EU Accession and the Serbian-Montenegrin Constitutional Charter

by Jovan Teokarevic *

Abstract:

The Constitutional Charter of the Union of Serbia and Montenegro was finally adopted in January 2003, after protracted negotiations involving unprecedented European Union participation. This paper outlines and analyzes some aspects of the Charter agreement in the context of prospective EU enlargement. It suggests that the EU enlargement context determined the negotiating process and the resulting document to such an extent that, in the end, they came to resemble the EU integration model more than that of state formation or constitutionalization in the classical sense. The EU's leverage over the negotiating parties was based primarily on the latter's overriding desire to return to the embrace of the international community. However, the paper goes on to examine in considerable detail the nature and extent of the EU's involvement in the negotiation process, determining that it was so far-reaching as to call the future viability of the resulting constitutional arrangement into question. Indeed, the paper concludes, the EU will have to be engaged to an extraordinary degree in its day-to-day workings for years to come, to give the nascent Union state even a chance of survival.

Keywords: EU; EU enlargement; Serbia and Montenegro; Constitutional Charter

---

* Dr. Jovan Teokarevic is since 1981 research fellow with the Institute for European Studies in Belgrade dealing with political and economic changes in communist and post-communist states Also, his a professor of Political Science at the University of Belgrade.

The long-awaited, oft-postponed adoption of the Constitutional Charter of the State Union of Serbia and Montenegro, in January 2003, raises the question of the adequacy of this new constitutional arrangement for the array of traditional functions performed by most modern states. For the moment, however, the debate in both former Yugoslav republics is focused chiefly on whether the new union allows for an easier, faster, and more satisfactory accession to the European Union (EU).

During the protracted negotiations between Belgrade and Podgorica, which led to agreement on the charter, prospective EU accession was the most important issue on the table. The need to overcome the barriers to EU membership motivated the political elites of each side to make concessions and reach a constitutional agreement. As in the case of Cyprus, the issues of the state's functionality and its integration into the EU have been intertwined in unprecedented ways.

The context of EU accession and the 'condition of all conditions'

The importance of the EU accession context for the progress of the Serbia-Montenegro constitutional agreement can hardly be overstated. First of all, the fact that the long negotiations between Belgrade and Podgorica were positively concluded at all was due, to a large extent, to the promise and prospect of membership in the EU and to the direct participation of the EU in the negotiation process.

Although membership itself is a long-term goal, the EU made it very clear that every step in the accession process was predicated on reaching agreement on a constitutional arrangement for the new state. The EU emphasized that a satisfactory constitutional agreement was the key – though not the only – prerequisite to any future EU membership. The same demand was imposed by the other international organizations in which Serbia and Montenegro sought membership, namely, the Council of Europe, NATO's Partnership for Peace, the World Bank, etc. Of course, the list of conditions did not stop at agreement on a constitution: among others, the most prominent was improved cooperation with the International Criminal Tribunal for former Yugoslavia in The Hague. Thus, mutual agreement by Belgrade and Podgorica on a constitutional arrangement for a common state was set forth as the 'condition of all conditions' for any improvement in relations with the international community.

Time seemed to be running out, particularly with a view to the

requirements of the so-called Belgrade Agreement. This prior agreement preceded the 2003 Constitutional Charter and formed its constitutional and political basis. It was reached, after long negotiations, in March 2002. In point of fact, negotiations concerning a new relationship between Serbia and Montenegro began immediately after former President of the Federal Republic of Yugoslavia Slobodan Milosevic was ousted from power in October 2000. Official Montenegro and the new democratic authorities in both Serbia and at the federal level were confronted, from day one of the post-authoritarian era, not only with the numerous political and economic consequences of the Milosevic regime, but also with the legacy of spoiled relations between the two republics.

The federation of Serbia and Montenegro, as envisaged in the Yugoslav Constitution of 1992, barely existed outside the constitutional text itself. From 1997 on, official Montenegro boycotted the federal institutions and managed to create a *de facto* independent state of Montenegro, ignoring almost all constitutional provisions. Meanwhile Serbia also went its own way, quite independent of the interests of Montenegro. Thus, the actual political process had very little to do with what was written in the original constitution and federal laws. With Milosevic gone, however, there was hope that relations between the two republics could be reconfigured in order to bridge the gap between the legal situation and reality.

EU mediation

The process leading up to the Belgrade Agreement proved to be long and difficult, given the distance between the two irreconcilable political and constitutional visions. The degree to which the political elites in both republics seemed prepared to jeopardize their reintegration into the international community in order to achieve victory on their own terms testified to the deep-seated nature of these differences. The president of Montenegro, Milo Djukanovic, insisted on the sovereignty of his republic, as the cornerstone of any new arrangement. He was opposed by the federal president, Vojislav Kostunica, and a number of Serbian political parties, as well as the political opposition within Montenegro, all of whom wanted a federation that would preserve strong ties between Serbia and Montenegro. When, after months of fruitless negotiations in 2001, it became obvious that a solution was not in sight, the EU decided to intervene more directly, facilitating negotiations and pressing for deadlines and certain key provisions.

EU representative Javier Solana wanted to extend the model used in

Macedonia and in Bosnia and Herzegovina to Serbia-Montenegro. Together with its partners, the EU had managed to impose radical constitutional changes on those other former Yugoslav republics. In Bosnia, in the spring of 2001, the high representative of the international community had compelled changes to the constitutions of Bosnia and Herzegovina, and the two constituent entities, the Federation of Bosnia and Herzegovina (Croatian) and Republika Srpska (Serbian). The changes effectively erased any distinction between majority and minority ethnic groups in all parts of Bosnia and Herzegovina. In other words, the constitutional reforms reintroduced the principle of equality of all individuals across the entire territory of the country, which had not been the case under the constitutions worked out in the Dayton Accords. In Macedonia, in the autumn of the same year, the international community, led by the EU and NATO, had succeeded in forcing amendments to the Macedonian Constitution in the form of the so-called Ohrid Agreement. This agreement was reached after months of negotiation, in the wake of armed conflict between the government security forces and forces of the Albanian extremists.

The same model appeared appropriate and applicable to the Federal Republic of Yugoslavia. The agreement required considerable effort on the part of the EU – both in public and behind the scenes, including active shuttle diplomacy by Javier Solana – to achieve a compromise acceptable to both sides. The official name of the Belgrade document, dated March 2002, was the 'Accord on Principles in Relations between Serbia and Montenegro'. It provided the basis for the two states' constitutional arrangement and was signed by key negotiators from Serbia, Montenegro, and the Yugoslav Federation, as well as EU representatives. The agreement imposed a detailed timeframe for ironing out the final relationship between the states, the most important component of which was the adoption of the Constitutional Charter within six months, and the later harmonization of the constitutions of the two republics with the charter.

Months passed, however, and the members of the joint Constitutional Commission – heavily influenced by their respective and mutually opposed political camps – proved unable to agree on the charter's text throughout the whole of 2002. These delays can be partially explained by the totally different conceptions of the new states that had to be reconciled by the commission. To make the task even more difficult, the work of the commission progressed in a generally scandalous and non-transparent fashion. To the public, the commission appeared to be a bunch of irresponsible politicians who lacked any sense of the urgency of the situation. In addition, neither the experts nor the

public had any idea of what was written in the charter's draft articles.

It must be said that elaborating the constitutional charter with the Belgrade Agreement as its basis was very difficult. The earlier Agreement had itself become the source of considerable confusion and misunderstanding. Many of its provisions were poorly defined and contradictory, leaving room for totally different interpretations. In particular, the new constitutional creature took on very different appearances when looked at from within and from abroad. Seen from abroad, especially from Brussels, it seemed to be one state, but viewed from within, two distinct states could be perceived.

Even if constitutional provisions could be agreed upon, from the very beginning there was little optimism that the new state would function properly. Due to its unconventional and idiosyncratic constitutional arrangements, the new entity was often referred to in expert and political circles as a 'Frankenstein state'. With no customs, taxation system, or currency in common, it would require a miracle to preserve the unified state for more than a few years. One of its most telling weaknesses was its obvious transitory character. For instance, the Belgrade Agreement stipulated that the republics could slate referendums on independence after three years. This provision precluded from the outset any ambitious plans for the future constitutional arrangement. Rather, it triggered a frenetic scramble for short-term political gain. In addition, the agreement lacked popular legitimacy – in both Podgorica and Belgrade, it was perceived as the work of a small circle of people acting under foreign pressure – making it vulnerable to dispute by future governments.

The EU steps up the pressure

The poor performance of the Constitutional Commission, and the fact that it began to lag behind the agreed schedule, caused the international community to increase its pressure and push for a finalization of the document. Most importantly, it made it clear that reaching an agreement was a precondition for any further steps the Serbian-Montenegrin state might make in international affairs.

The European Commission defined its requirements very clearly at the last meeting of the EU-FRY Consultation Task Force, held in Belgrade, in July 2002. No further meetings of this body were actually convened (this was the fifth meeting held during the one year of negotiations) because the EU was waiting for Belgrade and Podgorica to deliver on the promises made in the Belgrade Agreement. One recommendation from the final meeting reads as follows:

> The Feasibility Study, to be prepared by the European Commission, will examine the state of implementation of political and economic reforms, including the sectoral reforms which have been recommended, as well as the capacity to implement such reforms and thus the obligations which would arise under a Stabilization and Association Agreement. To begin writing such a study, a requirement will be the continued implementation of the Belgrade Agreement, through the Constitutional Charter, which will give clarity to the constitutional and economic structure of the state, and the Action Plans (on Internal Market Harmonization and, in more detail, the calendar for trade and customs alignment).

In other words, after adopting the Belgrade Agreement, a constitutional arrangement between Belgrade and Podgorica was necessary, to be followed by 'Action Plans' on internal market harmonization and a calendar for future trade and customs alignment. Only upon the completion of these tasks could authorities in Serbia and Montenegro hope to get on track to EU accession on the model of other Western Balkan countries (Croatia, Bosnia, Albania, and Macedonia). In the short run, then, this entailed two things: first, the preparation of a Feasibility Study by the European Commission; and second, provided the conclusions of the study were positive, the beginning of negotiations on a Stabilization and Association Agreement between the EU and the unified state of Serbia and Montenegro.

The Council of Europe delivered a similar message, concerning the urgency of finishing the charter as a first step on the way to European integration. In September 2002, the Parliamentary Assembly of the Council of Europe concluded that Yugoslavia had fulfilled all necessary conditions for membership, and voted to admit it, but only on the condition of the adoption of the Constitutional Charter.

Obviously, both the EU and the Council of Europe had a common goal: to clearly determine the nature of the country they were eventually going to negotiate with. Both were also inclined toward dealing with one country instead of two, and this had a decisive influence on the framing of both the Belgrade Agreement and the Constitutional Charter. Brussels and Strasbourg, therefore, seemed more favorably disposed to the Belgrade vision, as Javier Solana at one point openly declared, which held that the new entity had to form a 'functional state, meaning one state'. In a way, Brussels took a practical position, preferring to deal with a single future negotiating partner, a single entity responsible for undertaking the reforms necessary for European integration.

Any hope that Montenegrin parliamentary elections would facilitate negotiations vanished after Djukanovic's victory in late October 2002. His convincing victory only confirmed him in his pro-independence position. Signaling that the goal of independence might be on hold but would not be abandoned, the president (soon to be prime minister) of Montenegro said his government would prove that Montenegro 'can solve all its own difficulties, [after which] tension will decline, and talks over Montenegro's independence will be calmer. I still strongly believe independence both for Montenegro and Serbia is the logical epilogue to the process of ex-Yugoslavia's dissolution'.

In the background of the dispute personified by Kostunica and Djukanovic stood Serbia's reformist prime minister, the late Zoran Djindjic. His pragmatism caused him to be more inclined toward Djukanovic than Kostunica. But he also wanted to defer real solutions to disputed issues and adopt the charter quickly, as a precondition for enacting the reforms he advocated to facilitate rapid admission to the Council of Europe and other international organizations. In the meantime, other disputes of a more general nature were fueling the basic conflict between the two blocs, for example whether the charter was a contract between two sovereign states, as Djukanovic was arguing, or a classical constitution, for which Kostunica was advocating.

The differences of opinion were all the more dangerous because they testified to the chronic lack of a single fundamental condition – without which there could be no democratic consolidation: that is, the existence of a real state. This requires some sense among people living within common territorial borders of a shared political community. Throughout the negotiations, the development of such an ethos was impossible for the citizens of Serbia and Montenegro. This was partly due to the unresolved status of Kosovo, which UN Resolution 1244 stipulates is part of Yugoslavia, but which is in essence an international protectorate. But, it was impossible also because of the acute differences of opinion regarding the new Serbian-Montenegrin state.

Direct engagement, beyond conditionality

Despite all the problems mentioned above, the Constitutional Charter of the State Union of Serbia and Montenegro was eventually passed in January 2003. All observers share the opinion that the final result became possible because of one crucial factor: the very prominent role played by the EU.

Whatever Serbian and Montenegrin politicians may have thought of the EU's strenuous insistence on a solution, compliance with EU demands meant, first and foremost, the possibility of full inclusion in the international community, most importantly the EU. This had been a long-anticipated goal in both republics. Because of Milosevic, for most of the 1990s, Yugoslavia was under heavy international sanctions, imposed by the UN Security Council, but also by the EU. Living in this pariah status degraded the country in all possible respects and prevented economic renewal of any kind. Rejoining the international community became something of an obsession, placing enormous pressure on all post-Milosevic political elites to achieve this goal. In spite of the emphasis placed on reintegration into the international community, Yugoslavia lagged behind the initial timetable, established after Milosevic fell from power, by a full two years.

Because of all this, the EU had to play a very important role in the negotiations, more than that of mere mediator. Compared with Cyprus's somewhat similar negotiations, or with the EU sponsored constitutional reforms in Macedonia and Bosnia and Herzegovina, the level of EU involvement with Serbia and Montenegro might lead one to conclude that this process had more to do with the EU regional strategy in the Western Balkans, than simply with a standard EU effort to establish a relationship with a sovereign state seeking membership. The EU role in this context must be seen as part of its strategy to halt any further disintegration in the region. In light of this fact, the Union of Serbia and Montenegro might be better understood as the result of a process of integration on the broader EU model, than a process of state formation in the standard sense.

The EU's proactive role in the constitutional engineering of Serbia and Montenegro far surpasses the policy model known as conditionality. However, the new model of direct engagement has retained many of the deficiencies of conditionality. A recent study describing EU conditionality in the Balkans (Othon Anastasakis & Dimitar Bechev, *EU Conditionality in South East Europe: Bringing Commitment to the Process*, Oxford, 2003) points out the policy's weaknesses very precisely. At the risk of exaggeration, one might argue that the Serbian-Montenegrin Union is completely dependent on EU engagement, both today and in the future. If it were not for the EU, the Union of Serbia and Montenegro would not have been born at all. By the same token, one could hardly have any confidence in its future existence without the same level of day-to-day engagement by the EU.

The EU in the constitutional system

Based on the Belgrade Agreement and the Constitutional Charter, the EU must provide the following functions for the nascent state of Serbia and Montenegro: aim, standard, guarantor, monitor, and arbiter. To make the case more compelling, these five functions will be presented *expressis verbis:*

- As to the *aims* of the new state, Article 3 of the Charter clearly states that one of its six aims will be 'to join European structures, and particularly the EU'. The standard language of other constitutions (and international documents and political statements), which speaks of 'Euro-Atlantic integration', has been replaced here with wording that places much more stress on the EU than, for instance, on NATO.
- The EU also provides a *standard*, a role model, which Serbia and Montenegro will obviously strive to copy. At least this is how another sentence from Article 3 can be understood. It states that the two member states of the Union will '…establish and ensure the smooth operation of the common market on its territory, through coordination and harmonization of the economic systems of the member states in line with the principles and standards of the European Union'.
- The EU's role as *guarantor* stems not only from the context described above, but also from the fact that the EU representative is one of the formal signatories of the Belgrade Agreement. Solana signed it as a 'mediator', but the entire process and its consequences, together with the texts of the agreement and the charter, suggest that Solana's role was much more significant. The EU is a genuine guarantor of the Agreement, Charter, and of the whole constitutional system that will arise on the basis of these two foundational documents (including the new constitutions of Serbia and perhaps Montenegro, as well). Even further, the EU explicitly offers another type of guarantee. In the Belgrade Agreement, the EU promises to 'give guarantees such that in the event that other conditions and criteria are fulfilled for the stabilization and association process, agreed principles of the constitutional structure will not represent an obstacle for a rapid completion of the Agreement on Stabilization and Association'.
- A sentence at the end of the Belgrade Agreement reveals the role of the EU *as monitor* of the constitutional and reform processes in Serbia and Montenegro. It states: 'The European Union will assist in the realization of these goals and regularly monitor the

process'. The word 'regularly' places an even greater emphasis on the EU's involvement and certainly cannot be reduced to the regular reports on Western Balkan countries, which European Commission introduced in April 2002. It must surely entail much more, probably something similar to the screening of EU candidate countries, but with higher-level EU bodies involved more directly in every step of the process.

- Finally, the EU is to be the *arbiter* in any future conflicts between Serbia and Montenegro over powers, the division of which has been defined in a poor, contradictory, and controversial way. The Belgrade Agreement states the following: 'If one of the member-states deems that the other member-state is not fulfilling the obligations outlined in the Accord concerning functioning of the common market and harmonization of trade and customs policies, it reserves the right to raise the issue with the EU in the context of the process of stabilization and association, with the aim of taking appropriate measures'. The EU has undertaken this burden (most probably under pressure from Serbia and Montenegro), even though the new Union has a court as one of its institutions.

In all of these ways, the EU will have to be engaged – on the ground, in the corridors of power, on a day-to-day basis. It is easy to imagine that the EU might falter under so formidable a burden.

Is the Union of Serbia and Montenegro a functional framework for EU integration?

The following observations point to a negative answer to this question:

1) Although the Union of Serbia and Montenegro is a single entity in international law, its competences are significantly constrained by the member states. The new union has only five ministries: foreign affairs, defense, foreign economic relations, internal economic relations, and human and minority rights. These portfolios constitute the Council of Ministers, which is headed by the Union president. Furthermore, the Union's parliament can only make important decisions with the approval of the respective parliaments of the member states. By the same token, the Court of the Union shares competencies with the respective constitutional courts of Serbia and Montenegro, in cases of conflict between the Union and the member states, as well as in cases determining the compatibility of law with the Constitutional Charter.

2) Although the Union's Council of Ministers includes the ministers responsible for the policy areas of primary importance for EU accession, their function is essentially one of coordination. They are charged with coordinating policies, including those relating to EU accession, that originate in the member states. Furthermore, the member states are not only creators of policy, but also executors, after their coordination at the Union level. The Charter stipulates in great detail the responsibilities of particular ministries, a micromanagement of the structure of the executive that is rare in constitutional texts. The reason for this arrangement was to stress the coordinative role of the Council of Ministers.
3) Despite the opportunity to organize ministries in a more efficient manner, ministerial competences overlap significantly, even in areas relevant to the EU accession. In addition, the competences overlap even more egregiously with those of the ministries of the member states.

The EU and constitutional arrangements for weak states

On the basis of the foregoing analysis, one can draw the following three conclusions:

1) As has already been widely noted by scholars, the EU can support the survival of weak states (federations, unions, and so on) but only if these states are already EU members. With regard to states that are still a long way from EU accession, it cannot and does not support their survival.
2) Because of this, a constant engagement on the part of the EU will be necessary to ensure that the Union of Serbia and Montenegro functions properly, makes progress toward EU membership, and, indeed, continues to exist.
3) In the final instance, the tasks undertaken by the Union of Serbia and Montenegro will depend on the political will of the member states. If this will exists, awkward constitutional solutions should not be an insurmountable barrier. They will, nevertheless, remain a significant obstacle, at least for the next three years, after which the entire constitutional order will be reexamined.