

**LEGAL ANALYSIS OF THE
ADOPTION PROCEDURE
OF CONSTITUTIONAL
LAWS IN FOREIGN
COUNTRIES**

The practice of constitutional legislation of different countries shows that a Constitution is not sufficient for a comprehensive and effective regulation of legal relations in the state and society. In countries such as, for example, Azerbaijan, Spain, Italy, Kyrgyzstan, Poland, Russia, France, the Czech Republic, as in Kazakhstan, there is a particular type of normative legal acts, which act together with the national Constitution and develop its provisions. This is the constitutional law.

To properly assess the place and significance of the constitutional law can only by knowing the Basic law and the whole system of normative legal acts of the particular country. It is necessary to pay special attention because the constitutional law can be:

- 1) a part of the uncodified Constitution;
- 2) the act making changes to the constitution;
- 3) the act enacting the constitution;

4) an act of greater legal force than a simple law and less than the Constitution and governs only those social relations that are defined in the relevant articles of the Constitution as being subject to regulation by the constitutional law.

The Constitutional laws are the acts of the constitutional content that govern the fundamental group of state – legal relations and usually have a special status in the system of the current legislation. The peculiarity of the constitutional law is that it is not formally included in structure of the unified Constitution. The Constitutional law can operate «in parallel» with the Constitution and it is closed to it in value. A series of constitutional laws in total sometimes makes a block of the constitutional law.

Such term as «the constitutional block» is used in scientific and political lexicon (but not in the legislation) of the Romano-German countries to determine in conjunction with the Constitution and organic laws. Following the French model, the constitutional block includes the Constitution of 1958, the Preamble of the Constitution of 1946, the Declaration of Human Rights and citizen of 1789 and « recognized by the laws of the fundamental principles of the Republic » (i.e. the norm of the organic laws). In Spain the scientists include the organic laws in the constitutional block of Constitution.

In the global legal doctrine the constitutional law has long been known. In 1903 a German legal scholar G. Yellinek noted that this law

is the act of developing and supplementing the Constitution, which makes regulatory innovations and is approved by the observance of special procedural formalities. The last circumstance gives to the constitutional legislation a big valuable importance, being as a means of stabilization of concrete particular legal system and the guarantee against arbitrary discretion of «casual majority of people in power» [1].

And now in legal literature «the general, as a rule, is uncertainty of characteristics of the contents and validity of this type of the law» [2, page 26]. Constitutions, laws on modification, additions to the Constitution and acts of its introduction have always recognized by the constitutional laws in the «narrow» sense of this term. In those countries where there are no common texts of the constitutions (Great Britain, Canada) the function of the constitution is carried out by the constitutional acts which are replacing it [3, page 70].

In the world doctrine of law the constitutional law is the law which makes changes and amendments to the Constitution. It is accepted by a qualified majority of deputies of the legislative body and has the same legal force as the Constitution itself. In the constitutions of some states (for example, Moldova, Romania, Germany) the constitutional law is defined as the law which makes changes and amendments to the Constitution.

Classic examples of constitutional law are the amendments to the U.S. Constitution. As is known, there are 27 and each of them is a significant addition to the text of the Constitution, regulating or fixing the necessary changes in the sphere of most important public relations.

The group of laws is a kind of constitutional laws which make the so-called «unwritten Constitution», i.e. formally, it is customary laws, but because of its special importance, they carry out the functions of the Constitution. For example, the Habeas Corpus Act of 1679, the Magna Carta of 1215, the Laws of Parliament, i.e. acts that are as statutory law in «the unwritten British Constitution. The Constitution of the state of Israel consists of similar laws. Three constitutional laws make the Constitution of Sweden.

In the constitutions of other countries (such as Austria, the Czech Republic, Sweden) under this law it means no law amending the Constitution but the law making changes and additions at the same time it remains its own entity. For example, the Italian Law «About the Constitutional Court» provided by article 137 of the Constitution of Italy of 1947 can be the examples of the constitutional laws in the national law of foreign countries.

It is necessary to consider that the constitutional law not always completely defines a legal status of concrete government body.

For example, the Constitution of Italy reduced the scope of statutory regulation of constitutional laws. It provides the adoption of the constitutional law, which sets the overall status of the Constitutional court of the Italian Republic and only certain separate fundamental provisions concerning the implementation of constitutional justice. According to the Italian Constitution, the constitutional law has to define only the conditions, forms and deadlines for the filing of cases on constitutional legitimacy and the guarantee of independence of judges of the constitutional court. Other legal rules which are necessary for the creation and activities of this court shall be established by common law. This experience could be useful for the Republic of Kazakhstan because it accounts a higher legal force of constitutional law.

The other approach allows considering the constitution and the constitutional laws as legal acts of one level is shown by the Constitution of the Czech Republic of 1992 where the principles of creation of legal system of the former Czechoslovak Republic are traced. The constitution of this state was considered as one of its constitutional laws. The constitutional laws of the modern Czech Republic are urged to supplement the Constitution, being as if its components.

However, the article 12 of the Czech Constitution defined all the components of the constitutional system of the country a special place in which the constitutional laws have enacted in the period of transition from totalitarianism to democracy. The Czech Constitution also defines that the constitutional laws may contain not norms, but single instructions – for example, legislative fixing of changes of the boundaries of the state. In this country creation or elimination of self-governing territorial units is accordance with the constitutional law.

Thus, there is another kind of modern constitutional laws – the acts providing the solution of questions concerning the changes of the state boundaries. Similar examples are available in many states. If we consider the Russian Federation, we see that the adoption of the Russian Federation and (or) creation in its structure of a new entity, as well as the change of the constitutional-legal status of the acting subject is carried out by the constitutional law. For example, the Federal constitutional law «About the adoption to the Russian Federation the Republic of Crimea and creation as a part of the Russian Federation the new subjects – the Republic

of Crimea and the city of federal value of Sevastopol) was adopted in March 21, 2014.

The world experience of creation of national legal systems illustrates the various approaches to definition of the constitutional law.

In the Romano-Germanic legal family there is a specific category of constitutional acts – «the organic laws». According to the Constitution of France, the legislative Assembly adopts three kinds of laws: constitutional (changing the Constitution), organic (on the questions specified in the Constitution) and common [4, p. 114].

According to article 203 of the Constitution of Venezuela of 1999 «those laws which so are called in this Constitution are organic; they are accepted for the organization of the public power or for development of constitutional rights of citizens and they serve as the normative constraint for other laws» [5, page 75]. The organic laws are the acts adopted in pursuance of blanket rules of the Basic law. The basic law is laconic; it regulates a wide range of legal relationship in general.

It is impossible to include in the Basic law many rules which in detail would regulate state legal relations. Therefore the Basic law contains the norms ordering to adopt the law of a certain contents – for example, the electoral law. Such norms are called «blanket». They outline in the legal field the void to be filled in by the organic law. The act issued in pursuance of blanket norm is called organic because it becomes an external «body» of basic laws or makes a continuation of their «body».

By the general rule, all regulations must conform to the Basic law, to develop and to ensure its application. But not every legislative establishment is considered by the organic law. The organic unity with the basic law has only those acts the publication of which it explicitly required [6, p. 40].

Thus, in the foreign legislation the regulations similar to the constitutional laws of the Republic of Kazakhstan are called as «organic» laws. The organic law is adopted by the state legislative body on issues directly provided for by the Constitution in order that differs from the adoption of a constitutional (making changes and additions to the Constitution) and common laws. The organic laws are specified in the text of the Constitution. They contain rules relating to the most important constitutional and legal institutions (the status of the Supreme bodies of the state, citizenship, state of emergency and etc.).

The Constitution of France provides the regulation of the organic law of a legal status of such government bodies as the constitutional Council

(article 63), High court of justice (article 67), the Supreme Council of magistracy (article 65).

Sometimes in the legal literature the organic are called all laws mentioned in the text of the Constitution. But such approach is unacceptable neither for Kazakhstan, nor for France because their constitutions have references to customary laws.

The need for the adoption of organic laws is explained by the foreign legislation that they complement and develop the basic principles and provisions of the Constitution which provides the special procedure for the adoption of organic laws.

These laws are accepted:

- only by the Parliament which may not delegate the authority of their edition to the head of state or government;

- a qualified majority of votes of the deputies of the Supreme legislative body.

The organic law can be changed only by the organic law in accordance with the constitutional procedure of its adoption.

Such conclusion corresponds to the world constitutional doctrine and practice. In the majority of constitutions there is, as a rule, a number of the referential (blanket) provisions providing the adoption of the common laws which aren't relating to category of the organic.

The special significance of public relations regulated by constitutional law, its content and features of regulatory requirements report to this act the characteristics, actually providing it a higher position in the hierarchy of legislative acts in comparison with the common law.

The constitutional laws adopted in pursuance of the Constitution are usually defined by the legislator. Their basic purpose and function is the most complete regulation of the corresponding relations within the accepted constitutional concept. The main sense and purpose of the constitutional laws is that fact that in the constitutional legislation they are defined as the isolated and priority acts of the superior legal force developing fundamental norms but not a part of the Constitution.

Therefore the legislator can't randomly without changing the existing legal norms introduce new constitutional laws or abolish the existing ones instead of them publish the acts of the current legislation. At the same time the adoption of the constitutional laws on changing and addition the existing constitutional laws, their cancellation or acceptance in the new edition is allowable. Otherwise there is a risk of deformation of the whole of «the constitutional design».

Thus, such as type of sources of law as the constitutional law is a natural phenomenon and

important for development of the constitutional norms and principles, ensuring the rule of Constitution, law-making and law-enforcement practice. Thanks to them the efficiency and stability of legal regulation significantly increases and the statehood becomes stronger.

The constitution and the constitutional laws have to carry out together the functions assigned to them on regulation of public and legal relations and relations between them, and between the constitutional and common laws are to be strictly hierarchical in nature.

Литература

- 1 Еллинек Г. Общее учение о государстве / пер. с нем. – Спб.: Общественная польза, 1903. – Т.1. – С. 20.
- 2 Сравнительное конституционное право / отв.ред. В.Е.Чиркин – М.: Манускрипт, 1996. – 729 с.
- 3 Марченко М.Н. Закон в системе англо-саксонского права // Вестн. Моск. ун-та Сер. 11: Право. – 1999. – № 5. – С. 70.
- 4 Конституционное право зарубежных стран: учебник: В 3-х т. Т. 3 /Отв. ред. Б.А. Страшун. – М.: БЕК, 1997. – С. 114.
- 5 Андреева Г.Н. Конституционное право зарубежных стран: учебник. – М.: Эксмо, 2005. – 656 с.
- 6 Арановский К.В. Государственное право зарубежных стран: учебник для вузов. – М.: Издательская группа «ФОРУМ» – «ИНФРА-М», 1998. – 488 с.

References

- 1 Ellinek G. Obshhee uchenie o gosudarstve / per. s nem. – Spb.: Obshhestvennaja pol'za, 1903. – T.1. – S. 20.
- 2 Sravnitel'noe konstitucionnoe pravo / otv.red. V.E.Chirkin – M.: Manuscript, 1996. – 729 s.
- 3 Marchenko M.N. Zakon v sisteme anglo-saksonskogo prava // Vestn. Mosk. un-ta Ser. 11: Pravo. – 1999. – № 5. – S. 70.
- 4 Konstitucionnoe pravo zarubezhnyh stran: uchebnik: V 3-h t. T. 3 /Otv. red. B.A. Strashun. – M.: BEK, 1997. – S. 114.
- 5 Andreeva G.N. Konstitucionnoe pravo zarubezhnyh stran: uchebnik. – M.: Jeksmo, 2005. – 656 s.
- 6 Aranovskij K.V. Gosudarstvennoe pravo zarubezhnyh stran: uchebnik dlja vuzov. – M.: Izdatel'skaja gruppa «FORUM» – «INFRA-M», 1998. – 488 s.