamentary assembly—might quickly see their judicial and personal wings clipped. In addition, the complex programmatic nature of the 1974 Constitution—vying for the title of the world’s longest and most detailed constitution—painted a constitutional picture in which all the major strokes seemed to have already been made by the drafters, with very few, if any, gaps left to be filled by reasoned constitutional adjudication. Finally, the early weakening of the competences of the Court, as well as the significance of judicial review in general, as mentioned above,<sup>99</sup> probably provided a good indication of the opinion that the Court should not be too ambitious in furnishing its jurisdictional abode. Whatever the reasons, the Constitutional Court itself seemed to have reached such a conclusion and had, for a long time, refrained from adopting any significant judicial decisions on either the federal constitutional set-up or on its own role as the supreme judicial body of the land, leaving the former to the political branches and the latter to legal theory.<sup>100</sup>

<sup>97</sup> *Ibid.*, 129–130.

<sup>98</sup> See text accompanying footnote 113 below.

<sup>99</sup> See text accompanying footnotes 82 through 85 above.

<sup>100</sup> One author termed this period in which the Constitutional Court isolated itself from controversial constitutional issues and the functioning of the federal order “a splendid isolation”. See Peter Pavlin, “Vladavina prava: Republika Hrvatska in razvoj vladavine prava v Crničevem sodišču” [Rule of Law: Republic of Croatia and the Development of the Rule of Law in the Crnić Court], diploma Thesis Pravna fakulteta v Ljubljani, Ljubljana (1998), 12–14.

What is interesting, however, is that legal theory itself did not have a clear answer to the question of the proper role and functioning of the Yugoslav constitutional judiciary. Although Đorđević, by that time the venerable *doyen* of Yugoslav constitutional law, criticized the ignorance of the constitutional courts as to their own role, a brief comparison of his own texts on the issue reveals that this role was hardly immutable through time.

In a textbook from 1970, reviewing the existing constitutional arrangement and anticipating the one resulting in the 1974 Constitution, Đorđević writes:

“In Yugoslavia, the Constitutional Court was neither established as nor can it become an institution that would be specifically called upon to ‘write a new constitution’ [...] *The Constitutional Court does not have the task of ‘saying what the constitution is’* or by means of an old or new constitutional language to shape a particular social or political ‘philosophy’ of its own or even its own legal ideology.”<sup>101</sup>

In an edition of the same textbook from 1986, the cited paragraph is repeated but a further sentence is added: “[H]owever, [the Constitutional Court] uses and safeguards the Constitution, which means that *it can also interpret it* (which has rarely been done by the constitutional courts until today)”.<sup>102</sup>

In the already cited work on society and politics from 1988, however, he writes the following on the “role, the true role of the Constitutional Court”:

“According to the prevailing understandings and the practice, which are to a certain extent induced by the text of the Constitution itself, the Constitutional Court determines the constitutionality and the legality, that is to say it evaluates and measures things, but does not explore the essence of the question. It has been stripped of the duty to interpret the Constitution. But *without the duty of interpreting the Constitution there can be no constitutionality or legality.*”<sup>103</sup>

Thus, the twenty years between these publications saw the duty of constitutional interpretation, the task of “saying what the constitution is”, transformed from a forbidden fruit via an acceptable addition to a *sine qua non* of constitutional judicial review. Granted, one should allow for the possibility that Đorđević wished to distinguish between a faithful “constitutional interpretation” and an activist “saying what the Constitution [really] is”. However, even such a view could not square his earlier position with the one taken at a 1986 colloquium on the role of constitutional courts in the Yugoslav political system:

“[T]he constitutional judiciary must say what the law is, what the constitution is, not from the viewpoint of a social static, not from the viewpoint of *status quo*, as it

<sup>101</sup> Đorđević, *op.cit.* note 41, 645 (emphasis added).

<sup>102</sup> Đorđević, *op.cit.* note 17, 789 (emphasis added).

<sup>103</sup> Đorđević, *op.cit.* note 18, 130 (emphasis added).

is done today, but from the viewpoint of social development, so that by means of the interpretation of the Constitution the Constitutional Court becomes a body of the renovation of the social development.”<sup>104</sup>

He received a response from Miha Ribarič, a Slovenian constitutional expert:

“If we are referring to the question of judicial review of constitutionality, I am absolutely certain of everybody agreeing that every decision of the Constitutional Court in a sense signifies an interpretation of the Constitution. [...] To speak of some separate constitutional competence that would involve the competence of interpreting the Constitution, [however], that would depart at least from the understanding of the existing concept of the political system, if not the very concept of the substance of the state’s political system.”<sup>105</sup>

How can one account for such discrepancies, not only between the different constitutional lawyers but even between the viewpoints of the same preeminent constitutional expert at different times? The simple answer—and possibly one of the more plausible ones—is that the proclaimed understanding of the role of the Constitutional Court has mostly changed according to its author’s own impression of the practical (*i.e.*, political) role that the Court could and should play in light of changing social arrangements.

This, however, already leads us to the second dimension of the role and functioning of the constitutional judiciary—the question of its (self) positioning within the relationship of law and politics.

In the 1980s, this issue was addressed above all in the contributions of the Croatian constitutional lawyer Branko Smerdel. At a conference on federalism, he thus spoke of a tension between the “centrifugal” and the “centripetal” forces that was bound to occur in any federal polity and stressed the important role that the constitutional courts had in preventing the more severe conflicts between these forces by translating political conflicts into legal issues:

“[The solution lies] in the efforts to have the political questions and the constitutional disputes between federal units, as much as possible, resolved as legal questions on the use of the Constitution. In doing so, of an immense importance is the functioning of a strong, authoritative, dignified and independent—particularly in the sense of independence from narrow and egotistical interests of particular units—federal Constitutional Court, which must not at any cost be transformed into yet another forum for the confrontation of the positions of the actual holders of political power in the federal units where outvoting would take care of the blockages in making decisions, but must act as the guardian of the federal Constitution.”<sup>106</sup>

<sup>104</sup> See the comment of Jovan Đorđević in Vučković, *op.cit.* note 61, 416.

<sup>105</sup> See the comment of Miha Ribarič in *ibid.*, 426-427.

<sup>106</sup> Branko Smerdel, “Komparativni problemi primjene federalnog modela” [Comparative Issues in the Application of the Federal Model], in Jovičić, *op.cit.* note 46, 55-63, at 59. Smerdel went on to add that “even more important are the existence and the strengthening of the actual consensus of the entire population on the will and the need to live together”.

He elaborated further on the issue at the 1986 colloquium on the role of constitutional courts, commenting on a “resolute and uncompromising” decision of the Constitutional Court in 1984, in which it held as unconstitutional, by a majority of the judges’ votes, certain provisions of a federal law on foreign exchange and international credit operations, a statute that had been in force, notwithstanding certain amendments, since 1977.<sup>107</sup> Smerdel commented that the decision could only signify one of two things: either that Yugoslavia had finally, after twenty years, obtained “an active, independent, authoritative and expert Constitutional Court of Yugoslavia” or that the Court had been abused as a forum to bypass the principle of unanimity.<sup>108</sup> Namely, while the federal Assembly of the Republics and Provinces could only pass such a statute with the assent of the assemblies of the republics and the two autonomous provinces, a majority of the constitutional judges sufficed for the decision of the Court.

Smerdel outlined four possible exits out of this impasse: the abolition of the principle of unanimity in the passing of all legislation; the principle of judicial self-restraint, as per the US model; the option of having the Court adopt such decisions unanimously or with the cooperation of the constitutional courts of the federal units; or the possibility that the Court would in such cases only be adopting advisory opinions, akin to the case of the federal units’ constitutions.<sup>109</sup>

Smerdel himself saw the final option as the lesser of the evils. However, therein lies the rub, for would that not mean giving up on the very role that the Constitutional Court ought to have in translating political conflicts into legal questions? Thus, this issue would join hands with the issue of inconsistency between the constitutions, an issue that “[could] not be solved in a legal manner but [was] an eminently political question”.<sup>110</sup>

Such was the unclear fate of the constitutional judiciary and the generally uncertain fate of Yugoslav federal relations in the 1980s, a decade in which Yugoslavia suffered a deep-seeded social and economic crisis, a crisis that was deemed to have had inconspicuously started in the second half of the 1960s and had been evidenced in the growing inefficiency of

<sup>107</sup> Decision U-204/83 of 19 December 1984.

<sup>108</sup> See the comment of Branko Smerdel in Vučković, *op.cit.* note 61, 456. See, also, Branko Smerdel, “Ustavni sud Jugoslavije i neki problemi političkog pravosuđa” [Constitutional Court of Yugoslavia and Certain Issues of the Political Judiciary], in *ibid.*, 333-343, at 340-341.

<sup>109</sup> Smerdel, *op.cit.* note 61.

<sup>110</sup> Kristan, *op.cit.* note 81, 104. This approach may be recognized by the proponents of the somewhat dwindling ‘political question doctrine’ in the United States. For a recent critical appraisal, see Mark Tushnet, “Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine”, 80 *North Carolina Law Review* (2002), 1203-1235.



the economy<sup>111</sup> but that was widely held to have been caused primarily by an unsuitable institutional set-up.<sup>112</sup> Caught between the different understandings of its role in a legal order that did not favor an independent judiciary, the federal Constitutional Court spent most of its time handling the hundreds of less important cases with no or little systemic implications. Only rarely—and even then with at least a hint of overzealousness or biased judicial activism—did it try to make a deeper foray into the functioning or the development of the Yugoslav constitutional order.

That did not mean, however, that it was entirely devoid of any significance. Much like in the case of the European Court of Justice in the first decades of its own existence, one of its more important roles has been to ensure the functioning of the Yugoslav common market. Thus, for example, in 1988 it ruled unconstitutional a provision of the federal Law on Obligations that provided for the provisions of its general section not to be used for the issues that had been otherwise regulated by the statutes of a particular republic or province. In its judgment, the Court held that “regulation of the general section of obligations [was] an exclusive competence of the federation” and that “the general section of obligations [was] an essential foundation of the common Yugoslav market”.<sup>113</sup>

In this judgment, the Court stood up to the centrifugal forces (to use Smerdel’s terminology) and played a centripetal, integrative role. It also tried to play a similar role on a much more fatal political stage where the tension between the centrifugal and the centripetal forces was already tearing the federation into pieces.

<sup>111</sup> Dragoje Žarković, “Promene u društveno-ekonomskom sistemu—uslov izlaska iz krize” [Changes in the Socio-Economic System—a Condition for the End of the Crisis], in Ratko Marković et al. (eds.), *Ustavni amandmani i društvena kriza u Jugoslaviji* [Constitutional Amendments and the Social Crisis in Yugoslavia] (Univerzitet u Kragujevcu, Kragujevac, 1988), 15–25, at 15.

<sup>112</sup> Radoslav Marinković, “Ustavni amandmani i kriza u Jugoslaviji” [Constitutional Amendments and the Crisis in Yugoslavia], in *ibid.*, 35–43, at 35.

<sup>113</sup> Decision U-363/86 of 7 December 1988, *Ur.l. SFRJ* 2/89, 98–99.

## 4. The Role of the Judiciary and Politics in the Dissolution of Yugoslavia

### 4.1. On the Reasons for the Dissolution of Yugoslavia

Why did Yugoslavia disintegrate?<sup>114</sup> This is a question for 2 billion, 1.4 billion or 2.7 billion dollars,<sup>115</sup> on which a consensus may possibly never be reached. The possible reasons proposed by the various commentators are as diverse as the reasons for the crisis of the Yugoslav constitutional arrangements outlined in the first part of this article. Yet it is possible, with some simplification, to group the main contenders into two main and largely opposing strands.

The *first* seeks the reasons for the deterioration of the relations in the federation and its eventual demise in the rejuvenated and expanding centralization of Yugoslav political power under the helm of Serb hegemonism from 1984 onwards, which led the other republics into a state of prolonged agony.<sup>116</sup> The *second* puts the blame on the shoulders of the constitutional measures adopted by some republics in 1989 and 1990, which unilaterally and unconstitutionally undermined federal authority and aborted the federal constitutional system.<sup>117</sup>

In fact, the two interpretations reflect the divergence that has occurred between the two poles of federalism, the ‘coming together’ and the ‘holding together’ dimension of the federal bargain, the two poles that

<sup>114</sup> In putting this question, I assume that it is not controversial in itself—that in light of events in the early 1990s, the opinions of the Badinter Arbitral Commission on Yugoslavia and the later acts of all the concerned parties the debate over whether what occurred was a dissolution or a series of secessions has been put to rest. On certain aspects of this issue, see Colin Warbrich, “Recognition of States: Recent European Practice”, in Malcolm D. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth, Aldershot, 1997), 9-35, at 24-32. See also titles listed in footnote 1 above.

<sup>115</sup> The numbers are the estimates of certain monetary aspects of the dissolution linked to the growing dispute between Slovenia and Serbia: between 2 and 2.2 billion USD is the estimate of the benefits received by Serbia under the heading of “underdeveloped regions aid” in the period 1986-1989; 1.4 billion USD is the amount “borrowed” by Serbia from the National Bank of Yugoslavia in 1990; 2.7 billion USD is the estimate of the economic damage sustained by Slovenia during its path to independence. Cited from Božo Repe, *Ĵutri je nov dan: Slovenci in razpad Jugoslavije [Tomorrow is Another Day: Slovenians and the Dissolution of Yugoslavia]* (Modrijan, Ljubljana, 2002), 135, 148 and 153.

<sup>116</sup> See *ibid.*, 9 *et seq.*; Žagar, *op.cit.* note 14, 120-121; and Ciril Ribičič, *Ustavnopravni vidiki osamosvajanja Slovenije [The Constitutional Aspects of Slovenia’s Path to Independence]* (Uradni list RS, Ljubljana, 1992), 12-16.

<sup>117</sup> See Robert M. Hayden, *Blueprints for a House Divided: The Constitutional Logic of the Yugoslav Conflicts* (The University of Michigan Press, Ann Arbor, 1999), 16-17 and 27-52; and Milovan Buzadžić, *Secesija bivših jugoslovenskih republika u svetlosti odluka Ustavnog suda Jugoslavije: Zbirka dokumenata s uvodnom raspravom [The Secession of the Former Yugoslav Republics in Light of the Decisions of the Constitutional Court of Yugoslavia: A Collection of Documents with an Introductory Study]* (Službeni list SRJ, Belgrade, 1994), 14-15 *et seq.*

were, in the final years of Yugoslavia, most clearly represented by Serbia and Slovenia. It thus comes as no surprise that the proponents of the first position are those personally or intellectually affiliated with the stance of Slovenia and the proponents of the second one those affiliated with the stance of Serbia at the time.<sup>118</sup> It is not the intention of this article to offer an extensive ‘political’ analysis of the dissolution of Yugoslavia. Nevertheless, cognizant of my own national affiliation, two reasons lead me to attribute greater accuracy to the first interpretation.

*Firstly*, because it acknowledges and reflects the fact that at the core of the federal conflict there lies a double-sided tension between the proponents of a greater centralization, on one side, and those of a greater autonomy, on the other,<sup>119</sup> whereas the argument of a fatal unconstitutionality in regard to the measures adopted by the republics in 1989 paints a false image of a federation with a largely (or entirely) adequate and functioning constitutional order in which the only trouble was caused by those republics, primarily Slovenia, that were not willing to adhere to the principle of the rule of law.<sup>120</sup>

*Secondly*, because it seems inconceivable that one would start searching for the causes of the dissolution with the passage of the amendments to the Slovenian Constitution in September of 1989 without acknowledging at least the significance of the highly important events preceding it, such as the amendments of the federal Constitution in 1988, if not the entire period since the beginning of the 1980s when Yugoslavia officially began its descent into a social and constitutional crisis.<sup>121</sup>

<sup>118</sup> This is also very evident in the case of Hayden, although he spends much energy and ink in the introduction to assert that being married to a Serb, having spent almost the entire time of his residence in Yugoslavia in Belgrade and having collaborated on the book solely with the Faculty of Law in Belgrade should not be seen as dampening either his objectivity or an adequate expertise in the matter. See Hayden, *op.cit.* note 117, xii-xv.

<sup>119</sup> See, for example, Ribičič, *op.cit.* note 116, 16 (emphasis in the original): “[s]imultaneously with a sharp criticism of the constitutional order and the proposals for renewed centralization, some republics, in particular Slovenia, saw a strengthening of opposing trends and proposals that saw the future of Slovenia in *broadening and strengthening the autonomy of the republic.*”

<sup>120</sup> Hayden, *op.cit.* note 117, 30, also referring to a statement made by the last US Ambassador to the SFRY Warren Zimmerman: “[Slovenia’s] vice was selfishness. In their drive to separate from Yugoslavia they simply ignored the twenty-two million Yugoslavs who were not Slovenes. They bear considerable responsibility for the bloodbath that followed their secession.” See Warren Zimmerman, *Origins of a Catastrophe* (Times Books, New York, 1996), 71, cited in *ibid.*

<sup>121</sup> Such, namely, is the approach taken by Hayden who does not even mention the events prior to the Slovenian amendments. See Hayden, *op.cit.* note 117, 29: “[the federal] authority was first challenged, and effectively eliminated, by the unilateral action of the (then Socialist) Republic of Slovenia in September 1989, which passed amendments to its own constitution that claimed to render the federal constitution irrelevant to Slovenia. Following this act by Slovenia, the survival of the Yugoslav federation became impossible in constitutional terms and, for this reason, politically as well, which made the outbreak of internal war inevitable.”

In any event, one could hardly label the adoption of the Slovenian amendments as the initiator of the constitutional earthquake in the federal arrangement. Serbia adopted forty-one amendments to its own constitution seven months earlier, in February of 1989.<sup>122</sup> A significant feature of these amendments was a severe restriction—or a near abolition—of any real autonomy on the part of the two Serbian autonomous provinces, Kosovo and Vojvodina, which thus became little more than Serbian pawns in the Yugoslav federal game. This shift was supported and evidenced by the convocations of the Serbian legal community in 1988, planning for amendments that would “remedy” the “twisted character” and the “historical failing” of the existing model of the socialist autonomous provinces.<sup>123</sup> It was particularly troublesome that Kosovo was declared to be in a state of emergency at the time and that when the Assembly of Kosovo approved these amendments on 23 March 1989, it did so in contravention of the required two-thirds majority, with the majority of Kosovo Albanian delegates abstaining.<sup>124</sup>

By all this, I do not mean to say that the proponents of the ‘Slovenian’ view are not guilty of biased judgment,<sup>125</sup> nor that there was no difference of opinion in Slovenia at the time.<sup>126</sup> Many Slovenian leaders—while

<sup>122</sup> For the text of these amendments, see Bogoljub Milosavljević and Vladan Kutlešić (eds.), *Ustav Socijalističke republike Srbije sa ustavnim amandmanima I-XLIX* [Constitution of the Socialist Republic of Serbia with Constitutional Amendments I-XLIX] (Službeni glasnik SR Srbije, Belgrade 1989), 244–283. The Assembly of Serbia adopted the amendments on 23 February 1989 and they were later duly approved by the assemblies of Vojvodina (on 10 March 1989) and Kosovo (23 March 1989), leading to a final promulgation on 28 March 1989.

<sup>123</sup> See the introductory speech of Pavle Nikolić, “The Complete Constitutional Formation of the Socialist Republic of Serbia as a State—An Imperative of the Present Times”, in Pavle Nikolić et al. (eds.), *Promene ustava SR Srbije: Referati za savetovanje* [Changes to the Constitution of SR Serbia: Papers for a Conference] (Pravni fakultet, Belgrade, 1988), 1–17. The compilation includes forty papers in total given at the conference, out of which thirty-four speakers came from Belgrade, five from Novi Sad (Vojvodina), one from Niš (Serbia) and none from Kosovo.

<sup>124</sup> These events would later also feature in the trial against Milošević at the ICTY. See the description of facts in the *Prosecutor v. Milošević*, Case No.IT-02-54, Second Amended Indictment of 29 October 2001, paras.78–84, in particular para.81.

<sup>125</sup> See, for example, Repe, *op.cit.* note 115, 8, where Repe expresses astonishment at those foreign commentators who criticized Slovenia for its apparent selfishness “despite the fact that Serbia as the main opponent to the Slovenian proposals and demands for a Yugoslav reform is today economically devastated and politically on unstable democratic ground, while Slovenia is the most successful of all the former Yugoslav republics”. I am not entirely convinced that a stamp of justification or correctness for former political positions of one or the other side in the conflict may be sought in their later economic success.

<sup>126</sup> Kristan thus reports on the conflicts at the Ljubljana Faculty of Law where the members of the faculty adopted a position stating that the federal amendments had excessively encroached on the sovereign rights of the republic, while it was opposed by most members of the Faculty’s Department of Constitutional Law. See Ivan Kristan, “Degradacija suverenosti SR Slovenije” [Degradation of the Sovereignty of SR Slovenia], 49 *Zbornik znanstvenih razprav Pravne fakultete v Ljubljani* (1989), 111–131, 114.

fighting the proponents of centralization when the amendments to the federal Constitution of 1974 were being adopted—afterwards nevertheless defended these amendments in Slovenia and engaged in a public dispute with the opposition.<sup>127</sup>

Yet is it not already telling that in Slovenia there was an open and sharp public debate, in which the final consensus of public and political opinion agreed with a position initially only supported by the opposition? It is thus completely erroneous for Hayden to claim, out of ignorance or biased perception of the events, that the actions of Slovenia were the decisions of the “ruling elite” that “has used the institutional inconsistencies [with the 1974 Constitution] to destroy the (con)federal structure”.<sup>128</sup>

Without foraying into a deeper debate with the proponents of the various interpretations, *two further weaknesses* common to the accounts of the dissolution of Yugoslavia can be highlighted, at the same time returning the debate to the role of the Constitutional Court in the Yugoslav order.

The *first* concerns ‘external’ commentators and the danger that, in their eyes, their superficial experience with a particular system will be seen (and presented) as a profound understanding of the real reasons for its failure and then further buttressed by a simplified reference to their own domestic experience in offering seemingly self-evident instructions for its (ab)solution. Hayden thus addresses a question of interpretation of the 1974 Constitution whereby the Constitutional Court only adopts *opinions* on the compatibility of the members’ constitutions with the federal Constitution rather than a binding *ruling*:

“Despite the ambiguity in the text of the constitution, however, this problem was resolvable if the necessary logic of a federal system is taken into consideration. That is, the provisions of the federal constitution must override conflicting provisions in the constitutions of constituent units of the federation. If this rule were not to hold, then the federal constitution would become literally meaningless, since its provisions could be overridden and hence effectively repealed by any of the constituent parts of the federation. Further, if the federal constitution were not superior, it could in effect be amended by the unilateral action of the federal constituents, in disregard of the express provisions contained within for its amendment. This logic was set out in its essentials in the famous American constitutional decision in *Marbury v. Madison* (1803), a point that was introduced to the Yugoslav debate in an article in *Borba* (Lilić and Hajden 1989), although apparently with little impact.”<sup>129</sup>

There is no denying that the passage does have some force: the coherence and effectiveness of a legal order truly requires that hierarchically established rules are upheld unless or until validly amended. However,

<sup>127</sup> See Repe, *op.cit.* note 115, 163–166.

<sup>128</sup> Hayden, *op.cit.* note 117, 16–17 and 142.

<sup>129</sup> *Ibid.*, 39.

Hayden's argumentation is nevertheless weak: firstly and as further elaborated below, he incorrectly invokes *Marbury v. Madison*, a prominent decision yet one that did not deal with the "logic of a federal system". Secondly, even a more appropriate argument from US constitutional law could not automatically be transposed into other federal orders since, as widely accepted in the modern theory of federalism, no two federations are coterminous.<sup>130</sup> Finally, notwithstanding the importance of coherence, a part of the "necessary logic of a federal system"—if it is to be distinguished from a unitary state—is precisely in a certain established federal balance that neither the federation nor the member should unilaterally and arbitrarily distort.

As is well known to any scholar of US constitutional law, *Marbury v. Madison* did not concern the relationship between the federal level and the states but, rather, the relationship between the judiciary and the two political branches of government, in particular the scope of judicial review when reviewing the constitutionality of the acts of legislature. The closest I came in locating a passage that Hayden might have in mind when making his statement was the following:

"If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act, which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure."<sup>131</sup>

<sup>130</sup> A group of authors led by the great federalist Daniel Elazar, for instance, grouped the various federal arrangement into sixteen different types. See Daniel J. Elazar *et al.* (eds), *Federal Systems of the World: A Handbook of Federal, Confederal and Autonomy Arrangements* (Longman, Harlow, 2nd ed. 1994), xvii-xviii. This may very well be the reason that many theorists of federalism, from the early forerunners such as Althusius and Montesquieu to the modern authors, define federalism in somewhat vague all-encompassing terms rather than offer clear distinctions between the various forms or link its features to a particular state form. See Maurice Croizat, *Le fédéralisme dans les démocraties contemporaines* (Montchrestien, Paris 1992), 12; Bernard Barthalay, *Le fédéralisme* (Presses Universitaires de France, Paris 1981), 5.

<sup>131</sup> *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), 178.

However, this passage, just as the case itself, stands for a different proposition—that courts must be the guardians that ensure that a particular branch of government does not cross its constitutional boundaries:

“The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing; if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation.”<sup>132</sup>

In its essence, *Marbury v. Madison* is about the principle of the separation of powers. If any, its link to the issue of the federal relationship between the federation and its members is thus inverse: for the US constitutional doctrine holds that—apart from the horizontal separation of power of the federal branches of government—the principle “applies with equal force to interpretation of the Constitution’s vertical structure”.<sup>133</sup> In other words, that the same principle informs the relationship between the federal level and the states, in which both one and the other must respect mutually established limitations.<sup>134</sup>

If nothing else, this “logic of a federal order” alone would require any discussion of the crisis and the dissolution of Yugoslavia to begin in the middle of the 1980s or the events leading up to the amendments to the federal Constitution in 1988. As described by Kristan, these controversial amendments changed the constitutional arrangement of the federal relations, relocating approximately forty new spheres of competence to the federal level and demoting the sovereignty of the republics.<sup>135</sup> The importance of these amendments was recognized throughout Yugoslavia. Miodrag Jovičić, an eminent Serbian constitutional lawyer<sup>136</sup> who otherwise promoted a pan-Yugoslav referendum by which to amend the procedure of amending the Constitution, called them “a testing-ground for the livelihood of the Yugoslav federation”.<sup>137</sup> Other participants of a special

<sup>132</sup> *Ibid.*, 176–177.

<sup>133</sup> Laurence H. Tribe, *American Constitutional Law* (Foundation Press, New York, 3rd ed. 2000), 129.

<sup>134</sup> Tribe actually distinguishes between the term ‘separation of powers’ for horizontal separation and ‘division of powers’ for vertical, federal/state separation of powers. See *ibid.*, 124 and 129–130. Others simply refer to the vertical separation of powers as ‘federalism’. See Donald L. Doernberg, C. Keith Wingate and Donald H. Zeigler, *Federal Courts, Federalism and Separation of Powers: Cases and Materials* (Thomson West, St. Paul, MN, 3rd ed. 2004), xii.

<sup>135</sup> Kristan, *op.cit.* note 126, 113.

<sup>136</sup> Hayden himself describes him as “the constitutional theorist most in favor in official circles in Serbia”. Hayden, *op.cit.* note 117, 39.

<sup>137</sup> Miodrag Jovičić, “Promena ustava—probni kamen životnosti jugoslovenske federacije” [Chang-

conference on the issue attested to this, differing only as to their analysis of the main causes of and the proposed solutions to the crisis.<sup>138</sup>

Eventually, the federal amendments had been adopted and an assent thereto had been given by the Slovenian Assembly. However, as elaborated by Kristan,<sup>139</sup> it had little if any choice in the matter. On the one hand, it was hampered by the fact that a common agreement had previously been reached both on a date by which the amendments had to have been passed and on a decision that they would be adopted in a package rather than separately. Slovenia could only refuse its assent to all of the amendments together and, thus, inevitably be seen as a villain of the peace, responsible for all the Yugoslav failings of the recent years. On the other hand, a significant amount of pressure was applied to Slovenia to concede to the amendments, from the Federal Assembly and the Constitutional Commission, from the media and from the then-president of the Presidency of the SFRY Raif Dizdarević.<sup>140</sup>

This leads me to the *second weakness*—one that is important both for the understanding of the events at the time and in reviewing their later interpretation by ‘internal’ commentators. In the moments of crisis, law often gave way to politics—‘internal’ commentators by mere proximity or through direct involvement seldom managed to remain objectively detached and their commentaries have often become personal accounts or pamphlets of their political persuasion rather than objective legal analyses. Milovan Buzadžić, the president of the federal Constitutional Court during the crucial era of Yugoslavia’s dissolution, may serve as an example. In 1994, he published a selection of the Court’s decisions and opinions from

ing the Constitution—A Testing Ground for the Livelihood of the Yugoslav Federation], in Marković, *op.cit.* note 111, 129-36, at 135-136.

<sup>138</sup> See, for example, Mičo Carević, “Problemi ustavnog uređenja i funkcionisanja jugoslovenske federacije” [Problems of Constitutional Order and of the Functioning of the Yugoslav Federation], in Marković, *op.cit.* note 111, 169-176, at 174, on sharing the concern of requiring unanimity for the amendment to the federal constitution. However, compare Đorđi J. Caca, “Zakonodavna funkcija federacije i nadležnost njenih organa prema nacrtu amandmana na Ustav SFRJ” [The Legislative Function of the Federation and the Competences of Its Bodies in the Draft of the Amendments to the Constitution of SFRY], in Marković, *op.cit.* note 111, 281-291, at 289, who warns against taking the tilt towards the assumption of federal competence too far, for “a fetishization of this assumption regarding the relations in the areas of legislation is a negation of the fundamental elements of federalism”.

<sup>139</sup> On this in more detail, see Kristan, *op.cit.* note 126, 127-129.

<sup>140</sup> The Serbian viewpoint was also often dominant at the official gatherings of Yugoslav constitutional lawyers, which were most often also organized in Belgrade or another Serbian city. At the conference on the constitutional amendments in Kragujevac in 1988, for instance, there were thirty-seven speakers from Serbia (or forty if one includes the three from the autonomous province of Vojvodina), two from Croatia, two from Macedonia, one from Bosnia and Herzegovina and one from Slovenia. At the (international) conference on federalism in 1987, the numbers were similar: twenty-three speakers from Serbia, six from abroad, three from Montenegro, two from Vojvodina, Macedonia and Bosnia and Herzegovina, and one from Slovenia, Croatia and Kosovo.



this period with an introductory study that he announced was intended to shed some legal light on the problematic issues involved.<sup>141</sup> However, the beginning of the study betrays a much more involved, lyrical tenor:

“No one’, says Professor Mihajlo Džurić, ‘is ashamed or feels responsible for such a brutal desolation of hopes and aspirations of an entire generation of dreamers and enthusiasts, sacrificed in vain’. The dark, heterogeneous secessionist forces publicly celebrate this Herostratic fame. Distinguished warriors of these ruinous forces hail from the rostra: ‘Mission accomplished—Yugoslavia is no more’. As if history were only—*historia scandalis*. These pygmies do not understand that, to paraphrase Lomonosov, a manling atop a hill is still a midget while a giant is still tall in a cave. One can, this is true, enter history in various ways: as a demolisher or as a builder, as a guardian or a destroyer of a community, as a man or as a miser.”<sup>142</sup>

Whatever one’s thoughts of such a style of writing, it is hard to imagine from this introduction that what follows will truly be an objective legal analysis of the decisions of the Constitutional Court and their implications. Rather, it appears that the former president of the Constitutional Court of Yugoslavia wrote the study in the very livid presence of his own political persuasion and the experiences of ‘his’ Court, which, in 1990, finally—if unsuccessfully—tried to get involved in the resolution of the Yugoslav political conflicts.

#### *4.2. Law and Politics in the Dissolution*

So now, the unfortunate finale. Following the controversial amendments to the federal Constitution, Serbia, Slovenia and other republics adopted amendments to their own. On 18 January 1990, the Constitutional Court sent to the Assembly of the SFRY an opinion in which it found that five amendments to the Slovenian Constitution were at least partially in conflict with the Constitution of the SFRY.<sup>143</sup> In their dissenting opinion, the two Slovenian judges of the Court, Ivan Kristan and Radko Močivnik, mostly focused on the procedural failings of the Court’s decision but also protested the fact that it was adopted after a public debate that did not include either a representative of the Federal Assembly, which initiated

<sup>141</sup> Buzadžić, *op.cit.* note 117, 4.

<sup>142</sup> *Ibid.*, 3.

<sup>143</sup> Opinion IU-102/I-89 of 18 January 1990, *Urb. SFRJ* 10/90, 593-595. The amendments concerned the provisions on the organization of electric industry, railways and post within Slovenia, on the possibility of religious schools being established by the religious communities, on the exclusive competence of Slovenian authorities to declare a state of emergency on Slovenian soil; on the competence of Slovenia in all issues regarding the right to self-determination and on tying the actions of the Slovenian deputies in the Federal Assembly to the directives of the Slovenian Assembly. For the most part, these amendments were a reaction to the federal amendments from a year earlier.

the review, or a representative of the Slovenian Assembly, which could assist in clarifying the contested issues.<sup>144</sup>

Together with the opinion on the Slovenian constitutional amendments, the Constitutional Court adopted similar opinions on the constitutional amendments in the other republics and autonomous provinces. The notable exception was the case of the Serbian amendments, where the Court showed unexpected leniency:<sup>145</sup> its opinion, dissenting opinions notwithstanding, declared as unconstitutional only minor parts of three amendments, while not addressing at all the many provisions that severely hampered the status of autonomous provinces as enshrined in the federal Constitution. This discrepancy can be seen as an inconsistent or hypocritical favoritism towards Serbia; alternatively, it can also be seen as a consistent push by the Court towards ever more centralization, approving of measures that decrease the level of decentralization while opposing those that intended to buttress it.

In any event, these opinions resulted in no immediate formal consequences, as neither the Court itself nor the Federal Assembly had the power to repeal constitutional provisions of the federal units but could serve only to support a stricter review of constitutionality of all other general acts of the republic adopted on their basis. In fact, the Court did go on to issue a number of decisions that annulled numerous Slovenian statutes. Such decisions carried on into the time when Slovenia had already adopted the Declaration on the Sovereignty of the Republic of Slovenia,<sup>146</sup> when Slovenia declared independence and even when it had already received the first set of international recognitions as a sovereign state.<sup>147</sup>

At the end, the conspicuous features of these proceedings—from a certain improvisation on the part of those calling for the review of constitutionality to the procedural ineptitude of the Court, the ineffectiveness of its decisions and a somewhat absurd persistence in ruling on the unconstitutionality of Slovenian statutes into 1992—all served as yet another proof that, in the dissolution of Yugoslavia, the main protagonist was politics, not law.

Some external commentators claimed that the first seeds of Yugoslavia's failure had been planted with the very transition from a centralist

<sup>144</sup> For the text of the dissenting opinion, see Buzadžić, *op.cit.* note 117, 75-77. Dissenting opinions, while envisioned by the system, were not published together with the Court's judgments in the Official Gazette.

<sup>145</sup> Opinion IU-105/I-89 of 18 January 1990, *Urk. SFRJ* 10/90, 598-599.

<sup>146</sup> Joint Decisions IIU 61/90 and IIU 68/90 of 10 January 1991, *Urk. SFRJ* 23/91, 453-454, where the Constitutional Court annulled Arts. 2, 3 and 4 of the Declaration.

<sup>147</sup> For a number of such decisions concerning Slovenia, see Buzadžić, *op.cit.* note 117, 89-133.

to a federal polity<sup>148</sup> or with an imbalanced arrangement of this federal order.<sup>149</sup> In any event, it seems to have confirmed what Smerdel said at the conference following the federal amendments when he outlined two conditions for a successful functioning of the federation: first, a good constitutional text with a clear enumeration of competences and the mutual responsibility of the authorities; but also a consensus—both at the level of the ruling elites and at the level of the entire population—on the “federal constitution being the appropriate framework to solve their problems and disputes”.<sup>150</sup> The problem of Yugoslavia was that it met neither of those two conditions and this problem arose long before the Slovenian amendments in 1989.

In a sense, the predominantly political nature of the entire process of the Yugoslav disintegration was even mirrored by the actions of the international community in recognizing the new states. Following the conclusion of the Hague Peace Conference, “the last chance for Yugoslavia”,<sup>151</sup> the Badinter Arbitral Commission was called upon by the members of the European Community to issue an opinion on each of the aspiring new states as to whether they met certain agreed criteria for international recognition. The Commission indeed adopted its opinion and found Slovenia and Macedonia to be fully compliant with the criteria and Croatia predominantly so. The initial recognition, however, was given only to Slovenia and Croatia, while in the case of Macedonia—even though (and more so than Croatia) it fully met the agreed criteria—it was withheld due to the protests of Greece regarding its official name.<sup>152</sup>

Be that as it may, after a long crisis that neither forced political compromises nor that ineffective judicial decisions could alleviate, Yugoslavia came to an end.

<sup>148</sup> See, for example, Pierre Kende, “Bilan et perspective du fédéralisme en Europe danubienne et balkanique”, in M Martine Méheut (ed.), *Le fédéralisme est-il pensable pour une Europe prochaine?* (Éditions Kimé, Paris, 1994), 129–138, at 133, stating that the transition into federalism is problematic as it empowers the periphery at the expense of the centre and that Yugoslavia was the prime example of its failings.

<sup>149</sup> Jim Seroka, “The Demise of Socialist Federations: Developmental Effects and Institutional Flaws of the Soviet Union, Yugoslavia, and Czechoslovakia”, in Andreas Heinemann-Grüder (ed.), *Federalism Doomed?: European Federalism Between Integration and Separation* (Berghahn Books, New York, 2002), 103–115, at 113.

<sup>150</sup> Branko Smerdel, “Neki problemi odnosa federalizma i organizacije vlasti u aktuelnoj ustavnoj reformi” [Certain Issues of the Relationship Between Federalism and the Organization of Government in the Present Constitutional Reform], in Marković, *op.cit.* note 111, 153–163, at 163.

<sup>151</sup> This was a title of the book that contained the materials of the conference. See Sonja Biserko and Seška Stanojlović (eds.), *Poslednja šansa Jugoslavije* (Helsinki odbor za ljudska prava u Srbiji, Belgrade, 2002).

<sup>152</sup> On this, see Warbrich, *op.cit.* note 114, 29–30.

### **5. Lessons from Yugoslavia in Maintaining the European ‘Federal’ Balance**

Having outlined the rise and fall of Yugoslav federalism, I can now turn to addressing the question in the title of this article by means of a few concluding remarks. What lessons can Yugoslavia’s (wrong)doings impart to other polities—above all the European Union—that are faced with the same task of maintaining the federal balance between the drive for centralization and autonomy concerns?

At first blush, one may find a lesson that hardly needs reiterating: that achieving a suitable balance between the integrative pull of the union and the calls for an adequate autonomy of its members is a task as difficult as it is incessant. In that respect, the Yugoslav experience merely lends additional support to the Union’s own integrative blueprints blues, stated by the Schuman Declaration and regularly confirmed by the fruits of member states’ national politics.

This account of the Yugoslav federal arrangements, however, attempted to go beyond the frontispiece in order to illuminate the functioning of the mechanism behind it. Specifically, it has addressed the practical importance of the relationship of the judiciary with the political branches of the government and, more generally, the interplay of law and politics in maintaining the federal balance.

The viability of such comparisons for the European Union has already been shown by those—albeit rare—studies that tackled the position of the Community judicature in the relationship between law and politics,<sup>153</sup> as well as those that compared the US and European experiences (from both sides of the Atlantic) in relation to courts and federalism.<sup>154</sup> In contrast—and perhaps understandably so—the Yugoslav experience has hitherto been largely neglected. However, for a comparison to be useful, it is not necessary that its solutions be directly applicable or even suitable for the Union, just as it should be irrelevant whether or not they ultimately proved successful.<sup>155</sup>

<sup>153</sup> See Tim Koopmans, *Courts and Political Institutions* (Cambridge University Press, Cambridge, 2003), 98–128.

<sup>154</sup> For a general discussion, see Young, *op.cit.* note 6, 1612–1737; and Keohane, *op.cit.* note 6, 743–765; for a comparison between the European Court of Justice and the US Supreme Court, see G. Federico Mancini, *Democracy and Constitutionalism in the European Union* (Hart, Oxford, 2000), 163–175; for the positioning of the courts in relation to the political branches of government, see Koopmans, *op.cit.* note 153, 168 *et seq.*

<sup>155</sup> Compare Young, *op.cit.* note 6, 1617: “[a]s I will suggest, American federalism may well have failed to protect state autonomy in the ways that may be most important to Europeans. But failures are often even more interesting than successes from the perspective of lessons learned.”

The Yugoslav lessons can best be understood when placed next to the experience of the United States. It is true that, as far as the development of the legal order goes, the former Yugoslavia was several leagues behind the contemporaneous United States and should perhaps rather be compared with the experiences of the United States in the first half of the nineteenth century, leading up to its Civil War: this comparison seems apt not only in the general development of the legal order but in the peculiarities regarding the federal constitutional arrangements,<sup>156</sup> the accentuated role of the federal judiciary immediately prior to the disintegration and its bloody aftermath.

Yet even then, Yugoslavia would have good company in the European Union itself. As stressed by Larry Backer in one of the comparative studies, the Union would benefit most from the US federal experiences, notably the theories of John Calhoun, prior to the Civil War.<sup>157</sup> In a similar vein, Mancini observes that Community law is “still in its adolescence, more or less as American constitutional law was in the age of Marshall and, like American constitutional law, it is suffering all the pangs of nation-building”.<sup>158</sup>

As mentioned and well known, the ultimate end to the federal tensions of the mid-nineteenth century US and the former Yugoslavia was the same—the violent disintegration of the federation. However, is it not interesting that the federal high courts, trying to assert their authority, acted in opposite ways? One, the Constitutional Court of Yugoslavia, acted in a peculiarly centralistic fashion, while the other, the US Supreme Court with its infamous *Dred Scott* decision,<sup>159</sup> sided with the rebellious member states? How does one account, then, for the fact that in both cases the result of the federal friction was the same?

One possible answer might be that the actions of the courts are irrelevant when it comes to maintaining the federal balance. Another might be to stress that both of these cases concerned young, undeveloped legal

<sup>156</sup> One of the Slovenian amendments in 1990 established Slovenia’s right of nullification as the basis for its relationship with the federation. See Franc Grad, “Ustavni akti v procesu osamosvajanja republike Slovenije” [Constitutional Acts in the Process of Attaining Independence of the Republic of Slovenia], 18 *Pravna praksa* (1991), 2-4, at 2-3. A similar doctrine of nullification was asserted by the rebellious states in the US before the Civil War. See Louis Fisher, *American Constitutional Law: Constitutional Structures: Separated Powers and Federalism* (Carolina Academic Press, Durham, 6th ed. 2005), 308.

<sup>157</sup> Larry Cata Backer, “The Extra-National State: American Confederate Federalism and the European Union”, 7 *Columbia Journal of European Law* (2001), 173-240, at 235-236.

<sup>158</sup> Mancini, *op.cit.* note 154, 22.

<sup>159</sup> *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393. *Dred Scott* has since rightly been seen as seriously misguided, not so much for the Court having sided with the states but on the merits of the case: it held, in formalistic but rampantly racist terms, that enslaved and free blacks alike were never intended to be granted full membership in the American citizenry.

systems, and contrast them with the later solidification of the US constitutional order. Finally, it may be that these examples simply show the limits of the judiciary's role in those issues that transcend the framework of simple use or interpretation of the existing constitutional order and cut into the very constitutional fabric of a community or a federal polity. Before the Thirteenth Amendment to the US Constitution, the issue of slavery could simply not be definitively decided by mere recourse to the constitutional text.<sup>160</sup> Similarly, the Yugoslav disputes in the 1980s often returned to the question of the foundation set for a later Yugoslavia by the Anti-Fascist Council in 1943.<sup>161</sup>

Most likely, the true answer is a mixture of these possibilities. Yet they all point to an important feature that is more or less self-evident in the US debate but has largely been missing in both the Yugoslav and the European debates: the importance of the political role of the judiciary, all the more evident in the light of federalism. In the US, the confirmation hearings of a new Supreme Court Justice always brings to the fore issues related to the candidate's political affiliation and preferences, with the question of professional aptitude usually assumed as a given. If one can understand why a similar scrutiny had not been employed in the case of Yugoslavia with its unity of powers and communist dominance, however, it is all the more surprising that this aspect has received so little attention in the European Union. One of the few commentaries of the 'political persuasion' may be found in Mancini:

"The absence of any equivalent of confirmation hearings before the Senate means that the appointments take place without the glare of publicity and without of course the intrusive scrutiny of Europe's elected law-makers. In one sense the composition of the Court reflects Europe's ethnic diversity with great precision, since each nationality is represented. The system also guarantees a less monochrome, more politically balanced Court. Because each Judge's term of office expires after six years and because governments change with equal or greater regularity in most Member States, it is likely that at any given time roughly half the Members of the Court will have been nominated by a conservative administration and roughly half by a socialist or liberal administration."<sup>162</sup>

Yet even Mancini glosses over the actual political orientation of the Court's judges. He seems to assume that governments will appoint those judges that fit the ruling coalition's political preferences. This fact alone can be

<sup>160</sup> Perhaps evidenced best by the decision in *Dred Scott* itself, where the Supreme Court looked at the provision of the Declaration of Independence stating that "all men are created equal" and found it to be "too clear for dispute, that the enslaved African race were not intended to be included" in it. See *ibid.*, 410.

<sup>161</sup> See, for example, a long introductory passage on the role of the liberation and the Anti-Fascist Council in Ivan Kristan, "Ustavni status republike" [The Constitutional Status of the Republic], in Marković, *op.cit.* note III, 347-359, at 347-348.

<sup>162</sup> Mancini, *op.cit.* note 154, 165-166.

placed in doubt, for it seems that many member states, while deciding on their appointees, still primarily look for a good overall command of Community law and at most a formal political acceptability, while not enquiring into the personal political or ideological orientation of the candidates.<sup>163</sup> Yet even if Mancini's assumption were to hold true and the governments indeed appointed judges that fit their political outlook, this would still give us only a general insight as to their general worldview and much less any indication of their ideological beliefs on the fundamental issues of the European order. When it comes to appointing judges to the European Court of Justice, governments still tend to assume that the European Court is 'only' a professional body that applies the Community rules in a formal (or purely technical) manner so as to offer an appropriate interpretation of the Community legal order, no matter how many groundbreaking and controversial judgments it throws their way.

Perhaps this is still a remnant of that oft-praised "anonymity" and seeming insignificance of the Luxembourg Court that helped it to craft the European legal order.<sup>164</sup> In addition, it may be helped by the fact that the arrangement of the Community judicature does not envisage publishing dissenting opinions or announcing the vote on a particular judgment, thus preventing increased public scrutiny of ideological differences in the event of close decisions. Such scrutiny might jeopardize the legal authority of the judgments as well as expose the individual judges to potentially harmful scrutiny from their own member states but it also veils the strong significance that the orientation of individual judges can have for the final outcome of important decisions, wherewith the European Court protects and develops the (constitutional) foundations of the European legal order, never far from the border between law and politics.

It is in this respect that the Yugoslav experience both questions and justifies the title of this article. It seems evident that law can only be independent from politics in a constitutional order with a functioning principle of the separation of powers, with the judiciary serving its proper role as the 'legal' branch of government in a system of checks and balances with the 'political' branches of the legislature and the executive. In Yugoslavia, adherent to the doctrine of the unity of powers, any truly autonomous

<sup>163</sup> It is not uncommon for a member state to appoint as its judge someone who has previously already worked at one of the European institutions, far from its domestic political limelight. The President of the Court of First Instance, Bo Vestedorf, for instance, had previously worked as a lawyer-linguist in the Court's translation service.

<sup>164</sup> Recall the famous passage in Eric Stein, "Lawyers, Judges and the Making of a Transnational Constitution", 75 *American Journal of International Law* (1981), 1-27, at 1: "Tucked away in the fairyland Duchy of Luxembourg and blessed, until recently, with benign neglect of the powers that be and the mass media, the Court of Justice of the European Communities has fashioned a constitutional framework for a federal-type structure in Europe."

'legal' functioning of the judicial branch in relation to the political branches would be seen as an aberration. It may be interesting to note, in passing, that in US practice the Supreme Court is usually described as 'political' when it strongly opposes the political branches of government, while in Yugoslav practice the federal Constitutional Court was 'political' in the sense that it was yet another lever of federal political power.

Although the European Union is not a classical constitutional polity and lacks a clear separation of the three traditional branches of government, it has always strongly adhered to respect for the rule of law and the need for judicial review of the legality of its political acts. At the same time, it would be wrong to assume that the judicial decisions of the European Court of Justice are—or, indeed, should be—completely devoid of political connotations. Every time that the Court in a decision refers to “the current stage” of European integration, it makes a political statement in addition to the judicial decision. Its decision to recognize fundamental rights as unwritten general principles of Community law has been a tacit political decision, as has the reluctance to attribute any significant legal import to the politically enunciated principle of subsidiarity.

However, there are two important differences between the Yugoslav and European experiences in this respect. *Firstly*, because the Yugoslav Constitutional Court was not at the helm of an independent branch of government, the 'political' impetus of its decisions could only go towards supporting one of the political groupings. In contrast, the 'political' decisions of the European Court of Justice are largely concerned with preserving its own position as the supreme judicial authority in and the overall integrity of the Community legal order. *Secondly*, because the Yugoslav Constitutional Court lacked the proper jurisdictional authority as well as a proper self-understanding of the adoption of such political decisions, these lacked a solid constitutional foothold and were, ultimately, legally unpersuasive. Quite the opposite is true in the case of the European Court: the very 'political goal' of establishing its judicial authority requires its decisions to be—and appear—firmly grounded in law and well reasoned. In other words: in the case of Yugoslavia, it was precisely the double denial—both in constitutional doctrine and in practice—of the Constitutional Court that prevented it from successfully performing its legal role.

A more thorough exploration of the ways to ensure that all the European courts play their role successfully is a topic for another day.<sup>165</sup> In short, however, it is vitally important that they take decisions on the basis of clear and meaningful legal principles that adequately reflect the basic legal order and allow for the legal reasoning of the courts to remain legal

<sup>165</sup> For a small step in that direction, see Matej Accetto and Stefan Zleptnig, “The Principle of Effectiveness: Rethinking Its Role in Community Law”, 11 *European Public Law* (2005), 375–403.



and, thus, enact the principle of separation of powers in relation to the political branches of government.<sup>166</sup> There are probably other lessons that the European Union could draw from the Yugoslav experience in maintaining a federal balance. Yet one seemingly paradoxical piece of advice that the experience of the former Yugoslavia seems to impart to the Union is that, if the latter wants to ensure the proper 'legal' functioning of its judiciary in matters of federalism, it should do so by openly acknowledging its 'political' relevance rather than by living in denial.

<sup>166</sup> See, for example, Young, *op.cit.* note 6, 1713, who speaks about the importance of the courts' "conventions employed to interpret ambiguous statutes" and states that clear rules "have the effect of resolving potential clashes between state and federal authority at the level of statutory construction rather than constitutional power". In the European debate, see, for example, Armin von Bogdandy, "Doctrine of Principles", in Joseph H.H. Weiler and Armin von Bogdandy (eds.), *European Integration: The New German Scholarship, Jean Monnet Working Paper 9/03* (2003), available at <<http://www.jeanmonnetprogram.org/papers/03/030901.html>>.