

# Legal Aspects of the Dissolution of the Soviet Union in 1991 and Its Implications for the Reunification of Crimea with Russia in 2014

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## Abstract

This article is devoted to the examination of legal aspects of the dissolution procedure (termination of existence) of the Union of the Soviet Socialist Republics (USSR) in 1991. Based on interdisciplinary research the author investigates the legitimacy of the dissolution (termination of existence) of the Soviet Union, taking into consideration the results and legal effect of two referenda which took place in 1991: the Soviet Union Referendum on the preservation of the USSR on 17.3.1991 and the All-Ukrainian Independence Referendum on 1.12.1991. The research concentrates also on the exploration of the reasons for modern events that caused the Reunification of Crimea with Russia on 21.3.2014.

The original cause of the current dire situation in Ukraine and Crimea lies in the “*deliberate wrecking of Perestroika and in the thoughtless and*

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*adventurist dissolving of the Soviet Union” ... “Both before and after the pact was made by the heads of the Russian Federation, Belarus and Ukraine in the Belavezha Forest I was warning about the dangerous and destructive consequences” ... “Unfortunately they did not listen to my warnings. The Supreme Soviet of the Russian Federation approved the destruction of the Soviet Union with applause and not a single word was spoken about Crimea and Sevastopol” ...*

Letter of the former Soviet President *Mikhail Gorbachev* on 14.3.2014 addressed to the former editor-in-chief of “The Independent Newspaper/Nezavisimaya Gazeta” *Vitaly Tretyakov*.

## I. Introduction

Rethinking the reasons for the Crimean crisis which ended with the admission into the Russian Federation of the Republic of Crimea and Sevastopol city, it is necessary to identify reasons for this historical event, taking into account not only the arbitrary and unfair decision of the First Secretary of the Communist Party of the Soviet Union *Nikita Khrushchev* in 1954 which resulted in the transfer of Crimea from the Russian Soviet Federative Socialist Republic (RSFSR) to Ukraine, but also, in more recent times, issues connected with the dissolution (termination of existence) of the USSR. According to the opinion of *Mikhail Gorbachev* the “*adventurist dissolving of the Soviet Union*” is the prime cause of the reunification of Crimea with Russia. An attentive observer would notice certain mysterious metaphysical parallels between the Crimean crisis and the process of the dissolution (termination of existence) of the USSR which could be seen in the same referendum campaign, used both in the Soviet Union Referendum on 17.3.1991 and in the Crimean referendum on 16.3.2014. It appears that history repeats itself and moves into the next round in the spiral.

The common assumption is that the disintegration of the Soviet Union was inevitable; allegedly the only question was when the final disintegration of the USSR would occur. Despite the fact that this standard view concerning the hopelessness of the USSR is deeply rooted in the mass consciousness, I would dare to question this common assumption and quote the prominent Russian dissident writer *Alexander Zinoviev* (1922-2006):

“Contrary to a widely held view, communism did not collapse for internal reasons. Its collapse is the greatest possible victory of the West. This colossal victory has created a planetary power. The end of communism is also the end of democ-

racy: our era is not only post-communist, it is also post-democratic. Today we witness the establishment of the democratic totalitarianism, and if you wish, of totalitarian democracy.”<sup>1</sup>

Thus, there are two opposite assessments with regard to the dissolution (termination of existence) of the Soviet Union. *Nolens volens* in this context, the famous words of the German thinker *Friedrich Wilhelm Nietzsche* (1844-1900) comes to mind: “There are no facts, only interpretations ...”

Therefore the current research does not focus on the issue of viability of the USSR. This article will concentrate on the legal assessment of the measures undertaken with regard to the preservation of the USSR and on the legal analysis of the subsequent procedure of dissolution of the Soviet Union. The article will analyse the validity and legal consequences of the Soviet Union Referendum of 17.3.1991, and the legitimacy of holding the All-Ukrainian Independence Referendum on 1.12.1991. The purpose of this article is to examine the dissolution procedure of the Soviet Union in 1991 from a constitutional law perspective (based especially on the fundamental principles of democracy and the rule of law). Here we would apply the logic and methodology of the Venice Commission (European Commission for Democracy through Law) which has several times evaluated major political changes in Europe, merely on the basis of so-called basic democratic standards. Apart from the Venice Commission, this report will not refer to the rules of international law, even if self-determination is above all governed by international law. The question of self-determination as it relates to Crimea is beyond the scope of this report. This research is focused on Soviet, Russian and Ukrainian domestic sources, i.e. constitutions and statutes of a constitutional nature, referendum decisions, as well as on rulings by constitutional courts and equivalent authorities. All these issues, in particular the results of two constitutional referenda, were under-investigated in the legal scholarship and their consequences were underestimated by political actors in the post-soviet area. Today we see the results of this misunderstanding of the essence of the end of the Soviet Union, in particular in Ukraine which is *de facto* divided into two parts. Similarly, the Soviet Union was divided in 1991: there were not only separatist movements but also the strong will of people for integration which prevailed in the nation-wide referendum. Taking into consideration the political changes in 1991, we have to consider it from the point of the democratic legitimation which means in the first place that all state power has its source (starting point) in the people and any action of the public authority has to be approved (legitimated) by the people.

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<sup>1</sup> A. Zinoviev, Interview with the French newspaper Le Figaro on 24 July 1999.

Thus, based on internationally recognized democratic standards, a legitimation chain must always exist between the people and public authorities. In the political process after 1991 the legitimation chain was destroyed as political actors ignored the prevalent popular will for integration in the post-soviet area.

## II. Soviet Union Referendum on 17.3.1991: Validity and Legal Effects

On 27.12.1990 the Congress of People's Deputies of the USSR adopted the Law of the USSR "Concerning national voting (concerning the Referendum of the USSR)". According to Art. 5 of this law, the Supreme Soviet of the USSR decided to hold throughout the entire territory of the USSR, on Sunday, 17.3.1991, a Referendum on the issue of the preservation of the USSR as a federation of equal republics.<sup>2</sup> The need to hold this referendum was based on the Decision of the IV Congress of People's Deputies of the USSR made by roll-call voting on 24.12.1990. It concerned the necessity to preserve the Soviet Union as the renewed federation of equal sovereign republics in which the rights and freedom of a person of any nationality would be fully guaranteed.<sup>3</sup> Thus, the highest representative bodies of the USSR decided to organize the nation-wide voting (All-Soviet Union Referendum) as an instrument for the additional legitimization of their decisions with regard to the need for the preservation of the USSR.

The following question was put to the voters in the Referendum on the preservation of the USSR on 17.3.1991:

"Do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics in which the rights and freedom of an individual of any nationality will be fully guaranteed?"

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<sup>2</sup> The Resolution of the Supreme Soviet of the USSR on 16.1.1991 No. 1910-1 "Concerning the organization and measures to ensure holding the referendum of the USSR on the issue of preservation of the USSR", Gazette of the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR, 1991, No. 4, Art. 87 (Постановление ВС СССР от 16.1.1991 No. 1910-1 "Об организации и мерах по обеспечению проведения референдума СССР по вопросу о сохранении СССР" / Ведомости СНД и ВС СССР, 1991, No. 4, ст. 87).

<sup>3</sup> The Resolution of the Congress of People's Deputies of the USSR on 24.12.1990 No. 1853-1 "Concerning preservation of the USSR as the renewed federation of the equal sovereign republics", Gazette of the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR, 1990, No. 52, Art. 1158 (Постановление СНД СССР от 24.12.1990 года No. 1853-1 "О сохранении Союза ССР как обновлённой федерации равноправных суверенных республик" / Ведомости СНД и ВС СССР, 1990, No. 52, ст. 1158).

The results of the Soviet Union Referendum on 17.3.1991 are well-known: 113 512 812 people voted for the preservation of the USSR (i.e. 77.85 % of participating voters); while 32 303 977 people voted against (i.e. 22.15 % of participating voters). In total 148 574 606 voters took part in the referendum, representing a very considerable turnout of 80.03 %. At the time of the referendum the total number of registered voters in the USSR was 185 647 355 people, i.e. 37 072 749 Soviet voters did not participate in the voting. Thus, the general results of the Soviet Union Referendum on 17.3.1991 were clearly unambiguous: by a high turnout of voters (80 %) nearly 78 % of the voting citizens supported the need for the preservation of the USSR as a renewed federation.<sup>4</sup>

However, despite such convincing results it was not possible to keep the Soviet Union together. After just a few months, on 25.12.1991, the President of the USSR *Mikhail Gorbachev* declared his resignation and termination of all activities in the position of the President of the USSR because of “*considerations of principle*”. One day later the Soviet of the Republics of the Supreme Soviet of the USSR<sup>5</sup> adopted the declaration on the termination of existence of the USSR in connection with the establishment of the Commonwealth of Independent States (CIS). Thus, this day – 26.12.1991 – figures in history as the official date of the dissolution of the USSR.

In this regard the question is why the institute of direct democracy became ineffective; and why Art. 29 of the Law of the USSR of 27.12.1990 “Concerning national voting (concerning the Referendum of the USSR)” was violated since: “*the decision made by the Referendum of the USSR is final, has binding legal effect in all territory of the USSR and can be cancelled or changed only by a new Referendum of the USSR*”.<sup>6</sup> The most fre-

<sup>4</sup> Concerning results of the Referendum of the USSR on 17.3.1991 (From the Report of the Central Commission of the Referendum of the USSR), IZVESTIA, 27.3.1991 (Об итогах референдума СССР, состоявшегося 17.3.1991 года (Из сообщения Центральной комиссии референдума СССР) / Известия, 1991, 27 марта).

<sup>5</sup> The Soviet of the Republics of the Supreme Soviet of the USSR was a specially created ad hoc body on the basis of provisions of the Law of the USSR adopted on 5.9.1991 No. 2391-1 “Concerning state governing bodies of the USSR in a transition period”. Therefore the Soviet of the Republics of the Supreme Soviet of the USSR cannot be considered as a fully constitutional body, because the Constitution of the USSR did not provide any provision with regard to this kind of public body in the structure of the Soviet power. (Закон СССР от 5.9.1991 No. 2391-1 “Об органах государственной власти и управления Союза ССР в переходный период”).

<sup>6</sup> Law of the USSR on 27.12.1990 No. 1869-1 “Concerning national voting (concerning the Referendum of the USSR)”, Gazette of the Congress of People’s Deputies of the USSR and the Supreme Soviet of the USSR, 1991, No. 1. Art. 10 (Закон СССР от 27.12.1990 года No. 1869-1 “О всенародном голосовании (референдуме СССР)” / Ведомости СНД и ВС СССР, 1991, No. 1, ст. 10).

quent justification for the invalidity of the results of the referendum of 17.3.1991 is the fact that 37 072 749 Soviet voters did not participate in the Soviet Union Referendum. In particular, it is pointed out that only 9 of 15 republics of the USSR participated in the referendum. However, this critique is unpersuasive.

## 1. Republics of the USSR Participating in the Referendum on 17.3.1991

Certainly, an indisputable fact is that only nine out of fifteen Republics of the USSR participated in the Soviet Union Referendum on 17.3.1991. However, this fact does not have any influence on the validity of the final decision of the referendum. According to Art. 24(3) of the Law “Concerning national voting (concerning the Referendum of the USSR)” the decision of a referendum has to be considered as accepted if more than half of the citizens registered in the list of voters have participated and the decision was approved by more than half of the participating citizens. Thus, based on the legislation in force at that time and on general principles of law, the results of the referendum have to be considered lawful and obligatory. An indisputable principle of democracy is that the minority has to respect and to comply with the will of the majority (in turn, of course, the protection of the minority and the representation of its interests has to be guaranteed).

We should now analyse the referendum results<sup>7</sup> of each union republic which took part in the Soviet Union Referendum (see table No. 1). The common distinctive feature of vote on the Referendum in all nine union republics was the high turnout – ranging from 75 % to 97.7 % registered voters. The most important issue is that in all these republics the overwhelming majority of voters supported the preservation of the united state: the number of voters voting for the preservation of the USSR as a renewed federation varied from 71 % to 97,9 %. Thus, on 17. 3.1991, the will of the people to keep the common state and not to separate into “*ethnic quarters*” was clearly and unambiguously expressed.

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<sup>7</sup> Report of the Central Commission of the Referendum of the USSR concerning the Results of the Referendum of the USSR on 17.3.1991, PRAVDA, 27.3.1991 (Сообщение Центральной комиссии референдума СССР об итогах референдума СССР, состоявшегося 17 марта 1991 года / Правда. 27 марта 1991 года).

Republic of the USSR	Turnout, %	Votes for Soviet Union, %
RSFSR	75.4	71.3
Ukrainian SSR	83.5	90.2
Byelorussian SSR	83.3	82.7
Uzbek SSR	95.4	93.7
Kazakh SSR	88.2	94.1
Azerbaijan SSR	75.1	93.3
Kirghiz SSR	92.9	96.4
Tajik SSR	94.4	96.2
Turkmen SSR	97.7	97.9

Table No. 1

Soviet Republics (9 from 15) participated in the Soviet Union Referendum on 17.3.1991

Taking into consideration the modern situation in Ukraine and the Crimean crisis of 2014 we have to analyse separately the voting results in the Soviet Union Referendum in the Ukrainian Soviet Socialist Republic. First of all, the referendum in Ukraine had a very high voter turnout of 83,5 %, i.e. of the 37 732 178 registered voters, 31 514 244 participated. Furthermore, the vast majority of voters – 90,2 % (!), i.e. 28 610 899 voters of Ukraine voted for the preservation of the USSR. Voting results in the territory of Crimea were included in the general Ukrainian results. In Crimea (without Sevastopol city) 1 085 570 people (87,6 %) out of 1 239 092 people (turnout – 79,3 %) participated in the referendum and voted for the preservation of the Soviet Union. Thus, with regard to both turnout and the number of votes for preservation of the USSR, Ukraine exceeded two other Slavic republics – the RSFSR and the Soviet Belarus. Only soviet republics in Central Asia demonstrated much higher results. Thus, in March 1991, the citizens of Ukraine clearly and unambiguously voted for the preservation of one consolidated state with other union republics and for the idea of coexistence in the renewed federative state.

Having respect for fundamental constitutional documents of the modern Russian Federation and Ukraine, we would have to admit that the will of the people regarding the preservation of the consolidated single state has found clear and unambiguous reflection in them. In particular, the Declaration of State Sovereignty of the RSFSR of 12.6.1990 repeatedly states the “*will of the people of RSFSR ‘and’ solemnly proclaims the state sovereignty of the RSFSR on its all territory and declares stern resolve to create the dem-*

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*ocratic constitutional state as a part of the renewed USSR*".<sup>8</sup> The Declaration on the State Sovereignty of Ukraine was adopted on 16.6.1990. This founding constitutional document declares the intention to build relations with other union republics on the basis of treaties, in particular a new union treaty.<sup>9</sup> Commenting on provisions of these constitutional documents it is appropriate to quote the President of the USSR *Mikhail Gorbachev*: "We all were sure in the stability of the Soviet Union. And nobody in the World was expecting that the Soviet Union would break down in the near future. Nobody. And of course nobody among us."<sup>10</sup> As the referendum results show at this moment of history the citizens of the union republics of the USSR have judged on the stability of the Soviet Union and also on the intention to keep the common united state (at least citizens of those soviet republics which participated in the Soviet Union Referendum on 17.3.1991).

## 2. Republics of the USSR Not Participating in the Soviet Union Referendum

Usually the main criticism of the Soviet Union Referendum is applied to the fact that six of fifteen union republics of the USSR did not participate. It is argued that the Soviet Union Referendum took place at a time when the Soviet Union allegedly *de facto* had ceased to exist; it is generally said that there was an alleged paralysis of the central power and a boycott of the referendum in the Baltic republics (Lithuania, Latvia, Estonia), Armenia, Georgia and Moldova. This argumentation is wide open to criticism because, in accordance with acting referendum legislation at that time, there was no legal provision with regard to a minimum level of voter participation of the respective republics of the USSR. It is necessary to repeat that in compliance with applicable law, the Soviet Union Referendum on 17.3.1991 has to be considered valid and lawful, if more than half of the registered

<sup>8</sup> The Declaration of State Sovereignty of the Russian Soviet Federative Socialist Republic (RSFSR) on 12.6.1990, Gazette of the Congress of People's Deputies and the Supreme Soviet of the RSFSR, 1990, No. 2, Art. 22 (Декларация о государственном суверенитете РСФСР от 12.06.1990 года. Ведомости СНД и ВС РСФСР, 1990, No. 2, ст. 22).

<sup>9</sup> The Declaration on the State Sovereignty of Ukraine adopted on 16.6.1990, Gazette of the Verkhovna Rada of Ukraine of the Ukrainian Soviet Socialist Republic, 1990, No. 31, Art. 429 (Декларація про державний суверенітет України / Відомості Верховної Ради Української Радянської Соціалістичної Республіки, 1990, No. 31, ст. 429).

<sup>10</sup> *M. Gorbachev*, "To understand Perestroika ... Why it is important now." Moscow, 2006, 352. (*М. С. Горбачев*, Понять Перестройку ... Почему это важно сейчас. М., 2006, ст. 352).



voters of the USSR took part in the referendum and the decision of the referendum was approved by more than half of the voting citizens.<sup>11</sup> Moreover, we should take into consideration that despite the boycott and sabotage from public authorities of the aforementioned six republics, the referendum, nevertheless, took place in their territories: in voting stations organized by the local authorities and by military units of the Ministry of Defence of the USSR, the KGB of the USSR, and the Ministry of Internal Affairs of the USSR.<sup>12</sup> Despite a boycott organized by the leadership and population of six union republics, on their territories about three million citizens voted in the referendum and a majority of them supported the preservation of the USSR as a renewed federation.<sup>13</sup>

For this reason, the shunning of the referendum by the six union republics may be regarded as a very conditional boycott: the referendum nevertheless took place in their territories. The Soviet Union Referendum on 17.3.1991 became an indicator that those union republics striving for independence from “*Soviet Imperialism*” aimed to create their “*own microempire and, having received ... freedom for their own nations, do not want to give even a little of this freedom to other nations living in territories of their states*”.<sup>14</sup> This criticism in harsh terms with regard to “*microimperialism*” of young democracies is obviously and convincingly confirmed by the referendum results on their territories (see table No. 2), and also by those histor-

<sup>11</sup> See Art. 24(3) of the Law of the USSR on 27.12.1990 No. 1869-1 “Concerning national voting (concerning the Referendum of the USSR)”, Gazette of the Congress of People’s Deputies of the USSR and the Supreme Soviet of the USSR, 1991, No. 1, Art. 10 (см. часть 3 ст. 24 Закона СССР от 27 декабря 1990 года No. 1869-1 “О всенародном голосовании [референдуме СССР]” / Ведомости СНД и ВС СССР, 1991, No. 1, ст. 10).

<sup>12</sup> The Resolution of the Supreme Soviet of the USSR on 25.2.1991 No. 1975-1 “Concerning the implementation of the Resolution of the Supreme Soviet of the USSR concerning the organization and measures to ensure the holding the Referendum of the USSR on 17.3.1991”, Gazette of the Congress of People’s Deputies of the USSR and the Supreme Soviet of the USSR, 1991, No. 10, Art. 249 (Постановление ВС СССР от 25.2.1991 года No. 1975-1 “О ходе выполнения Постановления Верховного Совета СССР об организации и мерах по обеспечению проведения референдума СССР 17 марта 1991 года” / Ведомости СНД и ВС СССР, 1991, No. 10, ст. 249).

<sup>13</sup> Concerning results of the Referendum of the USSR on 17.3.1991 (From the Report of the Central Commission of the Referendum of the USSR), IZVESTIA, 27.3.1991 (Об итогах референдума СССР, состоявшегося 17 марта 1991 года [Из сообщения Центральной комиссии референдума СССР] / Известия, 1991, 27 марта).

<sup>14</sup> V. Tretyakov, Why Lost GKChP (The State Committee on the State of Emergency)? And How to Understand It, Rossiya Gazeta (federal release) of No. 3553 on 19.8.2004, <<http://www.rg.ru/2004/08/19/gosperevorot.html>> (В. Третьяков, Почему проиграл ГКЧП? И как к этому относится, Российская газета (Федеральный выпуск) No. 3553 от 19 августа 2004 г., <<http://www.rg.ru/2004/08/19/gosperevorot.html>>)

ical events which occurred after the vote on the Soviet Union Referendum 1991.

Parts of the Soviet Republics Participating in the Soviet Union Referendum	Turnout, %	Number of votes for the preservation of the Soviet Union, %
Moldavian SSR		
Transnistria (Transnistrian Moldavian Republic)	84	98
Republic of Gagauzia (Gagauz Autonomous Soviet Socialist Republic)	97	98
Georgian SSR		
South Ossetia (South Ossetian Autonomous Oblast (Region) of Georgian SSR)	96.3	99.9(!) In South Ossetia only 4 (!) out of 44 000 participants voted against the Soviet Union
Abkhazia (The Socialist Soviet Republic of Abkhazia)	52.3	98.6

Table No. 2

Parts of the Soviet Republics Participating in the Soviet Union Referendum on 17.3.1991

GEORGIA declared a boycott of the Soviet Union Referendum. The authorities of the Georgian SSR announced their own republican referendum regarding the “*restoration of the state independence of Georgia on the basis of the Act of independence on 26.5.1918*” and assigned a day for it on 31.3.1991. The Referendum of the Georgian SSR had a high turnout – 90,79 % of the citizens participated; 99,08 % of them supported the restoration of the state sovereignty of Georgia. At the same time, in turn, the Georgian Republican Referendum was boycotted by the inhabitants of Abkhazia and South Ossetia. From the referendum results in the table No. 2 it is obvious that the population of these republics, in contrast to the Georgian population, voted in the Soviet Union Referendum and unanimously supported the preservation of the Soviet Union. Thus, already at that time it was clear and obvious that two regions of Georgia – Abkhazia and South Ossetia – were striving for independence – but for independence from Georgia. The

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Georgian separatism directed against the USSR had generated the Intra-Georgian separatism of particular parts of Georgia.

Even before the Soviet Union Referendum it was possible to identify the aspirations of public authorities of these two provinces to the secession from the Georgian state. In particular, in 1990, Abkhazia proclaimed itself to be a sovereign Abkhazian Soviet Socialist Republic.<sup>15</sup> In turn, a similar process synchronously took place in South Ossetia – on 20.9.1990 the Soviet of People's Deputies of the South Ossetian autonomous Oblast (Region) proclaimed the South Ossetian Soviet Democratic Republic as a part of the USSR (i.e. as sixteenth Soviet Republic). Taking into consideration all these facts, the main and obvious political will shared by the authorities and population of South Ossetia and Abkhazia was to remain in the full and united union state and to join it as union republics. Even today official Tbilisi is unsuccessfully trying by political means and also by military actions to fight this “*Intra-Georgian separatism*”.

MOLDOVA faced a similar “*separatist scenario*” – striving for a separation from the USSR and boycotting the Soviet Union Referendum, the leadership of the Moldavian SSR itself faced a boycott of its own aspirations to independence. The vast majority of the population of two Moldavian provinces – Gagauzia and Transnistria – participated in the Soviet Union Referendum and through their vote gave a clear signal to the Moldavian leadership that Transnistria and Gagauzia did not share any aspirations for the separation from the Soviet Union. As with Georgia, it became evident that the Moldavian separatism from the Soviet Union would result in the disintegration of the independent Moldova: On 2.9.1990, at the Second Extraordinary Congress of Deputies of all levels of Transnistria in Tiraspol, the Dnestr Moldavian Soviet Socialist Republic (DMSSR) was proclaimed as a single and particular Soviet Republic in the framework of the USSR. On 25.8.1991 the Supreme Soviet of DMSSR adopted “The Declaration on independence of the Dnestr Moldavian Soviet Socialist Republic”. To complete the picture and for a better understanding, it should be noted that in 2006 another referendum was held in the Dnestr Moldavian Republic, resulting in 97,2 % of voters in favour of an accession to Russia. Unlike in Transnistria, the situation in Gagauzia was less intense, although the results in the Soviet Union Referendum also indicated an obvious will of Gagau-

<sup>15</sup> The Declaration on the State Sovereignty of the Abkhazian the Soviet Socialist Republic, The Soviet Abkhazia, on 28.8.1990, “To the Union of the Sovereign People”, Collection of Documents, Redactor *A. I. Doronchenkov*, Moscow, 1991, 246 et seq. (Декларация о государственном суверенитете Абхазской ССР, Советская Абхазия, 28.8.1990 / К союзу суверенных народов, Сборник документов, Составитель *А. И. Доронченко*, Москва, 1991, стр. 246-249).

zia's population to remain in the united union state and its unwillingness to separate from the USSR as independent Moldova.

THE BALTIC STATES (Lithuania, Latvia, Estonia) striving for their own independence from the USSR and boycotting the Soviet Union Referendum would face a problem of so-called "*Russian-speaking minority*"; ARMENIA would be involved in the bloody Karabakh conflict with Azerbaijan which broke out because of the awakening of separatist movements in the Caucasus region.

### 3. General Legal Assessment of the Soviet Union Referendum on 17.3.1991

Taking all the aforesaid into consideration, the following general conclusion may be made. The Soviet Union Referendum on 17.3.1991 was held in full conformity with the existing legislation and a significant detail of this referendum was a very high turnout of voters. There were no gross violations registered which could prejudice the reliability of the referendum results. Thus, the referendum results have to be considered as completely legitimate, final and obligatory in all territory of the USSR. On the basis of the law at that time any change or even cancellation of the decision with regard to the preservation of the USSR made in the referendum would have been possible only by holding a new referendum. In particular, proceeding from relevant requirements of the applicable legislation, a further decision could be made no earlier than ten years from the date of the previous referendum, i.e. judging this issue very legalistically there had to be a ten-year moratorium until 17.3.2001 with regard to any separation of any union republic from the USSR.<sup>16</sup>

Of course, we cannot ignore historical facts: The Soviet Union ceased to exist and life does not always run in parallel with legalistic rules. On the other hand, however, we have to admit that the results of the Soviet Union Referendum were undoubtedly lawful, reliable and obligatory. This is precisely where we find the origin of the legitimation chain<sup>17</sup> from the people

<sup>16</sup> The Law of the USSR "Concerning an order of the solution of the questions with regard to an exit of the union republic from the USSR" No. 1409-1 on 3.4.1990, Gazette of the Congress of People's Deputies of the USSR and the Supreme Soviet of the USSR, 1990, No. 15, Art. 252, (see Art. 10 of this Law) (Закон СССР "О порядке решения вопросов, связанных с выходом союзной республики из СССР" No. 1409-1 от 3 апреля 1990 года / Ведомости СНД и ВС СССР, 1990, No. 15, ст. 252. [см. статью 10 данного закона]).

<sup>17</sup> H. Maurer, Staatsrecht I, Grundlagen Verfassungsorgane Staatsfunktion, 6. Aufl. 2010, 182 et seq.

to public authorities: By referendum decision the people (multinational people as the only source of power) charged their representatives to keep the united single state – in the form of the renewed federation; however this mandate of the people remained without execution. Actually, the subsequent chain of political events went contrary to the will of the multinational people of the USSR who supported the idea of preserving the united single state.

After holding the Soviet Union Referendum on 17.3.1991, there was quite a difficult situation which generated three possible scenarios for action. The first scenario could be based merely on a very legalistic point of view of the results of the Soviet Union Referendum: Due to a clear will of the people, the Soviet leadership was charged with the task of keeping and ensuring the state unity of the USSR in a format of all fifteen union republics of the USSR (“*format 15*”). Considering the requirements of applicable legislation, the six union republics not participating in the referendum had to obey to the will of the voting people of the other nine union republics. This scenario (“*format 15*”) would be used as a pretext for actions by members of the State Committee on the State of Emergency (GKChP).<sup>18</sup> The second scenario suggested keeping the common and united state in the form of a renewed federation, but merely in the format of the nine union republics that officially participated in the Soviet Union Referendum on 17.3.1991 (“*format 9+1*”); based on this point of view it was regarded as appropriate to release from the USSR those six union republics which boycotted the referendum and to recognize their independence and legality of secession from the USSR. This scenario would be selected by the President of the USSR *Mikhail Gorbachev* when the Novo-Ogaryovo meetings were organized in April-August 1991. And apart from that there also remained also a third scenario – to ignore the results of the Soviet Union Referendum on 17.3.1991 – to declare them invalid, allegedly due to fact that on the voting day the Soviet Union actually *de facto* had ceased to exist (“*union dissolution format*”). The last scenario was eventually chosen by the leaders of the RSFSR, *Boris Yeltsin*, of the Ukrainian SSR, *Leonid Kravchuk* and of Belarusian SSR, *Stanislav Shushkevich* who signed the Belavezha Accords concerning the Dissolution of the Soviet Union on 8.12.1991.

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<sup>18</sup> Address to the Soviet people of the State Committee on State of Emergency in the USSR on 18.8.1991, Newspaper “PRAVDA” 20.8.1991.

### III. Termination of the Existence of the USSR: Legal Assessment and Consequences

In the second part of our discussion we will focus on a legal evaluation of the events that took place after the Soviet Union Referendum, i.e. what happened during the period from April to December 1991. In particular, we will focus on documents of the Novo-Ogaryovo meetings, documents and actions of members of the State Committee on the State of Emergency (GKChP), and also the Belavezha Accords and the Almaty declaration. Thus, the last months of existence of the USSR will be the focus of our attention.

#### 1. Legal Assessment of the Novo-Ogaryovo Process (“format 9+1”)

The Novo-Ogaryovo process had been initiated by the President of the USSR *Mikhail Gorbachev* as a procedure of negotiations with regard to the elaboration of the new Soviet Union Treaty which aimed to unite those nine republics that had participated in the Soviet Union referendum in a renewed federation: Azerbaijan SSR, Byelorussian SSR, Kazakh SSR, Kirghiz SSR, RSFSR, Tajik SSR, Turkmen SSR, Uzbek SSR and Ukrainian SSR. Thus, the negotiations in Novo-Ogaryovo took place in the “format 9+1”: nine union republics + the union (federal) centre as the special negotiator represented by the President of the USSR *Mikhail Gorbachev*. The Novo-Ogaryovo process began on 23.4.1991 when a strategic statement by all negotiators was adopted:

“The Participants of the meeting consider as an indispensable condition for the stabilization of the situation in the country the adoption of decisive actions on restoration of a constitutional order on the whole state territory, acting to ensure a strict compliance with existing laws until adoption of the new Union Treaty and the Constitution of the Soviet Union. A top-priority task for the overcoming of crisis is the conclusion of the new treaty of the sovereign states with due account of results of the held Soviet Union referendum ... During the whole transition period a normal work of public authorities of the Union and the Republics, Soviets of People’s Deputies of all levels must be insured ... Considering the extraordinary critical crisis situation in the country, leadership of the Union and the Republics consider as intolerable all attempts to achieve political goals by incitement to civil disobedience, strikes, appeals to overthrow the existing lawfully

elected public authorities. Participants of the meeting are aware that all these measures for stabilization of the situation and the overcoming of crisis are inconceivable without a cardinal increase of a role for union republics.”<sup>19</sup>

The main outcome from negotiations in Novo-Ogaryovo was the draft of a Union Treaty on the basis of which the renewed federation was supposed to be established – in particular in the form of a *soft federation* – called the Union of the Sovereign States (USS).<sup>20</sup> The signing of the Treaty on the Union of the Sovereign States (USS) was planned for 20.8.1991. However, the signing was hindered by the August Putsch of GKChP (also known as the 1991 Soviet coup d'état attempt) on 19.-21.8.1991 which happened when *Mikhail Gorbachev* and his family were on vacation in Crimea (!) in the state residence “Foros”. After the August Putsch failed, the work on the text of the new Union Treaty was continued, although instead of the establishment of a soft federation of nine republics the intention was to create a confederation. The signing of a new Union Treaty was planned for December 1991. However, this plan was thwarted by actions of the political leaders of the RSFSR (*Boris Yeltsin*), the Ukrainian SSR (*Leonid Kravchuk*) and Belarusian SSR (*Stanislav Shushkevich*) who signed the Belavezha Accords and thereby declared the dissolution of the USSR on 8.12.1991.

What kind of assessment (including legal evaluation) can be made of these negotiation procedures and documents of the Novo-Ogaryovo process? On the one hand (but not providing a legal assessment), the Novo-Ogaryovo process from April to December 1991 constituted a very realistic and rather wise attempt, under the circumstances, to keep the state unity of at least nine union republics. The first draft of the Union Treaty – the version before the August Putsch 1991 – was basically the most correct decision proceeding from results of the Soviet Union Referendum on 17.3.1991: Citizens voted for the preservation of the united state based on a federative form. However, after the August Putsch of 1991, a serious deviation from the decision of the Soviet Union Referendum 1991 was undertaken by the political leadership: The last version of the Union Treaty suggested the founding of a confederative alliance of nine union republics of the USSR. Even if this last version of the Union Treaty had been signed, a serious vio-

<sup>19</sup> From history of creation of the Constitution of the Russian Federation. Constitutional commission: shorthand records, materials, documents (1990-1993), Under a general edition of *O. G. Rumyantseva*, Moscow, Vol. 2, 2008, 800 (Из истории создания Конституции РФ. Конституционная комиссия: стенограммы, материалы, документы (1990-1993), Под общ. Ред. *O. Г. Румянцев*, Москва, Волтерс Клувер, Т. 2., 2008, ст. 800).

<sup>20</sup> Draft of the Treaty about the Union of the Sovereign States (USS), “Soviet Russia” No. 159 (10610), 15.8.1991 (Проект Договора о Союзе Суверенных Государств [ССГ] / “Советская Россия” No. 159 [10610], 15.8.1991).

lation of the will of the voters, as clearly expressed in the Soviet Union Referendum, would have occurred.

Based on a legal assessment of the Novo-Ogaryovo process, the following unpleasant conclusion is unavoidable: The President of the USSR *Mikhail Gorbachev* and all other participants of Novo-Ogaryovo meetings consciously violated foundational constitutional norms of the USSR. The Law of the USSR of 27.12.1990 No. 1869-1 “Concerning national voting (concerning the Referendum of the USSR)” had an explicit provision on the obligatory character of the referendum decision for all union republics (including those six union republics which did not take part in the Soviet Union Referendum of 17.3.1991).

Pursuing the aim of preservation of the state unity in “*format 9+1*”, the President of the USSR *Mikhail Gorbachev* took quite extraordinary steps. He officially recognized the independence of the self-proclaimed Baltic republics: Lithuania, Latvia and Estonia.<sup>21</sup> These actions constituted a direct violation of the applicable law because none of these three republics fulfilled any requirement of the USSR Law of 3.4.1990 “Concerning an order of the solution of the questions with regard to an exit of the union republic from the USSR”.<sup>22</sup> Thus, at that point in history the foundation was laid for direct negligence of the existing legal requirements by the union authorities as well as by the leadership of the soviet republics. “Perestroika” turned into “Katastroika” – norms of law were exposed to selective application according to the whim of the law enforcement officials.<sup>23</sup> A similar narrow-minded method of interpretation of the Soviet legislation is practised today by those who justify the self-determination of the Soviet republics merely by the existence of Art. 72 of the Constitution of the USSR 1977, which had a special provision regarding the right of each union republic to a free exit from the USSR (right to secession). However, this reasoning ignores a large number of violations of law and applicable procedures regarding the order of secession from the USSR and failure of respective republic leadership to comply with internationally recognized democratic standards: the need to hold “*serious negotiations among all stakeholders*” (such negotiations did not take place at all, when separating from the USSR; everything was decided merely by political leadership; thus, there was no “*broadest possible*

<sup>21</sup> Resolutions of the State Council of the USSR of 6.9.1991, No. GS-1, GS-2, GS-3 (Постановления Государственного Совета СССР, No. ГС-1, ГС-2, ГС-3 от 6 сентября 1991 года).

<sup>22</sup> A similar conclusion can be drawn with regard to gross violations of the existing legislation made by the procedure of secession from the USSR of other Soviet republics – Armenia, Georgia, Moldova, etc.

<sup>23</sup> A. *Zimoviev*, SMUTA (Chaos): Short Novels. Katastroika, 1995.



*commitment of the citizens to the resolution of the issue*"); the obligation of authorities to provide objective information and to be neutral, in particular *"the authorities must not influence the outcome of the vote by excessive, one-sided campaigning"*, etc. Last but not least, we should mention that the most serious violation of the international democratic standards which was committed by the dissolution procedure of the USSR relates to self-determination: *"Self-determination is understood primarily as internal self-determination within the framework of the existing borders and not as external self-determination through secession."*<sup>24</sup>

## 2. August Putsch and Belavezha Accords: Legal Assessment

Once again the actions of GKChP members during 18.-21.8.1991 primarily aimed at the prevention of the signing of the Union Treaty which could have created a renewed federation in the *"format 9+1"*. This task was accomplished; the new Union Treaty was not signed. However, considering these actions from a legalistic point of view, the arguments of the Soviet leadership in the GKChP were, under these circumstances, perfectly legal. The situation in the whole territory of the USSR had to be returned to control and to the legal framework. Therefore it was necessary to ensure the obligatory law enforcement by all legal subjects; it was also necessary to guarantee the implementation of the people's will as expressed in the Soviet Union Referendum. However, it was obvious that the members of the GKChP ignored the historical reality and the lack of resources to ensure the accomplishment of the ambitious task of keeping the unity of the USSR in the traditional form of 15 republics. The particularly tragic element of the situation was the fact that the members of the GKChP, in trying to keep the integrity of the whole USSR (as a large union of 15 republics), torpedoed any possibility to preserve the union of 9 republics (*"format 9+1"*). The August Putsch brought into discredit the idea of a preservation of the USSR as a renewed federation.

At the same time, after the August Putsch (which in essence was no more than a pseudo-putsch) an event which may be described as a hidden coup

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<sup>24</sup> Here we would allow ourselves to use the terminology and logic of the European Commission for Democracy through Law (Venice Commission) applied in the following report: Opinion of Venice Commission No. 762/2014 On "Whether the Decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a Referendum on becoming a constituent territory of the Russian Federation or Restoring Crimea's 1992 Constitution is compatible with constitutional principles" adopted by the Venice Commission at its 98<sup>th</sup> Plenary Session (Venice, 21.-22.3.2014).

d'état (or as the December Putsch) took place.<sup>25</sup> The Belavezha Accords have often been described as the *Belavezha conspiracy* or as *Belavezha collusion* (in Russian – “*Belovezsky Sgovor*”/“*беловежский сговор*”). What is the reason for this kind of harsh assessment? The fact is that after the August Putsch of 1991, according to the existing legislation, all political power had to be returned to the lawful President of the USSR *Mikhail Gorbachev*. Besides, it was necessary to finalize the creation of the renewed “*federation in a format 9+1*”, i.e. it was necessary to fulfil the obligatory provisions of the Soviet constitutional legislation and to implement the will of the people which was unambiguously expressed in the Soviet Union Referendum 1991. Exactly this purpose was declared in the television address of the President of the USSR *Mikhail Gorbachev* and the leaders of the republics of the USSR in November 1991: The signing of the new Union Treaty was planned for December 1991. However, after these public statements, the leaders of three union republics, *Boris Yeltsin* (RSFSR), *Leonid Kravchuk* (Ukrainian SSR) and *Stanislav Shushkevich* (Belarusian SSR) based on an individual initiative, gathered in the Belavezha Forest and signed on 8.12.1991 an act concerning the dissolution of the USSR and the creation of a Commonwealth of Independent States (CIS). In Alma-Ata on 21.12.1991 eight other republics joined the Belavezha Accords.

Under which law did these top officials sign the Belavezha Accords? The answer is simple – none. First of all, a creation of a confederative entity instead of the renewed federation directly violated the will of voters as demonstrated in the Soviet Union Referendum. Instead, the leaders of these republics made a decision to separate into “*national apartments*” and not to build a common union (federative) state. Secondly, the agreement of the three leaders was illegal with regard to the destiny of the whole state. *De jure* each republic could raise a question about its secession from the USSR; however, only by the will of all union republics and all citizens could the termination of the existence of the common union state be decided (i.e. by a new Soviet Union Referendum which could be held in ten years, or by the convocation of the highest Soviet Union representative body – the Congress of People’s Deputies of the USSR).<sup>26</sup> Thirdly, according to a legal assess-

<sup>25</sup> According to the opinion of *Leonid Kravchuk* – a former leader of the Ukrainian SSR and one signer of the Belavezha Accords – “the signing of the Belavezha Accords was a coup d’état which was completed peacefully”, “Leonid Kravchuk – A Peaceful Conspirator”, Radio SVOBODA (Radio Freedom), 8.12.2011, <<http://www.svoboda.org/content/article/24415159.html>>.

<sup>26</sup> The Statement of the President of the USSR *Mikhail Gorbachev* on 9.12.1991, IZVESTIA, 10.12.1991, <[http://www.gorby.ru/userfiles/file/zayavlenie\\_prezidenta\\_ssr\\_09\\_12\\_91.pdf](http://www.gorby.ru/userfiles/file/zayavlenie_prezidenta_ssr_09_12_91.pdf)>.

ment of the Committee of the Constitutional Control of the USSR (analogous to the modern Constitutional Court of Russia) on 9.12.1991

“... the republics cannot decide questions concerning the rights and interests of other republics. From this point of view the statement containing in (Belavezha) Accord that ‘the USSR as the subject of international law and geopolitical reality ceased to exist’ ... has no validity and legal effect.”<sup>27</sup>

Fourthly, the ratification procedure of the Belavezha Accords took place on 12.12.1991 with serious violations of existing rules. Ratification was carried out by an unauthorized public authority – by the Supreme Soviet of the RSFSR; according to the legislation in force this kind of question belonged to the exclusive competence of the supreme representative body – to the Congress of People’s Deputies of the RSFSR.<sup>28</sup> Unfortunately, all these gross violations of existing constitutional legislation had no legal consequences.

### 3. All-Ukrainian Referendum on 1.12.1991

The reaction of the Ukrainian leadership to the Putsch of the GKChP which happened in Moscow was remarkable. On 24.8.1991 – three days after the end of the August Putsch – the Supreme Soviet of the Ukrainian SSR adopted the Act of Declaration of Independence of Ukraine which referred to “*the mortal danger surrounding Ukraine in connection with the state coup in the USSR on 19.8.1991*”. Thus, in consideration of the August Putsch, the Supreme Soviet of the Ukrainian SSR proclaimed the Independence of Ukraine and the creation of an independent Ukrainian state.

This document is curious in several respects. The Act of Declaration of Independence of Ukraine was adopted after the 1991 Putsch and despite the obvious fact of the unsuccessful end of the Putsch in Moscow, the act declared a kind of unspecified “*mortal danger surrounding Ukraine*”. If the Act of Independence of Ukraine had been adopted during the action of the state coup of the GKChP (i.e. between 18.-21.8.1991), then by a long stretch of the imagination, it would be possible to talk about “*the mortal danger surrounding Ukraine*”, which would allow the justification of the unilateral

<sup>27</sup> Constitutional court of Russia, Reference book, under the general editorship of K. A. Katanyan, originated by M. S. Balutenko/G. V. Belonuchkin/K. A. Katanyan, 1997 (Конституционный Суд России, – Справочник / Составители: М. С. Балутенко/Г. В. Белонучкин/К. А. Катанян, Под общей ред, К. А. Катаняна, 1997).

<sup>28</sup> The shorthand report of the 21<sup>st</sup> meeting of the 4<sup>th</sup> session of Supreme Soviet of the RSFSR on 12.12.1991.

secession of Ukraine from the union state. It should be borne in mind that as a result of the GKChP state coup in Moscow only three people were killed. In this context it would be appropriate to make the following analogy to the modern political situation in Ukraine in 2014: during the events in Kiev during the so-called “Euromaidan” over hundred people were killed; thus, among other reasons, the “Euromaidan” in Kiev became a precondition for the self-determination of Crimea and its unilateral secession from Ukraine. In these events it is possible to recognize a peculiar kind of “*boomerang effect*” for Ukraine. In 1991 it was enough to justify the self-determination of Kiev and its unilateral secession from the USSR on the pretext of an unspecified “*mortal danger*” and to refer to three victims of “*bloody GKChP*”. However, following this sophisticated logic for the self-determination and a unilateral secession of Crimea from Ukraine in 2014, “*the mortal danger*” to the population of Crimea was much more tangible and explicit, considering 106 victims killed in “Euromaidan”, 48 killed in the Trade Unions Building in Odessa and thousands of people killed in the military operation in the East of Ukraine.

The second legal peculiarity of the Act of Declaration of Independence of Ukraine on 24.8.1991 is that it was already the second document concerning the independence of Ukraine. The first document – the Declaration on the State Sovereignty of Ukraine – was adopted on 16.6.1990.<sup>29</sup> Thus, *de facto* and *de jure* Ukraine declared its state independence twice. Clearly, the second time, the point of issue was the creation of an entirely independent Ukraine. *De facto* the second document meant a final secession of Ukraine from the USSR and a complete separation from the union state: both from the small union (“*format 9+1*”) as well as from the large union of fifteen republics (“*format 15*”). However, from a legal point of view, such unilateral secession from the union state was in direct contradiction to the will of the Ukrainian people as demonstrated in the Soviet Union Referendum on 17.3.1991. It should be borne in mind that the vast majority of the Ukrainian voters – 90.2 % (!), i.e. 28 610 899 voters in Ukraine – voted for the preservation of the common union state. Understanding these clear and insoluble legal contradictions, the authorities of Ukraine were trying to provide the maximum possible legitimation for their separatism. Firstly, the Act of Declaration of Independence of Ukraine adopted by the Supreme Soviet of Ukrainian SSR on 24.8.1991 was repeatedly approved by the Resolution

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<sup>29</sup> The Declaration on the State Sovereignty of Ukraine adopted on 16.6.1990, Gazette of the Verkhovna Rada of Ukraine of the Ukrainian Soviet Socialist Republic, 1990, No. 31, Art. 429 (Декларація про державний суверенітет України / Відомості Верховної Ради Української Радянської Соціалістичної Республіки, 1990, No. 31, ст. 429).

of the Verkhovna Rada of Ukraine on 11.10.1991. Secondly, it was decided to organize the All-Ukrainian referendum and to put the Act of Declaration of Independence of Ukraine to the vote. The All-Ukrainian referendum was planned for 1.12.1991 with the following question: “Do you support the Act of Declaration of Independence of Ukraine?”

Furthermore, these arbitrary actions of the public authorities of Ukraine cannot be considered as lawful on account of the gross violations of the active legislation. First, neither the Ukrainian public authorities, nor the citizens of Ukraine (at that time of the Ukrainian SSR) could unilaterally revise the decision adopted by the Soviet Union Referendum on 17.3.1991. Once again we must note the provision of Art. 29 of the Law USSR on 27.12.1990 “Concerning national voting (concerning the Referendum of the USSR)” according to which “*the decision made by the Referendum of the USSR is final, has binding legal effect in all territory of the USSR and can be cancelled or changed only by a new Referendum of the USSR*”. Secondly, and even if it were possible to consider any possibility of a new referendum, the next referendum about self-determination and a unilateral secession of Ukraine from the union state could be organized only 10 years after the Soviet Union Referendum on 17.3.1991.<sup>30</sup> Thus, using as a pretext “*a bloody state coup of GKChP*”, the Ukrainian authorities have consciously violated the existing legislation and voluntarily cut the connexion with the will of the Ukrainian people to preserve a common union state.

The All-Ukrainian Referendum on 1.12.1991 saw a turnout of 84,2 % of all citizens of the Ukrainian SSR with the right to vote (altogether 37 885 555 voters were registered in the Ukrainian SSR and in this referendum 31 891 742 voted). In the All-Ukrainian Referendum 1991 the Act of Declaration of Independence of Ukraine was supported by 28 804 071 voters (90,32 %), with 2 417 554 against (7,7 %). It should be noted that the lowest level of support for the Act of Declaration of Independence of Ukraine was in Crimea (the Crimean Autonomous Soviet Socialist Republic) – 54 %; and in Sevastopol – 57 %. In all other regions of Ukraine the support for the Act of Declaration of Independence of Ukraine varied from 83 to 98 % of voting citizens.<sup>31</sup>

<sup>30</sup> The Law of the USSR “Concerning an order of the solution of the questions with regard to an exit of the union republic from the USSR” No. 1409-1 on 3.4.1990, Gazette of the Congress of People’s Deputies of the USSR and the Supreme Soviet of the USSR, 1990, No. 15, Art. 252. (Закон СССР “О порядке решения вопросов, связанных с выходом союзной республики из СССР” No. 1409-1, 3.4.90 / Ведомости СНД и ВС СССР, 1990, No. 15, ст. 252).

<sup>31</sup> The Final Report about the Results of the All-Ukrainian Referendum on 1.12.1991 (Відомість про результати Всеукраїнського референдуму, 1 грудня 1991).

Thus, by means of an additional (albeit illegal) referendum, the Ukrainian leadership managed to create a kind of legitimacy for the unilateral secession from the union state and for the Declaration of Independence of Ukraine. In this particular case we are dealing not only with a clear violation of applicable legislation and existing referendum procedures but also with a phenomenon of intelligent manipulation of the will of voters. In March 1991, the citizens of Ukraine clearly voted in favour of the preservation of a common state in the form of the renewed federation, and in December 1991 (i.e. only nine months later) they made the opposite decision.

#### IV. Conclusion

Taking all the aforesaid into consideration, it is possible to draw a general conclusion about the illegality and illegitimacy of the dissolution of the Soviet Union from the perspective of USSR constitutional law. The Soviet Union could have been kept in the form of a renewed federation at least in the format of the small union ("*format 9+1*"). This option was the most realistic and legitimate scenario which considered the will of the people of the nine union republics that participated in the Soviet Union Referendum of 17.3.1991, and of the other six republics that boycotted this referendum.

We should note that in western public opinion there is a widely-held belief which regards the dissolution of the USSR as a largely psychological problem which allegedly "*Russians cannot overcome*". However, the point at issue is that this in fact concerns the legal dimension of the termination of existence of the USSR, namely the illegality (unconstitutionality) of liquidation of the Soviet Union and the non-compliance of actions with the existing law. Therefore it would be reasonable to draw the conclusion that a "*warped legal groundwork*" was laid for the foundation of statehood of the new independent states (the former Soviet Union republics) because the elite of nine republics consciously violated the will of the people. And now we witness in Crimea and in the East of Ukraine that the "*legal foundations have settled*", and the walls of the "*Ukrainian house*" are beginning to crack. It is an unfortunate fact that modern Ukraine is divided in half, both with regard to the future and to the past. In December 1991, the legitimization chain between the people and the political power was voluntarily broken. In the Soviet Union Referendum on 17.3.1991 the people of nine republics of the USSR voted for the preservation of the union state (renewed

federation).<sup>32</sup> This decision represented a conscious choice of the people for unity and against separation from each other, against creation of frontiers and customs, against the establishment of migration laws and separate citizenship, against new national currencies instead of a common one and against all other things which would inevitably be created by the independence and self-determination of each union republic.

The Soviet Union Referendum of 1991 was and would remain an important reference point with regard to the direction of the development of all nine republics which participated in the referendum, i.e. regarding the direction towards Eurasian integration. Modern developments confirm this general conclusion: the Eurasian Union (the Eurasian Economic Union) was created on the territory of the former Soviet Union on 29.5.2014.<sup>33</sup> Today the members of the Eurasian Union are Russia, Belarus, Kazakhstan, Armenia, Kyrgyzstan, and other former republics of the USSR, which participated in the Soviet Union Referendum 1991, also plan to join the Eurasian Union. Indeed, we should point out that the results of the Soviet Union Referendum on 17.3.1991 are being implemented in real political events of the recent decades of the post-Soviet area.

According to the opinion of the President of the USSR *Mikhail Gorbachev*

“... it was possible to save the Soviet Union, if it were decentralized and democratized. We were pretty closed to creating new groundwork for it. The New Union Treaty had to be signed on 20 August (1991). This activated its numerous opponents ...” ... “there were such type of people who wished very much to become little Tsar (Lord and Master) on their territories and nothing could be done against them ...”

These words have to be treated seriously because it was not the intention to preserve a soviet state ideology, but to keep the state unity, at least of those nine republics which voted in the Soviet Union Referendum 1991. Negotiators in the Novo-Ogaryovo Process worked on the elaboration of the groundwork for the new state to be founded as a union of nine republics that had participated in the referendum; and the point of issue was not the idea to preserve the state called Soviet Union but to create a new federation

<sup>32</sup> V. V. Komarova. Democracy as a Constitutional Imperative. Constitutional and Municipal Law, No. 22, 2009, 2 (*V. V. Komarova*, Демократия – конституционный императив. Конституционное и муниципальное право, 2009, No. 22, ст. 2).

<sup>33</sup> The Treaty concerning the Eurasian Economic Union (signed in Astana on 29.5.2014). The Treaty is ratified by the Federal Law on 3.10.2014, No. 279-FZ (Договор о Евразийском экономическом союзе [Подписан в г. Астане 29.5.2014], Договор ратифицирован Федеральным законом от 3.10.2014, No. 279-ФЗ).

to be called Union of the Sovereign States (USS). Thus, in the first place, it was about the preservation of a common political, economic, humanitarian and cultural space. The vast majority of citizens voted for the preservation of all these common spaces in the Soviet Union Referendum, but not for keeping the Soviet ideology and an old Soviet party system.

With regard to the All-Ukrainian Referendum on 1.12.1991 we should note that this referendum was not conducted in conformity with “*internationally recognised fundamental principles of electoral law*”, nor “*in accordance with legislation and the administrative rules*”. The organizers of the All-Ukrainian Referendum violated several provisions of the acting federal legislation. The most important issue was that in 1991 Ukraine did not have any law regulating a republican referendum. It was “*therefore not clear according to which legal rules*” the All-Ukrainian Referendum “*had to be carried out*”.<sup>34</sup> In addition to this, on 11.10.1991 the Verkhovna Rada confirmed the Act of Declaration of Independence of Ukraine and “*this raised doubt with respect to the legal effects of the referendum and the neutrality of the authorities*”. In accordance with the basic democratic standards for the holding of referendums the public “*authorities must provide objective information*” and “*public media have to be neutral, in particular in news coverage*”.<sup>35</sup> These principles were obviously violated by the public authorities of Ukraine in 1991 because they conducted a one-sided information campaign and whipped up mass hysteria by the broad use of the slogan: “*the mortal danger surrounding Ukraine*”.

Thus, there was a broad range of breaches of federal (union) legislation and of democratic principles for the holding of referendums. Instead of promoting unilateral secession, “*serious negotiations among all stakeholders*” should have been organized. Moreover, the last but most important

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<sup>34</sup> At that moment, as the independence of Ukraine was proclaimed on 24.8.1991 there was legal uncertainty – nothing in the Ukrainian legislation regulated the order of holding the republican referendum. Only few months after a *lex specialis* had been adopted with regard to the republican referendum: “Law of Ukraine No. 1660-XII on organization of referendum” on 10.10.1991, Gazette of the Verkhovna Rada of Ukraine, No. 48, 1991, Art. 663 (Постанова Верховної Ради України Про проведення всеукраїнського референдуму в питанні про проголошення незалежності України. Відомості Верховної Ради України (ВВР), 1991, No. 48, ст. 663).

<sup>35</sup> Here we would like to apply once again the terminology and logic of the European Commission for Democracy through Law (Venice Commission), applied in the Opinion of Venice Commission No. 762/2014 On “Whether the Decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a Referendum on becoming a constituent territory of the Russian Federation or Restoring Crimea’s 1992 Constitution is compatible with constitutional principles” adopted by the Venice Commission at its 98<sup>th</sup> Plenary Session (Venice, 21.-22.3.2014).



provision of public international law and an essential element of basic democratic principles is that “*self-determination is understood primarily as internal self-determination within the framework of the existing borders and not as external self-determination through secession*”.<sup>36</sup> It is obvious that besides the personal ambitions of the Ukrainian political leadership and mass hysteria about the “*bloody putsch of GKChP*”, together with the unspecified “*mortal danger surrounding Ukraine*”, there were no other rational arguments in favour of the secession of Ukraine at that time.

All of this has become a basis for the modern political crisis in Ukraine in 2014 and has provoked the division of the country. The violation of the initial and obligatory will of the people of Ukraine and the unilateral arbitrary revision of the results of the Soviet Union Referendum have become the main reasons for the disintegration of Ukraine, including the recent acts of self-determination of Crimea whose people were the least enthusiastic about the separatism of Kiev in 1991.

As a final summing up, we can only agree with an assessment of the members of the Russian Parliament (State Duma) which contains the following deductions:<sup>37</sup> Firstly, the results of the Referendum of the USSR on 17.3.1991 on the issue of the preservation of the USSR retains validity both for Russia and for the other union republics which participated in the referendum. Secondly, the decision-makers of the RSFSR who prepared, signed and ratified the act concerning the termination of existence of the USSR violated the will of the people of Russia on the preservation of the USSR, which was clearly expressed in the Soviet Union Referendum and the Declaration on the State Sovereignty of the RSFRS and proclaimed the aspiration of the people of Russia to create a democratic constitutional state as a part of the renewed federation. Thirdly, the agreement on the creation of the Commonwealth of Independent States on 8.12.1991 signed by the President of the RSFSR, *Boris Yeltsin*, but not approved by the Congress of People’s Deputies of the RSFSR<sup>38</sup> — i.e. by the appropriate highest representative body of the RSFSR, was illegal and had no validity in regard to the

<sup>36</sup> Venice Commission, Opinion No. 762/2014, On “Whether the decision taken by the Supreme Council of the Autonomous Republic of Crimea in Ukraine to organise a referendum on becoming a constituent territory”, 21.3.2014, para. 18.

<sup>37</sup> See The Resolution of the State Duma of Federal Assembly of Russia on 15.3.1996, No. 157-II GD “About validity for the Russian Federation – Russia of results of a Referendum of the USSR on 17.3.1991 on the issue of preservation of USSR”, *Rossiyskaya Gazeta*, 20.3.1996 (Постановление Государственной Думы Федерального Собрания РФ от 15.3.1996 г. No. 157-II ГД “О юридической силе для Российской Федерации – России результатов референдума СССР 17.3.1991 по вопросу о сохранении Союза ССР” / “Российская газета” от 20.3.1996).

<sup>38</sup> Such approval would have been necessary under Art. 104 of the Constitution of the RSFSR 1978 (as amended on 1.11.1991).

termination of existence of the USSR. Thus, the Reunification of Crimea with the Russian Federation that took place on 21.3.2014 became a practical realization of the initial will and aspiration of the people to live in one single democratic and constitutional state, which was clearly stated in the Soviet Union Referendum on 17.3.1991 and was clearly expressed again in the Crimean Referendum on 16.3.2014.<sup>39</sup>

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<sup>39</sup> For the current Russian academic discussion see: *V. L. Tolstykh*, Reunification of Crimea with Russia: Legal Qualifications, *Eurasian Legal Journal*, No. 5 (72) 2014, 40 et seq. (*B. Л. Толстых*, Воссоединение Крыма с Россией: правовые квалификации. Евразийский юридический журнал, No. 5 (72) 2014, ст. 40-46); *G. M. Velyaminov*, Reunification of Crimea with Russia: Legal Perspective, *State and Law* No. 9 2014, 12 et seq. (*Г. М. Вельяминов*, Воссоединение Крыма с Россией: правовой ракурс. Государство и право, No. 9 2014, ст. 12-18); Statement of the Association of Lawyers of Russia with regard to the situation in Ukraine and legality of the Referendum in the Crimean Republic and Sevastopol. *Legal World* No. 4. 2014, 6 et seq. (Заявление Ассоциации юристов России по ситуации в Украине и законности проведения 16 марта 2014 года референдума в Республике Крым и городе Севастополь. Юридический мир, No. 4 2014, ст. 6-7); *V. B. Evdokimov/T. A. Tukhvatullin*, The Admission of the Crimean Republic and Sevastopol City into the Russian Federation. *State Power and Local Self-Government* No. 5 2014, 37 et seq. (*В. Б. Евдокимов/Т. А. Тухватуллин*, Принятие Республики Крым и города Севастополя в состав Российской Федерации, Государственная власть и местное самоуправление, No. 5 2014, ст. 37-42); *A. E. Zogoeva*, The Annexation of Crimea and Sevastopol to Russia from the Perspective of the Russian Constitution and International Law, *Herald of Master Studies* No. 4-3(31) 2014, 4 et seq. (*А. Э. Цогоева*, Присоединение Крыма и Севастополя к России с точки зрения Конституции РФ и международного права, Вестник магистратуры, No. 4-3(31) 2014, ст. 4-6). *V. A. Tomsinov*, Crimea and Russia: reunification from international law perspective. *Legislation*. No. 6 2014, 10 et seq. (*В. А. Томсинов*, Воссоединение Крыма с Россией с точки зрения современного международного права. Законодательство, No. 6 2014, ст. 10-27); *V. A. Tomsinov*, International law in the context of reunification of Crimea and Russia. *Legislation*. No. 7 2014, 11 et seq. (*В. А. Томсинов*, Международное право с точки зрения воссоединения Крыма с Россией. Законодательство, No. 7 2014, ст. 11-26); *V. A. Tomsinov*, Ukrainian crisis: metamorphoses of geopolitics and international law. *Legislation*. No. 8 2014, 9 et seq. (*В. А. Томсинов*, Украинский кризис: метаморфозы геополитики и международное право. Законодательство, No. 8 2014, ст. 9-24).