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CONSTITUTIONAL REORGANIZATION OF THE FEDERAL REPUBLIC OF YUGOSLAVIA



Center for Liberal-Democratic Studies

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**Constitutional Reorganization
of the Federal Republic of Yugoslavia**

Report of the Expert Group

30 November 2001

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A Word Beforehand

The study before the reader is a contribution by three eminent international experts in the spheres of federalism and constitutional law to the understanding of a fundamental problem lying ahead of our state. The study has been made on the encouragement of Yugoslav President Vojislav Kostunica and with the financial assistance of the governments of the three authors' respective states – Switzerland, Canada and the Federal Republic of Germany.

The crisis in the Federal Republic of Yugoslavia has riveted the attention of European politicians for quite a while. Even more so after October 5, 2000. Since the former Serbian regime was toppled, the issue of survival of the common state of Serbia and Montenegro has rapidly evolved from a negative to an affirmative standpoint by European and other interested political actors. In the meantime, the European Union, the Organisation for Security and Cooperation in Europe (OSCE), the Council of Europe and the leading states of Europe and the world have taken a positive attitude towards a federal solution to the crisis. A series of statements, declarations and analyses in favour of preserving the common state speak for the fact that, at the very least, the stance of Europe and the world towards the survival of the state has become diametrically opposed to that prevailing ten years ago, when the then federation was in the state of internal collapse.

Just like then, international political actors now proceed from their own, well-thought-out interests in addressing this problem. Naturally, there is no argument about it, whatever the stance a country or an organisation might have taken. This time, the general attitude to the problem is in favour of the idea of preserving and reforming the federation, and all those in this country who advocate the federal solution can be political satisfied. And vice versa, which is becoming increasingly

clear from Montenegrin official views. Consequently, certain political inertia has shifted the arguments in favour of the common state from internal to external, predominately „European“ reasons for preserving and restructuring the federation. In a nutshell, the argument is as follows: „If it is good for Europe, than it is good for us, that is, Serbia and Montenegro in their common state.“

Relevant analyses produced within European organisations, including reports by specialised bodies of the Council of Europe (the Venice Commission) and the OSCE (the Office for Democratic Institutions and Human Rights), are by nature expert analyses, but their political framework has been determined by the policy these organisations have pursued towards the Federal Republic of Yugoslavia. However satisfied with them the local advocates of the federation may be, it is necessary to take into account that these documents, by the nature of things, will not go into the underlying reasons for constituting a state, or a federation for that matter, since they have to stem from internal relations – economic, technological, communication, as well as political, historical and social.

The analysis offered by Fleiner, Watts and Schneider is not only an expert study in the generic sense of the word, but also a scientific analysis in a classic sense, meaning that it had no preset political framework or a goal to adjust their arguments and proofs to. This paper is based not only on systematically studied materials and talks held with all relevant political actors in the country, but also enormous academic reputation of the authors, gained through decades-long research and pedagogical work and expert engagement in solving delicate constitutional and political problems of modern compound states - from Canada and Switzerland to South Africa and Cyprus. The fact that the authors supported in their conclusion a federal solution to the state crisis in the Federal Republic of Yugoslavia conveyed their general position that federalism is indeed able to offer an appropriate balance between unity and diversities, equality and functionality, the principles of the rule of law and political consensus. However, it is also the result of their principled and factual insight into the problem of relations between Serbia and Montenegro. For that reason, the authors offered a string of useful recommendations on mechanisms by which a federal balance can be reached in the concrete case of a two-member federation.

Today, when political interests and passions often hinder a rational search for a way out of the crisis, in Montenegro in particular, the study, produced by the three probably greatest experts in federalism, is priceless in providing for better understanding of the problem and a rational search for a way out of the present-day, seemingly unbreakable, impasse.

Belgrade, January 28, 2002

Slobodan Samardžić

1. Introduction

1.1. MANDATE

At the request of President Kostunica, an expert group of three members was invited to visit Yugoslavia to assess proposals for the constitutional reorganization of the Federal Republic of Yugoslavia. The three members of the expert group were Prof. Dr. Thomas Fleiner, Institut für Föderalismus, University of Fribourg, Switzerland), Prof. Dr. Hans-Peter Schneider (Institut für Föderalismusforschung, University of Hannover, Germany), and Prof. Emeritus Ronald L. Watts (Institute of Intergovernmental Relations, Queen's University, Canada). Our work on this project was made possible by the financial support of the Governments of Switzerland, Germany and Canada, but our assessment has been based independently from the views of those governments.

1.2. TERMS OF REFERENCE

To visit Yugoslavia, meet with representatives of various governments in order to gain insights into political orientations within Serbia and Montenegro, assess the situation of constitutional politics relating to the constitutional reorganization of the Federal Republic of Yugoslavia, and identify possible solutions;

To analyse and assess official documents pertaining to the constitutional reorganization of the Federal Republic of Yugoslavia, namely the "Joint Platform of The Democratic Opposition of Serbia (DOS) and the 'Together for Yugoslavia' Coalition, September 2001", and the "Government of Montenegro Platform for talks with the Government of Serbia on new relations between two states, December 2000", and also supporting documents and other unofficial proposals;

On the basis of talking to political authorities and analysing the documents outlining the proposals, and based on their own international experience and expertise, to draw up from a professional and politically neutral point of view a report with their findings, identification of criteria, assessment of the solutions being offered by the political participants, and recommendations on procedural and substantive issues, including possibly recommendations for more favourable solutions of a democratic character;

To submit their report by 30 November 2001 to the President of the Federal Republic of Yugoslavia and the governments of the Federal Republic of Yugoslavia, Montenegro and Serbia. The report will be made public in its entirety.

1.3. FACT-FINDING VISIT

The expert group visited the Federal Republic of Yugoslavia during the period 30 September to 5 October 2001. In Belgrade, the group met with representatives of the Federal authorities: President Vojislav Kostunica, Mr. Miroljub Labus (Minister of Economic Welfare), Mr. Dragoljub Micunovic (Speaker of the Chamber of Citizens), Mr. Serdja Bozovic (Speaker of the Chamber of Republics), Mr. Savo Markovic, special advisor to the Federal Prime Minister, and Mr. Slobodan Samardzic, and Ms. Ljiljana Nedeljkovic (Advisors to President Kostunica). In Belgrade, we also met with the Premier of Serbia, Mr Zoran Djindjic. In Podgorica we met with Mr. Milo Djukanovic (President of Montenegro), Mr. Filip Vujanovic (Premier of Montenegro), Ms. Vesna Perovic (Speaker of the Montenegrin Parliament), and with a group representatives of the "Together for Yugoslavia" Coalition, including Mr. Predrag Bulatovic (president of the Socialist People's Party), Mr. Dragan Soc (President of the People's Party), and Mr. Bozidar Bojovic (President of the Serbian National Party). Throughout our visit we received full cooperation and assistance from the authorities in all three governments.

During our visit a number of documents were made available to us for consideration. These included the current *Constitution of the Federal Republic of Yugoslavia* (adopted in 1992 and subsequent amendments); the current *Constitution of the Republic of Serbia* (adopted in 1990), and the current *Constitution of the Republic of Montenegro* (adopted in 1992); the *Joint Platform for*

Constitutional Restructuring of the FR of Yugoslavia prepared by the Democratic Opposition of Serbia and the Montenegrin Coalition “Together for Yugoslavia,” and adopted by the Federal Government at its August 30, 2001 session; the Government of Montenegro *Platform for talks with the Government of Serbia on new relations between two states* (December 2000); *The Basis of Defining the New Relationship Between Montenegro and Serbia* (Government of Montenegro (August 1999); *Constitutional Reform in Serbia and Yugoslavia: proposals by an independent group of experts* (Lidija Basta Fleiner, Vlademir Djeric, Marijana Pajvancic, Dragoljub Popovic, Zorica Radovic, and Slobodan Samardzic) published by the Belgrade Centre for Human Rights, 2001, which includes *Proposals for a New Constitution for Serbia*, a *Proposal for the Federation of Montenegro and Serbia* and an alternative *Proposal for the Union of Montenegro and Serbia*; *Proposal for Constitutional Restructuring of the Federal Republic of Yugoslavia* (Vojislav Kostunica, January, 2001); *The Union of Serbia and Montenegro: Proposal for the Reconstruction of FRY* (Bosko Mijatovic, Dragoljub Popovic and Slobodan Samardzic), Center for Liberal-Democratic Studies, Belgrade, 2000).

We have also had the benefit of reading the *Interim Report on the Constitutional Situation* produced by a Venice Commission delegation (19-20 October 2001)¹ That delegation visited Yugoslavia at the same time we were there, and in their interim report their assessment of the constitutional situation has turned out to be in many respects similar to ours. We took also into consideration the *Comments on the Draft “Referendum Law on the State Status of the Republic of Montenegro”* of the Office for Democratic Institutions and Human Rights of the OSCE, Warsaw, 5 November 2001

1.4. THE MAIN THRUST OF OUR REPORT

We found general agreement that the Constitution of the FRY is widely contested and that in virtually all quarters there is agreement upon the need for a restructuring of the federation. The status quo is untenable. At present, in Montenegro only three federal powers, defence, air traffic control and issuing of passports are exercised effectively, and in Serbia there is consid-

1 <http://www.venice.coe.int/site/interface/francais.htm>

erable overlap between the powers of the Federal and Republican levels.

Both the official proposals advanced for reform would involve a major restructuring of the federation. That proposed by the DOS and TFY coalition as a joint platform and adopted by the Federal Government 30 August 2001, envisages a radically more decentralized federation than the present one. There would be limited federal powers, mainly focussed on foreign policy, defence, a single market, and transportation, a bicameral federal legislature with parity for the Republics in the Chamber of Member States, guarantees of basic rights and freedoms of citizens and protection of special rights for national and ethnic minorities, a federal court and an ombudsman. The federation would remain a single international entity. That proposed by the Government of Montenegro proposes a loose confederal union between Montenegro and Serbia in which defence, foreign policy and securing the common market and currency would be responsibilities of the Union, but the member states would internationally be two independent states, and the function of the Union would be limited solely to coordination with parity of the member states a feature of all the joint institutions of the Union.

We have examined these proposals in the light of the historical, social, economic and political context, and the variety of other unofficial proposals that were made available to us. We have done so taking account of the following criteria: (1) the requirements for good governance, (2) maintaining the rule of law, (3) promoting democratic processes, (4) recognizing and legitimizing internal diversity (5) facilitating economic development and welfare, and (6) creating conditions facilitating membership in the European Union and Council of Europe. In the light of these criteria and based on our experience of such institutions elsewhere, in our view the official proposal of the Montenegrin government for a Union of Montenegro and Serbia, unless substantially modified along the lines of the unofficial alternative proposal for a Union proposed by the Belgrade Centre for Human Rights 2001, would be seriously deficient in terms of many of the criteria and particularly in relation to effective governance and to prospects for accession to European Union. The official proposal of the DOS-TFY Coalition meets the criteria better, but in our view requires a number of modifications both to ensure effective governance and also to provide effective safe-

guards for Montenegro as the very substantially smaller partner in the federation.

One important theme running throughout our report is an emphasis upon the importance both of democratic processes seeking a widely based consensus and of legality during any process of alteration if the solution is to have legitimacy both internally and internationally. This means for example that attempting to solve the future status of Montenegro by way of a referendum alone would create serious problems in terms of both legality and legitimacy. For legality and legitimacy, any change in the status of Montenegro will require not only a referendum within Montenegro, but also formal constitutional amendments of the current constitutions of Montenegro and the FRY. Furthermore, to be accepted as legitimate internationally, the referendum in Montenegro will need to be based on a clear question and supported by a clear majority of its citizens. For the latter a majority of those voting will be insufficient. There will need to be at least an absolute majority of voters resident in Montenegro.

Constitutional uncertainty clearly undermines economic development. Consequently we urge the authorities in all three governments within Yugoslavia to work on the constitutional restructuring immediately, with no further delay.

1.5. THE STRUCTURE OF OUR REPORT

Our report consists of six sections. Following the introduction, section 2 deals with an analysis of the current situation of constitutional politics in Yugoslavia. Section 3 examines the current constitutional framework and the requirements of legality and legitimacy in any process of change. In Section 4 we assess the alternative official solutions which have been proposed, as well as identifying useful elements from unofficial proposals. In Section 5 we set out the criteria employed in arriving at our recommendations. Finally, in Section 6 we present 15 recommendations. These recommendations are grouped under four headings: (1) General Procedural Recommendations (Recommendations 1-5); (2) Specific Procedural Recommendations applying to four possible general alternatives (Recommendations 6-9); (3) Substantive Recommendations applying to four general alternatives (Recommendations 10-14); (4) A concluding recommendation on the urgent need for action (Recommendation 15).

2. The Situation of Constitutional Politics

2.1. IDENTIFYING THE PROBLEMS

2.1.1. In General

The main problem arises from the fact that none of the constitutions (federal constitution, and both republican constitutions) is considered to be legitimate. But even more important is that this puts the question of the state as such is at stake. Nobody knows for sure in what state he or she will be living in the near future, what will be the borderlines of that state, what will be the government, and what shall be the democracy he or she will be able to participate in. Passports and citizenship are at stake, as is the currency and the customary right. What will be the taxes and for what state will they be used? Citizens belonging to a minority in a Republic may even fear, that all of a sudden they will be foreigners within their former home state and discriminated as foreigners with limited access to labour, property and democracy.

But at stake is not only the future status of every individual as a citizen, but also the procedures which will enable the population and the leading politicians to find a way out of the stalemate. Which political body or authority can legally or with legitimacy initiate any procedure? Who should be the parties representing whom in any negotiation? What authority can finally decide what should be the legitimate procedure?

All these open issues create an unbearable uncertainty for every citizen, for possible investors, for donors, for neighbour countries and for international organisations (such as the Council of Europe and the European Union in which Yugoslavia is seeking membership). This has a disastrous effect on the economy, social welfare and security, and political stability. Every

politician can misuse his or her position and at any time it is suitable for his or her interest question the legitimacy of an authority, procedure or even a democratic process. It is the responsibility of all politicians to seek as soon as possible the removal of this uncertainty by achieving some consensus on the rules to be followed in solving these issues.

2.1.2. Legal Problems in Particular

The problems to be decided in the case of the dissolution of the federation, of a unilateral secession of Montenegro, of the establishment of a Union with confederal elements or of a reconstruction of the federation are innumerable. We simply list here some of the problems, without addressing them in detail. In the following paragraphs we outline what we estimate to be the main issues to be solved.

Does a unilateral right of secession based on the right of self-determination exist according to international law?

- Is the decision of the Badinter Commission still valid for Montenegro?
- Has the Union proposal from Montenegro to be implemented by decentralization from the top or by aggregating units from the bottom after a consensual dissolution of Yugoslavia followed by a consensus of the two independent republics to create a Union. This would neglect the federal constitution and create a union based on the right of self-determination of Montenegro and of Serbia?
- What remains of the federal level in the case of unilateral secession?
- If Yugoslavia would be dissolved, who would be the successor for its assets and debts?
- Or does the Federation just turn into a unitary state and become absorbed by the constitution of Serbia?

How should a referendum be organised and implemented according to traditional democratic rules:

- What is a clear question?
- How are suggestive questions avoided?
- What is a clear majority of “the citizens” according to Art. 2 of the Montenegrin Constitution?
- What is a fair democratic procedure?
- What is the position of the three states (Montenegro, Serbia and the Federation) with regard to the referendum procedure?

- How is objective information provided to voters in a referendum and how are equal voices provided to different proponents in the procedure?
- How is neutrality of the state in the referendum procedure ensured?
- Are authorities required to give bipartisan information to voters?
- What should be provided in a negotiated contract with regard to the transition period?

Under the Constitution of Montenegro:

- Is the referendum sufficient or only a mandatory initial step to be followed by a formal amendment of the constitution?
- Does the wording “citizens” in Article 2 Constitution of Montenegro suggest an absolute majority of the citizens with voting rights?
- Art. 1 of the constitution of Montenegro: must it be changed before, after, or at the same time as the referendum?

2.2. HOW COULD THE PROBLEMS BE SOLVED

In our opinion the existing legal and constitutional bases of the Federation and of the Republics will have to be basically reconsidered in order to establish legitimacy with regard to the great bulk of the society, to enable the country to join the Council of Europe and the European Union, to implement human rights, to protect minorities and to reconstruct the federal balance.

The federal constitution basically lacks legitimacy for the following reasons:

- The constitution of the Republic of Serbia has never been adapted to the new federal constitution;
- Art. 135 second paragraph of the Serbian constitution enables the Republic in certain circumstances not to follow federal obligations if it is against its basic interest;²
- The amendments of the federal constitution, in particular the presidential election and the election of the representatives of the Republics have never been accepted by Montenegro;

2 “If acts of the agencies of the Federation or acts of the agencies of another republic, in contravention of the rights and duties it has under the Constitution of the Socialist Federal Republic of Yugoslavia, violate the equality of the Republic of Serbia or in any other way threaten its interests, without providing for compensation, the republic agencies shall issue acts to protect the interests of the Republic of Serbia.”

- Since 1997 the authorities of Montenegro have refused to implement federal law within Montenegro.
- The constitution does not provide a clear division of powers between the Republics and the Federation with the consequence that the jurisdictions are overlapping.³
- The constitution has almost no means to implement the protection of human and minority rights within the Republics.

Not only on the federal level, but also on the Republican level constitutional amendments are urgently needed. The Serbian Constitution needs to be adapted to the federation, it needs to guarantee human rights on the constitutional level⁴, to provide a clear separation of powers, and to limit the presidential right to establish an emergency situation, and to guarantee some basic rights also in emergency situation. And finally it has to provide consistency between the preamble (State of Serbian people and other nations and minorities) and Article 1 (democratic state of all citizens).

Thus Yugoslavia will face difficult challenges in order establish legitimate procedures for the reconstruction of the federation, the establishment of a new confederation, or a dissolution of the federation.

2.2.1. Reconstruction of the Federation?

In our opinion the most obvious legal path to follow would be to reconstruct the federation according to the amendment procedures provided in the Yugoslav Constitution of 1992.

Two alternative procedures are possible. The new constitution could be adopted according to the existing amendment procedures provided in Art. 139 to 142.

A second possibility would be to first amend the current constitution under its amendment procedure in order to change the amendment procedure to a new amendment procedure supported by a consensus among the different stakeholders. Such a new procedure might provide for the election of a constitution-making assembly with special provisions respecting the interests of the Republic of Montenegro and the minorities.

3 Article 7: Competencies in foreign affairs and Article 77 (competencies of the federation).

Taking into account the controversies with regard to the legitimacy of the existing constitution and the fact that the current members of parliament coming from Montenegro were elected in an election which was boycotted by the governing party. The second alternative has some appeal, but it may lengthen the deliberations.

2.2.2. Procedure for Establishment of a Union

2.2.2.1. Status of the Proposed Union Treaty

The alternative of creating a Union is not an option that we recommend (See Recommendation 11). However in the following analyses we simply examine the legal procedural problems linked to implementing such an alternative. The assessment of the two substantive proposals for a Union solution (Montenegro Platform and Expert Commission of Belgrade Centre of Human Rights) will be analysed later in section 4 below.

According to the Montenegro Platform of 2000, the Union would be created by an international treaty with two sovereign members of the Union. “Montenegro and Serbia will be internationally recognized states”. Thus, the Union treaty would finally become legally valid after ratification by the member states. As the treaty of the European Union is a treaty of international law, the Union treaty between Serbia and Montenegro would be concluded similarly according to the international law.

Analysing the Union proposal of the Belgrade Centre for Human Rights, the answer to the question, whether this would be established by an international treaty that creates a confederation, or would be a very decentralized Union constitution derived by decentralizing the existing federation is less obvious. Although in his introduction to the proposal Mr. Popovic considers the Union to be an international treaty⁵, there are several elements, which suggest that it would be a further decentralized constitution:

4 “Art. 12: Freedoms and rights shall be exercised and duties fulfilled on the ground of the Constitution, unless the Constitution provides that the conditions of exercising specific freedoms and rights shall be spelled out by law.” Thus, the manner of exercising specific freedoms and rights may be determined by law if this is considered necessary for their exercise.

5 “The two sovereign subjects conclude an act forming a union of states, and that act is basically a treaty.” No. 2 of the Proposal Explanation.

- Article 1 does not refer to the Republics as entities but to the citizens of Montenegro and Serbia.
- The Union Assembly has democratic legitimacy and the Government is not accountable to the member states but to the assembly (Art. 17).
- Implementation of union statutes is vested in the Union government, which can delegate this function either to the republics or to a special agency.
- The Union would be required not only to respect human rights but also to protect human rights. This implies powers to protect citizens against the will of their government and to implement this decision against the will of a republic government.
- The Union will dispose of a single armed force, and a common foreign policy, taxing power and single monetary area.

These elements point in favour of a constitution. However if the international community recognizes both member states as sovereign subjects in international law and conceives of the Union as an international organization, then the union built on the will of the member states each recognized internationally might still be considered as based on an international treaty somehow similar to the European Union, which has been considered by the constitutional court of Germany as a very specific “State-Community” (Staatenver-bund).

2.2.2.2. The Parties in the Procedure and the Parties of the Confederation

If the final purpose of the reconstruction of the federal balance should turn out to be a Union treaty, the basic procedure to regulate such a reconstruction should again be the existing constitutions. However, two different procedures may be possible: First the dissolution of Yugoslavia by mutual secession and then the conclusion of an international treaty by the sovereign members. The disadvantage of such procedure is, that there will important legal uncertainties for all citizens during the transition period.

The second alternative, which is legally less clear, but would probably provide more legitimacy, and probably less uncertainty, would be to decide at the same time on the restoration of the sovereignty of the Republics and on the treaty establishing the Union. Thus, if there is a clear common will to conclude a Union Treaty, the political authorities of Yugoslavia, Serbia and Montenegro

should – based on their existing constitutions and employing their amendment procedures – agree at the same time to proclaim sovereignty and independence, and acceptance of the Union treaty. This procedure should use the amendment procedures provided in both constitutions, including Article 2 of the Constitution of Montenegro with regard to the changing of the status of the country, and Art. 133 of the Serbian Constitution.

In conclusion we think, nevertheless, that the difficulties of either of the two alternative procedures will bring such enormous uncertainty that a Union treaty as the final solution to overcome the current stalemate should be avoided as an objective by all parties.

2.2.3. The Dissolution of Yugoslavia

Should all the important stake holders reach a consensus that Yugoslavia should be simply dissolved, the decision for the dissolution of Yugoslavia should be a common decision of the Republics on the one hand and of the federal institutions on the other. It should be decided by a procedure providing for the amendment of the federal constitution and should also respect the amendment procedures of the constitutions of the two republics. However, such a decision can only be made after all important elements for the transition from a federation to two separate and independent republics will have been decided by consensus. It might even be necessary to conclude simultaneously a treaty regulating all transitional matters with regard to the legal consequences and, of course, including all issues of the property, assets and debts of Yugoslavia and of the Republics.

3. Constitutional Framework and Requirements

3.1. CURRENT CONSTITUTIONAL FRAMEWORK

3.1.1. Historical Development of the FRY

The FRY has existed since 1992. It was hastily established as a successor federation of the former Yugoslavia. It is internationally recognised as a sovereign state member of the UN and successor to the former Socialist Federal Republic of Yugoslavia. The former Federal Republic of Yugoslavia had been reduced to a rump federation, because the four Republics (Slovenia, Croatia, Bosnia-Herzegovina and Macedonia) which seceded from the Federation, each established itself as an independent sovereign state. In the brutal wars following the dissolution of Yugoslavia thousands of people lost their lives, property and homes.

Legally, the dissolution of former Yugoslavia was recognized by the international community, following the advisory decisions of the Badinter Arbitration Committee in 1992. This Committee decided, that, if the essential organs of a federation are no longer able to function, that state is in dissolution, and as a consequence each federal unit might legally use its original right of unilateral self-determination and establish a new sovereign state out of a “non-state” situation. This unilateral right of self-determination was limited, however, to the territory of a federated unit. It could not be claimed by minorities which live within the territory of a respective federal unit.

According to the Badinter committee⁶ the Republics as federal units of a federal state which was no longer able to enforce its unity had by international law the unilateral right, based on the principle of self-determination, to form a new state according to

6 See opinion 1 <http://www.ejil.org/journal/Vol3/No1/art13.html>.

international law. This right to establish a new sovereign state as a subject of the international community, however was restricted to the Republics determined by the boundaries of the federation in dissolution. The internationally recognised right of self-determination of the minorities within the territorial boundaries of the Republics is restricted to internal autonomy but it does not give minorities the right to establish an independent state. Thus according to the Badinter decisions only federal Units of a federal state can, if the federal state is in disorder, claim by international law the right to be reconstructed as sovereign states according to international law. In consequence only the Federal state according to Badinter is – unlike a unitary state – open for dissolution; and in this case only the federal units as such have an original right of self-determination according to international law.

In 1992 the new Federation of Yugoslavia composed of the two remaining Republics Serbia and Montenegro was established. But the Albanian Minority in the district of Kosovo of the Republic of Serbia (labeled an autonomous province according to the Constitution of 1974), which boycotted the referendum for the new constitution, continued to claim the right of self-determination and hence the possibility of establishing an independent state like the other four Republics. Kosovo enjoyed a far-reaching autonomy as a province of Serbia according to the Constitution of the Socialist Federal Republic of Yugoslavia of 1974. But its right to self-determination has not been recognised by the international community. Nevertheless, the international community did intervene in order to protect the Albanian minority in Kosovo with the bombardment of Yugoslavia in 1999. Today Kosovo is under the administration of the United Nations and its security is protected by NATO forces (KFOR) supplemented by Russian troops. The territory of Kosovo is administered by the United Nations according to resolution 1244 of the Security Council, which states:

“...10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing insti-

tutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”

Thus, the territory of the province of Kosovo is for the time being excluded from any constitutional rearrangement relating to the Federal Republic of Yugoslavia or the Republic of Serbia. This uncertainty puts an important burden on any authority responsible for constitution-making.

3.1.2. The Claim to the Right of Self-determination by Montenegro

The Federal Republic of Yugoslavia (FRY) founded in 1992 consists of two Republics very different in geographical size and population. Montenegro, the smaller partner in comparison to Serbia, makes up about 1/15th of the population and of the size of Serbia. In 1999 Montenegro contained 651,000 inhabitants, and Serbia 9,978,000 inhabitants.⁷ According to the IMF Publication on the internet, the GDP of Serbia was 21 Billion DM while that of Montenegro was 1.5 Billion DM in 2001⁸ which is a somehow similar to the difference in population.

Since 1999 the Republic of Montenegro has claimed to have an “inalienable right of self-determination based on the historical and centuries-old sovereignty and verified by the decisions of the United Nations and by the Badinter commission”. On this basis the Government of Montenegro submitted in August 1999 a proposal for a new relationship between Montenegro and Serbia. In December 2000 this platform was modified by a new proposal for two independent sovereign states of Serbia and Montenegro united by a confederal Union.

According to this platform the Republic of Montenegro contests the legitimacy of the Federation and its federal institutions as well as its constitution. Citing the advisory decision of the “Badinter-Committee”, Montenegro claims the right of self-determination and thus the right to establish its own Republic as did the other Republics of Slovenia, Croatia, Bosnia-Herzegovina and Macedonia. While the Badinter Court Committee decision applied to the Constitution of

7 Statistical Pocket Book 2001, (Federal Republic of Yugoslavia, Federal Statistical Office) Belgrade 2001.

8 IMF Country Report No 01/176 October 2001 Federal republic of Yugoslavia Table 7C Serbia: Republican Government Fiscal Operations 1997–2001 and Montenegro Republican Fiscal Operations 2000–2001.

Yugoslavia of 1974, Montenegro makes its claim against the constitution of the FRY of 1992, claiming to have an inalienable right to self-determination and that the Federation has lost its legitimacy with regard to Montenegro because it did not respect its basic rights.

Although the Republic of Montenegro joined the revised FRY in 1992 following a referendum supported by an overwhelming majority of its citizens, its leaders advocating secession claim, that the “right” given to all the Republics of former Yugoslavia earlier by the Badinter arbitration committee is not exhausted and continues to apply despite the subsequent referendum to remain within the new federation and its functioning for nearly 10 years. Those making the claim:

- contest the democratic procedure of the referendum of 1992;
- and claim;
- that the citizens had been forced to vote for the new federation;
- that the Federation has been mal-functioning and
- that it has discriminated against the junior partner.

They also argue that due to a relatively independent Montenegrin economic system and the adoption of the DM as official currency, the Republic of Montenegro has become de facto independent and that for this reason Montenegro cannot return to a more integrated relationship within the federation.

The unilateral adoption by a federal unit of the hard currency of another country raises questions about its responsibility for a share of the federal debt in the eyes of creditors. Elsewhere, where secession has occurred, the allocation of a share of the federal debt to successor states has always required contentious negotiations.

Our committee is of the opinion that, although there are to begin with very good arguments to contest the soundness of the Badinter decision which in effect declassifies federal states internationally into “second class unitary states”, it is not necessary for us to reconsider that decision. However, we hold unanimously, that, if the right of the Republics for self-determination existed after the decision based on the constitution of 1974 (old Yugoslavia), this right was exhausted when the new Federal Constitution was established later in 1992.

With regard to the argument that there has been a de facto partial secession and independence, this cannot be based on a

unilateral right for self-determination. De facto illegal secession cannot under international law support a legal right to self-determination.⁹ Although some authorities argue that historically Montenegro was oppressed by the regime of Milosevic, such a complaint has not been made with regard to the current presidential regime. To the contrary, although the legitimacy of the constitutional amendment for the presidential election in July 2000 is deeply contested, the democratic legitimacy of the new president has been based on his election by the voters of the entire Federation, despite the recommendation of the Montenegrin authorities to their citizens to boycott these elections.

Montenegro did participate in the constitution-making process for the constitution of the federation in 1992 and it adopted this constitution with an overwhelming majority. Article 1 of that constitution expressly states: "...Montenegro is the member of the Federal Republic of Yugoslavia".

Today, the government of Montenegro argues in particular that the amendment of the FRY constitution passed in July 2000, which changed the election procedure of the President of the FRY from an election by the parliament into an election by the people, had not been adopted by the legitimate delegates of Montenegro and thus is invalid. (For the election of the members of the federal parliament in 1997 the governing party in Montenegro had recommended its citizens to boycott the federal elections). Thus, the Montenegro government has contested the legitimacy of the federal parliament and of any of its legal acts. Consequently, the Montenegro government does not recognize the elected President of Yugoslavia nor the other federal authorities.

During the war against Yugoslavia the government of Montenegro initiated its own legislation in order to develop within

9 A right to secession only arises under the principle of self-determination of peoples at international law where „a people“ is governed as part of a colonial empire; where „a people“ is subject to alien subjugation, domination or exploitation; and possibly where „a people“ is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states. (Decision of the Supreme Court of Canada: Reference Re the Secession of Quebec [1998] 2 S.C.R. 217).

Montenegro de facto the necessary elements for independence and sovereignty. It adopted its own currency (DM) and also customs tariffs. It also claims to have a more liberal economic system and higher living standards than Serbia. Today defence and air traffic control are the only authority actually exercised on the territory of Montenegro by the federation.

This policy towards Montenegro's independence and its own sovereignty has been enhanced by some actions of the international community. Nevertheless, after the democratic presidential elections of October 5 2000, the international community did not recognise Montenegro as an independent state. It has only recognized the FRY as a sovereign member of the international community.

Furthermore, Montenegro has in many respects continued de facto to accept the authority of the federal government as legitimate. For instance, Montenegro receives international grants given to the FRY through the central bank of the FRY. Indeed, the international community distributes its aid to Montenegro according to a principle of 1/10th. All citizens, including all authorities of Montenegro, use the FRY passport. The army, contested as illegitimate, has recently been asked to protect citizens in the territory of Montenegro after two persons were killed in villages close to the border line of Kosovo.

On the other hand, Montenegro has failed to transfer taxes and income from the customs to the FRY. It imposes its own different customs tariffs. Thus, the federal institutions such as administration, army and parliament are paid for only by the Serbian taxpayer.

3.2. CONSTITUTIONAL REQUIREMENTS

3.2.1. On the Federal Level

During the Milosevic regime Montenegro unilaterally broke out of the financial unity of the FRY. It decided to adopt the German Mark as the only acceptable currency in Montenegro, it set up its own system of customs and tariffs and refused to contribute to the expenditures of the FRY for services for the whole country in particular for the payment of the administration and the army. The unilateral adoption of a foreign currency was only possible, because Montenegro as such was not liable for the debts

of the FRY. Legally only the FRY was liable toward its international creditors. Thus Montenegro for the time being does not share the burden of the debts of the federation.

Such a unilateral de-facto partial secession was a clear violation of the very principle of federal loyalty (“Bundestreue” according to the constitutional theory in Germany). Thus today it can only retroactively be justified as an act of resistance against the totalitarian regime of Milosevic.

In July 2000 Milosevic changed the system of the presidential elections. However, the outcome of the elections provided an unexpected result for many observers. The citizens of Serbia took the chance offered to them and used their right to vote as a right to resist the totalitarian regime, and elected the common candidate of the opposition, Vojislav Kostunica. Unlike some citizens of Montenegro many did not boycott the elections but made use of the offered opportunity in order to overthrow the regime. Thus with a “soft” revolution the citizens of Serbia and Montenegro abolished the totalitarian regime by democratically electing a new president.

This was the beginning for a new democratic development in the FRY and in Serbia. Today the FRY is the only internationally recognised state and as such a sovereign bearer of rights and duties with regard to the international community. The Montenegro government, however, does not recognise the presidency of the FRY because in its view the elections were based on an illegitimate amendment of the constitution.

However, in our view, it would be absurd to declare the elections of the President of the FRY as illegal, because the only possible consequence would be reinstalling Milosevic.

This political and legal deadlock therefore can only reasonably be solved if both sides can overcome their preoccupation with history and start to recognise that acts of the past and elections considered by one of the parties as illegal or illegitimate were only justified out of the right of resistance against a totalitarian regime. The rule of law and democracy however can only be fully restored, if, during the period of transition, all parties agree to accept the illegal acts of the past as justified by the right of resistance in order to establish a democratic future, and agree to respect the existing constitutional structure as providing the guidelines for the procedure to be followed in order to establish a new legitimate political order. Thus, the procedure for solving the conflict should be governed by the respective provisions of

the current constitutions including all historical amendments. We are aware, however, that the procedures for the amendment of the constitutions might be considered illegitimate as they favour the majority. Consequently, we are also of the opinion, that in addition to employing the existing legal procedures the major parties in the process should first reach a political consensus and then implement it by following the existing legal procedures for constitutional amendments. Positive legality has to be complemented by political legitimacy.

3.2.2. At the Level of the Republics and in Particular Montenegro

Whatever the final solution, a new federation, a confederal union or dissolution of the federation, a fundamental change of the constitutional bases is not only needed on the federal level but also on the level of the Republics.

If there is to be a restructured federation, the Constitutions of the Republics will have to be harmonised with the new concept of the federation, which will change the division of powers, provide new federal organs, implement human rights and minority rights, etc. The constitutions of the Republics will have to take into account this new federal order for their own legitimacy.

3.2.2.1. Top Down – Bottom up Procedure?

The crucial question however is, what should come first: the federal or the republican constitution? There is no historical model of a federation, which reconstructed its legitimacy by dissolution followed by a bottom up procedure. The Swiss and US examples show clearly, that a top down procedure guarantees more stability in the uncertain transition period than a bottom up procedure. With regard to Yugoslavia the main challenge is the issue of the state at the federal level and the claim of Montenegro to obtain international recognition. As soon as there is consensus for a new federal arrangement, international credibility, and with it economical stability will enable the country, including the Republics, to improve politically and economically. Thus we are of the opinion, that all important controversial issues should first be negotiated and settled at the federal level.

With regard to the Constitution of Serbia one has to keep in mind, that this constitution dates from 1990 and thus predates

the current Constitution of the FRY. The Serbian Constitution was promulgated under the old Yugoslav Constitution of 1974 and provided in Art. 135 the right of resistance against the misuse of power within the old federation. Although our mandate does not specifically ask us to analyze the Serbian constitution, we are supportive of the outstanding proposals that the expert group of the Centre of Human Rights in Belgrade has already submitted for a new Serbian constitution. That proposal has also been endorsed in its interim report by the Venice Commission as of the highest quality and to be considered a model for other constitutions.

3.2.2.2. *With Regard to Montenegro*

Art. 1 of the Constitution of Montenegro

With regard to the requirement of legality, Montenegro has to respect Article 1 of its constitution, which declares Montenegro to be part of the FRY. Thus any decision of Montenegro for secession or for a confederal Union would require a change to Article 1 of the constitution.¹⁰

Art. 2 of the Constitution of Montenegro

According to Article 2 of the constitution any change of its status requires a previous referendum of the citizens. In our opinion the wording “citizens” and the importance of the decision require, as we shall explain later, at least an absolute majority of the eligible voters. According to the Montenegrin constitution the citizens must be asked in a referendum previous to the changing of the constitution.¹¹

Art. 117 to 119 Amendment of the Constitution of Montenegro

After the decision of the citizens by referendum, the Assembly must follow the procedure for constitutional amendments. A constitutional proposal needs a two-third majority. However, as this is a significant amendment the procedure of Art. 119 should be followed. Under that article the Assembly has to be

10 Article 1 STATE: Montenegro is a democratic, social and ecological state. Montenegro is a republic. Montenegro is the member of the Federal Republic of Yugoslavia.

11 There has been a certain ambiguity with regard to the English translation of this provision. The published English translation does not contain the word “previous”. We have, however, been informed by the adviser to the Minister of Justice of the Federal Government, that the correct original and valid text clearly requires a previous referendum, that is previous to any decision amending the constitution. Cp. Also Report of Venice commission No. 15 footnote 2.

dissolved and a new Assembly has to be convened within 90 days. This new Assembly then has to decide with a two-third majority of all deputies.¹²

3.3. CONSTITUTIONAL LEGITIMACY

The making of a new constitution cannot be reduced to a simple technical process to be guided by constitutional experts. Constitution-making is an eminently political process, which has to unite through the process and its results the different controversial political and cultural communities into one political community to be held together by a common state established by the common constitution.

To quote the authors of the Belgrade Centre of Human Rights Centre proposal for a new Serbian constitution: “A democratic reconstitution of Serbia can be achieved only as a democratic integration of a multicultural and multiethnic Serbia. This is why the tradition of aspiration to the free state of the Serbian nation, as well as the equality of all peoples inhabiting Serbia remains equally decisive for the legitimacy of the Serbian polity and thus its stability. The Proposal strongly advocates that the ethnocentric principle of a majoritarian nation be abandoned as a foundation of a given nation-state, in which the minorities ‘would be granted all rights’. Accordingly the Proposal defines Serbia as a

12 Article 117 PROPOSAL OF AMENDMENTS: A proposal to amend the Constitution may be submitted by at least 10.000 voters, by not less than 25 deputies, by the President of the Republic and by the Prime Minister. A proposal to amend the Constitution shall contain the provisions where amendments are requested and an adequate explanation thereof. The Assembly shall decide on the proposal for amending the Constitution by the two-third majority of votes of all of its deputies. If the proposal to amend the Constitution should not be adopted, the same proposal may not be submitted again before one year has elapsed from the day the proposal was refused.

Article 118 AMENDMENTS: The Constitution shall be amended by the Constitutional amendments. DRAFT The Assembly shall provide the draft of the amendment to the Constitution. The Assembly shall decide on the amendment to the Constitution by the two third majority of votes of all of its deputies.

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-third 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.

‘multicultural democratic state of all the citizens and peoples living in it’.”¹³

Our committee can only endorse these remarks. Not only the Republic of Serbia, but also the Republic of Montenegro is a multicultural state. Thus, the Federation as such will be a multicultural state, not only defined by the Serbs and the Montenegrins, but by several other ethnicities living within the boundaries of the Federation. Thus the principles identified by these remarks are not only relevant for Serbia and Montenegro but for the entire federation of Yugoslavia. Furthermore, the Venice Commission has suggested that parts of this draft for a Serbian constitution “are equally suitable as parts of a new Federal Constitution.”¹⁴

A new federal constitution should establish values, which are common and which can integrate not only the Serbs and the Montenegrins but also all other minorities living within the boundaries of Yugoslavia. Taking into account this indispensable and fundamental purpose of a multicultural state, the very fact, that the situation of Kosovo remains uncertain, adds an almost insurmountable obstacle to any constitution making process within the rest of Yugoslavia. (Although our group has no mandate with regard to Kosovo, it cannot simply ignore this essential impediment for the constitution-making process). A common state needs a common legitimacy based on common values which can integrate the diversities within the common state. This legitimacy can only be achieved, if the great bulk of the fragmented constitution-making power (“pouvoir constituant”) can advocate and be integrated by the common values. Those values can only achieve such a result, if within the fragmented society all the relevant diverse groups cooperate in establishing the common values. If important minorities have the feeling that the constitution has been made against their basic interests, the federation will always in their eyes lack legitimacy.

We have to be aware, that the need for legitimacy as the basis for holding a society together, applies equally whether the solution involves a federation, a confederal union, or dissolution into separate states. In each case the resultant states will contain not

13 Introductory remarks for the Proposal for a Serbian Constitution from Lidija Basta Fleiner Director of the Independent Group of Experts, In *Constitutional Reform in Serbia and Yugoslavia, Proposals by an Independent Group of Experts*, Belgrade 2001 p. 12.

14 Report Venice Commission No. 39.

only Serbs and Montenegrins but also other minorities. Thus, it seems that whatever solution is achieved, it will only obtain legitimacy, if the entire political process is inclusive and enables reaching a consensus among the different communities.

4. Assessment of Solutions Being Offered by Participants

4.1. PROPOSALS

4.1.1. Official Proposals

4.1.1.1. *DOS / Together for Yugoslavia (September 2001)*

The Coalition between the Democratic Opposition of Serbia (DOS) and "Together for Yugoslavia" promulgated in September 2001 under the title "Proceeding Points for a Joint Platform on Constitutional Restructuring of the Federal Republic of Yugoslavia" proposals for a new constitutional order of the FRY.

Based on the sovereign will of the citizens of Montenegro and Serbia the new constitution should provide a durable and legitimate foundation for their future coexistence in the common state. Also, it seeks to establish a federal and democratic polity and create conditions for the freedoms and rights of citizens to be exercised, the protection of national minorities guaranteed and for the two member states to be equal. The new constitutional order should also create all prerequisites for the common state to join regional and European integration processes.

The common state of Montenegro and Serbia would be based on the following principles of legitimacy:

- the sovereign will of the citizens of Serbia and Montenegro,
- the historic statehood tradition of Serbia and Montenegro, a
- the century-old cultural, political and economic ties between Montenegro and Serbia,
- the commitment of citizens to build their common state on the principles of the rule of law, in which basic rights and freedoms, along with the rights of national and ethnic communities, shall be consistently protected and power limited by legal principles and rules,

- the commitment of Montenegro and Serbia to achieve full international affirmation of both the common state and the member states through the harmonised activity of the common state, which will also pave the way for its efficient entry into the modern regional and European integration trends.

The common state would have the form of a federation, composed of two member states that would have the status of federal units.

Proceeding from these principles of legitimacy, a viable constitutional system of the common state is to be established for the welfare and benefit of all its citizens.

The common state would be vested with the following powers: 1) guarantees for the basic rights and freedoms of citizens and protection of special rights of national and ethnic communities; 2) a single foreign policy and the possibility provided for by the Constitution that the member states can establish international cooperation on an individual basis; 3) a single defence system and shared border control, with the parliamentary control of defence forces; 4) single market, customs, monetary and foreign trade systems; 5) transportation and communications in accordance with the defence system and international conventions.

The proposed organs and institutions of the common state are:

- the Federal Assembly composed of two chambers: the Chamber of Member States with an equal number of representatives from the two federal units, and the Chamber of Citizens composed of representatives of the citizens of the common state.
- the President of the Republic representing the common state in the country and abroad. The President of the Republic would be elected and recalled by the Federal Assembly. The President of the Republic would be recalled solely on the basis of the Federal Court's opinion that he/she violated the Constitution.
- the Federal Government as the holder of executive power in the common state. The Federal Government would be composed of the Federal Prime Minister and ministers, who cover the federal powers in their respective departments.
- the Federal Court unifying the constitutional court operations and regular court functions. The Federal Court would

exercise the constitutional review of constitutionality and legality and decide on extraordinary legal instruments when all legal instruments in the judicial systems of the member states are exhausted.

- the National Bank securing the functioning of a single monetary system.
- an Ombudsperson protecting the basic rights of citizens and the special rights of national and ethnic communities.

The powers of the common state would be divided into exclusive and mixed powers. The exclusive powers would be the sole responsibility of institutions of the common state. In the sphere of mixed powers, the Federal Assembly would endorse the basic elements of a system, while the Assemblies of the member states would regulate specific matters further. In these cases, all decisions would be implemented by executive and administrative organs of the member states.

Exclusive federal powers would be as follows:

- foreign policy
- shared defence and border control
- monetary system
- customs system
- the Law of Contracts and Torts, securities, court and administrative proceedings.

Mixed federal powers would be:

- the basic rights and freedoms and the protection of national and ethnic communities in accordance with international standards
- property relations
- tax system
- banking system
- foreign trade system
- transportation and communications
- pension, property and personal insurance.

In the domain of their autonomous powers, the member state could consensually govern the fields of mutual interest without arbitration by organs of the common state.

Amendments to the constitutional provisions governing the powers of the common state, the composition and election of federal institutions would require consent from the member states. Other constitutional amendments would require a two-third majority of all representatives in both chambers of the Federal Assembly.

4.1.1.2. Government of Montenegro Proposal for a Union 2000

In December 2000 the Government of Montenegro presented also a “Platform for talks with the Government of Serbia on new relations between two states”. The main arguments and proposals have been advanced as follows:

On the grounds of the historical and centuries-old sovereignty of Montenegro and the inalienable right of Montenegro to self-determination verified by the decisions of the United Nations and by the Badinter Commission and proclaimed by the Montenegrin Constitution of 1992: The Citizens of Montenegro decided to form a common state with Serbia – the Federal Republic of Yugoslavia. The Citizens of Montenegro wanted and expected FRY to be a democratic community of equal Republics and equal citizens. Nevertheless, many abuses of the FRY institutions and bodies occurred during its existence, which resulted in undemocratic relations and gross violations of the constitutional principles of equality of the Republics and citizens, at the expense of Montenegro.

Therefore, it is necessary to redefine the relations between Montenegro and Serbia on a new basis. This relationship can only be based on:

- the historical, state, national and cultural identity of the two states and two peoples, as well as on the sovereign right of citizens of both states to make decisions autonomously regarding their destiny;
- the tasks of common interest to Montenegro and Serbia are to be entrusted to the Union and to be conducted on an equal footing and subjected to the same level of control;
- on that ground, Montenegro offers the Platform for talks on a future Union, which should be based on a common interest of both states, as well as on the historical and current realities.

The starting point for a new Union of Montenegro and Serbia lies in the inalienable right of the citizens to decide upon their national and state destiny. This could be the only basis for determining the common interest of the Union of Montenegro and Serbia. This would create conditions to overcome the obstacles in their mutual relationship.

- Montenegro and Serbia would be independent and internationally recognized states.

- The independence of Montenegro and Serbia would be decided through a referendum of their citizens, who have the sovereign right to determine the destiny of their state.
- Independent and internationally recognised Montenegro and Serbia would constitute the Union of two states by referendum vote of their citizens.

Montenegro and Serbia would form a Union, aware of the common interest and the utility of such association, building a structure based on the principles and relations acceptable for both.

- In this Union, the citizens, their associations, companies and institutions would have a wide range of opportunities to fulfil their needs and interests.
- Montenegro and Serbia, independent from each other regarding questions of national and state sovereignty, in fulfilling the common interest should function without centralisation.
- For the Union of Serbia and Montenegro the only acceptable concept, it is argued, is the one that has as the basis the constitutional position of the states as genuine holders of sovereignty, delegating part of their competences, those that can effectively be carried out in the Union on an equal footing and in a rational manner.

The Union of Montenegro and Serbia should be based on the following principles:

- the equality within the Union of states;
- each state conducting in a sovereign fashion all state affairs within its competence;
- the Union carrying out only those activities entrusted to it;
- competences of the Union to be interpreted restrictively and performed, as a rule, by bodies of the member states and exceptionally by bodies of the Union;
- bodies of the Union constituted on the basis of the principle of equality and consensual decision making;
- open society;
- respect of international standards, human rights and freedoms including special minority rights;
- market economy with domination of private ownership and private entrepreneurship;
- rule of law;
- constitutionality and legality of Montenegro and Serbia.

The competences of the Union should be considerably narrower than the present competences of the FRY in order to minimise potential conflicts and to express the new character of the Union. The Union would have only the following responsibilities:

- defence and external security of the Union;
- foreign policy of the Union;
- securing a common market and a convertible currency.

The responsibilities under these competences of the Union would be conducted through the Assembly of the Union, the President of the Union and the Council of Ministers.

- The Assembly of the Union would have one “House”; its members, the deputies, would be elected on a parity basis within the framework of exclusive legislative competence of the member states.
- The President of the Union would represent the Union, would be elected or dismissed by the Assembly of the Union, and be subject to prior agreement of the Assemblies of the member states.
- The Council of Ministers of the Union shall perform the assigned executive tasks within the competence of the Union and shall include the President, the Vice-President and the Ministers for Foreign Affairs, Defence, Finance, and Economic relations. The member-state, through its government, would have the right to initiate a special protection procedure regarding the acts from the competence of the Council of Ministers.

In the sphere of economic relations the Union would have 1) a common market, 2) a single customs area, 3) a common convertible currency. Despite this common currency system each member-state would have its own central bank.

4.1.2. Unofficial Proposals

4.1.2.1. Centre for Human Rights

An independent group of constitutional experts (Lidija Basta-Fleiner, Vladimir Djeric, Marijana Pajvancic, Dragoljub Popovic, Zorica Radovic, Slobodan Samardzic) presented together two alternative constitutional proposals for the relations between Montenegro and Serbia published by the Belgrade Centre for Human Rights, 2001.

The first, entitled “Proposal for the Federation of Montenegro and Serbia” (pp 83 to 94), focused on providing legitimate foundations for a reorganised federation. It aimed to respect and express the multi-faceted complexity of the federation in a way that would secure the loyalty of the political factors to the common state. The proposal differed from the existing constitution of the FRY in emphasising the residual authority of the member states and the principle of subsidiarity in the distribution of powers between the federation and the republics, in urging that federal legislation as far as possible take the form of framework laws leaving implementation to republic governments, and in urging direct cooperation between the two republics in their areas of autonomous jurisdiction. It would limit federal jurisdiction to: (1) the minimal powers without which a state could not function, and (2) those necessary for the FRY to qualify for joining the various integration processes in Europe. It proposed a bicameral Federal Parliament as an appropriate balance between the federal and democratic principles, aiming at accommodating the needs for political participation, member state equality, and decision-making effectiveness. A number of other mechanisms for ensuring balance are proposed including alternation between the two Republics in the election of the President and the federal Prime Minister¹⁵, a parity rule in composition of the Federal High Court of Justice, and the requirement of a two thirds majority in both chambers for constitutional amendments.

The alternative proposal is for “the Union of Montenegro and Serbia” (pp 95-102). This confederal project for organising the Union of Montenegro and Serbia proceeds from the basic premise that there are two sovereign subjects Montenegro and Serbia, and that in both cases the exponents of sovereignty are the citizens of the two Republics. Because of this, exercising their sovereign powers directly – not through their representatives – the citizens decide on the formation of a union of states.

The two sovereign subjects would conclude an act forming a union of states, and that act is basically a treaty. The subjects concluding the treaty must abide by it and this constitutive principle must manifest itself especially in regard to the question of constitutional revision, i.e. amendment of the confederal act. By its nature, the confederal act bears the title of articles. Hence the

15 We would note that although it has not been constitutionally required, it has been a regular practice in Canada for over 50 years to alternate the major political leaders between English-speaking and French-speaking individuals.

proposal that the constitution should be given the form and title of the Articles of the Union.

From the standpoint of international law, the Articles of the Union create a single subject, which is a member of international organisations. This does not prevent Montenegro and Serbia from individually seeking and gaining membership in those international organisations, which allow and recognise that kind of membership.

According to the proposal, the Union of Montenegro and Serbia would have very limited powers. The powers of the Union proceed from the Articles – they are powers transferred from the two sovereignties. The Union has no original powers. The transferred powers, certainly, cannot be unilaterally returned to the original status. This would require a legal revision of the Articles of the Union.

The powers of the Union of Montenegro and Serbia would cover the following four areas:

- the protection of human rights (1);
- national defence and frontier police (2);
- foreign policy and international relations (3);
- economic matters to secure a common market, international transport and the environment (4).

While items (1) and (4) represent a sort of necessary unity for any community looking forward to membership in the European Union in the foreseeable future, (2) and (3) emanate both from the very form of the Articles of the Union and sheer rationality in action and organisation – the latter particularly valid for item (2).

The organisation of Confederal Government would be very simple.

- A unicameral Union Assembly would have unequal representation from the two Republics, which are widely disproportionate in population, but would feature a special decision-making process by way of five-eighths majority vote, ensuring for both confederal entities that a minority feeling in either cannot possibly prevail at the union level.
- The second organ of authority would be the Union Government, made up of four ministers, two from Montenegro and two from Serbia. It would be a directorial head of state, would act as such in international relations, and have a President, who would also be the President of the Confederation. The President, whose term of office would be one year,

would be elected by the Union Government, from Montenegro and Serbia in turn; the same person could not be the President twice in succession.

- The third body would be a Supreme Court of the Union, made up of eight justices, four each from Montenegro and Serbia.

The amendment of the Articles of the Union could only be made in the same manner as it was concluded. The old civil law idea of parallelism of forms for concluding and breaking a treaty has manifested itself to a certain extent here.

4.1.2.2. Center for Liberal-Democratic Studies

In 2000, another group of constitutional experts from the Center for Liberal-Democratic Studies (CLDS) in Belgrade (Bosko Mijatovic, Dragoljub Popovic, Slobodan Samardzic) earlier presented similar proposals for the constitutional reconstruction of FRY under the title “The Union of Serbia and Montenegro”.

This group recommended also a “State Union” between Montenegro and Serbia but as a “minimal federation”, based on the following principles:

- minimal and efficient government;
- principle of subsidiarity;
- constitutional principle – balancing the federal principle (equality of members) with the democratic principle (equality of citizens);
- principle of cooperation in the State Union;
- principle of the distribution of authority on the federal level;
- democratic procedure of establishing the Federal Constitution.

These basic principles should fulfil two essential conditions: equality of the member republics and functionality of the federal state. The state union has no political purpose, unless both conditions are fulfilled. The degree in which these conditions are fulfilled can be observed and estimated only in the institutional mechanism of the new constitution, which would operationalize the basic principles.

The fields of authority of the State Union would be:

- protection of the fundamental rights and freedoms of the citizens (including the rights of ethnic [minority] groups and communities;

- international relations and foreign policy;
- national defence;
- bases of the economic system for protection of the common market.

The government system of the State Union would be based on the principle of distribution of powers with the following institutions:

- The Federal Parliament consisting of two Councils (Council of Republics, Council of Citizens) would be the main representative and legislative body of the State Union. It would pass laws and other federal decisions, control the federal budget and the work of the Federal Government, elect the Federal President (or remove him from office), and ratify the international treaties.
- The President of the Republic would represent the State Union in the country and abroad. His functions and duties would be defined similarly to those enshrined in the present constitution of the FRY.
- The Federal Government would be the major institution of the executive power organised on the chancellor model. Its main duty would be to establish and lead the domestic and foreign policy, to initiate and to implement federal laws and other decisions. In the process of performing its functions, it would have to cooperate with the republic institutions of the executive power.
- Judicial organs of the State Union would be the Federal High Court and the Federal Constitutional Court.

The authors of this proposal admitted that the realisation of the idea of a “minimal federation” (model of common functions, which is achievable under the existent social, economic and political circumstances) organising the State Union of two parts of unequal size, population and economic capacity, which want to retain their important political and national autonomies, is an extremely difficult task.

4.2. ANALYSES OF THE OFFICIAL PROPOSALS

4.2.1. Analyses of Each Proposal

The “DOS–TFY” proposal for a “common state” is based on the concept of federalism. It recognises the existence of the two

“sovereign” states, Montenegro and Serbia, respects their special historic traditions and acknowledges on the other hand the strong political, cultural, religious and economic ties between them. The member states would have the status of “federal units”, i.e. of republics, which are considered as able “to achieve full international affirmation... through the harmonised activity of the common state”. The competence basis of the common state comprising foreign policy, defence, customs, securities, court administrative proceedings is quite small and is reduced from the existing FRY constitution but sufficient for an effective and functioning government on the federal level. One point that needs clarification is the meaning of “mixed federal powers”. It should be decided whether they are “concurrent competences” or areas of “framework legislation” of the common state. The latter would seem more appropriate.

The “Montenegro 2000” proposal (from the government of Montenegro) for a “Union” of Montenegro and Serbia seems to argue in favour of a very loose confederal system. Both states are supposed to be “independent” from each other and “internationally recognized”. The Union would be constituted only by referendums of the citizens of the two separate states and vested with transferred competences. Despite their differences in size, population, and economic strength both states in the Union would deal with each other on the basis of equality and consensual decision making. The few competences assigned to the union consist only of matters of defence, foreign policy, and securing a common market and currency. The government of the union is bound to decisions of the constituent states; their governments would have the right to initiate a special protection procedure with regard to acts of the Council of Ministers of the Union. But in fact, this type of a “Union” is an extremely loose confederation, because its government would be too weak to function properly and effectively.

The two proposals published by the Belgrade Centre for Human Rights in 2001 serve as useful complements and modifications to these two official proposals. In general outline their proposal for “the Federation of Montenegro and Serbia” is rather similar to that of the DOS–TFY coalition for a restructured federation, but the proposals of the Centre for Human Rights provide a useful emphasis on the need to accommodate the complex interests within the FRY based on principles of inclusiveness, balance and workable decision

making. Given that the official DOS–TFY proposals are set forth in outline form, if it is decided to go in the direction of a restructured federation, then during the process of fleshing out the details the principles and suggestions set out in the Belgrade Centre for Human Rights proposal should be borne in mind.

The alternative proposal of the Belgrade Centre for Human Rights for a “Union of Montenegro and Serbia” advances a much more workable form of confederal union than that in the official proposal of the Montenegro Government (2000) for a very loose confederal arrangement. Indeed, the Centre for Human Rights proposal recommends a confederation with some federal features and elements. Thus, like the EU it would be a hybrid of confederal and federal elements. It calls the new state composed by Montenegro and Serbia as two sovereign members also a “Union”, but the founding confederal act of this union, based on bilateral decisions of the two peoples, is conceived as a “constitutional” treaty (Articles of the Union) and the Union itself would be the only recognised subject of international law. Although this union might also have very limited transferred powers, its competences could not be returned by unilateral decisions of one of the member states. The Union’s Assembly is only a unicameral parliament. Most important for the coherence of this Union is its competence for protecting human and civil rights with the Supreme Court as a watchdog. Similar to the Swiss model of a confederation this concept tries to offer an acceptable balance between the principle of equality and the principle of functionality.

The “Center for Liberal-Democratic Studies” proposal for a “State Union” between Montenegro and Serbia is in fact based on the concept of a “minimal federation” like that of the DOS–TFY official proposal and the first alternative advanced by the Belgrade Center of Human Rights. The State Union would have a constitution which allocates and attributes the powers and functions to the federation and the two member states. The Federal Parliament would consist of two Councils (one of the republics and one of the citizens). A special Federal Constitutional Court would be the guardian of human rights and the rights of minorities. In many respects it is similar to the DOS–TFY proposal for a restructured federation, but this proposal goes into more detail on many aspects and these are worthy of consideration.

4.2.2. Comparison

Comparing the different concepts, it is quite clear that the official proposal of the DOS–TFY Coalition 2001, the first alternative proposed by the Belgrade Centre for Human Rights 2001, and the proposal of the Center for Liberal Democratic Studies 2000, as well as “the Proposal for the Constitutional Restructuring of the Federal Republic” by Vojislav Kostunica (January 2001), are all broadly similar in advocating a relatively more decentralised federal constitution with a bicameral parliament and a parliamentary executive system of government. They differ in some details and in emphases. In filling out the official proposals which are only in outline form, points raised in the unofficial proposals might well be carefully considered. We have done so in our own recommendations (see recommendation 13).

The alternative confederal union proposal of the Belgrade Centre for Human Rights 2001 is in fact a hybrid of confederal and federal elements, a combination, that might well make it workable in the event that it is decided, that agreement on a restructured federal constitution cannot be reached. In contrast the proposal “Montenegro 2000” does not even meet the criteria of a functioning confederal system because of some contradictions in the concept and other practical obstacles for efficient policies on both levels of government. Furthermore, only the four more or less “federal” models guarantee the survival of the FRY as a sovereign state in a very new constitutional environment and would fulfil the requirements of the EU and the Council of Europe.

4.2.3. Compatibility with Constitutional Background

The three proposals of “DOS–TFY” and the two Centres would be derived from the existing constitutions of the FRY, Montenegro and Serbia. They would avoid unilateral actions and would involve a procedure for adopting new constitutions which would be based on the principle of legality and would create democratic legitimacy. The “Montenegro 2000” proposal would lead to a dysfunctional Union and to the dissolution of the FRY by an illegal unilateral referendum, which is not compatible with the provisions governing a change of the status of the Republic in Art. 2, para. 4, 118, 119 of the 1992 Constitution of Montenegro. Following this proposal one would obtain neither legitimacy nor a new working relationship between Montenegro and Serbia.

5. Criteria for Recommendations

5.1. GOOD GOVERNANCE

5.1.1. The concept of “good governance”

Governance can be seen as the exercise of economic, political and administrative authority to manage a country’s affairs at all levels. It comprises the mechanisms, processes and institutions through which citizens and groups articulate their interests, exercise their legal rights, meet their obligations and mediate their differences. Good governance is, among other things, participatory, transparent and accountable. It is also effective and equitable. And it promotes the rule of law. Good governance ensures that political, social and economic priorities are based on broad consensus in society and that the voices of the poorest and the most vulnerable are heard in decision-making over the allocation of development resources.

Governance has three legs: economic, political and administrative. Economic governance includes decision-making processes that affect a country’s economic activities and its relationships with other economies. It clearly has major implications for equity, poverty and quality of life. Political governance is the process of decision-making to formulate policy. Administrative governance is the system of policy implementation. Encompassing all three, good governance defines the processes and structures that guide political and socio-economic relationships. Governance encompasses the state, but it transcends the state by including the private sector and civil society organisations. What constitutes the state is widely debated. Here, the state is defined to include political and public sector institutions. The primary interest lies in how effectively the state serves the needs of its people. The private sector covers private enterprises (manufacturing, trade, banking, cooperatives etc.) and the informal sector in the marketplace.

Civil society, lying between the individual and the state, comprises individuals and groups (organised or unorganised) interacting socially, politically and economically, and regulated by formal and informal rules and laws. Civil society organisations are the host of associations around which society voluntarily organises. They include trade unions; non-governmental organisations; gender, language, cultural and religious groups; charities; business associations; social and sports clubs; cooperatives and community development organisations; environmental groups; professional associations; academic and policy institutions; and media outlets. Political parties are also included, although they straddle civil society and the state if they are represented in parliament.

5.1.2. Consequences for Governing Institutions in the FRY

The FRY institutions of governance in the three domains (state, civil society and the private sector) must be designed to contribute to sustainable human development by establishing the political, legal, economic and social circumstances for poverty reduction, job creation, environmental protection and the advancement of women. Much has been written about the characteristics of efficient government, successful businesses and effective civil society organisations, but the characteristics of good governance defined in societal terms remain elusive. What are these characteristics?

- *Participation* – All men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that represent their interests. Such broad participation is built on freedom of association and speech, as well as capacities to participate constructively.
- *Rule of law* – Legal frameworks should be fair and enforced impartially, particularly the laws on human rights.
- *Transparency* – Transparency is built on the free flow of information. Processes, institutions and information are directly accessible to those concerned with them, and enough information is provided to understand and monitor them. The freedom of mass media has to be guaranteed and untouched by state authorities.
- *Responsiveness* – Institutions and processes must try to serve all stakeholders.

- *Consensus orientation* – Good governance mediates differing interests to reach a broad consensus on what is in the best interests of the group and, where possible, on policies and procedures.
- *Equity* – All men and women have opportunities to improve or maintain their well-being.
- *Effectiveness and efficiency* – Processes and institutions produce results that meet needs while making the best use of resources.
- *Accountability* – Decision-makers in government, the private sector and civil society organisations are accountable to the public, as well as to institutional stakeholders.
- *Strategic vision* – Leaders and the public should have a broad and long-term perspective on good governance and human development, along with a sense of what is needed for such development. There is also an understanding of the historical, cultural and social complexities in which that perspective is grounded.

Interrelated, these core characteristics are mutually reinforcing and cannot stand alone. For example, accessible information means more transparency, broader participation and more effective decision-making. Broad participation contributes both to the exchange of information needed for effective decision-making and for the legitimacy of those decisions. Legitimacy, in turn, means effective implementation and encourages further participation. And responsive institutions must be transparent and function according to the rule of law if they are to be equitable.

5.2. RULE OF LAW

5.2.1. Legality and Legitimacy for Transition

The principle of the rule of law is to have governments limited by law, ruled by legal instruments, accountable to law, with the protection of human rights enforceable by law. Procedures have to be regulated by the respective constitutional rules, which have to guarantee that they are respected by all political forces.

In the current constitutional conflicts with regard to the relationship of the Federal Republic with the Republics of Montenegro and Serbia, almost all actors contest, at least partially, the legitimacy of some of these constitutions. Some contest the legitimacy of

the federal constitution or of some of its amendments, some contest the legitimacy of the Serbian constitution, and some contest the legitimacy of the constitution of Montenegro as part of a federal republic which they claim does not legally exist.

All these arguments contesting the legitimacy and the legality of these constitutions and of some constitutional amendments have some grounds for justification. Thus, if one were to take the argument of the rule of law literally, there would be no constitution on the federal or the republic levels, which could pass a rigid test of the rule of law. In consequence no political actors would have a legal instrument limiting their political and legal power. Anarchy would be the logical consequence.

There is only one way out to avoid such anarchy: that is to accept for the limited transitional period all existing constitutions as bases for the necessary constitutional procedures. A legal acceptance now of all these constitutions without contesting their partial or total legitimacy, seems to us to be the only way out of the deadlock. This would provide a starting point to achieve the very principle of the rule of law limiting governments by law and preventing anarchy.

Acceptance by all of the legality of the current legal instruments as basic laws for proceeding towards finding a necessary consensus (rather than arguing about their legitimacy) would enable progress towards reaching an eventual reconciliation of conflicting views. We find support for such a process in the submitted doctoral theses of Maya Hertig¹⁶, who has examined the dissolution process of the Federal Republic of Czechoslovakia. She came to the conclusion that the major reason this dissolution process could be agreed upon by peaceful and non-violent procedures, was to be found in the fact, that although all the actors contested the legitimacy of the constitution, they agreed to accept its legality, at least for the transitional period, in order to enable negotiations to proceed.

5.2.2. With Regard to the New Constitutional Arrangements

Whatever constitutional arrangements are eventually agreed upon, they must implement the very principles of the rule of law.

16 Cf. Maya Hertig, *Die Auflösung der Tschechoslowakei: Analyse einer friedlichen Staatsteilung*, Diss Freiburg 2001.

Referendums and majority principles cannot “overrule” the rule of law. Governmental action must also be limited by law.

In our report we will only refer to the rule of law as far as it has special implications for a federal or confederal solution: in the case of a federal constitution, the constituent Republics must also be limited by rule of law. Thus, a federation or a confederation should provide a common court which can guarantee that acts of the republics in conflict with the federation or the confederation can be over-ruled and that federal or confederal “law” has supremacy over the domestic law of member states as, for example, in the European Union. It should include mechanisms and processes to guarantee peaceful conflict management between Republic and federal or confederal (union) governments. The rule of law also means that the constitutional arrangements have to guarantee that human rights are effectively protected with regard to minorities within the Republics.

5.3. DEMOCRACY

5.3.1. The Referendum in Montenegro

On October 10 (after our visit to Yugoslavia) a draft “Referendum Law on the State Status of the Republic of Montenegro” was submitted as *lex specialis* to the already existing Referendum Law, which had been adopted on 19 February 2001. The following remarks take into account this new amendment and in particular the comments which have been made by the ODIHR of the OSCE¹⁷

With regard to the principle of democracy, in addition we refer to the report of the Venice Commission as well as to the Comments of the ODIHR, and give some additional general considerations with regard to democratic procedures for secessions. With regard to the proposed referendum in Montenegro the following issues are controversial:

- What is the impact of the Referendum?
- What majority is required in the referendum?

17 Comments on the Draft “Referendum Law on the State Status of the republic of Montenegro” Federal Republic of Yugoslavia, OSCE Office for Democratic Institutions and Human Rights Warsaw November 2, 2001.

- Should Montenegrins living outside Montenegro in Serbia or even outside Yugoslavia have the right to vote?
- What should be the question to be asked in the referendum?
- Finally taking into account the Swiss experience with regard to these kinds of referendums should there also be some guarantees in the procedure ensuring that a clear will of the citizens is determined?

Most of these issues have already been addressed by the Venice Commission. Its conclusions were as follows:

- It would be advisable to introduce a specific majority requirement into the referendum law for referendums on the status of the country;¹⁸
- 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.¹⁹

As in principle we share the arguments and the conclusions of the Venice Commission we will only develop some additional comments.

5.3.1.1. A Clear Majority

Article 2 of the constitution of Montenegro provides, that for any change of the status of the Republic the citizens should be asked previously to determine their will in a referendum. According to its wording the will of the citizens can only be represented by a majority of the citizens making the decision. Article 2 of the constitution contains a procedure for initiating a change of the status of the Republic. Such a fundamental status can only be changed if it is decided by a clear majority. The Montenegrin Law on Referendum, which is still in force, does

18 Comments also of the ODIHR: “ODIHR urged in paragraph III B of the Assessment of 6 July, that some qualified or weighted majority should be introduced for a referendum result to be valid: „International law and the OSCE commitments contained in the Copenhagen Document include no standards on the issue. However, best international practice in conducting referendums in similar situations inform us that some level of weighted or qualified majority is preferable in order for the outcome of a referendum to be less contestable and stability safeguarded. Furthermore, a qualified majority requirement reduces the potential for repetitive referendums over the same issue as a result of minor shifts in the public mood“.

19 Report of the Venice Commission No. 28.

not refer in particular to such constitutional referendums. Thus, as such a referendum is of utmost importance, the reference in the constitution to “citizens” has to be interpreted as requiring that a least 50% of the total electorate must vote in favour for the referendum in order to initiate a change. With regard to the draft referendum law of October 5 for a referendum on secession, we consider, that this draft fails to respect the wording of Article 2 of the constitution, which refers to “the citizens”, and in particular to the international legal requirements developed in the Supreme Court of Canada Case relating to Québec.²⁰

A “clear majority” for secession is also required by the decision of the Supreme Court of Canada in a referendum on secession.²¹ In the subsequent Clarity Act passed by the Canadian Parliament as a result of the Supreme Court judgment, in any referendum on secession, the House of Commons must take into account the size of the valid votes, the percentage of eligible voters and any other question: “In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account the views of all political parties represented in the legislative assembly of the province whose government proposed the referendum on secession, any formal statements or resolutions by the government or legislative assembly of any province or territory of Canada, any formal statements or resolutions by the Senate, any formal statements or resolutions by the representatives of the Aboriginal peoples of Canada, especially those in the province whose government proposed the referendum on secession, and any other views it considers to be relevant.”²²

Taking these considerations and the conclusions of the Venice Commission into account, we are of the opinion that the Federation can take a referendum as an initiative to open negotiations for a secession into account only if at least an absolute majority of the eligible voters voted in favour of secession.

20 A clear majority vote in Quebec on a clear question in favour of secession would confer democratic legitimacy on the secession initiative which all of the other participants in Confederation would have to recognize. (Supreme Court of Canada, Reference re Secession of Quebec [1988] 2 S.C.R. 217).

21 “Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecois votes on a clear question in favour of secession.” (Op. cit.).

22 “(a) the size of the majority of valid votes cast in favour of the secessionist option; (b) the percentage of eligible voters voting in the referendum; and (c) any other matters or circumstances it considers to be relevant.” (Canada, Clarity Act 2000, C. 26).

5.3.1.2. *Impact of the Referendum*

On Montenegro:

It is obvious, that a referendum as such has no constitution-making power by itself and this applies even in Montenegro. The referendum may be the first step to possible constitutional amendments. The argument that the will of the people is more important than the will of the parliament overlooks the requirement under constitutional law that the parliament must in the end make the final decision when all consequences with regard to the secession are known. Looking into the experience of several secessionist referendums in Switzerland, where the people first had to vote in order to initiate the procedure and then finally to ratify the secessionist legal solution, the two decisions had a different impact on the people and hence different consequences. Thus voters voted differently in the second referendum because the consequences and the price to be paid were known fully only in the final decision on secession. The Montenegrin Constitution does not provide a second referendum, but instead a parliamentary procedure for completing constitutional amendments. It is only at this final stage that all the important and relevant information will be known to the parliament. Accordingly the referendum by itself does not invalidate or make unnecessary the parliamentary amendment procedure for the constitution. Consequently the full procedures for amendment have to be followed according to the constitution of Montenegro.

On Yugoslavia:

According to the decision of the Supreme Court of Canada there is no internationally recognised right for unilateral secession based solely on a referendum within a federal unit founded on the principle of self-determination. Thus, if a referendum does take place in a constituent unit and if a majority of the citizens vote for secession, the impact of the referendum would then be only to initiate negotiations for a possible peaceful secession on the federal level. These negotiations must take into account the interests of the remaining republic, of minorities within Montenegro, the legal consequences for citizens in Montenegro and for citizens elsewhere in Yugoslavia, and of course the financial and property implications.

5.3.1.3. *Montenegrins Resident Outside Montenegro*

The constitutional referendum should follow the general principles applied in Montenegro for elections and referendums. Thus, only citizens with residence in Montenegro would have the right to vote. A change in this principle would require a specific constitutional mandate prior to the referendum adopted according to article 2 of the constitution.

5.3.1.4. *Clear Questions*

The Supreme Court of Canada, in its ruling on the issue of a right to unilateral secession for Québec pointed out that the question the citizens have to decide upon must be clear.²³ This decision of the Canadian Court also has some validity for the case of Montenegro, as its decision on the right of unilateral secession was based not only on Canadian domestic law but also on international law.

In addition we would observe that any country, which has had experience in direct democracy, has required clear questions to be asked in any referendum. The aim of the referendum must be to determine a clear will of the expression of the people. A question is not clear, if it contains only an open mandate for negotiations or if it obscures the debate.²⁴ The question is not clear, according to the Swiss tradition, if it contains two different issues with different possible opinions of the voters, which have to be answered by one vote. Finally, it is necessary that the questions contain only issues which can be decided by the Republic and the Federation through negotiations. For instance the citizens cannot decide on whether the independent Republic will be

23 “Those principles must inform our overall appreciation of the constitutional rights and obligations that would come into play in the event that a clear majority of Quebecers votes on a clear question in favour of secession.” (Supreme Court of Canada, *op.cit.*).

24 “(4) For the purpose of subsection (3), a clear expression of the will of the population of a province that the province cease to be part of Canada could not result from

(a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or

(b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.” (Canada, Clarity Act 2000, c.26).

internationally recognized. Only the international community can decide whether it will be internationally recognized. Citizens cannot be asked, therefore, whether they want to decide in favour of an independent and “internationally recognised” Republic, as proposed in the new amendment of the law on Referendum of 5 October 2001. This amendment, however, has not been adopted by the Montenegro Parliament.

5.3.2. Some General Principles to be Applied:

5.3.2.1. Citizens Concerned and Affected²⁵

The decision of the citizens of Montenegro to secede concerns first the citizens of Montenegro. Thus, the citizens have to decide in a referendum, whether they will initiate negotiations for dissolving the federation with the federation and the Republic of Serbia. Democratically the citizens of Montenegro cannot, however, unilaterally make a final and legally valid decision on their own. They are part of the common Federation to which they owe loyalty. They have suffered in common with all citizens of Yugoslavia through all the years since 1992. A federation is also a solidarity pact and the principles of democracy require that all parts of the federation be involved in such crucial decisions which determine the future of the status of the federation.

5.3.2.2. Procedure to Establish a Clear Will of Citizens

The decisions of citizens have to express a clear will of the sovereign. In order to achieve such a clear will, the procedure for a democratic referendum has to follow some basic democratic rules usually found for referendums in democracies:

25 “Democracy, however, means more than simple majority rule. Constitutional jurisprudence shows that democracy exists in the larger context of other constitutional values. Since Confederation, the people of the provinces and territories have created close ties of interdependence (economic, social, political and cultural) based on shared values that include federalism, democracy, constitutionalism and the rule of law, and respect for minorities. A democratic decision of Quebecers in favour of secession would put those relationships at risk. The Constitution vouchsafes order and stability, and accordingly secession of a province „under the Constitution“ could not be achieved unilaterally, that is, without principled negotiation with other participants in Confederation within the existing constitutional framework.” (Supreme Court of Canada, op.cit.).

The state organising the referendum has to give either official bipartisan information or it has to invite both parties to inform the voters on behalf of the state on the consequences of a positive or negative result of the referendum.

The state has to refrain from partisan intervention in the debate. It should not finance the referendum campaign on behalf of one party. In Switzerland the federal supreme court annulled the Referendum of the Laufental because the Canton of Bern intervened with an unreasonable hidden financial support against secession.²⁶

This obligation to neutrality limits not only the federal government but also the republic government. The republic government has to observe a double loyalty. It must, according to the principle of federal loyalty, be loyal to the federation (the German principle of *Bundestreue*), and it must be loyal to the citizens. As long as the will of the citizens is not clear, it must inform citizens objectively in a bipartisan way. It cannot favour a campaign for or against one side in the referendum. The loyalty towards the citizens means that the constitutional branches of government as such should not influence the will of the citizens by a specific partisan campaign. This does not exclude political parties as such and representatives of parties from participating in the campaign.

5.4. DIVERSITY AND LEGITIMACY

5.4.1. Minorities²⁷

Minority protection is frequently argued as an issue which “only” has to be considered from the point of view of individual human rights. When countries are confronted with foreign immigrants, they may reduce the issue of their rights to individual human rights. But when countries like the FRY are confronted with communities rooted by tradition, history and common culture in the area and in the territory they are living in, minority rights have to be taken seriously and much more fundamentally. Important minorities require that their identity be respected

26 The decision of the Tribunal Fédéral of Switzerland 20th December 1988 BGE 114 Ia 427.

27 See also 3.3. Constitutional Legitimacy.

as communities and that they are able to protect and enhance their culture for future generations. On the constitutional level, they need to be given the status of participants in state-making and constitution-making in order to give the political authority of the state legitimacy also in the eyes of the respective minorities. To be respected as a community they need further to enjoy autonomy and shared powers in government and collective rights for language, religion, education and culture.

We draw attention as a good model to the already mentioned proposal for a new constitution for Serbia of the Human Rights Centre of Belgrade which contains several provisions to guarantee such general collective and individual rights for minorities:

Preamble:

“Conscious of the state tradition of the Serbian people and determined to establish the equality of all the peoples living in Serbia...”

Part I:

“The Republic of Serbia shall be a multicultural democratic state of all the citizens and peoples living in it...”

Chapter III – Special Rights of Persons belonging to National Minorities and Respective Obligations of the Republic of Serbia:

“Persons belonging to a national minority shall have special rights, which they exercise individually or in community with others.”

“The Republic of Serbia shall have the duty, wherever necessary, to adopt adequate measures to promote the full and effective equality of persons belonging to a national minority and those belonging to the majority in all spheres of economic, social, political and cultural life.”

5.4.2. State – Nation

Serbia and Montenegro are republics with several different cultural communities. Thus, the issue of minorities has not only to be addressed on the level of the Republics but also on the level of the common state. With regard to the common state we are even confronted with an additional problem, which is a heritage of the old Yugoslavia. The reason, for the construction of a state including all the Slavic nations in the south of the Balkans was the fact, that there was no territory which was clear enough to be given to one nation as a sovereign state. Thus, the international community was in favour of a common state of all southern

Slavic nations living within this territory in order to avoid violent state – making by the nations exercising ethnic cleansing within their majority territory.

Today the FRY is the remaining federation combining the two nations: Serbs and Montenegrins. If the federal state remains, both nations will have their own Republic. However, if the two states are separated, each remaining Republic will have to accommodate some members of the former state-making nation as a new minority nation not excluded from citizenship. If Serbs in Montenegro and Montenegrins in Serbia were to wake up in a new state as foreigners, conflict seems to be inevitable. And history has shown that such a solution is almost impossible to achieve without paying a terrible price.

In its decision on secession the Supreme Court of Canada did hold that following a referendum on secession, the negotiations which lead to a final secession would have to take into particular account the rights of the different minorities.²⁸ Thus, negotiations on dissolution must focus upon the minorities living in both Republics, and of course the minorities created by the new states would be the Serbs in Montenegro and the Montenegrins in Serbia.

5.4.3. Sanjak²⁹

Special consideration has to be taken of the so called district of Sanjak. Today Sanjak is a region with a territory overlapping the borderlines of Serbia and Montenegro. According to the last census the district had a majority of Muslims. In the wars leading to the break up of the former Yugoslavia it was indirectly but strongly involved because of its geographical position close to Bosnia-Herzegovina and to Kosovo.

Sanjak is the Turkish word for district. The region called “Sanjak” overlaps the borderlines of Serbia and Montenegro and is today geographically the very link creating a direct neighbourhood of the two Republics. It has historically been called the

28 Negotiations would need to address the interests of the other provinces, the federal government and Quebec and indeed the rights of all Canadians both within and outside Quebec, and specifically the rights of minorities.

29 We do not refer to regions with a specific history in Serbia such as Vojvodina and Kosovo. We mention only the specific case of the district of Novi Pazar named Sanjak as this historical territory overlaps the borderlines of Serbia and Montenegro.

Sanjak of Novi Pazar (Bazar). In the treaty of Berlin³⁰ recognizing Serbia and Montenegro as States in the European community with restricted Autonomy, the district of Novi Pazar separating Montenegro and Serbia remained under the Turkish administration. In the first Balkan war it was conquered partly by Serbs and partly by Montenegrins. Thus, neither the historically long-lasting sovereignty of the Montenegrin Monarchy nor the Serbs ever had sovereignty over the whole territory of the combined present Montenegrin and Serbian parts of the Sanjak. It was these municipalities in the Balkans which remained for the longest time under the Turkish administration, that is until 1912. Thus, we are confronted with regard to this district with a certain historical identity, which would overlap Montenegro and Serbia. This particular human situation has to be taken into account in any negotiation for the remaking of a Yugoslav Federation or its dissolution.

5.4.4. Majorities

If a multicultural state has to guarantee peace among its different communities, it has also to take into account the interests of the majorities. Minorities cannot overstress their position and prohibit the pursuance of the substantial interests of the majority. In making constitutional arrangements these substantial interests of majorities in the federation and in the two Republics have to be addressed. Either the common state with the two Republics or the two Republics must gain legitimacy with regard to the great bulk of the society, that is both the majority and the minorities.

5.4.5. Tools and Instruments to be Considered:

Multiculturality is a constitutional challenge, which requires different tools and instruments in order to create legitimacy and loyalty, to manage conflicts between different communities, to enhance identity and equality and to foster the existing diversity. Those tools need to address institutions and decision-making processes (shared power) in relation to constitution-making, legislation, administration and the judiciary. Concepts for autonomy

30 Art. XXV of the Treaty of Berlin of 1878, which excluded the district of Novi Pazar from the territory of Bosnia Herzegovina ruled by the Austrian-Hungarian empire.

and decentralisation must be applied. And finally procedures for conflict management have to be provided that have credibility for fairness. These can enhance a political environment enabling reasonable compromises. We will address only a few examples which might give some indication of what might be considered for the future federation.

5.4.5.1. Decision Making

With regard to decision-making processes we focus on the constitutional level, being aware that some of these tools might also be considered appropriate for the ordinary legislative processes:

On the constitution-making level we have to distinguish between tools and instruments to be considered in the constitution-making (*pouvoir constituant*) and in the new constitutional institutions (Legislature, Executive, Head of State, i.e. *pouvoir constitué*). Further one has to consider that tools are needed to protect minorities, to enhance their development, to foster their integration, and also to manage conflicts between the communities.

The actual constitution-making process has to observe the legal rules provided for making a new constitution according to the existing constitution of the FRY. By observing legality one also gains legitimacy. Thus, the different parties will have to seek the informal approval (power-sharing) of the different minorities in order to gain the necessary legitimacy. Important minorities must be taken seriously at the state-making level. They must be given the possibility to identify with the new constitution as their proper state and constitution, a conviction shared with other communities. It is obvious, that such a constitution-making procedure will require compromises at all levels of the concerned communities.

The new constitution will have to provide amendment procedures which exclude the possibility of majorities violating the substantial interests of minorities. It may provide alarm bell procedures such as those employed in the Belgium federation³¹ or

31 Belgium Constitution, Article 54 [Group Veto, Alarm-Bell Procedure]:

(1) With the exception of budgets and laws requiring a special majority, a justified motion, signed by at least three-quarters of the members of one of the linguistic groups and introduced following the introduction of the report and prior to the final vote in a public session, can declare that the provisions of a draft bill or of a motion are of a nature to gravely damage relations between the Communities.

along the lines of the proposals of the Rambouillet-Accord protecting vital interests of minorities.³² Important for reconciling the majority and minority concerns are also “opting-out” provisions such as those employed in Canada.³³ Finally one might also consider such tools of direct democracy as referendums and initiatives. Although direct democracy is majority oriented, it also has an important disincentive effect, as it encourages the political elite to seek consensus. In the Swiss experience, if the political elite does not find a consensus, the people have usually rejected the proposals in the subsequent referendum. Thus, the disincentive of direct democracy may very well enhance the development of a consensus-driven democracy, and this has proven to be an excellent tool for conflict management.

(2) In this case, the parliamentary procedure is suspended and the motion referred to the Council of Ministers which, within thirty days, gives its justified recommendations on the motion and invites the implicated House to express its opinion on these recommendations or on the draft bill or motion that has been revised if need be.

Article 99 [Composition of Government]:

(1) The Council of Ministers includes fifteen members at most.

(2) With the possible exception of the Prime Minister, the Council of Ministers includes as many French-speaking members as Dutch-speaking members.

- 32 Rambouillet Agreement 1 Constitution: Article II: The Assembly General. The following procedure shall be used in the event of a motion under paragraph 7: The Members making the vital interest motion shall give reasons for their motion. The proposers of the legislation shall be given an opportunity to respond. The Members making the motion shall appoint within one day a mediator of their choice to assist in reaching an agreement with those proposing the legislation. If mediation does not produce an agreement within seven days, the matter may be submitted for a binding ruling. The decision shall be rendered by a panel comprising three Members of the Assembly: one Albanian and one Serb, each appointed by his or her national community delegation; and a third Member, who will be of a third nationality and will be selected within two days by consensus of the Presidency of the Assembly. A vital interest motion shall be upheld if the legislation challenged adversely affects the community's fundamental constitutional rights, additional rights as set forth in Article VII, or the principle of fair treatment. If the motion is not upheld, the challenged legislation shall enter into force for that community.
- 33 Examples of “opting out” provisions in the Canadian Constitution Act 1982, are sections 38(3) and 40 allowing provinces to opt-out of constitutional amendments. In addition under ordinary legislation in Canada there are a variety of federal tax abatement arrangements for provinces opting out of federal programs for social welfare, youth allowances, etc., and also provisions relating to program delivery by provinces (e.g. student loans) where there have been opt-out arrangements for provinces.

Another interesting Canadian proposal, although in the end not ratified was the Meech Lake Accord, 1987, section 7 of which stated: “The Government of Canada shall provide reasonable compensation to the government of a province that chooses not to participate in a national shared-cost program that is established by the Government of Canada...”

5.4.5.2. Institutions

Apart from the construction of a two-chamber parliament, the most challenging institutions to be established are the head of state and the executive. The executive has to be an efficient institution to promote economic and political development, and at the same time it has to integrate the different communities. The Swiss experience with a fixed-term collegial executive and head of state of seven council members all elected individually by the united two chambers and a rotating head of state has superbly combined efficiency with consensus driven policies. This system, however, has to include within it the checks and balances of the three governmental branches and the expression of the will of the citizens through regular referendums and initiatives.

Important consideration has also to be given to the electoral system. The electoral system must produce an efficient parliament representing the different social tendencies of the multicultural society. To achieve such an aim, one has to find the delicate balance between a proportional electoral system and constituencies small enough to guarantee legitimate representation but large enough to give different communities a chance to be best represented in parliament.

5.4.5.3. Autonomy

Autonomy is a major tool to enhance the identity and the expectation of a prosperous cultural and economic development of a community as part of the multicultural common state. Federations enable extensive territorial and personal autonomy combined with power-sharing of the different political entities. Asymmetric multicultural societies dispersed throughout the territory require additional autonomy on the municipal level and also autonomy based on collective rights such as those recommended in the proposal for a new constitution for Serbia by the Human Rights Centre of Belgrade.

5.5. FACILITATING ECONOMIC DEVELOPMENT

It is a widely recognized experience elsewhere in the world that constitutional and political stability and the rule of law are important preconditions for domestic economic development

and for encouraging foreign trade and investment. It is not surprising therefore that constitutional uncertainty and lack of progress in resolving the relationship of Montenegro to the FRY have contributed to slow economic and industrial development, a lower standard of living and high unemployment, substantial imbalances between exports and imports, and weak foreign investment in both Serbia and Montenegro.

In such a situation the burden on Montenegro has been further increased by the effort to maintain a quasi-independent government and administrative machinery corresponding to that required in a much larger country the size of Austria but with less than 700,000 inhabitants and a GDP of around US\$1,100 per capita. The result has been a serious budget deficit, which has been covered by the international community, primarily the United States of America. Since the self-financing of Montenegro in the long-term is appearing to be untenable, Montenegro's survival in a financial sense requires extensive reform, either in the direction of such microstates as Liechtenstein, San Marino or Malta, or as a more integrated part of a reformed federation.

Both the Montenegro Government Union proposal and the DOS-FRY Coalition restructured federation proposal identify the need for a common market and currency, but the proposals differ in the way in which these would be coordinated or integrated. In this respect it is worth noting that experience elsewhere indicates that federations or quasi-federal hybrids (of which the EU is an example) have been more effective in managing economic development than have loose confederal unions, such as that proposed in the Montenegro Government Union proposal. Indeed, the relative economic effectiveness of federations over other forms of government has received some attention from scholars.³⁴

The importance of this criterion i.e., facilitating economic development, in assessing alternative proposals for reconstructing the federation, is emphasized by recent public opinion surveys in Yugoslavia such as that carried out by the G17 Institute in September 2001. It appears that two-thirds of the respondents are now dissatisfied with their way of living. Recent surveys have also indicated that eradicating poverty and achieving higher

34 See, for instance U. Wachendorfer-Schmidt, ed., *Federalism and Political Performance*, 2000.

salaries, which had been low on the list of issues of interest to the public in 1990, are now at the top of the list.³⁵

5.6. CONDITIONS FOR MEMBERSHIP IN THE EU AND COUNCIL OF EUROPE

5.6.1. Statements from the EU

As far as the political and constitutional requirements for a future admission of the FRY to the EU are concerned there are very clear and precise official statements made recently by some leading EU bodies.

5.6.1.1. The General Affairs Council

The most important decision in this matter was made on 22 January 2001 by the General Affairs Council of the EU with its “Conclusions on FRY/Serbia” in the following wording:

“Policies of democratic and economic reform, reconciliation and regional cooperation, will bring the Federal Republic of Yugoslavia closer to the European Union, through the “Stabilisation and Association Process”, in line with Council’s conclusions of May 1999.

To this end the Council underlines the need for the FRY, like the other countries in the region, to meet the criteria of the European Union’s “regional approach” agreed by the Council in 1997, building on commitments made by all participants at the Zagreb Summit as regards the respect for democratic principles, human rights and the rule of law, full cooperation with ICTY, respect for and protection of minorities, market economy reforms, regional cooperation, and compliance with obligations under Dayton/Paris and UNSCR 1244.

The Council recalls the important political and financial efforts already made by the European Union to encourage the consolidation of democracy and reforms in the FRY. As further sign of its support, it decided to send an EU ministerial troika to Belgrade in early February.

The Council urges the authorities in Belgrade as well as in Podgorica to agree on an open and democratic process, within an

35 V.I.P. Daily News Report, 22 October 2001, page 5.

overall Federal framework, to decide on a new constitutional arrangement for the relations between the components of the Federation acceptable to all parties. The Council welcomes the readiness shown by President Kostunica to play a constructive role to that end. It underlines the importance of avoiding any unilateral action which could jeopardise this negotiating process and to ensure the democratic legitimacy of its outcome. It reaffirms its conviction that any renegotiation of the Federal relationship must be consistent with the internal stability of the FRY and the regional stability of South Eastern Europe”.

5.6.1.2. Sven-Olof Petersson, Head of the Political Troika

After the talks of the mentioned EU Political Troika (consisting of Minister for Foreign Affairs Anna Lindh, Secretary General of the European Council secretariat and High Representative of the EU Common Foreign and Security Policy Javier Solana, and EU Commissioner for External Relations Chris Patten) in Belgrade and Podgorica Mr. Sven-Olof Petersson, senior official in the Swedish Foreign Ministry and head of the troika, made the following statement on 9 February 2001:

“We want to see an open and democratic process leading to a new constitutional arrangement acceptable to all parties. We expect Belgrade and Podgorica to negotiate in good faith and trust that the parties will ensure democratic legitimacy of the outcome. No unilateral action should be taken which could jeopardise this process.

Any renegotiation of the Federal relationship must take into account the internal stability of the FRY and the regional stability of South Eastern Europe.

We further expect the media in Montenegro and in Serbia to cover the issue fully and fairly, and to ensure that the full range of views in this important debate is heard by the citizens of Montenegro and Serbia. It is their future that is at stake, and they are entitled to be fully informed of the implications of any particular course of action”.

5.6.1.3. Anna Lindh, Foreign Minister of Sweden

This press release was preceded and enlarged by another statement of Foreign Minister Anna Lindh on 8 February 2001, explaining the expectations of the EU in a more detailed manner:

“The EU has clearly expressed its expectations on the new leadership in Belgrade. There is a need for a comprehensive reform programme to bring Yugoslavia fully back into Europe; to get the economy in shape, to repeal the restrictive legislation of the Milosevic years of mismanagement and to release Kosovar Albanian and other political prisoners. Within this context we have expressed our expectation of full cooperation with the international war crimes tribunal. A process has started. We would now like to see quick concrete results of this cooperation”.

5.6.1.4. The Permanent Council

These positions have been reaffirmed by two further statements of the Permanent Council of the EU, the first on 19 July 2001:

“Following the formation of the new government in Montenegro, the EU stresses the importance of rapidly establishing a dialogue between Podgorica and Belgrade on a future constitutional arrangement acceptable to all and consistent with regional and internal stability”.

The second on 13 September 2001:

“We also encourage a creative discussion between the authorities in FRY, Serbia and Montenegro on their future relationship. We welcome the recent proposal from the DOS coalition for a revised relationship and we encourage the authorities in Podgorica to negotiate in a constructive way. We would expect any solution to be agreed between Belgrade and Podgorica and to have complete democratic legitimacy. We believe that a revised relationship between the two Republics within a single Federal State is the best way to preserve regional stability”.

The EU insists so decisively and strongly in a federal solution or “roof” over Montenegro and Serbia that this point was included even in the list of “European Union Priorities” submitted to the 56th plenary session of the United Nations General Assembly: “The EU supports a democratic Montenegro in a democratic Yugoslavia; it encourages an early resumption of the dialogue between the new Government in Podgorica and Belgrade with a view to redefining their relations in an agreement acceptable to all parties”.

5.6.2. Statements from the Council of Europe

In a similar way the Council of Europe and its officials try to assess and to examine the legal and constitutional situation in the FRY with regard to a future membership of the federation.

5.6.2.1 *The Committee of Ministers*

After the 109th session of the Committee of Ministers in Strasbourg, 7-8 November 2001, the chair Ernst Walch, Minister of Foreign Affairs of Liechtenstein, stated in his “Conclusion” inter alia:

“Lastly, the 109th Session provided an opportunity for the ministers to take stock of the most important developments at the Council of Europe in recent month. In particular, the Ministers welcomed the progress made by Bosnia and Herzegovina and the Federal Republic of Yugoslavia down the road to accession to the Council of Europe, and hoped that the conditions that had to be met to allow these two countries to join – each on its own merits and in accordance with established procedures and the criteria applicable to all”.

5.6.2.2 *Report on the Conformity of Legal Standards*

Nevertheless, the recent report on the conformity of the legal order in the FRY with Council of Europe standards, presented on 7 November 2001 by the former President of the European Court of Human Rights Rudolph Bernhardt (Germany), and a former judge of the court Raimo Pekkanen (Finland) concludes, that

“the legal order of Yugoslavia is not, at this stage, in conformity with the Council of Europe standards”.

But the authors believe, with regard to the application for membership of the FRY dated from 9 November 2000, that

“the basis and the potential for meeting the requirements in respect of democracy, the rule of law and human rights are present. Giving the existing willingness and capacity to carry out programmes involving new legislation, institutional changes and other reforms, it may be expected that the FRY will comply in the foreseeable future with Council of Europe standards”.

The report emphasises that a vast reform programme has been implemented, although the pace of the reforms is too slow, which the authors attribute mainly to internal political problems. Concerning democracy, the report notes that

“the institutions of the legislature and the executive are formed by means of democratic elections and there is a multi-party system and a developed structure of ordinary courts. However, the constitutional crisis and political problems in the relations between Serbia and Montenegro are creating considerable difficulties that will have to be resolved as soon as possible. Large parts of the legal framework governing state institutions are outdated and certain areas, especially with regard to judicial independence, require urgent and radical reform”.

The rule of law is enshrined in the three constitutions of the FRY as well as of Serbia and Montenegro, and the FRY has a developed legal system. However, the authors report “a high degree of legal uncertainty, mostly due to lack of harmonisation of laws”. Problems they pinpoint include the enforcement of judgements, the reform of the police and compliance with judicial decisions by the state authorities. The constitutions guarantee most of the fundamental rights protected by the European Convention on Human Rights and its protocols, according to the report. However, this protection is seen to be insufficient in certain areas, such as deprivation of liberty, civil and criminal procedure, minority rights, freedom of expression and the media and freedom of association. Finally, complete abolition of capital punishment and full cooperation with the International Criminal Tribunal for the former Yugoslavia are areas where urgent action is needed, according to the rapporteurs.

5.6.2.3. Interim Report of the Venice Commission

In the meantime, an interim report on the constitutional situation of the FRY was adopted by the Venice Commission at its 48th Plenary Meeting in Venice, 19-20 October 2001, based on comments by Gerard Batliner (Liechtenstein), Jeffrey Jowell (United Kingdom), and Kaarlo Tuori (Finland). The conclusions of the report underline the importance of the open constitutional questions:

“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”.

This statement made it quite clear, that one of the main pre-conditions for the admission of the FRY as a member of the European Council is the solution of its internal constitutional problems.

5.6.3. Political Expectations

Summarising the content of the quoted statements and documents the following conditions will be fundamental in view of a possible accession or admission of the FRY and its regions to the EU as well as to the Council of Europe.

5.6.3.1. Structural Conditions

All mentioned statements emphasise the need for a new constitutional arrangement of the relations between the FRG and their two components: the Republics of Montenegro and Serbia (including the autonomous province of Kosovo). This arrangement should lead to new or revised constitutions on the federal as well as on the member state level.

The future relations between the Republics of Montenegro and Serbia should be based on a federal framework. The EU and the Council of Europe have rejected all proposals for any kind of a con-federal structure. The demand for a so called “federal roof” is indispensable and indisputable. That means also the preservation or restoration of a renewed and reformed FRY as a sovereign state.

The new constitutional arrangements concerning a re-established federation have to be acceptable to all involved parties and political movements. Therefore, compromises are needed and the spirit or willingness of living together in a multi-ethnic society instead of a split into hostile minorities with an uncertain future.

The results of the negotiations on the federal relations of the components to each other and to the FRY must be consistent with the internal stability of the FRY and the regional stability of South Eastern Europe.

A revised relationship between Montenegro and Serbia within a single Federal State is seen as the best way to preserve and strengthen regional stability. Therefore, the EU and the Council of Europe support a democratic Montenegro and a democratic Serbia as two parts with equal rights in a democratic federal Yugoslavia.

5.6.3.2. Institutional Conditions

The institutions of the legislature and the executive, although formed by democratic elections, suffer in large parts from an outdated legal framework governing these institutions. Especially the independence of the judiciary needs urgent reforms and changes of the respective statutes.

The EU and the Council of Europe expect in the foreseeable future efficient steps and actions to reduce the high degree of legal uncertainty mainly caused by a lack of harmonisation of laws and by deficits of their execution.

Other constitutional and administrative problems which have to be solved include the enforcement of judgements, the reform of the police and the acceptance of judicial decisions by the state authorities.

The guarantees of human and civil rights in the constitutions have to be fully implemented also in crucial areas such as the freedom of mass media and the freedom of association. The protection of these rights is considered as insufficient with regard to the deprivation of liberty, civil and criminal procedure, minority rights, the abolition of capital punishment, and last but not least the cooperation with the ICTY.

5.6.3.3. Procedural Conditions

The EU and the Council of Europe ask for a negotiating process in good faith and trust or “bona fide” negotiations in the next future. They insist on results acceptable for all parties and reject any unilateral action which may jeopardise the whole negotiating process.

The work on new constitutions should start as soon as possible. The Venice Commission of the Council of Europe mentioned expressively the Platform of DOS, welcomed also by the EU, and the proposals of the Belgrade Centre for Human Rights as adequate and useful drafts for the future constitutions.

At the end of the process a common proposal of the new constitutional order in the FRY reached by bona fide negotiations could be submitted to a popular referendum and confirmed by decisions of the three parliaments.

5.6.3.4. Open and Democratic process

The main precondition of the European organisations – important not only with regard to a future membership of the FRY, but also as far as the economic cooperation and the financial support are concerned – is the strong demand for an open and democratic political process.

That includes the respect for democratic principles, human rights, the rule of law, protection of minorities, reconciliation, economic reforms, and regional cooperation. A comprehensive reform programme for all parts of the FRY based on these democratic values should bring the whole federation closer to the European communities.

All statements highlighted the essential purpose and aim of this process. i.e. to ensure the constitutional legality and the democratic legitimacy and of its outcome. The solutions agreed by the involved parties must be not only legally in accordance with the existing constitutions, but also based on decisions of the peoples and/or parliaments with a sufficient majority justifying the fundamental changes in the new constitutional order of the FRY.

From this point of view the plan of the present government of Montenegro to organise a referendum on its independence (and consequently on the dissolution of the FRY) contradicts the conditions of the EU and the Council of Europe from three aspects: firstly, it is a denied unilateral step; secondly, it strikes at the principle of legality, because Art. 2 Sect. 4 of the Constitution of Montenegro provides only for a previous referendum opening the procedure for amending the constitution in terms of Art. 118 and 119 with regard to the status with a two thirds majority in the parliament; thirdly, it does not produce sufficient legitimacy in limiting the success to an approval of a simple majority with binding effects for later decisions of the parliament. Therefore, the European bodies will never accept this destabilising policy.

6. Recommendations

Our recommendations focus upon four possible alternative solutions: (1) dissolution of the federation to create two independent states of Serbia and Montenegro subject to international law, (2) the proposal for a confederal Union of Montenegro and Serbia as set out in the Government of Montenegro Platform, December 2000, and possible variants of this approach, (3) the proposal for constitutional restructuring of the Federal Republic of Yugoslavia as set out by the Joint Platform of the Coalition of the Democratic Opposition of Serbia (DOS) and the Together for Yugoslavia Coalition (TFY) September 2001, and possible variants of this approach, and (4) the constitutional status quo.

Our recommendations are grouped under four headings: (1) General Procedural Recommendations applying to all four alternatives, (2) Specific Procedural Recommendations applying to each of the four alternatives, (3) Substantive Recommendations concerning the structures, institutions, processes and desirability of the four alternatives, and (4) a final concluding recommendation.

6.1. GENERAL PROCEDURAL RECOMMENDATIONS

1. Criteria for evaluating alternative solutions

We recommend that in evaluating alternative solutions, the criteria set out in section 5 of our report be applied. These are facilitating good governance in terms of effectiveness, accountability and responsiveness, restoring the rule of law and legal legitimacy, facilitating open and democratic processes, providing for diversity and the legitimacy of the distinctive interests of Montenegro and Serbia and of minority interests within these states, facilitating economic development throughout Montenegro and

Serbia, and particularly important, developing the conditions for accession to membership in the European Union and the Council of Europe.

2. The importance of consensus and democracy

We recommend that any resolution be based on a negotiated consensus of the three governments and parliaments openly and democratically arrived at rather than by unilateral action of particular governments. This is essential both for the internal legitimacy of any solution arrived at, and for international legitimacy.

3. Constitutional legality and rule of law

We recommend that the processes by which consensus solutions are reached be in conformity with existing constitutions and the rule of law. This legality is essential for the internal and external legitimacy of any resolution arrived at. Otherwise, any solution arrived at, even though based on consensus, will always be open to subsequent challenge as not having been arrived at legitimately.

4. The creation of incentives and disincentives

We recommend that in the consideration or design of any structures and institutions, these be evaluated not simply in terms of the structures and the elements composing them, but in terms of the incentives or disincentives they create for subsequent political action and behaviour. Constitutions are not ends in themselves. They are important because they induce and channel the ways in which citizens and politicians act to establish policies. The function of constitutions is not merely to assign status to constituent elements, but to establish processes for effective policy-making. One example is the way in which in Switzerland the constitutional provision for legislative referendums has induced efforts among the political parties to achieve consensus within the Federal Assembly in order to minimize the risk of referendum challenges to their legislation. Another is the way in which in Germany the existence of the Bundesrat (a second chamber composed of representative of the Land government executives) has encouraged the federal government to take

account of the interests of the Länder, and of the Land governments to be supportive of the concerns of the federation as a whole.

5. Consideration of the particular circumstances of Serbia and Montenegro

We recommend that in adopting an institutional solution, the particular circumstances of Serbia and Montenegro be taken into account. There is no single ideal form of state, union or federation. These are pragmatic tools for achieving the welfare of citizens. Constitutions and institutions therefore, must be adapted to the particular circumstances of the country in question. Examples of models elsewhere may be helpful, but modifications to such models and innovations to fit the particular situations of Yugoslavia, Montenegro and Serbia are essential.

6.2. SPECIFIC PROCEDURAL RECOMMENDATIONS

6. Procedures in the case of the dissolution of the FRY

We recommend that if the FRY is to be dissolved the procedures followed must be democratically and legally legitimate. To be legally legitimate the procedure would need to take into account the legal requirements outlined in Sections 3. and 5.2. of our report. The appropriate procedure would be an initial consultative referendum under Article 2, para. 4, of the existing Montenegro Constitution or in the case of Serbia under Article 2, para. 2, of the Serbian Constitution. The Montenegro Law on Referendum came into force on 2.03.2001 refers in article 37 to decisions by a majority of the votes of citizens voting provided a majority of the total number of citizens having the right to vote have voted.³⁶ However, because Article 2 of the Montenegro Constitution, which overrides this, requires that any change in the status of the country shall be “decided by the citizens,” we interpret the latter to mean that what is required is a majority of the citizens, i.e. those eligible to vote and resident in Montenegro, not just a majority of those voting. We note that the

36 The proposed amendment to this law in 2001 has not as yet been adopted by the Parliament of Montenegro.

Supreme Court of Canada has ruled that under international law a referendum on secession to be internationally recognized as legitimate, requires “a clear question” and “a clear majority”. Furthermore, that judgement noted that such a referendum by itself is insufficient under international law for international recognition of a unilateral secession. A referendum with a clear majority in favour of secession in response to a clear question would have to be followed by a negotiated agreement upon a constitutional amendment of the federal constitution. Applying this to Yugoslavia, if the FRY is to be dissolved, the referendum result could be implemented only by subsequent action under procedures set out in Articles 140-142 of the existing FRY constitution. It would also require amendment of articles 1 and 2 of the Montenegro Constitution under the procedure set out in Articles 118 and 119. It is quite clear that a referendum result, while a necessary precondition, would by itself be insufficient for international recognition of unilateral secession. Furthermore to be valid, the wording of any referendum question that implies that international recognition would automatically follow would be misleading to the voters. We would also note that the Badinter judgment on the status of the Federation of the Republic of Yugoslavia was made before the adoption of the current FRY Constitution in 1992, and therefore cannot apply to its status.

7. Procedures in the case of establishing a confederal union

We recommend that in the case of establishing a Union of Montenegro and Serbia as proposed by the Government of Montenegro, December 2000, the procedure required would be either:

- dissolution of the current FRY employing fully in all respects the procedure outlined in Recommendation 6 above, followed by negotiations between the Montenegro and Serbia governments reaching agreement on the new structure and ratifying it by the processes set out in articles 118 and 119 of the Montenegro Constitution and articles 132-4 of the Serbia Constitution, or**
- an alternative procedure which would be to amend the structure of the FRY through procedures set out in Articles 140 to 142 of the Constitution of the FRY and to amend articles 1 and 2 of the Montenegro Constitution applying Article 119.**

One of these two procedures would be required to give the Union the legal legitimacy required for international recognition.

8. Procedure for restructuring the Federal Republic of Yugoslavia

We recommend that the procedure required for a constitutional restructuring of the FRY as proposed by the DOS and the TFY Coalition, would involve negotiations among the three governments of Montenegro, Serbia and the FRY, followed by implementation employing the constitutional amendment procedures set out in articles 140 to 142 of the FRY Constitution 1992 and subsequent amendments. Consensual agreement among the three governments would meet the requirement of political legitimacy, and ratification employing the formal constitutional amendment procedure would meet the requirement for legitimacy in terms of legality.

9. Procedure in the case of maintaining the constitutional status quo

To maintain the constitutional status quo would require no legal change, but because of the current challenges to its political legitimacy steps would need to be taken to restore its legitimacy through negotiations and agreements among the three governmental bodies of the FRY, Serbia and Montenegro. In its current form the lack of enforcement of the full provisions of the FRY Constitution has created de facto a dysfunctional federation and a crisis of political legitimacy. In the context of the contested legitimacy of the current constitution of the FRY, effectiveness is possible only if the three governmental bodies agree to work together to achieve a cooperative democratically based consensus supporting it.

6.3. SUBSTANTIVE RECOMMENDATIONS

10. Avoidance of dissolution of the common state

We recommend that dissolution of the common state in order to create two independent states of Montenegro and Ser-

bia subject to international law be avoided. We also so recommend because the resulting advantages would on balance be considerably outweighed by the shortcomings in terms of economic development and meeting the conditions for accession to the European Union. Two smaller independent states, provided that they are established under the procedures outlined in Recommendation 6, would have some advantages. Smaller less complex political states may facilitate democratic processes and governmental responsiveness, avoid the difficulties of balancing the interests of Serbia and Montenegro with a population ratio of about 15:1, and avoid the problems of reconciling different tariff rates, currencies and economic systems. On the other hand, on three of the criteria outlined in Recommendation 1 there would be serious problems. First, given the sharpness of divisions on the issue within Montenegro, it will be difficult to establish the cohesiveness necessary for an effective independent government, and there is a real prospect that it could contribute to serious internal instability within Montenegro. Economic development is likely to be hampered by discouraging investment and in an increasingly globalized international economy it is virtually impossible for very small states to respond effectively. Most important it would reduce to virtually nothing the prospects for accession to the EU by either of the two resulting states. The EU is becoming increasingly reluctant to accept for additional membership small states lacking wealth, and it has made it abundantly clear, as noted in Section 5.6 of our report, that for purposes of accession it would require a common state of Yugoslavia. The choice of two independent states as a political solution would therefore come at a heavy long-term economic price.

11. Problems of the Confederal Union Proposal

We recommend that the proposal for a Union of Montenegro and Serbia, as set out in the Government of Montenegro Platform, December 2000, or any closely related variant of this proposal be rejected. If a confederal solution is adopted, to be effective it will require all the features of the unofficial alternative proposal for a Union of Montenegro and Serbia proposed by the Belgrade Centre for Human Rights (2001). While the proposal of the Government of Montenegro provides the façade of cooperative action within which Montenegro's currently de facto independent role could continue, the

smallness of the benefits that would be obtained are far outweighed by the complexity of decision-making arrangements that would govern the limited fields of joint jurisdiction. While it is often inferred that the new Union would parallel the model of the European Union, the Union, as outlined in the Montenegrin government official proposal, would in fact be much weaker than the EU in which the competencies for economic harmonization have in practice become quite extensive. The principle of rotation of offices and responsibilities would be far more extensive than in the EU, and would lack the counterbalancing features of a permanent Commission which in the EU provides an important policy-making and continuity function. It would also lack the qualified voting patterns that exist in the Council to recognize to some degree differences in the size of the constituent states. Nor is there any provision comparable to the European Court for enforcing decisions. Thus, the proposal appears to create the equivalent of a complex automobile that lacks an effective engine. This would appear to replicate the situation of the short-lived West Indies Federation 1958-62 in which, although technically a federation, the joint powers were so weak that the member states found that their frustrations far outweighed any compensating benefits, and the larger member states soon abandoned the enterprise. In the Montenegro Government's official Union proposal little is gained but at the cost of considerable complexity and restriction upon the exercise of possible initiatives by the constituent units. It is difficult to see any advantage for Serbia (and even for Montenegro) of such an arrangement over full independence. Particularly crucial is the insistence in this proposal upon participation of the member states as separate entities in international bodies including the EU, a requirement that would make accession to the EU much more difficult to achieve.

In the contemporary world, confederal systems have had increasing appeal because of the protection they potentially offer for the sovereignty of the member states. In practice, however, there have been extremely few stable confederal systems and where they consist of only two units deadlocks have been virtually unavoidable. In federations, because their central institutions are directly elected by the citizens, these have had greater democratic legitimacy enabling them to undertake more decisive action. The only really successful confederal system in the contemporary world is the EU, but much of its success derives from

the fact that it is actually a hybrid of confederal and federal institutions rather than a pure confederation.

Although there is no international evidence to suggest that two member confederations are any more effective than two-member federations, if it is decided that some form of confederal Union proposal is to be proceeded with, then in our view it would need to incorporate at an absolute minimum all the features of the alternative proposal for a Union of Montenegro and Serbia (published by the Belgrade Centre for Human Rights, 2001). The key features of that proposal (see s. 4.1.2.1.) were that the confederal Union of Montenegro and Serbia would be considered a single entity within the international community and for purposes of accession to the EU, would have competency over four areas (protection of human rights, defence, foreign policy and single market), its competencies would include levying and collecting the value added tax, there would be a unicameral Union Assembly of 81 members with seats distributed to take some account of the difference in size of the member states but requiring a five-eighths majority to ensure that any majority vote would include a majority from each member-state, implementation of Union statutes would be vested with the Union Government, the Union Government would take all decisions jointly and as a single body, and there would be a High Court of Justice. This would avoid some of the shortcomings of the Government of Montenegro proposal and would provide the minimum requirement for an effective confederal Union.

12. A limited common state

We recommend that agreement upon some form of a limited common state along the lines advanced in the proposal for constitutional restructuring of the FRY set out in the joint platform of the DOS and the TFY Coalition (September 2001), possibly with some negotiated agreement upon further modifications (see recommendation 13), be accepted as the preferred objective. This would envisage a functional federation, more decentralised than the present federal constitution, with the minimal set of functions necessary for the joint and effective resolution of issues of common interest, provide for co-operation between federal and republic bodies in processes of decision-making and performing joint functions, and leave to the republics all other competencies. It would need to be based on

the principles of equality of the federal units and the operability of the federation as a whole. In relation to the criteria identified in Recommendation 1, it is the alternative most likely to achieve in a balanced way the fulfilment of the whole range of criteria, and it is by far the likeliest to facilitate full and earlier membership in the EU, a very important consideration. By comparison with the federal status quo, it would recognize the need for a more limited range of federal competencies. Experience in other federations (and, it should be noted, equally in confederal unions) does indicate that federations with only two member states and those with radical variations in the size of constituent units face particular difficulties. Consequently, special institutions or procedures including some confederal elements to deal with these problems will need to be developed. These and some other suggested modifications to the DOS–TFY proposals are outlined in Recommendation 13 below.

13. Possible modifications to the proposal for a limited common state

We recommend that to ensure the effective operation of the reorganized common state a number of modifications to the constitutional restructuring proposed in the joint platform of DOS and TFY Coalition (September 2001) be considered and agreed upon.

Some of our recommendations are elaborations where the official proposal does not go into sufficient detail, and some are suggested modifications to enhance effectiveness. They take into account various documents and proposals such as those of the Belgrade Centre for Human Rights (2001), of President Kostunica (January 2001), of the Center for Liberal-Democratic Studies (Belgrade, 2000), and some features in the Montenegro Government proposal for Union (December 2000), as well as our own experience and knowledge of federal and confederal political systems throughout the world. In any solution a balance will need to be found between sufficient minority protection on the one hand, and minimizing majority frustration on the other. Given the imbalance in population, size, and economic capacity between Serbia and Montenegro in a federation of only two units special features will be necessary. The modifications we propose for consideration relate to six broad areas outlined below:

- (1) We suggest some confederal and protective clauses relating to protecting Montenegro as the much smaller member state. The proposal of the Montenegro Government (December 2000) in section V, 1 and 3 (para. 3 in both cases), makes reference to the desirability of each member-state having the right to initiate a special protection procedure in relation to acts of the Assembly or Council of Ministers. There are precedents for such arrangements elsewhere which avoid absolute vetoes and deadlocks, such as the “alarm-bell procedure” in the Belgian federation whereby a motion by three-quarters of the members of one linguistic group in a Federal Legislative Chamber may raise the alarm that a proposed legislative bill seriously endangers good relations between the two major communities. This leads to immediate suspension of the normal parliamentary procedure and instituting of a special procedure to resolve the issue. Somewhat similar in function is Article 2, paras. 7 and 8 in Chapter 1 of the Rambouillet Accords, 1999 (18-03). These are outlined in section 5.4.6.1. of our report. We recommend that there be some such “alarm-bell procedure” for ensuring the protection of Montenegro’s interests as the much smaller partner. We also suggest that the Canadian precedent enabling in certain cases ‘opting out’ arrangements also be considered. These are also outlined in section 5.4.6.1 of our report.
- (2) In order to protect minorities within each Republic, collective rights of ethnic minority groups should also be included among the guarantees of basic rights in the federal constitution.
- (3) The financial arrangements within the restructured federation will need to be clarified. In the official proposal of the DOS and TFY platform little is specified other than including the tax system under the mixed powers. That potentially permits the Federal Government to regulate the whole framework of the tax system. Experience in other federations suggests that the financial arrangements are always contentious and therefore there is a need for greater clarity and precision, including provision for exclusive as well as joint taxing powers, for equalization transfers, and for mechanisms for regular readjustment of the financial arrangements. The allocation of financial

resources is important for two reasons: first these resources enable or constrain governments in the exercise of their constitutionally assigned legislative and executive responsibilities, and second, taxing powers and expenditures are themselves important instruments for affecting and regulating the economy. In relation to the legislative competencies proposed, the federal government's exclusive revenues might come from customs duties and a tax on added value (VAT). Some independent taxing powers should also be identified for the Republics. Each Republic should in principle have the right to levy taxes sufficient to perform its constitutional tasks. Remaining taxes should then be placed in the category of mixed powers but be left largely to the Republics (see for instance, the Center for Liberal-Democratic Studies proposal (Belgrade 2000, pages 20-22). Most federations have found it desirable to establish a system of equalization transfers to provide member-states with sufficient revenues to provide reasonably comparable levels of public service at reasonably comparable levels of taxation. Inclusion of this principle in the constitution is desirable, although in the interests of future flexibility detailed formulae for calculation of such transfers should not be built into the constitution. All federations have found that the financial arrangements have to be revised regularly because the revenues provided by particular taxes and the expenditure needs evolve and change over time. Mechanisms for periodic modification of the financial arrangements, as exemplified by the periodic independent finance commissions provided by the constitutions in such countries as Australia, India and South Africa, are therefore highly desirable.

- (4) The joint DOS and TFY Coalition Platform (Sept. 2001) states simply that the way of electing representatives to the Chamber of Member States shall fall within the jurisdiction of the member states. While reasonable, that could lead to considerable difference in the method of electing them. A number of other proposals have suggested the desirability of the representation from each member state being proportional to the representation elected in the republic parliaments. Some such arrangement may be desirable if the representation in the Chamber of Member

States is to represent the range of public opinion in each member state. Elections to the Chamber of Member States might occur after each election in a member state with members holding office until their successors have been elected after the next election so that there is no period during which a member state is unrepresented. It should also be clarified whether members of the federal Chamber of Member States may at the same time also be members of the legislature or government of the member state.

- (5) Given the proposal for a bicameral Federal Assembly composed of a Chamber of Member States representing the member states, and a Chamber of Citizens expressing the democratic principle by representing the citizens in the common state, the provisions for resolving possible deadlocks between the two chambers need to be spelled out clearly. Ultimately, to fulfil both the federal and democratic principles, legislation should require approval by a majority in each house. However, mechanisms and procedures for trying to resolve deadlocks would facilitate effectiveness. An example is the use of mediation committees as found in a number of federations.
- (6) Also requiring clarification is the relationship of governments to the Federal Assembly. The DOS and TFY Coalition platform (Sept. 2001) simply states that nonconfidence in the Prime Minister has to be voted by both chambers of the Assembly. It is not clear whether this must take the form of a constructive vote of confidence. This would be a desirable feature. Nor does it state whether the vote would take place separately in the two houses, or whether a motion once made in one house would be resolved in a joint sitting. A different approach is to establish a fixed term collegial executive on the Swiss model, as suggested in the Centre for Human Rights alternative Union proposal, but we would point out that the effectiveness of that institutional model in Switzerland is coupled with the extensive use of legislative referendums. Such a radical departure from the current Yugoslav processes might create more problems than it would solve. One might also, however, note that the system of direct democracy has proven to be a major instrument for conflict management and minority protection in Switzerland.

14. The need for change to the constitutional status quo

We recommend that the Federal Republic of Yugoslavia in its current constitutional form not be maintained unless substantially modified. Although recognized by the international community, the current FRY has some serious shortcomings. Its constitutional legitimacy is contested, the constitutional minority protections are insufficient, and it has provided an insufficient basis for economic reform. The result has been political instability, extensive de facto ignoring of constitutional provisions, and lack of investment and limited economic development. It therefore provides a weak base for preparing for membership in the EU. As a result the status quo is untenable and the need for constitutional restructuring is clear.

6.4. CONCLUDING RECOMMENDATION

15. The urgent need for action

We recommend that in view of the urgency and the need to avoid delay in constitutional restructuring, the President of the FRY take the initiative to establish a Presidential Commission with wide representation of the major interests in both politics and civil society in Yugoslavia, that is both Montenegro and Serbia, to seek consensus on the procedures for overcoming the current constitutional problems as quickly as possible.

Political uncertainty and possible instability discourage investment and foreign aid and become a major barrier to economic reform and development. Repeated delays in removing political uncertainty therefore have serious implications for the welfare of citizens in both Serbia and Montenegro. In our view it is therefore essential that the constitutional situation be addressed and resolved without further delay.