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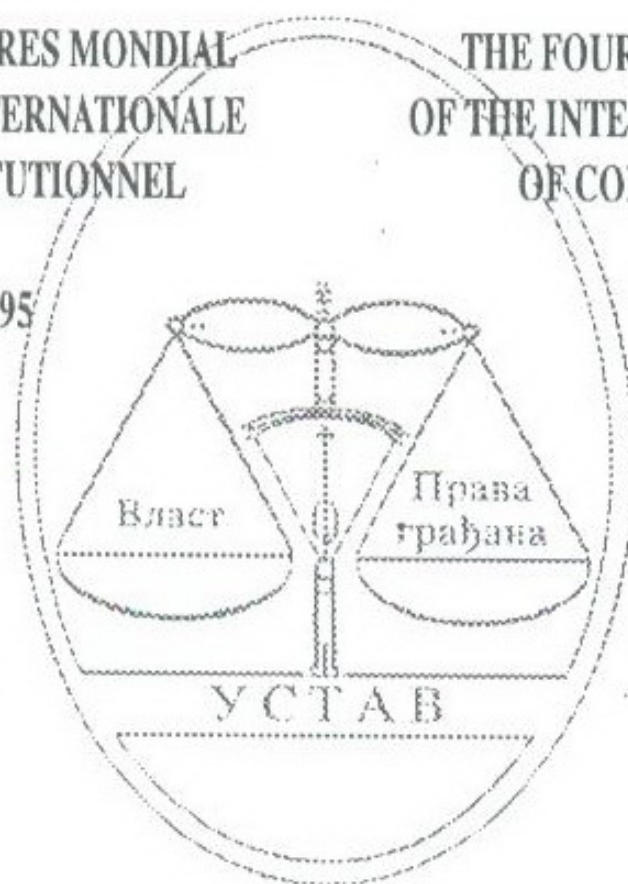
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V

**LE POUVOIR CONSTITUANT ET LA
NAISSANCE DES ETATS NOUVEAUX**

**THE CONSTITUENT POWER
AND THE BIRTH OF NEW STATES**

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THE UNBEARABLE LIGHTNESS OF CONSTITUTIONAL BEING

PROS AND CONTRAS ON POLITICAL TACTICS
AND LEGAL REASONING
BEHIND THE 1992 DRAFTING AND ADOPTING
OF THE CONSTITUTION OF THE FEDERAL REPUBLIC
OF YUGOSLAVIA

I. DISSOLUTION

With the fall of the Berlin wall, socialism was giving way to nationalism all over Eastern Europe. The collapse of the communist system in Eastern Europe brought new forms of nationalism, most explosive in cases of disintegration of former socialist federations - The USSR, Czechoslovakia, and particularly dramatic and tragic in Yugoslavia.¹ In Serbia and Montenegro the ex-communist parties managed double transformation, first turning them-

¹ Mark Wheeler, *The New Yugoslav People's War*, *Journal of Contemporary Soviet and East European Affairs*, Vol. 4, No. 2, March 1992.

selves into socialist parties, then - "...turning nominally socialist parties into openly nationalist ones..."² In Croatia, Slovenia and Bosnia and Herzegovina, and to some extent in Macedonia, nationalists used anti-communism to bolster their appeal and their international legitimacy.

The events, the crisis and the tragedy of the "Third Balkan War"³ that came upon former Yugoslavia in the course of the past several years focus world attention and concern.⁴ A study on the topic of inter-ethnic conflicts and war in the former Yugoslavia prepared by experts of the Institute for European Studies in Belgrade, concludes why Yugoslavia, as a country that has been identified as an advocate of peace in the efforts of surpassing divisions of the cold war, has ceased to exist: "In its first appearance, Yugoslavia was created as a kingdom that fell apart with the consequences of World War Two. In its second appearance, it was a communist republic in the form of a party state that fell apart with the fall of socialism and the post-war bi-polar European and world order. Cradled on the concept of war's end and the beginning of peace, the country disintegrated in the worst possible way - through war and destruction determined by inter-ethnic and religious conflicts in the central area of the former state (i.e. Bosnia and Herzegovina)."⁵ As for the causes of the conflict in Bosnia and Herzegovina, other studies by this Institute indicate that in Bosnia and Herzegovina, as in all of Yugoslavia, "...communism

² Robert M. Hayden, *Constitutional Nationalism in The Formerly Yugoslav Republics*, Paper presented at the conference on Nation, National Identity, Nationalism, University of California at Berkeley, Sept. 10-12, 1992.

³ Misha Glenny, *The Fall of Yugoslavia - The Third Balkan War*, Penguin Books, London 1992.

⁴ Aleksa Đilas, *The Contested Country - Yugoslav Unity and Communist Revolution 1919-1953*, Harvard University Press, 1990; Sabrina Ramet, *Nationalism and Federalism in Yugoslavia 1962-1991*, Second edition, Indiana University Press, 1991; Milica Bakić-Hayden & Robert M. Hayden, *Orientalist Variations on the Theme "Balkans": Symbolic Geography in Recent Yugoslav Cultural Politics*, *Slavic Review*, Vol. 51, pp. 1-15 (1992), etc.

⁵ L. Basta-Podunavac, R. Nakarada, S. Samardžić, J. Teokarević, D. Kovačević, *Međunacionalni sukobi i rat na prostorima bivše Jugoslavije i mogućnost njihovog rešavanja*, Institut za evropske studije, Beograd 1992, p. 3.

resolved the ethnical issue and inter-ethnic relations in a contradictory matter. (...) The ruling communists thought that nationalism was some kind of a "cultural" phenomenon, and they did not see that by their power, which had no economic foundation, they themselves were producing the causes for the future ethnic tensions and armed conflicts."⁶

In this context, international factors, notably the European Community and the leading nations of the West, willingly or not, contributed to the deterioration of the situation. It could be argued that these efforts (particularly the recognition of Slovenia and Croatia in January 1992, and soon after Bosnia and Herzegovina), far from bringing peace to this region, opened the depressive perspectives of perpetual inter-ethnic and inter-state conflicts: "...The responsibility for the Yugoslav disaster must rest, first with those Yugoslav leaders who have harnessed the chauvinism of their individual nations to destroy not only their fellow Yugoslavs, but also their own several nations, in whose interests they claimed to act. However, the responsibility for the complete breakdown of the Yugoslav state, which has condemned the region to long-term instability and military confrontation, rests with the European Community and the US."⁷

II. PLANS FOR SALVATION

In this political, international and economic context, plans for "the salvation" of Yugoslavia by Serbian President Slobodan Milošević and his aids were first publicly announced at a high-level meeting of delegations from Serbia and Montenegro that took place in Belgrade on February 5 1992. The next meeting was held in Titograd (Podgorica) on February 12, at which the two dele-

⁶ Slobodan Inić, *Razbijeno ogledalo: Jugoslavija u Bosni i Hercegovini*, in "Raspad Jugoslavije – produžetak ili kraj agonije", Institut za evropske studije, Beograd 1991, p. 121.

⁷ Robert M. Hayden, *Yugoslavia's Collapse – National Suicide With Foreign Assistance*, Economic and Political Weekly, Bombay, Vol. XXVII, July 4, 1992, p. 1377.

gations adopted a document entitled "*The Foundation of The Organization and of The Functioning of Yugoslavia as a Union*", with the main aim of preserving the constitutional and legal continuity of Yugoslavia now made up of two member republics - namely Serbia and Montenegro.⁸ In one of the first (semi)official statements to the public regarding the intention of drafting a new Yugoslav Constitution, it was explained that the idea of the unbroken existence of Yugoslavia (i.e. continuity) is attractive because it enables Serbia and Montenegro (which have, as it was stated "formal legal paternity over Yugoslavia") to evade the *ad hoc* procedure concerning international recognition, that other former Yugoslav republics had to pass.⁹ However, this idea was not only rejected by the democratic opposition and leading intellectuals at home, but it also failed to impress the United Nations and the International Community, as well, thus making Yugoslavia's international and constitutional position undetermined, to say the least.

III. BREAKING THE TIME BARRIER

Apart from the fact that drafting and adopting any new constitution in a post-communist political and social environment arouses not only expert curiosity and general interest, but numerous political and legal dilemmas as well, the new Yugoslav Constitution was an outstanding record-breaker, as it took only *five days* to write.¹⁰

⁸ *Sastanak predstavnika Srbije i Crne Gore – Potpuna saglasnost*, "Borba", Belgrade, February 6 1992, p. 4.

⁹ Dragan Kabadajić, *Očevi su poznati – Razgovor sa Prof. Dr Ratkom Markovićem*, "Politika ekspres", Belgrade, February 27, 1992, p. 8.

¹⁰ As pointed out in the government influenced media: "... Last week the experts expertly did their job – in only five days they put together something that usually takes months, sometimes even years – the Preliminary Draft of the Constitution of the new Yugoslavia containing some 140 provisions in ten Chapters". (Biljana Čpajak, *Otklonjene mnoge ustavne dileme o novoj državi – Još se ne zna ko će komandovati vojskom*, "Politika", Belgrade, April 5, 1992, p. 9).

The text of the Preliminary Draft of the new Yugoslav Constitution appeared in newspapers on April 15 1992. But contrary to previous practice, the "public constitutional debate" on the Preliminary draft of the Constitution was never officially announced. This was a clearly a "counter-precedent" particularly in regard to the 1988 constitutional debate over amendments to the 1974 Constitution of Serbia¹¹ that took forms of massive political campaigns organized by the League of Communists of Serbia with conferences, meetings and rallies in support of constitutional changes.¹²

The respective constitutional commissions of the parliaments of Serbia and Montenegro adopted the text of the Preliminary Draft,¹³ although there were many objections from the part of the opposition. Taking part in the discussion, leaders of the opposition, expressed the opinion that Serbia and Montenegro are in a totally new constitutional and political situation, and due to this, a Constitution can only be adapted by a Constitutional Assembly, and not by an "illegitimate and illegal body such as the Federal Chamber of the Assembly of the Federal Socialist Republic of Yugoslavia", and objected to the breach of the existing Constitution, on grounds that it prescribes a different amendment procedure. The opposition particularly indicated that the new constitution

¹¹ Compare: *Ustavna reforma u SR Srbiji – šta menjati u Ustavu SR Srbije*, Marksistička misao, Br. 6, Beograd 1988; *Promene Ustava SR Srbije* in "Promene Ustava SR Srbije, Pravni fakultet, Beograd 1988; *Promene Ustava SFRJ i Ustavni položaj SR Srbije*, Pravni život, br. 5–6, Beograd 1988; *Promene Ustava SR Srbije*, Opština, br. 9–10, Beograd 1988, etc.

¹² First hand accounts of this constitutional debate can be found in a book of collected speeches on this topic by, at the time President of the Serbian Assembly and President of its Constitution Commission: "This book contains my public speeches related to the constitutional changes. All this had happened between March 1988 and March 1989, almost a year – long period. *In this relatively short* (underlined – SL) period of time, many significant events took place in the political life of our country. No doubt, the constitutional changes, particularly the changes of the Constitution of the S(ocialist) R(epublic) of Serbia have not only been of the highest political importance, but also very dramatic." (Borisav Jović, *Datum za istoriju – 28. mart 1989*, BIGZ, Beograd 1989).

¹³ Velimir Ilić, *Prihvaćena radna verzija*, "Borba", Belgrade, April 14 1992, p. 7.

was "produced by representatives of only one political party" (i.e. Slobodan Milošević's Socialist Party of Serbia and their counterpart in Montenegro).

Contrary to previous practice three, out of the four political daily newspapers published in Serbia decided only to "report" on the current constitutional issues, i.e. publish short "informative" articles (e.g. on sessions, official statements, etc.).¹⁴ Only Belgrade's *Borba* (the independent political daily) opened its pages to a *de facto* constitutional debate. Excerpts:

– The new state under the old Yugoslav name is to cover up the military and diplomatic defeat of (Serbian President) Slobodan Milošević and the (Yugoslav People's) Army that supported him, and to make as painless as possible the loss of a state in which almost all Serbs lived together.¹⁵

– The provisions of the Preliminary draft of the Constitution are an obvious step backward in regard to the Constitution of 1974.¹⁶

– The present Federal Chamber of the Federal Assembly, which is to, as it is explicitly prescribed, adopt and proclaim the new constitution, does not have the legality or the legitimacy for this act. Legally, the mandate of the delegates (representatives) in the Federal Chamber has expired in 1990, and the second decision to extend their mandate (not to mention the first one) had no constitutional grounds, so there is ample ground to doubt the legality of the existence of the Federal Chamber, and consequently

¹⁴ Illustrating the general manner in which such "reporting" of constitutional issues was done, a very "interesting" article appeared in "Politika" on April 15. One of the sub-titles read "Constitution of The Federal Republic of Yugoslavia adopted" ("Usvojen Ustav Jugoslavije"). Obviously this was not correct, as the Constitution was not adopted then, but one week later (i. e. on April 27). No "errata" or other explanation was ever given.

¹⁵ Kosta Čavoški, *Crnogorci šesnaest puta ravnopravniji*, "Borba", Belgrade, April 16 1992, p. 13.

¹⁶ Miodrag Jovičić, *Kardelj nad Žabljakom*, "Borba", Belgrade, April 20 1992, p. 11.

its authority to adopt a constitution. Also, the Federal Chamber is utterly illegitimate, as the delegates were elected by virtue of one-party elections in 1986. In the present situation and the radically changed political circumstances, the one-party character of the Federal Chamber absolutely disqualifies its legitimacy.¹⁷

– The pessimistic model rests on the circumstance that the (so-called) Presidency of Yugoslavia on October 1 1991 established a "state of immediate danger of war", by which the existing Constitution of Yugoslavia was practically suspended. In conditions of such a "legal vacuum", the legal effects of the rule of law are substantially and procedurally irrelevant. Following this logic, The Constitution of the Federal Republic of Yugoslavia *de facto* and *de iure* is reduced to a "Constitution for a State of War".¹⁸

– Serbia and Montenegro have not entered the constitutional project as equals, primarily because Montenegro held a referendum on which the citizens were asked under which conditions they wish to establish a union - in Serbia a referendum was not held.¹⁹

The Preliminary Draft of the Constitution of Yugoslavia also drew reactions from independent trade unions, opposition political parties, as well as other public figures.²⁰

¹⁷ Pavle Nikolić, *Ujedinjenje radi razdvajanja*, "Borba", Belgrade, April 21 1992, p. 11.

¹⁸ Stevan Lilić, *Ustav za ratnu opasnost*, "Borba", Belgrade, April 23 1992, p. 13.

¹⁹ Radošin Rajović, *Srpsko-crnogorski Pijemont*, "Borba", Belgrade, April 23. 1992, p. 13.

²⁰ In press releases and public statements, the leaders and representatives of the (democratic) opposition parties in Serbia, *inter alia*, pointed out that: – the constitution that is being written on Mt. Žabljak is not democratic, because it was imposed upon us; – the Third Yugoslavia is being created by Slobodan Milošević in order to cover up his unsuccessful policy; – this is a naked fact confirming the disintegration of Yugoslavia; – the constitutional dialogue was never been opened, etc. (Svetlana Zelenbaba, *Šta o budućoj zajednici Srbije i Crne Gore, Trećoj Jugoslaviji, kažu neki od prvaka opozicionih stranaka u Srbiji – Žabljak umesto Briona*, "Borba", Belgrade, March 30. 1992, p. 7.).

IV. A STRANGE CASE OF DEJA VU

Apart from the described "public debate" on the Preliminary Draft of the Constitution, two legal conferences managed to be organized on this topic.

On April 24, a round-table discussion on the Preliminary Draft of the new Yugoslav Constitution was organized by the Faculty of the Department for Public Law and Political Science at the Law School of the University of Belgrade.²¹ The highlight of this discussion can be summarized in statements stressing that due to the fact that the new Constitution creates a new state, it cannot be the continuation of the old one, and that the new Constitution should represent the discontinuity, not the continuity with the previous regime.²²

Reflecting on the round-table legal conference held at the Law School of Belgrade's University, the media reported a *Strange Case of Deja Vu*: "Some TV stations (e.g. the independent "Studio B") have dedicated time to the discussion on the new Constitution held at the University of Belgrade. The professors of this Law School have, with one minor exception, said all the worst in regard to the mentioned document. But this did not draw my attention. I was impressed by the funny "deja vu" of this situation: in the same conference-room more than twenty years ago, a similar conference on constitutional amendments that were to result in the infamous 1974 Constitution was held. That conference came to be one of the biggest political scandals of the century - some of the professors suddenly "retired", some were fired, and one was even sentenced to prison. At the time, they were saying things that even the birds in Belgrade's parks know today. Some of the then "enemies of all species" were also speakers at last weeks

²¹ Papers and minutes from this discussion were published in the *Anali Law Journal* of the Belgrade University Law School (*Anali Pravnog fakulteta u Beogradu*, Beograd, br. 4, 1992).

²² B. Oprijan-Ilić, *Tribina na Beogradskom Pravnom fakultetu o Ustavu buduće države - Bruka i za struku*, "Nedeljna Borba", Belgrade, April 25-26, 1992, p. 6.

conference. The paradox lies in the fact that not more than six months have passed since the participants of the 1971 conference were publicly rehabilitated, as rare public figures that have, such a long time ago, by virtue of their professional skill and knowledge, discovered the disasters of the "most progressive (and extensive) Constitution in all of mankind's history". If by the pompous act of rehabilitating them, their clairvoyance (or call it what you like) has been recognized - than elementary logic is sufficient to conclude that their comments and criticism regarding the preset constitution is credible enough at least to earn them due respect of hearing them out. But, alas no! The legal profession is wrong again: in the same way lawyers were "wrong" in 1971. Today they will not be sent to prison or thrown out into the street, but for that matter the essence remains the same: we are still in the claws of the whims of omni-present politics. The feature of this particular ethno-existentialism, *inter alia*, is that knowledge is never viewed as a positive factor, except in retrospective, when the costs of its ignorance are astonishing."²³

The following day, on April 25, a round-table expert conference and discussion on the Draft of the new Yugoslav Constitution was organized by the "Forum Iuris" legal forum of the Lawyers Association of Serbia and the "Pravni život" law journal, with some two dozen experts participating in the discussion.²⁴

Referring to the two conferences (after the Constitution was adopted), legal constitutional experts reflected to the tune of *dixi et salvave animam meam*: "The unbelievable haste in the preparation and the adoption of the new Constitution of the Federal Republic of Yugoslavia threatened to discredit the legal profession, not only by not taking part in the creation of the basic law of the land, but also in having nothing to say about it before it

²³ Bogdan Tirnanić: *Druga TV strana – Treći čin, scena prava*, "Nedeljna Borba", Belgrade, April 30. – May 3, 1993, p. XIX.

²⁴ Papers and minutes from the discussion were published in the *Pravni život* Law Journal of the Lawyer's Association of Serbia (*Diskusija o Predlogu Ustava SR Jugoslavije*, *Pravni život*, Beograd, br. 7–8, 1992).

came into force. The latter, luckily did not happened, due to the endeavour of the Faculty of the Law School of Belgrade University and the Forum Iuris legal forum of the Association of Lawyers of Serbia. (...) Due to these two meetings and the debate that was herd, the lawyers saved their soul and proved that they are not ready to accept the accusation that the profession they practice is but a mere servant of daily politics.”²⁵

V. THE UNBEARABLE LIGHTNESS OF CONSTITUTIONAL BEING

Not taking into account any of the publicly presented arguments, the "unbearable lightness of constitutional drafting", was carried over to the "unbearable lightness of constitutional adopting". As facts speak for themselves:

In the course of only *ten days* from the point in time that could be acknowledged as the formal beginning of a constitutional procedure, i.e. from the day that the Preliminary Draft of the Constitution was discussed by the respective parliamentary commissions of Serbia and Montenegro (April 13), and only *eight days* from the day that the Preliminary Draft was made public (April 15), the Parliaments of Serbia and Montenegro adapted the Final Draft of the Constitution (April 23). Only *three days* later, amidst unison protests from constitutional lawyers, intellectuals and the opposition, the (rump) Federal Chamber of the (rump) Assembly of Yugoslavia adopted and formally proclaimed the Constitution of The Federal Republic of Yugoslavia on (Orthodox) Easter Monday, April 27 1992.²⁶

²⁵ Miodrag Jovičić, *Pravnici Srbije o Ustavu Treće Jugoslavije – Ustav ne stvara državu*, "Borba", Belgrade, May 5. 1992, p. 11.

²⁶ B. Matić, *Ustav i Uskrs*, "Politika", Belgrade, April 25. 1992, p. 10.

The Constitution of The Federal Republic of Yugoslavia consists of a Preamble and 144 provisions divided into ten Chapters.²⁷

VI. THE NEW REALITY

Consequently, the Constitution of the Federal Republic of Yugoslavia (and the new Yugoslavia proper) failed to achieve its main goal as proclaimed by the "constitutional drafters", i.e. the uninterrupted formal recognition of Yugoslavia by the international community and international organizations. On the contrary: the United Nations "suspended" Yugoslavia from the UN seat, thus practically rendering worthless the main argument of the political forces that engineered this constitutional project. In May 1992 the UN imposed economic sanctions on Yugoslavia that to this day are in effect.

As a result, the existing legal, political, economic and social order of the post-communist Yugoslav state created by Serbia and Montenegro turned into a "new reality" of constitutional inconsistency, international isolation, economic impoverishment and social dissatisfaction. Instead of a conclusion, it could be said that - "haste makes waste" - even in the case of drafting and adopting constitutions, and that the first possible opportunity should be taken by democratic forces in Serbia and Montenegro to correct this gross constitutional misdeed.

²⁷ I. General Provisions (Art. 1-18); II. Freedoms, Rights and Duties of Man and Citizen (Art. 19-68); III. Economic order (Art. 69-76); IV. The Authority of The Federal Republic of Yugoslavia (Art. 77); V. The Organs of the Federal Republic of Yugoslavia (Art. 78-114); VI. Constitutionality and Legality (Art. 115-123); VII. Federal Constitutional Court (Art. 124-132); VIII. Army of Yugoslavia (Art. 133-138); IX. Changes of The Constitution of the Federal Republic of Yugoslavia (Art. 139-142); X. Final Provisions (Art. 143-144). *The Constitution of The Federal Republic of Yugoslavia (English Version)*, Federal Ministry of Information, Belgrade 1992.

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