

CONSTITUTIONAL REFORM: THEORETICAL ISSUES

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The constitutional changes occasionally occur in other countries. In 2014 – 2015 new Constitutions or some amendments and additions in the Constitutions of some countries, in particular, Egypt, Yemen, Russia, Tunisia, Uzbekistan, and the Ukraine were adopted.

A Constitution ensures the adaptation to new conditions and some certain dynamics of the political and legal system. Some different means of disclosure, increase and implementation of the Constitution's potential are used for it. The Constitutional reform is an extremely radical means of the systemic synchronization of the legal policy and the legislation with changed historical situation, goals and objectives set for the society and its elite at a new stage of development. The following means such as improvement of the legislation and legal practice, purposeful impact on public consciousness, protection and interpretation of the constitution's norms are use for it and with it. However, at some stage it is also necessary to amend and add the text of the constitution, when the former text and its interpretation start more and more to reveal discrepancies to public needs, but traditions and technologies of law and understanding, their interpretation and flexible application are mainly exhausted. As far back as the ancient Indian treatise "Arthashastra" (Science of policy) put a question about the correlation of lawfulness and benefit. Although, in whole, the idea of ensuring the regime of legitimacy, the following directions of law are conducting, some situations that make go beyond the limits of the law text are not denied. It was recognized that the law itself and love (moral and religious sources) are based on the benefit interpreted as a common and the highest good of the society, the state. Therefore, in order to confirm the highest good, benefit including due to the law, in case

of contradiction between them and law, it is necessary to choose benefit.²⁰ There can appear the situations when in favour of the society and the state it is necessary to change the law, to pass the law.

In political science it was noticed long ago that the important parts of stability was legitimacy and effectiveness.²¹ A well-timed updating of the constitution is a significant element of the legitimacy of the system changes in the legislation, adequate public changes. Besides, the constitutional reform can contribute to increasing the efficiency of the state machine's functioning as well as the efficiency and coordination of the activity of the legislation's system in accordance with challenges of the time.

The necessity of the constitutional reform can be dictated by the fact that the society enters into a new stage of its development, for instance, forming a new independent state or a new subject of federation, or the society comes out of a recession entering into a new stage of an active development and the system of legislation shall be adequate to it. The legislation shall be orientated not only to come out of a recession using some certain means, methods and resources, as well as attraction of the updated means, methods, resources for a further natural development with an acceptable speed.

A state, in history and by its nature, is one of the most important means of organizing a public life (its economic, scientifically-technical, political, informative, and legal fields), regulating the distribution and mobilization of public authorities and resources²² which adequately change in accordance with situations. Taking into account new objectives the state can respectively rearrange its public authorities and reformat its mechanism of governing the processes in the society, its structure, functions and interaction between each other.

²⁰ See: *Udartsev S.F.* Istorija politicheskikh i pravovyh uchenij. Drevnij Vostok. Akademicheskij kurs. SPb.: Izdatelskij Dom S.-Peterburgskogo un-ta, Izd-vo juridicheskogo fakulteta SPbGU, 2007. S. 276-277. The present article with some changes and in Russian is published in «Law and state» journal (Astana), 2015, № 3. P. 44-49.

²¹ See, e.g.: *Yashkova T.A.* Sravnitel'naja politologija. M.: Izdatel'sko-torgovaja korporacija «Dashkov i K°», 2015. S. 352-353.

²² See: *Udartsev S.F.* Gosudarstvennost v uslovijah globalizacii: krizisnye javlenija, adaptacionnaya transformacija i razvitie // Pravo i gosudarstvo (Astana), 2013, № 4. S. 23. and the previous ones.

In history chaotic phenomena replace the others with a gradual increasing and the periods of strengthening the order after some certain reforms, changes, and rearrangements.²³

The typical phenomenon for post-soviet countries, nowadays, is that the stage of the chaotic development has completed or is going to the end and the elements of the order, stable ties between structures and institutions in the society are appearing, new structural elements and institutions are being completed. At this stage of the cyclic development some certain constitutional transformations integrating the accumulated changes and creating a platform for a crisi-free perspective development of the society are possible to occur.

During the historic development the constitution is responsible for organizing, streamlining and harmonizing the movements of the society relating to the assigned objectives. It is one of the most influential means in regulating the public life and social development.

In whole, appearing the necessity in the constitutional reform and accelerating the multidimensional constitutional process during the historical evolution (if it is not connected with historical leaps and ruptures of succession between the stages of the development as it happens at the moment of social outbreaks and political upheavals) can be connected, in particular, with:

- 1) the beginning of a new stage of the society's development and the necessity of the systemic institutional and normative-legal correction of public life corresponding to the occurred period;
- 2) deep structural changes in the economy, an active transition from the ineffective raw materials economy to the prospective processing industrial and innovative economy that can demand some certain changes in the operation of macro-legal factors for starting the mechanisms which regulate the connection with social processes of different public authorities, additional energy of social groups;

²³ The researcher of standing reputation in the field of the history of Great French revolution, P.F. Kropotkin, wrote: «The great reform is inevitably a compromise to the past, when any progress committed by the means of the revolution encloses inclinations for the future...The heritage entrusted by the revolution is to be embodied by peoples in their institutions. Everything that was not able to put into practice, all great ideas that were proposed during the upheaval but have not been carried out by the revolution in such a way to stay forever, all attempts of the sociological perestroika projected by it, - all these things become a part of the slow development period, the evolution, which follow after the revolution; though, in addition, the new ideas, which will be caused by the revolution, will be added when it will implement the programme inherited from the previous social upheaval. Than, in 100-130 years, a new upheaval will occur among another nation, and this nation, in its turn, will introduce the activity programme for the next generation. Such a way of the history development have been already traced for five or six centuries» (*Kropotkin P. A. Velikaya francuzskaya revoljuciya. 1789–1793 / primech. A.V. Gordona, E.V. Starostina; statji V.M. Dalina, E.V. Starostina. M., 1979. S. 445*).

- 3) an objective necessity of the correction of the political system and the mechanisms of the degree's regulation and the width's of involvement into law making and public administration of public authorities and layers, public initiative, widening or narrowing of the sphere of regulation of public life;
- 4) the replacement of the outdated ideology, elaboration and legal consolidation of the new political-legal ideas and conceptions of the updated legal doctrine;
- 5) a necessity to develop and implement some constitutional and other legislative constructions corresponding to them which ensure the boiled up steps for reforming the political system of the society and its legal principals (in particular, it is connected with democratization, strengthening of human and citizens rights and liberties);
- 6) a necessity to create an adequate historical situation of power sharing that take into account the dynamics of public authorities and interests' spectrum, the change of political power importance as well as reforming of the public administration system, changes of their structure and creation of subsystems which are not included into the constitution and deleted from its texts due to interpretation;
- 7) a new stage of the country's adaptation to international standards while the country is rooting into the international system of public relations within the framework of the UN, a global and regional integration of various international organizations as well as a branched net of bilateral and multilateral international relations.

In different historical situations constitutional reforms can be caused by the pressure from "below" – mass, opposition. In addition, they can be initiated by public authorities (from 'above'), and can be long-term and short-term. In both situations international influence can play the most important role, especially, during globalization.

The reform of the constitution can be a part of enormous legal reforms, a renewal of the country's policy, its political modernization, an evidence of leaving the historical transit zone in order to enter into a new stage of development. A timely and effective regulation of socio-political processes from "above", optimal batching of approaching transformations – the evidence of the stability of the state and political system development, their response to constantly changing internal and external conditions.

The constitutional reform is able to provide a real social-economic and political changes in the society (to stimulate or slow down some certain processes) or, under other conditions, to refresh "decoratively, to modernize the text and the language of the constitution.

The form of the main law can be for one occasion only or include some stages, be radical or moderate. Such a reform can provide realization of a temporal balance of political powers (as it often occurs during an unaccomplished revolution or a transitional period) or be marked by the victory of a quite certain political power in the result of the end to the balance of power.

The constitutional reform can turn out to be unexpected for the superior public bodies or be prepared according to the plan and beforehand by them if the need in these changes is increasing. In history the reform of the constitution often was inevitable during the crisis of state power legitimacy, during a revolution or after a coup d'etat.

Where and when the constitutional reform shall be conducted is a droit of public bodies being state and political leaders of the country if only they have not missed the historical time and a cause for it. If the political initiative relating to this issue passes to other powerful players who can make the state power conduct the reform of the constitution or even dictate its main characteristics, it either is hastily carried out by the state power or becomes an aim in a tough political fight and can be conducted after the opposition has won that was supported by the electorate.

Taking into account the fact that the procedure of carrying out amendments into the constitutions in accordance with the plan cannot be called simple, as well as admitting its certain connection with political and economic changes as before the reform and also after it, the creation of the constitutional norms, direct and indirect premises for specifying the direction of the further development of the society and the state as the result of changing shall be started in advance and in proper time.

In 2013 – 2015 the constitutional reform in Armenia was expected to be.²⁴ In the beginning of December in 2015 in Armenia the referendum on the constitutional reform was conducted that stipulated the transition of the country to the Parliamentary form of government. On the 13th of December in 2015 the Central election committee of Armenia submitted the final results on the referendum at the special meeting: «825 521 or 63,37% people have

²⁴ «Considering two possible options: adopting a new Constitution or changing and amending the present one, I consider the second alternative as more acceptable», – The Chairman of the Constitutional Court of Armenia, Gagik Arutyunyan noted during the agitation on the topic «Preliminary conception of the constitutional reforms in Armenia». See: Amending in the Constitution of Armenia is more reasonable than adopting a new one – the KC head // http://www.arka.am/ru/news/economy/vnesenie_izmeneniy_v_konstitutsiyu_armenii_tselesoobraznee_prinyatie_novoy_glava_ks/ (2015, Sept. 29). See also: Martirosjan S. Konstitucionnaja reforma v Armenii: celi zajavlennye i realnye // <http://www.rim Eurasia.org/news--2015-03-31--konstitucionnaja-reforma-v-armenii-celi-zajavlennye-i-realnye-17315> (2015, Dec. 15).

voted “pro” the constitutional reform, 421 568 people or 32,26% voted “against”. 53 435 bulletins were recognized as “invalid”. 1 201 613 people or 50,74% voters participated in it. The total number of the voters was 2 566 998 people.

In Kyrgyzstan some possible changes in the Constitution of the country is being discussed and prepared. However, because of the moratorium on carrying out changes in the present Constitutions till 2020 declared during the referendum in 2010 they can be adopted only in 2020 or earlier but only by the decision of the new referendum.²⁵

It was announced that the constitutional reform in Kazakhstan was coming. While speaking at the XVI “Nur Otan” party congress the President of the Republic of Kazakhstan, N.A. Nazarbaev, paid attention at an impending modification of the state machine activity, a gradual democratization of the political system and after completion of these processes the conduction of the constitutional reform emphasizing its step-by-step updating.²⁶

The legal policy, the constitution, the law-making and law-applied activity of modern states is impartially orientated to needs of the society's development in whole, a real historical practice. Impartially, in the legal sphere the priority of a real life, interests of the society and some individuals beyond the context of the early adopted law that shall be timely brought into a state in accordance with public needs.

The reform of the constitution is a more essential change in the system of legislation than an adoption of a new law. The ground for changing the constitution, especially as because for its reforming, shall be more durable.

The necessity in the constitutional reform in history, in addition to conducted reforms in accordance with a plan, shall be reflected in the complex of events, facts, the following ones can be related to them:

- 1) increasing a political tension and conflicts between the considerable groups of people and the state power, its policy; public opinion polls and the statistics of the authorized and non-authorized meetings and other protest actions can indicate it; during

²⁵ See, e.g: Venecianskaja komissija raskritikovala popravki v Konstituciju KR. 26.06.2015 // <http://ru.sputnik.kg/politics/20150626/1016318801.html> (2015, Sept. 29).

²⁶ See: Vystuplenie Prezidenta Respubliki Kazahstan, Predsedatelya partii «Nur Otan» N. Nazarbaeva na XVI siezde partii. 11 marta 2015 g. // Oficialnyj sajt Prezidenta RK – http://www.akorda.info/ru/speeches/internal_political_affairs/in_speeches_and_addresses/vystuplenie-prezidenta-respubliki-kazahstan-predsedatelya-partii-nur-otan-nazarbaeva-na-xvi-sezde-partii (2015, 21 сент.).

the culmination point of the opposition (as it happened? For instance, in Egypt in July, 2013), millions of people can be involved in meetings and manifests;

- 2) changing public consciousness, significant shift of public opinion relating to power varying from positive to negative and impossibility to change the pointed relation to some extent due to mass media, social or other measures taken by authorities including the measures relating to destruction of the public consciousness and switching over to other issues;
- 3) the growth of the population's dissatisfaction to the existing political and state institutions in aggregate with constantly increasing expectation of changes or their inefficiency, which was evident even for the state bodies, and the necessity of their modernization in the context of the reforms conducted by the public authority;
- 4) a protracted political instability,²⁷ which can cause a delay to solve the appeared political-legal problems and force to take some belated urgent political-legal measures;
- 5) a developing crisis of the legitimacy of the state power connected with a set of events, conflicts, corruption and other scandals that reflect its opposition to the nation (cruel violence over peaceful demonstrators, people participating in meetings, refusal from sensible negotiation with the public in socially important issues, etc.) discloses different important falsifications in public opinion, elections, etc.;
- 6) an appearance of political powers that are able to intercept a political initiative in conducting the boiled up political-legal changes and the fast growth of their impact;
- 7) a significant change of the international public opinion and the relation of the international community to the official state power in the country, acceptance of negative decision for the state power by international organizations, which have political and economical consequences; a change of power correlation in the international scene being important for the internal situation in the country.

Because of the uneven economic and social-political dynamics of the public development the situation can dramatically decline and its appraisal and perspectives of transition

²⁷ «The factors of the *political instability*, – L.N. Timofeeva wrote, – are usually considered to be the personification of power and difficulties of supplying its succession; the existence of interethnic and religious contradictions that create a threat to the integrity and the state itself. Thus, the political instability can be shown in the form of changing a regime, government, activating an opposition, an armed struggle against the ruling regime. Transitional regimes, the current reforms of political and socio-economic life are considered as the most instable (the original text is given in an italic form. – C. V.)» (*Timofeeva L.N. Politicheskij konflikt. Lekcija. M., 2008. S. 20*).

from one to another situation (for instance, means of going out of crisis) are changing with it. If something was considered to be impossible, not long after can become a necessity. That thing, which, today, can be done by spending less efforts, humane means and peacefully can demand challenging and stricter methods of overcoming tomorrow, if the situation changes. That thing, which was supported by minority not some years ago (especially, if the real relation was concealed), can be supported by majority in the nearest future (or vice versa). So, the implementation of things, which are considered true now, otherwise, can cause a lot of questions and be assumed as injustice.

The objective of state bodies and officials is to find an optimal correlation of time, place, form and means of response to different boiled up situations. In order the decisions would be optimal and timely, that is, without delay and beforehand, it depends to a large extent on them. The thought that many things depend on the staff and that the staff settles much, even sometimes everything, is topical at all times.²⁸

A serious political crisis is that line, which, if it is crossed, the state can be absorbed by some disastrous irreversible changes, chaos and anomia, and then achieve a new stage of development, changing of forms and a mode of operation. «*The political crisis* is a symbol of no other than a maximum output by the society of those social and political techniques, which were used by it till now. This sharp negative change of citizens' relation to the political power». ²⁹ Timely taken measures on overcoming boiled-up contradictions including the change of legislation provide more stability and steadiness than a harsh opposition to change and, thus, an indirect assistance for boiling up a political crisis.

In political-legal sphere if such a situation occurred, the other characteristics indicating failures in the constitution function and the institutes formed by it can become vivid. In particular, the following ones can be revealed:

²⁸ Karl Jaspers, thereby, also noted a negative tendency in history: «The physical distraction of outstanding people chocking due to the pressure of reality, - is a phenomenon that is traced in history very often. The quick growth of mediocrity, unwise population triumphs even without a struggle, only due to their great number suppressing spirituality. Exactly under such conditions there is a constant selection of the handicapped when slyness and brutality are a guarantee of significant advantages. I mean to say: everything great perishes, nothing important lives. However, in contrast to that, it shall me mentioned that something great comes back, a great thin echoes even if it keeps silent for centuries» (*Jaspers K. Smysl i naznachenie istorii*. M., 1991. S. 259.).

²⁹ *Timofeeva L.N.* Politicheskij konflikt. S. 21. In politology a political crisis more frequently «is measured by notion “non-legitimacy” of power and governance. The indicators of non-legitimacy of power can be considered by the level of compulsion used for embodying the policy: in the presence of attempts to overthrow the government or the lider; the strength of citizen insubordination, the results of elections, referendums, mass demonstrations in support of opposition» (Ibid).

- 1) the discrepancy of the constitution and its norms to the fundamental public relations and the occurred or boiled-up social changes in economy (for instance, relating to property), politics, an international situation;
- 2) an impossibility to interpret the constitution adequately in the existing situation because of the existence of some certain prohibitions and limits;
- 3) an impossibility to develop legislation because of the boiled-up public demands on the platform of the present constitution, that is, when there is a significant gap between the context of the advanced law and the out-of-dated text of the constitution;
- 4) a necessity in a political reform, closure or updating of some certain political and state institutions assigned by the constitution, however, in that form and those functions which cause hampering the further development of the society and cannot be improved by interpreting the constitution;
- 5) a necessity to redistribute power between superior state bodies as well as between the superior and local ones if this power is specifically, unequivocally written in the constitution.

There can be other evidence of the build-up constitutional reform becoming apparent fully, as a rule.

It shall be remembered that legal policy, public opinion, a certain historic situation and specific actions of power in different cases can promote both a positive, consolidated, developing interpretation of constitutional norms and ideas and their negative, discredited interpretation.

However, conducting of the legal reform, in particular, constitutional one is quite important. Some moments shall be taken into account while conducting the reform. Objective and subjective conditions shall appear. Not only legal science but most of society's ranks shall realize inevitability and necessity of this reform. The draft of the reform shall not be established on doubtful prognoses, controversial views and contain elements of risk; in addition, it shall minimize some possible social expenses.³⁰

The legal reform shall not tear ties between the past and the future, continuity in law without a special reason. "Every reformer shall be a prudent conservative suggesting: «Do not break

³⁰ *Maltsev G.V. Razvitie prava: k edineniju s razumom i naukoj. M., 2005. S. 198.*

that one, which is still working rather well and be sure that the new one is better than the old one, etc.».³¹

While taking a decision to conduct the constitutional reform the degree of necessity to do it and a current possibility to carry out the reform shall be proportioned to the established procedure of changing the constitution in that or another country. The question is that the procedures connected with making alterations in the constitution in different countries can considerably differ. There are flexible constitutions when it is enough to change its laws (Great Britain, New Zealand), less strict (the Constitution of Pakistan 1973, Spain 1978, Kazakhstan 1995) and stricter (the Constitution of the USA 1787 and Russia 1993) which can be changed after ratifying amendments by the subjects of the Federation. Moreover, In Russia it is prohibited to amend into chapter 1.2 and 9.³²

In order to succeed in transformation it is necessary to ensure a social and information support of the reform and increase of its supporters while implementing the project. While preparing and conducting the reform it is important to work out the method of evaluation of its intermediate results, its separate stages, reasonable offers and their analysis. “All and at once” or ignore “indicators of unsuccessful conducting of the reform” should not be expected from the reform. It is important to have techniques for evaluating «if the reforms have been carried out in a proper way or not, where the mistakes were done, when the reform stopped to correspond to the expected and planned results».³³

In general, the constitutional reform promotes the country to enter into a new legal space, can help to start a new path in history. At the same time it is a powerful means for macro-regulating the legal system, public life that shall be used only in a special occasions when there is an actual necessity of legitimate going out the limits of the existing legislation, its reforming.

While synchronizing the development of the society and the constitution at present time the main global and general tendencies of the countries' evolution having an appropriate level of development of the region shall be taken into account. It is necessary to proceed from the fact that the potential of the constitution having an especial social value can and shall be implemented to the maximum. However, if it is necessary the text

³¹ Ibid. S. 199.

³² Habrieva T.Ya., Chirkin V.E. Teorija sovremennoj konstitucii. M., 2007. S. 96.

³³ Maltsev G.V. Indicated writing. S. 199.

of the constitution can be improved in that part where its inefficiency for the current time and the future was exposed.³⁴

At the same time it shall be remembered that even if the text of the constitution has been changed fully its role and meaning are not exhausted and implemented. The development of the constitution is not limited only by changing its text but it includes its interpretation, the improvement of the legislation based on it, development of institutions on human rights, legal education, legal professional and public consciousness, legal culture as well. In order to improve and implement the provisions of the constitution it is necessary to involve all means providing the disclosure of its positive potential. At the same time it is necessary to follow the events, impartially analyze the appeared problems and take measures in proper time aimed at correlating the implementation of the constitution and the correspondence of its text to the condition of the society, challenges of time, and correspondence to the legal policy.

Translated from Russian by

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³⁴ See also: *Udartsev S.F.* Konstitucija i razvivajushheesja obshhestvo // *Diplomatija zharshysy / Diplomaticeskij kurjer*. 2005, № 4. S. 259 – 263; *Idem.* Globalizacija, perspektivy pravovogo razvitija i konstitucija // *Zh. Juridicheskij forum – Legal Forum. Nauchno-prakticheskij zhurnal – Scientific&Praktical Journal [Bishkek]*. Issyk-Kul, 2014. S. 60-68; *Idem.* Pravovye pozicii Konstitucionnogo Soveta i formirovanie dejstvujushhego prava // *Konstitucionnyj kontrol v Kazahstane: doktrina i praktika utverzhdenija konstitucionalizma / Pod red. I.I. Rogova, V.A. Malinovskogo*. Almaty: Raritet, 2015. S. 135-161; *Sergey F. Udartsev.* Prospects of Legal Development and Constitution // *RUSSIAN LAW: THEORY AND PRACTICE*. 2015. №. 2. P. 6-16. и др.

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