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CONTENT

TRENDS IN THE MODERNIZATION OF CONSTITUTIONAL CONTROL IN THE RUSSIAN FEDERATION

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Abstract: This article presents the author's analysis of the changes in the legislation on the Constitutional Court of the Russian Federation, that are being discussed at the highest governmental level. In particular, special attention is paid to the formation of new trends in adjusting the institution of constitutional control (the procedural aspect), which are in demand by the political elite and are often necessary for immediate adjustment of the political forces balance, but, at the same time, are insufficiently developed from the point of legal theory. The study concludes that such a discrepancy between the expected and that of being carried out directions of development of the institution of constitutional control inevitably leads to increased risks in the activities of the Constitutional Court and also hardly correlates with such fundamental constitutional principles as maintaining the trust of citizens to the activities of the state (including its certain governmental bodies), as well as legal certainty (in the context of predictability of the legal effect of regulation).

Keywords: Constitutional Court of the Russian Federation, constitutional justice, amendments to the Constitution of the Russian Federation, modification of the Constitution of the Russian Federation, constitutional control, ex-ante constitutional control, constitutional procedure.

Problem statement. The events that took place at the end of 2019 and the beginning of 2020 certainly forced all researchers in the field of constitutional review to turn their attention back to this seemingly well-established institution of domestic constitutional law. Indeed, 2019 marks the 25th anniversary of the adoption of the current Federal law "On the Constitutional Court of the Russian Federation"[1], which has been subject to various changes over the past quarter of a century. However, the analysis of the conducted reforms shows that against an average index of "stability legislation", which until 2010 was about 1 month, but after 2010 went to about 20-25 days[2], 16 amendments, introduced up to date, represent in some sense unusual (especially in comparison with, say, the Code of administrative offences, etc.). On the one hand, such a "delicate" appeal of the legislator to the basic legal act on constitutional control in the Russian Federation may be due to the balanced regulation of this institution, which requires only individual adjustments, point adjustment to the requirements of modern development of the state and society. On the other hand, the reason for such a rare appeal of the legislator to the problems of reforming the legislation on constitutional control may lie in the extremely low political interest in this issue, a certain sense of security, etc., which is largely reflected in the efficiency of solving certain issues in the sphere of reforming the said institution. For example, there are frequent cases of literally lightning-speed adoption of amendments to the Federal law On the Constitutional Court that are of great political significance (but not always undisputable from the point of view of legal theory)[3]; adoption of veiled point amendments in the system of other legislative changes not related to the

[1] Federal constitutional law from 21.07.1994 № 1-FKZ “On the Constitutional Court of the Russian Federation”.
[2] For more information, see the research conducted by the Center for Strategic Research in 2017: URL: https://www.csr.ru/ru/news/rastushhaya-nestabilnost-zakonodatelstva-meshaet-planirovat-budushhee-strany/ (accessed January 19, 2020).
[3] This is about recent years amendments, which were adopted within a week from the moment the corresponding initiative was submitted to the State Duma (see, for example: Federal constitutional law of 14.12.2015 N 7-FZ "On amendments to the Federal constitutional law "On the Constitutional Court of the Russian Federation".

constitutional procedure[4]; adoption of a set of amendments interspersed with "textual clarification of provisions"[5].

The problem in this regard is the approach of the legislator's choice of a particular area of the adjustment, taking into account that a number of science-discussed and objectively necessary from the point of view of requirements of the Constitutional Court of the Russian Federation itself (which often is expressed in unequivocal hints contained in decisions) proposals on potential directions of changes in the legislation remains without attention[6].

In the context of the mentioned issues, it seems appropriate to focus on the specific strategic directions of the reform of the constitutional proceedings, which were marked at the highest state level: 1) the problem of clarification of grounds of the admissibility of the constitutional complaint; 2) the problem of expanding the scope of the preliminary constitutional review; 3) the problem of clarification of object of the constitutional review (in terms of expanding the list of acts subject to review by the Constitutional Court of the Russian Federation).

Clarification of grounds of the admissibility of the constitutional complaint. This aspect of the problem is related to the statement of the President of the Constitutional Court of the Russian Federation V.D. Zorkin at a meeting with the President of the Russian Federation dedicated to the Day of the Constitution of the Russian Federation[7]. In particular, during the traditional meeting of the Judges of the Constitutional Court with the President of the Russian Federation, V.D. Zorkin proposed to clarify the grounds of the admissibility of the complaints of citizens, adding the requirement of passing the procedure in the ordinary courts. Such order, according to the President of the Constitutional Court, would eliminate the excessive zeal of the applicant to appeal to the Constitutional Court after the district court (and sometimes even after the decision of the justice of the peace), which in turn would contribute to the harmonization of relations within the judiciary, reducing conflict situations among the ordinary courts and between the practice of the Supreme and Constitutional courts.

It seems that such an unexpected proposal needs at least serious scientific study for the following reasons. First, the reason stated as a leitmotif for the introduction of an additional condition of admissibility – the reduction of conflict within the unified judicial system – is of

[4] In this case, we can cite as an example the Federal constitutional law from 29.07.2018 № 1-FKZ "On amending the Federal constitutional law "On the judicial system of the Russian Federation" and certain Federal constitutional laws in connection with the establishment of general jurisdiction courts of cassation and general jurisdiction courts of appeal" associated, on the basis of name, with the processes of the new organization of general jurisdiction courts. In connection with this circumstance, article 2 looks extremely strange, which increases the term of office of the Vice-President of the Constitutional Court to 76 years (which miraculously coincides with the reassignment of O.S. Khokhryakova to the specified position to 76 years).

[5] Such amendments were repeatedly introduced by the legislator in the Federal law on the constitutional court. In particular, in this way was substantially weakened requirements for the number of judges of the Constitutional Court of the Russian Federation, necessary for adjudication, and the appointment of a new judge when an office becomes vacant (the Federal constitutional law from 04.06.2014 № 9-FKZ "On amending the Federal constitutional law "On the Constitutional Court of the Russian Federation"). However, the most sophisticated one was the amendment made by the Federal constitutional law of 28.12.2016 № 11-FKZ. In fact, having fixed a new type of decisions that was of no questions or practical problems (a judgement with the identification of the constitutional meaning), the legislator simultaneously corrected article 100 of the Federal constitutional law On the Constitutional Court, deleting the words "in any case" from its part two. Such editorial changes could not be noticed in the case if it was not associated with a significant limitation of the applicant's right to a so-called prize – an unconditional review of enforcement decisions based on the provisions found to be unconstitutional.

[6] An example is the expected amendments to the relevant legislation that allow the Constitutional Court to interact with the applicant in electronic form (Federal constitutional law № 5-FKZ of 08.06.2015 "On amendments to the Federal constitutional law "On the Constitutional Court of the Russian Federation". In addition, there were sufficiently developed and reasoned points of view in science about the overdue and expected reforms: see, for example, O.N. Kryazhkova Changes in the Russian constitutional justice that were expected, are expected and unexpected // Constitutional and municipal law. 2014. № 10. P 41–51, etc.

[7] See: URL: https://www.vedomosti.ru/politics/news/2019/12/12/818563-uslozhnit-obrascheniya-grazhdan-ks (accessed January 26, 2020).

serious concern. Of course, this circumstance is extremely important, especially in modern Russian realities, but it still seems somewhat controversial from the positions expressed by the Constitutional Court of the Russian Federation itself in a number of decisions. In particular, the Court noted that the state, even if it has the goal of preventing the abuse of law, should not use excessive measures, but only necessary and strictly determined measures, in order to ensure that the exercise of constitutional rights does not violate the rights and freedoms of others. This principle of proportionate restriction of rights and freedoms, enshrined in article 55 (part 3) of the Constitution of the Russian Federation, means that the public interests listed in this constitutional norm can justify legal restrictions of rights and freedoms if they are adequate for socially justified purposes[8]. Thus, it is a socially significant goal that seems to correspond to modifications of the rule of law aimed at eliminating the problem of domestic interaction. In addition, this legal position was developed in the practice of the constitutional Court, which also noted that the goals of rational organization of the activities of government bodies alone cannot serve as a basis for restricting rights and freedoms (judgements of 13.06.1996 № 14-P, 11.03.1998 № 8-P, 18.02.2000 № 3-P, 30.10.2003 № 15-P,..., 16.04.2015 № 8-P, 29.11.2016 № 26-P, 17.01.2018 № 3-P).

In addition, when implementing the proposed initiative, the effectiveness of the Constitutional Court of the Russian Federation itself will be in doubt. In fact, the applicant will complaint to the Constitutional Court in cases where the violation of his right (which can later be established in the course of constitutional review) is not just fixed in place by the decision of the ordinary court, but also to some extent "rooted" in practice, since the period of passage of numerous instances by the applicant (up to the Supreme Court of the Russian Federation) will also actually create additional difficulties for the applicant. At the same time, the Constitutional Court is currently not deprived of the opportunity to independently assess the potential legal effect of providing constitutional review in relation to a specific provision contested in the applicant's complaint. Thus, having discovered a significant constitutional defect, the Constitutional Court has the opportunity to nullify it even before it is fixed (but most likely accepted) by the practice of the Supreme Court of the Russian Federation, which in turn can cause much more problems in the context of the impact of the Supreme Court's explanations on the practice of lower courts.

Moreover, as rightly pointed out V.D. Zorkin, at present, this problem hardly appears to be extremely significant from the position of the Constitutional Court, because, as mentioned above, the Constitutional Court has sufficient tools to assess the constitutional significance raised by the applicant and also to evaluate the risk of such priority of constitutional review[9].

In fact, current practice shows that the Constitutional Court refrains from resolving complaints in situations where the resolution of the issues raised in them is not completed during ordinary legal proceedings.

In 1998 the Constitutional Court formulated a basic position related to the impossibility of replacing the ordinary judicial dispute resolution (legal proceedings) with constitutional review. Thus, the Ruling of 1.07.1998 № 113-O the Constitutional Court noted that according to the attached to the complaint materials no conclusion can be made on the matter of what law how exactly it will be applied in particular claimant’s case and whether this could lead to a breach of his rights enshrined in the Constitution of the Russian Federation, to which he refers in support of its position. Under such conditions, consideration of this complaint in the Constitutional Court of the Russian Federation could prejudge the conclusions of the of the general jurisdiction court. However, the Constitution of the Russian Federation (articles 118, 125, and 126) does not allow the substitution of constitutional proceedings for civil, administrative, or criminal proceedings. At the same time, the Constitutional Court has developed a whole set of approaches to the situation when the applicant tries to make the specified substitution of legal proceedings: there are no documents confirming the completion of the case (ruling from 21.06.2011 № 844-O-O); from the

[8] See: Judgement of the Constitutional Court of the Russian Federation from June 13, 1996 № 14-P.
[9] See: URL: http://kremlin.ru/events/president/news/62309 (accessed January 26, 2020).

attached documents, it follows that the proceedings continue (rulings from 02.07.2009 № 1008-O-O[10], from 29.09.2011 № 1295-O-O[11]; from 17.06.2010 № 922-O-O[12]; from 30.09.2019 № 2449-O[13], etc.). In addition, the practice of the Constitutional Court shows that the number of complaints containing such a defect hardly constitutes a significant share of the total amount of correspondence received by the Constitutional Court.

Thus, it can be stated that the establishment of additional procedural obstacles for citizens to apply to the Constitutional Court, which is not currently due to objective reasons, and is also quite successfully compensated by the approaches developed by the Constitutional Court, can hardly be considered as a necessary reform of constitutional control.

Expanding the scope of preliminary constitutional review

As already mentioned in the introduction of this article, in this situation it is necessary to talk about the proposals made by the President of the Russian Federation in the framework of his traditional annual address to the Federal Assembly and, to date, very successfully expressed in the form of a draft law on the amendment to the Constitution of the Russian Federation submitted to the State Duma of the Federal Assembly of the Russian Federation[14]. It seems that the reforms proposed by the head of state also deserve some critical comprehension (especially given the suddenness of their introduction and consideration by the chambers of the Federal Assembly).

Among the significant array of constitutional amendments that have already become the subject of massive comment, the amendments concerning changes in the powers of the Constitutional Court of the Russian Federation also took their place. In particular, the new version of article 125 of the Constitution of the Russian Federation (namely, the proposed part 5^1) proposes to expand the scope of preliminary constitutional review to federal legislation (federal constitutional laws and federal laws in certain cases). Thus, according to the proposed regulation, the Constitutional Court is vested with the authority to review the constitutionality of laws adopted in the manner prescribed by part 3 of article 107, and part 2 of article 108 of the Constitution of the Russian Federation (as amended), prior to their signing by the President of the Russian Federation.

Of course, these changes deserve a full study (including, or rather, primarily, from the point of view of the necessity of such a "balance of powers" alteration in the system of separation of powers, provided by article 10 of the Constitution), but this article is focused solely on the question of competence of the Constitutional Court.

In fact, the institute of preliminary constitutional review is already present as an independent authority of the Constitutional Court, however, under the current wording of the Constitution, this right is limited solely to the subject area of international treaties not entered into force, and international agreements on the acceptance into the Russian Federation of a new constituent part (as a special case the general rule on international agreements, what in particular stated the Constitutional Court[15]). Such a limitation is not without legal logic, since, as the authors of the commentary to the federal constitutional law «On the Constitutional Court of the Russian Federation» pointed out, "international treaties that have entered into force for Russia do not fall under the jurisdiction of the Constitutional Court of the Russian Federation. Disputes concerning existing international treaties are resolved in accordance with international legal mechanisms established by international law, in particular articles 46, 65, 66 of the 1969 Vienna Convention

[10] The decision in which contested provision has been applied in a concrete case, later was reviewed by the Supreme Court of the Russian Federation.
[11] The case was referred to a court of cassation.
[12] Court of appeal review was pending due to expert study conduction.
[13] Court of cassation review was pending.
[14] URL: https://sozd.duma.gov.ru/bill/885214-7 (accessed January 26, 2020).
[15] Judgement of the Constitutional Court of the Russian Federation from 19.03.2014 № 6-П.

on the Law of Treaties.[16]" It is thus evident that the review of international treaties in accordance with article 15 of the Constitution became part of the legal system of the Russian Federation from the moment of ratification of an international treaty is required, and the only possibility of such a check occurs only before ratification of the latter (i.e. before the entry into force).

However, it should be emphasized that such logic cannot be applied to the preliminary review proposed for ordinary legislation. Moreover, it actually creates a situation of parallel constitutional procedures[17], in which two completely different situations can lead to the same essential result. It is not difficult to guess that in this case we are talking about a preliminary review of the draft federal law before it is signed. If the Constitutional Court finds that the proposed regulation complies with the Constitution of the Russian Federation, this de facto excludes the possibility of ex post re-review the law that has already been adopted, but this possibility remains de jure in the mode of abstract and concrete review. Such examples can hardly be called speculative, since V.D. Zorkin also clearly indicated that the main group of problems related to the constitutionality of laws today is not so much in the wording of the provisions being checked, but in their application and judicial interpretation.

Moreover, this problem is not so much theoretical and methodological (which is generally characteristic of proposed constitutional amendments), but rather practical. First, re-review of provisions that has entered into force by the Constitutional Court significantly undermines the constitutional principle of maintaining the trust of citizens in the actions of the state. In particular, as the Constitutional Court itself noted, the content of this principle stands for the fact that when changing the legislation, a reasonable stability of legal regulation must be maintained and arbitrary changes to the legal system are unacceptable. In addition, citizens should be given the opportunity, if necessary, to adapt to changes during a certain transition period[18]. It is obvious that if a legal provision is found to be clearly unconstitutional (taking into account the existing law enforcement practice), which has been checked on a preliminary basis, the Constitutional Court will not be able to overcome the conclusion formulated earlier without infringing on the essence of the above-mentioned principle.

Another significant omission in the context of the proposed procedures of preliminary review is the exclusion of laws of the Russian Federation on the amendment to the Constitution of the Russian Federation from the number of acts subjected to the review, while the opposite, unlike the earlier examples, could be justified and expected change, directed to improve the system of constitutional review in the Russian Federation, as well as to strengthening the role of the Constitutional Court in the system of checks and balances .

However, some possibility of positive developments in this issue should still be admitted. In particular, the draft constitutional amendments provide the Constitutional Court with the right to verify the constitutionality of laws (in this case, the common term «law» is used, as the Constitutional Court itself has repeatedly stated, thus expanding the potential subject of review) adopted in accordance with part 3 of article 107 and part 2 of article 108 of the Constitution of the Russian Federation[19]. It is important to pay attention to the wording used in the proposed part 51 of article 125 of the Constitution of the Russian Federation – "*laws adopted in accordance with part 2 of article 108 of the Constitution of the Russian Federation*". It seems that such an ornamental design allows us to draw some analogies with the formula used in article 136 of the Constitution of the Russian Federation " adopted according to the rules fixed for adoption of federal constitutional laws...". Thus, stipulating procedure of preliminary request of the President

[16] Commentary to the Federal constitutional law «On the Constitutional Court of the Russian Federation» / ed. G.A.Gadjiev. P. 88.
[17] Malyutin N.S. Judicial interpretation as a constitutional procedure in the context of separation of powers in the Russian Federation // Constitutional and municipal law. 2015. № 8. P. 12-19.
[18] Judgement of the Constitutional Court of the Russian Federation from 24.05.2001 № 8-P.
[19] Proposed part 5^1 of the article 125 of the Constitution of the Russian Federation.

of the Russian Federation in the Constitutional Court, the proposed part 2 of article 108 of the Constitution allows, taking into account a systemic interpretation of the said provision with the provision of article 136 of the Constitution of the Russian Federation, to consider preliminary review as an optional part of the procedure of adoption of federal constitutional law, and hence also applicable to the law of the Russian Federation on the amendment to the Constitution of the Russian Federation.

Clarification of the scope of constitutional review. Along with adjusting the competence of the Constitutional Court, the proposed version of the Constitution of the Russian Federation also addresses a number of issues related to expanding the scope of constitutional review. In particular, in the proposed part 5^1 of the article 125 of the Constitution establishes that the Constitutional Court at the request of the President of the Russian Federation in accordance with federal constitutional law, verify the constitutionality of laws of subjects of the Russian Federation prior to the promulgation by the senior official of the subject of the Russian Federation.

It seems that this regulation is not devoid of controversial points that need to be clarified before the adoption of these constitutional amendments.

First, it must be noted that the novelty of this amendment declared by the President of the Russian Federation is somewhat illusory. Thus, according to the current legislation, specified by the practice of the Constitutional Court of the Russian Federation, the legislation of a subject of a Russian Federation is considered as a full-fledged subject of constitutional control in a situation when these laws are adopted on issues of joint jurisdiction. However, unlike the provisions of part 2 of article 125 of the Constitution, the proposed amendment does not specify subject area of regulation for potentially reviewed laws of the constituent parts of the Russian Federation, thus allowing the possibility of review of legislation enacted within the exclusive regional competence, under article 73 of the Constitution. In this situation, we can certainly talk about expanding the approach of the legislator to determining the scope of review of the Constitutional Court.

Secondly, the possibility of review of laws of the subjects of the Russian Federation adopted on issues of its exclusive jurisdiction (assuming such a possibility, as discussed above) is unlikely to become an effective institution given the current system of federative relations. In particular, the point is that the Constitution of the Russian Federation, being the main and in fact the only measure for the Constitutional Court of the Russian Federation, does not specify its attitude to the issues of jurisdiction of the subjects of the Russian Federation, thus leaving them a significant degree of autonomy. It is obvious that the implementation of constitutional review of such legislation will be impossible without taking into account federal legislation (which seems questionable in the context of article 73 of the Constitution), and without interpretation of regional constitutions and charters, which in the end is not correlated with the idea of a federative constitutional review and autonomy of subjects of the Russian Federation outlined above.

Finally, the proposed constitutional regulation provides for the possibility for the President of the Russian Federation to appeal to the constitutional Court before the regional law is signed by the highest official of the subject of the Federation. However, this procedure also contains a number of controversial points. How will the President of the Russian Federation track the fact that the head of a subject has signed a regional law that could potentially become the subject of verification? What should I do if, in the process of preparing a presidential request to the constitutional Court, the head of a subject signs a controversial law, and the latter, in turn, comes into force? Perhaps, in this scenario, it would be more logical to transfer the appropriate authority to the head of the subject?

In addition, we should note the following. This procedure is to be initiated by the Federal authority (the President of the Russian Federation) in the other Federal authority (constitutional Court) in the manner provided solely by the Federal legislation, as well as the substance of which is to check for compliance with the Federal act, of any kind not related to the idea of delimitation of competencies between the Federation and the constituent entities because, in fact, violates the

principle of non-interference of the Federation in the autonomy of the subject, fixed by the Constitution of the Russian Federation through the exclusive reference to article 73 .

Meanwhile, it should be noted that the question of the possibility of checking the legislation of the subjects of the Federation in the order of constitutional control arose from scratch. Back in 1999, when interpreting certain provisions of articles 125, 126 and 127 of the Constitution of the Russian Federation, the constitutional Court, according to the fair comment of judge N. V. Vitruk, ignored a number of important issues that, it seems, should have been paid attention to by the legislator when developing a strategy for reforming the institution of constitutional control. In particular, N. V. Vitruk noted that today the competence between the constitutional (statutory) courts of subjects and courts of General jurisdiction to review the provisions of regional legislation is not clearly differentiated, which creates a kind of confusion when considering this category of cases. It seems that the inclusion of another potential "player" in this process will not help resolve the existing uncertainty, but on the contrary, will increase the potential for conflict in the implementation of this procedure.

Conclusion. The presented brief analysis allows us to conclude that the proposed directions for modernizing constitutional control in the Russian Federation today can hardly be called scientifically developed and justified from the point of view of both the needs of society and the needs of the constitutional Court of the Russian Federation itself. At the same time, the considerable work of the scientific community specializing in the analysis of procedural problems of the constitutional protection of human rights and freedoms, if studied by the state at a certain stage, is for some reason not taken into account when developing a strategy for legislative policy in this area, which often leads to an imbalance of the existing and fairly well-functioning system. It seems that such a policy of the state, combined with the speed (or rather, the suddenness) of the passage of proposed projects, significantly reduces the stability of the entire system of legal regulation, and also hardly positively affects the confidence of citizens in the institutions of such a state.

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