

Transformation of Provisions of the Constitution of the Russian Federation and the Constitution of the Commonwealth of Australia Devoted to the Federative Structure

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Abstract

Background/Objectives: This study conducted theoretical and legal analysis of certain provisions of the Constitution of the Russian Federation. Major attention is paid to the ways of resolving contradictions in the text of the Constitution. **Method/Statistical Analysis:** As an optimal method the Constitution transformation is currently proposed. **Findings:** The authors analyze some of the decisions of the Constitutional Court. Then, a comparison with the Constitution of the Commonwealth of Australia and its evolution is provided. To ensure objectivity and impartiality of constitutional interpretation it is necessary to change the procedure for the formation of the Constitutional Court. **Improvements:** To ensure the interests of the Russian Federation it is necessary to change the principle of formation of the Council of the Federation, and then to provide the members of the Council of the Federation with the right to propose candidates for judges of the Constitutional Court after the rejection of candidates proposed by the President.

Keywords: Commonwealth of Australia, Constitution of the Commonwealth of Australia, Constitution, Federalism, Federal Structure

1. Introduction

The current Constitution of the Russian Federation, adopted in 1993, is fundamentally different from its predecessors: the Constitution of the Soviet Union and Russia. It carries new values and orientations of modern political and socio-economic development in the center of which are the basic human rights and freedoms.

However, it should be understood that the provisions of the Constitution of the Russian Federation are developed in a complex political environment of the collapse of communism, confrontation of the authorities (presidential and parliamentary), opposition of various social forces. Thus, the text of the Constitution of Russia is the result of the social compromise made to date.

As a result, the Constitution reflects political controversies that existed at the time of its adoption, and that is why the text abounds with logical contradictions. The

value of the constitutional text is difficult to overestimate for the integrity and consistency of the entire legal system at that. Veniamin Chirkin¹, stressing the guiding significance of the terminology used in the Constitution for the law-making and law enforcement, said the following: *“The meaning of the preposition “in” in Part 3, Article 5 of the Constitution of the Russian Federation is known, where “the equality of rights and self-determination in Russian Federation”, i.e. within Russia, is spoken about. For example, the form of self-determination can be changed (the autonomous district can be created instead of the autonomous region, etc.), but the secession from the Russian Federation is excluded”*.

The contradictions in the law are the cause for the emergence of new social conflicts that exacerbate and amplify the instability of social relations². The Constitution of the Russian Federation has a guiding value for all branches of the law, and that is why the logical contradiction between

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its provisions considerably complicates the legal regulation of all social relations. In the text of the Constitution of the Russian Federation there are other legal and technical problems, the most striking of which are associated with the regulation of the territorial structure of Russia.

In the constitutional regulation of the Russian territorial structure, there are many legal and technical problems. I. V. Leksin³ mentions some these problems, and one of them is the scarcity of the constitutional framework of the territorial structure of Russia. In his opinion, based on the degree of the state and social importance of some key constitutional provisions on territorial structure (for example, the procedure for the territorial changes at the level of the constituent entities of the Russian Federation, the territorial organization of local self-government), their regulation should be carried out directly in the Constitution, but not in the law.

One of the most striking contradictions embodied in the Constitution is the enshrinement of the principle of equality of the constituent entities of the Russian Federation together alongside with the simultaneous enshrinement of differences in their constitutional and legal status. For example, in Part 1, Article 5 of the Constitution the types of the constituent entities of the Russian Federation are listed: republics, cities of federal significance, provinces, regions, autonomous regions and autonomous districts. It also proclaims the principle of equality of the constituent entities of the Russian Federation. The principle of equality is also repeated in Part 4, Article 5 as well as in Part 2, Article 72l.

At the same time, Part 5, Article 66 of the Constitution makes it possible to change the status of the constituent entity of the Russian Federation, which suggests the question if all six regions of the Russian Federation have the same legal status, what is the need for the constituent entity to change it? Simultaneously Part 2, Article 5 of the Constitution of the Russian Federation applies the term “state” to republics. Part 2, Article 68 and Part 1, Article 66 give national republics additional status privileges - republics are entitled to adopt their own constitution and establish their own state languages.

In the text of the Constitution there are other legal and technical problems, several examples of which will be given in this paper.

The issue about the possibility of adjusting textual flaws contained in the Constitution is the subject of fierce debate at all times of its existence. To eliminate existing legal gaps in the Constitution, the scientists offered several

measures differing in terms of radicality. It is proposed to resolve contradictions through:

- revision of the Constitution as a whole;
- amending the Constitution;
- adoption of laws and other legal acts;
- interpretation of the rules by the Constitutional Court of the Russian Federation.

In addition to this, according to some scientists the Constitution does not require any changes. Thus, Armen Armenovich Dzhagaryan⁴, Doctor of Law, believes that as a kind of general, absolute norm, the Constitution cannot be the object of assessment as for the legal quality.

The proponents of the revision of the Constitution have an absolutely opposite view. For example, Andrey Aleksandrovich Kondrashov⁶, Doctor of Law, called the Constitution as “originally defective”. Defectiveness of the Basic Law, in his opinion, was not only in the substantive flaws and establishing a special “super-presidential” form of government, but also in the process of its development and adoption. The Constitutional Council developing a text consisted of representatives appointed only by the head of the state who were loyal to him⁵. However, such an approach, according to Vladimir Ivanovich Fadeyev, Doctor of Law, creates illusory hopes that, by adopting a new constitution, changing radically the content, we finally get a new better life, a new state apparatus, a new civil society.

Recognizing the objective need for modernization of the Russian Constitution, Doctor of Law Natalya Vladimirovna Butusova⁷ says that in order to avoid a legal constitutional idealism and romanticism it should be borne in mind that the modernization of the Constitution could lead to positive changes only under certain conditions of subjective and objective character. Among the subjective factors Natalya Vladimirovna considers the political will to carry out constitutional reforms, active involvement in this process the civil society, creating the legal framework for public discussion of draft laws and other important issues of the state life (including the adoption of federal constitutional law “On Constitutional Assembly”). In addition to this, in her opinion, it would be reckless to start a constitutional reform “without making deep, systemic changes in all spheres of life of the Russian society and the state”. As Andrey Nikolayevich Medushevskiy⁸, PhD., rightly pointed out, “the political component of constitutional modernization is to achieve it within the framework of the contractual model and avoid the legal continuity rupture model”.

As there are no conditions required for the modernization now, in practice the last two ways of resolving contradictions, gaps and uncertainties in the Constitution have already been used - the adoption of laws and other legal acts, and also interpretation of the rules of the Constitutional Court of the Russian Federation, combined in science by the general term "transformation"⁹.

Transformation of the Russian Constitution currently represents the best option for its development, referring to the number of transformation benefits flexibility (adaptability to substantially changed circumstances); responsiveness; a relatively high probability of avoiding social and political upheavals, often accompanied by reform of the constitution¹⁰.

Federal laws specify and develop constitutional norms to some extent. However, they all must comply with the Russian Constitution and they cannot contradict it. And the verification of these laws compliance with the Constitution is provided by the Constitutional Court of the Russian Federation.

At a time when there are contradictions, uncertainties and gaps in the text of the Constitution, the role of the Constitutional Court of the Russian Federation significantly increases, which aims to provide an authoritative interpretation of the Constitution. There is no doubt that the Constitutional Court must be impartial, and its judgment should be based on original tenor of the constitutional norms, of its "letter and spirit". At that the distinction between the clarification of the original meaning of the current Constitution rules and the interpretation of constitutional norms in favor of changing political reality is very subtle.

According to Part 2, Article 11 of the Russian Constitution, "the state power in the Russian Federation is carried out by the state authorities formed by them". Despite the fact that the Russian Constitution does not directly specify the procedure for the election of heads of executive bodies of the state power in the constituent entities of the Russian Federation, in Part 2, Article 3 it provides that people exercise their power directly and through bodies of the state power.

In accordance with this paper intent and its interrelation with Article 32 of the Constitution, which enshrines the right of citizens to elect public authorities, the Constitutional Court of the Russian Federation in the Decree No. 2-P of 18.01.1996 concluded that the highest official forming the executive body of the constituent entity, "gets its mandate directly from the people and is responsible to it"¹¹.

However, in the Decree No. 13-P of December 21, 2005, the Court rejected this legal position and found the provision on canceling the election of regional governors directly by population consistent with the Constitution. In addition it referred, to Part 1, Article 77 of the Russian Constitution at the same time, according to which the system of bodies of the state power of the constituent entities of the Russian Federation is established by them in accordance with the principles of the constitutional system of the Russian Federation and the general principles of organization of representative and executive bodies of the state power, established by the federal law.

This constitutional provision does not imply that these principles "are relating to the status and the basis of the procedure for formation of these bodies", as the Court states in its judgment. Both the status and the formation of these bodies can be completely independently established by the constituent entities. This right of the constituent entities derives from Part 2, Article 11 and Part 1, Article 77 of the Constitution¹².

The current situation is likely due to the existing procedure for the formation of the Constitutional Court. According to Part 1, Article 4 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", the judges of the Constitutional Court are appointed by the Council of the Federation on the recommendation of the President of the Russian Federation. "Because the appointment, as we know, is a formal procedure, the Constitutional Court of Russia is actually formed by the President"¹³.

As the Russian president plays a crucial role in the formation of the Constitutional Court, many scientists leave in serious doubt independence and impartiality of the Constitutional Court^{14,15}. Therefore, the offers to revise the procedure for appointing judges to the Constitutional Court of the Russian Federation look appropriate¹⁶.

It should be understood that the procedure for appointment judges to the Constitutional Court, enshrined in Part 1, Article 4 of the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", which was originally enshrined in the Constitution of Russia (Clause "e", Article 83, Clause "zh", Part 1, Article 102). That is, changing the procedure for formation of the Constitutional Court without amending the Constitution is impossible.

However, the procedure for forming the Council of the Federation, which appoints judges to the Constitutional Court, changed dramatically several times since the

adoption of the Constitution, including adoption of Amendments to the Constitution. Currently, the Council of the Federation consists of two representatives of each constituent entity of the Russian Federation - one representative of the legislative (representative) and executive bodies of the state power; representatives of the Russian Federation, appointed by the President of the Russian Federation, the number of which is not more than ten percent of number of the members of the Council of the Federation - representatives of the legislative (representative) and executive bodies of the constituent entities of the Russian Federation.

Existing nowadays principle of formation of the Council of the Federation gives rise to unfavorable criticism in the scientific community. It was suggested that the Council of the Federation formed on such a principle does not fully reflect the views and interests of the Federation. There exists a reasonable proposal to resume the scheme used in the transition period when the Council of the Federation was formed by the election in binomial regional districts, which requires the adoption of a new Federal Law "On elections to the Council of the Federation of the Federal Assembly"¹⁷.

Consider another contradiction - between the provisions of Part 2, Article 4 and Part 6, Article 76 of the Russian Constitution. It is captured in Part 2, Article 4 that the Constitution of the Russian Federation and federal laws have the supremacy on the entire territory of the Russian Federation. At the same time, Part 6, Article 76 sets the rule of prevailing regional law - in the case of contradiction between a federal law and a normative act of a constituent entity of the Russian Federation issued outside the limits of responsibility of the Russian Federation and the joint responsibility of the Russian Federation and the constituent entities of the Russian Federation.

The Decree No. 13-P of July 18, 2003 the Constitutional Court of the Russian Federation stated that the provision of the Article 4 (Part 2) of the Constitution of the Russian Federation, according to which federal laws have supremacy on the entire territory of the Russian Federation, cannot be considered in isolation from the provisions of Article 76 of the Constitution of the Russian Federation. On this basis, the Constitutional Court came to the conclusion that undue influence of the federal legislator in the purview of only the constituent entities of the Russian Federation is unacceptable¹⁸.

However, the text of the Constitution still contains the controversy, which means that in case of having some

political reasons, the Court once again, as in the Decree of December 21, 2005 may face a dilemma: should it declare Part 6, Article 76 to be applied in this case and thus challenge the federal government, or should it avoid confrontation, ignoring this provision, as once ignored the existence of Part 2, Article 11 of the Russian Constitution, which states that "the state power in the constituent entities of the Russian Federation is carried out by the state authorities formed by them".

The provisions of the Constitution of the Commonwealth of Australia, dedicated to the federal structure, and their interpretation by the High Court of Australia

The Constitution of the Commonwealth of Australia was adopted by the British Parliament in 1900, and entered into force on January 1, 1901. The Commonwealth of Australia was created after decades of debates, when six self-governing colonies came to an agreement on the formation of a new unified state with a new unified national government.

Despite the long process of negotiation and adoption of the Constitution, the text of the Constitution of Australia, however, cannot be considered perfect in terms of regulating the federal structure of the country.

In Australia, at present, according to the former Australian Prime Minister Tony Abbott, the federal government certainly is sovereign within its sphere of responsibility, and states within their spheres of responsibility rarely act as sovereign governments¹⁹. Expanding the sphere of responsibility and the authority of the federal government, and also an increase in control over the states by the federal government is largely due to some provisions of the Australian Constitution, devoted to the federal structure. These provisions include the following:

- **Residual Regulation of Power and Authority of the States.**

In Australia, as well as in Russia, the Constitution establishes the sphere of the sole responsibility of the Commonwealth (Article 52, 90 and others in Australian Constitution), the sphere of the joint responsibility of the Commonwealth and the states (Article 51 of the Constitution of Australia). The sphere of the state authority is not specifically defined, but Article 107 of the Australian Constitution stipulates that "every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or

withdrawn from the Parliament of the State, continue at the establishment of the Commonwealth, or at the admission or establishment of the State, as the case may be". During the 20th century as a result of a broad interpretation of powers of the Commonwealth, established in the Constitution by the High Court of Australia, the sphere of power and authority of States decreased significantly²⁰.

- **The Lack of Guarantees for the Financial Rights of the States**

One of the main concerns of the Australian federalism is considered to be a high degree of vertical fiscal imbalance^{21,22}. In other words, the federal government's budgetary revenues far exceed its direct expenditure responsibilities, and fiscal revenues of state governments, in contrast, are less than their expenditure responsibilities.

The interpretation of the High Court of Australia contributes to the expansion of the fiscal power and authority of the Commonwealth. In the early years of the Australian Federation existence the High Court adopted a "narrow" interpretation of Article 90 of the Australian Constitution, which gives the Commonwealth the exclusive right to establish customs duties and excise taxes²³. But in the 20-ies of the 20th century in case *Commonwealth vs. Australia* judge Rich criticized such a "narrow" interpretation, pointing out that Article 90 provides the Commonwealth with an exclusive right of "all indirect taxation on goods"²⁴.

Vertical financial imbalance leads to the fact that the federal government gives state governments various grants from the federal budget to fulfill their authority. As a result, state governments depend on the federal government and cannot independently exercise their power and authority.

- **The Priority of the Federal Legislation**

Article 109 of the Australian Constitution establishes the absolute priority of the federal legislation over the regional one: in case if a state law contradicts to the law of the Commonwealth, then the state law is invalid.

Initially, the contradiction between laws was understood only as a direct contradiction - that is, the inability to fulfill the requirements of both laws simultaneously. Subsequently, however, the High Court of Australia developed a doctrine of "covering the field of law". According to this doctrine, to recognize the state law as invalid in accordance with Article 109 of the Constitution, the intention of federal legislator is sufficient to make a law adopted by

it the only law in a particular field of law. If, in the opinion of the court, the federal legislator had such an intention, then the state law will be invalidated even if there was no direct controversy between the law of the Commonwealth and the law of the State. A classic example of using a court doctrine of "covering the field of law" can be considered the *Ex parte McLean* case²⁵.

It should be noted that the procedure for amending the Constitution of Australia is governed by Article 128 of the Constitution and it is a fairly complex procedure. The proposed bill amending the Constitution shall be adopted by an absolute majority of both Houses of Parliament. For at least two but not more than six months after its passing by both Houses, the proposed law should be put to a referendum to the voters of each state and territory that have the right to vote in elections of members of the House of Representatives. When the bill is introduced to the electorate, the voting should take place in the form prescribed by the Parliament. Then, if in most states, voters approve the proposed law by a majority of votes, and if the majority of voters, who take a vote, approve the proposed law, the law amending the Constitution should be submitted to the Governor General for the Royal Assent.

Since the adoption of the Constitution the actual distribution of power and authority has changed significantly. Professor in Griffith University A. J. Brown²⁶ believes that the provisions of the current Constitution in many respects do not meet present-day realities. Moreover, he notes that "almost nothing in the Constitution will help us make the federal system work, on the contrary, many gaps in the Constitution is the source of our problems".

The Australian Constitution established that the judges of the High Court of Australia are appointed by the Governor-General-in-Council. In addition, the Constitution does not establish any guarantees of participation of the constituent entities in the appointment process. Professor in Sydney University Anne Tom²⁷ writes that "the Union is inclined to appoint judges who have a positive attitude to the centralization and the expansion of authority of the Commonwealth".

2. Conclusion

Legal and technical problems existing in the Constitution certainly raise the question of the need to adjust them. The text of the Constitution cannot be considered as a constant, firstly, in relation to certain uncertainties and contradictions existing therein, and secondly, due to the

ongoing development of society. However, the Russian Constitution is not unique in this. None of the constitutions of the world can be considered as perfect.

It should not be expected that after the constitutional reform, we will get a perfect society and state as if by magic. On the contrary, hasty amendments to the Constitution (and especially the revision of the Constitution) can lead to very serious consequences, including the destabilization of society. The Constitutional Reform can lead to the positive changes only under certain conditions, and also at an active participation of the civil society in the process of discussing the upcoming changes.

Therefore, in our opinion, the current solution of contradictions in the Constitution by its transforming is optimal. A decisive role here plays the interpretation of the Constitutional Court. However, the borderline between clarification of original meaning of the provisions of the current Constitution and the interpretation of provisions of the Constitution in favor of changing political reality is very subtle.

It can be concluded that the constitutional regulation of federal relations in Russia and Australia has a number of similarities which have similar consequences - the scarcity of the constitutional foundations of territorial structure as a result of court decisions exercising the constitutional interpretation leads to the fact that the federal units are not independent in their power and authority.

Thus, to safeguard the interests of the Russian Federation and the objectivity of the interpretation of the Constitution of Russia it is necessary to change the procedure for formation of the Constitutional Court of the Russian Federation.

In Belgium, among the judges of the Constitutional Court, "there is always a double-parity: between legal professionals and former politicians and also between Dutch-speaking and French-speaking people... Former politicians are also often the lawyers, but it is not a legal requirement"²⁸. According to the Court, it has a "balanced composition in terms of language, political affiliation and occupation, which offered a guarantee of impartiality"²⁹. And there is another example: in Germany the Federal Constitutional Court judges are elected in equal numbers (by eight) by Bundestag and Bundesrat (Part 1, Article 94 of the Basic Law of the Federal Republic of Germany)³⁰.

In our view, to ensure the interests of the Russian Federation it is necessary to change the principle of formation of the Council of the Federation, and then to

provide the members of the Council of the Federation with the right to propose candidates for judges of the Constitutional Court after the rejection of candidates proposed by the President.

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