

CONSTITUTIONAL (MATERIAL) OBLIGATION TO ELIMINATE THE UNCONSTITUTIONALITY OF LEGAL REGULATION, DECISIONISM

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ABSTRACT

The courts of constitutional justice can recognize a normative legal act or its individual provision as not complying with the constitution. Thus, such an act (or provision) can be removed from the legal system of the state. Meanwhile, there are the following controversial issues: - legal consequences of the adoption of such a decision; - actions of subjects of law-making activity to eliminate the unconstitutionality of legal regulation. In this regard, the issue of the role of judicial decisionism in ensuring the sustainability of legal regulation is also of interest. This study analyzes the current legislation (governing the elimination of unconstitutionality of legal regulation), as well as the prevailing judicial practice and doctrinal studies on this topic. The article examines the problems of imposing a constitutional obligation to eliminate the unconstitutionality of regulation and judicial decisionism. To determine the general trends in this problem, the experience of other states, both legislation and practice, is studied. For a better understanding, the problem is examined through the prism of a parliamentary system, democratic values and the relevant constitutional proceedings. After an act is recognized as unconstitutional, society loses the opportunity to exercise its rights in the absence of relevant mechanisms. One of the research aims is to define the subject responsible for filling the gaps in the legislation.

Keywords: Constitutional Control, Decisionism, A Gap in Law, Judicial Activism, Unconstitutionality of the Law, Constitutional Obligation.

INTRODUCTION

In the world practice of constitutional law, it was established that it is a constitutional obligation to eliminate the unconstitutionality of legal regulation in a specific legal relationship. Such an obligation appears if legislative activity does not adhere to constitutionality. Namely, when the proposed legal regulation was imperfect at the time of adoption of the regulatory legal act (Chemerinsky, 2019). This obligation can also be caused by external (objective) reasons, for example, a change in constitutional and other regulation (in the logic of a constitutionally specified hierarchy of normative legal acts) (Teubner, 2019).

The mentioned obligation is not narrowed to the need to repeal a normative legal act that is not in accordance with the certain country's Constitution or other act(s). The Constitutional Courts around the globe have expanded the relevant approach, providing for the need to positively address the shortcomings of legal regulation. This is due to the attempt of the constitutional control body to delicately address the elimination of certain norms and (or) institutions from the legal system. Otherwise, it can lead to significant negative socio-legal consequences. That is, it might be relevant to temporarily preserve legal norms (e.g., that do not

fully comply with the Constitution of the Russian Federation) than to witness a significant violation of constitutionally protected values (Melnikov et al., 2018). This necessitates the enhancement of both the legal regulation in general and the regulation of a particular sphere of public relations.

The specifics of the subject and the nature of lawmaking determine the essential features of performance mechanism of the considered constitutional obligations. In the regulatory practice of Russia, the constitutional norms on the status and functions of the Constitutional Court of the Russian Federation (Art. 125 of the RF Constitution) orient this judicial body to ensure the constitutional quality of legislative regulation. At the same time, the practical activity of this body indicates the following. The court is often unable to exercise constitutional rights and freedoms not as a result of the action of the particular impugned norm, but due to the lack of legal regulation (Dolakova et al., 2018). The aforementioned determines the actual expansion of the scope of functioning of the constitutional control body. Namely, the subject of constitutional review includes not only a positive norm but also a constitutionally unacceptable gap.

A similar mechanism finds application in the practice of foreign law and order. In more than thirty judgments, the Belgian Constitutional Court has decided not to invalidate the impugned norm, and determined that the absence of such a legislative norm is unconstitutional. At the same time, the court has emphasized that the legislator should fill in the unconstitutional gap (Verstraelen, 2018).

A similar approach has been adopted in the UK, where the constitutional obligation of parliament to amend an unconstitutional law (or recognize it as null and void) is elevated to the status of custom (conventional norm). In addition, the parliament sometimes amends or revokes the statutes in order to resolve the issue of incompatibility before the court does, usually in the field of human rights (Duxbury, 2017).

Hence, one may argue that the mechanism of constitutional justice, in general, has a compensatory character in relation to constitutional obligations. The mechanism is based on the universally binding legal statements (the exclusion of a norm from the legal system directly by the court). Taking into account the above, such a mechanism requires additional tools, including more binding properties.

Thus, the purpose of the study is to identify legal “gaps” in the current legislation of the Russian Federation, which regulates the elimination of unconstitutionality of legal regulation. The constitutional problems of Russia are presented against the background of international experience. The study also focuses on the prevailing judicial practices and doctrinal studies when developing the most successful approach towards their resolution.

LITERATURE REVIEW

Conceptual understanding the relationship between the judicial and legislative branches of government is fundamental to perceive not only judicial politics but policy making generally. Rather than the hierarchical relationship between court and legislature that judicial review might imply, many scholars posit an ongoing “*dialogue*” between the branches on constitutional and statutory issues (Hasen, 2012). The courts cannot act alone; they depend upon the responsiveness of the “*political*” branches. The strongest assertion that a court can make in this dialogue is to declare a statute unconstitutional using its powers of judicial review (Canes-Wrone et al., 2014).

The powers of the higher courts (to interpret the constitution and laws) to some extent “*crowd out*” the legislative initiative. The judiciary is endowed with mechanisms to protect

subjective rights and thus it establishes the meaning and limits of the application of legal norms and thereby limits the discretion of the legislator (Jhaveri & Scully-Hill, 2015). On the other hand, a court with the power to apply constitutional norms even against the legislative majority will also attract attention as an institution that restricts the adoption of democratic decisions. The power of a constitutional court can be misused (Waldron, 2006). In difficult cases of constitutional courts, opinions on whether this power has been used properly or misused will typically be divided. There are no perfectly operational, invariable and cross-culturally valid standards on interpretation of constitution (or any other legal act) or concerning law's application and policy-making process (Burchardt, 2004). There is much controversy over the proper area of application of constitutional powers as well as over the reach and limits of judicial power in general.

In the practice of international law and order, legal regulation is often updated not by amending legislation, but by judicial activism (Lindquist, 2017; Schacter, 2018). Similar judicial discretion methods are used to implement international legal norms without amending the law itself (Roux, 2015). This allows one to dynamically interpret EU legislation, which takes into account (and adapts to) social changes taking place at the national and union levels (Lenaerts & Gutman, 2016). A similar approach to the interpretation of the law is used in the practice of the Federal Constitutional Court of Germany. As Grimm notes, the concept of constitutional provisions (as an expression of values) represents a rejection of a literal interpretation of the Constitution. With this approach, the goal of a constitutional interpretation is to provide the greatest possible effect to constitutional values, as well as the function that constitutional norms should play in a society in a changing environment (Grimm, 2015).

Regards the Russian legal framework, it is thought that Article 80 (paragraph 1) of the Federal Constitutional Law on the Constitutional Court of the Russian Federation does not allow deputies of the State Duma to introduce a bill that brings the unconstitutional provisions of the Federal Law into conformity with the Constitution. The mentioned Article obliges to wait (and then adopt) such bills only from the Government and thereby limits the independence of the legislative body and the right of legislative initiative of State Duma's deputies (Mazurov, 2009).

At the same time, the legislation does not define the mechanism of responsibility of the Government for untimely introduction of the bill to the State Duma. The law-making body (in particular, the collegial representative body) only after a certain, sometimes very long time, makes the appropriate changes (recommended by the court) in the normative legal act. When the Government introduces the bill (in pursuance of the decision of the Constitutional Court), it does not mean that it will be quickly adopted. Since it is practically impossible to set up a certain date of law's adoption for the State Duma. The State Duma is only required to consider the bill in an extraordinary order (Narutto, 2012).

METHODS AND MATERIALS

The empirical basis of this work is presented by the provisions of the legislation of Russia, as well as decisions of the highest judicial instances. The theoretical basis of this work is the domestic and foreign researches on the constitutionality of normative regulation, the elimination of legal uncertainty, ways to fill in gaps in law, and the process of courts' decision-making.

In this study, for completeness of data, the legislation of the Russian Federation (RF) is analyzed with respect to the jurisdiction of the RF's Constitutional Court (incl. the provisions of

RF's Constitution). For clarity and consideration of the issue from a practical point of view, the following decisions of RF's Constitutional Court are carefully studied:

1. The decision of RF's Constitutional Court as of June 24, 1997 No. 9-P “*Verifying constitutionality of the Articles 74 (part one) and 90 of the Khakassia's Constitution*”//Collection of RF's legislation. 30 Jun 1997. No. 26, 3145 p.
2. The decision of the RF's Constitutional Court as of May 31, 2016 No. 14-P “*Verifying constitutionality of Article 31.1 of the Federal Law on Roads and Road Management in RF and Amending Certain RF's Legislative Acts*”.
3. The decision of RF's Constitutional Court as of 19 May 1998 No. 15-P “*Verifying constitutionality of Articles 2, 12, 17, 24 and 34 of RF's legislation on notaries*”//Collection of RF's legislation - 01 Jun 1998. - No. 22, 2491 p.
4. The decision of RF's Constitutional Court as of March 31, 2015 No. 6-P “*Verifying constitutionality of clause 1, part 4, article 2 of the Federal constitutional law on the Supreme RF's Court. Verifying constitutionality of paragraph 3, subclause 1, clause 1 of article 342 of RF's Tax Code. Verification is in connection with a complaint of the JSC Gazprom Neft*” // Collection of RF's legislation.-13 Apr 2015.-No. 15, 2301 p.
5. The decision of RF's Constitutional Court as of March 10, 2016 No. 448-O. The Intellectual Property Rights Court made a request to verify the constitutionality of clause 2 of article 1248, clause 2 of article 1398 and clause 2 of article 1406 of RF's Civil Code. The latter is in conjunction with the provisions of the Rules for filing claims and their consideration in the Chamber for Patent Disputes//Legal-reference system “*Consultant Plus*”.
6. The decision of RF's Constitutional Court as of July 20, 1999 No. 12-P “*Verifying constitutionality of the Federal Law as of April 15, 1998 On cultural values transferred to the USSR after World War II. The presence of these cultural values in the Russian Federation*”//Collection of RF's legislation-July 26, 1999 -No. 30, 3989 p.
7. The decision of RF's Constitutional Court as of 10 Jun 1998 No. 17-P “*Verifying constitutionality of Article 4 (clause 6), Article 13 (subclause "a" of clause 3 and clause 4), Article 19 (clause 3) and Article 58 (clause 2) of the Federal Law. Namely, the Federal Law as of September 19, 1997 "On basic guarantees of electoral rights and the right of RF's citizens to participate in a referendum*” // Bulletin of RF's Constitutional Court-1998-No. 5.
8. The decision of RF's Constitutional Court as of April 30, 1996 No. 11-P. This decision was aimed to verify constitutionality of clause 2 of RF's Presidential Decree as of October 3, 1994 No. 1969. Namely, the decree “*On measures to strengthen the unified system of executive power in RF*”. The decision was also aimed to verify constitutionality of clause 2.3 of the Regulation “*About the head of the administration of the federal territory, region, city, or autonomous region*”//Collection of RF's legislation.-May 6, 1996.-No. 19, 2320 p.
9. The decision of RF's Constitutional Court as of January 27, 1999 No. 2-P “*Interpretation of Articles 71 (Clause “g”), 76 (Part 1) and 112 (Part 1) of RF's Constitution*”//Collection of RF's legislation.-08 Feb 1999-No. 6, 866 p.

In addition to the above decisions of RF's Constitutional Court, the study also examines other states' constitutional courts' decisions. The study analyses decisions of constitutional control bodies of developed democracies. It should be noted that the constitutional obligation to eliminate the unconstitutionality of legal regulation is studied not in statics, but in dynamics, through the prism of the development of constitutional justice.

One reason for the negative effect of the rule of law is that the requirement of consistency is not sufficiently embodied in positive law (Dann, 2010). There may be only limited evidence of the requirement that legal texts should be consistent with Federal State Constitutions, the Basic Law and the treaties of the European Union. However, this equally applies to almost all general requirements of the rule of law. Thus, principles on the protection of legitimate expectations and on non-retroactivity, and requirements of legal certainty as well as the principle of proportionality should be embodied in the relevant legal texts. Nevertheless, these principles and

requirements have reached the status of recognized legal propositions and remain unaffected by recent case law.

RESULTS

There is a practice in some countries when a court finds a “*normative act*” or an international treaty in whole or in part unconstitutional, the document is considered void from the moment the decision is published. There are also cases when only political actors can challenge the constitutionality of normative acts and international treaties (Dann, 2010). In cases when a law is found unconstitutional, it may also result only in a recommendation to the legislature to review, revise or repeal the law. It is also takes place when a court does not have the authority to void statutory laws when considering individual complaints from citizens regarding the violation of civil rights.

Concerning the RF's practice, let us consider the decision of RF's Constitutional Court No. 9-P as of June 24, 1997. This decision notes Article 76 (Part 5) of RF's Constitution. The Article stipulates that the laws and other regulatory legal acts of RF's subjects must not contradict federal laws. In cases when such federal laws were adopted by RF, as well as jointly by RF and its constituent subjects¹. In the event of a contradiction between federal law and another act issued in the Russian Federation, a federal law shall prevail. This requirement applies both to the legislators in the constituent RF's subjects and to all law enforcement bodies.

In relation to Russian constitutional law practice, it can be noted that RF's Constitutional Court identifies the duty to maintain constitutionality of legal regulation. Thus, in the decision No. 14-P as of May 31, 2016, the constitutional control body recognized the impugned regulatory legal acts as consistent with the Constitution. It was indicated that RF's Government is obliged to regulate mandatory payments to road funds. Where it is not allowed to impose an excessive economic burden on owners of heavy vehicles. Economic feasibility of each specific payment (its size) should be analyzed. It is also important to take into account the interests of all levels of RF's budget system. The subjects of the corresponding constitutional obligation should also be specified. In particular, instead of the category “*legislator*” (which is traditionally used in comparable situations), the Constitutional Court identifies the subject of the corresponding constitutional obligation as the “*Federal Assembly*”. The effectiveness of the legislative process is determined not only by the legal activity of the chambers of the Federal Assembly, but also by President's legal activity. With the creation of the Constitutional Court, the possibilities, limits and even responsibilities of the legislator become the object of justice. Thus, the legislator is no longer free to interpret the Constitution as it pleases. The legislator is bound to its interpretation coming from the Constitutional Court.

In 2001, an attempt was made to concretize the obligations of lawmakers to eliminate deficiencies in legal regulation in the following situation. Namely, when the Constitutional Court of Russia recognizes the normative act as incompatible with the Constitution of Russia in whole or in part. Otherwise, when the Constitutional Court implies the need to fill in the gap in legal regulation. The said is in accordance with the Federal Constitutional Law “*On RF's Constitutional Court*”. The RF's Government is obliged to introduce a corresponding bill within 6 months to the State Duma in the following cases. Namely, if the normative legal act (federal law) is recognized as unconstitutional, or the act of RF's Constitutional Court implies the need to fill in a gap or contradiction in legal regulation (Federal Constitutional Law, 2001).

The RF's Government is defined in law as a special entity and thus is responsible for

initiating the legislative process if there is a relevant decision of the federal constitutional justice body. The said is an additional guarantee of compliance with the constitutional order. If RF's Government is inactive or delays introduction to the State Duma of a bill, then the federal legislator is obliged to implement the decision of RF's Constitutional Court. Moreover, according to RF's Constitution, the Federal Assembly is the legislative (representative) body of state power (Bondar, 2006).

The fact that the Russian Government was chosen as the subject of legislative initiative demonstrates a significant limitation in determining the subjects of constitutional obligation. The subject that might omit unconstitutionality is not the Government, but the legislator. Despite this, it is difficult to oblige the relevant body or its members (e.g. deputies) to introduce a legislative initiative to amend such inconsistency. Such difficulty is stipulated by the following aspects:

1. The number of legislative initiative subjects is limited (part 1 of article 104 of the RF Constitution);
2. A need for formal identification of such a subject;
3. The principles of autonomy and decentralization (lack of one-man management, hierarchy organization principles) of Parliament;
4. The free mandate of legislature members.

The Committee of the Federation's Council on Constitutional Legislation, Legal and Judicial Issues, and the Development of Civil Society made a statement in 2012. The statement was about the improvement of the mechanism for eliminating the unconstitutionality of legal regulation. It was stated that the mechanism for the implementation of decisions of the Constitutional Court of Russia requires a qualitatively new legislative regulation of this stage of constitutional proceedings. It was also suggested to introduce constitutional legal responsibility of RF's Government officials for failure to implement Constitutional Court's decisions.

However, in the situation of limited opportunities for the formation of effective mechanisms of legal responsibility at the appropriate level, a certain provisional effect can be achieved with the help of the following aspects:

1. The subsidiary nature of Government's involvement in the situation under consideration;
2. Introduction at a federal level of a formally defined response procedure to the relevant acts of the Constitutional Court of Russia. As noted earlier in relation to other situations, in particular, the President's obligation to sign and promulgate laws.

The obligations to implement the decision of RF's Constitutional Court (on the unconstitutionality of legal regulation) are, above all, the material obligations of law-making bodies to eliminate the situation of unconstitutionality. Such obligations, at the same time, have their own grounds for occurrence, deadlines, a specific procedure, and subjects of execution.

The failure to fulfill constitutional obligation cannot be ascertained based on the existence of a legal gap as such and the non-obvious effectiveness of the legal regulation (chosen by the legislator). It, therefore, cannot be resolved in the logic of constitutional control.

For example, the following is noted by RF's Constitutional Court in its Decision No. 15-P as of 19 May 1998. Namely, the lack of a mechanism for resolving possible disagreements between the notarial chambers and the judiciary (regarding joint issues) may in practice lead to the following:

1. A violation of the rights of persons interested in notarial activities;
2. Shortage of notarial services;
3. Other negative consequences (that the applicants pointed out in this case).

However, this is not a basis for recognition of the first and second parts of Article 12 of RF's legislation on notaries as contradicting the RF's Constitution (incl. it's Articles 3 and 11). The problem of ensuring appropriate legislative regulation should be solved by the legislator. A necessary condition for such a statement is the constitutional inadmissibility of the corresponding action (inaction) of a law-making nature.

At the same time, it is hardly possible to see clear criteria for stating a constitutionally significant gap, which opens up wide discretionary opportunities for RF's Constitutional Court. This kind of situation allows one to see at least a violation of constitutionally significant principles of equality and formal certainty in legal regulation. Non-compliance with such principles is considered by the RF's Constitutional Court as a sign of unconstitutionality of such law. In some cases, RF's Constitutional Court recognizes norms that do not meet the criterion of legal certainty (that is, contain gaps) as unconstitutional. In others, RF's Constitutional Court replenishes the legal uncertainty of norms by interpreting them constitutionally. Sometimes, RF's Constitutional Court states that it is not in the sphere of its competence to either interpret or fill in the gaps in the law (Sharnina, 2018). It is important to note that constitutionally significant gaps may relate to the following. First, non-fulfillment of constitutional obligation to regulate social relations. Second, the absence of one or another norm (group of norms) in a certain regulation that causes the situation of unconstitutionality.

The judicial obligation to fill in the gap in the legal regulation is also reflected in RF's Code of Administrative Procedure, namely, part 4 of Art. 216 state the following. The court may recognize a normative legal act as fully or partially invalid. The court may as well recognize an insufficient legal regulation of administrative and other public legal relations, which may entail a violation of the rights, freedoms and legitimate interests of an indefinite number of persons. In this case, the court has the right to oblige authorities, local government, other bodies, authorized organization or official (who have adopted the contested normative legal act) to adopt a new normative legal act. Such a new normative legal act that will replace a normative legal act recognized as invalid in full or in part (Civil Procedural Code, 2015).

The specificity of these duties allows a high degree of certainty to assess the effectiveness of their performance. Thus, according to the Information-analytical report as of April 15, 2015, the federal legislator in 2014 unfulfilled 36 decisions of RF's Constitutional Court (Secretariat of RF's Constitutional Court, 2014). Moreover, this document states the improvement of the situation with the enforcement of judicial acts. The delay in the legislative process in the State Duma is recognized as the main factor hindering the execution of the Constitutional Court's judgments. At the same time, the legislative process regarding the enforcement of Constitutional Court's decisions continues to be negatively affected by the fact that there are no legislatively established deadlines for the adoption of relevant federal laws. This situation raises questions about the possibility of the constitutional obligation of the legislative bodies to carry out lawmaking by order of some entities (including the courts). Along with the possibility of the effective implementation of these obligations (the difficulty to force the Federal Parliament to adopt a certain law). At the same time, the legislative (representative) bodies of the constituent RF's subjects have direct responsibility with specific deadlines for execution. Such bodies may also face the threat of dismissal by the highest official of RF's subject (head of the highest executive body of state power of the constituent RF's subject, as well as RF's President) (Federal Law, 1999).

This is due to the lower constitutional prescription of the mechanism of power organization at the regional level in comparison with the federal one. The comparable regional

mechanisms are unthinkable in relation to the Federal Parliament. In this case, there is the limited constitutional obligation and the practice adopted by the Constitutional Court of Russia to participate in positive lawmaking (assuming the right to determine the content of legal regulation).

In the context of a positive constitutional obligation to implement legislative regulation, it is appropriate to consider appropriate compensatory mechanisms. Among these, there is the possibility of the issuance by RF's President of decrees that fill the gaps in legal regulation. The decrees on issues requiring a legislative decision. Provided that such decrees do not contradict the RF's Constitution and federal laws. Such decrees are valid until the adoption of relevant legislative acts (Decision of RF's Constitutional Court dated April 30, 1996 No. 11-P). This approach also correlates with the wider position of RF's Constitutional Court. Namely, the mere attribution of a particular issue to the jurisdiction of the Russian Federation (Article 71 of RF's Constitution) does not mean that this issue cannot be resolved by normative legal acts other than the law. Except in cases when RF's Constitution itself excludes this, requiring the solution of a specific issue by the adoption of a federal constitutional or federal law. (Decree of RF's Constitutional Court as of 27 Jan 1999 No. 2-P).

It should also be noted that such a wide discretion of the Constitutional Court on the interpretation of the basic law of the state is not something new for the practice of world's constitutionalism. Western doctrine pays rather close attention to the issue of decision-making by the higher courts, which significantly affects both individual groups of public relations and the legal system as a whole.

The question of the admissibility of judicial activism, in this regard, is debatable. Allowing the judiciary to make final decisions regarding the interpretation of human rights inevitably entails giving them the opportunity to make evaluative decisions (Bilyalova et al., 2019). This contradicts the democratic ideal, according to which, if not all decisions, then at least all-important decisions should be made by the people or the body formed in the framework of electoral procedures. On the other hand, unlimited decision-making by elected representatives can also violate human rights, so there is a need to establish restrictions on "*elected branches of government*". Human rights, by their very nature, are these restrictions, but without the judiciary exercising control over such restrictions, they are not effective (Klatt, 2015).

From this, in particular, it follows that the courts, formed on a non-party (i.e. non-political) principle, in their decisions, should be guided by the ideas of justice and expediency that have developed in society, the so-called "*politics of law*", and not politics in its broader meaning. Meanwhile, studies of judicial decisionism also indicate that judges' decisions can be partially determined by their ideological (in the narrow sense of the term) preferences. Uncertainty regarding the influence of ideological preferences on judges' decisions can make it difficult to predict outcomes for the parties, which also affects the principles of legal certainty and the legitimate expectations of participants in public relations (Desrieux & Espinosa, 2019).

It is not possible to explain or to understand the existence of legislative margins of appreciation without explaining and understanding the content and supremacy of the Constitution. The supremacy of the Constitution is the reason for the obligations attached to internal legislative proceedings. It is important to note, however, that these obligations are not duties. The lack of fact-finding and the lack of reflection by Members of Parliament do not force the Constitutional Court to declare a statute unconstitutional; but without reflection the legislative margins of appreciation do not exist. The relationship between the legislative margins of appreciation and the fulfilment of legislative obligations is characterized by normative

connectivity, based on the principle of the separation of powers and the idea of compensation. Thus, legislative margins of appreciation, procedural standards and compensatory interventions by the Constitutional Court work like a system of communicating tubes.

DISCUSSION

Constitutional courts as legal subjects-supreme courts with the competence to review statutory legislation for compatibility with constitutional law (Tushnet, 2008) are a widely accepted part of many democratic political systems. Whether a judicial institution with the competence to declare legislative acts unconstitutional is compatible with the principle of democracy is, however, contested (Waldron, 2006).

In fact, there are two perspectives from which the operation of constitutional courts can be analyzed: either with a focus on their possible or actual safeguarding and fostering function with respect to democracy, or with a focus on how they may or do restrict democratic decision-making. To get a complete picture, both aspects must be considered.

On the other hand, courts with the power to apply constitutional rules even against a legislative majority will necessarily also come to attention as a factor limiting democratic decision-making. The power of a constitutional court can be misused (Tsindeliani, 2015). It is in the nature of things that in the usually difficult cases decided by constitutional courts, opinions on whether this power has been used properly or misused will typically be divided. There are no perfectly operational, invariable and cross-culturally valid standards determining interpretation and rule-making, law application and policy-making (Kau, 2007). Once a constitutional court has been established, it may assume a competence for judicial review, which the constitution has not conferred upon it explicitly; accusations of excess of power will inevitably arise. Opinions on whether such accusations are justified or not will inevitably be divided.

The Federal Constitutional Court of the Federal Republic of Germany has adopted decisions, by appeal of citizens living near the airport. Citizens have appealed that the legislator, although having passed a law against aircraft noise, but has omitted protection from airport noise. Citizens have noted that an article of the Basic Law protects the right to life and security of a person. In its decision, the Court took a fairly balanced position. It recalled that the constitution may require the legislator to amend the law, even if the law was consistent with it at the time of adoption. The court confirmed that, based on the results of the newly acquired knowledge, a check may be required to see if the changed circumstances do not lead to the revision of once adopted decisions. According to the Court, it can be argued that the legislator is obliged to change the original law against noise, since the frequency of flights has increased significantly since the adoption of the law, and the transition to jet aircraft has seriously complicated the situation with noise. At the same time, the Court recognized that the legislative and executive branches of government independently determine by what measures they fulfill their duties. The Court can conclude that it is unconstitutional not to take certain measures. Only if it is obvious that the original rules became defective in the changing circumstances, and, in spite of this, the legislator made no efforts or took obviously wrong measures in order to rectify the situation. In this case, given the lack of relevant scientific research on the limits of aircraft noise and the need to maintain international air traffic, the Court was unable to conclude that the legislator had clearly neglected its constitutional obligations (Avakyan et al., 2014).

In recent years, the courts seem, however, to have abandoned their previous restraint. In addition to judgments, which are in line with well-known constitutional requirements, the

constitutional courts of a number of countries, the German Federal Constitutional Court and the European Court of Justice are increasingly making decisions in which they actively develop general constitutional requirements on parliamentary legislation. These requirements go beyond known constitutional commitments to the rule of law, they relate to various matters (Payandeh, 2011), and their scope and intensity reach so far that they can be understood as a paradigm shift towards a comprehensive duty to rational and consistent legislation. According to the courts, the legislator must now consistently implement and design its own self-imposed main decisions; justify exceptions to the basic decision with a specific objective reason; correctly and accurately determine the current situation requiring a careful weighing of the relevant facts; introduce less intrusive alternatives into the legislative procedure; and demonstrate that proposed new rules serve to achieve the intended goal in a coherent and systematic manner (Cornils, 2011).

No matter what decision the court makes, such a decision, in any case, has a long-term effect on regulatory policy. All constitutional decisions include the choice of how to regulate state action. If the court decides to recognize the law as constitutional without further clarification, it approves the current regulatory system (Sarina et al., 2016). If the court declares the law invalid, but relies on the legislature to develop new rules, it also makes a regulatory choice. Indeed, the recognition of the law as constitutional forms, among state authorities and other participants in public relations, legitimate expectations that the contested approach to legal regulation is correct. The development of law in general and the work of the law enforcer, in particular, will correspond to the logic set forth in the positions of the higher courts (O'Rourke, 2015).

It seems that a strong judiciary, capable of playing the role of an important counterweight in the system of separation of powers, is possible only in developed law and order, characterized by a high level of legal culture.

A transparent and appropriate legislative process means that the advantages and disadvantages of a regulation can be properly surveyed. This process contains the requirements of producing logical, coherent and realistic laws; of consisting of clear norms; and having a recognizable, coherent and viable justification. Within these requirements, moreover, the facts and "*rationes decidendi*" are comprehensively and verifiably specified and are in general less invasive than the alternatives. With these requirements, the ideal of the modern, rational constitutional state seems to have been reached. What objections could be raised against these legislative obligations? There are several objections, a number of which relate to the paradigm shift heralded by the case law. It is assumed that the rules established by jurisprudence do not find a sufficient basis in the existing law. With the dynamic generation of general requirements, the courts have undermined basic decisions of constitutional law and European law (Lepsius, 2009), and placed their own conceptions of rationality above the decisions of the competent legislator (Axer, 2010). Consequently, they have increased the risk of paternalism (Dann, 2010), shifted the balance from the legislature towards the judiciary, and threatened the capacity of politics to enact reforms. In addition, it is feared that in the sphere of EU law, the national competency of Member States for areas not falling under EU competence is overridden by Europeanization following from the requirement of coherence (Axer, 2010).

If adherence to the law should be of any value as an explanation of the decision-making by the constitutional court, the court in question should act in a relatively mature legal tradition. While, in the latter, the rules of legal argumentation have developed, and where numerous decisions over the years have created a stable system of general legal and cultural values. At the same time, the legal culture in which the court operates should be focused on making a relatively

strict distinction between law and politics. That is, the distinction between making decisions based on the duty of judges to conscientiously seek the most convincing legal decision in a case, and making court decisions based on personal political preferences or party-political considerations (Roux, 2015).

Thus, the activities of the courts in the interpretation of legal norms are aimed, *inter alia*, at creating the stability of the rule of law. The constitution of the state, being the basis for all branches of law, is not only a reflection of existing social relations (which is why many researchers call it a social contract), but it also sets the vector for their development. In this regard, one can talk about the stability and reality of the constitution, which is provided precisely by the activities of the judiciary. This circumstance corresponds to the impossibility of making arbitrary, that is, inconsistent with established relations, amendments to the basic law of the state. That is why additional mechanisms for protecting the constitution are developed in constitutional theory and practice. One such mechanism, for example, is the doctrine of constitutional substitution, which originated in Colombia, and which assumes the existence of the right of the constitutional court to control the content of constitutional amendments.

In the 20th century, several constitutional courts followed the example of the Supreme Court of India in *Kesavananda Bharati v. State of Kerala* case. In which the court ruled that constitutional amendments may be void if they contradict some of the fundamental principles that make up the “*basic structure*” of the Indian Constitution. Similar arguments were formulated in the 19th and 20th centuries by American experts and disputed (albeit unsuccessfully) in American courts (Kay, 2018).

CONCLUSIONS

There is a debatable issue of the subject who is obliged to introduce a bill that eliminates the unconstitutionality of regulation. The uncertain interpretation of the provisions of Russian law gives rise to several approaches to solving this problem.

Any legislation attempting to steer society is predestined to be amended or derogated: eventually it will become obsolete, unable to keep pace with changing or emerging realities. It is thus a basic legisprudential claim that its justification must be conceived of as an ongoing process: the reasonableness of laws is not a static attribute, for it may depend on facts, which could not be anticipated nor assessed at the moment of their enactment. Increasingly, legislators are asked to contend with complex and rapidly shifting social environments or issues, and must often rely on uncertain prognoses. Yet, in our turbulent regulatory era, the post-legislative stage of the lawmaking cycle can no longer be regarded as a purely political matter. When the constitutionality of a piece of legislation depends on the verification of prognostic assumptions, the assessment of events and impacts occurring after its passage must have a place in judicial review. Still, even unbinding appeals to lawmakers can also be productive: not only do certain statutes become thereby marked as constitutionally precarious, but also, and above all, *ex post* evaluation finally enters the constitutional discourse—thus filling an old gap in juristic accounts of lawmaking.

At the same time, a conclusion is drawn about the possibility of overcoming the gap of legal regulation through judicial activism. The problem of absence of a normative legal act that should regulate certain legal relations is common both for the Constitutional Court or other authorized body, which repealed this act, and for the parliament, which adopted this act. In this case, the legislator should be responsible for the timely amendment of the legislation in

accordance with the Constitution and developing public relations. Lawmaking is a dynamic activity and should always be adapted to a changing world, take into account current trends, and, most importantly, clearly observe the Constitution.

There might be cases when the right provided for by the Constitution is practically impossible to exercise due to the lack of a legal mechanism for its implementation. While the latter was recognized as unconstitutional by the Constitutional Court. It is necessary to foresee such situations and make sure that gaps in the legislation, if they appear, are eliminated as soon as possible. Thus, in practice, the following measures regarding the legal framework of RF should be taken:

1. The elimination of gaps in the legislation is regulated by the Constitution, the law on the Constitutional Court and the rules of parliament;
2. Setting deadlines for parliament to adopt a new law that will govern those relations that are not regulated in connection with the recognition of the previous law as unconstitutional.

ENDNOTE

1. The Russian Federation consists of republics, krais, oblasts (regions), cities of federal importance, an autonomous oblasts (regions) and autonomous okrugs, which are Russian Federation's constituent subjects.

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