Legal Study of the Development of the Doctrine of Constitutional Identity in Russia: General Prerequisites

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Abstract

The basic laws are considered as the result of the national identity, desire and will of the people of each country, which defines the relationship and position of the people with each other and with the political system and the goals of the country's ideals. Therefore, it is necessary to analyze the constitution in the manner of content analysis. Therefore, it should be checked what are the main elements of national identity in the constitution? Is the nature of these elements intrinsic or a process? In the constitution, all the elements of national identity are taken care of in a coordinated way, or is there a kind of monopoly in this field? The article examines the main prerequisites for the development of the Russian concept of constitutional identity. According to the authors, the main reason for the development of the doctrine of constitutional identity in Russia was the jurisdictional conflict between the ECHR and the Constitutional Court of the Russian Federation. This conflict was related to the "right of the last word", which was defended by the Strasbourg Court (especially in the case of *Anchugov and Gladkov*). This position clearly and not ambiguously demonstrated a departure from the previous practice of "dialogue" between the two levels of jurisdiction. Extending the absolute primacy of the "right of convention" to constitutional provisions has once again become *a casus belli*. The authors analyzed the main prerequisites for the formation of the doctrine of constitutional identity through the prism of foreignгo experience, paying attention to the legal argumentation used by European constitutional courts to assess the enforceability of international obligations.

Keywords: Constitutional identity; law, jurisdictional conflict; ultra vires control; identity control.

Introduction

The issue of "activism" of supranational equity bodies has as of late become pertinent for the Protected Court of the Russian Organization. Jurisdictional clash of the European Court of Basic liberties (ECHR) and the Sacred Court of the Russian League, as we would see it, have numerous likenesses with comparative cases from the act of European established courts. Subsequently, it very well may be assessed through the crystal of unfamiliar legitimate insight, utilizing ideas created by the public protected equity groups of the States gatherings to the European Show on Basic freedoms, essentially, this applies to the precept of established character.

In this study, we will look at several related issues:

- first, these are the reasons for moving away from the previous practice of "dialogue" between two levels of jurisdiction;

Today, legal culture is one of the most important concepts in the field of humanities. Legal culture deals with the differences in people's perceptions, perceptions, expectations and feelings about law and its performance in different situations. For example, legal culture indicates that there are fundamental cultural differences between the civil law of European countries and the common law of England. This difference has caused many to consider the harmonization of private laws of European countries as impossible and undesirable. On the other hand, some people believe that the European legal culture already existed and its traditions can be revived, or that European lawyers who share a common culture can increase the possibility of harmonizing European law. In this discussion, culture is considered as a border that divides Europe in terms of law or considered as a field that has the ability to harmonize European law. When legal culture is considered as a context for harmonization, the differences between different European laws and legal systems lose their importance, because the European cultural trend is towards finding common solutions to legal issues. Even if these solutions are presented with different expressions in various legal and national systems. One of the things that make legal assimilation necessary is business needs. Business networks are built based on instrumental, social relationships. As long as

the public interests that these business networks provide are the same and the same law governs the relationship between these networks. Culture is considered irrelevant. But as mentioned, in addition to social instrumental relations, culture is made up of other parts. As a result, legal harmonization discussions should consider all aspects of culture. So the main question is how the instrumental and non-instrumental aspects of culture are related and how the science of law can control them.
- secondly, how these changes affected the constitutional development of the idea of creating a special area of legal regulation – constitutional identity;
- third, it is a question of how unique the Russian way of constitutional development is, whether there are parallels between the approach of the Constitutional Court of the Russian Federation and the approaches used by the constitutional justice bodies of the Council of Europe member states (*ultra vires control*, etc.).
If such similarities are found, in our opinion, it is fair to raise the question of the possibility of using this experience for further development of the doctrine of constitutional identity.
The law consists of rules and regulations that are prepared and regulated according to the needs of the society by the discerning people, reviewed and approved by the expert legislators in the parliament and used with the purpose of regulating individual and social relations and creating order, security and justice, after It is validated through legal procedures and the government guarantees its implementation and protection of its privacy and sanctity. The ultimate goal of creating legal rules is to implement order and justice by using legal mechanisms.
It is flourishing, but in its extreme form, it has caused conflict, strife, war and conflict in human life, and as a result, lawlessness. Growth and development in various economic, social, cultural and political dimensions have not been achieved, except in the shadow of creating order and security and of course compliance with the "law". Compliance with the law and rule of law indicates the stability and cohesion of the society. Healthy relations between citizens and positive interaction will be possible in the light of compliance with the "law". Security as the main need of today's life in its various dimensions is formed only in the shadow of the law. New needs demand new rules and regulations. Social order is the blessed product of rule of law, and lawlessness is considered a kind of orientation towards social norms; A phenomenon that is seen in all societies to a degree of intensity and weakness. In some societies, accepting the law, obeying and respecting it is rooted in the behavioral culture of the people in such a way that it has become "sacred" for them to the point where "all their actions, behavior, deeds and thoughts show themselves." A society that regulates its movement according to the law, more than anything else, it helps the emergence of creativity and in the direction of prosperity within itself; Since the ultimate and ultimate goal of the law is to create order and establish justice in such an environment, the "ruler of the law" has taken steps to determine the limits and boundaries and clearly outline the relationships of individuals from the legal rights of the members of the protection society, prevent encroachment on the sanctity of people's rights, and create discrimination. And he avoids inequality and uses all his harmony to maintain order and observe justice. In such a society, the distribution of wealth and facilities is done according to the ability, talent and merit of people, the rights and duties are necessary and necessary and before the assumption is made that people are familiar with the laws; The principle is placed on the education of rights and duties because it requires a population micro-group, when citizens evaluate the law in line with their personal and social interests, they favor its implementation. Law evasion in many societies is rooted in history and the past due to special conditions, non-compliance and compliance with the law goes back to the weakness in understanding the functions of the law; The responsibility of the government and the government: avoiding task-oriented view, moral weakness, inattention to the place of culture in the regulation, formulation and approval of laws, weakness of the legislative system, conflicts of laws with individual and group interests, diminishing the role of customs, habits and beliefs in laws, fueling the atmosphere of mistrust in the society and as a result discrediting the role and place of public participation and the government's monopoly in affairs.

Methods

The study used both general scientific methods (analysis, synthesis, induction, deduction, system, structural, functional methods) and private scientific methods (comparative legal, formal legal). A review article is a type of article that reviews the background of a scientific topic. In review articles, the results presented in scientific writings about a specific topic are summarized and evaluated. This type of article may examine anything, it is designed to summarize, analyze and evaluate information that has already been published. In such articles, experimental and new findings are rarely reported. Review articles have a well-defined narrative, are usually critical, and should provide theoretical and emerging interpretations. The important role of review articles is to guide original scientific writings. For this reason, it is essential that the citations provided are accurate and complete.

Results and Discussion

Relations between the Constitutional Court of the Russian Federation and the ECHR since the ratification of the Convention on March 30, 1998, have moved from a model of friendly cooperation to a confrontational model at the present stage.

The development of the "confrontational" trend, according to the authors, begins with the decision of the ECHR Chamber dated October 7, 2010 (*Konstantin Markin against Russia*). In this decision, the ECHR found a violation of the prohibition of discrimination against male military personnel (the inability to provide them with parental leave). In the context of our study, what is interesting is not the Markin case itself, but only the causes of the jurisdictional conflict.

And *the main* cause of the dispute was a sharp divergence of the position of the ECHR and the Constitutional Court, which also previously expressed its position on the Markin case (in decision No. 187-O-O dated January 15, 2009).

In its decision dated October 7, 2010, the ECHR explicitly refers to the position of the Constitutional Court of the Russian Federation (in paragraph 34 of the Judgment) and criticizes its legal reasoning. In fact, this decision calls into question the authority of the Russian constitutional justice body; the ECHR enters into a direct polemic with the Constitutional Court, expressing a diametrically opposite position.

The Constitutional Court of the Russian Federation reacts to the current situation rather sharply and enters into an open polemic with Strasbourg. In his article published in the same year 2010, V. D. Zorkin for the first-time calls into question the enforcement of decisions of an international body of justice [1]. In his opinion, the ECHR's decision is *an ultra vires act*, i.e., the court's recommendations go beyond its powers and "directly invade the sphere of national sovereignty". V. D. Zorkin's reference to the experience of German and Italian judicial doctrine is also significant. Subsequently, this technique will be used in a number of decisions of the Constitutional Court of the Russian Federation. The criticism of the Chairman of the Constitutional Court of the Russian Federation is supported by his deputy S. P. Mavrin, pointing out the objective impossibility of implementing the ECHR decision. In the post "Decisions of the European Court of Justice and the Russian legal system" S. P. Mavrin states that "the domestic legislator is not able, without violating the Constitution, to implement into its legal system the measures resulting from the ECHR decision in the Markin case" [2., p. 5.].

A detailed analysis of the Markin case is beyond the scope of our study. It should be noted that the conclusions reached by the Chamber in the Markin case were also supported in the decision dated March 22, 2012 (Grand Chamber). In the context of our study in this judgment, there are several points of interest that illustrate the expansion of the scope of interpretation of the Convention's norms by the Strasbourg Court. Thus, the Court uses such a tool as an appeal to the "pan-European consensus" in interpreting the Convention, emphasizing the flexibility and dynamism of human rights in terms of "promoting gender equality".

The existence of a "pan-European consensus" is confirmed by reference to a comparative study of the relevant legislation in the legal systems of the member States of the Council of Europe (see paragraph 71 of the Judgment). An appeal to the" pan-European consensus " is also necessary to justify changes in one's own position expressed in the case *Petrovich against Austria*.

In fact, Strasbourg points out to the Constitutional Court that when making decisions, it should also focus on the "live" Convention, while maximally unifying the national legal system within the widest possible limits. At the same time, the limits of such unification will be set by Strasbourg unilaterally. Based on this, many researchers argue that the European Court of Justice is trying to create a "shadow constitution" and assume the functions of the Constitutional Court of Europe with the "right of last resort" in resolving any convention-constitutional conflicts [3]. Most sensitive for the Russian side in the case of *Markin* is concerned with the issue of recognizing the decision of the Constitutional Court of the Russian Federation as incompatible with the Convention. According to the fair statement of M. Hartwig: "the question of the correlation of two legal systems becomes a question of the correlation (decisions) of two courts" [4., p. 138]. The ECHR actually forces the Constitutional Court of the Russian Federation to review its own decision on the case of *Markin*, demanding the impossible in violation *of the lex non cogit ad impossibilitia principle*. The Constitutional Court of the Russian Federation, in its Ruling No. 6-O dated January 13, 2000, found that its decisions were final and not subject to appeal.

The further development of the conflict is connected with another case – *Anchugov and Gladkov*. If in case of *Markin* the catalyst for controversy was the question of the correlation between the decisions of the two courts, then in the case of *Anchugov and Gladkov* the contradictions between the two jurisdictions have reached a new level. In its decision dated July 4, 2013, the ECHR questions the provisions of the "unchangeable" Chapter 2 of the Constitution of the Russian Federation (Part 3 of Article 32 of the Constitution of the Russian Federation). It should be noted that the decision was based on the approach formulated in the *Hearst against Great Britain* case, and in this case the Grand Chamber of the ECHR also found a violation of Article 3 of Protocol No. 1 of the ECHR. Legal reasoning of the ECHR in *the Hurst case* and in the case of *Anchugov and Gladkov* largely coincide. The European Court of Justice itself points out the connection between these cases, directly referring to the *Hearst precedent*. From the case file *Hearst*'s central argument is also borrowed-an appeal to the "pan-European consensus" (there is no ban on elections for prisoners in most countries participating in the Convention).

Without examining in detail, the subject matter of the dispute itself (the permissibility of defeat in electoral rights) and the arguments of the parties, we will only consider the consequences of this decision for the Russian

legal system and the emerging parallels with *the ultra vires doctrine*. The expediency of such a comparison is indicated, for example, by A. S. Ispolinov. In his opinion, the relationship between *the European Court of Justice* and national jurisdictions have not received adequate attention in the national legal doctrine. A. S. Giants notes that it "contributes to our understanding of the actions of the constitutional court as an exception, certain regrettable and all sorts of reprehensible" [5]. P. D. Blokhin, analyzing the practice of the Federal constitutional court of Germany, also correlates these doctrines together. In his opinion, constitutional identity and the "*ultra vires*" doctrine act as a kind of "tests for assessing obligations at the level of the European Union" [6., p. 67.]. In connection with the question of methods of ensuring constitutional identity, S. A. Grachev mentions the "*ultra vires*" doctrine [7., p. 59.].

In our opinion, the ECHR in this case, based on an "evolutional" interpretation of Article 3 of Protocol No. 1 of the ECHR, made a decision that meets all the criteria of the "*ultra vires*" act. In this regard, we need to answer the question of whether the body of an international organization in this decision went beyond the limits of the powers granted to it.

Let us consider the appropriate approach of the German FCC. First, "the result of such an interpretation should not imply an extension of the Treaty." Second, the "*ultra vires*" act entails "a serious structural shift resulting in a violation of the sovereign rights of a Member State." Based on these criteria, we will consider the ECHR decision of July 4, 2013.

The Strasbourg Court's approach to the case *Anchugov and Gladkov* (as in the *Hirst* case) was based on an interpretation that appeals to the "pan-European consensus". However, in our opinion, there should be limits to this interpretation. In this case, even this method of interpretation has undergone a significant transformation. Thus, the Court itself, based on the results of its comparative legal analysis, indicates that only "nineteen of the 43 participating States considered in this study grant prisoners the right to vote without any restrictions". Nineteen States out of 43 clearly do not constitute an overwhelming majority, therefore, there is no consensus in this case (and the presence of consensus is "*conditio sine qua non*"). Using a similar logic, the European Court of Justice in the *Hurst* case also states that even if there is no consensus, it still exists: "even if there is no pan-European approach to the problem, this fact in itself cannot be decisive in the case."

As N. V. Varlamova rightly points out, "the term' European consensus ' is more of a metaphor "rather than a reality -" there was only one case in the European Court's practice [*Cal Tekeli v. Turkey.*] when it stated complete uniformity of regulation" [8., p. 100.].

Thus, within the framework of this "logic", if the national law of the "progressive" part of the Council of Europe member States (not necessarily the majority) contains the correct norm, we can say that there is a "pan-European consensus". Such radical "activism", in our opinion, is just an example of "interpretation extending the Contract", which corresponds to the feature of the "*ultra vires*" act. This interpretation makes it possible to supplement and supplement the ECHR in the widest possible way, ignoring the national specifics of the member States (customs, traditions and culture). Critics of the "European consensus doctrine" have repeatedly noted that" it deprives states of the opportunity to develop human rights in accordance with the mores, traditions and culture inherent in their communities" [9]. It is quite natural that such a legal argument raised reasonable doubts, both in the UK and in Russia.

Consider another sign *of the ultra vires act* - " a serious structural shift resulting in a violation of the sovereign rights of the state." It is quite obvious that the implementation of this decision was hindered by Part 3 of Article 32 of the Constitution of the Russian Federation. The Strasbourg Court's argument that "any part of the State's jurisdiction" is subject to convention control directly contradicts the "*ultra vires*" doctrine and seems doubtful.

The Russian Federation, while transferring part of its sovereign rights by ratifying the ECHR and Protocol No. 1, did not grant the European Court of Justice such competences and powers. According to the "ultra vires" doctrine, the integration of international law into the national legal system is limited by the fundamental principles of democracy. The position of a citizen can only be regulated by such norms, in the creation of which he can participate through the election of bodies that give consent to ratification: "if bodies, institutions and other institutions usurp functions and powers that are not transferred to them according to the law on ratification, then they violate the very basis of popular sovereignty."

According to the FCC of Germany, the violation of sovereign rights occurs due to the fact that such an act "subordinates a citizen to a public authority that he has not legitimized and over which he cannot exert effective influence.It is obvious that the ECHR in its" activism " has crossed this line.

The implementation of this decision could lead to "serious structural shifts" in the Russian legal system. According to G. B. Romanovsky's fair observation, such an adjustment of the legislation in this case would mean "twisting the domestic Basic Law under a specific decision of an international instance" [10., p. 153.]. It should be noted that the international judicial body was well aware of the existence of a convention-constitutional conflict in this case, and directly insisted on "serious structural shifts" that affected the most essential aspects of the national legal order (up to the revision of the entire Constitution).

All of the above makes it possible, in our opinion, to characterize the ECHR's decisions in the case of *Anchugov and Gladkov* as an act of "*ultra vires*" that violates the sovereign rights of the state. It appears that in the case of

Anchugov and Gladkov (as in the case of *Hearst against the United Kingdom*), the ECHR tried to significantly expand the boundaries of its mandate, appropriating the function of a pan-European legislator "in a missionary effort to create an ideal legal space" [4., p. 201.].

Summary

Let us proceed to the conclusions concerning the prerequisites for a jurisdictional conflict between the ECHR and the Constitutional Court of the Russian Federation. In our opinion, this conflict was related to the "right of last resort", which was defended by the Strasbourg Court (especially in the case of *Anchugov and Gladkov*). This position clearly and not ambiguously demonstrates a departure from the previous practice of "dialogue" between the two levels of jurisdiction. According to the Strasbourg Court, they should be replaced by subordination relations. Refusal to perform obligations arising from the "law of contracts" could not justify *no legal argument at national law including constitutional law*. In its practice, the ECHR has consistently defended and developed the "right of last resort" approach in any disputes with national jurisdictions. The right to the last word of the ECHR has also been consistently and uncompromisingly defended by the Venice Commission of the Council of Europe.

The development of this trend, according to the authors, has led to the fact that at the present stage the ECHR has actually abandoned its commitment to the principle of subsidiarity, giving itself super-powers. All this has led to the interpretation of many ECHR decisions by national constitutional justice bodies as "*ultra vires*" acts. It should also be noted that similar jurisdictional conflicts with Strasbourg have occurred not only in Russia, but also in other member states of the Council of Europe. As Matthias Hartwig rightly points out: "The Constitutional Court of the Russian Federation is not alone in its understanding of the relationship between constitutional law and international law, but rather is in a very decent society" [4., p. 134.].

Conclusions

Extending the absolute primacy of the "right of convention" to constitutional provisions has once again become *a casus belli*. As in the case of the similar "activism" of the Luxembourg Court, this position could not fail to provoke a response from the national justice system. The Constitutional Court of the Russian Federation has expressed a need to create a special area of legal regulation that would have "immunity" in relation to decisions of international justice bodies.

Achieving this goal was complicated by the openness of the Russian Constitution to international law. As in the case of the German Constitution, the Russian Basic Law established the principle of "friendly" attitude to international law (in accordance with Article 15 para. 4 of the Constitution of the Russian Federation). The Russian Constitution's commitment to international law has become a serious obstacle to protecting the national legal system.

The way out of this predicament was a step-by-step constitutional reform, which changed the balance in determining the relationship between the Constitution and international law and at the same time led to the emergence of the concept of constitutional identity in the Russian judicial doctrine.

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