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THE CONSTITUTIONAL COURT OF YUGOSLAVIA IN THE PROTECTION OF BASIC HUMAN RIGHTS

BY DIMITRIJE KULIĆ*

The development of judicial review and protection of constitutionality in Yugoslavia is fairly recent. It was instituted 18 years after the end of World War II, when Yugoslavia had already firmly defined her own approach to the evolution of the state.

The social and political relations which have developed particularly during the past twenty years indicate, to an increasing degree, the necessity and the importance of judicial control of the constitution.¹

Yugoslavia's independence and democracy has required an effective system of protecting constitutional rights, without which the existence of a legal state is unimaginable. It became evident that this type of control was absolutely necessary under conditions of developing self-management democracy and the system of social self-management as it exists in Yugoslavia today. Control and protection of constitutionality in this country during the past 8 years since the establishment of constitutional courts in the Federation (the Constitutional Court of Yugoslavia) and one republican constitutional court in each republic (six republican constitutional courts) as well as one constitutional court department in the province (2 departments) has been effected along the following principles:

1. The constitution is the supreme legal and social document of the country. All functions of authority and public authorization, as well as the function of the political party, emanate from the Constitution and cannot be acquired by any other document. Similarly, each and every function of authority and public authorization can only be effected as provided for in the Constitution.
2. The federation, republics, provinces and communes are all equitable communities in the sight of the Constitution, and they effect their jurisdiction and functions exclusively on the basis of the Constitution. Therefore, none of them are hierarchically superior or subordinated to any other. The legal system cannot be created or regulated arbitrarily. Therefore, the federation, republics, provinces and communes are, in their mutual relations, equitable larger or smaller communities. The obligations of the smaller communities in relationship to the larger ones, the federation and the republics, stem exclusively from the Constitution and the Laws of the Federation, and/or republics. All legal documents must be in accordance with the Yugoslav Constitution.

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¹ The spread of judicial control of constitutionality is especially prevalent after the famous case of *Madison v. Marbury* (1803), 1 Cranch 137, 2 L. Ed. 60 (U.S.S.C.).

3. The control of constitutionality within the jurisdiction of the legislative body, the parliament of Yugoslavia, was relinquished in 1963 with the adoption of the Constitution now in force, and the establishment of constitutional courts which are the only bodies authorized to rule on the validity of a law or act.

The main reason for a solution of this kind was that the legislator cannot be the judge of his own affairs. The control of constitutionality must be entrusted to an unbiased, neutral and qualified body, as the guardian and "servant" of the Constitution, the only one officially authorized in the country to state what is constitutional and what is unconstitutional. This is the constitutional court, which by organization and function, should be specially concentrated and directed towards the important functions of the control and protection of the Constitution and the Law, and in which the stated rights of citizens and social self-management, as the basis of democracy in the country, hold the central place.

Holding this function of control and protection of constitutionality, and protecting the Constitution as an objective document and an objective right, the constitutional court also acts increasingly as a political body for the protection of the citizens' basic rights, thus helping to strengthen and stabilize the legal and social system.

However, what is especially interesting in the contemporary judicial review of constitutionality is the Yugoslav Constitutional Court's jurisdiction in *ex officio* proceedings. The competence to proceed on its own initiative has invested the constitutional judiciary with a place of exceptional importance in regulating social relations; as a result, the constitutional courts do not emerge only as organs of repression. They have not been left in the classical position of having to wait for the initiative of competent subjects who would, according to the Constitution, be able to initiate proceedings. The Constitution has invested the Constitutional Court with this right and thus, has created broadbased possibilities for the Constitutional Court to start proceedings on its own initiative against unconstitutional actions.

Most of the cases brought before the Constitutional Court on the issue of constitutionality and legality, pertained to constitutional rights of social self-management. This was to have been expected even at the time when constitutional judiciary was instituted, as many centres of decision-making within the self-managing system used to pass legislation which not infrequently failed to conform with the Constitution.

On this occasion, I have found it useful to present only a few cases brought before the Constitutional Court of Yugoslavia pertaining to the protection of the basic constitutional rights of citizens.

Protection of the Right of Private Ownership — Annulment of the Law on Nationalizing Building Land

One of the first major decisions of the Constitutional Court of Yugoslavia is certainly the one annulling the regulations passed after April 7, 1965, which, by the Law on the Nationalization of Buildings and Land for Lease, national-

ized building land, thus violating the right of private ownership guaranteed by the Yugoslav Constitution.²

Prior to this court decision, many citizens, work organizations and institutions in Yugoslavia had appealed to the Constitutional Court of the Federation, requesting an investigation of the constitutionality of the Law on Nationalization (and other regulations passed on the basis of the latter) and an annulment of all decisions unconstitutionally violating the interests and rights of citizens and other legal entities pertaining to the right of private ownership. The Constitutional Court accepted these initiatives and, by virtue of office, initiated special *ex officio* proceedings.

During its proceedings in this dispute, the Constitutional Court of Yugoslavia established the existence of unconstitutional regulations on the nationalization of building ground³ and ruled that the citizens' complaints were justified. It was considered that these laws could not constitute a basis for the nationalization of building land. The ruling of the Constitutional Court annulled the regulations of the executive councils of the republics Montenegro, Croatia and Serbia wherein localities and districts had been determined, to be classified as towns and settlements of an urban character, thus, expanding building areas. On the basis of the judicial review proceedings, the Constitutional Court of Yugoslavia established that the executive councils of these three republics had, even after the adoption of the 1963 Constitution, invoked the provisions of article 34 of the Law on the Nationalization of Building Land, on the basis of which certain places were to be considered as towns and urban settlements, so that such land had to be nationalized.

The starting point of the Constitutional Court was that, according to the Yugoslav Constitution, the right to private property could not be abolished. Thus, the laws passed by the executive councils of the republics, which effectively nationalized private property, were contrary to the Yugoslav Constitution.

The Constitutional Court based its decision on the ground that the provisions of the Law on Nationalization⁴ differed in the restriction of ownership rights for building sites, from the provisions of the Yugoslav Constitution, which gives no foundations for the abolition of private property rights. According to interpretation of the Constitutional Court, the Yugoslav Constitution makes a distinction between farming, forest and building land and in this sense, determines different restrictions on the scope of private ownership rights of each of these kinds of land. The indisputable basis for the correctness of the ruling of the Constitutional Court is contained in the provisions of the Yugoslav Constitution which guarantees the right to private ownership of arable land. This provision of the Constitution runs: "Agricultural workers are guaranteed the right of ownership of arable farm land to an area up to

² Ruling of the Constitutional Court of Yugoslavia.

³ The Articles in point were Art. 34 and 35 of the Law on the Nationalization of Buildings for Lease and Building Land, which had been passed by the Federal Assembly.

⁴ Art. 34 and 35, Law on Nationalization of Buildings For Lease and Building Land.

10 hectares per household".⁵ The Yugoslav Constitution also offers the possibility that the Law may provide for the right of ownership of other land, and in particular, the conditions whereby agricultural workers may hold the right of ownership of land which is not arable.⁶ In this way the Yugoslav Constitution left no possibility for restricting arable farming land not exceeding an area of 10 hectares per household; this represents a constitutional guarantee of ownership of this property.

The extension of urban areas to include land which is arable and which is otherwise the private property of agricultural workers, i.e. declaring them construction land, *de facto* constituted the nationalization of private farming land and its transfer to social property. Thus, according to the ruling of the Constitutional Court, the republican executive councils of three republics (Montenegro, Croatia and Serbia) as well as the assembly of the autonomous provinces, districts and communes, by determining as such and/or expanding building areas, effected an unconstitutional action, namely abolishing the right to private property as guaranteed by the Constitution. The Constitutional Court refused to accept the claims of the various participants in this proceeding who justified the nationalization of private land by arguing that it was necessary for the privately owned land in point to become building land and so social property, in the interests of urban development. While admitting urban requirements in this respect, the Constitutional Court of Yugoslavia protected the basic rights which are guaranteed citizens by adhering to its decision that such measures could be taken, and such interests met, only in a manner not conflicting with the Constitution. Therefore the Court retained its stand that such a measure constituted an attack on the private property rights as guaranteed by the Constitution.

Unconstitutionality of the Law on Expropriation

According to the ruling of the Constitutional Court of Yugoslavia, constitutional property rights⁷ were likewise violated by the Law on Expropriation.⁸ According to the ruling of the Constitutional Court of Yugoslavia, just as this federal law was unconstitutional, the provisions of the republican laws were equally unconstitutional. The provisions of the federal law proved to be unconstitutional as regards the expropriation of land.

During the past few years, citizens and other legal entities lodged frequent complaints about the determination of compensation for expropriated real estate. The Constitutional Court of Yugoslavia therefore had to deal not only with the problem of nationalization but also that of expropriation. In these cases, expropriation emerged as a specific form of unconstitutional

⁵ Art. 21 of the Constitution of Socialist Federal Republic of Yugoslavia. (SFRY), *Constitutions of the Countries of the World*, (Dobbs Ferry: Oceana Publications Inc., 1972).

⁶ Art. 21, para. 3 of the Constitution of SFRY.

⁷ Art. 25 of the Constitution of SFRY.

⁸ Art. 35, 43 and 47, Law on Expropriation.

impounding of private property. The conversion to social property was at variance with art. 25 of the Constitution of SFRY which states,

Real estate owned by citizens and juristic persons may be expropriated against equitable compensation, or ownership rights may be restricted, if so required by general interest as spelled out by federal statute.

The right of ownership of objects of special cultural value may be restricted under statute, if so required by general interest.

The practice which violated the citizens' real estate rights was the conspicuously low compensation to those whose land had been expropriated for housing or other construction; the question of adequate compensation emerged as a serious constitutional issue within the framework of so called indirect control, as a repressive form of control of constitutionality.⁹ In this context the Supreme Court of the Socialist Republic of Slovenia¹⁰ initiated proceedings with the Constitutional Court of Yugoslavia¹¹ to decide the constitutionality of the Law on Expropriation.

In considering this disputed issue as one of particular importance in making its final ruling, the Constitutional Court considered the criteria invoked in the determination of compensation for expropriated land of citizens. According to the ruling of the Constitutional Court the unconstitutionality of the Law on Expropriation lay in art. 35 which, in determining a citizen's compensation for expropriated land, took as the basis only the registered revenue on actual land (from a threefold to tenfold annual revenue), determining specifically that compensation could not exceed the market price of the land. As regards the compensation for expropriation of privately owned buildings, the unconstitutional law (art. 43) determined as compensation only the value of the material obtained after the building was demolished, and admitted only in exceptional cases the insignificant costs of demolition.

The Constitutional Court of Yugoslavia declared this Law of Federal Assembly as unconstitutional for the following reasons:

1. Compensation for expropriated real estate according to art. 25 of the Constitution of SFRY, as affected by the Law on Expropriation, was inadequate. The essence of adequate compensation requires absolute indemnification of the owner of privately owned real estate and of the vehicle of the right to use real estate owned by the society. In this dispute, the Constitutional Court adopted the view that in assessing compensation one cannot take into account only a single criterion (the value of material after the building's demolition) and that the solution to the question must be sought in the assessment of numerous subjective and objective factors on which the determination of a just compensation is made in each individual case according to

⁹ Yugoslav constitutional judiciary knows exclusively that the repressive control of constitutionality, and preventive control has not been accepted in this country. Abstract and concrete control of constitutionality should, on the one hand, safeguard the independence of the legislative process, and on the other, should contribute to the complete and effective responsibility of the legislator in passing laws.

¹⁰ A similar motion for estimating constitutionality was also submitted by the Workers Council of the Glass Factory in Parácin (Socialist Republic of Serbia).

¹¹ Ruling U-68/66 of June 28, 1967.

its merits. The Constitutional Court did not accept the excuse that expropriation had been effected in the "general" interest.

2. In determining adequate compensation for expropriated farm land, the Constitutional Court adopted the view that the register revenue of land cannot be the sole and exclusive criterion in complying with the intention of art. 25 of the Constitution of SFRY. According to the view of the Constitutional Court of Yugoslavia, revenue from farming land is, among others, dependent on average yields from various kinds of land over a longer period of time. In the opinion of the court, the register revenue of the land should be taken as the yardstick for income tax liabilities on farming land. Therefore the register revenue differs from the actual revenue according to the private owner's earnings from his farm land. The elements which affect the value of farm land include the value of investments, the location of the land, the other assets of the owner, etc.

In determining an adequate compensation for expropriated buildings owned by citizens, the Constitutional Court adopted the view that one cannot consider as adequate compensation the value of its material after the building has been demolished, but must include the labour invested in it and the value of the material which is incomparably higher when the building is being constructed than after it has been demolished.

For the aforementioned reasons the Constitutional Court of Yugoslavia declared the Law on Expropriation, as a law passed by the Federal Assembly, to be unconstitutional.¹²

Protection of Freedom of Movement (The Maribor Case)

Late in 1967, a decision of the communal assembly in Maribor (Republic of Slovenia) attracted the attention of the Yugoslav public, and the decision has now come to be known in Yugoslavia as the "Maribor Case". The communal assembly in Maribor passed a regulation on December 28th restricting the movements of children and minors under 16. According to this decision, (art. 12), parents and guardians were bound to see to it that children and minors under 16, should not be on the street or in public places after 8:00 p.m. from November to March, and after 9:00 p.m. from April to October, and that sports and other organizations engaged with youth should so arrange their work so that it would end by these times. The same regulation (art. 14) forbade children and minors without adult accompaniment from attending cinema and theatre performances, concerts and other kinds of

¹² During the proceedings of control of constitutionality of the Law on Expropriation before the Constitutional Court of Yugoslavia, the Federal Assembly accepted the conclusions (ruling) of the Court that the law was unconstitutional and according to and in keeping with the Constitution of Yugoslavia, it immediately approached the alteration to comply with the Constitution. The Assembly passed the law amending and supplementing the Law on Expropriation, by which the unconstitutional articles 35, 43 and 47 of the law were dovetailed with art. 25 of the Yugoslav Constitution. At its session of March 20, 1968, having declared the said law not complied with the Constitution and that the ruling of the Constitutional Court of Yugoslavia had been accepted, further proceedings in this disputed case were halted.

entertainment, with the exception of performances for the youth organized by youth or other social organizations. After 8:00 p.m. minors were not allowed to remain, alone or accompanied by adults, at performances, entertainments or night clubs whose programmes and frequenters had an obvious negative effect on the education of youth, nor were they permitted after this time "to loiter unnecessarily in the streets or in restaurants."¹³

The Constitutional Court of Yugoslavia at the request of the Constitutional Court of Slovenia, and after public discussions, decided first to have this case considered by the Constitutional Court of Slovenia in order to investigate the constitutionality of the legislation. That Republic ruled that the legislation in question did not violate the constitutional law of the Republic of Slovenia.

However, within its jurisdiction, and assessing the concord of this decision with the Constitution and Law of the Federation, the Constitutional Court of Yugoslavia adopted the opposite view, it accepted the contention that the case in point was a flagrant violation of art. 51 of the Constitution of SFRY as this decision restricted the freedom and rights of citizens. Art. 51 states:

Citizens shall enjoy freedom of movement and abode.

Restriction of the freedom of movement or abode may be ordered by law, but only in order to ensure the conduct of criminal proceedings, to prevent the spread of contagious diseases, to protect public order, or when the interests of the country's defence so require.

The first reason cited by the Constitutional Court was that the action of the Maribor assembly restricted people's freedom and rights and that a decision of this kind reflected "the relationship of the society and man, the community and the individual, freedom and coercion." Secondly, the antisocial phenomena and other deviations in the behaviour of minors, could not be resolved without an elaborate and coordinated system of educational and other cultural and political measures. The third basis of the decision was that prohibition and prescription of punitive measures infringe upon a certain sphere of human rights, including those of the youth, who are as equal as other citizens in the eyes of the Constitution and the Law. The Court also stated that restricting freedom and prescribing punitive measures as "socially justified" cannot be effected contrary to the Constitution, nor can they be issued outside the competence of the organs which, according to the Constitution and the Law, are solely authorized to prescribe such measures. It was also held that it is the right and duty of the commune to maintain public law and order on its territory, just as it is the right of the commune to take corresponding measures to protect minors. However, these rights and

¹³ The initiative for starting proceedings before the Constitutional court of Yugoslavia was made by numerous youth and cultural institutions — the editorial office of the youth publication "Mladost", the Central Committee of the Yugoslav Youth Union, the Federal Council for Education and Culture, the Institute of Criminology in Ljubijana, the Society for Youth Education and the Society of Friends of the Youth in Slovenia, the Association of Pedagogic Societies in Yugoslavia, the Council for the Education and Welfare of Children in Yugoslavia, the Central Committee of the Youth Union of Serbia and the Faculty of Philosophy in Belgrade.

duties of the commune and the educational aims it wants to attain, can only be effected within the framework provided for by the Constitution.

In the legal assessment of this decision, the Constitutional Court of Yugoslavia reached the conclusion that this kind of decision represented a restriction of freedom of movement not only for children but for minors under 16. According to the Yugoslav Constitution, freedom of movement is one of the basic freedoms of citizens. Restriction of this freedom, according to the Constitution can only be effected in exceptional cases; to ensure the successful conducting of criminal proceedings, to prevent the spread of contagious diseases, to protect public order or in the interests of the country's defence. Even assuming that minors were a danger to public order and peace, such a decision could only be adopted by passing a law and not by a ruling of the communal assembly.

Distinguishing between the guaranteed freedom of adults and those of minors is contrary to the basic principles of the country's democratic and political system and the Constitution which, in granting these rights, makes no distinction between age categories. Taking as a starting point the principle of human equality, the Constitution of Yugoslavia, does not view the freedom of movement of minors any differently than the freedom of movement of adults.

The Constitutional Court of Yugoslavia did not accept the position of the communal assembly in Maribor, that its decision did not violate the Constitution, because minors are under the special protection of the social community, and that parents are entitled to and responsible for the upbringing and education of their children.¹⁴ The Court did not admit the reasons of the municipal assembly maintaining that they have no connection with the constitutional principles of freedom of movement of citizens.¹⁵

The ruling of the Constitutional Court of Yugoslavia in this dispute is significant as from the standpoint of the Basic Law on Minor Offenses and from the viewpoint of art. 49 para. 1, of the Constitution of SFRY which states,

No one shall be punished for any act which before its commission was not defined as a punishable offence by statute or a legal provision based on statute, or for which no penalty was threatened.

In this connection, the Constitutional Court ruled that the decision on public order and peace (especially art. 12 of this decision) was also illogical in conception, as "loitering" is only forbidden for minors under 16, at a certain

¹⁴ Art. 57, para. 2 of the Constitution of the SFRY states, "Minors deprived of parental care and other persons unable to provide for themselves and take care of their rights shall enjoy special protection of the community." Art. 58, para. 3 states, "Parents shall have the right and duty to raise and educate their children."

¹⁵ The ruling of the Constitutional Court in this dispute runs: "It has been established that art. 12 para. 2 and art. 14 of the Decision on public law and order in the Maribor Commune ("Modovcinski uradni vesnik" za občine Dravograd, Slovenj, Gradec in Slovenska Bistrica" nr. 1/68, 2/68 and 20/68) are not in conformity with the Yugoslav Constitution and with art. 2 para. 1 of the Basic Law on Minor Offenses; Provisions of art. 12 para. 2 and art. 14 of the said decision are therefore rescinded as well as provisions of art. 17 para. 1, point 7 and art. 18, para. 2 point 1 and point 2 of the Decision . . ."

time and in a certain way; this would mean that "loitering" is not prohibited for adults, that it is permitted by day, and permitted in places other than the street.

The three cases recorded above are only some of the many disputes the Constitutional Court of Yugoslavia was called upon to settle. The present experience of the Constitutional Court of Yugoslavia has indicated the need to give detailed consideration to its future function and jurisdiction. Yugoslav jurists, particularly those directly engaged with this kind of material, have great interest in further developing and advancing judicial control of constitutionality. In this context, serious work is already under way both in changing the constitutions of the Federation and the republics as well as on enacting some new laws in connection with the pending changes in the jurisdiction of constitutional courts.

The need for a broader and more important role and function of constitutional courts stems from the following:

1. During the past few years (especially between 1968 and 1971), Yugoslavia has approached major constitutional changes and has passed 42 constitutional amendments to the 1963 Constitution of SFRY. These constitutional amendments had, as their most essential aim, the expansion of the legislative competences of the republics and provinces in federal policy making; the jurisdiction of the federation has thus been considerably reduced.
2. The constitutional amendments have likewise resulted in changes in the process of legislation. The Federation has retained jurisdiction mainly over questions of foreign affairs and national defence and the interests of a united market. Almost the entire legislative competence over sovereignty switched to the republics; the logical consequence is that the function of the republican constitutional courts has gained in significance.
3. The constitutional courts must attain greater efficiency in their actions in order to effect a more consistent application and respect of the Constitution and the Law in order to prevent unconstitutional laws.
4. The subjects, so far, who have initiated proceedings before the Constitutional Court, have been state organs and social organizations, either as interested or accused parties in proceedings. Citizens whose constitutional rights have been infringed upon have not been able directly to initiate such proceedings. They could either entrust this initiative to organs competent to start proceedings, or could appeal to the Constitutional Court, which could then decide whether or not it would accept the request to commence an action. If the Constitutional Court decided that there were grounds for initiating proceedings, it would do so by *ex officio* procedure. However, the more consistent protection of man's basic constitutional rights, indicates the need for creating full possibilities for the citizens to initiate such proceedings themselves in cases when their basic constitutional rights have been infringed.

5. Within the Yugoslav reality the following provision of the Yugoslav Constitution is acquiring more and more importance:

The courts follow and study social relations and phenomena of interest in effecting their functions and sponsor motions for preventing socially dangerous and deleterious phenomena and for consolidating legality.¹⁶

The essence of this provision of the Constitution is directed towards creating a new dimension in the jurisdiction of courts, particularly constitutional courts. The Yugoslav Constitution insists on a more marked, complete and organized function of the Constitutional Court in following and studying social relations and problems of importance in protecting constitutionality and legality. The Court as a whole would within its permanent function, the classical function of pronouncing judgment and resolving concrete disputes, operate increasingly as an analyst and observer of social phenomena and events of interest in the protection of the Constitution and the Law; its function would not be restricted solely to the judging of concrete disputes. As a political body, the Constitutional Court would, on the basis of its own practice and that of other judicial organs and scientific study, from time to time draw attention to social phenomena, their manifestations and causes, thus emerging in a broader preventive function of protecting constitutional rights.

¹⁶ Art. 135 of the Constitution of SFRY.