

About Preliminary Constitutional Control in Russian Federation

Acerca del control constitucional preliminar en la Federación de Rusia

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Fecha de recibido: 2020-11-30

Fecha de aceptado para publicación: 2021-02-01

Fecha de publicación: 2021-03-25



Abstract

The article analyzes the amendments to the Constitution that were adopted on July 4, 2020. The authors consider the changes concerning the legal status of the constitutional justice body in the Russian Federation and the Russian Federation subject. The article analyzes the foreign experience of exercising the powers of these bodies to exercise preliminary constitutional control and the possibility of their power use in Russian judicial practice. The positive and negative aspects of preliminary constitutional control institution introduction into the Russian practice are highlighted. The author also analyzes the experience of the Constitutional Supervision Committee of the Union of Soviet Socialist Republics on the implementation of the authority to exercise preliminary constitutional control. The expansion of the RF Constitutional Court powers and, on the contrary, the narrowing of the constitutional (charter) court powers of the RF constituent entities is not the only change in the field of constitutional justice in the Russian Federation. In this regard, they considered the issue of changing the composition of the RF Constitutional Court and complicating the procedure for applying citizens with a complaint about violation of constitutional rights and freedoms. Thus, the author comes to the conclusion that there are temporary provisions in the Russian Federation Constitution.

Key words: constitutional court, preliminary constitutional review, draft law, amendments, Constitution, powers.

Resumen

El artículo analiza las enmiendas a la Constitución que fueron adoptadas el 4 de julio de 2020. Los autores consideran los cambios relacionados con el estatus legal del órgano de justicia constitucional en la Federación de Rusia y la Federación de Rusia en cuestión. El artículo analiza la experiencia extranjera de ejercer los poderes de



estos órganos para ejercer un control constitucional preliminar y la posibilidad de su uso del poder en la práctica judicial rusa. Se destacan los aspectos positivos y negativos de la introducción preliminar de la institución de control constitucional en la práctica rusa. El autor también analiza la experiencia del Comité de Supervisión Constitucional de la Unión de Repúblicas Socialistas Soviéticas sobre la aplicación de la autoridad para ejercer el control constitucional preliminar. La ampliación de los poderes del Tribunal Constitucional de RF y, por el contrario, la reducción de los poderes de los tribunales constitucionales (estatutos) de las entidades constituyentes de RF no es el único cambio en el campo de la justicia constitucional en la Federación de Rusia. Al respecto, consideraron el tema de cambiar la composición del Tribunal Constitucional de RF y complicar el procedimiento para presentar a los ciudadanos una denuncia por violación de derechos y libertades constitucionales. Por tanto, el autor llega a la conclusión de que existen disposiciones temporales en la Constitución de la Federación de Rusia.

Palabras clave: tribunal constitucional, revisión constitucional preliminar, anteproyecto de ley, reformas, constitución, poderes.

Introduction

On July 4, 2020, after all-Russian voting, the Article 1 of the RF Law on the amendment to the RF Constitution (March 14, 2020) No. 1-FKZ "On improving the regulation of certain issues concerning the organization and functioning of public authorities" (The RF Law on the amendment to the RF Constitution No. 1-FKZ) entered into force. One of the most significant changes made to the RF Constitution in the sphere of judicial power is the power scope increase of the RF Constitutional Court, in particular, the thing is about the right to exercise preliminary control over bills of the RF constituent entities on the request of the RF President.

In addition to the above, significant changes in the legal status of the RF Constitutional Court are also observed in the context of its composition. In the future, the staff of judges of the RF Constitutional Court will be reduced from 19 to 11. Obviously, this is due to the judicial burden decrease, which will occur due to the complication of the procedure for citizens' appeal with complaints about the violation of constitutional rights and freedoms (from now on, citizens will be able to appeal to the Constitutional Court of the Russian Federation, provided that all other internal means of judicial protection will be exhausted). It should be noted that the wording of the Part 1 of the Article 125 of the Constitution, which changes the number of judges of the RF Constitutional Court, will not be in effect until the term of office of the acting judges terminates on the grounds provided for by the FKZ №1 (July 21, 1994) "On the Constitutional Court of the Russian Federation". In connection with the above, we can talk about the existence of temporary provisions in the RF Constitution.

Methods

The method of comparative legal analysis made it possible to identify the peculiarities inherent in the institution of preliminary constitutional control in foreign countries.

With the help of the system-structural method of cognition, they revealed the peculiarities of constitutional amendments concerning the activities of the judicial bodies carrying out constitutional justice.

The formal legal method of research was used to determine the content of concepts such as "constitutional control", "preliminary constitutional control", "temporary provisions", etc.

Results

Securing the implementation of preliminary constitutional control over regional draft laws by the RF Constitutional Court will jeopardize the need for the functioning of constitutional justice bodies in the constituent entities of the Russian Federation. Such fears, in turn, are due to the presence of foreign constitutional courts in practice going beyond the exercise of "preliminary" constitutional review. It seems that the body of constitutional justice in a constituent entity of the Russian Federation must also be given the opportunity to carry out preliminary constitutional control over draft laws on the amendments to the constitutions (charters) of constituent entities, other draft laws of constituent entities, providing for this authority in the Article 27 of the Federal Constitutional Law (December 31, 1996) No. 1-FKZ "On the judicial system of the Russian Federation."

Discussion

The amendment to the Constitution 2020, in partic-



ular, provides for the expansion of the powers of the RF Constitutional Court through the introduction of preliminary control over the draft laws of the Russian Federation, which amend the RF Constitution, the draft laws of the Russian Federation, the laws prior to their signing by the President of the Russian Federation, the laws of the constituent entity of the Russian Federation prior to their promulgation by the highest official of the RF constituent entity (The RF Law on the amendment to the RF Constitution No. 1-FKZ).

Let us remind that the bodies of constitutional justice in the Russian Federation before the adoption of the Law No. 1-FKZ did not have the authority to exercise preliminary control over draft laws. As A. Bick notes, "judges able to rule acts of Parliament incompatible with the constitution and strike them down" (Blick, 2011).

In this regard, the question arises: how urgent is the need for the Constitutional Court of the Russian Federation to exercise preliminary control over draft laws of the constituent entities of the Russian Federation, when specialized courts have been created in the constituent entities of the Russian Federation to carry out constitutional justice?

Before proceeding to consider this issue, we believe it is necessary to note that there was experience in the implementation of preliminary constitutional control in the history of the Russian state. The Committee for Constitutional Supervision of the Union of Soviet Socialist Republics, which was established in 1988 and whose functions were to ensure compliance with the Basic Law of the country, was endowed with a wide range of powers, including the provision of opinions on the compliance of the draft laws submitted for consideration by the Congress of People's Deputies (The RF Constitution (Basic Law) was adopted by the RSFSR SC on 04/12/1978).

As you can see, preliminary control was carried out only in relation to draft laws at the federal level. It should be noted that the execution of these powers could be initiated both by the Committee for Constitutional Supervision of the Union of Soviet Socialist Republics, and by the subjects of lawmaking, that is, by the legislative and executive bodies of state power.

Questions arising in connection with the presence of contradictions in the acts of the same level, a large number of reference norms, the absence of a

mechanism for the implementation of certain norms, determine the relevance of preliminary constitutional control implementation.

I.Yu. Ostapovich notes that the negative tendency of preliminary constitutional review is the presence of elements of politicization in the activities of the RF Constitutional Court (Ostapovich, 2014).

In our opinion, given the existence of different, opposite positions of the deputies of the RF State Duma on certain changes in legislation, due to the fact that the RF Constitutional Court has the authority to resolve disputes (paragraph 2 of the Article 3 of the Federal Constitutional Law of July 21, 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation"), it, on the contrary, could well become an arbiter ensuring the balance of political forces in parliament.

At the same time, if the RF Constitutional Court is empowered to exercise preliminary control, the question of the need for subsequent control in relation to regional legislation will arise. For example, in foreign practice, there are the cases when constitutional courts, endowed with the right to express themselves on individual bills, significantly expand the scope of powers, while exercising subsequent procedural control (Nikitina, 2016). The supporter of preliminary control, French lawyer Jean Rivero argued that subsequent control creates "real unpredictability", while preliminary control ensures order and safety (Rousseau, 1998).

As an example, we can cite the activities of the Constitutional Court of Moldova, which, according to the Constitution, speaks out on proposals to revise the Constitution (paragraph "c" of the part 1 of the Article 135 of the Constitution of the Republic of Moldova) (<https://www.legislationline.org>). That is, the constitutional legislation of the Republic of Moldova provides only preliminary control with respect to bills that amend the text of the Constitution, however, the activity of the court indicates the possibility of its implementation and subsequent control.

By the decision of March 4, 2016, the Constitutional Court of the Republic of Moldova declared that the Law No. 1115-XIV (July 5, 2000) on amendments and additions to the Constitution of the Republic of Moldova was not in conformity with the Constitution. The basis for the adoption of such a decision by the Court was the violation of the procedure for consideration and adoption of the Law



on the Amendments and Additions to the Constitution. In accordance with the constitutional provisions, the draft law was submitted to the legislature together with the opinion of the Court, but in the process of consideration it was subjected to significant changes, which radically changed the text content of the amendments. The Constitutional Court noted that such a change should have entailed a repeated appeal to the Court, since "after the conclusion of the Constitutional Court, changes are not allowed in the draft law on revising the Constitution, and ignoring or exceeding the limits of imprisonment may become a reason for cancellation of the changes made" (On the control of the constitutionality of some provisions of the Law No. 1115-XIV).

Given this trend, it can be assumed that if the RF Constitutional Court is empowered to carry out preliminary constitutional control in relation to draft laws of the RF constituent entities, it will also be able to carry out subsequent control in relation to regional legislation, but in this case the question will arise on the expediency of the functioning and work of constitutional (charter) courts in the constituent entities of the Russian Federation. Let us recall that today, out of 85 constituent entities of the Russian Federation, constitutional (statutory) courts function only in sixteen constituent entities of the Russian Federation. Besides, the results of their activity often raise doubts among the authorities.

Thus, it seems necessary to establish a clear mechanism for the implementation of the authority to exercise preliminary constitutional control by the RF Constitutional Court. Similar powers, for example, are vested in the constitutional courts of Albania, Azerbaijan, Kazakhstan, Ukraine, Romania, the Republic of Turkey and a number of other countries. The legislation of the Republic of Kazakhstan establishes a separate authority of the constitutional justice body to check the constitutionality of laws adopted by the parliament, prior to their signature by the President (On verification of the Law of the Republic of Kazakhstan). According to Romanian legislation, the Constitutional Court has the right to make decisions on the constitutionality of not only draft laws, but also of any changes aimed at the Constitution revision (On the Organization and Operation of the Constitutional Court: Law № 47/1992). At that, let's note that the Constitutional Court of Romania is a relatively young constitutional jurisdiction, both within the national legal tradition and within the EU constitutional family (Viță, 2015).

In Serbia, for example, the institution of preliminary constitutional review, in the fair opinion of Professor Nenadić, looks like nothing more than a "constitutional opportunity" (Nenadić, 2009), since not a single decision has been made by the Constitutional Court within the framework of preliminary review by the Constitutional Court for ten years.

In the domestic literature, it is noted that preliminary control is necessary for draft federal laws establishing or strengthening legal liability. This conclusion can be reached by analyzing the legal position of the RF Constitutional Court, formulated in the Decree No. 10 on April 8, 2014. The court found that the existence of a too high minimum threshold for an administrative fine was not in accordance with the norms of the RF Constitution (Resolution of the RF Constitutional Court No. 10-P (April 8, 2014)).

It is worth noting that recently, the parliament has been adopting laws that lack a mechanism to implement responsibility for certain offenses. In particular, one can cite the provisions of the Federal Law No. 15-FZ "On protecting the health of citizens from exposure to second hand tobacco smoke and the consequences of tobacco consumption" (February 23, 2013), which establishes the prohibition on tobacco smoking in certain territories, indoors and at facilities.

Also it is noted in the literature that the elements of preliminary constitutional control can become an effective tool in terms of "excessive rule-making" elimination when certain social relations are regulated by federal law, although they may well be regulated by bylaws" (Ostapovich, 2014).

Conclusions

In our opinion, in connection with the beginning of a new "era" of constitutional reforms, it was appropriate to adopt the experience of foreign countries concerning introduction of constitutional justice body activities into the practice of the Russian Federation, the implementation of preliminary constitutional control in relation to bills by means of which amendments are made to the text of the RF Constitution, the constitutions (charters) of the RF constituent entities, respectively.

Thus, summing up the above, we can conclude that the institution of constitutional justice in the RF constituent entities in the form of the activities of constitutional (charter) courts can be liquidated in the near future, since the RF Constitution as amended on 03/14/2020 does not provide for the



establishment of constitutional (charter) courts in the RF constituent entities of the Russian Federation, despite the fact that the constitutional (statutory) justice operates in the Russian Federation on the basis of constitutions (statutes) of the constituent entities of the Russian Federation, the laws of the constituent entities of the Russian Federation on constitutional (statutory) court (Gazizovich & Mahmutovna, 2018).

Acknowledgements

The work is performed according to the Russian Government Program of Competitive Growth of Kazan Federal University

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