

On the Constitutional Process Concept Stages Role in Creation of the Modern States

Igor E. Ilichev

Department of State and Legal Disciplines, Belgorod Law Institute of the Ministry of Internal Affairs of Russian Federation Named After I D Putilin, Belgorod, Russia

Email address:

ilicigor@yandex.ru

To cite this article:

Igor E. Ilichev. On the Constitutional Process Concept Stages Role in Creation of the Modern States. *Social Sciences*.

Vol. 7, No. 6, 2018, pp. 268-273. doi: 10.11648/j.ss.20180706.14

Received: July 25, 2018; **Accepted:** September 13, 2018; **Published:** October 31, 2018

Abstract: The constitutional process is viewed as a complex phenomenon of legal life. In its broad interpretation the term Constitutional Process is the history of constitutionalism (constitutional reforms, the change of constitutions) in a particular country, in a narrow one – the totality of the stages of the life cycle of a single Constitution in their natural sequence, the history of a concrete Constitution. The history of constitutionalism in Russia presented in a concise form is linked to the goals and the procedure of the adoption of Russian constitutions. The study of the procedural aspects allowed the author to form the conceptual apparatus of the constitutional process, to identify and describe, also in a graphic form, the main stages of the life cycle of a single Constitution, to show the discrete nature of the modernization of existing legal constitutions and their shifts and the continuous nature of the development of a real (actual, non-formal, unwritten) constitution as a result of free folk art. Seven differences between the legal and actual constitutions have been identified and described, as well as the stimulating role of the actual constitution for the development of the legal Constitution and constitutional reforms. The article discusses the role of the constitutional process in the creation of modern States, legal and social conditions for a stable and long existence of the legal Constitution, the reasons for the emergence of new constitutions and their implementation in Russia, permissible limits of amendments to the current legal Constitution, and finally, how the problem of constitutional crises in developing countries may be solved under the auspices of the United Nations.

Keywords: Constitutional Process, Constitutional Reforms, Philosophy of the Phenomenon, Concepts, Stages, Legal Constitution, Actual Constitution, Their Correlation, Life Cycle, Modern States, Creation

1. Introduction

The dramatic events connected with the collapse of the Soviet Union caused the need for the development of constitutions in countries in the post-Soviet space. These constitutions are oriented towards the creation of legal, democratic states.

But one should not think, however, that only the peoples of the former USSR face these problems. These are the problems of the whole developing world (see, e.g., [1]). They are becoming more and more relevant in the Old World, too, where the problem of refugees, out of control, puts Europeans in front of the need to tighten the rules of their.

Residence in the countries of Western Europe (see, e.g., [2]).

This made the problem of theoretical description of

constitutional reforms (constitutional processes) urgent (see, e.g., [3]).

In the scientific literature there are various interpretations of the term “constitutional process”.

Inter alia, in scientific turnover in Russia there is often an understanding of the constitutional process as the procedural activity of the Constitutional Court of the Russian Federation (rules of production in the Constitutional Court of the Russian Federation). Speaking about the principles of constitutional court proceedings, the Federal constitutional law [4] gives an opportunity for researchers to interpret the procedural activity of the Constitutional Court as a constitutional process (see, for example, [5]). However, such an interpretation of the constitutional process should be taken as incorrect scientific slang.

In a broad, general understanding the constitutional

process is the sequence of the main stages of the country's constitutional development [6]. It is this idea of the constitutional process that we intend to adhere to in the further analysis of the problem under study. The task of the study is to develop a philosophy of the phenomenon called the constitutional process.

Reflecting on this problem, we came to the conclusion that the constitutional process as a social phenomenon is the unity of two mutually related processes. The primary basis of these processes is the life cycle of a single Constitution. The life cycle of a particular Constitution in a particular country, as it develops historically, can be supplemented by a process of changes of constitutions.

2. Methods

The development of the philosophy of the phenomenon called the constitutional process applied to the Russian Federation includes the need to work through the following issues:

- a. Retrospective analysis of the history of constitutionalism in Russia.
- b. The reasons for the emergence of new constitutions and their implementation in Russia.
- c. interpretations.
- d. To solve the formulated problems, we use formal-logical comparative-legal methods analysis synthesis comparisons, generalizations.

2.1. Retrospective Analysis of the History of Constitutionalism in Russia

Russia has got a short, but rather rich history of the constitutional process (constitutionalism).

Until April 23, 1906, Russia used to be an Absolute Monarchy.

The Manifestoes of August 6, 1905 (on the establishment of the State Duma), October 17, 1905 ("On the improvement of the state order") and February 20, 1906 (on the reorganization of the State Council) granted the population of Russia for the first time in its history "the unshakable foundations of civil freedom" as a forced measure, the concession of the monarch under the pressure of the mass revolutionary speeches of 1905 Processed in accordance with these manifestoes in order to "strengthen the foundations of the renewed state system" and promulgated on April 23, 1906, the Basic State Laws became, in fact, the first Constitution of Russia, transforming the country into a Constitutional Monarchy.

The February Revolution of 1917 led to the fall of the Russian Monarchy. In accordance with the manifesto of the Provisional Government of September 1, 1917, Russia

acquired a republican form of government. However, the Provisional Government did not manage to solve the problem of the constitutional consolidation of the reforms that it had begun: both the Provisional Government and the existing State Duma (the first Parliament of Russia) became history under the pressure of the Bolsheviks.

The October Socialist Revolution of 1917 radically changed the political situation in the country. The Third All-Russian Congress of Soviets instructs the All-Russian Central Executive Committee (VTsIK) to draft the basic provisions of the Constitution of the Russian Socialist Federative Soviet Republic (RSFSR).

On October 10, 1918 the Fifth All-Russian Congress of Soviets approved the first Constitution of the RSFSR. The Constitution established the foundations of the state system, enshrined the socio-economic foundations of the new system and included the Declaration of the Rights of the Working and Exploited People.

On December 30, 1922, the First Congress of the Soviets of the USSR approved the Declaration in an updated version and the Treaty on the Formation of a New State, the Union of Soviet Socialist Republics. The RSFSR joined the USSR together with the Ukrainian Soviet Socialist Republic, the Byelorussian Soviet Socialist Republic and the Transcaucasian Socialist Federative Soviet Republic.

On January 31, 1924 the Second Congress of the Soviets of the USSR approved the first Constitution of the USSR.

The Constitution of the USSR acquired the highest legal force (supreme power) in the entire territory of the USSR. This required aligning the constitutions of the Union republics that were parts of the USSR. Since that moment, the constitutional process in these republics has gone in the wake of the constitutional process of the USSR.

2.2. The Reasons for the Emergence of New Constitutions

And their implementation in Russia.

Constitutional reforms have become quite widespread in developing countries [7].

According to S. A. Avakyan, the reasons for the appearance of new constitutions are:

- a. The emergence of a new state;
- b. Setting of a new socio-economic and political system in the existing state;
- c. Change in the form of the state, form of government, political regime;
- d. The end of the established term of the existing Constitution [8].

The history of constitutionalism in Russia is practically an exhaustive illustration to the scheme of prof. S. A. Avakyan (table 1).

Table 1. The history of constitutionalism in Russia.

	The title of the act, year of adoption	Purpose (purpose of adoption / target of decision) of the Constitution	The procedure for the adoption of the Constitution
1	Basic State Laws, 1906	The transformation of the absolute monarchy into a constitutional	The Highest Approval [9]

	The title of the act, year of adoption	Purpose (purpose of adoption / target of decision) of the Constitution	The procedure for the adoption of the Constitution
2.	The Constitution of the RSFSR, 1918	The consolidation of the results of the October Revolution, the emergence of a new state	Resolution of the Fifth Congress of the Soviets [10]
3	The Constitution of the RSFSR, 1925	Association of the RSFSR with other republics in the USSR	Resolution of the Twelfth Congress of the Soviets [11]
4	The Constitution of the RSFSR, 1937	The consolidation of the provision for the abolition of the exploiting classes	By Session of the Supreme Council of the RSFSR [12]
5	Constitution (Fundamental Law) of the RSFSR, 1978	The consolidation of the provision on the socialist nation-wide state	By Session of the Supreme Council of the RSFSR [13]
6	Constitution of the Russian Federation, 1993	Proclamation of the Russian Federation as a democratic federal state with a republican form of government	By means of nation-wide vote [14]

It can be seen from the table that only the 1993 Constitution of the Russian Federation was adopted in the most democratic way – by means of popular vote. All the previous constitutions either were Supremely Approved (Basic State Laws of 1906), or were accepted by representatives of the ruling class (all constitutions of the USSR and the RSFSR).

2.3. Interpretations

Presented material allows us to interpret the constitutional process as a history of constitutionalism (constitutional reforms, changes of constitutions) in one or another particular country.

In a narrow interpretation, the constitutional process can be viewed as a set of stages in the life cycle of a single Constitution in their natural sequence, as the history of an individual Constitution.

Indeed, the practice of many states, including Russia, shows us that any constitution is a living organism: it is nurtured as a project, then adopted in one way or another – comes into the world, develops, improves, and finally, under pressure of force majeure circumstances, radically changing political, economic and social situation in the country, ceases to exist. It is then replaced by a new Constitution, which is starting its own life cycle. The old Constitution becomes a fact of the political history of the state.

In order to further describe the life cycle of the Constitution, let us agree on the terms:

- a. the legal Constitution – the official text of the Constitution;
- b. the actual constitution – a set of written and unwritten norms that have a steady circulation in society;
- c. the life cycle of the Constitution – the period from the moment of its adoption to its cancellation;
- d. a young Constitution – a newly adopted Constitution;
- e. a mature Constitution – a Constitution in the period of its sustainable existence and development;
- f. an aging Constitution – a Constitution that loses its ability to adequately regulate the changing social relations in the country;
- g. constitutional crisis – circumstances, the situation that led to the abolition of the current Constitution;
- h. "dying" Constitution – Constitution in conditions of constitutional crisis;
- i. the birth of a new Constitution – the process of preparing

and adopting of a new Constitution.

The ideology of the new Constitution at the time of its adoption is not so realistic, as futuristic, aimed at the future. Academician T. Y. Khabrieva and Professor V. E. Chirkin define such a situation as the discrepancy between the written and the real constitutions that is actually realized in the emerging socio-political and legal reality [6].

The written (legal) Constitution differs from the real one by its measure of embodiment of the constitutional ideas in life.

The legal Constitution always lags behind the factual one. This is due, above all, to the technical impossibility (and inexpediency) of an exhaustive constitutional settlement of the entire aggregate of existing social relations: the Constitution regulates the main, most significant social relations.

At the time of adoption of the Constitution, the distinction between the legal and real constitutions is minimal: the authors of the text tend to take into account all the tendencies of progressive social development (the young Constitution).

Under the circumstances of social stability, the development of the Constitution has a steady-progressive character. Paying tribute to the necessary innovations that do not affect the foundations of the constitutional system for a sufficiently long time, the Constitution acquires a mature character.

However, even in conditions of stability, the discrepancy between the legal and actual constitutions grows, including due to the conservatism of the written Constitution, its inability to "keep up" with the realities of life.

The growing gap between the legal and actual constitutions creates the potential that testifies to the aging of the written Constitution, the approximation of the constitutional crisis. When this potential reaches critical proportions, there is a need to change the Constitution. Its life cycle is nearing completion.

3. Results

Reasonings about the life cycle of the legal Constitution, the relationship between written and unwritten constitutions, and the processes of changing legal constitutions become more understandable if we present all these events graphically. The conclusions about the life cycle of the legal Constitution, the relationship between written and unwritten constitutions, and the processes of changing legal

constitutions become clearer if all these events are presented graphically.

The life cycle of the legal Constitution and the history of the actual (real) constitution coexisting with it is illustrated by a diagram.

status of Constitution

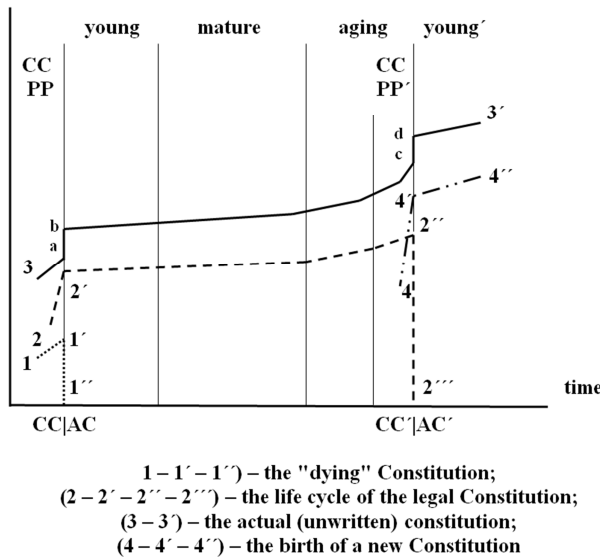


Figure 1. Graphic description of the life cycles of constitutions.

The life cycle of the legal (written) Constitution (curve 2 on the diagram) includes the preparatory period PP, the adoption of the Constitution (the point of the AC on the time axis), the stages of the "young", "mature", "aging" Constitution and, finally, the constitutional crisis (points CC and CC' on the time axis). That results in the adoption of a new Constitution (points AC and AC' on the time axis), while the old one loses its status and becomes a historical fact of the constitutional process (segment 2' 2'').

The preparatory period PP characterizes, first of all the constitutional crisis of the CC, condemning to death the existing Constitution, secondly, the coexistence of the current ("dying") Constitution (curve 1 before the break) and the actual Constitution (segment 3a). Thirdly, in the depths of the preparatory period PP, the text of the new Constitution is being prepared (curve 2 to the first break).

At the time of adoption of the new Constitution (the point of the AC on the time axis), there is a qualitative change in the political situation in the country:

Firstly, the constitutional crisis is resolved – the previous Constitution is terminated (segment 1' 1'');

Secondly, the new legal Constitution comes into force (the first break in curve 2);

Thirdly, the actual constitution gets an abrupt increase due to the new norms of the new Constitution (segment a b).

The leap-like augmentation of the actual constitution occurs under the influence of two factors which are acting in opposite directions.

Termination of the previous Constitution does not mean its complete negation – the text of the new Constitution, as a

rule, incorporates useful elements (norms, principles) of the previous Constitution. At the same time, part of the norms of the new Constitution already existed in real life in an unwritten form and it is only materialized in the text of the new Constitution. For these reasons, the segment a-b is not as large in size as one would expect.

4. Discussion

The diagram above gives an idea of the life cycle of a separate legal Constitution, the processes that accompany its birth, development and replacement by a new Constitution, the parallel existence and spontaneous development of an unwritten constitution. However, the diagram does not answer a number of questions of both theoretical and practical interest. In this section, we will discuss the following three aspects:

- What are the differences between legal (written) and unwritten constitutions;
- What are the conditions for a stable and long existence of the legal Constitution;
- What are the permissible limits of amendments to the current legal Constitution.

4.1. Differences Between Legal (Written) and Unwritten Constitutions

The analysis shows that the actual (real) constitution has at least seven significant differences from the written (legal) Constitution.

Firstly, it is always richer, wider than the written Constitution. This is due to the fact that the actual constitution absorbs as well as the rules of law, as the customs and traditions followed by the population of the country, and all that new that has not yet been consolidated in the norms of law, but is becoming a never growing phenomenon of social life or has already become that.

Secondly, the actual constitution is much more mobile than the legal Constitution – due to the conservatism of the latter, associated with the special order of making changes to it, as well as the inability to absorb all useful new without bureaucratic delays. The mobility of the actual constitution becomes the reason for the "lagging behind" of the legal Constitution already at the stages of its youth and maturity, not to mention the old age (see diagram).

Thirdly, the actual constitution, unlike the legal one, is eternal. It originated before all written constitutions and will survive each of them, because it lives in the consciousness and practice of society instead of on paper.

Fourthly, the actual constitution, unlike the legal one, is plural: it is different for each of us.

A different understanding of what is approved and what is disapproved, allows some particularly gifted individuals to go beyond the ordinary, habitual, to generate "crazy" ideas, which at first are rejected by society, and then imperceptibly become a necessary part of the social being (remember, for example, a story about rights and the freedoms of the individual). It also generates negative manifestations

(corruption, crime, etc.).

Fifthly, the actual constitution, unlike the legal one, is more productive: no single written Constitution can "keep up" with the actual one, at least because it is continuously created by free people. Legal Constitution comes to existence just once, "under order", put on paper by a small group (in the best case, by groups) of specialists associated in their activities with the requirements of opposing political elites.

Lagging the legal Constitution from the actual one, which takes a critical scale ("aging" Constitution, see scheme), becomes the cause of the constitutional crisis (CC, CC'). The voices of scientists and politicians call for constitutional reform, citing a number of weighty arguments and criticizing the authorities for "unacceptable slowness" in resolving this issue (see, e.g., [15, 16]).

The period of the aging Constitution becomes the preparatory period (P) for the birth of a new Constitution (a break on curve 4, the point PC' on the time axis).

Sixthly, if a written constitution provides for a special procedure for its adoption and revision, amendments to it, then the real constitution is infinitely free. It absorbs and preserves in itself any useful rules of life and, as a rule, rejects all the useless of what is generated by folk art. It is practically not influenced by the state and only to some extent by political forces, whereas the legal Constitution is always a compromise of the most influential political elites at the time of its adoption.

Seventhly, if the development of the actual constitution goes basically continuously and smoothly (except for rare "crazy" ideas and the adoption of new constitutions, see above), the legal Constitution develops discretely, overcoming the resistance of the conservative legislator. In this case, conservatism plays, of course, a positive role, keeping the legislator within the evolutionary changes in the Constitution.

4.2. Conditions for a Stable and Long Existence of the Legal Constitution

The stability of the Constitution is one of the important factors of the existence and sustainable development of any country including Russia (see, e.g., [17], [18]).

Stable and long-term existence of the Constitution is possible with a number of the necessary legal and social conditions. The composition of these conditions includes:

- a. Special, legally enshrined procedure for making amendments and additions to the country's constitution;
- b. Effective care of the state about its citizens, their well-being and comfort in their native country as a condition for preventing social explosions, revolutions, etc.;
- c. Clear regulation of the legal status and activities of political parties, other public associations, civil society institutions, as well as their responsibility for violations of the established regulations;
- d. Compliance with the law by all branches and officials of state and local governments, law enforcement agencies and citizens;
- e. A rigid response of the authorities to any statements

aimed at the destruction of the constitutional system of the country, violation of its sovereignty and territorial integrity, the rights and freedoms of man and citizen enshrined in the Constitution;

f. Legislative procedure for the adoption of a new Constitution.

All these principles are enshrined in the Constitution and laws of the modern Russian Federation.

For federal states (such as Germany, the Russian Federation, Swiss Confederation, the United States of America, etc.), compliance with the principle of the correspondence of regional laws to federal legislation, the priority of federal legislation, is of great importance.

The implementation of these principles together provides effective prevention as a social upheavals, as well as related constitutional crises. At the same time, the violation of these principles, the facilitated procedures for amending the Constitution and laws are the cause of numerous abuses of power, corruption, thus as a result, lead to profound shocks in the life of society (e.g. Ukraine, Venezuela, a number of countries in Africa, etc.).

4.3. Permissible Limits of Amendments to the Current Legal Constitution

The possibilities for changing the text of the Constitution are laid down in the constitutions of many countries. The Constitution of the Russian Federation is not an exception. According to Chapter 9, the Constitution of the Russian Federation may be amended by the initiative of the President and the Government or some other subjects of law. The decision on the adoption of these amendments is taken by the chambers of the Federal Assembly (Parliament) of the Russian Federation.

Permissible limits of amendments to the current legal Constitution are established. Permissible limits of amendments to the current legal Constitution are established by the Constitution of the Russian Federation. Article 135 of the Constitution prohibits amendments to Chapter 1 ("The Foundations of the Constitutional System"), Chapter 2 ("Human and civil Rights and Freedoms") and Chapter 9 ("Constitutional amendments and constitutional review"). The amendment of these chapters is qualified as a revision of the Constitution, that is, in fact, as the adoption of a new Constitution. This position seems to be quite reasonable, at least, due to the fact that the amendment of Chapter 1 changes the fundamental principles of the state structure of the country.

Article 135 of the Constitution provides for a mechanism for the adoption of a new Constitution. To this end, the Constitutional Assembly is convened, which is drafting a new Constitution of the Russian Federation and either adopts a new Constitution itself, or issues a draft Constitution for a national vote (referendum) – the way the current Constitution was adopted.

5. Conclusion

Understanding the nature and dynamics of the legal and actual constitutions opens up new opportunities for the development of constitutional law as a methodological basis for constitutional law making. The actual constitution should be the subject of joint research by constitutionalists and sociologists as a source of ideas that pushes development, improvement of the legal Constitution, becomes the subject of legislative activity, prepares the ground for the adoption of a new Constitution. However, it should be understood that the constitution is not a document that can be manipulated to satisfy the current political passions. The foundation of its stability and longevity is a healthy conservatism. Otherwise, the Constitution expects an imminent crisis, as evidenced by many examples from the history of many states.

The problem of the constitutional crisis as such, understood as the final stage of the evolution of the current Constitution plays an important role, especially for developing countries.

Constitutional crises until the recent times have been mainly resolved by means of the revolutionary changes. Unconditional achievement of mankind was the invention of a conflict-free way of resolving constitutional crises. This became possible in a democratic society, a society that participates in its institutions in the preparation of a new Constitution and itself adopts this Constitution.

Such conditions, as a rule, do not appear in dictatorships and authoritarian States. Proceeding from the regularities of the constitutional process revealed in this paper, we strongly believe that the world community could assist developing countries with undemocratic regimes in solving the problems of democratic reforms by developing appropriate recommendations and overseeing their implementation under the auspices of the United Nations.

Acknowledgements

The author is grateful to Miss Irina I. Janssen (Kingdom of the Netherlands) for her help in translating the article into English.

References

- [1] Martin van Vliet, Winluck Wahu, Augustine Magolowondo. Constitutional Reform Processes and Political Parties. Principles for Practice. Netherlands Institute for MultiParty Democracy, Africa Studies Centre, 2012. 60 Pp.
- [2] Claudia Postelnicescu. Europe's New Identity: The Refugee Crisis and the Rise of Nationalism. European Journal of Psychology, 2016 May; 12(2): Pp. 203 – 209.
- [3] Andrei N. Medushevsky. Law and justice in Post-Soviet Russia: Strategies of constitutional modernization. Journal of Eurasian Studies. 2012 Vol. 3, No 2 Pp. 116 – 125.
- [4] The principles of the constitutional proceedings. In: The Federal constitutional law of 21 July 1994 № 1-FCL (an edition from 28.12.2016 No 11-FKZ) "On the Constitutional Court of the Russian Federation". – Chapter 4.
- [5] Y. Kovalyov. The foundations of the constitutional proceedings in Russia. The Young Scientist. 2015 No. 22 Pp. 604 – 606.
- [6] T. Y. Khabrieva, V. E. Chirkin. The Theory of the modern Constitution. – Moscow: Norma, 2007. P. 9.
- [7] T. Y. Khabrieva, L. V. Andrichenko. Constitutional Reforms in the Post-Soviet Space: Development Trends. Perm University Herald. Juridical Sciences. 2017. Issue 37. Pp. 272 – 287.
- [8] S. A. Avakian. Constitutional law of Russia. Training course: in 2 Vol. / 5-th Ed. Moscow: Norma: Infra-M, 2015. Vol. 1. Pp. 161 – 165.
- [9] Basic state laws of the Russian Empire. 23 April 1906 In: Russian Legislation of the 10th – 20th centuries. Vol. 9 Moscow: Legal literature, 1994. Pp. 43 – 51.
- [10] The Constitution (Basic Law) of the Russian Socialist Federal Soviet Republic (adopted by the V all-Russian Congress of Soviets at the meeting of July 10, 1918.). URL <http://constitution.garant.ru/history/ussr-rsfsr/1918>.
- [11] The Constitution (Basic law) of the Russian Socialist Federal Soviet Republic (approved by the XII all-Russian Congress of Soviets on may 11, 1925). URL <http://constitution.garant.ru/history/ussr-rsfsr/1925>.
- [12] The Constitution (Basic Law) of the Russian Soviet Federal Socialist Republic (approved by the resolution of the Extraordinary XVII all-Russian Congress of Soviets of January 21, 1937. URL <http://constitution.garant.ru/history/ussr-rsfsr/1937>.
- [13] Constitution (Basic law) of the Russian Soviet Federal Socialist Republic. Adopted by the Supreme Council of the RSFSR on April 12, 1978. URL <http://constitution.garant.ru/history/ussr-rsfsr/1978>.
- [14] The Constitution of the Russian Federation (adopted by popular vote on December 12, 1993). URL <http://base.garant.ru/10103000>.
- [15] V. N. Butusova. On the modernization of the Russian Constitution, Constitutional and municipal law. 2013. No. 1. Pp. 5 – 11.
- [16] N. A. Bobrova. 20 years and 20 deficiencies of the Russian Constitution. Constitutional and municipal law (Rus.). 2013. No. 3. Pp. 33 – 37.
- [17] G. N. Komkova. The stability of the Constitution is the legal basis for the stability of the Russian state. Bulletin of the Saratov state law Academy. 2014. No. 1 (96). Pp. 65 – 69.