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**AMENDING THE CONSTITUTION IN
A POST-COMMUNIST COUNTRY:
WHAT PROTECTION OF ECONOMIC AND SOCIAL RIGHTS
IN THE RUSSIAN FEDERATION**

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Preliminary remarks

There is no doubt, that the fundamentals of political, economic and social systems of communist states were based on utopian ideas. Therefore, they collapsed so rapidly leaving only ruins of practically all institutions of political and social life. And only distorted conscience of the vast majority of population remained unaltered feeding new illusions and shadows of the past.

Such material and spiritual context explains many patterns of constitutional development of the post-communist states evolving in the struggle of fragmented and constantly changing fractions of political forces deprived in the main of social roots and often possessed by dreams of gaining personal advantages or embezzling public funds.

It is extremely difficult to unite such forces in the support of the draft constitution and at the same time to protect the constitutional text from their attempts to infiltrate it by norms distorting its mechanisms or minimizing its safeguards.

These preliminary observations based on my experience as a member of the working group of the Constitutional Commission of the Russian Federation (1992 – 1993) and a legal scholar, I will reveal more broadly in the light of constitutional regulation of economic and social rights in the post-communist Russia.

The first stage of constitutional reform: The amendments to the Constitution of 1978 and the draft of the Constitutional Commission of the Russian Federation

The first stage of the constitutional reform launched by the elections of the Congress of People's Deputies of Russia on March 4, 1990, was intended to solve two interconnected goals:

- (1) to make amendments to the acting Constitution of Russia of 1978 permitting to solve current political, economic and social problems and
- (2) to elaborate the new Constitution of Russia ensuring its irreversible transition and with minimum losses to market economy, democracy, legal and social state.

The first goal was implemented only partially due not only to enormous hardships of reforming the soviet economic and political systems but to the constant struggle of the Congress of People's Deputies and the Supreme Soviet (permanent parliament) of Russia with the central government of the Soviet Union (till September 1991) and later with the President of the Russian Federation (elected on June 12, 1991) and some member states of the Russian Federation demanding broader or independent political status.

As a result, the main part of about 300 amendments to the Constitution of Russia of 1978 adopted in 1989 – 1993, were aimed mostly on solving political disputes but not on constitutional provision of economic or social reforms. Nevertheless, some amendments accelerating economic and social reforms deserve to be mentioned.

For instance, the amendments of April 21, 1992 laid down as irrevocable fundamentals of the Russian Federation such constitutional values as the government by the people, federalism, Republican form of government and separation of powers.

The amendments of December 15, 1990 changed the economic system of Russia permitting the development of private property and revoking the exclusive status of state property. In particular, the amendments revoked the constitutional obligation of citizens “to take care of and to reinforce the socialist property” and “to fight against theft and wastefulness of state and public property and to carefully treat the people’s wealth”.

On the 9th of December of 1992 the Constitution was amended by provisions acknowledging the priority of human rights, proclaiming the equal protection of private, state, municipal and collective property and prohibiting the use of property in the aims contrary to the interests of society, rights and freedoms of other citizens.

In the whole, the Constitution of 1978 was not regarded as a proper legal instrument for a comprehensive economic and social reform. This mission was assigned to the draft Constitution elaborated by the Constitutional Commission formed by the Congress of People’s Deputies and headed by the President of Russia.

The draft Constitution of the Constitutional Commission was based on the idea of elaborating proper balances not only between different levels and branches of the government, but also between different freedoms and rights and even the restrictions imposed on their execution.

The other basic idea was to protect the new constitutional values from cancellation and the text of the Constitution from excessive practice of amending. Therefore, the working group of the Constitutional Commission introduced a special part of the draft. Devoted to the fundamentals of the constitutional system, it was intended to have higher legal force than the other provisions of other parts of the Constitution.

The first chapter of the draft Constitution “Fundamentals of the Constitutional System of the Russian Federation” included two articles, one specifying the fundamentals of the social state (Article 8) and the other one protecting the variety of forms of economic activities as a remedy for revoking the principles of the former socialist economy (Article 9).

In particular, Article 8 of the draft Constitution stipulated that the social goal of the Russian Federation is to provide for equal and just opportunities for the development of individuals and achievement of wellbeing of individuals and society in the whole. Revealing the content of this general value, it contained a broad list of responsibilities of the state, in particular, in protecting labor and health of people, establishing minimum level of wages, providing support to families, maternity and childhood, disabled and elderly persons, developing the system of social services, providing pensions and other forms of social protection, creating conditions for the development of culture, ecological security and rational use of natural resources.

Article 9 emphasized that economy of the Russian Federation shall be based on social market economy system ensuring the freedom of economic activities, entrepreneurship and labor, on variety and equality of forms of ownership and their legal protection, on faithful competition and pursuit of public benefit. It also underlined that the state shall regulate national economy in the interests of individual and society and that economic relations shall be built on social partnership between individual and the state, employee and employer, producer and consumer. These basic provisions were developed in two parts of the draft Constitution devoted to economic, social and cultural rights and freedoms and to organization of civil society.

Chapter IV of the draft Constitution contained a vast enumeration of economic, social and cultural rights, including economic freedom as a product of the right of property, free entrepreneurship and free labor (Articles 34 - 36), the right to the free of charge protection of health (Article 37), the right to favorable environment (Article 38), the right to social protection (Article 39), the right to home (Article 40), the right to education (Article 41), the freedom of art and technical creativity (Article 42).

Nearly all of the aforesaid freedoms and rights were accompanied by appropriate obligations of state and municipal organs. For instance, the right to home was ensured by the provisions that no one may be arbitrarily deprived of home; that the state and municipal organs shall stimulate home construction and to create other conditions for realization of the right to home; that low income persons and other individuals, as specified by law, may rent home belonging to state or municipalities free of charge or for flexible payment.

Such constitutional guarantees were reinforced by appropriate provisions of part three of the draft Constitution devoted to civil society.

For instance, Article 57 acknowledged all forms of property (private, state and others) and prohibited nationalization.

Article 58 proclaimed that land, subsoil, wildlife and plant life and other natural resources shall be in state, private and other kinds of property and, that they shall be regarded as the domain of peoples leaving in appropriate territories, that they may not be used in the detriment of their interests and that owners may not accumulate land and other natural resources beyond the limits as established by law, that the use of land may not damage its fertility and environment.

Article 59 stipulated that labor is free and shall be promoted by state and society, that freedom of individual and collective labor contracts shall be guaranteed and may not deteriorate the state of workers as established by the Constitution and laws, that labor collective has the right to participate in management of affairs of enterprise or organization and that the state shall create conditions for full employment of working population.

The draft Constitution proclaimed also that the state shall protect the rights of consumers (Article 60) and the freedom of competition (Article 61).

Special guarantees were provided for trade unions and other public associations involved in the spheres of economic, social and cultural rights (Articles 63 – 65, 67) and for families, children, minor, aged and disabled persons (Articles 71 – 72).

Finalizing the analysis of the mechanism of economic and social rights and freedoms as laid down in the draft Constitution of the Constitutional Commission, it would be appropriate to note that it preserved the tradition of comprehensive regulation of economic and social rights of the former soviet constitution with the hope to preserve solidarity of population. But this hope never came true.

The second stage of constitutional reforms: The Constitution of the Russian Federation of 1993

Confrontation of the Congress of People's Deputies and the Supreme Soviet, on the one side, and the President of the Russian Federation, on the other side, resulted in dramatic events of October 1993 when the parliament was besieged and later dissolved after fierce attack of military troops.

There was only one way for stabilizing the situation and for restoring legality – to adopt the new Constitution for Russia. This mission was fulfilled by the Constitutional Assembly convened by the President with the aim at first to substitute and later to continue the work of the Constitutional Commission.

The Constitutional Assembly elaborated the new draft Constitution which was approved at the national referendum on the 12th of December 1993 and entered into force on December 25, 1993.

The new Constitution has borrowed practically without any changes many norms (about 60 %) of the text of the draft of the Constitutional Commission. It has preserved its division into fundamental and other constitutional provisions, its mechanism of federative state structure and status of municipal power, its guarantees of personal and political rights.

But it differed on two key issues – on regulating separation of powers and on ensuring economic and social rights. The first one was characterized by predominant position of the President in the political system of Russia, and the other one by prevailing significance of economic rights.

These differences reflected political and ideological passions and dreams existing at that time.

The authors of the Constitution of 1993 believed that free market economy will cure all diseases of economic and social life. Therefore, they tried to minimize the constitutional barriers restraining its future development.

The Constitution has proclaimed among other fundamental values the guarantees of the unity of economic space, free movement of goods, services and financial resources, support for competition and freedom of any economic activity and of the free legal standing of private, state, municipal and other forms of ownership (Article 8).

Confirming these guarantees, the Constitution introduced a large range of additional provisions. In particular, it specified that land and other natural resources may be in private, state, municipal and other forms of ownership (Article 9), that everyone shall have the right to freely use his or her abilities and property for entrepreneurial or any other economic activity not prohibited by the law (Article 34), that everyone shall have the right to have property in his or her ownership, to possess, use and manage it either individually or jointly with other persons and that no one may be arbitrarily deprived of his or her property unless on the basis of decision by a court of law (Article 35), that citizens and their associations shall have the right to have land in their private ownership (Article 36).

The scope of these rights and guarantees was limited insignificantly. The Constitution stipulated that no economic activity shall be aimed at monopolization or unfair competition (Article 34), that property can be forcibly alienated for state needs only on condition of a preliminary and equal compensation (Article 35), that the possession, use and management of the land and other natural resources shall be freely exercised by their owners provided this does not cause damage to the environment or infringe upon the rights and interests of other persons (Article 36).

The Constitution has omitted the main part of restrictions on ownership, in particular requiring state regulation of economy, limiting the use of property by demands of pursuit of public benefit and observance of social partnership, prohibiting the damage to fertility of land and so on.

On the hand, the constitutional scope of social rights was considerably reduced.

The fundamentals of the constitutional system included only the minimum set of social standards, by stating that the Russian Federation shall be a social state, whose policies shall be aimed at creating conditions which ensure a dignified life and free development of man and that the Russian Federation shall protect the work and health of its people, establish a guaranteed minimum wage, provide state support for family, motherhood, fatherhood and childhood, and also for the disabled and for elderly citizens, develop a system of social services and establish government pensions, benefits and other social security guarantees (Article 7).

Such restrictive approach was preserved in the major part of other constitutional provisions devoted to social rights.

For instance, Article 37 substituted the right to work by the provision that work shall be free and that everyone shall have the right to make free use of his or her abilities for work and to choose a type of activity and occupation.

The Constitution has significantly decreased the guarantees of free labor only prohibiting forced labor and proclaiming that everyone shall have the right to work under conditions meeting the requirements of safety and hygiene, to receive remuneration for work without any discrimination and not below the statutory minimum wage, to have security against unemployment.

It also stated that everyone shall have the right to rest and leisure and that a person having a work contract shall be guaranteed the statutory duration of the work time, days off and holidays, and paid annual vacation.

The Constitution has also acknowledged the right to individual and collective labor disputes with the use of means of resolution thereof established by federal law, including the right to strike.

But it drastically reduced the obligations of the state to regulate the labor market and to provide appropriate guarantees to employed persons.

The same pattern was followed in the constitutional regulation of issues of protection of motherhood and childhood (Article 38), of social security in old age, in case of disease, invalidity, loss of breadwinner, to bring up children (Article 39), of guaranteeing the rights to have home (Article 40), to health care and medical assistance (Article 41), to a favorable environment (Article 42), to education (Article 43), to freedom of literary, artistic, scientific, intellectual and other types of creative activity and tuition (Article 44).

For instance, the Constitution contained only mere declarations that motherhood and childhood shall be under state protection, that state pensions and social benefits shall be established by laws, that no one may be arbitrarily deprived of his or her home, that everyone shall have the right to a favorable environment, that intellectual property shall be protected by the law and that everyone shall have the right to participation in cultural life, to the use of institutions of culture, and access to cultural values.

Such norms were in sharp contrast to the former constitutional safeguards which, for instance, were absolutely prohibiting to deprive any person of his or her home.

More broad guarantees were preserved in the field of health care and medical assistance. Article 41 stipulated that medical assistance shall be made available by state and municipal health care institutions to citizens free of charge, with the money from the relevant budget, insurance payments and other revenues and that the Russian Federation shall finance federal health care and health-building programs, take measures to develop state, municipal and private health care systems, encourage activities contributing to the strengthening of the individual's health, to the development of physical culture and sport, and to ecological, sanitary and epidemiologic welfare.

The Constitution has preserved the significant part of the former guarantees of the right to education, providing that the accessibility and gratuity of pre-school, general secondary and vocational secondary education in public and municipal educational institutions and enterprises shall be guaranteed and that everyone shall have the right to receive, free of charge and on a competitive basis, higher education in a state or municipal educational institution or enterprise, and that the Russian Federation shall institute federal state educational standards and support

various forms of education and self-education (Article 43).

Such constitutional framework was conceived to pave the way for unimpeded development of national economy at the expense of the major part of former social programs. As a result, the country has lost its enormous and in general efficient system of social programs, but this did not help to make closer the economic prosperity. It remained, like communism, only in dreams.

The third stage of constitutional reforms: Realization of constitutional values in legislation and law enforcement practice

The failure of the economic model of the new Constitution was predetermined by the lack of necessary resources.

The population in the whole was not involved as an active actor of the new economic system. The voucher privatization has actually excluded it from participation in the division of state property. At the same time hyperinflation of 1992 – 1995 has totally deprived the vast majority of population of their savings. Obviously, the constitutional guarantees of equality of economic opportunities and rights (Articles 8, 19, 34 and 35) were not intended for them.

There were no business people able to resume responsibility for the market development of national economy. Such social force was totally exterminated in 1920 – 1930. Therefore, this gap was filled in the main by representatives of the former soviet party-economic nomenclature, underground economy and criminal world, possessed only by the idea of self-enrichment. Such human substrate was genetically unable to produce social class of effective business managers and to implement the constitutional appeal to secure the wellbeing and prosperity of Russia (Preamble to the Constitution).

There was no modern production basis able to compete in the global economy. The main part of industrial and agricultural factories and enterprises were obsolete and were doomed to be bankrupt. The state refrained from their support which infringed the constitutional obligation of equal protection to private, state, municipal and other forms of ownership (part 2 of Article 8).

There were no financial resources required for the support of everyday activities of economic enterprises, not to mention the needs of their modernization. The financial situation was deteriorated by constantly growing capital outflow from Russia which infringed the constitutional requirement of the unity of economic space (part 1 of Article 8).

There was no adequate legislative basis of economic reforms. Economic legislation of the first decade of the post-soviet Russia was badly structured, full of contradictions and gaps and often more preventing than promoting the solution of urgent goals of economic development. Moreover, there were system legislative errors distorting the existing or creating nonviable economic infrastructures and space. As examples, one may note the decrees of the first President of Russia legalizing lien auctions, which permitted through the government loan secured shares to transfer the largest state enterprises of Russia (for instance, Norilsk Nickel, UKOS, Lukoil, Sibneft) to private owners.

Deplorable economic situation caused by the aforesaid factors resulted in the severe economic crisis of 1998, which led to the fall of national currency and new wave of hyperinflation, to sharp decline in production and bankruptcy of thousands of enterprises.

But the most disastrous consequences of the crisis of 1998 were in the sphere of social services. They were not able to finance the main part of the social programs which deprived the vast majority of population of the constitutional guarantees of social rights and freedoms. They existed for them only on paper but not in life.

The further constitutional development of economic and social rights and freedoms may be analyzed in the two interdependent dimensions: recovery from the economic crisis and restoration of the link between the Constitution and the real economic and social life. But this analysis we will continue only in the latter one in order to follow mainly the road of law.

There were no amendments to the Constitution of 1993 dealing with the issues of economic and social life. But this does not mean that it was regarded as absolutely rigid and that it was left unaltered.

The Constitution has been developing in two ways:

- (1) Through constitutional interpretation by the Constitutional Court of Russia and other judicial organs applying its provisions; and
- (2) By detailed elaboration of constitutional values and norms in legislation and other normative acts.

In the whole, the courts of general jurisdiction rarely undertake the mission of constitutional interpretation preferring to step aside and to leave it to the Constitutional Court which has been directly vested by the Constitution with the power to interpret the Constitution on the request of the President, Council of Federation, State Duma and legislative organs of subjects of the Russian Federation (Article 125).

The practice of the constitutional interpretation of the economic and social rights by the Constitutional Court was vast and in general directed on rectification of the initial disbalance between economic and social rights.

In a number of judgments it confirmed the right of the state to limit the scope of economic freedoms in the pursuit of general welfare. At the same time the Constitutional Court has significantly enlarged the scope of social rights broadly interpreting the constitutional provisions.

Nevertheless, it would be appropriate to note that the potential of the constitutional interpretation in this field is not fully realized. There are still some gaps which may be filled, in particular in reinforcing the guarantees of social rights.

The detailed elaboration of economic and social constitutional values and norms in legislation and other normative acts has been exercised in several waves.

For instance, the legislative provision of economic rights and freedoms at first was focused on the detailed regulation of civil law relations. Four parts of the Civil Code were consecutively adopted in 1994, 1996, 2001 and 2006.

The second stage of legislative elaboration of economic constitutional values was oriented on elimination of administrative barriers as one of the central goals of administrative reforms in Russia (2006 – 2010).

Now Russia has entered the third stage which is characterized by modernization of legal regulation of economic rights (modernization of the Civil Code was launched by the President in 2008 and it still is not completed) and by harmonization of the judicial practice which shall be achieved by the merger of the courts of general and arbitration jurisdictions as a focal point of the judicial reform started in Russia in 2013.

There were several stages in the development of the legislative provision of social rights and

freedoms. The first stage (1993 – 2003) was devoted to the elaboration of a new legal framework for regulating social rights. The second stage (2005 – 2012) was concentrated on monetization of social benefits and advantages and reorganization of social services. The third stage was launched in 2012 by the election program of V. Putin demanding to make social police more merciful and just.

The contours of this new policy are still vague. But it is obvious that its realization will totally depend on the potential of national economy which currently experiences not the best times...