

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

EXCHANGE OF VIEWS ON THE DRAFT CONSTITUTION

OF THE RUSSIAN FEDERATION

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POINTS OF VIEW CONCERNING THE

PRINCIPLE OF FEDERALISM

by

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1. The principle of Federalism in the Draft Constitution of the Russian Federation of 13 November 1992

The principle of federalism is the only principle of the state-territorial structure adequate for a state like Russia. The reasons are threefold :

- the territorial dimension of Russia;
- the multinational character of the state, and
- the historical experience of over-centralisation which was the characteristic of the Soviet Union; the most convincing turning off from former centralistic structures is the introduction of vertical separation of powers.

The profound importance which the principle of federalism will have for the future of Russia is expressed in the fact that this principle is incorporated in Section 1 of the Draft Constitution as one of the basic principles of the constitutional system which can be changed only by a nationwide referendum.

2. The shaping of the Principle of Federalism in the Draft

The provisions of the draft clearly demonstrate the overcoming of the pseudo-federalism of the old Russian constitution of 1978 in its original version. According to the draft Russia will be a genuine federation.

2.1 The stable constitutional establishment of the "subjects of the Federation"

The firm establishment of the member units of the Federation can be derived from the following provisions :

- the member units - the subjects of the Federation - are expressly enumerated in Article 74; their legal status as such subjects cannot be altered without their consent, Article 74(3);
- the territorial basis of the subjects of the Federation is solid, because their territory cannot be changed without their consent; this is also true in cases of an alteration of state boundaries of Russia by way of an international treaty, Article 75(1), Article 86(3);
- the competences of the Federation are determined in a catalogue, Article 76; in the field of concurrent competences the Federation can issue only "fundamentals of legislation", Article 77(2), so that in principle the regulation in details is left to the jurisdiction of the subjects of the Federation; in this field future disputes may arise with respect to the notion "fundamentals"; the presumption of jurisdiction of the member units for matters not regulated by the constitution (Article 7(3)) prevents the Federation from enlarging its competences; the convincing evidence for a genuine federation is found in Article 133, according to which the distribution of competences between the Federation and its constituent units can be changed only under the requirement of a three-fourth majority of the elected deputies of the Federal Assembly in which the subjects of the federation are represented - thus the centre of gravity of the so-called competence-competence is in the hands of the subjects of the Federation;
- a very interesting, and as far as I can see, a really original innovation is Article 79, according to which the Federation may transfer - by way of an agreement - parts of its competences to the subjects of the federation and vice versa; thus a very flexible mechanism is established which enables specific distributions of competences in order to satisfy particular needs or wishes.

2.2 Participation in the forming of the will of the Federation

The legal possibility of member units of a Federation taking part in the formation of the will of "the centre" is another element of a federal structure. This element is also contained in the Draft.

The main provision in this respect is Article 84. The federal parliament consists of two chambers, one of which - the Federal Assembly - is the very organ which enables the subjects of the Federation to play an active role at the federal level, and that not only in the important field of federal legislation. Additionally the right of the legislative assemblies of the subjects of the Federation to initiate (federal) legislation may be mentioned here (Article 9), as well as Article 128(2) which requires an agreement with the member units for the introduction of the state of emergency in one of these units.

3. Unitarian elements

3.1 The legal regulation and the maintenance of the status as a subject of the Federation

The Republics, Territories (Kraj), the Regions (oblasti), the Cities of Moscow and St. Petersburg, the (Jewish) Autonomous Region and the Autonomous Areas (avtonomnye okrugi) have in principle the same constitutional-legal status. Besides the provisions of the Federal Constitution the member units themselves regulate their "legal status" (Article 7 - 2 (russian version of the Draft of 19 October 1992)). But there is an exception : the autonomous area may be a part of a Republic, Territory or Region, Article 74(2). The specific features of the legal status of the autonomous area shall be determined "by the federal law". In the Russian version of 19 October 1992 the legal status of the self-governing territorial units within the Republics, Territories, Regions, autonomous regions and autonomous areas should also be determined "by federal law", Article 74(4); "federal law" is eliminated in the English version of the Draft of 13 November 1992. However, also this new version seems to suggest that only the Supreme Soviet of the Federation has the power to regulate the legal status of the self-governing territorial units. In my opinion this legislative power of the Federation is inconsistent with the principle of federalism as formulated in Article 7 (decentralisation of state power). The legal regulation of the status of both the self-governing territorial units and the autonomous areas within a Republic, Territory or Region should be left to them.

A highly delicate provision is Article 75(2). The ratio legis of this provision is evident: the territorial integrity of the Federation shall be preserved as far as possible. The provision that alterations of the boundaries of the Federation require the expression of the will of the population of the respective territory may only be welcomed because this is in accordance with the principle of self-determination. The additional condition - the subsequent expression of the will of the whole of the people of the Russian Federation - however is a very doubtful one. This condition may still be in accordance with the principle of self-determination with its present content. But to overrule the will expressed by the population of a given territory by a vote of the whole population of the Federation may provoke serious consequences. Radical elements may start armed fighting ("wars of liberation") to achieve separation of the Federation, and that means civil war. It may be more prudent "to let the people go". They cannot "fly to the moon"; because of the geographical vicinity to the Federation they remain connected with the Federation.

3.2 The constitutional autonomy of the member units

According to Article 76(d) the "establishment of the general principles for the organisation of the system of bodies of the state power" of all the subjects of the Federation is within the jurisdiction of the Federation. It is clear that within a Federation a certain homogeneity of the constitutions of the member units with the federal constitution is necessary. But the guarantee for this homogeneity is already in the constitution - in Chapter XVIII. In view of this Chapter it is superfluous to give the Federation additional jurisdiction to regulate the "general principles" for the organisation of the member units. In view of the aim of decentralisation the constitutional and statutory autonomy of the member units should not be infringed by the Federation.

3.3 Federal taxes and dues

A very serious constitutional gap is the regulation - or better: non-regulation - of the tax system. Federal taxes and dues belong to the (exclusive) jurisdiction of the Federation, Article 76(h). Federal taxes and other tax-related federal payments and dues are introduced by federal law, Article 118(6). But the constitution does not determine the kinds of federal taxes, this determination is left to the federal legislator. There is also no provision stipulating an obligation of the Federation to pay at least parts of the federal revenues into the budgets of the member units of the Federation. This constitutional openness of the federal tax system gives the federal legislator the opportunity to determine the most interesting tax sources to be federal ones. The federal legislator has the power to weaken severely the financial independence of the member units. The participation of the member units in the federal legislation via the Federal Assembly does not seem to be a reliable mechanism to prevent such a development, because the federal Assembly can be outvoted by a two-thirds majority of the Duma, Article 89(4).

3.4 The executive power

The catalogues of the (exclusive and concurrent) jurisdiction do not differ between legislative and executive powers. That means that "jurisdiction" comprises both powers. Article 80 of the Draft provides that the federal organs as well as the organs of the member units "shall implement the federal laws" as prescribed by the constitution "and federal law". On the basis of this constitutional provision it is possible that federal laws confer the implementation of the federal laws mostly on federal executive bodies. This opens the door for a centralisation of the executive power and the development and strengthening of the federal bureaucracy to the disadvantage of the executive powers of the member uni