

# Some Remarks Concerning the Russian Constitution and the Report of Prof. Krasnov

Michael GEISTLINGER, Salzburg

## 1. Introduction

Analyses of the Constitution of the Russian Federation and of the Russian Political System by Russian authors tend to neglect the starting point of the Russian Constitution 1993 and the historical facts which led to the entry into force of this Constitution. The Russian Federation of today was the heart of the Russian Empire until 1917 and the dominating Union Republic of the former Soviet Union. The first president of the independent Russian Federation after the break-down of the former Soviet Union was President Eltsin who was also the last president at the top of the Russian Socialist Federal Soviet Republic (RSFSR) which was renamed into Russian Federation in 1992. This new name was adopted by means of an amendment of the old constitution of a union republic which irrespective of all reforms accomplished during the times of Gorbachev as last leader of the former Soviet Union continued to be based on the USSR Constitution 1977, adopted under Brezhnev, and widely copied on the Republican level by the RSFSR Constitution 1978.

When the former Soviet Union was dissolved at the end of 1991 and the RSFSR like the other fourteen former union republics became independent states, seen from the perspective of the constitutions of these entities, they lost their head which was the constitution of the former union. Having been evaluated as pure derivatives of the former constitution on the union level, all of a sudden these constitutions got endowed with the power forming the only and supreme legal basis for the respective territory. At the same time – due to the elimination of the monopoly of the Communist Party – these constitutions changed their very nature. As long as the monopoly of the Communist Party of the USSR existed, the party documents, decisions and orders had priority over any law, including constitutional law. Analysing constitutional reality, therefore, meant in Soviet times, to analyse party law and only subordinate to it the Soviet Constitution and the constitutions of the Soviet republics.

With regard to the RSFSR and the later Russian Federation President Eltsin, therefore, accomplished a master piece by eliminating the party monopoly and by assisting in assigning the RSFSR/RF Constitution, many times amended in those years, the nature of the key document as law forming the normative basis for any exercise of power in the RSFSR and later RF. Only from that moment onwards the role of the Russian constitution could be directly compared to the role of any other constitution of a state, including the German, French or Austrian constitution. It is still admirable that such change of the nature and relevance

of law could take place with nearly no blood-shed and only few cases of armed conflict, one of them, however, of a severe dimension and continuing until present, the Chechen war.

On the other hand, as to all other elements, to be dealt with by a constitution, President Eltsin – with few exceptions, some of them, however, of great importance – could not do more than to preserve the heritage.

To start with the major exception: The principle of division of powers was introduced by amendment of art. 3 of the Constitution RSFSR 1978 on 21 April 1992. Until this moment art. 3 incorporated the marxist-leninist principle of democratic centralism involving the unity of powers. Today, the principle of division of powers is laid down in art. 10 Constitution RF 1993.

President Eltsin, however, inherited from the times of the former Soviet Union the Stalinist composition of Russia in the framework of the so-called Russian federalism. He also inherited the concept of Russia as a national state being based on the power of the multinational people of the Russian Federation and last, but not least, the office of a strong president compared to other bodies.

The coming into being of the Constitution RF 1993 shows, however, that the constitutional powers of the Russian president were not strong enough to provide for other major amendments or even a new constitution. President Eltsin – violating the Constitution – had to suspend the powers of the legislative bodies and to impose an extra-constitutional procedure for adopting the Constitution RF 1993. He chose the way of a coup d'etat<sup>1</sup> or even presidential revolution in order to end up at a new constitution shaped according to his own wishes. Besides general tradition, it is this historical background which explains the system of a presidential republic in today's Russia with strong powers of the president in comparison to other presidential regimes.

Since Prof. Krasnov substantially focusses on the character of the Russian Federation as a presidential political regime, but assigns minor importance to the federal structure and does not even mention the issue of the multinational people of the Russian Federation as the only source of power in the RF, this small article will deal with these two items.

<sup>1</sup> See Constitutional Court of the RF, 21 April 1993 (VSND RF i VS RF 1993/18/653; VKS RF 1994/2-3/38 ff) as well as for many others T. G. Moršćakova, Verfassungsgerichtsbarkeit – Ein Neubeginn in Russland. In: A. Nußberger, C. Schmidt, T. G. Moršćakova, Verfassungsrechtsprechung in der Russischen Föderation. Kehl am Rhein 2009, 1 – 11 (3).

## 2. The Multinational People Bearing the Sovereignty and Being the Only Source of Power in the Russian Federation

When the RSFSR declared its independence on 12 June 1990, it included the following provision as number 3: "The multinational people holds the sovereignty and is the only source of state power in the RSFSR. The people realizes this power immediately or through representative bodies on the basis of the Constitution of the RF." Today's art. 3 para. 1 Constitution RF 1993 reads slightly different, but follows this path: "The bearer of the sovereignty and only source of power in the Russian Federation is its multinational people."

Throughout its existence the former Soviet Union tried to overcome its colonial background and the same background of its republics, in particular the RSFSR, by pretending that all its more than 120 peoples and nationalities have grown together over the decades forming the supreme quality of a people which is the „Soviet people.“ The end of the Soviet Union shows that this concept always was a fiction and that in reality the peoples and nationalities preferred their own existence and future. Already prior to the end of the former Soviet Union, the concept of the "multinational people", thus, was designed to replace the "Soviet people", being aware of the fact that still about 100 peoples and nationalities continued to live on the territory of the RSFSR and RF after the end of the former Soviet Union. The cohabitation of these peoples and nationalities, many of them having neither a linguistic, nor social, nor historic relationship with the Russians as the dominant nation, is based on colonial roots leading back to Tsar Ivan IV with regard to Siberia and to the second half of the 19th century with regard to the Northern Caucasus. The Russian theory of state, in particular, the so-called colonisation theory, most prominently represented by Kavelin and Gradovskiy, assigned to the Russian people the special quality of forming and maintaining a state composed of different peoples and nationalities. The Russians were said to be apt to do so based on *sobornost'* (a specific kind of collectivism), a philosophy which helped to pave the way towards pan-slavism and bolshevism in the later development.

Art. 3 Constitution RF 1993, thus, lays down the concept that all peoples and nationalities forming the multinational people of the RF, *id est*, being citizens of Russia and able to exercise public authority in theory and practice, identify themselves with this multinational people. It may well be doubted whether this corresponds to reality, if one considers Chechnia and the Northern Caucasus as a whole. Peoples and nationalities from these areas clearly expressed an opposite will. But there are also other subjects of the RF giving rise to doubts at the above concept.

Russian commentaries of art. 3 Constitution RF 1993 hold that key-elements of the structure of

the "multinational people" are not peoples, nationalities or any other kind of collective entities, but individuals.<sup>2</sup> Individuals declare their nationality and express their will of belonging to a certain people or nationality. Besides that, it is obviously assumed that all citizens of the RF have declared their will belonging to the "multinational people" of the RF. By isolating the individual as decisive unit the Russian theory escapes the problem of how to solve eventual conflicts between different wills inside the "multinational people" of the RF. Against the background of peoples and nationalities who clearly do not want to belong to the RF the category and concept of "multinational people" of the RF must be considered to be the real weak and vulnerable point of the Russian Constitution. Under the USSR Constitution 1977 it has been emphasized that the consolidation of the USSR as a national state took place peacefully and by free will of the peoples. The Preamble of the Constitution RF 1993 takes this position as granted and realized by history. It does not mention the free will anymore, but reads: "We, the multinational people of the RF, united by a common fate on our land...". For the Chechens and others the "common fate" means the dominating Russians integrating other peoples and nationalities into their state against their will and using so-called subjects of the RF and other administrative-territorial units which have been set up and whose borders have been drawn by Stalin.

## 3. The Russian Federalism

Another master-piece of the approach of President Eltsin on the constitutional level has been to overcome an avalanche of declarations of independence, which included the danger of break-away of many parts of the RSFSR, by attracting the former autonomous republics of the USSR on the territory of the RSFSR representing the peoples and nationalities living on their territories to form the new Russian Federation by concluding the Treaty of Federation of 31 March 1992. The concept behind this treaty is very similar to the Union Treaty of 1922 which was understood as having founded the Soviet Union and was followed by the first USSR Constitution in 1924. President Eltsin's approach can be called as a kind of contractual federalism. Since it was not easy for him, to find an agreement with all former autonomous republics thereby "upgrading" their status into republics he showed ready to grant considerable concessions.

The Treaty of Federation was followed by the Constitution RF 1993 and soon it became visible that quite some provisions of the Treaty as applied by certain subjects of the RF were in conflict with the Constitution. This fact was tolerated for some years, but then the Russian Constitutional Court turned out to be the instance to assist President Putin in strengthening the powers of the center and binding opposing subjects

<sup>2</sup> See in particular, S. A. Avak'yan, *Konstitutsionnoe pravo Rossii* (Constitutional Law of Russia). Moskva 20104, II, 102.

of the RF to a narrow understanding and application of the provisions of the Constitution. In practice, the Constitution RF 1993 overrules every conflicting provision of the Treaty of Federation and its application.

The leading case in the jurisprudence of the Constitutional Case of the RF in this context is the Altay-Case.<sup>3</sup> The Constitutional Court had to decide on violations of several provisions of the Constitution RF 1993 by the Constitution of the Republic of Altay, one of the 83 subjects of the RF. The decision shows that the Constitutional Court of the RF did not use its margin of appreciation and space for interpretation of the RF Constitution in the interests of the subjects of the Federation, but followed a centralistic approach.<sup>4</sup> De facto, thus, the Constitutional Court assists the President of the RF in liquidating concessions entered into by President Eltsin having concluded the Treaty of Federation in 1992.

The major issue for clarification by the Constitutional Court was the question whether a republic of the RF has sovereignty. The Constitutional Court did not accept the concept of a divided sovereignty. Sovereignty in the eyes of the members of the Court means „according to the sense of articles 3, 4, 5, 67 and 79 of the Constitution RF 1993 the priority, the independence and the autonomy of state power, the completeness of the legislative, executive and judicial powers of a state on its territory and the independence in the international relations.“ According to the Court it is an essential qualitative criteria of the RF as a state and characterizes its status under constitutional law. In the eyes of the Court sovereignty is indivisible. The Constitutional Court of the RF explains this view as follows:

“The Constitution of the RF does not allow for any other holder of the sovereignty and for no other source of power than the multinational people of the RF and it does not see any other state sovereignty than the one of the RF. According to the Constitution of the RF, the sovereignty of the RF excludes the existence of two different levels of sovereign powers existing in one unique system of state power and enjoying priority and independence“. The fact that art. 5 para 1 calls republics “states“ does not allow to conclude that these subjects have even a restricted sovereignty.

As a consequence the Russian federalism as understood by the Russian Constitutional Court is not to be based on a contractual will, but on the will of the multinational people of the RF. This reference to the “multinational people“ of the RF weakens the whole concept of the Russian federalism in the same way as does art. 71 lit b Constitution RF 1993. According to this provision the jurisdiction of the federation includes the “federal structure“ of the RF, which means the whole chapter III of the Russian Constitution, id est, the core of the Russian federalism.

It must be concluded from such competence of the Federation that also the abolishment of a or some kinds of subjects or their replacement by other types of subjects falls not even in the joint jurisdiction of federation and subjects of the federation, but is part of the exclusive jurisdiction of the Federation. If a federal unit as one of the underlying elements of federalism has no guarantee of existence, but is at the disposal of its counterpart and subject to a respective decision by the Federation, by its very essence it is the center which decides, there is no joint will. The Russian federalism can then be no more called than a unitarian federalism.

<sup>3</sup> Decision of 7 June 2000, SZ RF 2000/25/2728, VKS RF 2000/5/2; translation into German in: Nußberger/Schmidt/Moršćakova (above fn 1), 173 - 195 (178)).

<sup>4</sup> M. Hartwig, Der Föderalismus in der Russischen Föderation. In: Föderalismus in der Diskussion (Zukunftsforum Politik 36) 2001, 69 - 92.