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CONSTITUTIONAL DESIGN AND DESTINY OF THE STATES: THE WEIMAR CONSTITUTION AND THE ST VITUS DAY CONSTITUTION IN COMPARATIVE PERSPECTIVE

***Abstract:** The Weimar Constitution of 1919 and the St Vitus Day Constitution of 1921 were quite different in many aspects. Their comparison is nevertheless of interest not only because it shows some influences of the older one to the younger, but also for the fact that it displays the line of developments of the two countries – Germany and Yugoslavia. If considered from the standpoint of parliamentary government, territorial organization of the two states and some other features the analysis of the respective constitutional developments leads to several conclusions. The two constitutions had their initial shortcomings, but those did not belong to the same area of constitutional law. In Germany they concerned the horizontal separation of powers, whereas in Yugoslavia they belonged to the vertical division of power. Both constitutions under survey ended up in dictatorships. In both countries, attempts were made in the course of history to remedy the initial shortcomings or constructive errors of the two constitutions. In Germany such attempts were successful, which on the contrary was not the case in Yugoslavia. Germany therefore became a well-functioning liberal democracy, while Yugoslavia failed and disappeared.*

Key words: Constitution, Weimar, St Vitus Day, Germany, Yugoslavia, comparison, developments.

1. INTRODUCTION: THE ROLE OF CONSTITUTIONAL DESIGN

Constitutional designs are most certainly influential on the destiny of states. Whether they are always decisive can be however doubtful. The purpose of this little study will therefore be to explore how and to what extent the constitutional designs determined the political and constitutional history of two countries – Germany and Yugoslavia. Some elements

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of the constitutional settlements were considered by the academics to be constructive errors and assessed accordingly. In both countries there were efforts to overcome such errors in construction.

It may seem at first glance that the two constitutions adopted after World War I in the two countries were completely different and quite remote in many important aspects. Their differences were indeed profound, but the two constitution texts had nevertheless significant traits in common and showed influences of the older, German text, on the younger. This paper will deal with the issue of construction errors in the two constitutional designs, as well as with the efforts to repair the constitutional edifice in the respective states. Those errors and attempts to overcome them marked the political developments and the constitutional history of the two countries, leading to divergent outcomes. The topic is going to be researched in the light of the most recent scholarship, however integrated with the conclusions of classical academic contributions in the field.

2. DIFFERENCES AND INFLUENCES

The Constitution of the German Reich of 11 August 1919, called the Weimar Constitution after the city of its adoption, and the Constitution of the Kingdom of the Serbs, Croats and Slovenes, adopted on St Vitus Day, 28 June 1921 and therefore usually known as the St Vitus Day Constitution are marked by striking differences.¹ The Weimar Constitution instituted a republic, whereas the St Vitus Day Constitution provided for a monarchy. The former was passed in a country which had existed in its unified form of modern time for almost half a century, while the latter was a constitution of a new born state, created only towards the end of 1918.

Despite these profound differences of the two constitutions there were provisions evidencing the influence of the German constitution text on the drafters of the other constitution. Such an example are the provisions on fundamental rights, which find place in articles 109–165 WR, corresponding to the articles 22–44 VU. For instance, Article 153 WR can be compared to Article 37 VU. Both provide on constitutional guarantees of property. The beginning of Article 153 WR reads, “Property shall be guaranteed by the constitution.”² This corresponds to the introductory stance

1 WR will be used as the abbreviation for the Weimar Constitution (Weimarer Reichsverfassung) and VU for the Constitution of St Vitus Day (Vidovdanski Ustav).

2 The *Weimar Constitution* – Constitution of the German Reich, German National Assembly, translated by Howard Lee McBain and Lindsay Rogers (https://en.wikisource.org/wiki/Weimar_constitution, 1. 10. 2021).

of Article 37 VU: “Svojina je zajamčena.”³ The provisions are concordant in putting forward two more ideas, namely that the property imposes obligations, as well as that its nature and limits shall be prescribed by law.

Another example of immediate influence of the older constitution text on the younger concerns the protection of labour. “Labour shall be under the special protection of the Reich”, reads Article 157 WR to which corresponds the beginning of Article 23 VU: “Radna snaga stoji pod zaštitom države”. Including this among the provisions on fundamental rights was a novelty. Serbian constitutions of the nineteenth and the beginning of the twentieth century had never had such a guarantee. Its introduction in the constitution of the newly born kingdom, of which Serbia was a part, brings evidence of an immediate influence of the Weimar Constitution on the Constitution of St Vitus Day.

Between the two extremes, clear differences on one side and immediate influences on the other, the two constitutions have features in parallel which call for comparison. This paper will focus on such comparable aspects that are of primordial interest for constitutional developments of the Kingdom of the Serbs, Croats and Slovenes which changed its name into Yugoslavia as of 1929. These aspects encompass the topics of nation and tribes (2), parliamentary government (3), territorial organization of the state (4), and last but not least the destiny of the two constitutions (5). The analysis to follow will display how the destiny of the two constitutions mirrors the destiny of the respective countries in which the constitutions were adopted. One of them managed to overcome the constitutional constructive errors, so as to become a prosperous liberal democracy, while the other failed and disappeared.

3. NATION AND TRIBES

The Weimar Constitution had a short preamble, beginning with the words “Das Deutsche Volk einig in Seinen Stämmen”. Translating into English McBain and Rogers avoided the word “Stämmen”, meaning literally tribes, so as to put “The German people united in every respect”. For the purpose of this paper the German original is of greatest interest, because it has a parallel if not in the text then certainly in the set of ideas guiding the St Vitus Day Constitution. Notably, at the time of adopting the constitution back in 1921 the Serbs, Croats and Slovenes were considered to be three tribes of one and the same nation, which strangely enough

3 Unless otherwise noted all translations in this text stem from its author. The Serbo-Croatian wording is almost a translation from the German original, which reads, “Das Eigentum wird von der Verfassung gewährleistet.”

remained without a name. The formula used by politicians, intellectuals and the public at large designated the nation as one but having three names. The expression “troimeni narod” was currently in use, which would correspond in a somewhat clumsy translation to a “three named nation” in English. The St Vitus Day Constitution was based on the assumption prevailing in the Constituent Assembly that the Serbs, Croats and Slovenes were three tribes of one and the same nation. The Constituent Assembly was indeed divided on the idea of nationhood and of giving a name to the nation and its nation state. Some of its members were in favour of creating a name, like Yugoslavs and respectively Yugoslavia for the country. Others however prevailed in their opposition to this approach considering it artificial, which resulted in the official name of the new state – Kingdom of the Serbs, Croats and Slovenes.⁴

Behind the problem of the country’s name stood the leading concept of international law after World War I, advocated by President Wilson, which put forward self-determination of the people. That was the general idea of the German constitution preamble – the German people, determined to restore and confirm the Reich, has given itself a democratic constitution. It has nevertheless been remarked in academia that the Wilsonian program was not thoroughly carried out, notably to the detriment of Germany.⁵ Despite certain inconsistency in its application the self-determination of the people was a concept which was widely accepted and represented a rule to be followed.

The St Vitus Day Constitution didn’t have a preamble. The royal prerogative balanced the right of the people in a monarchy, but in spite of that the constitution was also laid down on the concept of self-determination of the people. The designed nation without a name was united by the provisions of the constitution as regards the symbols and the language. Article 2 VU provided for the symbols of the Kingdom that were composed of the ethnic symbols of the three ethnicities, whereas Article 3 VU designated the official language as Serbo-Croato-Slovene. In reality there was no such language, but the formula seemed convenient to the drafters of the constitution. The Serbs and the Croats spoke the same language, but that was by no means the case of Slovenes.⁶ The expression was introduced to satisfy the desired national unity.

4 Jovanović, S., 1995, *Ustavno pravo Kraljevine Srba, Hrvata i Slovenaca*, Beograd, pp. 89–90 (the first edition of the book appeared in 1924).

5 Kühne, J.-D., 2020, *Die Weimarer Reichsverfassung im Spiegel zeitgenössischer Betrachtung*, Baden-Baden, p. 20.

6 Jovanović, S., 1995, pp. 90–91; Pavlović, M., 2000, *Jugoslovenska država i pravo 1914–1941*, Kragujevac, p. 157. For the roots of the idea of a three named nation cf.

It has been remarked among scholars that the preamble of the Weimar Constitution was “a table of contents and not a program”.⁷ According to the preamble the German nation adopted a constitution based on liberty and justice. However, the German national unity was not completely undisputed in the time of adopting the Weimar Constitution. It has been remarked in academia that Berlin, as a world metropole, was confronted with the population which had lived in separate German states for generations, so as to acquire regional, cultural and religious characteristic features.⁸ Some scholars insisted on the wording of the preamble to the Weimar Constitution that the German people were united in their tribes – “einig in Seinen Stämmen”, which would mean that the unification process had not been fully completed and the unity fully achieved.⁹

In the case of St Vitus Day Constitution, the situation was more complex than in Germany. The three ethnicities that took a decision to form a common state were considered to be on the path of nation building. It was indeed a program, or design. “Merging of Serbs and Yugoslavs has just started, so that we shan’t be able to realize before the elapse of a good number of years whether the process of assimilation will end up in a victory of the Serbdom, or in its fusion with Croatianness and Slovenianness in Yugoslavism.” Those were the words of Slobodan Jovanović, constitutional lawyer and historian.¹⁰ They fairly bring evidence of the state of mind in the social situation of the newly created state in the 1920s.

The unification of Germany of 1870 was a product of political events and a war, but it was laid down on the prevailing cultural identity and the language, common for all Germans. It was rooted in history, literature, sentiments and memory of the common past, despite significant regional differences and political frontiers that were crossing the German lands. The Serbs, Croats and Slovenes lacked many of these elements. Their history was not one and the same, their developments were divergent, especially for the Slovenes. To some extent the Croats and the Serbs had common sentiments and popular literature, as well as the memory of living together in some parts of the Habsburg Monarchy. They speak the same language, however different from the Slovene. Nation building of Southern Slavs was a noble idea, mostly spread among intellectuals, be-

Trgovčević, Lj., 2005, *Serbien und die südslawische Frage bis zur Entstehung des Königreichs der Serben, Kroaten und Slowenen (SHS)*, *Österreichische Osthefte* 47/1–4, pp. 20–21.

7 Wittmayer, L., 2014, *Die Weimarer Reichsverfassung*, Nexx Verlag, p. 40 (the book was first published in 1922).

8 Fabio, U. di, 2018, *Die Weimarer Verfassung – Aufbruch und Scheitern*, München, p. 88.

9 Wittmayer, L., 2014, pp. 102–103 with reference to Poetzsch.

10 Jovanović, S., 1995, p. 39.

ginning with the first half of the nineteenth century. Those were elements providing optimism for a construction of a nation of Yugoslavs. What the optimistic attitude towards Yugoslavism failed to observe at the time of formation of the Kingdom of the Serbs, Croats and Slovenes was the fact that the nation building had already taken place within each of the three ethnicities. The idea of a Yugoslav nation was somewhat belated and belonged to the set of ideas of the nineteenth century.¹¹

The politicians and constitution drafters were driven by circumstances. Each of the three ethnicities had a certain interest in forming the state in common with the other two. The Serbs tended to achieve a situation in which all Serbs would live in one country and therefore wanted a union with the former provinces of Austria-Hungary. The Slovenes and the Croats feared Italian territorial aspirations because the territories they inhabited belonged to Austria-Hungary, a country that lost the war against the allies, one of which was Italy. That was what made them prefer a union with Serbia, a country which was on the winning side in World War One, instead of remaining alone to claim self-determination of their own. In such a kaleidoscope of trends, tensions, desires, sentiments and intentions the idea of unity and nation building managed to prevail, however by a modest margin in the Constituent Assembly. It had to be forged through the institutions of St Vitus Day Constitution. The kernel of those institutions was the parliamentary government.

4. PARLIAMENTARY GOVERNMENT

The parliamentary form of government was adopted in both constitutions discussed in this paper, notably with considerable distinctions. The German Reich was a republic, while the Kingdom of the Serbs, Croats and Slovenes was a monarchy. These circumstances affected the mechanisms of parliamentary government in the two countries. However, it was not the only point of distinction. The Weimar Constitution provided for the organization of power which stood between the presidential and parliamentary forms of government.¹² Only the latter will be of interest here.

The parliamentary government of the Weimar Constitution has to some extent a parallel in the form of government of St Vitus Day Constitution. The main element of similarity is the one chamber parliament. This calls for explanation and analysis of the relevant provisions of the Weimar Constitution. Article 20 WR provides for Reichstag, “composed

11 Trgovčević, Lj., 2005, p. 230.

12 Fabio, U. di, 2018, p. 17.

of the representatives of the German people”, while Article 60 WR reads, “A Reichsrat shall be established to represent the German states in national legislation and administration”. The two provisions taken together give the impression of a two-chamber parliament of a federation. The impression is nevertheless incorrect, because the Weimar Constitution did not introduce a federal settlement. The German provinces (Länder) did not participate as such in the decision-making process at the level of the Reich.¹³ For traditional reasons the historical provinces were maintained, but they lacked the status of federated states. The system that was in place under the Weimar Constitution has been described in academia as unitary, or unitarist federation.¹⁴ The legislative power was vested in the Reichstag alone. Reichsrat was not a chamber of parliament and its assent in the legislative procedure was required out of courtesy.¹⁵

The St Vitus Day Constitution provided for one chamber legislative body – the National Assembly. Such a settlement was the outcome of the principal stance of the majority in the Constituent Assembly, formed by two political parties – the radicals and the democrats. Both parties had mostly Serbs as supporters. However, entrenching the issue of the organization of power was closely connected to the territorial organization of the state. Remarkably, some of the draft constitutions prepared by parties other than radicals and democrats, as well as by some individuals, envisaged a two-chamber legislative body. That was mostly, but not exclusively, the case of the drafts produced by the parties that enjoyed support among the Croats and Slovenes. Notably the draft made by Stojan Protić, a prominent radical and the first prime minister of the new kingdom, also provided for a two-chamber parliament. Protić was inspired by the Belgian constitution.¹⁶ The reason which guided the majority in the Constituent Assembly of the Kingdom of the Serbs, Croats, and Slovenes to adopt the concept of unitary state was essentially the same as the one of the founding fathers of the Weimar Constitution. It was the fear of separatism, which may threaten to destroy not only a certain constitutional settlement, but also the state itself. The idea of nation state appeared to be embodied in unitarism, hostile to subnational identities.

13 Wittmayer, L., 2014, pp. 138, 142–146.

14 Cf. for unitary state (Einheitsstaat) Menger, C. F., 1990, *Deutsche Verfassungsgeschichte der Neuzeit*, Heidelberg, p. 169; for unitaristic federation (unitarischer Föderalismus) Kühne, J.-D., 2020, p. 24.

15 Wittmayer, L., 2014, p. 326 with reference to Preuss, the father of the constitution, that the system was unicameral; and p. 328 for the assent out of courtesy.

16 See Jovanović, S., 1995, pp. 72–81 and Pavlović, M., 2000, pp. 132–144 for constitution drafts in general; and Pavlović, M., 2000, p. 134 for the Belgian constitution as a source of inspiration.

5. TERRITORIAL ORGANIZATION OF STATE

5.1. THE REICH AND THE STATES

While the provisions on parliamentary form of government stand in parallel because of the existence of one chamber parliaments in both constitutions, the differences arise as regards the territorial organizations of the two countries. The place of the provisions on the territorial organization of the Reich creates the difference already at first glance. Those provisions are at the beginning of the text of the constitution, in articles 1–19 WR, under the title “The Reich and the States”. Once again, the impression is that the Reich is a federation. The Reich’s power to legislate is regulated by enumeration in Article 7 WR. Since there is national legislation and the one of the states Article 13 WR provides that “national laws are superior to the laws of the states”. The alteration of state boundaries could occur according to Article 18 WR only “by virtue of national law modifying the constitution”.

However, Article 15 WR provided that the national government was competent to supervise the execution of national laws and to provide guidelines in that regard. In case of a dispute between the national and state authorities concerning execution of national laws (Art. 15 WR), as well as in case of constitutional controversies (Art. 19 WR) the final decision was with the courts of law. Many elements of the constitutional settlement regarding relations between the Reich and the states were indeed federalist in nature. It was mostly out of fear of dissolution of the country, and in order to suppress separatism that the constitution drafters adopted the concept of unitary state. As remarked in academia, under the Weimar Constitution Germany was not properly unitary, but rather a unitarist federation.¹⁷

5.2. FROM THIRTY THREE UNITS TO NINE AND BEYOND

If compared to the title devoted to the Reich and the states the provisions on territorial units in St Vitus Day Constitution displayed a striking difference. These provisions found their place in Articles 95 to 101 VU, which fell within the title regulating the administrative power. Article 95.1 read, “The administration of the Kingdom shall be carried out in regions, districts, counties and municipalities.” The same article of the constitution provided that a region could not have more than 800.000 inhabitants, and also that the division of the country into regions should apply according to natural, social and economic circumstances.

17 Kühne, J-D., 2020, p. 24.

The formation of regions should have applied by law. However, among transitory provisions of St Vitus Day Constitution there was Article 135 VU which included a deadline for the adoption of the respective statute. It also provided for the situation in which the government and the parliament could not meet the deadline. In the latter case there were some limits for the government. Should the government fail to introduce a bill on the formation of regions within four months from the adoption of the constitution and the parliament would not be able to legislate in three months from the introduction of the bill the government was entitled to pass a decree on the issue. However, in that case certain restrictions were to apply. To expose on the restrictions Article 135 VU included the names of traditional territories of which the new Kingdom was composed: (1) In Croatia and Slovenia four regions shall be formed; (2) Montenegro in its boundaries of 1913 including the county of Boka Kotorska, but excluding the counties of Pljevlja and Bijelo Polje shall be one region; and (3) Bosnia and Herzegovina shall be divided into regions within the existing boundaries (“u svojim sadašnjim granicama”). The deadline posed by Article 135 VU was not met and the issue of formation of regions was entrenched by a government decree, which had a force of statute because it could be repealed or amended only in the legislative procedure. The government decree was issued on 26 April 1922.¹⁸

According to the 1922 decree the Kingdom of the Serbs, Croats and Slovenes consisted of thirty three regions. Croatia was divided in four regions, whereas Slovenia was divided in two. Dalmatia, which is nowadays a part of Croatia, was divided in two regions. Vojvodina, which is nowadays a part of Serbia, was one region. The territory of the Kingdom of Serbia before World War One was divided in seventeen regions, while Montenegro was one. In Bosnia and Herzegovina former districts were promoted to become regions.¹⁹ The regions enjoyed autonomy based on constitutional provisions. Article 96 VU provided for the scope of autonomous competence and Article 97 for the autonomous budget. By virtue of Article 99 VU the regions were entitled to legislate, however the pieces of their legislation were not given the name of laws, but of decrees. Article 98 provided for regional authorities. They were Regional Assembly and Regional Council. The Assembly was elected by the citizens, while the Council was elected by the Assembly. Apart from those there was a governor (veliki župan) as a representative of the central government in the region.²⁰

18 Jovanović, S., 1995, p. 455.

19 Jovanović, S., 1995, pp. 455–456, Pavlović, M., 2000, pp. 164–167.

20 Jovanović, S., 1995, pp. 456–461, Pavlović, M., 2000, p. 162.

The constitutional status of regions in the Kingdom of the Serbs, Croats and Slovenes if compared to those of the states in the German Reich under the Weimar Constitution shows the difference of the two countries. The Kingdom was a unitary state, whereas the Reich was a unitarist federation and only in the last resort of legal analysis a unitary state, because it lacked the essential element of a federation, *i.e.* the participation of the federated units as such in the decision making process. Notably Germany had already been a federated monarchy, as of 1871. The territorial units within the Reich were rooted in a long tradition dating back to the Middle Ages. That was not the case with the new formed Kingdom in the Balkans. The territories it was composed of relied only partly on traditions. That was for instance the case of the Kingdom of Serbia, or the Kingdom of Montenegro, or of Croatia under the settlement of 1868 made within the Hungarian part of the Habsburg Monarchy. To some extent that was the case of Dalmatia as well, having been a dominion of the Austrian Crown. Other territories, like Bosnia and Herzegovina for example, had neither been independent states in modern era or had lacked a full status of a Habsburg Crown dominion. That also applies to Slovenian lands, as well as to Vojvodina and some parts of Croatia.

Among many intermingled elements influencing constitutional developments of the new Kingdom, born in December 1918, it is the evolution of territorial organization of the country that probably best shows the mainstream of its history. In brief, the parliamentary government of St Vitus Day Constitution failed because of the high political tensions between the Serbs and the Croats. The tensions reached their peak in 1928, when shooting in the National Assembly occurred. The leader of the most influential Croatian political party was murdered in parliament, while in session. The murderer was a Serb from Montenegro. The Crown reacted by suspending the constitution and introducing royal dictatorship on 6 January 1929.²¹ Under the dictatorship the country changed its name into Kingdom of Yugoslavia. The alteration of the name was in line with the king's idea of integral Yugoslavism, which was then favored by the Crown and became the official ideology. The idea was reflected in the new territorial organization of the country, however in a controversial way.

On the one hand the Crown favored integral Yugoslavism, which was aimed to pose foundations of a nation state of the Yugoslavs, while on the other the territorial organization of the state was reshaped so as to meet some of the Slovenian and Croatian political demands. The Crown

21 Pavlović, M., 2000, pp. 200–212 for the event in the National Assembly and its consequences. For the introduction of royal dictatorship cf. Mirković, Z., 2017, *Srpska pravna istorija*, Beograd, pp. 228–231.

reached out to those ethnicities, but the reform stopped half way. The new legislation introduced in June 1929 abolished the regions and provided for three types of territorial units. From bottom up they were municipalities, counties and banovinas (in singular: banovina).²² The term banovina stems from Croatian political history and it was aimed to enhance the melting pot and the formation of true Yugoslavs. There were nine banovinas and apart from those a special administrative unit for the capital city of Belgrade. Following the principal idea of creating a nation the territories of the banovinas did not correspond to the ethnic boundaries. Neither were the banovinas given the name of the three recognized ethnicities forming the population of the country. The banovinas were named after rivers which marked their territories in geographical terms.

In the West of the country lay the Drava banovina, with the seat of its administration in Ljubljana. That was the only one among the new territorial units which covered the ethnic territory of one of the recognized ethnicities, because all of the Slovenes lived in that unit. The Croats had the majority in two banovinas. One was the Sava banovina with the seat in Zagreb and the other was Primorska (meaning: littoral), which had its seat in Split. Primorska was the only banovina that escaped the rule of being named after a river. The Vrbas banovina had a seat in Banja Luka, whereas the Drina banovina had a seat in Sarajevo. The latter unit spread its territory on both banks of the Drina river. The Zeta banovina had a seat in Cetinje. Its territory mostly covered the pre-war Kingdom of Montenegro. In the South-East of the country lay the Vardar banovina, which had its seat in Skoplje. To the north of it was the Morava banovina, with the seat in Niš and in the North-East of the country was the Danube banovina with the seat in Novi Sad, spreading its territory on both banks of the Danube. Between the Morava and the Danube banovinas the capital city of Belgrade was situated, with its own administration.

This territorial organization survived the royal dictatorship, which ended in 1931, when the king Aleksandar I gave a constitution to the country. The lengthy Article 83 of the 1931 Constitution provided in detail on the boundaries of the nine banovinas thus making unable the introduction of any border change by way of legislation. Articles 84–95 provided for the organization of power within a banovina. The banovina authorities were Ban, Banovina Council (banovinsko veće) and Banovina Committee (banovinski odbor). Ban was appointed by the Crown to represent the central government, the Council was a representative body, elected by the citizens with a four year term of office, while the Committee was appointed by the Council, to serve as executive organ.

22 Jevtić, D., in: Jevtić, D., Popović, D. (eds.), 2012, *Narodna pravna istorija*, Beograd, pp. 273–275; Pavlović, M., 2000, pp. 219–223.

The territorial organization of the Kingdom of Yugoslavia, introduced in 1929 and given status of constitutional provisions in 1931 remained in place for a decade. It was reformed in 1939 on the grounds of a Serbo-Croatian agreement. King Aleksandar I who had introduced the settlement was murdered in October 1934, while in visit to France, in Marseille. As of that date a regency ruled in the name of king Peter II who was a minor. The key figure of the three persons regency was prince Pavle, a cousin of the assassinated king.

Prince Pavle took a realistic stand towards the issue of the state's constitutional settlement, abandoning the idea of the nation building aimed at creation of a Yugoslav nation. He encouraged negotiations between Croatian and Serbian leading politicians instead. Their aim was to achieve unity within the state on a new basis, *i.e.* by introducing elements of federalism in the state organization. The negotiations were complex, lasted for months and eventually resulted in a compromise, the kernel of which was a fundamental reorganization of the Kingdom of Yugoslavia. Since the topic encompassed sensitive constitutional issues the most prominent lawyers on both sides, Croatian and Serbian, assisted the political leaders.²³ The politicians reached an agreement in August 1939 to which the legal experts provided formulations introducing reform of the territorial organization of the Kingdom. The essence of the reform was the formation of Croatian banovina. It was for the first time that a banovina was named after one of the ethnicities inhabiting Yugoslavia. The Croatian banovina was formed by way of unification of the two previously existing banovinas with the Croatian majority of population, to which eight limitrophe counties having the same majority were added.²⁴ Once the Croatian banovina was created it became clear that the territory to the west of it was Slovenian, whereas the one laying to the east of it was Serbian. A draft was prepared to organize the Serbian territory within the Kingdom as one banovina under the name Serbian Lands.²⁵ A trialistic federalism was at the doorstep in Yugoslavia when the World War II broke out.

5.3. GERMAN DEVELOPMENTS

The turning point of constitutional developments in Germany occurred at the end of January 1933 when the President of the Reich entrusted Hitler, the leader of the Nazi Party (NSDAP) to form a cabinet. In a

23 On the negotiations from the standpoint of one of the experts cf. Konstantinović, M., 1998, *Politika sporazuma*, Novi Sad, pp. 11–46.

24 Pavlović, M., 2000, pp. 337–339; Mirković, Z., 2017, pp. 233–234; Jevtić, D., 2012, pp. 299–301.

25 Konstantinović, M., 1998, pp. 578–579.

couple of months the new cabinet thoroughly destroyed the parliamentary form of government of the Weimar Constitution and introduced dictatorship. Within that framework the position of the states/Länder was altered. Slight changes in regard to borders of states took place, but those were of minor importance. Despite the fact that the states were formally maintained the Nazi regime divided Germany into new territorial units, called gaus (in German Gau in singular, Gaue in plural).²⁶ Their number grew as time went on, so as to overcome forty. The states became insignificant because the administration of the country was performed through the new units efficiently submitted to the Nazi Party supervision. Each Gau was headed by a Gauleiter who was a high-ranking Nazi Party official. Germany thus became a proper unitary state.

When Nazi Germany crashed and unconditionally surrendered in 1945 the country was divided into occupation zones conferred to the four allied powers that won the war. As of 1948 the three Western occupying forces, the United States, Great Britain and France launched the process of transferring powers to the Germans, which led to the formation of the Federal Republic of Germany. In the former Soviet occupation zone in the eastern part of the country the German Democratic Republic was formed. The Federal Republic of Germany adopted its constitution in May 1949. The constitution was given the name of Basic Law/Grundgesetz.²⁷ It provided for a federal structure and was maintained after the reunification of Germany in 1990 as the constitution for the entire country.

5.4. YUGOSLAVIAN DEVELOPMENTS

Yugoslavia had ceased existing during World War II, but the country was renewed after the war. During the war along with the struggle for liberation against the enemy, a civil war took place between revolutionary communists and loyalists faithful to the monarchy. The former won in the civil war and established a communist federation in the form of popular republic.²⁸ The federal political settlement had been set up already during the struggle for liberation of the country and before the republic was introduced in Yugoslavia and its first post-World War II constitution adopted. The reason for this can be found in one of the fundamental ideas of the communist policy. Organizing Yugoslavia as a federation was put forward as the solution to the problem of internal, ethnically rooted tensions within

26 Menger, C. F., 1990, pp. 186–187.

27 Menger, C. F., 1990, pp. 203–205; on the background of the Basic Law in brief cf. Popović, D., 2019, *Comparative Government*, Cheltenham UK, Northampton MA, USA, pp. 66–68.

28 Marinković, T., 2019, *Serbia, Alphen aan den Rijn*, pp. 58–59.

the country. Notably, some more ethnic groups were recognized, along with the Serbs, Croats and Slovenes. Right after World War II they were Macedonians and Montenegrins. All ethnicities were equal and the coat of arms of the republic represented them in five torches forming one and unique flame. In course of time however, it has become clear that there was a significant group of population that could also claim recognition within the constitutional system of the ethnic federation. As of the 1960s one more group was recognized as equal with the previously mentioned five. Those were Bosnian Muslims, a group that was officially recognized under the name Muslims (Muslimani). The name nevertheless was by no means designed to stress a religious element characterizing the group. It was used in a somewhat inappropriate manner to stand for the group's ethnicity.²⁹ The evolution of the communist federation in Yugoslavia showed constitutional instability in spite of a mostly personalized government of the strong man of the regime. The regime even managed to last for a decade after the strong man passed away, but then eventually crashed in a bloodshed and a fratricidal war in the 1990s.

6. DESTINY

6.1. THE APPROACH

Turning to the destiny of the two constitutions that have been compared in this paper it comes to one's mind that there may have been constructive errors inherent in those two, which decisively influenced not only their destiny, but to a certain extent also the evolution of the two countries – Germany and Yugoslavia. There are similarities in regard to the end of the two constitutions. Both were succeeded by dictatorships. There was a difference in form however. The Weimar Constitution has never been repealed. As of 1933 it was drowned in new legislation that introduced the dictatorship of the Nazi Party. On the contrary, the St Vitus Day Constitution was formally suspended when king Aleksandar I introduced royal dictatorship in 1929. The issue of a constructive error in the Weimar Constitution as the reason for its failure has been treated among German scholars. Some of them labeled the issue as such, whereas others tried to consider the failure on a broader basis. They went beyond the text of the constitution so as to take into account the implementation of its provisions. Nevertheless, even following the latter approach one cannot escape the question of constructive errors, because the implementation of the constitution was simply based on the text of its provisions.

29 Popović, D., 2003, *Le fédéralisme de l'ancienne Yougoslavie revisité. Qu'est-ce qui n'a pas fonctionné?*, *Revue Internationale de politique comparée*, Vol. 10/1, pp. 43, 48–49.

6.2. THE WEIMAR CONSTITUTION: ERRORS AND CORRECTIONS

Considering the deficiencies of the Weimar Constitution on a broader basis and especially the decline of the support in the electorate to the political parties that were faithful to the constitution Kühne refers to a remark of a Prussian politician who expressed wonderment that the constitution had managed to last until 1933.³⁰ The same scholar put forward what he labeled as intrinsic weak points of the constitution. The most outstanding among those was in his view the cohabitation in case of a political divergence between the head of state and the coalition government, like the one which existed under Hindenburg's presidency. The constitutional provisions regulating such a situation were in the author's opinion incomplete or full of gaps (lückenhaft).³¹ This goes along the line of reasoning adopted by Di Fabio, who also insists on the shortcomings of the constitutional settlement at its origin, situating them in the organization of power. In his view the main problem of the Weimar Constitution was indeed inherited from the previous German constitutional regime, which was in place under the monarchy. Di Fabio put it explicitly that the constitutional error had been conceived in the German Empire/Kaiserreich. Notably, according to the constitutional settlement of 1871 the cabinet of the Empire stood between the Parliament and the Crown. The Emperor had a say in political matters, such as for instance on war and peace, on the armament, foreign affairs, but also in social policies.³² That pattern of relations of the state organs was substantially reproduced in the Weimar Constitution, with the sole difference that the Reichspräsident replaced the Emperor. The chancellor as prime minister was not only accountable to the Reichstag, but was also the Reichspräsident's chancellor, the circumstance which brought a significant ambivalence to his position. The two scholarly opinions just mentioned have a common ground. They find the deficiency of the Weimar Constitution in the horizontal separation of powers. It can be argued at this point that the German constitutional history showed developments which led to the rectification of the weak point of the Weimar Constitution. It occurred with the adoption of the Basic Law/Grundgesetz providing for a constructive motion of censure, which stabilized the executive and removed the ambivalence existing in the chancellor's position while the Weimar Constitution was in force.

30 Kühne, J-D., 2020, p. 28.

31 *Ibid.*, p. 29.

32 Fabio, U. di, 2018, p. 74.

6.3. THE ST VITUS DAY CONSTITUTION: CORRECTION ATTEMPTS

The Yugoslavian evolution was different from the German constitutional developments. The horizontal separation of powers provided for by the St Vitus Day Constitution was probably the most advanced form of parliamentary government in the entire history of Yugoslavia. This may be surprising given the fact that the constitution was suspended after a horrible, violent incident which took place in Parliament while it was in session. A thoroughly parliamentary regime has never been restored in the country. The failure of the St Vitus Day Constitution however, lay outside its provisions on parliamentary government.

The constitution's construction error was not rooted in the horizontal separation of powers, but quite the contrary in the vertical division of power. From the very beginning *i.e.* as of the unification of South Slavs in the Kingdom of the Serbs, Croats and Slovenes, there was a fundamental dilemma concerning the territorial organization of the kingdom. The main question was whether the country should be a unitary state or organized as a federation. The former model was adopted in the St Vitus Day Constitution. The latter, being always perceived as an ethnic federation, met opposition of those who claimed that it would lead to the destruction of the state, because of the idea to found a federation on ethnicity. An earlier attempt to introduce a federal structure in Yugoslavia occurred under the monarchy on the eve of World War II. It was based on the agreement concluded between the Serbian and Croatian political leaders, which resulted in a constitutional reform, but remained unaccomplished.

Federalism was introduced in Yugoslavia under the communist regime at the end of World War II. It was an outstanding feature of the revolutionary constitutional settlement within the framework of a people's republic, but the system nevertheless eventually proved a failure in the outcome. The most prominent Yugoslav constitutional lawyer Slobodan Jovanović assessed the feasibility of federalism in Yugoslavia at the beginning of the country's constitutional developments and once the federalism was introduced, soon after its introduction. Back in the 1920s analyzing the prospects of introducing federalism in Yugoslavia Jovanović commented on the prerequisites for such a constitutional settlement. One federalist role model was Germany with the preponderance of a strong militarized state enjoying hegemony within the federation, and the other was the USA with the strong centralized political parties as pillars of the political system. Jovanović identified neither of the prerequisites characterizing the role models that might serve the task of accommodating federalism in Yu-

goslavia. There was no military organized hegemon state, nor were there centralized political parties with the influence in the entire country. The author therefore remained skeptical as regards the introduction and prospects of federalism. Decades later, observing from the exile after World War II, Jovanović labeled the communist federation as an “experiment” in the one party political system.³³ This would mean that albeit outside of liberal democracy one of the abovementioned requirements was nevertheless fulfilled. There was a strong and centralized communist party to enforce federalism. Commenting on Jovanović’s opinion Pavković remarked that the system crashed when slowly, in the course of time the communist party lost its highly centralized character and was replaced by the communist parties of federated republics. They only preserved the common name, which served as a cover and an ideological label of the political and constitutional settlement.³⁴

The dissolution of the unique and centralized communist party by way of strengthening its components was reflected in constitutional developments. The crucial phase of the entire evolution took place while the 1963 Constitution of Yugoslavia was in force. That constitution was an example of constitution making without nation building. It was first melted in numerous constitutional amendments and subsequently replaced by the 1974 Constitution which considerably reduced powers of the federal authorities, transformed the state into a confederation and eventually led to the dismantling of Yugoslavia.³⁵

In his voluminous book on the Weimar Constitution, which appeared in the 1920s and has been already mentioned in this paper, Wittmayer compared the German constitution with the constitutional settlements in the USA and Switzerland. The author presented one of his conclusions as a “paradoxical formula”. Its essence may be reproduced as follows: “The stronger the federalist idea [...] the less of a federation [...] until it becomes a confederation.”³⁶ The Wittmayer’s formula seems to have predicted the history of Yugoslavia. Once the federation was introduced it could not resist the centrifugal force of its components, which was growing in the

33 On Jovanović’s opinion cf. Pavković, A., 2008, *Slobodan Jovanović – jedan nesentimentalan pristup politici*, Beograd, p. 356.

34 *Ibid.*, p. 357.

35 Marinković, T., 2019, pp. 67–69; Marković, R., 2020, *Ustavno pravo*, Beograd, pp. 142–145; Popović, D., Ustav Republike Srbije od 2006. u istorijskoj perspektivi, in: Ilić, T., Božić, M. (eds), 2020, *NOMOPHYLAX, Zbornik radova u čast Srđana Šarkića*, Beograd, pp. 607–608.

36 Wittmayer, L., 2014, p. 149; Wittmayer’s formula also matches the evolution of Belgium, a country that initially was a decentralized unitary state, which was transformed into a regionalized state, then a federation and later on into a confederation.

course of time. A rigid and ethnically based communist federation was introduced in the beginning. The country was subsequently subject to transformation under the pretext of improving the federal settlement by introducing more decentralization, which indeed served the purpose of enhancing powers of the elites in the federated republics. These elites managed to introduce a confederal constitutional settlement and eventually dismantle the country.³⁷ Federalism in communist Yugoslavia turned out to be inefficient and unable to put an end to the inter-ethnic tensions it was supposed to soothe.

7. IN THE GUISE OF CONCLUSION

Both constitutions compared in this paper encompassed constructive errors, but those did not belong to the same area of constitutional law. The Weimar Constitution had a shortcoming in the horizontal separation of powers, whereas in the St Vitus Day Constitution it was in the vertical division of powers. The constitutional developments of Germany and Yugoslavia showed trends aiming at overcoming the constructive errors by introducing alterations in the respective constitutional settlements. The alteration consisted of strengthening the executive in the parliamentary form of government and reshaping the position of the head of state in Germany. In Yugoslavia the crucial change was the introduction of federalism, although within a communist system. The German reform proved successful, whereas the transformation of the constitutional settlement was a failure in Yugoslavia. Therefore, two questions arise at this point as regards the latter country. Firstly, was the construction error of St Vitus Day Constitution irremediable? Secondly, if that was not the case, what could have been a remedy?

Answering the first question could by no means be in the affirmative. The unitary form of state was not the only possible option for the vertical division of power. Moreover, a federal constitutional settlement had been suggested in the time of drafting the St Vitus Day Constitution. The suggestions were mostly in favor of introducing a federal structure of the state based on ethnicity. Had a federation based on ethnicity an alternative model in Yugoslavia in those days? It could be hardly imaginable for various reasons.

The only plausible alternative to ethnic federation could have been to lay down the territorial organization of the state on the units it was

37 On dismantling the country and the formation of rump – Yugoslavia cf. Popović, D., 2021, *Constitutional History of Serbia*, Paderborn, pp. 220–223.

composed of. The territories that the country was composed of inherited borders created to meet requirements different from those the new kingdom was confronted with. In some cases such territories could not be properly defined in terms of frontiers between them. It was different in German lands, where the old monarchies had their traditional frontiers, separate evolutions, ruling dynasties and the like. Besides, some of the historical units in Yugoslavia were ethnically homogeneous, while others were contested between two ethnicities. The tensions within the country were ethnically rooted. The ethnicity was at stake and represented a challenge.

A path towards a model of state organization based on ethnicity was opened at the end of the Yugoslav monarchy but remained unachieved. That model was adopted and carried out later on under the communist rule in the country. Two more questions are therefore important from a historical perspective: a.) was the ethnic federation in principle a solution to the problem of ethnic tensions in Yugoslavia, and b.) why didn't it work?

Eminent scholars expressed unanimity giving replies to the first question on ethnic federation. In his memoirs posthumously edited by his son and published towards the end of the last century, professor Konstantinović, from the Law School of Belgrade University, and former justice minister, reported he had tackled the issue of post-war constitution of Yugoslavia in October 1944 while in exile in London. The occasion was of particular importance. He had a conversation with Šubašić, former ban of Croatian banovina and at the moment the prime minister of the royal government in exile. Šubašić was committed by the British to make a deal with Tito, who was most likely to win in the Yugoslav civil war. Tito exercised the military control of the situation in Yugoslavia, although the country was still partially occupied by the Germans. The idea of a political deal was to form a Yugoslav government of national unity, by a fusion of the exiled royal government and Titoist authorities in the country. Šubašić asked Konstantinović about his views on the post-war constitutional settlement of Yugoslavia, as regards "competence of federative autonomous units". Konstantinović wrote reproducing his own answer to the question, "three units, divided into several autonomous units with broad powers, and full self-government of villages".³⁸ The number of units forming Yugoslavia is not of primordial importance for the model advocated by Konstantinović. The conversation took place before the government of national unity formed in November 1944 accepted the idea of the Titoist National Liberation Movement to recognize more than three ethnic groups. The essential was the concept of ethnic federation, which was clearly supported by Konstantinović, a renowned professor of law and a pre-war minister of justice.

38 Konstantinović, M., 1998, p. 451.

Slobodan Jovanović expressed the view that introducing federalism in Yugoslavia both on the eve of World War II and after that war were indeed experiments. His opinion was that the centralism of the organization of power had by no means provided strength to the country. In a lecture of 1939, his suggestion was to give up the idea of Yugoslav nation building and to favor liberal nationalisms of the Serbs and Croats, in an atmosphere of a rational approach of both groups to the question of constitutional settlement of Yugoslavia.³⁹ Jovanović did not live to see the disintegration of the country in the 1990s, but his view nevertheless seems to be justified.

Decades after Jovanović passed away Pavković published a voluminous study analyzing the stance advocated by the famous professor who ended his life in exile. The title of Pavković's essay shows the essence of both Jovanović's and Pavković's opinions – *An Unsentimental Approach to Politics*. Yugoslavia could have survived had it been organized on strictly rational premises, which regrettably lacked throughout its history. Liberal nationalism may be subject to criticism. However, despite all deficiencies it was fruitfully combined in modern times with a pattern of organization which emerged in Europe at the supranational level. Such a model might have proved successful within the Yugoslav framework had there been enough enthusiasm in favor of a rational approach to politics. On the contrary, the sentiments prevailed providing the main reason for the dismantling of Yugoslavia.

At the very end of this paper something should be added to explain the failure of Yugoslavia. The statement that the lack of rational approach to the constitutional issues was catastrophic for the country deserves a little note. A survival of the communist federation after a possible shift of regime in the 1990s was imaginable. The dismantling of the country could probably have been avoided. The problem however was in the founding principles of federalism, as practiced in the communist regime. Notably, a proper ethnic federation could have been preserved, had Yugoslavia had such a model carried out thoroughly. Once six ethnic groups were recognized as of the 1960s the problem consisted in the fact that not all of them were properly given their territories. Bosnia and Herzegovina did not fit the pattern of a homeland for one of the ethnicities, for it was multiethnic from the beginning and remained such. In addition to this there has never been an adequate response to the question of the status of internal minorities *i.e.*, inhabitants of one ethnicity living on the territory of another.⁴⁰ In other words, to be able to survive Yugoslavia needed a much more complex structure than the one which had been introduced under the communist

39 On Jovanović's opinion cf. Pavković, A., 2008, pp. 357–361.

40 Popović, D., 2003, p. 48.

rule immediately after World War II. Konstantinović was therefore right in 1944 to point out to Šubašić that the principal constituent units of the federation should include autonomous units within them.

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USTAVNO UREĐENJE I SUDBINA DRŽAVA:
VAJMARSKI I VIDOVDANSKI USTAV
U UPOREDNOJ PERSPEKTIVI

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APSTRAKT

Vajmarski ustav iz 1919. i Vidovdanski ustav iz 1921. bili su prilično različiti u mnogim aspektima. Njihovo poređenje je, međutim, od interesa ne samo zato što pokazuje neke uticaje starijeg ustava na mlađi, već i zbog činjenice da prikazuje liniju razvoja dve zemlje – Nemačke i Jugoslavije. Ako se posmatra sa stanovišta parlamentarne vlade, teritorijalne organizacije dve države i nekih drugih karakteristika, analiza odgovarajućih ustavnih dešavanja dovodi do nekoliko zaključaka. Dva ustava su imala početne nedostatke, ali oni nisu pripadali istoj oblasti ustavnog prava. U Nemačkoj su se ticali horizontalne podele vlasti, dok su se u Jugoslaviji odnosili na vertikalnu podelu vlasti. Oba ispitana ustava završila su u diktaturi. U obe zemlje tokom istorije bilo je pokušaja ispravke početnih nedostataka ili konstruktivnih grešaka u dva ustava. U Nemačkoj su takvi pokušaji bili uspešni, dok to nije bio slučaj u Jugoslaviji. Nemačka je zato uspela da postane liberalna demokratija koja dobro funkcioniše, dok je Jugoslavija nestala kao država.

Ključne reči: Ustav, Vajmar, Vidovdan, Nemačka, Jugoslavija, poređenje, razvoj.

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