

DIRECT EFFECT AND APPLICATION OF PROVISIONS OF THE CONSTITUTION OF THE RUSSIAN FEDERATION: THE QUESTION OF THE DELIMITATION OF CONCEPTS

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The article is devoted to the theoretical and practical problems of direct effect of the Constitution of the Russian Federation.

The purpose of the study is the delineation of concepts of direct action and the direct application of the Constitution. The proposed topic is very relevant, because nowadays, when the Russian Federation is striving to build a rule-of-law state and a developed civil society, the theoretical and practical bases of the direct action of Constitution require a scientific justification.

The methodological basis of the study was: a formal-logical method that made it possible to clarify the properties of the Constitution of the Russian Federation, distinguishing it from the statics and dynamics from other regulatory legal acts. The practice of direct enforcement of the Constitution was analyzed with formal-legal method.

The authors analyzed theoretical material: the works of Vengerov A.B., Vitruk N.V., Grevtsov Yu.I., Kokotov A.N., Kravets I.A., Lychin V.O., Nevinskii V.V., Ebzeev B.S., - as well as empirical data - decisions of the Constitutional Court of the Russian Federation and other courts.

The authors came to the conclusion that the direct effect of the Constitution of the Russian Federation is a legal feature of the norms of the Basic Law, that are implemented irrespective of the existence of normative legal acts that specify them. Even if it is necessary to specify the norms of the Constitution, clarifying rules are created on the basis of constitutional legal requirements and only develop them for the purpose of implementation. Direct application of the Constitutional rules is only one of the forms of its implementation, according to Art.15 (1) of Russian Constitution.

Key words: constitution, direct effect of the constitution, direct application of the constitution, human and civil rights and freedoms, legal features of the constitution, implementation of the constitution, enforcement of the constitution.

Информация о статье:

Дата поступления – 09 августа 2017 г.

Дата принятия в печать – 10 февраля 2018 г.

Дата онлайн-размещения – 20 марта 2018 г.

Article info:

Received – 2017 August 09

Accepted – 2018 February 10

Available online - 2018 March 20

1. Introduction

Despite the long period of the existence of the Constitution of the Russian Federation and postulate of Art. 15: "The Constitution of the Russian Federation has the highest legal force, direct effect and is applied throughout the Russian Federation" legal certainty in the matter of "direct action" and "application" of the Basic Law of the Russian Federation is still missing, however, as there is no legal interpretation of the data terms. Often, the application of the Constitution of the

Russian Federation is expressed in a formal reference to its article without reproducing the text in other legal acts, for example, in judicial decisions [1, p. 17].

In the context of the question of the direct effect of the Constitution of the Russian Federation, it seems appropriate to clarify what constitutes an "action" of the Constitution, what is its relation to "implementation," including application as one of the forms. In the process of analyzing scientific literature, we found the following positions.

2. Direct action of the Constitution is determined through forms of implementation of the law

For example, B.I. Kozhokhin wrote that the direct effect of the Constitution is limited and can not be regarded as the only way to implement it. In his opinion, the Constitution as a legal act, which forms the foundation of the entire legal system of the state, is implemented directly (as a politico-legal document of direct action) in the process of application, and with the help of the entire body of legal, political and moral-ethical norms used in this state [2, p. 88]. That is, in this case, the author considered not so much the "direct action" of the Constitution as the possibility of its application without mediating legal acts which is one of the forms of implementation of the Constitution.

Yu. I. Grevtsov also draws attention to the direct operation of the Constitution, which first of all deals with the possibility of its direct application by general courts in order to ensure the implementation of the fundamental rights and freedoms enshrined therein or for protection. He singles out the sign of the direct effect of constitutional norms: their real and direct application by the general courts, that is, if a particular norm of the Constitution is applied directly by the general courts, then it has a direct procedure of action. If, however, the general courts can not recognize or defend the subjective right enshrined in the constitutional norm, relying only on the text of this norm, therefore, to consider such a constitutional norm as having a direct effect of sufficient grounds, in his opinion, there is no [3, p. 94-96].

A similar approach is also encountered in the speech of I.A. Aleshkova, who marked two types of application of the Constitution: direct (basic) and indirect (derivative carried out by the courts of general jurisdiction.) First, it is carried out within the framework of procedural activity and represents both the application of a specific constitutional norm (constitutional norms, and the application of a specific constitutional norm (constitutional norms) in conjunction with the norms of other laws that specify its provisions, in substantiating and issuing a judicial decision. The second - carried out by courts of general jurisdiction and within the framework of procedural activities, and is an application of rules of law, where the constitutional norm has been concretized in conjunction with the legal positions of the Constitutional Court of Russia [4, p. 110]. From our point of view, this kind of division is not justified, since the Constitution itself, having fixed the direct effect of its norms, does not point to those that do not. Moreover, the basis for the "verification" of direct action is placed only by the direct application by the courts of the norms of the Constitution, which is much narrower than the term "action" itself.

Chirkin V.E. "Direct action means that the constitution must be directly applied by the highest authorities of the state, officials, courts. It should be used and executed by citizens, stateless persons, public associations, legal entities, etc." [5, p. 61]. Again, only the term "application" is used, a performance that seems to be a very limited approach.

A.B. Vengerov writes on this subject: the direct effect of the Constitution means that for the first time the court, the executive authorities had the opportunity to legally apply the provisions of the Constitution to resolve specific disputes, use these norms to issue substantiated administrative acts, examine complaints and applications of citizens [6, p. 48-55]. He also notes that "the direct effect of the Constitution has become an integral element of the application of law. Two main forms of direct application of the Constitution are clearly visible: with the help of the Constitutional Court, which has an appropriate procedure for this, and with the help of other law enforcement agencies, including ordinary courts" [7, p. 513, 518].

Arguing about the direct effect of the Constitution of the Russian Federation, it is appropriate to suggest paying attention to the direct effect of the law, which, according to B.I. Gogurchunov

and M.B. Gogurchunova, is understood as a form of exercising the right, i.e. the property of legal norms without any specific acts to exert direct regulatory influence on everyone to whom they are addressed, as well as the associated possibility of citizens' demand for protection, i.e. ensuring their rights, with reference only to these provisions of the law [8, p. 38-40].

We believe that the above positions suffer the main drawback - consideration of the "direct action" of the Constitution only through the prism of its application. From our point of view, this approach is unacceptably narrow, since even a direct action and direct application of the Constitution of the Russian Federation is demarcated, which speaks of various semantic loads of these concepts.

3. Direct action of the Constitution is not equal to its implementation

Thus, V.O. Luchin notes that "the operation of the Constitution shows its readiness to exert an actual influence on public relations. Implementation begins when the relevant actors have used the Constitution, and its regulatory influence finds its object. "Action" and "implementation" of the Constitution are considered by him as different facets, characteristics of the same phenomenon [9, p. 63-64].

B.S. Ebzeev, also recommending not to confuse the notion of "action" and "realization" of the Constitution, proposes to highlight the dynamic and static aspects of its operation, the latter being understood as the operation of the Constitution from the moment of its announcement, from the same moment its decisions are binding for all subjects of law, it extends to the entire territory of the state. However, the "operation of the Constitution" also has a dynamic side, it means its introduction into the fabric of social relations as a limiter of public power and guaranteeing the rights of the individual as the main features of a law-governed state with its characteristic unconditional supremacy of law [10, p. 6-7].

A.N. Kokotov, while sharing the "action" and "implementation" of the Constitution, rightly points out that "it acts in space (the territory of the Russian Federation), in time (since December 25, 1993, in certain cases its norms may be addressed to relations, arisen earlier than this date), in a circle of persons (in respect of all who are under the jurisdiction of the Russian Federation). The implementation (implementation) of the Constitution, its norms, fundamental rights and freedoms is a characteristic of the actions of subjects of law in relation to the extraction from the Constitution of the opportunities inherent in it, the legal "use values". Elementary ways of implementing the Constitution by subjects of law: use, observance, execution, application - depend on the nature of constitutional norms" [11, p. 60]. It is difficult not to agree with this position.

I.A. Kravets singles out the levels of direct action of the Constitution: "The first level is the direct implementation of constitutional norms and methods of their protection by citizens of the Russian Federation and other individuals, and in cases provided for by constitutional legislation and legal entities. The second level is the application of constitutional norms by courts of general jurisdiction and arbitration courts in the resolution of specific cases. The third level is the application of constitutional norms in constitutional legal proceedings in the exercise of certain powers of the Constitutional Court of the Russian Federation" [12, p. 368]. In this case, the question arises: and on the bodies of state power that are not relevant to the judicial system of the Russian Federation, the direct effect of the Constitution does not apply? This position is somewhat truncated, due to the fact that only the courts are involved and, supposedly, only in their work it is possible to see the realization of this property of constitutional and legal norms.

It is noteworthy that VO Luchin [9, p. 89], BS Ebzeev [13, p. 284] adhere to the idea that there are two forms of the operation of constitutional norms: direct, direct - when the Constitution can be applied directly, without concretizing its legislation, and indirectly - when the achievement of certain goals is impossible without applying the norm specifying the Constitution. We believe that speech here is not about action, but about two forms of realization: direct and indirect, which is very narrow, since the concept of "direct action" includes the implementation of constitutional provisions, and not just application.

The direct effect of the Constitution is legislatively separated from its direct application, therefore, we believe that "direct action" is a term particularly relevant for a person and a citizen

who, referring to this property, may require public authorities directly applying the Constitution to protect their rights and freedoms. In theory, the category "direct action" includes:

- the operation of the Constitution in time, in space, in a circle of persons;
- execution, compliance, use of constitutional norms;
- Orientation and the requirement to public authorities to directly apply the norms of the Constitution.

Some authors attempted an in-depth study of the direct effect of the Russian Constitution, but they were able to give basically only the characteristics of this phenomenon.

For example, A. N. Kokotov, under the direct action of the Constitution of the Russian Federation, suggests the following: first, the right of individuals to direct, direct use of constitutional rights and freedoms; secondly, it means the duty of all subjects to whom constitutional prohibitions are addressed, to observe them directly; thirdly, it means the duty of authorized subjects to directly execute, apply binding constitutional norms [11, p. 6-61].

RV Shagieva under the category "direct action" of the Constitution means only those cases of its direct influence and implementation that are related to the specific activity of citizens, other addressees of the Constitution in the political, legal and socio-economic spheres, when everyone can use the provisions of the Constitution most profitable to fulfill their legitimate interests [14, p. 13]. In the context of such an approach, the idea of "action" is lost, and implementation remains, that is, the direct activity of the subjects.

V.M. Antonenko formulates the definition of the concept of "direct action" as follows: "This property of the constitution to act as a direct regulator of social relations without the need for its detailed elaboration in normative legal acts" [15, p. 6]. The approach is very interesting, but at the same time, he calls into question the necessity of the existence of normative and legal acts acting on the territory of the Russian Federation.

In our opinion, N.V. Vitruk came closest to revealing the essence of the "direct action" of the Constitution, who found that the direct effect of the RF Constitution is manifested, first, in its supremacy in the legal system: laws and other legal acts adopted in RF, should not contradict the Constitution of the Russian Federation (Part 1, Article 15); second, in the determining regulatory impact of constitutional provisions on all sectoral (current) legislation; thirdly, in free, proactive activities of subjects of social relations on the basis of constitutional provisions (for example, the exercise of each of their constitutional freedoms); Fourth, in the direct application of constitutional norms by courts and other law enforcement agencies and their officials in the absence or contrary to the existing sectoral regulation in case of its contradiction with constitutional provisions [16, p. 151-152].

V. Nevinsky points out some problems that arise when the direct effect of the norms of the Russian Constitution is placed in the "absolute": 1) many constitutional norms by virtue of the very nature of the Constitution are so abstract that the citizen and the court are not able to apply them in solving a specific business; 2) on the way of the direct action of the norms of the Russian Constitution, there are obstacles in the form of the reservations and limitations contained in it, which can be overcome only through additional legal regulation in the event of favorable social, economic and political conditions; 3) the direct effect of certain norms of the Constitution of the Russian Federation formulated specifically and without formal constitutional restrictions can be restrained by the lack of political decisions on certain critical issues in the life of society and the state; 4) the importance of direct enforcement of the norms of the Constitution of the Russian Federation is improved law enforcement of judicial bodies, primarily the Constitutional Court, the Supreme Court [17, p. 65-79].

4. Practice of judicial support of direct action of the Constitution of the Russian Federation

Undoubtedly, in practice, the direct effect of the Constitution of the Russian Federation causes not only problems, but also some perplexity. Unfortunately, the state authorities are not always interested in the Basic Law acting directly, in particular, it is enough to turn to the articles of Chapter 2 "Human and Citizen's Rights and Freedoms". Article 31, which states: "Citizens have the

right to assemble peacefully, without weapons, to hold meetings, rallies and demonstrations, marches and pickets", has a direct effect, that is, it contains rules of conduct that, in theory, can be implemented without any reservations, without specifying legislation. However, the state authorities considered it necessary to create a federal law of June 19, 2004, No. 54-FZ "On Meetings, Meetings, Demonstrations, Processions and Picketing", which concretizes this norm of the Constitution, which runs counter to the theory of direct action of the Constitution. In one of his speeches, V. Putin said: "We can not restrict the citizens' right to freedom of expression, but one should not interfere with those people who do not participate in street activities. Law enforcement practice should in no way limit the democratic rights of citizens to express their will and express their position, including through street processions. But all this should be organized so as not to harm citizens who do not participate in these events". It is noteworthy that the Constitutional Court in its Resolution of May 18, 2012 No. 12-P clarified the following: " The right to assemble peacefully, without weapons, to hold meetings, rallies and demonstrations, marches and pickets, guaranteed by the Constitution of the Russian Federation and the international- legal acts as an integral part of the legal system of the Russian Federation (Article 15, Part 4 , The Constitution of the Russian Federation) is not absolute and can be restricted by the federal law for constitutionally significant purposes. Accordingly, such a federal law should provide for the realization of this right and, at the same time, the observance of proper public order and security, without prejudice to the health and morality of citizens on the basis of the balance of interests of the organizers and participants of public events, on the one hand, and third parties, on the other, the need to guarantee the state protection of rights and freedoms to all citizens (both participating and not participating in a public event), including by introducing adequate prevent and prevent violations of public order and security, the rights and freedoms of citizens, as well as the establishment of public liability for actions, their violating or threatening their violation". But what about the direct effect of the norms of the Constitution of the Russian Federation? In our opinion, it remains here considered, because the duty of the state in accordance with Article 2 of the Constitution: "Recognition, observance and protection of human and citizen's rights and freedoms". Therefore, in the context of the submitted federal law, it is the state that cares about creating adequate conditions for holding rallies, demonstrations, processions and picketing. For the rights and freedoms of some should not conflict with the rights and freedoms of others.

Article 33 of the Constitution of Russia tells us that citizens have the right to apply personally, as well as to send individual and collective appeals to state bodies and local self-government bodies. On the idea, without concretizing its Federal Law "On the procedure for consideration of applications of citizens of the Russian Federation", it is hardly possible to adequately perceive this norm. However, in Resolutions of July 18, 2012 No. 19-P the Constitutional Court of the Russian Federation itself expressed the following legal position: "The operation of the Federal Law" On the Procedure for Considering Appeals of Citizens of the Russian Federation, "as follows from Part 1 of Art. 1 and part 1 of Art. 2, extends to appeals sent to public authorities, local governments and officials. In itself, such a definition of the circle of addressees of citizens' appeals is consistent with the provisions of Article 33 of the Constitution of the Russian Federation, which does not directly imply the need for legislative consolidation of guarantees of the rights of citizens when referring to independent subjects of legal relations other than public authorities and their dignitaries".

Another example, connected with the principle of separation of powers. The applicant was the State Duma of the Tomsk region. The subject of consideration were the provisions of the RF Government Regulation, according to which the draft federal law received for conclusion to the Government of the Russian Federation without a financial and economic justification and other necessary materials is returned by the Government Office to the subject of the right of legislative initiative without presenting an opinion. Position of the applicant: the challenged norm violates the right of legislative initiative of the subjects authorized for its implementation by the Constitution of the Russian Federation, in particular, legislative (representative) bodies of subjects. As a result, the Court recognized the disputed provisions of the Government Regulation that do not comply with

the Constitution in form, content, as well as from the point of view of the separation of state power into legislative, executive and judicial. One of the motivations of the Constitutional Court is noteworthy: "The organizational and functional independence of the legislative authorities, fixed by the Constitution of the Russian Federation, predetermines the constitutional and legal status of the legislative (representative) bodies of the constituent entities of the Russian Federation and their participation in federal lawmaking, which takes place in various forms, legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it "One of the motivations of the Constitutional Court is noteworthy: "The organizational and functional independence of the legislative authorities, fixed by the Constitution of the Russian Federation, predetermines the constitutional and legal status of the legislative (representative) bodies of the constituent entities of the Russian Federation and their participation in federal lawmaking, which takes place in various forms, legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it "One of the motivations of the Constitutional Court is noteworthy: "The organizational and functional independence of the legislative authorities, fixed by the Constitution of the Russian Federation, predetermines the constitutional and legal status of the legislative (representative) bodies of the constituent entities of the Russian Federation and their participation in federal lawmaking, which takes place in various forms, legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it "The organizational and functional independence of the legislative bodies enshrined in the Constitution of the Russian Federation predetermines the constitutional and legal status of the legislative (representative) bodies of the constituent entities of the Russian Federation and their participation in federal lawmaking, which is carried out in various forms, in particular in the form of legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it "The organizational and functional independence of the legislative bodies enshrined in the Constitution of the Russian Federation predetermines the constitutional and legal status of the legislative (representative) bodies of the constituent entities of the Russian Federation and their participation in federal lawmaking, which is carried out in various forms, in particular in the form of legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it "in the form of legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it "in the form of legislative initiative. This right, as having direct effect by virtue of Article 15 (Part 1) of the Constitution of the Russian Federation, is exercised by legislative (representative) bodies of the subjects independently, within the limits established by the Constitution of the RF and with observance of the requirements arising from it".

Thus, it can be noted that the Constitutional Court of the Russian Federation very often refers to the direct action of the norms of the Basic Law, using different language: either clarifying that the Constitution of the Russian Federation has a direct effect, or, for example, in one of the Resolutions: "The need for federal measures influence in order to protect the Constitution, ensure its supreme legal force, supremacy and direct action <...>, requires the state authorities of the

constituent entities of the Russian Federation to comply with the federal Constitution and the and it flows directly from the foundations of the constitutional order fixed by the Constitution <...> ".

What gives a person and citizen the direct effect of the Constitution? First of all, the opportunity, referring to its norms, to defend their violated right, demand the possibility of exercising their right or freedom, even if there is no "technical" superstructure, even if there are no acts that promote the fullest implementation of the norms of the Constitution. For example, the decision of the Central District Court of Kaliningrad was satisfied with the statement of Gr. I., who challenged the decision on conscription, citing the fact that he is a member of a religious organization "Jehovah's Witness" and because of religious beliefs he can not perform military service. The court, in view of the fact that the right to alternative civilian service is guaranteed by Part 3 of Art. 59 of the Constitution of the Russian Federation, which has the highest legal force, and the witnesses questioned in the court session really confirmed the religious beliefs of I., obliged the conscription commission to provide him with an alternative civilian service.

When considering the practice of courts of general jurisdiction, attention was drawn to the fact that in fact they very rarely refer to the norms of the Constitution when resolving disputes, and the Supreme Court of the Russian Federation very often applies the norms of the Basic Law, motivating their decisions. At one time there was a period of a peculiar "peak" of activity in the activity of the Supreme Court, dedicated to the direct operation of the Constitution: 1996-2001, after this period, the body rarely resorts to such formulas as the direct operation of the Constitution. Probably, this can be explained by the fact that the lower courts realized the possibility of direct application of the norms of the Constitution, and the emerging new legal relations have already acquired a very solid legal and regulatory framework.

But the arbitration courts were very active users of the rule of direct action of the Russian Constitution, which can be illustrated by the following examples. In the Decision of the Arbitration Court of the Omsk Region on May 25, 2011 on the case A46-2885 / 2011 on the suit of the Administration of the city of Omsk to the Ministry of Finance of the Russian Federation represented by the Office of the Federal Treasury for the Omsk region on recovery of 2 762 449 rubles 50 copecks in the operative part of the decision it was clarified that, in accordance with Article 133 of the Constitution of the Russian Federation, local self-government in the Russian Federation is guaranteed by the right to judicial protection and to compensation for additional expenses incurred as a result of decisions taken by public authorities. The Constitution of the Russian Federation has the highest legal force, direct effect and is applied throughout the territory of the Russian Federation (Article 15 of the Constitution of the Russian Federation). It was also noted that the highest judicial instances of the Russian Federation also repeatedly drew attention to the fact that courts should in all cases apply the Constitution of the Russian Federation as an act of direct action.

5. Conclusions

Thus, we can assume the following: direct effect of the norms of the Constitution of the Russian Federation is the legal property of the norms of the Basic Law, which has a legal character expressing the rule of action and implementation of the norms of the Constitution, irrespective of the existence of normative legal acts that specify them. This property is unlimited, that is, even if it is necessary to specify the norms of the Basic Law, this is not an exception to it, since the specification itself is created on the basis of constitutional legal requirements and only develops them for the purpose of implementation, and does not establish them. And the application of the Constitution of the Russian Federation, especially in the activity of courts, is a process through which this property is provided .

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<p><i>Библиографическое описание статьи</i></p> <p>Аничкин Е.С. Прямое действие и применение норм конституции РФ: к вопросу о разграничении понятий. / Е.С. Аничкин, Т.И. Ряховская // Правоприменение. – 2018. Т. 2, № 1. – С. 31-39. – DOI 10.24147/2542-1514.2018.2(1).31-39</p>	<p><i>Bibliographic description</i></p> <p>Anichkin E.S., Ryakhovskaya T.I. Direct effect and application of provisions of the constitution of the Russian Federation: the question of the delimitation of concepts. <i>Pravoprimerenie = Law Enforcement Review</i>, 2018, vol. 2, no. 1, pp. 31-39. – DOI 10.24147/2542-1514.2018.2(1).31-39 (In Russ.).</p>