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The Issues of Decisionism in the Implementation of the Constitutional Authority

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Abstract

The article deals with the problematic of constitutional decision-making, decisionism and constitutional duty in the constitutional law system via comparative qualitative research methods. As a result, the methodology for determining relevant legal decisions that are objectively related to the object of constitutional-legal relations is the issue of constitutional-legal decisionism. Summing up the analysis of the perspectives of the problems of constitutional legal decisionism, it can be said that it contains questions related to the development of a constitutional legal decision.

Keywords: Constitutional, Decision-Making, Duty, Policy, Law.

Los temas del decisionismo en la implementación de la autoridad constitucional

Resumen

El artículo aborda la problemática de la toma de decisiones constitucionales, el decisionismo y el deber constitucional en el

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sistema de derecho constitucional a través de métodos comparativos de investigación cualitativa. Como resultado, la metodología para determinar decisiones legales relevantes que están objetivamente relacionadas con el objeto de las relaciones constitucional-legales es el tema del decisionismo constitucional-legal. Resumiendo el análisis de las perspectivas de los problemas del decisionismo legal constitucional, se puede decir que contiene preguntas relacionadas con el desarrollo de una decisión legal constitucional.

Palabras clave: constitucional, toma de decisiones, deber, política, derecho.

1. INTRODUCTION

The subject area of the solution issue as such is not limited to any one branch of knowledge, or medicine, engineering, economics, other industries, and directions confront it. In modern medicine, very close attention is paid to a medical decision. Quite fundamental works have been published in medical decision making. The main attention of them is focused on decision-making tools that increase the likelihood of achieving the desired treatment outcome in clinical practice. In economics, in turn, this issue is represented by the definition and assessment of alternative courses of action and the selection of a suitable model in a specific situation. It includes determining the acceptable alternative courses (models) of development and directly choosing the most suitable alternative (Jones & Werner, 2003: Gamarra et al, 2018: Baya et al, 2019).

The focus of the problems of decision making in legal science and practice is functionally logically similar to those in other branches

of knowledge. The issue of the concept of a constitutional legal decision is closely related to the sociology and philosophy of law, resting on the problems of public administration, the politics of law and the ideology of law. At the same time, it is important to determine - in terms of which philosophical and legal approaches it is worth looking at this issue. This will largely determine the coordinate system based on which the elements of the category of the legal decision should be determined, and subsequently, the evaluation criteria (determinants).

For example, focusing on legal centralism, you run into a hierarchical normative order and legalistic-positivist approaches, which inevitably leads to a crisis of a prescriptive understanding of the law. From the point of view of the concept of legal centralism, the law is a uniquely systematic and hierarchical normative order, consisting of norms that go from top to bottom from the sovereign team (Bodin, 1576), or from top to bottom as more high legal force or recognition. In any case, when subordinate norms, which make up the right, have the necessary authority based on their place in the hierarchy of norms, what they come from - a sovereign team, a basic norm or recognition rule - is always a given (Desrieux & Espinosa, 2019; Shestak et al., 2019).

Focusing on legal pluralism, you relate to the correlation of public order and narrowly legal order (for example, their opposition), the assessment of the legal component in a social context, the effectiveness of the law, etc. Legal pluralism is a fact. Legal centralism is a myth, an ideal, a claim, an illusion. One way or another, the

ideology of legal centralism had such a strong influence on the imagination of lawyers and social scientists that such a picture of the legal world could easily pass itself off as a fact and formed the foundation of social and legal theory (Griffits, 1968).

Recently, a request for the development of law (legal reforms) has been more and more clearly seen in Russia, however, it is far from being implemented, since only a certain part of the legal corporation is its driving force. Meanwhile, the state of the political and legal systems in Russia does not allow such a dialogue to be institutionalized, which is largely due to the specifics of the Russian constitutional and legal development. Russian political and legal consciousness still reflects many features of Soviet and pre-Soviet history. Its socio-cultural basis was a rigidly centralized (essentially unlimited) power, which, as it was, towering above society, bears elements of syncretism of pre-bourgeois societies (the monarch is the anointed of God, the state is the owner of the main means of production, the ideology of the only ruling party, merged with the state, fulfills the role of a peculiar secular religion, etc.) (Muromtsev, 2006). Such a political and legal construction presupposes a severe restriction on the freedom of an individual who does not take part in solving the most important issues of social and political life; the party-state power thinks for him. The effective functioning of such a regime is possible only in a strong state, involving a rigid vertical of power. Here, the individual is accustomed to strict regulation of his behavior, and it is built in the framework of the legal axiom only what is permitted by law is permitted. This model of power is based on the

passivity of members of society whose purpose is to approve the decisions of the authorities and provide them with popular support. In the Russian tradition, the expansion of personal freedom of citizens (or subjects of the tsar, the emperor) has traditionally been associated with "a crisis of power, with its inability to return social relations to a strict regulatory framework" (Malko, 2010: 17). This remark is of the utmost importance when it comes to the methodology of developing a constitutional and legal decision as a result of law-making (in the broad sense) activity.

The legal decision, in every way, forms the core of law-making activity, which tends to a certain type of socio-culture - and the type of socio-culture is largely mediated by the approach to law and the constitutional tradition. On the other hand, studies of the mechanics of judicial decisions also indicate that judges' decisions may be partly determined by their ideological preferences. However, the uncertainty regarding the influence of ideological preferences on judges' decisions makes it difficult to predict outcomes for the parties (Garoupa & Ginsburg, 2009). The Russian legal science and law enforcement are largely distinguished by its attraction to legal studies, to the assessment of form, rather than to an empirical assessment of the object of analysis of lawmaking.

The issues of the methodological solution have long been the object of scientific attention of legal scholars - representatives of the methodological direction of jurisprudence empirical legal studies (ELS). Vividly illustrates the difference in approaches, for example, the fact that Western science increasingly says that the connection

between the architecture of the institute and its effectiveness is not as obvious as it might seem at first glance, while Russian science almost always directly relates the effectiveness of the system with its institutional component (although not always).

It is worth paying attention to the conclusion of the representatives of the Chicago School of Law based on the results of a large-scale comparative legal study using an empirical technique that the relationship between the structure of judicial councils [judicial bodies] and the quality of enforcement is insignificant, as well as the extent to which institutional decisions are effective in the context of the problem of judicial independence (Chemerinsky, 2012). In most European countries, independent juries are used in litigation. On the one hand, the use of representative juries can serve as the basis for legitimacy. The integrity of any justice system ultimately depends on how abstract and fair court decisions are for all accused, without any jury prejudice. Thus, the jury's decision-making mechanism is also of great interest and the need to confirm it as the fairest and independent or to refute these words (Hans, 2008). Jury decision-making motives are a separate issue for research.

The methodological basis of lawmaking was rather actively discussed in Soviet legal science. Attention was paid to the issues of sociological support of lawmaking. The crisis of centralism can hardly be associated solely with the Soviet legal system and legal science: in the latter, nevertheless, rather deep attention was paid to the empiricism of law-making activity, in Soviet law. At the same time, one should not forget about such aspects inherent in Soviet law as,

firstly, the ideologization of all spheres of public life and, secondly, the lack of an independent judiciary - de jure and de facto, which significantly devalued sociological methods in jurisprudence.

The issues of legal decisions (the motivation for their adoption, their forms, approaches to implementation) in Russian legal science are very fragmented. This makes it necessary to study this issue in more detail, which is the purpose of this work. To achieve this goal, it is necessary to solve the following tasks:

- Analyze and compare the works of domestic and foreign legal scholars on the mechanism, motivation, and specifics of decision-making.
- Identify the issues of decision-making in state legal institutions.

Studies of legal policy and law policy can be considered a certain attempt in this direction. Meanwhile, the understanding of legal policy in Russian doctrine tends, as a rule, in the aspect of state and legal development, to a potestas paradigm, and in terms of the object composition of legal policy to legalism.

2. METHODS AND MATERIALS

Based on the works of research lawyers, political scientists, court records, it has been conducted analysis to uncover the specifics of the problems and the functioning of the decision-making mechanism in state institutions.

3. RESULTS

The issues of developing a solution (decisionism) are closely connected with the category of ideology, the latter in its different sense (both official ideology and ideology of law and order as such) can predetermine a decision. Domestic studies of ideology as a constitutional-legal category, as a rule, largely related to its prescriptive manifestation, which is inherent in the scientific clusters of the post- potestas block. This determines the approach of the Russian science of constitutional law concerning the understanding of ideology.

It is reasonable to believe that an ideology defined prescriptively can either directly mediate certain legal decisions, or be a means of legitimizing those. This can be quite clearly seen in the acts of the Presidium of the Supreme Soviet of the USSR, the legislative acts of the USSR and union republics - the relationship between a legal, specifically defined ideology and the adoption of a specific legal decision (both a regulatory and a casual act) can be almost direct. Meanwhile, in the constitutional and procedural practice of the USSR — especially in the late period — acts of constitutional supervision are devoid of any ideological connotation, however, as they lack even a detailed substantive motivation, they are distinguished by a very scanty character of presentation.

Meanwhile, the acts of the Committee on Constitutional Supervision created in the last years of the Union of Soviet Socialist Republics are lack of deep motivation and sometimes completely

absent. Many acts of the Committee, which have resolved essentially complicated legal issues, fit on half a page of A4 format and in no way detract from their legal significance, although such an approach of brief motivation is still far from perfect. The absence of a detailed substantiation of the law does not provide an idea of the decision-making methodology, and with what circumstances, social factors, goals, and values of the rule of law, the constitutional oversight body associates one or another of its approaches in resolving an incident.

The issue of ideology in constitutional law lies on various planes - from the very definition of the meaning of the concept of ideology in the scientific and theoretical dimension in its relation to a prescriptive understanding of the relationship between ideology and legal policy. The latter is on the sidelines of modern domestic science of constitutional law, often being only a shadow of industry-specific vector regulation. A certain part of modern research (mainly theoretical and legal) is devoted to theoretical issues of the content of legal ideology in the context of the problems of correlation of liberal and conservative legal approaches[1]. However, it is important to make a remark that here it deals with the ideology of law in the rule of law in general (which is close to the politics of law), and not about a narrow (prescriptive) understanding of ideology within the meaning of the Soviet approach, reflected (only with a minus sign) in part 2 of the article 13 of the Constitution of Russia (O'Rourke, 2016).

The ideology of law and order in the minds of judges (and not ideology within the meaning of part 2 of Article 13 of the Constitution of Russia) in the paradigm of state legal development can have a

decisive influence on the constitutional and legal decisions. This can be seen in the example of the US Supreme Court, where the views of judges and the ratio of the number of judges of a certain ideological orientation often determine the choice of a particular political and legal position, and, accordingly, the outcome of the case. At the moment, there is a close relationship between membership in a particular party and attitudes towards the Affordable Care Act. The question is whether the judges of the Supreme Court will follow this example. It would be a mistake to believe that the adoption of judicial decisions in constitutional cases in such areas is entirely the result of taking precedents and doctrines into account and is not influenced by the larger ideological views existing in society on these issues (Chemerinsky, 2012).

At the same time, modern studies show that laws recognized as unconstitutional in the United States can (conditionally) remain in the books since the legislature (legislative body) has no constitutional obligation to repeal them. Some constitutional courts draw up their decisions in such a way as to be sufficiently specific on what may be required to rectify a constitutional defect in the law. In Central and Eastern Europe, lawmakers often verbatim follow court decisions by amending laws that have been declared unconstitutional. The aforementioned actualizes the issues of the constitutional obligation of law-enforcement bodies to correct legislative defects.

4. DISCUSSION

If one tries to formalize the indicated issues of the constitutional-legal decision, it can be concluded that the constitutional-legal decision in the narrow sense is a methodologically justified motivated position adopted by the subject of jurisdiction within the framework of its discretionary powers, as relevant as possible to the actual circumstances and legal conditions. It must be assumed that a transparent methodological basis for the solution is an a priori feature of the modern democratic rule of law.

It will be justified to conclude that all constitutional and legal decisions include the choice of a model of how to regulate the actions of the state. When the court upholds the law without further clarification, it supports the existing system of regulating the activities of the executive branch. When the court recognizes the law as invalid, it relies on the legislative branch will create new rules governing the actions of the executive branch; it also makes a regulatory choice.

In this regard, the composition of questions to which the subject of jurisdiction answers when making a decision will be of the utmost importance from the perspective of constitutional legal decisionism. For example, when a panel of judges makes a decision on the constitutionality of a law or the actions of authority, one of the factors that can influence the decision will be the uniformity of judges' perception of the issue of law in a particular case. If the judges believe that they are considering the constitutionality of various issues, their purpose of adoption decisions is likely to diverge. That is why it is

reasonable to assume that the decisions of the bodies of constitutional review should directly formulate the very question of law that is raised in the case. This increases the systematic mechanics of decision making.

An attempt to build a coherent empirical methodology for developing a constitutional legal decision was made by Alexy (2008) in his developed methodology for applying the principle of proportionality using mathematical formulas for the ratio of opposed constitutional legal principles. Alexy (2008), determining the ratio of constitutional principles opposed to each other, comes to some conditional mathematical formulas of their ratio. Here, for example, is how his formula for correlating the weight of competing legal principles is presented:

$$W_{i,j} = \frac{W_i \cdot I_i \cdot R_i^e \cdot R_i^n}{W_i \cdot I_i \cdot R_i^e \cdot R_i^n}, W_{i,j} \to 1 \qquad (1)$$

where P_i, P_j are comparable (competing) legal principles, W_i is the abstract (ideal) weight of P_i relative to other principles, but regardless of the circumstances of a particular case, I_i is the intensity of objective obstacles to the implementation of P_j, R_j^e is the reliability of normative assumptions to assume that the implementation of P_j and the non-realization of P_i, R_i^n are necessary - the reliability of the regulatory assumptions to believe that the implementation of P_i and the non-realization of P_j, $W_j$are necessary - the abstract (ideal) weight of P_j relative to other principles, but whatever the circumstances ca, I_j - the

intensity of objective obstacles to the implementation of P_j, R_j^e - the reliability of empirical assumptions to believe that it is necessary to implement P_j and the non-realization of P_i, R_j^n - the reliability of regulatory assumptions to believe that it is necessary to implement P_j and non-realization P_i.

At the same time, Kucherenko (2011) also recognizes the use of empirical methods, although he speaks of the pressure of ideology in decision-making, although it does not completely cover it with an ideological element. He prefers to consider the constitutional-legal decision as to the result of an interpretive technique, constitutional doctrines and the principle of neutrality.

In Russia, constitutional legal decisionism is practically not mentioned, however, researchers sometimes raise this issue. For example, Kucherenko (2011) draws attention to the issues of decisionism in the context of the activities of expert and analytical units of the presidential apparatus. Independent experts represent the very factor that can significantly correct the information-analytical asymmetry between the president and internal advisers. Such an external correction of informational-analytical asymmetry is some guarantee that the president gets access to information that advisers are not interested in providing the president with or that they do not have at all.

The founder of decisionism, Schmitt (2005), in his works focused on the preservation of statehood as a key element of goal-setting, which determines the completeness of sovereign power and the absence of restrictions on its jurisdiction. In this regard, in the

methodological part, Schmitt's (2005) approach is more than justified. Nevertheless, from a substantive legal perspective, one can argue with him for a long time and stubbornly about the limits and arbitrariness of the discretion of the sovereign in decision-making. The methodology for determining relevant legal decisions that are objectively related to the object of constitutional-legal relations is the issue of constitutional-legal decisionism.

5. CONCLUSIONS

Summing up the analysis of the perspectives of the problems of constitutional legal decisionism, it can be said that it contains questions related to the development of a constitutional legal decision, the subject area of which is: in the internal plane - the ratio of constitutional law norms, principles, doctrines and values, in the external planes - forms of expression of substantive elements (constitutional norms, laws, judicial precedents, conventional agreements, etc.), as well as relevant significant external conditions.

If you refocus your view on the practice of exercising public authority in Russian constitutionalism, you can state that the political system and the legal system, gravitating towards centralism, have a chaotic, often manipulative and reactionary nature of the decisions made, as well as the paradigm - decision first, then justification (which, in turn, is largely related to the practice of functioning of the institution of the head of state). Unfortunately, this problem is typical

for many Russian government bodies and structures, which justifiably raises criticism (Chemerinsky, 2012).

When it comes to discretion of a public authority or a person filling a public post, including when exercising a constitutional obligation, in Russian legal reality, as a rule, it is assumed that such discretion in itself implies the possibility of making an arbitrary decision, which clearly diverges with the constitutional meaning of the principle of separation of powers, the principle of legal certainty, validity, etc. Meanwhile, the authors are aware that driving absolutely all decisions made by the subjects of jurisdiction into strictly empirical methods in itself looks very utopian. It is necessary to find a reasonable balance - such that positing decision-making methods in those areas of relations where it is possible (say, in the legislative process and normative control), it gave a synergistic effect on other areas by analogy, which creates an empirical basis and a field for further research.

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