DEVELOPMENT OF THE MECHANISM OF CONSTITUTIONAL CONTROL IN THE RUSSIAN FEDERATION

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The mechanism of constitutional control has not been developing in Russia for very long, meeting difficulties and obstacles, and nowadays it still faces some challenges. It's obvious that future difficulties and problems will be successfully overcome, as has happened in the past, but the question is what is the cost?

I would like to dwell upon the history of the constitutional control in Russia. The law of the USSR on 1st December, 1988 # 9853-X1[1] amended the Constitution of the USSR and the USSR Committee of Constitutional Supervision was established. Twenty three members were elected by the Congress of People's Deputies of the USSR for a ten year period from experts in politics (at that time! – M.K.) and law. The number of members was increased to 27 under the law of the USSR on 23rd December, 1989 # 974-1 "Amendments to the Article 125 of the USSR Constitution"[2] and they represented every social republic. The Committee was functioning from May 1990 till December 1991 and passed 23 decisions, some of them on very important matters of human rights.

The RSFSR Constitution (article 104, part 12 as amended by the Act on 27th October, 1989)[3] set up the RSFSR Committee of constitutional supervision. The article provided that ten commissioners should be elected from among the experts in the field of politics and law for a 10-year period. Later in the RSFSR Constitution as amended by the Act on 15th December, 1990 # 423-1[4] in part 1 article 10 the words "RSFSR Committee of constitutional supervision" were amended to "Constitutional Court of the RSFSR".

Thus, the RSFSR Constitution (as amended on 15th December, 1990) and the Act of the RSFSR on 6th May, 1991 # 1175-1[5] (amended on 12th July, 1991 when the Congress of People's Deputies adopted the Resolution to enact the Law "On Establishment of the Constitutional Court of the RSFSR"[6]) became the legal framework for the newly established institution – the Constitutional Court of the RSFSR. The Law "On Establishment of the Constitutional Court of the RSFSR" in its article 1 defines the Court as "the highest judicial body for constitutional control in the RSFSR, exercising the judicial power in the form of constitutional proceedings". Under this law the Constitutional Court of the RSFSR was eligible to decide cases on the constitutionality of the law enforcement and to initiate the proceedings and now

[1] Vedomosti SSSR, 1988, № 49, P. 727
[2] Vedomosti SSSR, 1989, № 29, P. 574
[3] Vedomosti VS RSFSR, 1989, № 44, P. 1303
[4] Vedomosti SND i VS RSFSR, 1990, № 29, P. 561
[5] Vedomosti SND i VS RSFSR, 1991, № 19, P. 621
[6] Vedomosti SND i VS RSFSR, 1991, № 3, P.1016

the Constitutional Court does not have these powers. On 29-30th October, the 5th Congress of People's Deputies elected 13 judges (4 of them have been serving as judges till the present time) and the Constitutional Court of the RSFSR started, its first session took place on 30th October, 1991. Up to October 1993 the Court had passed 28 important decisions including on the USSR Communist Party case, on the case of establishment of the Ministry of State Security and Domestic Affairs (integrated Ministry) and others. On 5th October, 1993 the RSFSR Constitutional Court passed a decision on the well-known Presidential Decree # 1400 dated 26.09.93 "On Gradual Constitutional Reform in the Russian Federation"[7] (dissolution of the Congress of People's Deputies and the Supreme Soviet of the Russian Federation). In two days after this, on 7th November, 1993 the President by his Decree # 1612 actually suspended[8] the activities of the Constitutional Court for a long time. The Chairman of the Constitutional Court was recommended (by paragraph 5 of the Decree) to make proposals to the Federal Assembly of the Russian Federation "on organizational and legal framework of constitutional justice in Russia and the possibility to set up the Constitutional Division at the Supreme Court". De facto the Constitutional Court of the Russian Federation was suggested to self-destruct.

However the Constitutional Court of Russia retained its power and in the Constitution adopted on 12.12.1993 it was included in Section 7 "Judicial Power", also the Constitution has the provisions for other high courts of the country – the Supreme Court and the Supreme Arbitrary Court.

Since that time the Constitutional Court of Russia exercised its judicial power in the framework of the new Constitution of Russia (which identified its role and place in the national legal system) and the new Federal Constitutional Law "Constitutional Court of the Russian Federation" on 21st July, 1994 # 1-FKZ[9]. Under the new constitutional and legal regulations the Court consisted of 19 judges; it wasn't eligible to admit a petition for consideration by its own initiative; it was not its power to assess the constitutionality of the actions of officials, as well as the constitutionality of the political parties; the Court was only empowered to verify laws in case of requests or complaints. The constitutional proceedings were also changed – the Court considered and resolved the cases in two Chambers and in Plenum (i.e. full membership), etc. Article 1 of the Federal Constitutional Law defined the Court as the judicial body of constitutional control which exercises judicial power independently by means of constitutional judicial proceedings.

After all judges were appointed the Constitutional Court started to exercise its powers in February 1995. In the period of 1995-2000 it issued 12 judgments on the Constitution interpretation; in 2006 the Court issued 10 resolutions and 35 rulings on different cases. It's obvious that the constitutional assessment of the Constitutional

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[7] Sobranie Aktov Presidenta I Pravitelstva Rossiiskoi Federacii, 1993, № 39, P.3597

[8] Moreover, in the Attachment # 2 to the Presidential Decree on 24 December 1993 # 2288 (Rossiiskaya Gazeta, 1994, 14 January) the Act "Constitutional Court of the RSFSR" was recognized as invalid and inapplicable to state authorities, local authorities and officials

[9] SZ RF, 1994, № 13, P.1447

Court improved the basic institutions of the Russian legal system – criminal, civil, other branches of law and their procedures.

In 2008 the Constitutional Court moved from Moscow to St. Petersburg. By that time most petitions to the Court were on socio-economic matters, not human rights. This fact indicates the changes in Russian legal system and society. Violations of socio-economic rights and freedoms, in all their diversity, are often very similar in effect, and the Constitutional Court introduced new practice: the Court applied its positions on the matters where the Constitution was interpreted to the similar matters. It was suggested to make so-called "positive rulings" without public hearings. This practice was criticized, mostly in the academic community. Academicians discussed possible problems that could occur, for example different legal interpretation of one matter in two Court chambers. Also a "level arrangement" problem could occur – the plenary session of the Court might formulate an opinion different from that of any chamber, though each chamber gives the opinion on behalf of the Court. Some other contradictions were also pointed out.

The following issues were regulated by the amendments to the Federal Constitutional Law "Constitutional Court of the Russian Federation" in 2010[10] and 2011[11].

The Court organizational structure: to eliminate the divergence of opinions the law didn't establish the Court chambers and provided for all court sessions to be plenary. At the same time the amount of cases for consideration and the efficiency of the Court work didn't change.

The Court proceedings: Article 47.1 of the Law "Constitutional Court of the Russian Federation" introduced a new constitutional proceeding under which the Court may consider and resolve cases without hearings, through so-called "written procedure". It became possible because the Court had accumulated experience of constitutional judicial proceedings in Russia and even in foreign states. It is important to note that a new proceeding is held in the framework of the basic constitutional principles – the adversary system and equality of the parties, except the principle of oral hearings.

Moreover, the principle of continuity was changed and this allowed the Constitutional Court to begin consideration of a new case before the pronouncement of a decision passed on the outcome of the consideration of the previous case; so this rule was aimed to expedite proceedings.

It was necessary to eliminate the possibility of collisions in the country's judicial system and, in a reform, the conditions of admissibility of the complaint to the Court were amended: a complaint is admissible if the law has been applied in a specific case the consideration of which has been completed in the court. Before this the complaint was admissible when some rules or provisions were challenged even if they ought to be applied but were not applied by the Court.

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[10] FKZ ot 2 June 2009 № 2-FKZ (SZ RF, 2009, № 23, P. 2754)

[11] FKZ ot 3 Novebmer 2010 № 7-FKZ (Rossiiskaya gazeta, 2010, 10 November)

The status of the persons exercising constitutional justice: after the reforms the judges of the Constitutional Court don't elect the chairman and his deputies – it is the authority of the Federation Council to appoint the judges upon nomination made by the President of the Russian Federation; now the Court judges can decide on the suspension or termination of a judge's powers; they consider the reasons for early termination of the Chairman and his deputies' powers by the Federation Council upon nomination made by the President.

The provision on execution of the Court decisions was also amended. The provision implies that decisions of courts and other bodies based on acts or individual provisions thereof found to be unconstitutional by the judgment of the Constitutional Court of the Russian Federation shall not be executed and shall be reviewed in the events stipulated by the federal law. Moreover, the lawmaking process providing the decisions of the Constitutional Court was considerably improved.

The reforms of three mechanisms of constitutional control helped to stabilize the judicial power, to make it more efficient and to strengthen constitutional law and order.

Merging the Russian Supreme Court with the Supreme Arbitration Court under the Act on 5th February, 2014 # 2-FKZ (Constitution Amendment "The Supreme Court and the Prosecutor General's Office of the Russian Federation" [12]) has not changed the status and the powers of the Constitutional Court. Article 125 of the Russian Constitution which describes the Court powers now does not have a provision on the Supreme Arbitration Court. In principle merging the three top courts of the country, including the Constitutional Court, was possible. This possibility was discussed in some alternative drafts of the Russian Constitution, for example, the document proposed by the Institute of the National Strategy read: "The Supreme Court of Russia is the highest judicial body in Russia and it is composed of the constitutional, administrative and criminal chambers" (part 2 article 78)[13]. The author of this paper in 2006 in his article on the issues of economic justice wrote (in the last part of the Introduction): "Talking about the future of economic justice in Russia, we can paraphrase a joke of the famous economist Keynes: 'Long-term prospects for Russian economic justice are great if it does not die in the short term'. I mean – if there is not an obligatory (by amending the current Constitution) merging of arbitrary judicial system with the system of courts of general jurisdiction and – which is not excluded – with constitutional and statutory branch of the judiciary. And even in that case economic justice will stay alive, but it will be organized and developing differently".[14] Did it happen so in 2014 (regardless of constitutional justice)? And what will be the effect for the constitutional control bodies?

As we know the reason for merging the Supreme Court and the Supreme Arbitrary Court of Russia was often inconsistency in judicial practice of two systems.

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[12] Rossiiskaya gazeta, 2014, 7 February

[13] See, for more details: Petrov A.A. Konstitucionnoe pravosudie v Rossii. Alternativnaya istoria. Chast II//Journal konstitucionnogo pravosudia, 2010, № 3 (15), P.1-5

[14] Kleandrov M.I. Ekonomicheskoe pravosudie v Rossii: proshloe, nastoyaschee, buduschee. – M.: Volters Kluver, 2006, P. XIII.

It happened because some cases fall under the jurisdiction of both courts and the Constitutional Court has already considered such cases in its practice. Former Chairman of the Supreme Arbitration Court of the Russian Federation (up to 2004) V.F. Yakovlev (currently Advisor to the President of the Russian Federation) spoke about more underlying causes in his speech on February, 28th 2014 at the Conference "Development of Justice Systems in the Russian Federation: how the judicial reform can influence lawyers and how lawyers can influence the reform". This conference was devoted to the merging process of the top courts of Russia. He mentioned that merging courts is a necessary measure: "The Supreme Courts have forgotten about their mission". He added that when arbitrary courts (for commercial disputes) were established the idea was to let the Supreme Court and the Supreme Arbitrary Court of Russia cooperate. "Their goal was not just to consider the cases but to become a think tank of the judicial branch and to ensure uniformity of judicial practice".[15]

One of the effects of merging is that interaction of the new Supreme Court and the Constitutional Court has resulted in an imbalance in the representation of judges in the judicial system. Before merging the judicial branch in Russia was divided into independent systems – courts of general jurisdiction and arbitrary courts (they were part of the whole judicial system) and also the constitutional and statutory branch which was not the part of the judicial system. Judges representing the two systems and the constitutional branch were – on an equal footing – presented in the judicial community and were vested with much public authority under federal laws. Now, after merging the Supreme Court and the Supreme Arbitrary Court, we have the only judicial system which includes a separate system of arbitrary courts, a sub-system of military courts, with thirty five thousand judges involved in this united judicial system compared with less than one hundred judges in the constitutional and statutory system. Misbalance is evident and it restrains parity and proportionality of judges in judicial bodies. It is necessary to formulate new principles of judicial branch formation and reorganize the existing judicial bodies.

On the other hand, the fact that the Constitutional Court was not combined with the Supreme Court and the Supreme Arbitrary Court doesn't prove that there are no problems with exercising constitutional control in the Russian Federation and that the Russian society is satisfied with constitutional control functioning.

I should say that no amendments to the Federal Law on the Constitutional Court (it has been amended 8 times for 20 years) were spontaneous. For example, the regime of written judicial proceedings was introduced after deep research and analysis[16]; the catalogue of published research on constitutional justice had 11 343 works by 2011.[17] The role of the Constitutional Court (its 19 judges and several hundred experts) in the improvement of the legislation on constitutional

[15] EZH-jurist, 2014, № 10.

[16] See: Mitjukov M.A. Pismennoe razbiratelstvo v konstitucionnom sudoproizvodstve: Rossia I opyt zarubezhnyh stran// Gosudarstvo i pravo, 2005, № 10, P.5-13.

[17] Bibliografia po konstitucionnomu pravosudiju/otv. sost. M.A.Mitjukov.-2-e izd., izm., pererab., i dop. – M.: KNORUS, 2011. -1120 p.

justice and the judicial practice is very significant. Besides protection of constitutional rights, interpretation of the Russian Constitution, constitutionalization of sectoral legislation[18] (which is often criticized by researches in different branches of law[19]), creating "unwritten rules of constitutional justice"[20] and formation of constitutionally justified expediency[21] the activities of the Constitutional Court are very divergent – it is the venue for annual international, nation-wide research conferences and seminars, the Senate readings (the event has been organized twice a month for five years), etc. It makes it possible to define basic drawbacks of constitutional control in Russia – in other words before offering treatment we must know the diagnosis.

It is very important to mention that the constitutional control is exercised not only by the Constitutional Court. Russia is a federative state and the Federal Constitutional Law on 31st December, 1996 # 1-FKZ "Judicial System in the Russian Federation" [22] in its article 26 provides for the right of Russian regions to establish their own constitutional (statutory) courts. They were set up at the beginning of the 1990s but in some regions ceased to exist very soon due to different reasons. For example, in Mariy El it happened to the Constitutional Court, in Irkutsk to the Statutory Court, etc. By now there are 85 regions in Russia, and only 18 courts of the kind exist: the statutory courts of St. Petersburg, Sverdlovsk, Kaliningrad, Chelyabinsk regions and 14 constitutional courts in Russian republics; 75 judges working in all these courts. Constitutional (statutory) courts of the Russian regions are not federal; they are established in the framework of regional legislation, organizational structure and budget, the decision on establishing such courts are the prerogative of the regions. In 38 regions where these courts do not exist the constitutions have the provision on constitutional (statutory) courts, in 24 regions there are laws regulating constitutional courts. However de facto the constitutional courts are not established in more than three-quarters of regions and this violates the principle "equality of all before the court: a citizen of Sverdlovsk region, for instance, when his/her rights are violated, complains to the statutory court of his/her own region, and a citizen of Tyumen region (which is situated nearby) in the same situation has to apply to Tyumen regional court of general jurisdiction which is not intended for decision of such a case, because there is no Statutory Court in Tyumen region.

The problem can be outlined here – similar in their legal nature cases that should be considered by the constitutional (statutory) courts of the Russian regions are considered and resolved in two different proceedings: in the framework of

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[18] See: Dolzhnikov A. Vlianie konstitucionnyh prav na rossiskuyu pravovuyu sistemu// Sravnitelnoe Konstitucionnoe Obozrenie, 2012, № 6 (91), P.109-120.

[19] See., for example:Bozhjev V. «Tihaya revoljuchia» Konstitucionnogo Suda v ugolovnom processe Rossiiskoi Federacii//Rossiiskaya justicia, 2000, № 10, P. 9-11.

[20] See: Dolzhnikov A. «Rukopisi ne gorjat»: nepisannye prava v konstitucionnom pravosudii// Sravnitelnoe Konstitucionnoe Obozrenie, 2014, № 1 (98), P.120-137.

[21] About this see: Zorkin V.D. Sovremennyi mir, pravo i Konstitucia. – M.: Norma, 2010, P. 153

[22] SZ RF, 1997, № 1, P.1

constitutional/statutory legislation by constitutional/statutory courts of the 18 Russian regions where these courts are established; and in the framework of separate provisions in the Civil Procedural Code, these provisions cannot be referred to administrative procedural legislation because in Russia there is no special law regulating the administrative proceedings and which could by applied by the courts of general jurisdiction. Though more than 10 years ago bills on the system of administrative proceedings were proposed they were not enacted and by now we have independent judicial boards on administrative cases in the courts of general jurisdiction of all levels, so we cannot speak about a system of administrative courts – at least in the nearest future. The Constitutional Court of the Russian Federation and the 18 constitutional (statutory) courts of the regions of the Russian Federation (and soon there will be a few more) do not constitute any system – there is neither an organizational nor institutional nor procedural structure. However, judges at both federal and regional courts are involved in the judicial community of the country; some of them are elected to the Judicial Council, the Presidium of the Council of Judges, etc., but not more than that.

But the lacuna in the system of the constitutional and statutory branch of the judiciary is a big problem which is, so to say "knocking at the door". So, a few years ago, the Legislature of one of the Russian regions – the City of St. Petersburg – proposed a bill with the provisions vesting the Russian Constitutional Court with the right of review of decisions of constitutional (statutory) courts of the regions of the Russian Federation. The State Duma of the Federal Assembly – the lower house of the Russian Parliament – did not support this bill; however there were some other proposals on the issue.

The problem falls within one more constitutional procedural framework. Part 2 of Article 118 of the Russian Constitution proclaims: The judicial power shall be exercised by means of constitutional, civil, administrative and criminal proceedings. It means that the Russian Constitutional Court and constitutional (statutory) courts of Russian regions (those that have been established and will be established in the future) are exercising their powers through constitutional proceedings. Now there is no unified law on the issue. The norms on constitutional proceedings are included in separate ("personal") legal regulations adopted for every court of the constitutional/statutory branch of judicial power. This situation when constitutional proceedings are regulated by dozen of laws (one federal constitutional law and others are regional laws) and are not even coordinated with each other cannot be acceptable.

The author can suggest a coherent decision for the problem: a) there should be a will and a federal law stipulating for obligatory formation of a constitutional (statutory) court in every Russian region (in the situation within multiple-structured regions of Russia, when one region is a part of another but they both are equal under the Constitution, for example for Tyumen region including Khanty-Mansy region and Yamalo-Nenetz region, there should be a "united statutory court"); b) it is necessary to develop and adopt federal law (Model Law or the Foundation – for the regions of Russia) which regulates the constitutional proceedings.

The Constitutional Court of Russia also comes across various problems which are obstacles towards quality constitutional control. I'm going to describe some of them.

The powers of the Russian Constitutional Court which are provided by the Constitution and the legislation are not sufficient to analyze the whole range of issues related to the particular cases for the Court consideration. Article 74 of the Federal Constitutional Law "The Constitutional Court of Russia" provides that the Court makes decisions and passes declaratory judgments solely on the subject stated in the petition and only in relation to that part of the act or the competence of the body, the constitutionality of which is challenged in the petition. While passing the decision the Constitutional Court of the Russian Federation shall not be bound by the grounds and arguments stated in the petition. The Constitutional Court passes the decision on the case assessing both the literal meaning of the act under consideration and the meaning attributed to it by an official and other interpretations or the prevailing law-applying practices, as well as proceeding from its place in the system of legal acts. The Court is not empowered to consider the reasons for adopting the rule of law constitutionality of which is challenged or assess the unconstitutionality of law-applying practices. Even if the Court reveals the constitutional ground of specific (sectoral) relationships. Sometimes the ground of unconstitutionality of law-applying practices is subjective, it is the result of abuse of powers by a public official. Even in this case the Court is not empowered to pass a private (personal) ruling.

Also the Court is not vested with the power to initiate proceeding on any matter. It's interesting that in other countries the constitutional control bodies are vested with such powers, for example in the case when one third or one quarter of judges have the right to initiate the petition. This practice could be effective for the Russian Constitutional Court.

Lacking these powers the Constitutional Court cannot always pass a decision being absolutely sure that the decision is just, however justice for Russians is sacred.

Another problem of the current constitutional control exercised by the Russian Constitutional Court can be described – the number of petitions to the Court is more than nineteen thousand every year. On the one hand, it is good; it means increased awareness and legal literacy of the Russian people, the strengthening of civil society institutions. On the other hand, it means growing burden on judges – in 2006 the Constitutional Court passed 10 judgments and 635 rulings, in 2009 - more than 20 judgments and 1676 rulings, in 2011 - 30 judgments and 1865 rulings, and in 2013 - 30 judgments and 2278 rulings. And the fact is that since 2011 the Court has been working without the chambers, only at plenary sessions.

The decisions of the Court in which the act deemed to be unconstitutional (or in which the acts are constitutionally interpreted) and the decisions in which the Court orders the federal legislature to amend the challenged acts are often ignored. There are 39 Court decisions (as of March 15, 2014) which have not been executed. This fact can be explained to some extent – many specific acts and the Civil Code must be amended and the Civil Code of the Russian Federation is under reform now and much

work and research has to be done, but it is only one minor reason for ignoring the Court decisions. Another challenge is to increase effectiveness of the monitoring of the Constitutional Court and to improve the mechanism of execution of its decisions. To a large extent, this situation stems from the provisions of part 1 Article 80 of the Federal Constitutional Law: under this provision the Russian Government is bound to introduce bills on amendment of laws declared unconstitutional. However, other members of the legislative process, mostly the State Duma, possess the right to initiate laws – these facts are discussed in professional legal literature.23

Another reason is the absence in both the Constitution and in the Federal Constitutional Law of rules on time limits for filing a constitutional complaint after the alleged violations of constitutional rights. And this gap sometimes makes execution of the decisions of the Constitutional Court complicated and even impossible which is deemed a violation of constitutional rights. Besides, this gap complicates the work of the legislator executing the Court decision – the rule deemed to be unconstitutional could have been amended after it violated the constitutional rights of the person.

I can mention some other problems and challenges. But there is a saying in the academic community: to set the task and to identify the problem is 50 per cent success.

[23] See: Aranovskii K.V. Uslovia soglasovania praktiki mezhdunarodnogo i konstitucionnogo pravosudia //Journal Журнал konstitucionnogo pravosudia. 2013, № 3(33), P. 5