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On a Direct Action of the Russian Constitution and Decisions of the Constitutional Court of the Russian Federation: Problems and Seeking Their Solutions

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direct action of the Constitution and decisions of the Constitutional Court, nullification of federal legislation, legal positions of the Constitutional Court, differentiated restriction of passive electoral rights, message of the Constitutional Court

A direct action of the Russian Constitution (hereinafter – the Constitution) and decisions of the Constitutional Court of the Russian Federation (hereinafter – the Constitutional Court) as interconnected foundations of the practice of the enforcement of law despite its evidence under careful consideration prove to be connected with some problems which are investigated in the article[1].

Let us start with a direct action of the Constitution which we understand as "*its direct regulating impact on social relations, realization of its prescriptions in the good behavior of all subjects of law*"[2]. At first glance there exist no problems with it at all. The Constitution has the supreme juridical force, direct action and is used on the whole territory of the Russian Federation, and laws and other legal acts adopted in the Russian Federation do not contradict the Constitution (article 15 of the Constitution). The rights and freedoms of man and citizen shall operate directly (article 18 of the Constitution).

[1] As is known, two forms of a direct action of the Constitution are distinguished in the Russian theory of constitutionalism: *immediate* and *mediate* (See, for instance: B.S. Ebzeev, *Individual and State in Russia: Mutual Responsibility and Constitutional duties*, Moscow 2007, p. 282). In this article we will discuss a direct *immediate* action of the Constitution and decisions of the Constitutional Court.

[2] N.E. Taeva, *The Rules of Constitutional Law in the System of Legal Regulation of the Russian Federation*, Moscow 2015, p. 70.

Concerning this matter, many noted Russian scientists have expressed their opinion clearly and unambiguously. According to B.S. Ebzeev, "immediate action of constitutional provisions is typical of all forms of state activity – legislative, executive and judicial, as well as for the implementation by citizens of their rights, freedoms and obligations"[3]. Putting the accent on a direct action of the Constitution in real life V.O. Luchin remarks, "A direct action of the Constitution allows a citizen to require from the state to secure their opportunity of to use the constitutional provisions, and the state is obliged to fulfill this requirement"[4]. A.B. Vengerov thinks it is very pragmatic for everyone to carry the Constitution in their own pocket, which becomes an important juridical support for a citizen in everyday or official *extreme* cases[5]. All seems to be clear and understandable. However, let us refer to a concrete case from the constitutional practice in which I happened to be an immediate participant.

According to the Constitution:

- everyone shall be obliged to pay the legally established taxes and dues (article 57);
- federal taxes and dues are included in the jurisdiction of the Russian Federation (article 71);
- the system of taxes paid to the federal budget and the general principles of taxation and dues in the Russian Federation shall be established by federal law (article 75);
- federal laws adopted by the State Duma on the federal taxes and dues shall be liable to obligatory consideration by the Council of the Federation (article 106).

Interpretation of these constitutional provisions in their *system interconnection* allows to arrive at the conclusion that the federal taxes and dues should be reckoned as "*legally established*" when they are established by federal laws. Hence, an obligation of everyone to pay the federal taxes and dues itself is referred to to those which are established by federal laws. Thus, based on a direct action of the constitutional provisions, if the federal taxes and dues are not established by federal laws, the obligation to pay them does not appear.

But contrary to these constitutional provisions in 1995 five federal dues on alcoholic production were established by the Decision of the Government of the Russian Federation (hereinafter – the Government)[6].

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[3] B.S. Ebzeev, *Constitution. Law-governed State. Constitutional Court*, Moscow 1997, p. 60.

[4] V.O. Luchin, *Constitution of the Russian Federation. Problems of Realization*, Moscow 2002, p. 66.

[5] A.B. Vengerov, *Theory of State and Law*, Moscow 2004, pp. 509–510.

[6] The Decision of the Government of the Russian Federation dated 28.02.1995 No. 197 "On the introduction of fees for issuing licenses for production, bottling, storage and wholesale of alcoholic production".

At the time referred to I was a deputy of the State Duma of the Stavropol Territory and I directly dealt with issues connected with the impact of its decision on wine-making in the Stavropol Territory. It should be noted that this impact was really disastrous.

Besides the contradiction to the Constitution, the Decision of the Government established exorbitant dimensions of these dues which wine-making factories could not really pay. All the wine-making business in the Stavropol Territory was on the verge of bankruptcy. It was awful!

Considering wine-making as the national wealth and a part of the Russian culture, the State Duma of the Stavropol Territory adopted the special Decision on this matter which included the following actions:

– to make a request to the President of the Russian Federation (hereinafter – the President) with the proposition to abolish the aforementioned Decision of the Government;
– to make a request to the Constitutional Court about its contradiction to the Constitution (the deputies trusted me to represent the interests of the Stavropol Territory in the Constitutional Court);
– to reckon that the aforementioned Decision of the Government was not liable to realize in the Stavropol Territory until its consideration by the President and the Constitutional Court[7].

Why did we go and do such a thing? Because the constitutional provisions shall have the supreme juridical force, direct action and shall be used on the whole territory of the Russian Federation. Hence, in our opinion the norms of the aforementioned Decision of the Government which contradicted the Constitution did not cause an obligation of the taxpayer to pay these dues. The deputies as representatives of the people of the Stavropol Territory could not look quietly at how the Government tried to destroy our wine-making. Had it not been for the deputies who stopped the Decision of the Government, the people might have talked about our wine-making only in a past tense.

President Yeltsin did not make any steps to settle this conflicting situation; moreover, our request to him remained without any response. But the Constitutional Court agreed with our arguments and declared the Decision of the Government contradicted the Constitution and was accordingly invalid[8]. Thereby, the Stavropol Territory preserved the existing situation in wine-making and defended its economy from illegal encroachment of federal authorities. Then maybe for the

[7] The Decision of the State Duma of the Stavropol Territory dated 13.06.1995 No. 233-17 GDSK "On the Critical Financial Condition of the Wine-making Branch in the Stavropol Territory".

[8] The Judgment of the Constitutional Court of the Russian Federation dated 18.02.1997 No. 3-P.

first time the Government was shown that its powers were not boundless, but are located strictly within the limits determined by the Constitution.

In my opinion, this case is a concrete and very successful example of a direct action of the constitutional provisions in real life. I can anticipate some objections of my possible opponents that nullification of the Decision of the Government which was put into practice by the State Duma of the Stavropol Territory contradicts the Constitution itself: as the Decision of the Government shall be obligatory for fulfillment in the Russian Federation (article 115 of the Constitution), so its norms should be applied until they are declared invalid by the Constitutional Court.

Responding to such objections it is necessary, firstly, to remark that the issue of nullification of federal normative acts is ambiguous enough and might be treated differently in the theory of constitutional law.

According to B.S. Ebzeev, nullification of federal normative acts by subjects of the Russian Federation might undermine the federative system of Russia which in this case risks to be transformed from a state-legal formation into an international legal association. In those cases when federal authorities, from the federal subject's point of view, exceed the bounds of their jurisdiction it is necessary to make a request to the President who may use conciliatory procedures, or to the Constitutional Court capable of nullifying any normative act unconformable of the Constitution[9].

The regional deputies, taking into account the above, held another point of view according to which by virtue of the supreme juridical force and direct action of the Constitution on the whole territory of our country the State Duma of the Stavropol Territory lawfully used the constitutional provisions in its activity. At any rate, in considering this case, the Constitutional Court did not discover any violations in the actions of the regional Duma.

Secondly, if we proceed from the logic of the opponents, then any normative act (from federal law to the decision of the regional Governor and the head of the village administration) should be executed, even if its clear contradiction to the Constitution is really observed. In this approach, the real juridical force does not have the constitutional provisions but (*contrary to them*) the provisions of another normative act, which is absolutely unjustified, in my opinion. Let us illustrate this with one more example from my juridical practice.

In 1994 the rate of the profit tax channeled to the regional budget was increased by the Decision of the Head of administration of the Stavropol Territory, which was not even officially published for general knowledge[10]. Then,

[9] B.S. Ebzeev, *Constitution. Law-governed State. Constitutional Court*, Moscow 1997, pp. 34–35.

[10] The Decision of the Head of administration of the Stavropol Territory dated 20.01.1994 No. 20 "On temporary quotas of deductions from taxes".

businessmen, without any request to the courts, refused to execute this decision and they published in the media an open letter titled "YOU COMMAND, US – NOT TO AGREE", addressed to the Head of the administration of the Stavropol Territory, the regional Prosecutor and the Chief of the regional tax service. On the wave of such disturbance and rejections to execute this obviously unconstitutional normative act the tax authorities did not forcibly collect the profit tax at the higher rate, which was increased illegally, and in the end the regional authorities were forced to cancel this decision[11].

With that said, we reckon that any reasoning according to which the provisions of the normative act contradicting the Constitution should not be executed until this fact is recognized by the Constitutional Court, does not correspond to the Constitution itself. To think differently means to believe that the provisions of the Constitution are of a purely declarative nature, they have no direct action on the territory of the Russian Federation and are addressed not to the citizens of our country, but only to the courts.

A direct action of the Constitution, as rightly noted in the scientific literature, enshrined in the Fundamentals of the constitutional system, refers to the basic principles of the state structure, which gives the Russian Federation the nature of a law-governed, constitutional State[12].

Hence, I will allow myself to make a highly seditious conclusion that any subject of law, not only the public authority but also each citizen of our country under a collision of the constitutional provisions and norms of any other normative act is obliged to apply the constitutional provisions, but not the norms of the normative act contradicting the Constitution.

The constitutional principle of a direct action of the Constitution is also embodied in the disposition on a direct action of the decisions of the Constitutional Court, which is also included in the title of this article. Looking at it, everything seems to be clear and understandable. Normative acts or their provisions recognized as unconstitutional shall become invalid (article 125 of the Constitution). The decisions of the Constitutional Court shall be obligatory and directly applicable throughout the territory of the Russian Federation for all bodies of power, organizations and citizens. Decisions of courts and other bodies based on acts or individual provisions thereof found to be unconstitutional by the judgment of the Constitutional Court shall not be executed (article 6, 79 of the Federal constitutional law "On the Constitutional Court of the Russian Federation").

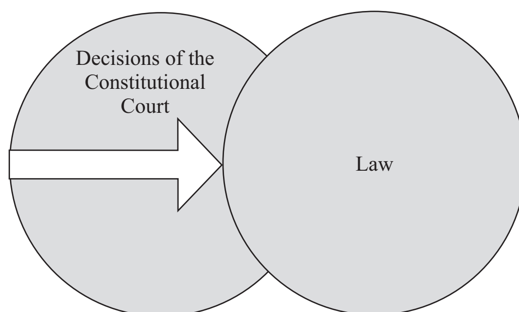
But what to do in the case when the Federal legislator has not brought the law into conformity with the decision of the Constitutional Court? Such cases have

[11] In detail, see: V.A. Cherepanov, *Business and Politics*, Stavropol 1997, pp. 26–32.
[12] N.E. Taeva, *The Rules of Constitutional Law…*, p. 79.

occurred, and we all know about them. In 2004 at the National conference on the monitoring of legal space and legal enforcement practice B.S. Ebzeev, as a judge of the Constitutional Court, spoke about eight decisions of the Constitutional Court not executed by the Federal legislator. Let me quote his words, which as always are significant, imaginative and convincing. So, at that conference, he said the following: "The Fathers of the Legislation make this sphere of relations regulated, as a result of your Silence either forms an inadmissible lacuna and in essence the Constitution does not act in some part, or there is a situation that cannot be endurable"[13].

Since that time many years have passed, but the situation concerning the execution of the decisions of the Constitutional Court has not changed for the better[14]. Moreover, this situation gets aggravated because of the recent legislative innovations (2016) about the juridical force of decisions of the Constitutional Court, according to which is not allowed to enforce a normative act in the interpretation diverging from its interpretation given by the Constitutional Court (part 5 of the article 79 of the Federal constitutional law "On the Constitutional Court of the Russian Federation"). Thereby, the interpretation of the law by the Constitutional Court is as though "fused" into the content of the legislative norms and becomes an integral part of them, which can be represented as the following scheme.

Scheme 1. The implantation of the legal positions of the Constitutional Court in the content of legislation



[13] *Proceedings of the II all-Russian scientific-practical conference "Monitoring of legal space and legal enforcement practice"*, Moscow 2005, p. 69.

[14] So, as of April 15, 2015 according to the Secretariat of the Constitutional Court, 36 decisions of the Constitutional Court had not be executed by the Federal legislator // Information-analytical report "On execution of decisions of the Constitutional Court of the Russian Federation adopted in the implementation of the constitutional proceedings in 2014" placed in the information system "Consultant Plus".

This scheme clearly shows that the legal position of the Constitutional Court as "normative-interpretative provisions"[15] constitute together with the legislative norms a single normative complex that regulates appropriate social relations. And any law-enforcement subject, in the event of such collision, should follow the decision of the Constitutional Court, but not the normative act contradictory to this Decision.

In this connection, it some acute problem situations are likely to appear in law enforcement, such as in the case with the Federal law dated 02.05.2012 No. 40-FZ, which established the limits of passive electoral rights, according to which all the citizens condemned to imprisonment for committing a grave or especially grave crimes at any time in the past had no right to be elected.

The Constitutional Court, checking its constitutionality, came to the conclusion that in itself the legislative restriction on passive electoral rights on the basis of previous conviction does not contradict the Constitution. However, these restrictions are disproportionate to the constitutionally significant purposes and do not correspond to the Constitution because it has established termless and undifferentiated restrictions of passive electoral rights[16].

In order to implement this Decision, some changes were introduced in the Federal legislation according to which the termless, i.e. lifelong deprivation of the passive electoral rights was replaced by its restriction on a certain period (the term of the criminal record plus some period of time after cancellation of conviction or its withdrawal)[17].

However, the Federal legislator has fulfilled only one part of the Judgment, abolishing the perpetuity of deprivation of the right to be elected. The other part, concerning the elimination of undifferentiated restrictions of passive electoral rights has not been implemented, although in the opinion of the Constitutional Court, restriction of passive electoral rights on the basis of a criminal record should be differentiated depending on the nature and degree of social danger of the crime and the personality of the convict. it should also be taken into account what penalty was imposed – a real incarceration or only probation, and for what period of time the citizen was deprived of liberty.

Thus, there is a very sharp, and not only legal but also political situation when election commissions, who are under a duty to apply the law only in its interpretation given by the Constitutional Court, will have to make decisions for themselves about the differentiated admission to the election of persons who have committed grave and especially grave crimes, depending on the social danger of these actions

[15] L.V. Lazarev, *Legal positions of the Constitutional Court of Russia*, Moscow 2003, p. 74.

[16] The Judgment of the Constitutional Court of the Russian Federation dated 10.10.2013 No. 20-P.

[17] Federal law dated 21.02.2014 No. 19-FZ.

and the personality of the convict.Take, for example, the presidential elections in Russia. With that said, it turns out that the Central Election Commission of the Russian Federation may, in its discretion, admit one of the people convicted of these crimes to the elections, and deny others in their registration depending on the assigned punishment. Imagine a hypothetical situation when a person serving suspended sentence with not extinguished criminal record for a heavy crime submits documents for the registration as a Presidential candidate.

It is obvious that any decision of the Central Election Commission (positive or negative) taken in such a situation will be challenged by the other, dissenting party. Under this perspective, our arguments do not already seem to be abstract scientific theorization, but they move into the sphere of making concrete political decisions which will be discussed not only in the Russian Federation but throughout the world community.

In this particular case, it appears that it is necessary to adjust the existing criminal record qualification by setting its differentiated application depending on the type and size of the punishment: for example, to establish that under suspended sentence this restriction on passive electoral rights only covers the period until cancellation of conviction or its withdrawal.

Of course, other options are also possible to differentiate restrictions of passive electoral rights on the basis of a criminal record, but under any of them such legislative changes must be taken promptly in order to prevent the occurrence of an acute political situation when the public authorities will "stumble out of the blue", and insufficiently thoughtful decisions can lead to mass protests, which are quite predictable in such situations.

With this particular case everything seems to be clear. But the fundamental solution to such problems requires a radical enhancement of the role of the Constitutional Court in strengthening the constitutional legality. Let me explain what I mean. The Supreme Court of the Russian Federation to ensure uniform application of the legislation of the Russian Federation shall be entitled to give clarifications on issues of judicial practice on the basis of studying them and generalization (part 7 of the article 2 of the Federal constitutional law "On the Supreme Court of the Russian Federation").

In the activity of the Constitutional Court the situation is absolutely different. Consideration of matters in the Constitutional Court is of a declaratory nature, the powers of generalization and explanation of the judicial practice on its own initiative are not fixed. The Constitutional Court shall consider cases only on the basis of concrete requests or complaints and in this regard could not initiate a judicial review selecting at its discretion matters for the constitutional judicial proceedings.

"Because of the rigor of these requirements", stressed O.V. Romanova, "the contribution of the Constitutional Court in improving the state rule-making is

not systematic and regular, but occasional, and depends not on the needs of the State, but on whether the subjects having the right to initiate proceedings in the Constitutional Court of the Russian Federation will can realize the need for this improvement"[18].

In this regard, the peculiar constitutional and legal reality has occurred when the Constitutional Court actually keeps the silence about the non-execution of its decisions. As a result of such silence some invalid problem situations are formed, which entails the violation of the constitutional provisions. A periodic transmission of informational materials (from the Constitutional Court to the Federal legislator) on the execution, or rather non-execution of the court decisions does not fundamentally change the status quo, since such materials do not force anyone to do anything.

In our opinion, the radical enhancement of the role of the Constitutional Court in strengthening the constitutional legality is possible through an active usage, or rather a "Renaissance" of the legal institution (hereinafter – the Institution) of the message of the Constitutional Court, as many times mentioned in the scientific literature[19].

The Institution of the message of the Constitutional Court, for the consideration of which both chambers of the Federal Assembly may hold joint sittings (article 100 of the Constitution), has not been made concrete in the Federal constitutional law "On the Constitutional Court of the Russian Federation".

In the former Rules of the Constitutional Court, adopted in 1995, it was established that "the Constitutional Court basing on the results of its activities shall address the Federal Assembly on the situation of the constitutional legality in the Russian Federation at least once a year" (§ 46 of the Rules). However, this requirement has not been implemented in the constitutional practice. In the existing Rules of the Constitutional Court, adopted in 2011, it is only said that a decision about sending the message of the Constitutional Court shall be passed in its session, and drafting of the message of the Constitutional Court shall be fulfilled by the Commission from among the judges, to ensure the operation of which the working group may be formed.

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[18] O.V. Romanova, *Legal positions of the Constitutional Court of the Russian Federation according to the problem of the legal regulation of the issues under the joint jurisdiction of the Russian Federation and its subjects*, «Law and legislation» 2002, № 2, pp. 22–23.

[19] For example: M.A. Mityukov, *Methodology of research of the problem of the message of the Constitutional Court of the Russian Federation*, «Constitutional and Municipal Law» 2010, № 12; O.V. Brezhnev, *Institute of the message of the Constitutional Court to the legislative authority: problems of theory and practice*, «Russian Justice» 2014, № 9; S.A. Tatarinov, *Some issues of modernization of the organization and activities of the Constitutional Court of the Russian Federation*, «Constitutional and Municipal Law» 2012, № 9.

As is known, the Constitutional Court addressed the Supreme Soviet of the Russian Federation with the Message "On the situation in the constitutional legality in the Russian Federation" in 1993. Then, the Constitutional Court has never used this Institution in his activities, which is therefore turned into a "dormant" constitutional provision.

In my opinion, the solution of different problems emerging in the constitutional practice as raised in this article and many others is feasible just with the help of the message of the Constitutional Court addressed to the Federal Assembly. We believe that the real "Renaissance" of this Institution should be put into practice by its detailed legal regulation, and not in the Rules of the Constitutional Court but just in the Federal constitutional law "On the Constitutional Court of the Russian Federation" itself.

The message of the Constitutional Court, for example, may be taken at its plenary session in the form of a judgement binding on all the public authorities, citizens and officials. Such an annual message addressed to the Federal Assembly might hold the generalization of judicial practice and on this basis – the formulation of generalized legal positions, the analysis of unexecuted decisions with specific injunctions to the legislator, establishment of "normative-interpretative provisions" on application of the legislation in situations where there are collisions between the decisions of the Constitutional Court and the normative acts not brought into accordance with them.

Moreover, it is in this way that the problem with the Federal constitutional law on the Constitutional Assembly, which is directly named in the Constitution, but has so far not been adopted in our country, might be eventually decided. A draft of such a law has been made by Professor S. A. Avakian and put up for public discussion on the website of the Law Faculty of Lomonosov Moscow State University[20]. It is hoped that due to the active role of the Constitutional Court through its annual message it will be able to stimulate the Federal legislator to draft and adopt this Federal constitutional law defining the procedure of the revision of the Basic Law, as it should be in a democratic law-governed state, which was declared by the Russian Federation in the very first article of its Constitution.

Résumé

A direct action of the Russian Constitution and decisions of the Constitutional Court of the Russian Federation as interconnected foundations of the practice of the enforcement

[20] URL: http://www.law.msu.ru/node/21199 (accessed: 07.12.2017).

of law are considered from the point of view of their immediate regulating impact on social relations. On the basis of the analysis of concrete cases and legal positions of the Constitutional Court some problems are marked, and possible ways of their solution are proposed. The author arrives at the conclusion that any subject of law in case of a collision between constitutional provisions and rules of any normative act must apply the Constitution but not the rules of this normative act even if this fact has not yet determined by the Constitutional Court. In an effort to solve problems arising during the direct action of the Constitution and decisions of the Constitutional Court active application of messages of the Constitutional Court is proposed which is marked in the Constitution but does not apply in the constitutional practice and is needed in detailed legal regulations.

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