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CONSTITUTIONAL LAW-MAKING AS A SOCIAL PRODUCT

ELABORAÇÃO DE LEIS CONSTITUCIONAIS COMO UM PRODUTO SOCIAL*

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Abstract: The purpose of the study is to investigate the participation of society in the process of constitutional law-making and comprehension of this phenomenon in the modern science of law. The authors used a group of methods to achieve the goal of the study. These methods included classical general scientific methods (dialectical, formal-logical, analysis, synthesis, comparative) and private-scientific method of categorical analysis. Different approaches to the definition of the essence and types of constitutional law-making are disclosed and analyzed. The article expresses the opinion that the scope of the category of "constitutional law-making" is artificially narrowed. Authors examined the correspondence of the popular conception of law-making in general and the conception of constitutional law-making in particular to the objectives of creating a harmonious system of law. New approaches to the definition of the essence of constitutional law-making are formulated and the conclusion about the need for modernization of the concept of constitutional law-making is made. The authors suggest that the analysis of the content of constitutional-legal phenomena requires the use of different methodologies.

Keywords: Norm of constitutional law. Constitution. Legislation. System of law. Constitutional law-making.

Resumo: O objetivo do estudo é investigar a participação da sociedade no processo de elaboração do direito constitucional e a compreensão deste fenômeno na ciência moderna do direito. Os autores utilizaram um grupo de métodos para atingir o objetivo do estudo. Estes métodos incluíam métodos científicos clássicos gerais (dialético, formal-lógico, análise, síntese, comparativo) e

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métodos científicos privados de análise categórica. Diferentes abordagens para a definição da essência e tipos de elaboração de leis constitucionais são divulgadas e analisadas. O artigo expressa a opinião de que o escopo da categoria de "elaboração de leis constitucionais" é artificialmente restrito. Os autores examinaram a correspondência da concepção popular de legislar em geral e a concepção de legislar constitucional em particular com os objetivos de criar um sistema de direito harmonioso. Novas abordagens para a definição da essência da legislação constitucional são formuladas e é feita a conclusão sobre a necessidade de modernização do conceito de "legislar constitucional". Os autores sugerem que a análise do conteúdo dos fenômenos jurídico-constitucionais exige o uso de diferentes metodologias.

Palavras-chave: Norma de direito constitucional. Constituição. Legislação. Sistema de direito. Elaboração de leis constitucionais.

1. INTRODUCTION

Modern society is not only constantly modernizing, it is also important, while on the path of renewal, to constantly adjust the vector of this renewal in accordance with changing perceptions of the postmodern society (Smirnov *et al.*, 2019). The direction of modernization of legal science is largely determined by the understanding of the goals of the law. These goals are expressed in the most general and yet, at the same time, concentrated form in the provisions of the constitution (Tsapko *et al.*, 2017). The Constitution as the basis of the rule of law is of particular importance today due to the increased dynamics of public life and the shrinking distance between the citizen defending their rights and the highest human rights institution – the constitutional court (Smirnov *et al.*, 2020). In this light, the significance of the study of constitutional law-making as an institution of law is very high. For a more effective analysis of the essence and features of constitutional making, it is necessary to study both its known and little-studied aspects. This need is caused by the fact that constitutional law-making as a legal phenomenon that is not sufficiently institutionalized does not always yield the results unequivocally accepted by society. The involvement of to varying degrees organized social groups in the procedures of constitutional law-making will make its results more responsive to society's aspirations: "a necessary condition for progress is an intergenerational connection in which ancestors and descendants form a living whole" (Solovev, 2012).

The subject of research is the study of conformity of the widespread concept of law-making in general and the concept of constitutional law-making in particular to the tasks of building a harmonious system of law.

The purpose of the study is to investigate the categorical boundaries of constitutional law-making in the modern science of law.

2. METHODS

To analyze the categorical boundaries of constitutional law-making in legal science, the study uses various methods of research: classical general scientific methods (dialectical, formal-logical, analysis, synthesis, comparative).

The study also actively employs the private-scientific method of categorical analysis, as well as the method of cognitive categorization.

3. RESULTS AND DISCUSSION

It is argued that the definition of constitutional law-making is artificially narrowed and cannot be reduced to the activities of the authorized state bodies. Society in its various strata and concentrations of opinion not only can but must have the opportunity to influence the procedure of constitutional law-making at the earliest, pre-project stage.

Modern social space is objectively multi-dimensional, social communities continue to polarize (on religious, economic, cultural, and social grounds), the deformation of traditionally established values and orientations increases, there is no systematic understanding of the trends of human development, as well as the place, role, and meaning of the individual in the future. Taken together, these factors cause large-scale difficulties in the analysis of social connections and regulatory structures (including law).

The systemic characteristics of paradigmatic and syntagmatic connections between social groups change. At the same time, such changes generate new social communities and at the same time contribute to the alienation of the other, older groups from socially significant discursive practices. This factor forms the ground for antagonism, an imitative component in communications grows, isolated social spaces spontaneously form, and new ontological and axiological doctrines are idealized. Such entropic social dynamics indirectly affect law-making, including its highest, constitutional level.

Constitutional law-making is understood in a broad and narrow sense: as a large-scale process of forming the entire system of constitutional law and the system of legislation, i.e. the adoption of legislative acts that develop the provisions of the Constitution, and as revising the provisions of the Constitution alone and making amendments to it.

The theory of law rarely addresses issues related to branch rulemaking, to the process of law formation "ab ovo", which also applies to constitutional law-making. This circumstance is explained by the fact that: 1) this area of relations is insufficiently regulated by the norms of legislation; 2) law-making is carried out by a small group of specially authorized subjects, which partly sacralizes their activity and brings to life the illusion of their professionalism and the ability to do without detailed regulation in rulemaking; 3) the scientific apparatus reflecting the specifics of all stages of law-making is not detailed enough; 4) there is no correlation between the scientific ideas about law-making and the practical activities of the subjects of law-making.

Compared to law-making in any other branch of law, constitutional law-making has a more complex structure, as well as other distinguishing features. Constitutional law-making covers the entire system of constitutional law, not only the Constitution of the Russian Federation and constitutional legislation. Constitutional law-making is aimed at the formation of a supersystem of legal norms both established by the Constitution and projected on all legislation, on the entire future system of law. Thus, constitutional law-making must take into account the future development of law. Constitutional lawmaking is carried out by the highest bodies of the state and, periodically, by the capable population as a whole, and is, therefore, carried out, in contrast to sectoral law-making, in more strictly established procedural forms. Constitutional law-making is associated with greater public attention and discussion due to its particular public importance. Constitutional law-making carried out by the best experts sets the standard of quality in law-making for all other subjects of law-making. Constitutional law-making is carried out by extraordinary subjects: in the Russian Federation, it is either the Federal Assembly of the Russian Federation acting within the framework of a procedure different from the current legislation, or the Constitutional Assembly, or the capable population as a whole in the form of nationwide voting.

The main feature of constitutional law-making in the Russian Federation is its implementation exclusively in the form of law-making (Nosov, 2014). Other types of constitutional law-making are not regulated by the Constitution of the Russian Federation. Such imperative regulation, however, allows the interpretation of constitutional prescriptions by an authorized subject, which may be due to the need to level the alleged, real, or imaginary shortcomings of constitutional provisions and current legislation. These shortcomings are caused by various reasons: an attempt to protect the interests of an isolated group of persons; an earlier simplistic approach to the formulation of

constitutional provisions, which gave precedence to a temporary settlement of a problem without taking into account the perspective of constitutional regulation; a misunderstanding of the meaning of a constitutional provision and the rule derived from it.

If we exclude the subjective reasons for the emergence of these shortcomings, they can be boiled down to insufficient legal regulation of pre-project activities of the subjects of law-making in the field of constitutional law-making, which negatively affects the subsequent regulation of social relations due to the flawed correction of the content of legal norms.

Insufficient legal regulation of pre-project activities in the field of constitutional law-making may be countered by increasing public attention to the problem of ensuring the quality of the content of the norms of constitutional law.

In Russia, public control over the law-making activities of public authorities has intensified through the establishment of various public chambers, one of the functions of which is to conduct expert reviews of laws and draft laws of the Russian Federation and its constituent entities, draft normative legal acts of executive authorities of the Russian Federation and its constituent entities, and draft legal acts of local self-government bodies.

Public control over the activities of the authorities is also carried out with the help of the All-Russian public movement "All-Russian People's Front". These facts show that the existing shortcomings in the Constitution of the Russian Federation in the field of normative construction are largely mitigated, although, in itself, the problem of ensuring the quality of constitutional law-making remains for the long term.

The weak spot of constitutional lawmaking is the scientific justification of the goals, objectives, and means to be achieved and applied as a result of the operation of the Russian Constitution.

At present, the process of adopting amendments to the Constitution of the Russian Federation is normatively regulated, but the stage of pre-project activities preceding it in the constitutional law-making is not regulated normatively, not provided for theoretically, and not reflected in the approved structure of constitutional law-making. The pre-project stage is vital because it is at this stage that the practice of the application of constitutional norms, their effectiveness, and the public opinion on the need for amendments to the constitution is studied. At this stage, the opinions of different strata of society, appeals of state and municipal bodies and officials, public organizations and citizens, proposals of specialists in the field of law are generalized. As rightly indicated by G.V. Maltsev, negligence of this stage leads to a situation "when constructing institutions designed to

regulate conflicts between participants in future legal relations, one definitely feels the 'sympathy of the legislator' to one of the parties, which is left unspoken in the text of the law, but is quite perceptible. On the outside, it is expressed in minor procedural details, the creation of certain obstacles for some and small concessions for others" (Maltsev, 2007, p. 39). Such an effect of the legislation is absolutely unacceptable, and if such a phenomenon is allowed in constitutional law-making, we can conclude that there is a moral crisis of legal ideals. The detailing of constitutional prescriptions must be unemotionally precise, creating real opportunities for their application on an equal basis to all interested subjects of law.

Chairman of the Constitutional Court V.D. Zorkin also agrees with the imperfection of constitutional provisions as he notes "a bias in favor of the executive branch of power, insufficient clarity in the distribution of powers between the President and the Government, in determining the status of the presidential administration and the powers of the prosecutor's office" (Zorkin, 2018).

Another disadvantage of the constitutional lawmaking process at the current stage is the periodically observed attempts of the legislator to, in a broad sense, adopt certain normative provisions from the legal systems of other countries. Imposing onto society the models of legal regulation developed in other conditions, in a different legal culture, does not invoke respect for the ideal of the rule of law enshrined in the Constitution of the Russian Federation and the law as a whole.

For the purposes of constitutional law-making, the provisions of the preamble to the Russian Constitution are of great importance. B.S. Ebzeev emphasizes that "the normative meaning of the preamble lies in the fact that it typically determines the strategy of both law-making and law enforcement, imposes on the state, state and public bodies, and officials the legal obligation to act in accordance with the fundamental principles articulated in it. From this we should not underestimate its importance as a way of articulation and some of the positive legal principles of constitutional regulation, which, however, are characterized by a very high level of abstraction" (Ebzeev, 2009).

The practical implementation of the provisions of the Preamble for the purposes of legal regulation is conditioned by the quality of the normative material provided by the Preamble. The Preamble of the Constitution contains provisions that cannot directly serve as material for the construction of norms-rule of conduct. The content of the Preamble of the Constitution makes it possible to derive norms-targets, norms-declarations, norms-principles, but not norms with a three-part structure. The number of actors involved in the

direct application of the provisions of the Preamble is enormous, and it does not require any special knowledge and skills, unlike trying to apply the main part of the Constitution. The legal culture of the individual comes to the forefront in such mass "replenishing" constitutional law-making. Modern personal legal culture includes such an important property as law-abidance in the broad sense, i.e. the adequacy of human behavior to the legal norms existing in society, their recognition, operation with them, and building relations with other participants of social relations on the basis of models of ideal behavior set by legal norms.

The Constitution of the Russian Federation acts as a normative basis of the Russian society and state, so it is largely characterized by stability (Bezrukov, 2015). The Constitution as the foundation of the legal system should be conservative to resist arbitrary interference due to changes in the political situation.

Law-making in general and constitutional law-making in particular as a continuous process is usually divided into several stages: preliminary (or pre-project) and main. In the first stage of the preliminary stage of constitutional law-making, the objective need to create a new constitutional provision is established. After that, in the second stage of the preliminary stage, the decision to develop a draft is made, its text is drafted, finalized, discussed, and finally formalized as a subject of legislative initiative.

Then, as part of the main stage, the draft passes through the competent law-making body. At the second stage of law-making, the draft passes through such stages as the formal introduction of the draft by the subject of the law-making initiative, the inclusion of its consideration on the agenda, the subsequent discussion of the draft, its adoption, and promulgation.

The analysis of the practice of constitutional law-making process in Russia at the present stage suggests that the order of acceptance of amendments to the Constitution of the Russian Federation is regulated by article 136 of the Constitution of the Russian Federation, as well as by the Federal Law № 33-FZ of March 4, 1998 "On the order of acceptance and entry into force of amendments to the Constitution of the Russian Federation". The Resolution of the Constitutional Court of the Russian Federation of October 31, 1995, № 12-P "On the case of the interpretation of Article 136 of the Russian Federation Constitution" also retains some power.

At the same time, the features of the constitutional-legal level of normative regulation of social relations predetermine the implicit specificity of the process of constitutional law-making. Such specificity is seen in the following.

The content of the constitution is conditioned by factors of socio-economic and political nature.

The result of constitutional law-making is often predetermined by the dominant political force. This dictates the content of the activities to achieve the result and also affects the structure of the process. In this way, the stability of constitutional development and the continuity of domestic politics are achieved. However, the law "is a part of the human world, a system of recursive communications, and it cannot be reduced to laws, norms, ideals, relations, or human psyche, taken as separate semantic centers of the concept of law" (Poliakov, 2006). Therefore, such classical constitutional law-making, in addition to its apparent procedural efficiency, has an inherent distance from contemporary law-making needs of society, both because the legislator follows their own needs and because of the legislator's lack of consideration of the position of the most active social groups that have emerged since the electoral cycle that has formed the current dominant political force.

Chapter 9 of the Russian Constitution, as well as the Federal Law № 33-FZ of March 4, 1998 "On the order of acceptance and entry into force of amendments to the Constitution of the Russian Federation" establish the procedure for adopting amendments to the Russian Constitution, in which the population is present at its completion – as the carrier of constituent power through participation in a national referendum.

G.V. Maltsev suggests that the existence of legal norms and legal ideas separate from legal relations means the emancipation of "the subjective factor, and people get some means of consciously arranging their lives into their own hands" (Maltsev, 1977, p. 45). The potential of changeable public discourse is not used in constitutional law-making, so its result will always be the enshrinement in the text of the constitution of the ideals, goals, and interests of yesterday. The replenishment of members of the State Duma of the Russian Federation is cyclical, as are the periods when they accumulate the needs expressed by the population. Implementing the existing two-stage mechanism of constitutional law-making at the moment of transition to the second stage of the first stage, the preparation of the draft, the subject of the right to constitutional law-making loses contact with active, non-indifferent, and interested public groups. Subsequently, the public is familiar with the text of the draft amendment as "Deus Ex Machina". But, unlike the dramatization, the text of the amendment, although shrouded in mystery, does not have an unquestionable authority a priori.

The task of the Russian science of constitutional law is to form a mechanism for taking into account the positions of public groups interested in the final result of constitutional law-making, similar to the one that began to form in relation to the law-making carried out by the State Duma. Constitutional law is not reducible only to its formally fixed, written part, and it is necessary to supplement the first stage of constitutional law-making with procedures that would allow selecting constructively inclined public groups that are significant in public support at the moment and make them, albeit on a limited scale, subjects of constitutional law-making at its pre-project stage. The comprehension of the significance of the practices and ideals existing in society in the sphere of the norms of constitutional law is already in progress, and there comes an understanding that it is necessary to take into consideration "the proper regularities created by the people to organize the process of their free progressive development and create conditions for the free progressive development of man" (Makushin, 2017).

Public legal consciousness is characterized by the kind of normativity that is different from the normativity typical of positive law. The legal consciousness is determined not so much by the norms of law, as by the citizens' perception of the content of laws, the ideas of law, the need for lawful behavior, as well as the consciousness of these perceptions and the habit of their implementation, that is, what can be called a latent norm-organization (Plakhov, 2011).

4. CONCLUSION

It needs to be noted that the mechanism of constitutional law-making in the Russian Federation established by Chapter 9 of the Constitution exists and is actively applied, but requires improvement.

For this reason, it is important to elaborate both theoretically and practically the mechanism of constitutional law-making in the Russian Federation, because the quality of constitutional norms and of the entire system of law depends not only on how well the state apparatus exercises its capabilities in the field of constitutional law-making but also on the degree to which the most active parts of society are involved in this process.

REFERENCES

Bezrukov, A.V. (2015). *Konstitutsionnoe pravo Rossii: uchebnoe posobie* [Constitutional law of Russia: textbook]. Moscow: Iustitsinform.

Ebzeev, B.S. (2009). *Kommentarii k Konstitutsii Rossiiskoi Federatsii* [Commentary on the Constitution of the Russian Federation]. Moscow.

Makushin, A.A. (2017*). Filosofiia prava: ot obychaia k konstitutsionnym zakonomernostiam: uchebnoe posobie* [Philosophy of law: from customs to constitutional laws: textbook]. Saint Petersburg: St. Petersburg Institute (branch) of the All-Russian State University of Justice.

Maltsev, G.V. (1977). *Sotsialnaia spravedlivost i parvo* [Social justice and law]. Moscow: Mysl.

Maltsev, G.V. (2007). *Sotsialnye osnovaniia prava* [Social foundations of law]. Moscow.

Nosov, S.I. (2014). *Konstitutsionnoe pravo Rossiiskoi Federatsii: uchebnik dlia studentov, obuchaiushchikhsia po napravleniiu podgotovki "IUrisprudentsiia" (kvalifikatsiia "bakalavr")* [Constitutional law of the Russian Federation: textbook for students studying in the field of "Jurisprudence" (Bachelor's degree)]. Moscow: Statut.

Plakhov, V.D. (2011). *Norma i otklonenie v obshchestve. Filosofsko-teoreticheskoe vvedenie v sotsialnuiu etologiiu* [Norm and deviance in society. A philosophical and theoretical introduction to social ethology]. Saint Petersburg: Izd-vo Iuridicheskogo instituta.

Poliakov, A.V. (2006). Postklassicheskoe pravovedenie i ideia kommunikatsii [Postclassical jurisprudence and the idea of communication]. *Pravovedenie*. Number 2, 29.

Smirnov, D., Tereshchenko, E., Botasheva, L., Trofimov, M., Melnikova, V., & Dolgopolov, K. (2020). Digital jurisprudence. *Revista Inclusiones*. Volume 7. Number 1, 273-283.

Smirnov, D.A., Zhukov, A.P., Aparina, O.Y., Lauta, O.N., & Zakalyapin, D.V. (2019). Use of the Transformational Leadership Model in Police Management. *Amazonia Investiga*. Volume 8. Number 20, 236-241.

Solovev, V.S. (2012). *Opravdanie dobra* [The Justification of the Good]. Moscow: Institut russkoi tsivilizatsii, Algoritm.

Tsapko, M.I., Gontarenko, A.S., Gryaznov, D.G., Reshetnikova, I.V., & Shcherbakova, O.V. (2017). Elections and referendums in the constituent entities of the Russian Federation: Current issues and areas for improvement. *Man in India*. Volume 97, 485-493.

Zorkin, V.D. (October 9, 2018). Bukva i dukh Konstitutsii [The word and the spirit of the Constitution]. *Rossiiskaia gazeta*.