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INTERIM REPORT

ON THE CONSTITUTIONAL SITUATION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA

Adopted by the Venice Commission at its 48th Plenary Meeting, (Venice, 19-20 October 2001)

Based on comments by:
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INTRODUCTION

1. By letter dated 18 September 2001 the Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, Mr Gunnar Jansson, informed the Venice Commission that his committee had decided to ask the Venice Commission for an opinion on the constitutional situation in the Federal Republic of Yugoslavia.

2. Following this request a Commission delegation composed of Vice-President Tuori (Finland), Mr Batliner (Liechtenstein), Mr Jowell (United Kingdom), Mr Buquicchio and Mr Markert from the Secretariat went to the Federal Republic of Yugoslavia from 30 September to 3 October 2001. In Belgrade the delegation met representatives of the Federal authorities (Mr Grubac, judge at the Federal Constitutional Court, Mr Samardzic, Adviser to President Kostunica,and Mr Zugic, Head of Multilateral Activities at the Ministry for Foreign Affairs), of the authorities of the Republic of Serbia (Mr Korac, Vice Prime Minister, Ms Karamarkovic, President of the Supreme Court of Serbia, and Mr Ivosevic, Vice-President of the same Court) and of the Belgrade Centre for Human Rights. In Montenegro it met the Ministers for Foreign Affairs and Justice, Messrs Lukovac and Sturanovic, the Speaker of the Assembly, Ms Perovic, the President and judges of the Constitutional Court, the adviser of the President, Mr Vukovic, representatives of the opposition coalition "Together for Yugoslavia" including Mr Bulatovic from SNP, Mr Soc from NS and Mr Bojovic from SNS, Professor Sukovic from the Academy of Science and Mr Peel-Yates, Head of the OSCE-ODIHR office. The delegation would like to thank the Council of Europe offices in Belgrade and Podgorica for their assistance in preparing and carrying out the visit.

3. The present report can only have an interim character. Usually an assessment of the constitutional situation in a country requires an in-depth analysis of the existing constitution and the mains laws implementing it. In the case of the FRY such an analysis does not make sense at the present stage. The interlocutors the Commission delegation met were unanimous in favouring the adoption of completely new constitutions both at the Federal and the Republican level. As will be set out below, the Federal Constitution is largely obsolete and at the Republican level it seems very likely that the present constitutions will be replaced by much better texts. Under these circumstances it would seem inappropriate and unfair to provide an opinion on the constitutional situation in Yugoslavia, which is destined to be used in the context of the accession of the country to the Council of Europe, on the basis of texts adopted during the old regime. The Commission has therefore chosen to provide an interim assessment of the situation, outlining the main perspectives for the near future instead of concentrating on the legacy of the past.

THE CONSTITUTIONAL SITUATION AT THE FEDERAL LEVEL

1. Present relations between the Federal and Republican authorities

4. The decisive constitutional issue at the Federal level, which has overshadowed all other constitutional issues, is the question of the continuation of the Federation between Serbia and Montenegro. The Republics of Serbia and Montenegro are indeed the only members of the Federation and with the dissolution of the Federation between them the Federal Constitution would disappear.

5. The present Federal Constitution dates from April 1992. It was amended on 6 July 2000 in a way prejudicial to the interests of Montenegro. In particular, the Federal President is now directly elected, making the influence of Montenegro (about 5% of the population) marginal, the powers of the Prime Minister (usually a Montenegrin) were reduced and the mode of election to the Chamber of the Republics is now defined in the Federal Constitution. While this Chamber was previously elected by the Assemblies of the Republics, it is now directly elected by the citizens. The second chamber thereby may become less focused on defending the specific interests of the Republics[1]. The amendments were rushed through in a questionable manner and they are considered illegitimate by Montenegro. As of 8 July 2000 the Montenegrin Assembly decided not to recognise any longer any acts of Federal authorities. It should be noted that even before this decision Montenegro had acted much more independently than foreseen by the Constitution and that Serbia never harmonised its Constitution with the Federal Constitution. At present, only two Federal powers, defence and air traffic control, are still exercised with effect for Montenegro and in Serbia there seems a lot of overlap between powers of the Federal and the Republican level.

6. Indeed, nobody seems seriously to envisage maintaining the present Constitution. The proposals made for a new Federation from the Federal side require a new Constitution; the proposals made by Montenegro imply replacing the Constitution by an Act of Union or similar legal instrument.

7. The most recent proposal from the Federal side is a Platform of 30 August 2001, jointly agreed by DOS, the coalition of the governing parties in Serbia and FRY (and together with the Montenegrin opposition party SNP at the Federal level), and "Together for Yugoslavia", the grouping of opposition parties in Montenegro favourable to maintaining the Federation. This platform provides for only minimum powers of the Federation, mainly in the areas of foreign affairs, defence and maintaining a common market. The Montenegrin Platform is confederal, based on the voluntary union of two sovereign States, each of them enjoying full international personality. The two approaches will be analysed below in more detail.

8. It is clearly a political choice whether a federal or a confederal solution is preferable under the specific situation of the FRY. It is not up to the Venice Commission to take a position in this respect. The present report therefore focuses on the legal aspects of the procedure for arriving at a solution. It has however to be underlined that the present situation is unsatisfactory and cannot continue for very long.

9. First, constitutional relations at present are not based on secure legal foundations. The Montenegrin authorities consider the Federal Constitution illegitimate and disregard it; in Serbia relations between the Federal and Republican level are messy and function mainly because the governing parties in Serbia are represented in the Federal government. Due to the boycott of the Federation on the part of the majority coalition in Montenegro, only the opposition sits in the Federal Chamber of the Republics. The issue of future relations between Serbia and Montenegro risks paralysing reforms. Despite some recently introduced democratic reforms (such as the move in Serbia and at the Federal level to appoint independent judges to the Constitutional Courts), other necessary reforms risk being blocked because of the lack of a constitutional basis. The legal and political uncertainty in turn discourages economic investment.

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[1] *For a more detailed analysis of the amendments see the Report by the International Crisis Group, Current legal status of the Federal Republic of Yugoslavia (FRY) and of Serbia and Montenegro, Washington/ Brussels, 19 September 2000.*

10. Second, from the point of view of the international community it is particularly noteworthy that Montenegro does not formally recognise the FRY foreign office or its representatives abroad (and, conversely, the foreign office does not consult the Montenegrin authorities). Nor does Montenegro recognise the international commitments entered into by the Federal authorities. Following the overthrow of the old regime, the FRY has in particular acceded to a large number of international human rights treaties and is considering accession to others, including the European Convention on Human Rights. This is done without formally consulting the Republics. Montenegro, which does not recognise the Federal authorities, does not officially recognise and implement their acts although, on substance, it has no objections to these treaties. This is obviously a situation which has to be clarified before accession to the Council of Europe could be contemplated.

11. Until now, no serious negotiations at the official level have taken place. These have been blocked mainly for procedural reasons, the Montenegrin government wishing to negotiate with the Republic of Serbia and not with the Federal Government, which it considers illegitimate. Instead the Montenegrin authorities are considering pursuing independence on the basis of a referendum.

2. Legal assessment of a possible referendum on the status of Montenegro

12. The holding of a referendum on the question of the independence of Montenegro would first of all raise the question of its admissibility under Federal law. The FRY Constitution, like most other constitutions, contains no explicit provision on whether it is possible for a federated entity to secede. However, the reference in the Preamble of the Constitution to the voluntary association between Serbia and Montenegro could be interpreted as permitting a secession of one of the Republics. In any case, politically the question of the admissibility of secession under Federal law does not seem relevant. It was striking that during the talks of the Commission delegation with representatives of the Federal or Serb authorities nobody questioned the principle that it is possible for Montenegro to secede. While there was reference to the need for such a secession to take part in a legal and constitutional manner, all interlocutors emphasised that there would be no military intervention or other undue pressure to prevent a secession of Montenegro.

13. As regards the Constitution of the Republic of Montenegro, it mentions twice (Articles 2.4 and 119.1) the procedure for a possible change in the status of the Republic. Independence would be a change in the status of Montenegro and indeed none of the interlocutors of the delegation in Montenegro contested the principle that it is legally possible for Montenegro to become independent although some were politically opposed to such independence.

14. The Constitution contains however strict procedural conditions for any change in status. First of all, according to Article 2.4 "Any change in the status of the country, change of the form of government and any change of frontiers may not be decided without a previous referendum of the citizens."[2] A referendum is therefore a necessary condition for a possible independence.

[2] *This translation is more accurate than the translation provided by the Montenegrin authorities: "Any change … shall be decided upon only by citizens in a referendum."*

15. It is however questionable whether it is a sufficient condition. According to Art. 1.3 of the Constitution "Montenegro is the member of the Federal Republic of Yugoslavia." Independence would therefore require amending the Constitution. By virtue of Articles 117.3 and 118.3 the Assembly shall decide on the proposal for amending the Constitution by the two-thirds majority of votes of all of its Deputies. In addition to the referendum, a two-thirds majority in the Assembly therefore seems to be required at first sight.

16. Several of the interlocutors of the delegation argued that this parliamentary majority is not required following the successful holding of a referendum on independence. The arguments used were that the people are sovereign and parliament is therefore obliged to follow the expressed will of the people, and that independence is a different situation from an ordinary constitutional amendment. In such a case people act as constituent power and the previous constitution loses its validity.

17. The Commission finds these arguments not persuasive. Democracy cannot be reduced to a simple reflection of the popular will. In a State respecting the principles of the Council of Europe decisions have to be taken in accordance with the Law. In its "Guidelines for Constitutional Referendums at National Level"[3] the Commission has stated (at II.B.3) with respect to constitutional referendums: "The use of referendums must comply with the legal system as a whole and especially the rules governing *revision of the Constitution.*" Applied to the present case the need to respect all safeguards set forth in the Constitution is particularly obvious. The Constitution contains no rule as to the majority required for the success of a referendum. A decision on the independence of the country should however not be left to an ad hoc majority in a single vote but requires specific safeguards. It is therefore fully justified if the Constitution requires in addition to a referendum a specific majority in the Assembly.

18. The argument that a decision on independence is not envisaged by the rules for amending the Constitution is in contradiction with the text of the Constitution. Article 119[4] in Part V of the Constitution on Amendments to the Constitution explicitly treats a decision on the status of the country as a constitutional amendment and even requires the dissolution of the Assembly and the election of a new Assembly which again has to decide by a two-thirds majority.

19. While these rules may be considered excessively rigid and were indeed criticised by the Speaker of the Assembly, Ms Perovic from the pro-independence Liberal Alliance, the legitimacy of the Constitution of Montenegro was not questioned by her or anybody else. Its rules have to be fully respected.

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[3] *Adopted at the 47th Plenary Meting of the Commission in Venice on 6 to 7 July 2001, document CDL-Inf(2001)10).*

[4] *Article 119: SIGNIFICANT AMENDMENTS AND A NEW CONSTITUTION*

If the proposal to amend the Constitution shall pertain to the provisions regulating the status of the country and the form of rule, if it restricts freedoms and right or if the adoption of a new constitution is proposed, with the day of adoption of the amendment to that effect the Assembly shall be dissolved and a new Assembly convened within 90 days from the day such an amendment was adopted.

The new Assembly shall decide by a two-thirds majority of votes of all the deputies only on those amendments to the Constitution which are contained in the adopted amendment, i.e. the adopted amendment for the promulgation of the new constitution.

20. Since the coalition "Together for Yugoslavia" holds more than a third of the seats in the Assembly of Montenegro, it is likely that some votes of the Montenegrin opposition will therefore be required for a decision in favour of independence. The representatives of the Coalition indicated to the Venice Commission delegation that they would vote for independence if the referendum were held in accordance with the following conditions:

a) an absolute majority of the registered voters and not only of expressed votes is required for adoption;
b) citizens of Montenegro living outside Montenegro, in particular in Serbia, have the right to take part in the referendum;
c) the voters register is corrected, especially in areas where minorities live;
d) only one question is put at the referendum.

21. It is obviously up to the political parties, respectively the members of the Assembly concerned, to take their decisions. Since some of the conditions mentioned pertain to the referendum law of the Republic adopted on 19 February 2001, the Commission considers it however useful to provide some comments on the most relevant provisions of this law. It should be noted that ODIHR has provided an in-depth analysis of this Law[5]. A working group reviewing the law with respect to a possible referendum on independence has been set up by the Assembly of Montenegro. However, only the pro-independence parties take part in the group which is boycotted by the Coalition Together for Yugoslavia.

22. According to the present text of the referendum law, a positive decision requires participation by more than 50% of registered voters and an affirmative vote of more than 50% of expressed votes. This rule is criticised for two reasons:

a) The Liberal Alliance considers the rule on minimum participation an incentive for a boycott;
b) Together for Yugoslavia considers that a decision for independence should require an absolute majority of registered voters.

23. As regards the first argument, it is true that acceptance by a minimum percentage of the electorate is preferable to requiring a minimum turnout in order not to provide an incentive for a boycott. However, for a question of this importance it would be inappropriate to simply delete the rule on minimum turnout without replacing it by a rule on a minimum percentage of the electorate, leaving only a requirement of a minimum percentage of expressed votes.

24. As regards the second argument, it seems indeed appropriate to require a clear and substantial majority for a decision on the independence of the Republic. While there is no international standard on this matter,[6] it is of fundamental importance that the

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[5] *Assessment of the Referendum Law, Republic of Montenegro, Federal Republic of Yugoslavia, Warsaw, 6 July 2001, accessible at http://www.osce.org/odihr/documents/reports/election_reports/yu/mntasm_reflaw_06jul2001.pdf.*

[6] *Similar questions have nevertheless been addressed in Canada and Ireland. The Supreme Court of Canada, in its judgment in Reference re Secession of Quebec [1998] 2 S.C.R. 217 (CODICES database [CAN-1998-3-002]), referred to a requirement of a "decision of a clear majority of the population of Quebec on a clear question to pursue secession" (§ 93). It declined, however, to specify what would constitute a clear majority, beyond stating that this would involve a qualitative evaluation (§ 87).*

The Belfast Agreement of 10 April 1998 between the United Kingdom and Ireland expressly envisages a possible future transfer of territorial sovereignty of Northern Ireland from the United Kingdom to Ireland if that choice is "freely exercised by a majority of the people of Northern Ireland" (Article 1, Belfast Agreement.). The provisions of Schedule 1.2, Annex A to the Multi-Party Agreement which is annexed to and given force by Article 2 of the Belfast Agreement make it clear that what is meant by a majority of the people is a simple majority of those voting in a poll held for the purpose of ascertaining the will of the people of Northern Ireland

referendum and its results be accepted as legitimate. This applies in particular since the referendum law provides in general that decisions in a referendum are binding without a specific reference to referendums amending the Constitution. It appears that the authors of the law do not share the analysis of the Commission that decisions in such referendums have to be confirmed by a two-thirds majority in the Assembly. This is all the more reason to require an additional safeguard at the level of the decision by the people.

25. As regards the right to vote in the referendum, under the referendum law any citizen of the FRY resident for at least two years in Montenegro has this right. It is fully in line with international standards that in a federal State each citizen votes in the federated entity of his residence, irrespective of the fact of a possible entity citizenship. This voting rule corresponds to present practice in Montenegro for parliamentary elections and, while there may be arguments in favour of allowing all citizens to vote on the question of independence, the right to vote in a referendum should follow the right to vote in elections. A different rule would entail a substantial risk of double voting since Montenegro citizens resident in Serbia may vote in Serbian elections. The Commission therefore fully shares the assessment by ODIHR[7] that the residency requirement is justified in principle, although it seems excessive to require 24 months residence.

26. As regards the electoral register, the OSCE/ ODIHR office in Podgorica shared only to a limited extent the criticism by the opposition parties. In its Report on Elections of Representatives to the Assembly (Republic of Montenegro/FRY) ODIHR found that "the degree of accuracy of the voter register [fell] within the parameters of established democracies with similar registration systems". However, it noted that "nonetheless, errors must be remedied before any future polls in Montenegro".[8] The OSCE seems best placed to provide an impartial assessment of this question and the Commission therefore notes that the electoral register, once corrected in line with ODIHR's recommendations, will provide an adequate basis for carrying out a referendum.

27. As regards other, more technical aspects of the Law, the Commission refers to the thorough assessment by OSCE/ ODIHR[9].

28. To sum up its conclusions with respect to the referendum, the Commission considers that

- It would be advisable to introduce a specific majority requirement into the referendum law for referendums on the status of the country;
- In the case of a positive result, a referendum on independence would have to be confirmed by a two-thirds majority of the Assembly of Montenegro;
- It is in full accordance with international standards that the referendum law requires that voters must have residence in Montenegro.

29. These conclusions show that it will be extremely difficult to settle the status question by referendum in a constitutional way. The opponents of the referendum have more than one third of the seats in the Assembly. According to opinion polls it seems

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regarding its status. This provision of the Agreement has been given effect in the United Kingdom's domestic law by section 1 of the Northern Ireland Act 1998.

[7] *Fn 5, at E.*

[8] *Warsaw, 12 June 2001, accessible at: http://www.osce.org/odihr/documents/reports/election_reports/yu/fry_mont_fin2001pe.pdf , at G.*

[9] *Fn 5 above.*

clear that independence is the preferred option of the majority of voters but far less likely that it would get a majority of registered voters. Montenegrin society is deeply divided on this issue and emotions run high. However, for precisely this reason, it is essential that the legitimacy of a referendum on this issue – in terms of both procedure and results – must not be open to question. Neither independence pushed through by a slight majority nor maintaining a federation rejected by an - albeit not very strong - majority is a satisfactory solution. Both results would risk creating a very unstable situation.

3. Possibilities for a negotiated solution

30. Under these circumstances it should be reconsidered whether it is not possible to achieve a more consensual solution through negotiations. Without doubt the settlement of the status question will have to be confirmed by a referendum in the end. However, the settlement should be based on the will of the large majority of citizens and not on a slight majority or a large blocking minority. Therefore all efforts should be made to arrive at a solution acceptable to the moderates on both sides. Further negotiations and dialogue seem essential.

31. From the purely legal point of view, it does not seem impossible to arrive at a compromise. The stark alternatives in which the issue is usually presented, either a federal State or two independent States co-operating in the framework of a Union, seem indeed irreconcilable. However, looking at the fine print in the proposals, positions seem far closer.

32. As regards the powers of a possible future Union between Serbia and Montenegro, the Platform of the Government of Montenegro of 28 December 2000 mentions:

- Defence and External Security of the Union;
- Foreign Policy of the Union;
- Securing a common market and a convertible currency.

The Joint Platform DOS/ Together for Yugoslavia of 30 August lists:

- Guarantees for the basic rights and freedoms of citizens and protection of special rights for national and ethnic minorities;
- A single foreign policy and the possibility provided for by the Constitution that the member states can establish international cooperation on an individual basis;
- A single defence system and shared border control, with the parliamentary control of defence forces;
- Single market, customs, monetary and foreign trade systems;
- Transportation and communications in accordance with the defence system and international conventions.

33. These lists are not too dissimilar as points of departure for negotiations. Of course, the same terms do not necessarily have an identical content and the Montenegrin proposal provides the central level mainly with a co-ordinating function while the DOS Platform gives to it an integrating function. Nevertheless compromises seem possible. The Federal level is ready to accept that the Federation will exercise in the future only fairly minimal powers. In the area of foreign relations, it seems willing to grant to Montenegro a fairly strong position including the possibility to conclude international agreements. Montenegro wants to join the European Union (as does FRY) and the idea of

ceding sovereign powers to the extent necessary to build or maintain a common market should therefore be acceptable.

34. As regards institutions, both proposals provide for an indirectly elected President and Government/ Council of Ministers. The Montenegrin proposal contains a number of safeguards ensuring parity of representation of the member States in the institution. According to it there is a one-chamber assembly composed on a parity basis while the DOS/Together for Yugoslavia Platform takes into account the different size of the Republics through a two chamber Assembly, with only one chamber having parity representation. The latter proposal also provides for a Federal Court, a National Bank and an Ombudsperson at Federal level. While these proposals contain substantial differences, there seem to exist possibilities of negotiation and compromise for creative lawyers. The Belgrade Centre for Human Rights has drafted two proposals, one called Constitutional Foundations For the New Federation of Montenegro and Serbia, the other a confederal proposal of Articles of the Union[10]. Both proposals would constitute valuable input for future negotiations.

THE CONSTITUTIONAL SITUATION IN THE REPUBLIC OF SERBIA

35. The present Constitution of the Republic of Serbia was adopted on 28 September 1990, before the Federal Constitution. There seems to be general agreement that a completely new Constitution should be adopted that is compatible with modern democratic standards.

36. The Commission welcomes this approach since it is apparent that Serbia can adopt a much better constitution than the existing one. A group of independent experts started already in July 2000 before the overthrow of the old regime to draft under the auspices of the Belgrade Centre for Human Rights a new Constitution of Serbia. It recently submitted an avant-projet[11] which was publicly debated on 22 September 2001. The text, which does not claim to be a complete draft but comes quite close to it, is a remarkable document of the highest quality. Used as a basis it would provide Serbia with a Constitution which could serve as a model for other countries.

37. In particular, the draft

- Is based on a civic and not an ethnic approach to the State;
- Provides for a high level of protection for human rights, with precise and effective rules granting such rights and a careful wording of possible restrictions to avoid misuse of such restrictions;
- Grants constitutional status to international human rights standards;
- Provides for a parliamentary system of government with a strong government and a president with not too many powers;
- Carefully regulates the state of emergency;
- Contains strong guarantees for judicial independence;
- Decentralises the Republic by establishing strong regions;
- Establishes a strong constitutional court.

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[10] *In : Belgrade Centre for Human Rights, Constitutional Reform in Serbia and Yugoslavia., Proposals by an independent group of experts, Belgrade 2001, pp. 81 et seq. and 95 et seq. respectively.*

[11] *Footnote 9, pp. 25 et seq.*

38. While the text does not claim to be a final draft and some approaches might merit further discussion[12], it provides an excellent basis for a future constitution and the Commission can only call on the authorities of the Republic of Serbia to rapidly start work on a new Constitution, taking this text as the basis.

39. It should also be pointed out that some parts of the draft are equally suitable as parts of a new Federal Constitution. This concerns in particular the human rights provisions which are eminently suitable for a future member State of the Council of Europe.

THE CONSTITUTIONAL SITUATION IN THE REPUBLIC OF MONTENEGRO

40. Several interlocutors in Montenegro, among them the Minister of Justice, confirmed that it was intended to draft an entirely new Constitution following a decision on the status. A detailed analysis of the present Constitution seems therefore not warranted.

CONCLUSIONS

41. The Commission notes that it would not be useful at the present moment to provide a meaningful assessment of the constitutional situation of the Federal Republic of Yugoslavia. This is because all of the present constitutions are destined to be replaced by new texts. The Commission is concerned at the lack of secure constitutional foundations, which are impeding necessary democratic reforms at all levels and causing an atmosphere of uncertainty. It calls on the authorities to start official work on new constitutions as soon as possible, taking full account of helpful existing drafts, in particular that of the Belgrade Centre for Human Rights. As regards the question of the future status of Montenegro, it notes that solving this issue by way of a referendum alone presents difficulties in terms both of the legality and the legitimacy of such a solution. The Commission therefore urges the interested parties to try to reach a common proposal through bona fide negotiations, which could then be submitted to a popular referendum and confirmed by the relevant decisions. To clarify the situation would also be fundamental in view of a possible accession to the Council of Europe.

[12] *For example one might wonder whether the situation in Serbia does not require an asymmetric form of territorial government.*