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The judicialization of politics as a significant phenomenon of global development: Russia's experience

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The article explores how the courts' role has transformed in both the state system and society due to their expansion beyond their traditionally defined jurisdiction and the juridification of public relations. It is shown that this phenomenon is common at both the domestic and supranational levels. It takes into account the historical, political, legal, religious, and other unique characteristics of each country. The example of the Russian Federation is utilized to determine the potential for the advancement of judicial power in the context of the society's juridification, as individuals are progressively inclined to view themselves and others as legal subjects. Through the use of statistical data, the process of broadening the scope of judicial activities is illustrated. The author has proposed a definition for the term "judicialization". The process of judicialization was considered through both the decisions of state power and the initiatives of society. The approaches of Russian and foreign researchers in assessing the phenomenon of strengthening the role of the courts are analyzed. The contradictions that arise from the conditions under which the judiciary operates, while limiting state arbitrariness as part of the state mechanism, have been brought to light. It has been shown that the judiciary is perceived as a specialized institutional system rather than an independent branch of power and reforming the role and significance of the judiciary in the advancement of Russia has become a crucial requirement. The conclusion was drawn that the judicialization of politics is a noteworthy phenomenon in the evolution of the political and legal sphere globally, which demonstrates the judiciary's novel role and significance in society.

Keywords: court, judicial power, court functions, judicialization, state mechanism, juridification.

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1. Introduction

Globally, there have been major changes in understanding the role and importance of courts in the political and legal transformation of society in recent years. In Western literature, it is generally accepted that the judicial power has expanded its scope in recent years (Gardbaum 2014). Recently, courts have increasingly extended their jurisdiction beyond what was traditionally understood, limiting the scope of specific cases. Nationally and supranationally, this is taking place. Specifically, the European Union, where the judicial practice of governance under the auspices of the Court of Justice of the European Union is successfully forming, is on the cusp of transforming the role of the judicial power into a multilevel legal order. There has been a significant development in the powers of the European Court of Human Rights.

There is no doubt that our time is an age of judicialization, when everything is tested for validity through legal claims. According to researchers, among the most significant phenomena of political-legal transformations in the late 20th and early 21st centuries, judicialization, which is the reliance on courts and judicial means to overcome a wide range of social development challenges, has arguably become the most prominent (Hirschl 2011).

Objectively, Russia's ongoing integration into the legal world order implies certain conjugacy in these processes.

Our opinion is that a comparative analysis of these processes is urgently needed in order to identify Russia's participation in them, determine the prospects for the development of the Russian judicial power, and strengthen its competitiveness in the ever-increasing struggle between ideas, capabilities and accomplishments.

2. Basic research

There is a direct relationship between the discussion of a wide range of issues of the development of the judicial power in the world and the determination of where the judicial power (court) fits within the separation of powers. Power and law are known to form an organic combination that distinguishes the judicial power from other branches of power, which do not have a similar connection to law. For them, law serves merely as an external border, not as an immanent beginning that determines their internal content.

The court is an institution of state power whose activities are solely based on the law, without which justice cannot be delivered. In its activities, the court is guided exclusively by law, uses exclusively legal instruments and achieves an exclusively legal result — restoring and protecting the violated rights and legitimate interests of subjects of law.

This combination of features determines the special place and role of judicial power in developing a legal state, as it protects the rights and legitimate interests of subjects of law. Furthermore, one should note that the properties of the judiciary that arise from recognition of its organic connection to power and law are not automatically implemented. It is merely a theoretical-legal construction whose implementation is determined by its interaction with legislative and executive bodies. A contradiction exists within the judicial power: on the one hand, it is integrated into the state system and is an element of state activity; while on the other hand, its main objective is precisely to limit state power prerogatives, i. e. to limit state arbitrariness.

Separation of powers does not clearly define the place of judicial power. In certain legal procedures, the judiciary is vested in other branches of power through its status as the “ultimate arbiter of law”. In each country and at a specific historical stage, the scope of the judicial power’s authorities and, to a greater extent, their implementation is determined by the interaction of many factors. Among them, researchers distinguish three crucial ones: institutional-legal features, which are primarily determined by a country’s constitution, the judiciary’s readiness and ability to exercise its powers, as well as political traditions and guidelines. In these circumstances lies the contradictory position of the judicial power in the state mechanism, its strength, well-known weaknesses and the consequent dangers it poses to society.

To begin with, the importance of juridifying public relations in the dynamics of the place and role of the judicial power in social transformation should be emphasized. As a result of juridification, legal instruments are actively extended to new areas of public relations, and legal regulators are given greater importance, taking quality of legal life to new heights.

The juridification of society involves people becoming increasingly accustomed to thinking of themselves and others as legal subjects. Additionally, the legal framework is accepted by people not only because it meets certain legal standards, but also because it reflects the way they live (Habermas 1998, 215).

As legal norms extend into the realm of social relations, a judicial approach to resolving social conflicts is developed with reliance on legal standards and procedures, where procedural justice is sought as a basis. Researchers see the objective foundations of this process, consisting in an evolving division of labor and a decrease in interpersonal solidarity within society (Hirschl 2006, 724).

It is impossible to ignore the significant country specifics in the development of this process. In particular, it is far from complete in Russia, being mediated by the significant legal nihilism of many of our fellow citizens when it comes to judicial protection of their rights and interests. There is a need to not only note this Russian specifics but also to consider it when discussing plans and implementing legal reforms, to keep in mind the continuing norms of healthy mass social regulation, and not to impose excessive expectations on the courts, whose effectiveness is often unjustifiably disappointing.

Among the many reasons the judicial power is so important is the scope of its authorities to determine the legal limits of state power in the field of rights, freedoms, and legitimate interests of subjects of law, namely the citizens’ rights to privacy and labor rights. The scope of judicial activity in the Russian Federation is continuously expanding. The courts considered more than 40 million cases in 2022, which is 1 million more than in 2021 and almost a third more than in 2018. In administrative proceedings, 5,3 million cases were heard — 17 % more than in 2021. Courts of general jurisdiction handled 7,26 million administrative cases and 0,77 million criminal cases against 778 thousand persons. In challenging regulatory legal acts, 67 % of the requirements were met, while in challenging actions (inactions) and decisions of state authorities, local self-government and officials, 44 % of the requirements were met. Over the past years, civil courts have experienced increase in workload: 25,7 million cases were heard in civil proceedings, 2,3 million cases more than in 2021. Arbitrazh courts resolved 1,7 million economic disputes, i. e. 62,5 thousand cases more than in 2021; 0,24 million bankruptcy cases — 28 % more than in 2021, as well as 1,9 million separate disputes in

bankruptcy cases. Probably, this is explained by some of the economic decline associated with the pandemic¹.

Due to the initiative in the trial being taken by the holders of rights, the courts expand their activities towards jurisdictional mobilization of the holders of rights, manifesting as judicialization from below.

The most relevant form of increasing the role and significance of the judicial power causing the greatest interest among researchers is the transfer of controversial issues of an openly political nature and importance to the courts. The judicialization of politics is defined as this form of transforming political issues into legal ones (Zor'kin 2004).

There has been a significant increase in the use of judicial regulation to regulate the political sphere around the globe, both in “old” and “new” democracies, and even in countries with authoritarian regimes (Lin 2017).

Several examples illustrate this process. In Europe, French and German lawmakers and executive bodies are changing their desired policies quite frequently in response to or pending decisions by national constitutional courts. In Latin America, Asia, and Africa, courts have often played a critical role in establishing constitutional rules and policies to safeguard new or fragile democracies from military intervention, ethnic conflicts, and revolutions (Fischer 2020; Sallon 2005; Sieder 2020).

The fundamental determination of Israel as a “Jewish and democratic state”, the political future of Quebec and many other political issues were formulated and addressed as judicial challenges (Mautner 2011).

The ruling in *Bush v. Gore* (Balkin 2001), in which the U.S. Supreme Court, not voters, essentially granted George W. Bush the presidency of the United States, was branded by some as the constitutional coup initiated by five conservative justices.

A recent example is the UK. At the end of 2019, the Supreme Court of Great Britain declared the Prime Minister's decision to be unconstitutional and legally null and void. The decision by B. Johnson to prorogue UK Parliament during Brexit has become revolutionary, since the courts became the primary arbiter of whether certain political motives, which are serving as guidelines for the executive power, are acceptable (Cowie, Cygan 2020).

While almost everyone recognizes that these issues are neither purely nor even above all legal dilemmas. The growing political-legal status of justice in the modern world leads some researchers to make rigorous conclusions, believing that “former state justice bodies have suddenly discovered that they now embody the source of legitimacy from which the state itself grows” (Garapon 2004, 44).

In light of the increasing judicialization of politics that has already been taken for granted, it is urgent to study the content and forms, incentives, and restrictions of its development across different countries, taking into account their historical, political-legal, religious and other particularities.

Judicialization of politics has several important features. Firstly, it concerns the productivity of its development from institutional and political factors. Political goals are increasingly being achieved through legal means. It is this political initiative that underlies both specific manifestations of the court's activity in making fateful decisions and pre-

¹ “The Supreme Court summarized the work of the courts for 2020”. *Website of the Supreme Court of the Russian Federation*. Accessed July 23, 2023. https://www.vsr.ru/press_center/mass_media/29651/. (In Russian)

venting such decisions from being made under the guise of confronting “unreasonable” judicial activism.

Other branches of power have a fairly extensive set of tools for influencing courts and judges, including mechanisms for establishing judicial panels, procedures for vesting and terminating powers, changing the court powers, ignoring or delaying the implementation of... undesirable decisions, etc. A vivid example is a significant limitation on the powers of the Eurasian Economic Commission (EAEU) integration association body — the EAEU Court — in response to “excessive” judicial activism of its predecessor, the Court of the Eurasian Economic Community (EurAsEC) (Ochered’ko 2021).

In the judicial system, there is a high level of public authority that enables the judicialization of politics. There is no institutional or ideological vacuum in which courts operate. Other branches of power can only take the initiative to transfer political issues to the courts if they are confident that the courts will make decisions in general in accordance with the cultural preferences and policies aimed at overcoming key challenges of society and the state. Thus, in terms of the judicial power, judicialization implies a sufficient degree of societal consolidation, primarily in terms of power structures.

One fundamental point needs to be emphasized here. A new model of resolving social conflicts (from political model to judicial one) has emerged with the criminalization of politics. These models encompass different actors, different principles and decision-making mechanisms and different outcomes of conflict resolution. In contrast to the political model of decision-making, the judicial model of conflict resolution rejects the significance of “values” and the principle of majority. The technocratic approach in the judicial model is determinative, denying “politically unacceptable decisions” and allowing “the only right decisions”. As a result of eliminating the value approach in the name of technocracy, the evolution of society’s political sphere may not unfold as expected.

Over the past few decades, judicial activity has swept the globe, including Russia. The judicial power plays a crucial role in setting and implementing legal policies in Russia. The highest judicial bodies are involved in constitutionalization processes and related institutional and jurisdictional transformations. They have contributed significantly to the development of the judicial and doctrinal foundations of jurisprudence.

The highest courts of the Russian Federation, mainly the Constitutional Court, also deal with resolving political issues of crucial significance. Back in the 1990s, the Constitutional Court of the Russian Federation was involved in assessing the constitutionality of the regulatory legal acts of the President of the Russian Federation regarding the restoration of constitutional legality in the Chechen Republic. A key holding of the Court was that the territorial integrity and unity of Russia are unshakable norms, which exclude any possibility of unilateral armed secession².

A transfer of some issues to the Russian Constitutional Court is often motivated by a desire to legitimize political decisions. This may explain why the Russian President

² The Resolution No. 10-P of the Constitutional Court of the Russian Federation dated July 31, 1995, on the Case of Checking the Constitutionality of the Decree No. 2137 of the President of the Russian Federation dated November 30, 1994, on Measures to Restore Constitutional Legality and Law and Order in the Territory of the Chechen Republic, the Decree No. 2166 of the President of the Russian Federation dated December 9, 1994, on Measures to Suppress the Activities of Illegal Armed Groups in the territory of the Chechen Republic and in the Zone of the Ossetian-Ingush Conflict. Henceforth all references to Russian regulations and judicial practice are given according to the data from the “ConsultantPlus” system. Accessed May 30, 2024. <https://www.consultant.ru>. (In Russian)

requested a conclusion on the updated Constitution of the Russian Federation from the Constitutional Court³.

Considering the given examples of the Constitutional Court of the Russian Federation's activity, we cannot view them as examples of the effective transfer of political power from representative bodies to the courts. They are, in our opinion, rather a secondary outcome of political pressure or manipulation of constitutional law and constitutional justice.

As an evident example, the Constitutional Court of the Russian Federation was forced to decide whether the election of governors was constitutional⁴ when it supported regional elections in 1996, and in December 2005, the Court decided that the new rules abolishing regional governor elections were constitutional as well⁵.

This phenomenon needs to be assessed correctly in the context of Russia's political and legal transformation. Due to the originality of many phenomena that make up the mentality of the people, the history of the development of state institutions, the peculiarities of Russian political and legal tradition, and the existing legal system, as we have already mentioned, the prosecution of politics is not considered as a really developing and problematic process at present. As a whole, the prospects for continuing judicialization of politics with its expansion and reduction of all problems to judicial resolution are, after all, still relatively modest, as described by the maxim of Alexis de Tocqueville stating that there is no such political process that would not be considered in court (Tocqueville 2000, 162).

In Russia, the expansion of the role of the court based on a more complete unleashing of its inherent state-power potential, and often the mere formulation of such a question, causes alert. In the development of the objective tendency to strengthen the judiciary in relation to the prospects for strengthening the rule of law and legal democracy, many see the pitfalls of the justification of politics or the politicization of justice as a downside (Vinogradova, Mikhailova 2020, 77).

Basically, it boils down to a discussion of judicial activism manifested in the interference of the court in the activities of the executive and legislative power, and not always leading to the expected outcome (Zor'kin 2012).

However, in our opinion, these phenomena should not be mixed. Coinciding in their content, they differ in their driving forces. If judicial activism is determined by the legal choice of the judicial body, then in the judicialization of politics, as we pointed out above, the drivers are political spheres that shift the decision of controversial political and fateful issues for the country to the courts.

³ The Opinion No. 1–3 of the Constitutional Court of the Russian Federation dated March 16, 2020, on Compliance of the Provisions of the Law of the Russian Federation on the Amendment to the Constitution of the Russian Federation on Improving the Regulation of Certain Issues of the Organization and Functioning of Public Power that Did not Enter into Force with the Provisions of Chapters 1, 2 and 9 of the Constitution of the Russian Federation, as well as on the Compliance of the Procedure for the Entry into Force of Article 1 of this Law with the Constitution of the Russian Federation in connection with the Request of the President of the Russian Federation.

⁴ "The Ruling No. 2-P of the Constitutional Court of the Russian Federation dated January 18, 1996, in the Case of Checking the Constitutionality of a Number of Provisions of the Statute (Constitutive Law) of the Altai Krai".

⁵ The Ruling No. 13-P of the Constitutional Court of the Russian Federation dated December 21, 2005, on the Case of Checking the Constitutionality of Certain Provisions of the Federal Law on General Principles for the Organization of Legislative (Representative) and Executive Bodies of State Power of the Constituent Entities of the Russian Federation in Connection with Complaints from a Number of Citizens.

Discussion of the processes of judicializing politics, in fact, comes down to recognizing the given or determining the prospects for the courts to occupy a new place and role in the social development of the country. Russia also badly needs a new place and the role of the judicial power in social development.

Certainly, there have been significant improvements in the judicial sphere in democratic Russia. It has taken us 30 years to establish a new judicial system with the most advanced institutions and legal instruments. A number of independent assessments have been conducted on the quality of Russia's work in this area. Among 47 Western countries' courts, the European Commission for the Efficiency of Justice (CEPEJ) of the Council of Europe recognized the Russian judicial system as the most technologically advanced and least expensive (Kulikov 2020).

Even though strong progress has been achieved in the development of the Russian judicial system, it does not close the gaps in its development. Imbalance between the branches of power, when the executive branch is not supplemented by "capable and adequate" legislative and judicial bodies does not allow the judicial power to fulfill the inherent role of "ultimate arbiter of law", contributing to the consolidation of the rule of law as the most important condition for socioeconomic, political and legal progress. Rather than being perceived as an independent branch of power, the judiciary resembles the specialized institutional system.

There is an urgent need to change the role and importance of the judiciary in Russia's development. In light of the fact that Russia cannot succeed without legal modernization (Zor'kin 2015), it is equally clear that courts will have to play a new role and place in legal modernization.

There is active discussion at all levels, in expert communities and scientific teams, particularly at the Russian Academy of Sciences, regarding strengthening the judiciary's role and importance (Vinogradova, Mikhailova 2020; Kleandrov 2021a; Kleandrov 2021b).

According to Russia's strategic documents, the judicial reforms aimed at strengthening its independence are part of a broader effort to increase political and legal effectiveness.

Changing the role and place of the judicial power is not the courts' responsibility, but that of other branches of power. Combined with the legislative branch, the executive branch plays the decisive role with the President of the Russian Federation as its head. As noted above, the judicial power must be capable and willing to exercise the powers granted.

3. Conclusions

Today, the judicialization of politics represents a significant change in the political-legal sphere and highlights the new role and significance of the judicial power. Throughout the late 20th — early 21st centuries, all countries have gone this way, this is a landmark moment.

While Russia does not remain detached from world affairs, the advance of these processes is regulated by a variety of incentives and restrictions determined by the people's mentality, specific historical, political-legal circumstances of the country's development and mother factors.

Currently, the judicialization of politics, which means transferring controversial issues of an openly political nature and significance to the courts, is not considered to be a really developing and problematic process in Russia. Accordingly, this reflects the court's real standing in the current Russian political-legal system.

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