

Exchange of views with the Constitutional Commission of the Federation of Russia (Moscow, 17 February 1993)

A delegation of members and experts of the European Commission for Democracy through Law met representatives of the Constitutional Commission of the Russian Federation in Moscow on 17 February 1993. The list of participants is attached.

The exchange of views was based on written reports submitted by Mr Herbiet, Mr La Pergola, Mr Marques Guedes, Mr Rosas and Mr Schweisfurth.

Text of the draft Constitution (CDL(92) 52)

Sections on Fundamental Rights, Freedoms and Duties of Man and Citizen, and on Civil Society

Mr Maas-Geesteranus noted that the coexistence of the two chapters could pose problems of co-ordination and definition of the scope of a right. For instance, the freedom of expression or the right of property of the individual were in fact affected by the limits imposed to their exercise in the chapter on civil society. Furthermore, the provision on the right of property on land, subsoil etc. in Art 58.1 needed clarification.

Mr Rosas said that the list of civil and political rights was too long, and should be reduced to its basic provisions.

The legal status of rights guaranteed by law and not by Constitution (Art 13.2) was not clear, and the general provisions on restrictions (Arts 13.3 and 15) should rather be worded as the corresponding provisions of the European Convention on Human Rights.

The definition of the state of emergency (Art 126) should be improved, and adequate guarantees provided (Art 129).

Mr Danilov explained that the Section on civil society had been inserted in order to prevent the return of despotism.

Section on the Federal Structure

Mr Schweisfurth considered that the territory and the competence of the federal units were well set out in Chapter XII, and could not be changed without the consent of the unit concerned. Also, the possibility to transfer powers between the unit and the Federation (Art 79) was a positive feature. However, the power of the Federation to legislate on the status of the units (Art 74.4) was at variance with the principle of federalism.

The fiscal regime of the units (right to impose taxes, or obligation of the Federation to transfer to them part of the federal taxes) was not clear, and this was a major lacuna of the text. Federal and local taxes should be clearly identified in the constitution.

Problems might also arise in case of a federal referendum (Art 75.2) overruling local referenda on the alteration of boundaries of the Federation.

Mr Luchterhandt added that it was not clear whether sovereignty was detained by the multinational people of the Federation (Art 1.2) or by the people of each unit (Art 7).

Furthermore, there was no mention of the power of the units to adopt their own constitution, subject only to the Federal Constitution.

Chapter on Federal legislative power

Mr Beaudoin considered that the bi-cameral system envisaged was the most appropriate to a federal State. The attribution of the same number of seats in the Federal Assembly to each unit irrespective of size, although justified in principle, might in some cases give rise to discontent.

Chapter on the Judiciary

Mr Marques Guedes said that two main options for constitutional control were open: diffused control by all courts, or centralised control by a Constitutional Court. The latter system, which had been chosen by the Russian draftsmen, was the most appropriate to a country where different legal systems prevailed and different jurisdictions were in operation: the Constitutional Court would then work as a "Court of the Courts".

However, Art 108.4 did not spell out clearly the legal effect of the decisions of the Constitutional Court.

Mr Danilov objected that any gap in the text would be filled later by case law. It was also considered that a diffused control system would be more appropriate for a country such as Russia.

Procedure for adoption of the Constitution

Mr Sheynis explained that a proposal to hold a referendum on the draft Constitution had been put forward, but the terms of the question to be put to the citizens were still unclear: adoption of the whole Constitution, or approval of certain basic principles, and if so which ones?

Another proposal aimed at convening a Constituent Assembly, with the sole task of writing the Constitution. The Supreme Soviet would continue to legislate, and the People's Congress would have to renounce its right to adopt the new Constitution under the terms of the Constitution in force. This idea had been put forward by those who believe that the present Parliament, elected three years ago, had lost democratic legitimacy in the eyes of the people. The possibility of submitting to referendum the text elaborated by such a Constituent Assembly was also examined.

Mr La Pergola, Mr Schweisfurth, Mr Beaudoin, Mr Marques Guedes, Mr Herbiet, Mr Rogati, Mr Luchterhandt and Mr Maas-Geesteranus took part in the ensuing debate. They contributed a comparative analysis of the various procedures as well as precedents in the constitutional history of Europe, with a view to providing the Russian legislators with as much information as possible on which to base their political choice.

They recalled that a number of Constitutions in the past had been adopted by Constituent Assemblies, but this was feasible in countries where the process of formation of political parties representing the people's opinions had already taken place, and might prove not feasible in countries undertaking a major social and political upheaval. When such an Assembly had been set up (Italy, Spain, Germany in Weimar, Philadelphia) it also had ordinary legislative powers.

Since the Assembly would represent the will of the people, there would be no need for a referendum to adopt the Constitution.

A referendum could instead be held on a very specific question (e.g. choice between monarchy or republic in Italy after the war).

A word of warning was uttered against the risks of a referendum on too complicated a text, where voters would easily find lacunae or drawbacks, which

would make them reject the whole text and leave the country without an alternative solution.

Referenda are sometimes invoked by opponents of the project, hoping that the people would reject it. It also happened in history that oppressive regimes have been introduced thanks to plebiscites.

LIST OF PARTICIPANTS

European Commission for Democracy through Law

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ITALY :

Mr Antonio LA PERGOLA, Member of the European Parliament (President)

Mr Elio ROGATI, Conseiller parlementaire, Chambre des Deputes

NETHERLANDS :

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CANADA :

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Experts

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