



Gagik
Harutyunyan

CONSTITUTIONAL CULTURE:

THE LESSONS OF HISTORY
AND THE CHALLENGES
OF TIME

CONSTITUTIONAL CULTURE:
THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME

GAGIK HARUTYUNYAN

Recommended for publication by the decisions of the Academic Board of Public Administration Academy of the Republic of Armenia and the Board of the Center of Constitutional Law of the Republic of Armenia

Editors: **G. Danielyan** - Doctor of Law, Professor
R. Avagyan - Doctor of Law Professor
K. Mirumyan - Doctor of Law, Professor

The subject matter of this study is the phenomenon of constitutional culture, viewed from the philosophical, historical, logical, systemic-epistemological, comparative-constitutional, and legal implementation dimensions. An attempt is made, for the first time, to present the nature and specifics of the formation and expressions of constitutional culture in the Armenian reality, beginning with the Early Christian period. Current issues and challenges of constitutional developments are discussed. The trends in the systemic development of European constitutional culture are highlighted. The conceptual approaches are proposed for the perception of the value system integrity of constitutional culture in the Republic of Armenia; profoundly incorporating the lessons of history; accurately assessing the challenges of the time, developing the policies of constitutional and legal development, establishing constitutionalism and guaranteeing the Rule of Law in the country.

Many issues of methodological and practical nature, raised by the Author, have received a wide response in the international scientific circles and may play an important role in solving the problem of overcoming the deficit of constitutionalism.

**CONSTITUTIONAL
CULTURE:
THE LESSONS OF HISTORY
AND THE CHALLENGES OF TIME**

Revised English Edition
Yerevan 2017

TABLE OF CONTENTS

UDC 342: 93/94

GAGIK HARUTYUNYAN - Doctor of Law, Professor

CONSTITUTIONAL CULTURE:
THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME

ISBN 978- 99930-66-63-7

© 2017 Gagik Harutyunyan

INTRODUCTION TO THE FIRST EDITION	9
INTRODUCTION TO THE SECOND EDITION	13
CHAPTER 1. EPISTEMOLOGICAL NATURE AND SUBSTANCE OF THE NOTION “CONSTITUTIONAL CULTURE”	20
1.1. Legal and philosophical perceptions of the notion “constitutional culture”	20
1.2. From Constitution to constitutionalism: the dialectics of the desired and reality	41
CHAPTER 2. HISTORICAL ROOTS OF FORMATION OF CONSTITUTIONAL CULTURE IN THE ARMENIAN REALITY OF THE CHRISTIAN PERIOD	57
2.1. The legal and political significance of the proclamation of Christianity as a state religion in Armenia	57
2.2. The constitutional role and significance of national ecclesiastical councils	65
2.3. Legal characteristics of canonical constitutions	70
2.4. Typical features of constitutional culture in the pages of the Armenian legal-political thought	86
CHAPTER 3. CONSTITUTIONAL CULTURE IN THE BACKGROUND FOR THE FORMATION OF RULE-OF-LAW, DEMOCRATIC STATE AND ESTABLISHMENT OF CONSTITUTIONALISM	114

3.1. Constitutional culture in the system of the contemporary European legal thought	114	4.8. Axiological nature and features of the national constitutionalism	254
3.2. Manifestation of the nature and specifics of constitutional culture in the conditions of the Armenian new reality	129	4.9. Main deformations of constitutionalism in the transformative social systems	261
3.3. Contemporary perceptions of pivotal values of the Constitution of the rule-of-law, democratic states	152	4.10. Axiological main issues of constitutional developments from the perspective of the contemporary challenges	276
3.4. Main issues of the new stage of constitutional developments in the Republic of Armenia	172		
CHAPTER 4. GLOBAL CHALLENGES OF GUARANTEEING CONSTITUTIONALISM	186	CHAPTER 5. THE IMPERATIVE OF GUARANTEEING THE SUPREMACY OF THE CONSTITUTION	287
4.1. Interrelations between statehood and constitutionalism	186	5.1. Contemporary requirements regarding constitutional review	287
4.2. The new posture of supranational constitutionalism	190	5.2. Trends of development for the systems of constitutional justice	319
4.3. Guaranteeing of constitutionalism as a criterion of rule-of-law State	192	5.3. Interpretation of the Constitution by the Constitutional Court	331
4.4. Guarantees of constitutionalism in the Anglo-American and continental legal systems	233	5.4. Settlement of disputes regarding constitutional powers as the guarantee for constitutionalism	337
4.5. Constitutionalism at the crossroads of politics and law	243	5.5. Precedential nature of the decisions of the Constitutional Court	345
4.6. Constitutional roots of public concordance and tolerance	247	5.6. New stage of international cooperation in the field of constitutional justice	356
4.7. Main issues of constitutionalization of the social behaviour of the individual and political and public behaviour of state authorities	249	CHAPTER 6. CONSTITUTIONAL MONITORING AS A NEW QUALITY OF THE EXPRESSION OF CONSTITUTIONAL CULTURE	360
		6.1. Organic link between the definitions “Constitution”, “constitutional culture”, “constitutionalism”, “constitutional monitoring” in the context of sustainable development	360

6.2. Conceptual approach in introducing systemic constitutional monitoring	382
6.3. Main issues of constitutional monitoring in the conditions of social transformation	385
6.4. "Constitutional control" and "constitutional monitoring": interrelation and manifestation of its essence	387
6.5. Constitutional diagnostics as a mechanism for implementation of systemic constitutional monitoring	391
6.6. Constitutional monitoring for guaranteeing the rule of law	398
6.7. Constitutional monitoring for ensuring functional balance of power	410
6.8. Constitutional monitoring and constitutional responsibility	420

INSTEAD OF A CONCLUSION:

ROLE OF THE RULE OF LAW CHECKLIST IN THE SYSTEM OF CONSTITUTIONAL MONITORING /CONCEPTUAL APPROACHES/	427
--	-----

APPENDIX I	438
APPENDIX II	454
SUMMARY	479

**INTRODUCTION
TO THE FIRST EDITION**

Frequent references are made in recent international practice to the experience of constitutional developments and to the common trends and specifics of the development of constitutional practice. In particular, these issues were the subjects of comprehensive discussions in Rotterdam in 1999, in Santiago in 2004 and in Athens in 2007 at the Summits of the International Association of Constitutional Law. In 1999 a special international conference particularly on issues of constitutional culture was convened in Poland.¹ In 2004 another conference took place in Warsaw to discuss the experience of constitutionalism and constitutional developments in the countries of Eastern Europe in the course of the preceding 15 years. Having participated in these, as well as in a number of other conferences of the same caliber, and having experienced first hand the spirit of discussions at these forums, the general logic of setting forth and analyzing issues, and in view of the topical nature of the fundamental subject of those discussions in the context of the Armenian reality, we considered it appropriate to embark on a comprehensive reflection on the fundamental issues of constitutional culture, the necessity for a serious discussion of which cannot be overestimated also from the perspective of transitology.

Our submissions to the conferences mentioned above were mostly aspiring not only to identify the principal trends of development of constitutionalism in European countries, the particulars of their

¹ Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000

expression in our context, but also reflected on the distortions thereof in transition countries, and the underlying causes. We have made an attempt to pay special attention to these issues in this work.

A historical, logical and comparative analysis of the formation of constitutional culture in the Armenian reality is of particular interest, in view of the former's deep roots, rich traditions and enlightening lessons. Since this is a less explored subject, and demanding a meaningful analysis and evaluation from the perspective of contemporary legal mind and criteria, as well as appropriate exposure to foreign scrutiny, we assign great importance to a general historical overview of the formation of constitutional culture in the Armenian reality, which contains enlightening lessons from the viewpoint of current developments.

We do not subscribe to far-reaching approaches and are certain that the constitutional culture may only acquire systemic integrity at a certain level of development of civilization, upon the establishment of constitutionalism and safeguards for the supremacy of the Constitution in a country. Nevertheless, as an intellectually evolving system of values, it has deep historical roots and is incarnate in "unwritten constitutions," customs, traditions, spiritual values and canon, statutes and rules of constituting significance. The constitution and constitutionalism should not be viewed within the four corners of the logic of the law. Constitutional culture is an important element of the entire intellectual and cultural heritage of a nation, of its collective memory, and its acknowledgment and absorption possesses a great charge of self-cognition for just about every nation.²

² Perhaps it is with this in mind that Shahamirian wrote this in his preface to the 18th century publication of the *Entrapment of Vanity*: "Here is my only request to the reader of this: when you acquire this book, first read it three times from cover to cover and, second, if the reader happens to have been born and nurtured in parts of the world controlled by barbaric tribes, I beseech him to look for and find someone living under the government of free Christians, someone who has seen the world, enquire him in person about every uncertain point encountered here and get, with the latter's assistance, the explanation and the beneficial meaning of every article I wrote." (Որոգայթ փստսց, Երևան, 2002, էջ 16).

There are few studies in international literature devoted specifically to constitutional culture, among which one may single out, for example, "Constitutional Culture and Democratic Rule" (Stanford University, California), which discusses over a dozen of fundamental issues. This list includes, most notably, "Constitutional Democracy. Sources and Traditions", "The Formation of Constitutional Culture," "The Logic for the existence of a Democratic constitution," "The Structure and Content of a Constitution". A comparative analysis," Separation of powers and the independence of the judiciary," "Constitutional Amendments and the Stability of Constitution," etc.

The specific framing of the broader subject, such as "Fundamental issues of European constitutional culture," "Constitutional culture and tradition," "Constitutional culture in various continents," "Constitutional Culture and Human Rights," "Religion and Constitutional Culture," "The Role of the Constitutional Court in the formation of Constitutional Culture," etc, have become the subject of discussions at international conferences and specialized literature.³

In these and other similar discussions and studies special attention is paid to the origins of constitutional culture, the particulars of its expressions, the formation of constitutional tradition, the comparative analysis of the Constitution in effect and the qualities of constitutionalism in a country. We have adhered to the same general principle, revealing the epistemological essence and substance of the notion "Constitutional Culture" and attempting to perform a systemic analysis of the historical development of constitutional culture and constitutional tradition in the Armenian reality, to summarize and evaluate its lessons in the context of international trends of constitutional advancement and the current challenges that the newly independent Republic of Armenia and the international community are facing. His

³ Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000, էջեր 4-5, Constitutional Cultures: The Mentality and Consequences of Judicial Review. Robert F. Nagel. University of California Press, 1993.

Holiness Vazken I Surpreme Patriarch and Catholicos of All Armenians quite wisely stated in his article "Our Future:" "In order to construct a future the first and foremost prerequisite is to have a foundation in the present, the past may only illustrate the extent of our potential."⁴ That is a reason why this monograph assigns special importance to a comprehensive analysis of current expressions of constitutional culture and the fundamental problems of ongoing constitutional developments, the imperatives of the establishment of a democratic, rule of law state in transitional countries.

INTRODUCTION TO THE SECOND EDITION

Within the last centuries, the issue of constitutionalism from the viewpoint of the limitation of power and entrenchment of the rule of law has always been in the spotlight of scientific research and statecraft. The formation of the liberal legal thinking in Europe pushed to the first line the necessity of guaranteeing human rights and freedoms, and this revolutionary wave was firstly reflected into the first practical systematized work, namely the Bill of Rights of 1689 in England. It was further reflected in the American Declaration of Independence of 1776, as well as in the French Declaration of the Rights of Man and of the Citizen of 1789. The latter includes a perfect formula in regard of constitutionalism, namely emphasizing that **"A society in which the observance of the law is not assured, nor the separation of powers defined, has no constitution at all."** /Art 16/. The existence of constitution was obviously conditioned on the fact of existence of constitutionally stipulated values and fundamental principles in the real life.

The new logics of state-public formation of life was being developed, which took as a cornerstone emphasizing on law and limitation of power. Founding Fathers of the Constitution of the United States of America found the solution of this issue firstly in the separation and balancing of powers. As James Madison used to argue, in order to balance vanity it shall be confronted by vanity. He considered that the constitutional balancing of conflicting and competitive interests

⁴ Ոգևդեղեն կյանք, Ս. Էջմիածին, 1998, էջ 68:

can limit the Government and guarantee the freedom⁵. On the other hand, back in 1773 Hakob and Shahamir Shahamiryans entitled the constitution of the future independent Armenia as “The Entrapment of Vanity”, thus summing up in this title the whole essence and logics of the constitutional regulations.

Taking as a basis these roots of constitutional legal thinking, the liberal-legal developments gradually realized the genius generalization widely recognized since the early Medieval Ages, according to which **if the human’s life laws are not driven from the natural law, laws of nature, then they are not laws, but they are their degeneration.**

The constitutional developments specifically during the XX century gave a systematic integrity to the constitutional developments, which were based on the liberal legal value system. They have reached their classical perfection in the Basic Law of the Federal Republic of Germany, thus prescribing in Article 1, that human dignity, his/her rights are not inviolable and inalienable, but **they are directly applicable law**. This was a new quality of constitutional culture.

The previous millennium brought many fundamental solutions, including unprecedented systematic conflicts and collapses, which dictated the necessity for new constitutional solutions to dozens of countries. The last two big waves occurred after the World War II and the collapse of the USSR. In both cases the developments went through the path of necessity for establishing of constitutional democracy, which had been historically checked and did not have value system alternative. **That was achieved much more easily on the level of constitutional textual solutions. The gap between those solutions and the real life, however, continues to be huge.**

The existence of constitution is not enough for solving any issue. More significant, however, are the existence of adequate constitutional

⁵ See Рассел Г. Конституционализм: опыт Америки и других стран – <http://www.infousa.ru/government/dmpaper2.htm> (09.03.2009).

order, implementation of constitution, transformation of constitutional normative values into the rules of real life, as a result of which it will be possible to guarantee the rule of law. The biggest mission has been and is the harmonization of public life realities with the constitutional solutions.

Few years ago, in the preface of monograph titled “From Constitution to Constitutionalism”, which was published firstly in Armenian and afterwards in French, I mentioned that on 19-21 November 2004 the European Commission for Democracy through Law of the Council of Europe (the Venice Commission) organized international seminar, which was examining the experience of constitutional developments and main tendencies of the Eastern European states within the last 15 years⁶. It was an effort which was aimed to sum up the general logics of the European developments in the field of constitutionalism within the frames of new reality. During this seminar our wish was to call attention on several key issues, which are specific for the constitutional-legal solutions of the transformative societies. The selection of topic of my report was also conditioned by that and it was entitled “Constitutionalism: the Main Tendencies of European Developments and Some Deformations of the Constitutionalism in Post-Soviet Region”. The discussion of this topic and several other concrete issues brought to the conclusion, that the systematic research of peculiarities of constitutional developments in all post-communitarian area, the finding of nature and reasons of existing deformations, the appeasement of the rupture between the constitution and constitutional reality, as well the development of functional legal

⁶ It is worth to mention the fact, that on May 23-24, 2003 at the German city of *Göttingen* the European Commission for Democracy through Law of the Council of Europe (the Venice Commission) organized seminar titled “European and US Constitutionalism”, which comprehensively examined particularly the value system peculiarities of the matter at discussion (see Collection Science and technique of democracy, N 37. European and US constitutionalism. G. Nolte (Editor). European Commission for Democracy through Law. Council of Europe Publishing, 2005.

concept and required approaches of overcoming the consequences of the mentioned rupture have attained extremely big importance for the broad circle of legal scholars. In our deep belief, the solution of this issue has a fundamental importance for the transformation studies.

The mentioned issue was much more broadly discussed in July 2013 during the international conference convened in Yerevan to which delegates from 33 countries participated, as well as in publication titled "New Millennium Constitutionalism: Paradigms of Reality and Challenges", which was also published on the mentioned occasion⁷. The latter publication was coauthored by 23 distinguished constitutionalists from 19 countries and reflected scientific generalizations in regard of contemporary issues of development of constitutionalism, thus suggesting also the conceptual ways for their solution.

The same issue was again a subject of discussion at the international conference organized on 24-25 November 2014 in Algeria, to which constitutionalists from more than 30 states participated and made as a subject of discussion the issues of constitutional developments in the African continent and the main reasons of social explosion and deformations of constitutionalism.

The plenary session of the Venice Commission of the Council of Europe of 12 March 2016 approved the "Rule of Law Checklist" / CDL-AD (2016) 007/, which raised the fundamental principle of the Pan-European approach to the realization of the rule of law to the new practical dimension.

At the same session the President of the Constitutional Court of the Republic of Armenia presented a report on the issue of constitutional monitoring, and the proposition to convene the Pan-European conference on the subject, in order to combine their efforts to overcome the deficit of constitutionalism, was approved.

⁷ NEW MILLENIUM CONSTITUTIONALISM: PARADIGMS OF REALITY AND CHALLENGES (Published on the Initiative and with a Foreword of Dr. G.G. HARUTYUNYAN), YEREVAN, -2013.

The transformation from constitution to constitutionalism, from the slogan "democratic, rule-of-law state" to the concept of strengthening of the civil society and guaranteeing the rule of law is not only an aim, but it also represents concrete issues, which also require concrete solutions and new quality and level of constitutional culture⁸. Upon the suggestion of my colleagues from different countries, I have decided to present some of my conceptual approaches and analysis in regard of these issues also in more systematized way, thus reaching possibly broader audience.

Nowadays this issue is of the most comprehensive and disturbing nature. Within the international context, the new value system concussions, the implemented researches within the last years on nature and content of social contradictions, the discussions at various international conferences, the comparative analysis of axiological peculiarities of constitutions and constitutional amendments of around 150 states from all over the World, as well as the necessity of promoting new conceptual approaches based on contemporary constitutional developments and new tendencies of internationalization of constitutionalism have conditioned **the specific highlighting of the issue of the constitutional monitoring** and development of certain systematic methodological approaches regarding it.

As I have mentioned in the Preface to the first edition of the book, the international practice of the recent years not only in regional but also in global scope often refers to the experience of constitutional development, the general guidelines and features of formation of constitutionalism and constitutional culture. In particular, these issues were the subject of a comprehensive review of the Summits of International Association of the Constitutional Law held in Rotterdam,

⁸ In terms of practical importance the report CDL-AD (2016)007 on RULE OF LAW CHECKLIST published by the Venice Commission on March 18, 2016 is of great significance.

1999, in Santiago, 2004, in Athens, 2007, in Mexico, 2010, and in Oslo, 2014 and World Congress on Constitutional Justice held in Cape Town, 2009, in Rio de Janeiro, 2011 and in Seoul, 2014. The fact that in recent years at many universities and research institutions around the World, centers of comparative constitutional law are being opened and many bulletins dedicated to the issues of constitutionalism are being published is also conditioned by the awareness of the place and role of constitutional culture, unprecedented rise of the importance of constitutionalism in the sustainable and synchronized development of the public-state systems.

These issues have also been the subject of discussion at the annual congresses hosted by the international organizations, such as the Conference of European Constitutional Courts and the Conference of the Constitutional Control Organs of the Countries of New Democracy.

At the above mentioned scientific conferences, my reports were mostly dedicated not only to the exploring of main trends of development of constitutional culture and constitutionalism in the European states and to the peculiarities of their manifestation, but furthermore, to the deformations of constitutionalism and their roots in transformative states. These issues, as the key matters of the transformation studies, are for the first time a subject of such systematic research.

The contemporary international developments also demonstrate deep social and value system crisis in many countries. They cause daily bloodshed of thousands of people and affliction. **The social community clearly demonstrates immune deficiency.** We strongly believe that the current conflicts and social cataclysms are also due to distortion of constitutionalism, **the timely detection, assessment and overcoming of which were not guaranteed.**

We do believe that the new conceptual approaches proposed in this work /for ensuring the adequate level of constitutional culture, the establishment of constitutionalism and entrenchment of the effective system of constitutional monitoring/ can be an important guarantee for stable and dynamic development on international level.

The monograph is primarily addressed to our talented new generation so that wized by the lessons of history and time, their efforts will aid to the establishment of the dignified, democratic, secure and sustainable Republic of Armenia of our dreams.

CHAPTER 1. EPISTEMOLOGICAL NATURE AND SUBSTANCE OF THE NOTION “CONSTITUTIONAL CULTURE”

1.1. LEGAL AND PHILOSOPHICAL PERCEPTIONS OF THE NOTION “CONSTITUTIONAL CULTURE”

In contemporary legal usage the notion of “constitutional culture” is undergoing a certain re-valuation and is therefore in need of a serious academic analysis. It has become more urgent, than ever before, to assure a sustainable and meaningful existence of human community based on broad social accord, the imperative of using the gains of civilization to the benefit, rather than the detriment of mankind. Maintaining global stability and ruling out social cataclysms truly stand out among the challenges of mankind in this new millennium, since they may lead to unprecedented disastrous consequences.

Which is why the 7th international congress of the International Association of Constitutional Law, held in Athens between June 11-16, 2007, paid special attention to the rethinking of notions “constitutional conflictology” (viewing the constitution as an opportunity and means to overcome a whole range of disagreements and confrontations) and “constitutional diagnostics” (assessing the real essence of social turnover from the perspective of constitutional values, discovering the real landscape of constitutionalism).

Within the last century the role of the safeguard for universal human stability was mainly reserved to the Fundamental Law of a state,

a written constitution which, enshrining the goals emanating from the common civilizational values of a particular society and the fundamental principles of social existence, stipulates the basic rules of social behavior, the nature of relations between the individual and the state, the procedure and the limits for the exercise of power, hence creating a necessary environment based on social accord and conducive for the full implementation of the human potential for creation and progress. This becomes possible at a certain stage of development of civilization and social conscience. The human community, as a system of social cohesion, dates back to about ten millennia, whereas constitutionally regulated nation-states, in the modern sense of it, have been in existence for almost two hundred years. Nevertheless the phenomenon of a “constitution” is deeply rooted in history and its emergence has also led to the formation of certain constitutional culture, with an imprint of the value indicators and the legal mindset of the time. **This becomes possible at a certain stage of development of civilization and social conscience.**

The human community, as a system of social cohesion, dates back to about ten millennia, whereas **constitutionally regulated nation-states, in the modern sense of it, have been in existence for almost two hundred years.** Nevertheless, the phenomenon of a “constitution” is deeply rooted in history and its emergence has also led to the formation of certain constitutional culture, with an imprint of the value indicators and the legal mindset of the time. The roots of the proverb that **the Constitution should be written, taking into account the nation and the time**, go back to Solon - the “Founding Father” of the Athenian democracy.

In Latin the word “constitution” (constitutio) refers to founding, establishing. On the other hand, not every act of founding or establishing something culminates in constituting a “constitution.” The latter is typically characterized as the Fundamental Law (or the entirety of laws) of a state, possessing ultimate legal power. The basic properties of such a law are determined by the fact that it shall define:

- the foundations of state order;
- the safeguards for the granting and protection of civil and human rights and fundamental freedoms;
- the system of public administration, its functions, organizational and procedural principles;
- the legal boundaries for the exercise of political power, the enjoyment of individual political, economic and social freedoms.

In numerous interpretations of the notion “Constitution” the circumstance is emphasized that it is a fundamental document that sets out the rules regulating the government of a state and which has a specially protected legal status. The mentioned notion can cover something wider, “constitutional law”, and can thus embrace not only the rules set out in a country’s fundamental document but also other rules, whether found in law passed by the legislator or in decisions of the courts. “Constitution” can refer also to the de facto system of government in a country⁹.

In the Armenian language the notion “constitution,” սահմանադրություն (sahmanadrutyun) also implies “to establish” in the first place. As noted by professor Kh. Samuelian, the Armenian Ecclesiastical Councils in the Middle Ages reserved themselves the significance of a “lawmaking factor” and used the term սահմանք, which often was synonymous to “canon” or “law,” wherefrom in their canonic rulings one frequently encounters the verbs սահմանել, սահմանադրել (sahmanel, sahmanadrel) in the sense of “make laws or rules.”¹⁰ At the same time the etymology of the notion սահմանադրություն (sahmanadrutyun) also allows for ‘setting the borders,” drawing the limits of power and setting up a “inescapable entrapment” for all those who may attempt to venture beyond the scope of their powers prescribed by law¹¹.

9 How Constitutions Change (A Comparative Study), edited by Dawn Oliver and Carlo Fusaro. Oxford and Portland, Oregon, 2011, p. 3.

10 Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 46:

11 Որոգայթ փառաց (Հակոբ եւ Շահամիր Շահամիրյաններ), Երևան, 2002, էջ 15:

The New Haikazian Dictionary of the Armenian Language offers a remarkable interpretation of the word սահմանադրություն (sahmanadrutyun).¹² It begins with a list of foreign-language equivalents, such as: determinatio, constitutio, statutum, dispositio. It then goes on to an exceptionally interesting and valuable characteristic: “**Determination of borders and Supreme oversight.**” This is followed by examples of historical usage, in particular a phrase used by Movses Khorenatsi with reference of the Ashtishat Council: “established mercy through a canonical constitution,” or an expression “Chalcedonic constitution” used by Aristakes Lastivertsi. It is obvious that the notion of “constitution” in this dictionary embraces a scope of significant substance, characterized by the following important features:

1. it is a decision, a ruling, a “pronouncement of law;”
2. it has a terminal meaning, there may be no other “decision” beyond or above it;
3. the expression ‘**supreme oversight**’ complements the terminal, ultimate nature of the decision, emphasizing the fact that it is based on the existence of inalterable values “granted from above.”¹³

Armenian historical bibliography in grabar (classical Armenian language) has been consistent in the meanings associated with the notion “constitution,” something lacking in modern Armenian translations. A typical example, which we may use again later, is in a passage from Movses Khorenatsi’s “History of Armenians,” which undeniably refers to a constitution. The subsequent translations have replaced the phrase “through constitution” by “through borders,” completely depriving the notion of its original meaning.¹⁴

The New Haikazian Dictionary bases the notion “constitution” on the notion of սահմանադրել (sahmanadrel) interpreted as “to set a border,” “determine,” “regulate,” “ordain,” “make the law,” “establish.”

12 Նոր բառագիրք հայկազեան լեզուի, հ. 2, Վենետիկ, 1837, էջ 688:

13 On this also see: «Բնական օրենք. գրաւական, տոհմային եւ ազգային իրավունք», աշխատասիրեալ ԻՀ. Եփրեմայ վարդապետի ՄԷթ, Վենետիկ, 1851:

14 Տե՛ս Սովսես Խորենացի, Հայոց պատմություն, Ե դար, Երևան, 1997, էջ 225:

All of the above essentially evolve around the idea of setting rules or legal regulation. Thus the features of the notion “constitution” outlined above should be, according to this dictionary, augmented by the normative nature thereof, as the current characteristic goes.

According to Hrachia Ajarian, the notion “constitution” comprises the roots սահման (sahman) (a determined measure, tip, end, canon, statute)¹⁵ and դիր (dir) (set).¹⁶ Eduard Aghayan offers the following explanation for constitution: “1. The fundamental law of a state, which establishes its social and administrative structure, electoral system, principles for organization and exercise of public authority, principal rights and duties of citizens. 2. Established order. 3. Determining, setting borders.”¹⁷

In Armenian bibliography and comparative linguistic analyses, the notion “constitution” clearly characterizes a certain order of things and phenomena, the circumstances of establishing, adopting a pattern or a canon, with an emphasis on its special, exceptional nature.

It follows from this analysis **that the existence of constitutional culture shall at least be preceded by the ability of the society to make “terminal,” “ultimate” decisions which ‘set the borders” as well as the existence of certain prerequisites which will allow for the enforcement thereof.**

The notion “constitution” in the Armenian reality was also used with relation to individual contracts or the by laws of various institutions.¹⁸ The notion “constitution” has also been the subject of varying encyclopedic interpretation. An encyclopedic dictionary edited by doctor of philosophy M. Philipov in 1902 states, in particular, that the word constitution in chemistry denotes “a grouping of particles, atoms,” in physiology and medical science “the body build” or “the ability of an organism

15 Աճառյան Հր., Հայերեն արմատական բառարան, հ. IV, Երևան, 1979, էջ 162:

16 Ibid, հ. I, էջ 676:

17 Աղայան Էդ., Արդի հայերենի բացատրական բառարան, Գ-Ֆ, Երևան, 1976, էջ 1271:

18 See: Егиазаров С. А. Исследования по истории учреждений в Закавказье. Ч. II. Казань, 1891, էջ 361:

to resist detrimental impact” (a remarkable definition, allowing for parallels with the society’s organism), in public law “a state entity based on common law and a number of statutes, or a particular charter.”¹⁹

The encyclopedic dictionary of constitutional law, edited by professor Maklakov,²⁰ first lists the Russian synonyms for the Latin word “constitution:” установление, учреждение, организация. It then goes on to offer two groups of explanations for the notion. Firstly, it is viewed as a system of legal acts of the highest power of law regulating relations of ultimate importance pertaining to human rights and freedoms, the foundations, forms of administration and territorial organization of a state, the formation of bodies of public authority. Incidentally, such a system may comprise one general or several individual legal acts. The constitution tops the summit of the hierarchy of such legal acts, and all other acts shall be in conformity therewith. Secondly, the example of France is used to demonstrate that the legal acts of another nature may also be called constitutions, such as a statement or a resolution of a special nature adopted by a parliament, which, without altering the constitution, addresses an important issue. The example quoted is the “Constitution of Broglie,” a law enacted on March 13, 1872, upon the initiative of Duke A. de Broglie, a member of the Parliament, which regulated the relations between the President and the Council.

The encyclopedic dictionary of constitutional law edited by Professor Avagian emphasizes the fact that a constitution is the fundamental law of a state which expresses the will and the interests of the people, is endowed with the appropriate ultimate legal effect, is enacted by parliament, a special constitutional assembly or directly by the people. It is also stressed that a Constitution is an instrument of

19 Энциклопедический словарь (составлен под ред. М.М. Филиппова), т. III, приложение к журн. “Природа и люди” за 1902, էջ 1741: Այս սուսեկաներին անդրադարձ կի նաեւ մեկ այլ հանրագիտարանային բառարանով՝ Փ. Брокгауз, И.А. Ефрон: «Энциклопедический словарь». М., изд. «Русское слово», 1996 г.

20 Конституционное право: Словарь /Отв. ред. В.В. Маклаков. М., 2001, էջեր 230-231:

both the state and society, which leads to the conclusion that the Constitution is a “political document.” Four basic features are singled out from among constitution’s principal characteristics, according to which a Constitution is:

1. a legal act;
2. of ultimate nature, possessing supreme legal force;
3. the basis for current legislation, determining the nature thereof;
4. enacted and amended through a special procedure.²¹

The encyclopedic dictionaries also make an important emphasis on the fact that a constitution appears as an organic entirety of constitutional goals, principles and ultimate legal norms, which regulate fundamental social relations in dynamic equilibrium.²²

The basic features quoted are **necessary and sufficient** for affirming the existence of a constitution or ranking a legal act within the class of a constitution. These criteria may also be of utility in reflecting on historical developments and studying axiological specifics of the emergence of constitutional tradition. It is noteworthy, from the perspective of substance, that in interpreting the notion “constitution” various authors assign particular importance to the fact that it determines the state and social order, electoral system, principles for the formation and operation of bodies of state authority of the country in question, as well as the human rights and freedoms.

It is also noteworthy that the encyclopedic definitions of the notion “constitution” sometimes contain language that describes it as a set of constitutional customs.²³ In international discourse this is also called the **unwritten constitution**. In this case the emphasis is on the fact that the community has succeeded in forging a general agreement around some basic rules of its existence, and that such rules are duly respected,

21 Конституционное право. Энциклопедический словарь /Отв. ред. д.ю.н., проф. С.А. Авакьян. М., 2000, էջեր 313-315:

22 Арутюнян Г.Г., Баглай М.В. Конституционное право. Энциклопедический словарь. М., НОРМА, 2006, էջեր 228-231:

23 Պողոսյան Վ.Վ., Սահմանադրական հասկացությունների համառոտ բարարան / խմբ. Գ. Հարությունյան, Երևան, 2001/, էջ 208-209:

protected and play an essential role in assuring a natural orderly course of life and development for the society in question. Beginning with the 17th century the British political establishment predominantly perceived the notion of “constitution” not as a uniform legal and political act underpinning the existence of a state and individuals therein, but rather as a summation of principles and approaches along the fundamental axis of relations between society and state **which assure the freedom of men, the supremacy of law, the restriction of power**.²⁴

The American encyclopedic dictionaries present the constitution as an organic law established within the system of a state, an entirety of fundamental and specific principles of law through which and on the basis of which public authority is formed. It represents different branches of public administration and the sovereign power of the people. In American law the notion “constitution” signifies a written document, which is the principal source for the exercise of public authority.²⁵

In yet another dictionary the Constitution is viewed as the fundamental law of a nation or state, **which may be written or unwritten**, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government and regulating, distributing, and limiting the powers of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.²⁶

The above examples affirm that the main emphasis in these conditions is on the basics of state power being constitutionally organized.

The idea of Professor Ebzeyev, according to which the gradual development of social practice and legal thought enriched the notion “constitution”, considering it as a value system phenomenon, the fundamental law of not just the state, but also the society, is absolutely accurate²⁷.

24 On this also see: Невинский В.В. Конституция Российской Федерации: испытание мировым опытом // Журнал российского права, 2003, N 11, էջ 65:

25 Steven H. Gifis. Law Dictionary. New York, 1984, p 92.

26 Henry Campbell Black, Black’s Law Dictionary, WEST Publishing CO. 1968, p 384:

27 Эбзеев Б. Прямое действие и непосредственное применение Конституции Российской Федерации – гарантия прав и свобод человека и гражданина // Право и управление: XXI век. N 1 (1), 2005, p. 72.

If we reflect on the legal and political nature of a constitution, it first and foremost serves the **function of establishing**, as the **embodiment of public accord around the basic principles of social existence**. Its enacting implies the emergence of a new legal and political status of the society, emanating from a set of certain civilizational values, goals and principles. Through such social accord the constitution enshrines the outcomes of communal social existence particular to the historical stage in question, the goals and directions of progress, safeguards the stability and dynamic development of the system.

“Founding” legal documents were adopted as early as in Ancient Rome; they were viewed as representing a compromise between monarchic power and the landowners or individual cities. Aristotle refers to Ion, Draco, Solon, Pisistratus, Cleisthenes, Areopagus, Aristides and others constitutions²⁸.

The constitution is also called upon to implement a significant **organizational function**, under which it not only encapsulates the accomplished state, but sets forth new objectives before the society: reorganize communal life in conformity with constitutional norms and principles; identify appropriate structural arrangements and solutions; put in place legal and political prerequisites necessary for guaranteeing constitutionalism.

The constitution offers clear guidance for *weltanschauung*, it contains norms-objectives and norms-principles which enshrine a particular system of societal values, as well as the means and approaches to help get there, it also adds clarity to the **ideological vector of the system**.

The constitution has a certain **foreign policy charge**, not only accommodating the international trends of constitutional and legal developments, but also defining the legal principles and the procedures for conducting a state’s foreign policy.

The **legal function** of a constitution had always been historically significant and it currently enjoys especial significance. This function requires that the constitution not only provides the basis for the formation

²⁸ Արսիստոտել, Աթենական հասարակարգը, Երևան, 2000թ., pp. 12-82.

of the legal system and that its norms possess direct effect, but that it also determines the directions and nature of legislative developments.

At the same time, it is more important that the **Constitution sums in a thorough and systemic way the cognition by the society of objective laws of social-historical developments**.

Meanwhile “laying the borders” of social relations, **setting binding rules of behavior for everyone through general accord**, depending on its nature, format, scope, application and value guidelines, contributes to the emergence of corresponding equivalent constitutional culture.

The constitutional culture is a certain system of values of the human community geared towards creative co-existence on the basis of common rules of social cohabitation acquired through mutual consent.

The constitutional culture implies the existence of not only social accord and a certain level of social appreciation of man, a possibility to guarantee a regular development of social existence on the basis of meaningfully absorbed values and principles, but also of the capacity to transform such a possibility into reality.

The principal components of constitutional culture comprise the intellectual absorption of social co-existence, the existence of fundamental values for organic subsistence, of social accord around them, the reproduction thereof through universal behavioral rules of living and acting, a rendering of a certain systemic legal nature thereto, and a particular attitude towards them within the society. In the social practice these components are historically expressed in their systemic integrity, as well as in a more fragmented manner. The constitutional culture is observed in literature as an incarnation of legal culture and is characterized as an expression of the attitude of the members of the public towards law, statute, the authorities, the state and to legal norms and constitutional principles in general.²⁹

²⁹ Steven H. Gifis. Law Dictionary. New York, 1984, p 92:

Professor Francis Snyder also notes that the constitutional culture is part of general legal culture. At the same time he believes that Friedman offered the best definition of legal culture in 1969,³⁰ according to which legal culture pertains to **the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole.**

The idea of Professor A. Lukashева is worth mentioning, according to which social-normative system and values, the roots of which go back to social interactions of people, are important components of culture, in general³¹. Professor G. V. Maltsev also draws a principal conclusion, mentioning that the fundamental notions of law, together with the social-cultural developments, gain a new quality and nature³².

The constitutional culture, in its turn, defines the place of the law (in particular constitutional law) in the context of self-cognizance of the society within the system of its culture. It is rightfully emphasized in literature that the sole fact of the existence of a Constitution is not yet sufficient to launch a discourse about the constitutional culture. The fact of the existence of constitutional culture needs to be validated by the attitudes of the members of the public towards the constitution, their willingness and real possibilities to live by its norms.³³

Professor Bondar's idea is also worth for mentioning, according to which the assessments regarding the Constitution dominant in the social consciousness, the level of constitutional culture in the state and society, functionality of the idea of constitutionalism are not conditioned just with the existence of Fundamental Law as a legal act or even with its "age"; there is a deeper, more important social-cultural circumstance – the ori-

³⁰ <http://www.eurozine.com/article/2004-02-19-snyder-en.html>.

³¹ Лукашева Е.А. Человек, право, цивилизации: нормативно-ценностное измерение. М.: Норма, 2011. – п. 12.

³² Мальцев Г.В. Социальные основания права. – М.: Норма: ИНФРА – М, 2011. – п. 38.

³³ <http://www.claremont.org/writings/000901west.html>.

gins of constitutionalism³⁴. Academician Kutafin considers constitutionalism to be fictive, when the Constitution based on its ideas and the reality deviate from each other³⁵.

In a study published on the occasion of the 200th Anniversary of the US Constitution Daniel Levin assigns particular importance to the fact that the Constitution is not merely a text, but rather a system of values that live, are reproduced and provide guidance for public life.³⁶ Whereas Roger Goldman maintains that American constitutional culture possesses three fundamental features:

- an emphasis on rights on the expense of duties;
- a central role of the judiciary in the protection of human rights;
- the perception of the Constitution as a "living document," a development in progress.³⁷

Professor Ch. Saunders, in her turn, comparing specific features of the British and the American constitutional cultures, stresses that the British constitutional culture represents evolutionary, rather than revolutionary tradition, and **is anchored on gradual, historically shaped system of constitutional values.**³⁸

At the dawn of human civilization customary and ethical norms were the basis of social existence, together with the spiritual values and canon, which were applied and preserved in public co-existence as binding rules of behavior. Observed from the perspective of their perception

³⁴ Бондарь Н.С. Судебный конституционализм в России в свете конституционного правосудия. – М.: Норма; ИНФРА. – М, 2011. – С. 24. Бондарь Н.С. Конституционные ценности и политика: конституционализация политики, но не политизация конституционных ценностей // Журнал конституционного правосудия. 2016. N1 (49), pp. 23-30.

³⁵ Кутафин О.Е. Российский конституционализм. – М.: Норма, 2008. С. 47.

³⁶ REPRESENTING POPULAR SOVEREIGNTY: THE CONSTITUTION IN AMERICAN POLITICAL CULTURE by Daniel Lessard Levin. Albany: State University of New York Press, 1999. <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/levin99.html>.

³⁷ Roger Goldman - The Protection of Individual Rights as the Fundamental Element of the United States Constitutional Culture // Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000, p 25:

³⁸ Saunders Ch. A. Constitutional Culture in Tradition // Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000. P. 41:

by the general public, inasmuch as they pertained to the entire public and were of systemic regulatory significance, they contained ostensible components of expressions of constitutional culture.

From the viewpoint of legal axiology³⁹ the emergence of constitutional culture is determined by the **extent to which “constituting” relations are legally appraised and become universally accepted rules of behavior**, irrespective of whether they are of customary nature or appear as an established rule of behavior that is universally binding. In literature the constitution per se is often considered a cultural phenomenon only if it is evoked in life, becomes an active, living phenomenon, is fully perceived and recognized, rather than being a compilation of nice language and smart ideas.⁴⁰

The constitutional culture, nevertheless, is most fully fledged at a certain level of civilization, when a well-realized demand emerges to establish, through the vehicle of public accord, basic principles and rules of behavior as universally binding legal norms, and to abide by these. From the legal viewpoint this demand has led to the emergence of constitutions and constitutional regulation of public life. The mere existence of a Constitution, however, as already mentioned, is not sufficient to consider a country or a state constitutional. **It is also necessary for constitutional norms to be evoked in real life, and for the public to adopt a stable attitude towards them, forming real qualities of public constitutional culture and elevating them to an organic component of national culture.**

At such a stage constitutional culture acquires a new quality in the social and state systems wherein, alongside **the Constitution, there also exists constitutionalism**, where constitutional norms and principles are a living reality, where an environment necessary and sufficient for the constitutional democracy has come into being, where the constitutional norms have direct effect and there is an effective system

³⁹ See Политико-правовые ценности: история и современность /Под ред. В.С. Нерсесянца. М., 2000, Гл҃р 5-30:

⁴⁰ Book Review-Höberle and the World of the Constitutional State, <http://www.germanlawjournal.com/print.php?id=227>.

of oversight, where the Constitution is not an instrument in the hands of the state, but **a fundamental law of civil society**, a toolkit to assure harmonious and sustainable development of the society, not only through defining basic behavior rules, but also drawing a border for the authorities, restricting them by the law. In such case we deal with the notion of **“democratic constitutional culture”** typical for the democratic social systems, where the national and universal cultural features are in harmony.

Moreover, the Constitution and constitutionalism may not be viewed only from the narrow legalistic perspective, in the context of pragmatic legal relations or abstract notions. Both are profound cultural phenomena, deeply rooted in interdependent value systems, offering clear civilizational guidance and a level of their perception, comprehension and cognizance. It is in this framework of complementarity that the constitutional culture in its turn determines the choice of the model of constitutional democracy and the respective strategy, thereof.

The level of constitutional culture is also determined by the level of constitutional solutions, clarity and progressiveness of constitutional principles, solutions for their implementation within a constitution, and so-called constitutional “maturity” and “taste.” A lot has been discussed within the last few centuries about the “perfect” constitutional model for a democratic state. As early as in 1928 in his book “Verfassungslehre” Carl Schmitt speaks about the “perfect concept for the constitution of a civil rule of law state.” The axis of discussions at the summit of the International Association of Constitutional Law in Santiago in 2004 evolved around the subject “Constitutionalism, Old Doctrines, New World.” One of the important conclusions reached there was that a comprehensive and perfect Constitution is not at all possible. It is a quintessence of every society’s system of values, necessarily based also on certain general principles and approaches that have gained recognition in international constitutional studies. In systems where constitutional democracy is still embryonic the main issue at

stake in constitutional developments is to avoid distorting fundamental values and principles, to **understand that a constitutional state is forged through an adequate constitutional culture of the society.** It is also essential to underline that the constitutional culture is more stable than constitutional systems, although **their inner axiological connection is indivisible.**

In the light of the current achievements of civilization the principal characteristic of constitutional culture is that **a country's Fundamental Law must include the whole system of in-depth, enduring values of the society and guarantee their stable protection and reproduction.** These values, in turn, are formed in the course of centuries, with each generation giving an effort of re-thinking them and, through its own additions, securing the continuity of development. The success accompanies those countries and nations, wherein this chain remains unbroken or is not seriously disrupted.

Therefore **the notion of constitutional culture may be characterized as the entirety of the specific system of values which underlies the convictions, awareness, legal perception, and legal consciousness of the social community, which were historically formed on the basis of social accord, defining principal rules of behavior and the need to guarantee them.** The constitutional culture also characterizes the quality and level of relations between constitutional subjects and institutions the level of "maturity" thereof in mutual legal relationship.

The constitutional scholars often use the notion of "constitutional culture" in the plural.⁴¹ When talking about the **constitutional cultures** the emphasis is put on the systemic properties of their formation. For example, the notion "Verfassung" in Germany acquired broad usage in the 17-19th centuries, when it was used to denote laws of fundamental importance, containing norms, which aimed at sustainable and lasting perspective. The term applied to the "Capitulation Act" of King Ferdi-

⁴¹ This was the conclusion of many among the participants of an international conference in Warsaw in 1999.// Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000:

nand III in the elections of 1648; the Peace of Westphalia, 1803; the Final Act of the Principal Royal Standing Committee etc.⁴²

Professor Cheryl Saunders, in turn, singles out the constitutional systems of the United Kingdom, the USA and France.⁴³ Robert Goodin stresses the existence of features that are common to constitutions of various countries.⁴⁴ Generally, the constitutional culture is of exceptional importance for comparative constitutional studies. The author of "Comparative Constitutional Traditions," while emphasizing that a constitution is an extrapolation of political, philosophical, sociological, economic and other ideas within goals and objectives of the highest order, performs a comparative constitutional analysis of eleven constitutional systems.⁴⁵ These include the constitutional systems of the US, Great Britain, China, Canada, India, Japan, Nigeria, France, Germany, Mexico and Saudi Arabia. Such a classification, of course, is extremely conventional and may also be contested.

The list of such systems can be substantially expanded. What matters under the circumstances is the emphasis on the fact that the constitutional traditions and constitutional culture have undergone historical developments within certain systems of civilizational values. Irrespective of the above emphases, the historical truth is that each country and nation has gone through its individual path of formation of constitutional culture and establishment of constitutional realities, borrowing to this or that extent the experience of others, making additions and amendments emanating from its own system of values. The essential and fundamental aspect is that the **constitutional culture and the Constitution itself can not be a commodity that is imported**

⁴² <http://university.tversu.ru/misc/pravo/pravo.html>.

⁴³ Saunders Ch. A. Constitutional Culture in Tradition // Constitutional Cultures. Ed. By M. Wyrzykowski. Warsaw, ISP, 2000. P. 37-54.

⁴⁴ Goodin R.E. Designing Constitutions: the Political Constitution of a Mixed Commonwealth // Constitutionalism and Transformation: European and Theoretical Perspectives / Ed. by R. Bellamy, D. Castiglione. Blackwell, 1996.

⁴⁵ COMPARATIVE CONSTITUTIONAL TRADITIONS, by James T. McHugh. New York: Peter Lang Publishing, 2002. <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/McHugh504.htm>.

or exported. These realities are formed upon the basis of a particular society's system of values. Failing that, however skillful those grafts may be, they cannot become viable and turn into a living reality. We shall return to this issue later. At this point we would like to specifically stress that in nation-state entities these value systems were formed in the course of centuries and are at the core of the preservation of identity features and one's "kind." Therefore the **constitutional culture cannot be anational.** It is the Constitution that is first and foremost called upon to assure harmony between the national and the supra-national, a reasonable combination of universal values and national specifics, with a view of securing an environment necessary for the preservation of the "kind" and its reproduction with the enhanced qualities, as well as necessary and sufficient prerequisites for the meaningful and guaranteed exercise of man's creative drive.

The constitutional culture is not an abstract notion: it is incarnate in the axiological foundations of the constitution itself, in all walks of social existence, it is expressed over the solid foundation of values and ideals that have been developed over the centuries through a painful process of validation.

We believe that **the culture of every nation is in its conscious existence, its acknowledged presence along the axis of time**⁴⁶. The value dimension of every sovereign nation's constitutionalism, considering its social and cultural specifics, affords a unique nature to its concrete constitutional solutions.

The contemporary notion of **constitutional culture is defined by us, in general terms, as a historically formed sustainable value system of convictions, perceptions, and legal awareness, enriched by the experience of generations, which constitutes the basis for the social community in the process of establishing and guaranteeing, through public accord, of the fundamental rules of democratic and lawful behavior.**

⁴⁶ We drew such a conclusion in the result of the thorough discussion of the issue with a prominent writer, dramaturge Perch Zeytuntsyan.

Within this approach, **contemporary constitutionalism equals the presence of fundamental rules of democratic and legal behavior, set by a social accord, that exist as an objective living reality in social life, in civic behavior of each individual in the exercise of governing powers.**

More generally, **"constitutionalism" is the systemic, intellectually absorbed existence of constitutional values in real social life. It is a general legal principle of characterization of the social behavior of the society.**

The conclusion is definite: the problem does not merely boil down to the implementation of the constitution, but rather to the **formation of a social system in which constitutional axiology is enforced by every cell of the system as a prerequisite for its own existence.**

Nevertheless, "constitutionalism" is such a notion, regarding which there are numerous and often contradictory viewpoints in professional literature. Before touching upon their nature and peculiarities we consider it necessary to concern genealogical roots of the notion. For the first time, this concept was revived by the Founding Fathers of the American Constitution, who considered constitutionalism as an expression of the supremacy of the Basic Law over the laws and legal acts. G. Berman believes that the notion of constitutionalism was put into scientific circulation in the end of XVIII and in the beginning of XIX centuries mainly in order to emphasize the American doctrine of the supremacy of Constitution over the laws. The constitutionalism was the evidence of the existence of Constitution, accentuation on its role and importance. At the same time, as it was noted by the same author, the reality of this phenomenon, in other legists' opinion, has elder roots and concerns city legal systems of the Western Europe of IX-XII⁴⁷.

The **notion of constitutionalism** is currently associated with a number of legal phenomena, such as:

⁴⁷ Берман Г., Западная традиция права: эпоха формирования. - М., 1998.-р. 370.

- the commonality of principles, rules of operation and structural mechanisms that are traditionally used with a purpose of limiting state power⁴⁸;
- the constitutional means for the establishment of limits on state power⁴⁹;
- a national-scale supra-partisan consolidating ideology⁵⁰;
- a political-legal regime, one of the features of which is the introduction of essentials of harmony and justice into the society⁵¹;
- the existence of constitutional form of governance, state authority that is restricted by a constitution⁵²;
- self-restraint of the state⁵³;
- supremacy of law in all areas of socio-political life, implying priority of human rights and guaranteeing mutual responsibilities of individuals and the state⁵⁴;
- theory and practice of state and social life organization in conformity with the Constitution, or a political system leaning on a Constitution⁵⁵;
- a principle of the rule of law, which assumes restriction of the powers of the leaders of the state and public authorities⁵⁶;

48 Шайо А. Самоограничение власти (краткий курс конституционализма). - М., 1999.

49 Varendt E. Introduction to Constitutional Law. - Oxford Univ. Press, 1998. -P. 14.

50 Нерсисянц В. С. Конституционализм как общегосударственная идеология // Конституционно-правовая реформа в Российской Федерации. Сб. ст. / Edited by Ю. С. Пивоваров. - М., 2000. - pp. 6-8.

51 Сони́на Л. В. Конституционализм в Российской Федерации как политико-правовой режим: автореф. дисс. ... канд. юрид. наук. - Екатеринбург, 2001. - p. 7-8.

52 Пуздрач Ю. В. История российского конституционализма IX-XX веков. - СПб., 2004. - p. 7.

53 Шайо А. Транснациональные сети и конституционализм // Сравнительное конституционное обозрение. 2008. N 5 (66). - p. 123.

54 Ромашов Р.А. Современный конституционализм: теоретико-правовой анализ. <http://www.lawlibrary.ru/disser2000401.html> (09.03.2009).

55 <http://dic.academic.ru/dic.nsf/enc-law/1027/>.

56 Рассел Г. Конституционализм: опыт Америки и других стран - <http://www.infousa.ru/government/dmpaper2.htm> (09.03.2009).

- the existence of a Constitution (written or unwritten), its active impact on the political life of the country... constitutional regulation of the state system, the political regime, constitutional recognition of human rights and freedoms, the legal character of relations between citizen and state⁵⁷.

The constitutionalism is characterized also as realization of the principle of rule of law, limitation of power of the head of state and bodies of state power and the implementation of the latter via prescribed procedures⁵⁸.

The formulations are not limited to this. At the same time, the mentioned examples are enough to present the main features of different perceptions of the phenomenon.

Many legists believe that “constitutionalism” is a multilayer notion, and it’s impossible to characterize it on the basis of a certain concrete feature. For instance, Professor B. Strashun, while presenting a brief historical analysis of this notion and phenomenon, draws a very important conclusion, mentioning that the essence of this notion is inseparable from the existing state order⁵⁹. The author also agrees with our principal approach, according to which in the mentioned context existence of not the Constitution, but real constitutionalism is essential⁶⁰.

The professional approaches regarding the issue of constitutionalism can be conditionally classified into two big categories:

1. when the phenomenon of constitutionalism is linked to the fact of the existence of Constitution and legal regulation implemented via it;
2. when constitutionalism is viewed from the axiological aspect, as an expression of a specific culture of social co-existence – constitutional culture.

57 See Кутафин О.Е. Российский конституционализм. - М., 2008. - p. 47. We also believe that in this phrase the term ‘human being’ would be more appropriate instead of the term ‘person.’

58 Грэг Рассел, Конституционализм: опыт Америки и других стран, <http://infousa.ru/government/dmpaper2.htm>

59 Сравнительное конституционное обозрение, 2011, N5 (84), pp. 43-47.

60 Ibid., p. 44.

We believe that the first approach emanates from the second one and has a derivative significance. In literature Constitution is often considered as a cultural phenomenon just in cases when it is realized, is a living reality, is perceived and recognized, and doesn't remain as a collection of smart thoughts⁶¹.

To our mind, the existence of constitutionalism, first and foremost, has an axiological nature, and, as we mentioned, is linked to the reality of constitutional culture. We consider necessary to state once more that constitutionalism is not that much an evidence of the existence of a written Constitution, as the characteristic of the expression of constitutional culture, the conscious existence of constitutional order, its essential elements in real life.

We absolutely agree with the mentioned approach of V. Nersessians, according to which constitutionalism is a nationwide ideology, **it is a culture of state co-existence**, which is formed in the course of millenniums and centuries, has deep social roots and **should firstly be considered as a form of expression of constitutional culture**, which can be different not only in different countries, but also at different stages of development. Hence, we consider necessary to study the issue from this aspect, taking into account also "The Athenian Constitution", to describe the methodological significance of historical-logical and axiological approaches⁶².

The constitutionalism, as the law itself, is an objective social reality, evidence of the civilized co-existence of a social society, guarantee of the stable and dynamic development of the given society⁶³.

61 Book Review - Höberle and the World of the Constitutional State, www.germanlawjournal.com/print.php?id=227.

62 Արիստոտել, Աթենական հասարակարգը, Եր., «Հայաստան», 2000թ.

63 Г. Арутюнян, Конституционализм как фундаментальный принцип права в правовом государстве // Конституционное правосудие, 2012, N 1. - p. 5-16. Бондарь, Концепция судебного конституционализма: методология исследования в свете практики конституционного правосудия. Ibid., p. 29.

The constitutionalism, as a mode of legal substance, is characteristic for social societies, which have reached certain level of recognition and regulation of social freedoms and mutual social understanding on the basis of the system of corresponding social-cultural values.

With a view to the above, we believe that the **notion of constitutionalism shall be perceived not as one of the basic principles of constitutional law, but as a universal and fundamental principle of the law as such**. One may paraphrase the Roman well-known legal principle "*ubi societas ibi jus*" (if there's a society, law will be there) and claim "**where there is constitutionalism, there will be a rule-of-law state.**"

The constitutionalism determines the essence of coordinated behavior of the society, the character of its cognizant existence in time, the level of maturity of social relations and legal regulation thereof. This, first and foremost, is the ideal of civilized self-regulation, which the society must pursue.

1.2. FROM CONSTITUTION TO CONSTITUTIONALISM: THE DIALECTICS OF THE DESIRED AND REALITY

In each legal system the constitutional culture first of all is consolidated and manifested by the help of constitutional doctrine which is typical for the given system. The latter, in its turn, includes the integrity of systematized knowledge, principles and approaches in regard of the life's fundamental relations, their formalization in the content of the Basic Law, their legal nature, social role, and political importance. The integral part of the constitutional doctrine is also the clarification of value system landmarks of social community, the definition of the scope of discretion of power and rules of individual's behavior on the basis of the fundamental values of state and civil society. The constitutional doctrine includes theoretical and methodological foundations of the Constitution, the criteria for their implementation in social practice,

standards for the determination of constitutionality, trends in the development of constitutional studies and constitutional culture, the nature and concrete specifics of constitutionalization of social relations. The constitutional culture acquires substance only in the event and to the extent, when and to which extent the Constitution or constitutional norms become a living reality. It would be appropriate to recall Hegel's discourse on the substance of "das Recht," where he emphasizes that a notion and its existence in real relations represent two different things, like the spirit and the body, which nevertheless cannot be separate from each other⁶⁴. Moreover, there shall be a certain harmony between constitutional perceptions and social realities, **harmony between the desirable and real, between a value which has gained a public recognition and has become a basic rule of behavior and the real behavior.**

As a form of expression of constitutional culture and an expression of a certain level of cognizance of value systems in a social community, constitutionalism is determined by a number of factors:

1. the level of legal and philosophical perception of social phenomena and objective laws;
2. trends in the development of the society and the degree of social validation of man;
3. the nature of relations between an individual and the society;
4. value system priorities of the social community;
5. the level of development of production relations;
6. the level of social protection of an individual;
7. the level of political culture and legal awareness within the society;
8. the existence of socio-economic prerequisites for the establishment of social accord;
9. the ideological orientation of state authorities and the level of their understanding of the responsibility for the society's future;

⁶⁴ Гегель Г. Философия права: Пер. с нем., М., 1990, р. 59.

10. the nature of impact of universal values and the degree and possibility of harmonization thereof with the qualities of national identity;
11. traditions of formation of constitutional value system and the level of their definition and realization via the legal means;
12. the nature of concrete constitutional solutions, the level of their systemness;
13. the challenges which constitutional developments face;
14. the real level and quality of constitutionalization of social relations;
15. the nature of impact by exogenous and endogenous factors on systemic stability, etc.

The most important challenge of constitutional architecture is for concrete constitutional solutions to be such as to allow constitutional norms, provided there is a necessary and adequate level of constitutional culture, to be effective by default, with no "manual override," that is for the so-called "autopilot" mode to be engaged. In the absence of such a culture the Constitution turns into a compilation of fine language and wishful thinking or an instrument and leverage of governance, employed at the discretion of the authorities within the four corners of the problems they need to resolve. In such circumstances the nature of the phenomenon of a constitution is distorted and it may no longer be perceived as "a determination of borders and Supreme oversight"⁶⁵. A certain disruption takes place of the unity between the phenomenon and its expression, between "body and spirit," which may lead to inevitably disastrous consequences for the system.

An important characteristic of the expression of constitutional culture is **constitutional legal awareness**. In most general terms the latter implies a realization of the need for constituting norms in social relations, a definition thereof, and willingness to live and abide by those norms, as well as to respect and protect them. All members of the society, their diverse formations and establishments including the state

⁶⁵ See Նոր բառագիրք Հայկազյան լեզվի: Հատոր երկրորդ: Վենետիկ, 1837 թ., p. 688.

as incarnate in institutions of public authority, constitute subjects of constitutional legal awareness.

Lack of harmony between the constitutional legal awareness of the members of the society and that of the state institutions may become a cause of social discord and calamity. One of the main features of civil society is that the state is guided by the constitutional legal awareness of the public, which is in turn based on the safeguards of the supremacy of law and the limitation of power by the law. One of the most important missions of state power is to contribute to the formation of constitutional legal awareness in each subject of constitutional relations, based on a profound, meaningful and uniform perception of fundamental constitutional values and principles and their consistent implementation.

Quite naturally a citizen, various bodies of public governance, as well as different subjects of constitutional relations are endowed with **varied constitutional legal capacity**. The latter is determined by the nature of their constitutional functions, the scope of competences, rights and duties. An important feature of constitutional culture is the extent to which the functions of various subjects of constitutional legal relations, rights and duties are harmonized and balanced, the extent to which maintaining such an equilibrium in its dynamics is guaranteed.

The historical experience of formation of constitutional culture in the Armenian reality attests to the fact that it has undergone serious evolutionary development, structural and systemic progress. The first steps were determined by the need to assign legal nature to fundamental customary norms and to clarify value system guidelines. It is not incidental that 7 out of the 30 canons ascribed to Gregory the Illuminator (301-325 A.D.) pertain to matrimonial and familial relations. The rules are prescribed on "leaving one's second wife and returning to the first," "a virgin and second marriage," "abducted girls," "the effeminate (homosexuals)," "the wailing and the lamenters," "those who distort the last will of the deceased," etc. All these canons clarify and condense value system approaches and represent rules of behavior that characterize the ethical composition of an individual, the family and the society.

It is typical for the Armenian reality that, also through subsequent centuries, the constituting canons enacted by the national-ecclesiastical councils assigned a great place to matrimonial and family relations and the rules of ethics. It follows from an analysis of the rules enacted in the course of the 4th to 8th centuries that they were first and foremost devoted to assuring compliance with the divine commandments, strengthening the foundations of the system of values underlying individual and social behavior. This issue was ascribed more importance than the regulation of the forms and nature of governance⁶⁶.

Another important feature is that the continual risk of losing one's statehood, external pressures, the imperative of preserving identity qualities and a number of other factors have constantly pushed to the foreground the need to strengthen the family, preserve tradition, forge a healthy social environment, acquire clearly defined value system orientation. At this stage the basic expressions of the still embryonic constitutional culture pertain to the implementation of those social priorities. The issues of social and individual moral behavior became more important than the ones regarding the state system. Assurances of man's divine representation, securing the pure qualities of his creative essence become the axial issue of canonical constitutions.

Beginning with 301 A.D., with the proclamation of Christianity as a state religion, a qualitatively new reality of co-operation between secular and church authorities emerged in the country which, through the course of the centuries, played a crucial role in the formation and development of the Armenian legal and constitutional culture⁶⁷.

In the conditions of existence of statehood the clarification of foundations of the constitutional order of the state, the formation of a system of governance, the establishment of the main principles of citizen-state interaction, the regulation of the external and domestic

⁶⁶ This circumstance was conditioned also by the fact of the adoption of canonical constitutions by the national-ecclesiastical assemblies.

⁶⁷ Naturally, whether in the past or now, relations between religion and constitutional culture have their specifics in various countries. On this see: Penelope Foundethakis (Panteion University, Athens) - Religion and Constitutional Culture in Europe // Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000, pp 169-191.

functions of the state become the principal expressions of constitutional culture.

The lessons of history indicate that the birth of constitutions is often dictated by the need to address the most complex issues that challenge the society. In reality the adoption of the US Constitution in 1787 proclaimed to the world the emergence of a completely new type of a state. In September 1774 the British Colonies convened the first continental congress in Philadelphia, which raised a voice of protest against the trampling of the rights of the Colonies. Already in 1775 unconcealed struggle for independence broke out. The Second Continental Congress, convened in July of 1776, set forth the issue of the need for the adoption of a declaration of independence, which was enacted on July the 4th. The drafting and adoption in 1787 of the Constitution by the Constitutional Convention, which was subsequently ratified by the states, played a pivotal role for the ensuing close co-operation between the American states, establishment of a unified state and the strengthening thereof. A study of the history of adoption and ratification of the Constitution, the unyielding struggle between the federalists and anti-federalists attests⁶⁸ to the fact that the establishment of a federal state was of fundamental significance for the formation of American constitutional culture, which is characterized by the separation and balance of powers through checks and balances, the existence of an independent judiciary and judicial constitutional review. For the first time in the world a presidential republic was formed on this basis. The first expressions of subsequent development of the American constitutional culture pertain to the Constitutional Amendments that entered into force in 1791, enshrining fundamental human rights and freedoms and their safeguards (The Bill of Rights). **In some sense it was a transition from the power-centered constitutional model to the human-centered one. The American experience in fact marked the dawn of a new quality of constitutional culture**, which is characterized by a constitutional system that includes the foundations of constitutional order and the procedure for the organization of state power, as well as the entire spectrum of relations between an individual and the society.

⁶⁸ See, in Particular: Christopher Collier and James Lincoln Collier, Decision in Philadelphia: The Constitutional Convention of 1787, New York, 1987.

As we have mentioned, the constitutional culture is a continually developing phenomenon, which acquires a qualitatively new essence and substance in conditions of a democratic state and civil society. The latter is determined by the role and significance of the Constitution in these societies. **The constitutionalization of social relations is an important accomplishment of democratic civilization** in the sense that such societies are characterized by non-discrimination, pluralism, tolerance, solidarity, respect toward human rights and freedoms and protection thereof, clear-cut and reliably guaranteed separation of powers, and the administration of justice prevails.

In a society like this the following become the main descriptors of constitutional culture:

1. the place and role reserved to an individual within social relations, recognition of and respect towards his/her dignity, guaranteeing rights and freedoms as ultimate values with direct effect;
2. restricting authority by the law;
3. separation and balance of powers, assurance of a dynamic equilibrium in the chain **functions-institutions-competences**;
4. establishment of the power of the people, elected nature and accountability of government;
5. optimal decentralization of political, economic and administrative powers, guaranteeing free economic competition;
6. the existence of a judiciary system endowed with functional, structural, material and social independence;
7. Formation of civil society and its active role in constitutionalization of social relations;
8. harmonization of domestic legal system with international legal norms and principles;
9. guaranteeing the Constitution`s supremacy and stability;
10. existence of a viable system of constitutional monitoring, ensuring the continuity of revelation, assessment and restoration of distortions of constitutional equilibrium.

These principal descriptors may be expressed differently in various constitutional systems. It is, however, incontestable that a **Constitution is not a commodity that may be imported or exported**. It represents a dynamic conceptualized model of every country's particular system of values, called upon to secure the progress of such a system, its harmonious and sustainable development, taking into account the advancements of progressive ideas in this area⁶⁹. Therefore constitutional solutions are also based on fundamental principles of nature, deviations from which may add a different quality to the constitutional system. For example, excluding the possibility of restricting authority by law is sure proof of the fact that we are not dealing in this case with a rule-of-law state, and without clearly defined separation of powers the establishment of constitutional democracy would be impossible. The formation of democratic governance is also impossible in the absence of appropriate constitutional culture. It is not incidental that in literature one encounters phrases like "anti-constitutional culture" or "constitutional anti-culture"⁷⁰. This attests to the distortion of constitutional values and principles and as such their becoming an instrument in the hands of the authorities.

In view of the principal descriptors of constitutional culture, constitutional architecture should depart from the premises of first clarifying the constitutional objectives of a society. This should be followed by spelling out the principles that emanate from the value system orientation of a given society and are laid in the foundation of constructing a country's constitutional order. The degree of their implementation determines the true character and specifics of expression of constitutional culture in that country. The success of constitutional democracy in a state, in its turn, shall be judged by the level of its constitutional

⁶⁹ It would be appropriate here to refer to the statement by the representative of Senegal at the international conference in Santiago (Constitutionalism, old doctrines, new world, Chile, January 12-14, 2004) to the effect that all African countries have constitutions but there is no constitutionalism, since those constitutions are predominantly constructed on the basis of imported values and have the nature of mottoes.

⁷⁰ <http://university.tversu.ru/misc/pravo/pravo.html>.

culture, which in our times constitutes one of the important components of the national security strategy. Almost a century ago, reflecting on the Lawbook of Mkhitar Gosh, V. Bastamians wrote that when a nation's "legal culture" is adequate, it may "cleverly and beneficially enjoy liberal laws and a broader autonomy, requiring, as new phenomena emerge in its life, to have new laws put in place."⁷¹

The constitutional culture is not an abstract notion; it is manifested in all aspects of the existence of social organism. It reveals, first and foremost, the system of values that underlies social interaction and the operation of state machinery. The level of constitutional culture determines particular constitutional solutions, and the progressive nature of a Constitution as a country's Fundamental Law. The constitutional culture is incarnate in the laws and statutes enacted, the political organization of a state, the operation of and relations between political institutions and branches of government, the social substance and the legal capacity of an individual. Lessons learnt from history invariably indicate that, after all, the main yardstick for gauging the level of constitutional culture in a country is the degree of constitutional democracy, and raising it is the foremost requirement of constitutional culture.

The way from Constitution to constitutionalism, from desirable to real passes through constitutionalization of social relations.

The most general feature of international constitutional and legal mind is the fact that now, more than ever before, it is considered important to have sound guarantees of constitutional principles and norms in social practice. Their so-called constitutionalization is considered to be the prerequisite for the establishment of the rule of law, of democratic state systems.

If, prior to the 18th century, the development of the legal and political mind had led to the idea of adoption of constitutions, acquiring social cohesion through the Fundamental Law of social community, the

⁷¹ Բաստամյանց Վ., Դասաստանագիրք Մխիթար Գոշի. Իրաւաբանական հետազոտութիւն // «Փորձ», 1879, N6, p. 66.

main challenge of the post-constitutional period was **guaranteeing constitutionalism in the country through the Constitution.**

As we already mentioned, constitutionalism is a complex sociopolitical and legal phenomenon. It first and foremost assumes the **establishment of constitutional democracy.** This objective is pursued by countries that have chosen the path of social progress. **Reaching this objective, among others, requires certain mandatory guarantees to be in place, such as the recognition of and adherence to constitutional objectives and fundamental principles both by the state and the entire society, necessary legal consciousness, the existence of state authorities in compliance with constitutional principles, the construction of a legal system following the principle of the rule of law, reliable protection of constitutional order and the supremacy of the Constitution, etc.**

The First Congress of the World Conference on Constitutional Justice⁷² gave special importance to the issue that in many countries the establishment of constitutionalism significantly felt behind the constitutional documentary solutions. The latter are often copied as achievements of the legal thought and the human civilization, not becoming an organic component of the value system of a given concrete society. The existence of the Constitution is not enough for establishing constitutionalism. Moreover, the Great Britain, which doesn't have a separate Basic Law, is currently considered as one of the established democratic and rule-of-law states in Europe. **The issue is in realizing the fundamental constitutional principles in the national legal system and social practice.**

At the same time, the issue of harmonization of national and universal on the level of constitutional solutions is not just urgent, but also initial from the aspect of the current international legal developments. The issue is not only what exactly is the constitutional order enshrined by the Constitution or what principles underlie the relations of the authorities with the law. What is essential is, how does the constitutional order in question

⁷² It took place in Cape Town (the Republic of South Africa), on 22-24 January, 2009.

transmit into social reality, to what extent do fundamental constitutional provisions acquire flesh and blood, who is the real source and bearer of power, to what extent is human dignity protected or guaranteed, how separate, independent and balanced are the branches of state government? Safeguards for the above constitute the basic yardstick that makes it possible to assess the real standing of constitutionalism, to reveal the level of harmonization of the real and desirable.

For the states which have chosen the way to the rule of law and democracy the comprehension of the reality that the path from the Constitution to constitutionalism does not end just by adopting the Basic Law of the state, by this or that preparatory step prescribed in the transitional provisions, by the formation of necessary institutions, by defining human rights and freedoms in the Constitution. This way is a peculiar **reflection of the prescribed and the reality,** the interrelations of which have an initial significance particularly for the transforming social systems. **This way passes through an each member of the social society, through the whole system of his/her value perception.**

At the same time, in the new millennium the doctrines regarding the political formation of the society and constitutional developments, which, stemming from the 16-18th centuries legal-philosophical origins, in the 19-20th centuries became the theoretical base and cornerstone for the formation of national state systems and international legal relations, face serious challenges. The axis of discussions at the summit of the International Association of Constitutional Law in Santiago in 2004 evolved around the subject "Constitutionalism, Old Doctrines, New World." Five days of discussions, more than 100 reports presented to more than 450 participants from 61 countries had one general conclusion: the new millennium poses new challenges to the constitutional-legal solutions formed and realized in the previous centuries. The old doctrines should be seriously reconsidered. New problems require new solutions. The approaches were reflected in the same spirit also during the 7th International Congress of the International Association of Constitutional Law, held in Athens in 2007.

The raised questions are clear and obvious. The main issue is to find exact answers to several concrete issues stemming from them.

Firstly: which are the new challenges the humanity is facing in the new millennium, which may require new constitutional-legal solutions?

Secondly: what peculiarities do these challenges have for the social systems in transition and what kind of specific solutions do they require?

Thirdly: which are the value system bases and main trends for the further constitutional-legal developments?

The comparative analysis of the international legal developments shows that the main factors, which are typical for the social order of the new millennium and, to our mind, dictate new solutions, are, in general, the following:

1. An unprecedented internationalization of various social processes is taking place, economic, social, spiritual and cultural relations are gaining a supranational nature;
2. Economic, information and legal globalization and universalization of many values, which concern the social community, have created a qualitatively new situation of social integration, when unprecedented international formations are formed, as, for instance, the European Union, in case of which the idea of the supranational Constitution inevitably emerged;
3. One of the peculiarities of the new reality is that the borders between the national democratic systems and supranational economic relations are essentially severed⁷³;
4. From the international aspect the democratic developments, on the one hand, require a new level and quality of co-operation,

⁷³ As it was fairly mentioned by Professor Ernst Ulrich von Weizsäcker, in such conditions, when democracy is enclosed in the national-state borders, but economic relations have a supranational nature, one should speak about the necessity of a new stage of the development of democracy - global democracy (Deutschland, 2002, N 4, August-September).

protection of the legal order, systemic harmony and stability, on the other hand, a serious contradiction between strengthening democracy in national relations and the dictate of force in interstate relations has emerged⁷⁴;

5. In such a situation overcoming international financial and economic crisis, which gained a nature of a systemic, deep reproduction crisis on the threshold of the new millennium, is also becoming difficult. Moreover, the systemic crisis establishes new preconditions for social cataclysms, which do not find solution without bloodshed;
6. As a general tendency, the regulatory role of the state in the social relations is decreasing⁷⁵. But the global economic and financial crisis, which has a deeper value system nature, requests a new approach - it's impossible to reach stability in extreme situations without the state's active interference;
7. Accumulation of the negative social energy and systemic collapses in the end of the previous century have led to such a situation of the social life, for which instability, uncertainty, value system confusion, activation of irrational and "mediocrity", are typical;
8. Strengthening of the civil society and establishment of the democratic, rule-of-law state has become a universal ideal. The issue of conciliation of universalism and national peculiarities

⁷⁴ The following idea expressed by the former President of France Jack Shirak during the international conference "On Peace, Security, International Law, Sight to the Future" convened in Saint-Petersburg on April 12, 2003 is worth mentioning: "International politics, which is established on the basis of democratic values, should be anchored by indisputable collective norms, and at the same time, an international justice system should be founded, which should give these legal norms a thorough effect. No international order, which is aimed at continuous perspective, can be based on the logics of the force" (Правоведение, 2003, N 5, p. 8).

⁷⁵ This concerns both the economic sphere and various issues of public administration. As it was emphasized by Professor Yuri Tikhomirov, strengthening the democratic foundations of the public power and establishing the effective system of social self-governance create necessary prerequisites for the citizens to thoroughly and fully realize their right to participate in the governance of the state (Ю.А. Тихомиров - О модернизации государства // Журнал российского права. 2004, N 4, pp. 3-16).

is becoming more urgent. At the same time, instead of harmonization, value system contradictions are straining in the nation-centered state-social systems and human-centered ones. Moreover, the notions “ethnos” and “demos” should be rethought in the constitutional-legal relations;

9. Human society, on the one hand, is gradually becoming a mercantile consumer society from a spiritual and cultural one, on the other hand, the religion, the spiritual sphere, moving away from the essential role of making an individual to live on the basis of divine values, are turning into a formal, self-contained inner church phenomenon moved away from a human being. Moreover, in conditions of evolving free market and economic global competition moral norms are losing their previous role of the regulator and stimulus of social relations;
10. The scissors of richness and poverty have reached such a bound of polarization, when they simply become incompatible⁷⁶. Drug addiction and terrorism have become a universal evil. The unprecedented spread of the latter has economic, social, political motives and resists to the value system, which nowadays underlies the establishment of democratic relations on the basis of civil agreement⁷⁷;

⁷⁶ The Nobel Prize winner, former adviser to the USA President, economist Jozeph Stiglic is absolutely right, summarizing that the reasons for such a polarization are the wrong course of economic globalization and extreme liberalism. The aim of the development of the humanity is not to accumulate the richness in the hands of a few individuals in conditions of ubiquitous poverty. Each economic initiative should be assessed also from the aspect of its social consequences (“In the Shadow of Globalization” Deutschland, 2002, N 4, August-September).

⁷⁷ As it was fairly mentioned by the former member of the French Constitutional Council Professor Jack Rober, member of the Supreme Court of Ireland Francis Murphy, member of the commission on legal affairs and human rights of the Parliamentary Assembly of the Council of Europe Michelle Yunon, Chairman of the Austrian Supreme Court Evrin Felcman and others within the frames of their speeches “On Ensuring the Balance between the Interests of Expedience and Human Rights in the Fight against the Terrorism” presented at the 10th international judicial conference convened in Strasbourg in May 2002, the fight against terrorism leads to the ensuring the victory of the ideals which underlie the social agreement of the whole society.

11. The human dignity, his/her rights are becoming an object of international relations. The humankind entered the new millennium, “crushing” national stereotypes of the perception of law and the issue of human rights” protection became a supranational phenomenon, essentially restricting the state sovereignty in this issue;
12. The role and place of the international law are essentially changing in interstate legal system. At the same time, differences of traditional legal systems are becoming more relative. Precedent is becoming an important source of law in the European Continental legal system, and human rights, irrespective of national borders, are becoming an object of international protection. The experiments are also performed quite often for “exporting” democracy without paying sufficient attention to the importance of establishing necessary environment for its existence, or it is carried out just on the basis of political calculations;
13. After the end of the Cold War and in conditions of the democratic developments in post-communist area new pillars of international balance are being looked for. The world has transformed to an instable unipolar system from a bipolar one with real tendencies to outgrow to a multipolar system. On the one hand, the pillars of international systemic stability are still in the process of clarification, on the other hand, the existing international institutions serving for this aim are losing their previous role and place;
14. New problems of universal co-operation have appeared. The humanity has created sufficient prerequisites for self-destruction and the factor of eventuality or natural disasters can make this probable possibility real. The necessity to act in co-operation against global dangers has also become more than urgent;
15. The scientific and technological thought and achievements, current informational opportunities, even tests for creating a tech-

nical or organic artificial man are dictating new approaches of general value system.

The list of enumerations can be continued. The mentioned, however, is also enough to ascertain that in this context all problems, which concern the issues of the stable and harmonic development of the society on national and international levels, should be considered⁷⁸. At the same time, it should be emphasized that the mentioned phenomena are not new and have not appeared all of a sudden. Just evolving, they have gained a new quality and the nature of impact together with the new challenges of constitutionalization of social relations.

⁷⁸ In international practice one can often meet fair criticism that the internal logics of the historical developments, new realities, challenges of millennium aren't studied and taken into account with necessary and sufficient deepness. They have become mostly a subject for superficial speculations and political bargaining (Particularly, Brands M. The Obsolescence of Almost All Theories Concerning International Relations // European Review. 1998. 6(3)).

CHAPTER 2. HISTORICAL ROOTS FOR THE FORMATION OF CONSTITUTIONAL CULTURE IN THE ARMENIAN REALITY OF THE CHRISTIAN PERIOD

2.1 THE LEGAL AND POLITICAL SIGNIFICANCE OF THE PROCLAMATION OF CHRISTIANITY AS A STATE RELIGION IN ARMENIA

Many authors have made the adoption of Christianity in Armenia as official state religion the subject of serious academic analysis in vast volumes of historiography. We do not intend here to reflect upon these in details, refraining from reference to the historical circumstances.

We consider it more important, within the scopes of the discussed subject, to look for answers to the following questions:

1. What is the political significance of proclaiming Christianity a state religion in Armenia in 301 A.D.?
2. What were the systemic approaches proposed to law and order and what were the foundations laid for developments in building a state and a legal order?

There have been reflections on the first question in literature.⁷⁹ The overall conclusions mostly pertain to the:

- geopolitical situation that emerged around the country (Armenia between the hammer and the anvil: the crosshairs of expansionist interests of Rome and Persia);
- strengthening of Zoroastrianism in Persia and concerns about it being upgraded to the status of state religion;

⁷⁹ See, in particular: Միրումյան Կ., Հայ քաղաքական մտքի պատմությունից, Երևան, 2002, էջեր 37-46.

- imperative of preserving Armenia's physical integrity and the fundamental issues of strengthening the power of centralized monarchy;
- need for a uniform, coordinated state ideology as a guarantee for the consolidation and strengthening the unity of all strata around the nation's common goals and interests.

Notwithstanding the existence of divergent interpretations and opinions, the overview of which does not belong to this study, the real political vector of the time was that **“the policy of forced introduction of Zoroastrianism in Armenia and its resistance thereto represented a conflict of not only differing religious ideologies, but also of the weltanschauung, cultural values and mental orientation. In this conflict Armenia appeared as the bearer and defender of Hellenistic tradition, a representative of the cultural Pax Hellenicum.”**⁸⁰ Moreover, as a result of the expansionist policy of Sassanid Persia by the second half of the 3rd century most of Armenia's territory was under foreign control. The Armenian statehood was once again on the verge of destruction, and that raised the historic challenge of preserving state authority and national identity.⁸¹

The historical reality was that, to meet this challenge, the proclamation of Christianity as a state religion in 301 A.D. was reserved an exceptional role as a consolidating religious and ideological factor, called upon to preserve and strengthen statehood. The new value system orientation created the necessary ideological preconditions for developing and implementing a uniform nation-state policy, turning the spiritual-ideological factor into a powerful instrument of consolidating various social strata of the population, strengthening the country's sovereignty, ensuring the 'salvation turnaround for the land of Hayastan.' It is doubtless that in proclaiming Christianity as a state religion and exerting great efforts to spread it and have it rooted king Trdat first

⁸⁰ As K. Amatouni writes: "Armenia, ignited like a spark in the clash of two great empires, had the unfortunate fate of getting tempered in the competition between the Iranian East and the Roman West." Կ. Ամատունի, «Աղդեցուքիւն Յուստինեան Հռոմեական օրինաց Հայկական իրաւունքին վրայ եւ աստիճան այդ ազդեցության»// Բազմավեպ, 93 (1935) էջ 132.

⁸¹ Ibid, p 38.

and foremost pursued the objective of strengthening his nation-state. Nikoghayos Adonts states: "Armenia turned its face to the West when it became Christian. The threat of assimilation and oblivion had been looming over Armenia. There was no other way for salvation than to rely on Christianity."⁸² Professor Kohler, a foreign author, has made the following remarkable generalization: "Here we have a nation that moved from Caucasian dependence to a civilized state when it adopted a highly sophisticated religion, and all the principles that came with it. It would not be an exaggeration to say that only through this the Armenians succeeded to emerge in the world as possessing their own civilization."⁸³ In reflecting on professor Karst's "On the history of Armenian legal mind" H. Assadourea writes: "It was of great significance for its history and law that the country converted to Christianity in a period when it was weak."⁸⁴ In his research Prof. H. Hovsepian also concludes: "the spread of Christianity and its adoption as state religion early in the 4th century was of great significance for the development of the Armenian legal and political mind."⁸⁵

Overcoming the old mentality and switching to new value system was a tough challenge for everyone in Armenia. In describing the painful aspects of the Armenian reality during the transition of the first half of the 4th century; the general transformation, the penetration of Christian values, Pawstos Buzand notes: "there was hatred against each other and jealousy, bad will, hostility, grudge, sniping, treachery amongst friends and brothers: the loved ones, neighbors, kin, in-laws, family, relatives, all conspired against each other. People craved each other's blood, spared no effort to harm one another, all because of evil behavior and wicked

⁸² Նիկողայոս Աձոնց, Հայկական հարց, Երևան, 1996, էջ 148 (One should mention that the West essentially was Christianized much later).

⁸³ Գոլեր [Կոհլեր], Իրաւունք Հայոց, Վիեննա, 1890, էջ 14 (The material published in 1888 in the Journal of Comparative Law was entitled: Dr. I. Kohler. Das Recht der Armenier).

⁸⁴ Յ. Ասատուրեան, Պրոֆ. Կարստի Ուրվագիծ հայկական իրաւագիտութեան պատմութեան, // Բազմավեպ, 65 (1907), էջ 109.

⁸⁵ Овсепян О.А. и др.: Политико-правовая мысль Армении //История политических и правовых учений: средние века и Возрождение. М., 1986, էջ 109:

reason.”⁸⁶ The burden of overcoming this situation, restoring hope, faith and solidarity was mostly on the shoulders of the state as well as the church. The fact that Gregory the Illuminator was proclaimed a spiritual leader by popular consent in these circumstances is truly remarkable. As recounted by Agatangelos: “With the approval of his wife Ashkhen and his sister Khosrovdoukht king Trdat ordered all his troops to convene. Under orders everyone hurriedly converged from all over on the city of Vagharshapat in the Ayrarat province. The King as well set out to reach there. The entire army was there: superiors, viceroys, governors, chiefs, princes, feudal lords, noblemen, judges and generals came and presented themselves to the king. The king sought everybody’s advice, in order to make haste and hurry to become heirs to the good deeds. Come, said he, let us, without delay, make Grigor, the guide of our lives granted to us by God, our pastor, so that he enlightens and restores us through baptism in the law-instructing sacrament of the Lord our Creator.”⁸⁷

The following are of interest in the above testimony:

- the Grabar (Classical Armenian) phrase «հրաման էս ի ժողով կոչել միաբանութեամբ ամենայն զօրաց իւրոց» (“hraman yet i zhoghov kochel miabanutyamb amenayn zorats yurots”) is translated literally as “ordered all his troops to convene,” seriously distorting its meaning. The subsequent text makes it clear that it refers to summoning the king’s supporters with a purpose of arriving at a consensual decision, rather than a military gathering;
- the king wished to make “Grigor a pastor” by ‘seeking everybody’s advice,’ to assure the establishment of public accord over this most important issue;
- a new phenomenon was born, the institute of National Ecclesiastical councils, which over the subsequent centuries played a decisive role in refining the values and qualities of our identity, defining through public accord the basic canons and principles of our lives, and ensuring their implementation.

⁸⁶ Փավստոս Բուզանդ, Հայոց պատմություն, Երևան, 1987, էջ 55.

⁸⁷ Ագաթանգեղոս, Հայոց պատմություն, Երևան, 1983 թ., էջ 445.

By proclaiming Christianity the religion of the state, not only was the Christian doctrine embraced on a national level, but also – its entire value system, which includes the **Christian legal mindset**. We do not intend here to dwell on its details here.⁸⁸ We shall attempt to offer a general overview of the principal conceptual features of the Christian perception of law, with a view of further expanding on their implementation in the Armenian reality.

A study of the fundamental principles in biblical heritage: the “legal,” historical, monitive, prophetic books of the Old and New Testaments, from the Genesis to the Revelation, comes to prove that:

1. A human being, whom God has made in his image and likeness, is the axis of any and all relations; an interminable system of values that are inalienable from man, constitute the essence of his existence, and violating which shall be an inhuman, illicit act going against the Creator. The conceptual basis for the Christian legal thinking is the theomorphic⁸⁹ nature of man, and principles and practical approaches to issues like human rights, social co-existence, the role of state, the essence of power, the political system and, generally, any legal subject are interpreted in the former’s context.

2. The basis of statute is divine law, and only such statutes are lawful.⁹⁰ The formula of Christian perception of law is that law is the discipline of what is fair and kind, and these, in turn, are divine categories, since the source of law is the Lord. Over the course of centuries the philosophical and legal mind, setting forth the fundamental question of correspondence between law and its legal content,⁹¹ considering the

⁸⁸ See more on this in: Պապայան Ռ., Արդի իրավունքի քրիստոնեական ակունքները /գիտ. խմբ.՝ Գ.Գ. Հարությունյան, Մ.Ա.Ս. Էջմիածին, 2002:

⁸⁹ As stated by Davit Anghaght quite to the point in his time: “Philosophy means acquiring the likeness of God within human capacity.” Դավիթ Անհաղթ, երկեր: Երևան, 1999 թ., էջ 45

⁹⁰ Whoever requires for the law to rule, is requiring the divine and the reason to rule. // Аристотель. Соч. в 4 тт. Т. 4, էջ 481

⁹¹ Արիստոտել, Աթենական հասարակարգը: Երևան, 2003, էջեր 26-27:

'spirit of law' to be the basis for positive legislation,⁹² ascribing importance to having laws that are "in harmony with the essence of man and to the liking of our rational spirit,"⁹³ viewing law as an "absolute notion, the current reality of free self-consciousness,"⁹⁴ believing that natural law emanates from the essence of divine creation of man, which pushes him towards reciprocal association,⁹⁵ characterizing law as "the mathematics of liberty in the history of mankind,"⁹⁶ has gradually arrived at the following generalization: assuring the rule of law is a pivotal value for the establishment of civil society.

3. Christianity proposed God-given principles for the establishment of law, construction of state power, organization of relations between people, for them not to be cut off from their original divine essence, to stay immune from self-denial and degeneration. And that is only possible if people measure and weigh what they do or intend to do by lasting values, following divine commandments ("I am the Lord your God [...] You shall have no other god" Exodus 20:3; "You shall not make a carved image [...] you shall not bow down to them or worship them" Exodus 20:4-5; "You shall not make wrong use of the name of the Lord your God" Exodus 20:7; "The seventh day is the Sabbath of the Lord your God, that day you shall not do any work" Exodus 20:10; "You shall not commit murder" Exodus 20:13; "You shall not commit adultery" Exodus 20:14; "You shall not steal" Exodus 20:15; "You shall not give false evidence" Exodus 20:16; "You shall not covet anything that belongs to your neighbor" Exodus 20:17).

The clarification of the boundaries for the expression of rights, defining the principle of **permissibility of that which is not forbidden**, along with laying legal foundations for liberties, became the axis for harmonization of social relations. It follows from the divine principles of human co-existence that the state should also be constructed and orga-

⁹² Монтескье Ш. О духе законов // Монтескье Ш. Избр. произведения. М., 1955, էջ 159:

⁹³ Որոգայթ փառաց, Երևան, 2002, էջ 71.

⁹⁴ Гегель Г. Философия права. М., 1990, էջ 90:

⁹⁵ Гроций Гуго Де Гроот. О праве войны и мира // Антология мировой правовой мысли. Т. III. М., 1999, էջեր 21-26:

⁹⁶ Ներսեսյանց Վ.Ս., Տիվիլիզմի մանիֆեստը, Երևան, 2001, էջ 21.

nized under divine law ("natural law also implies the existence of a natural state").⁹⁷ The fundamental principles of common co-existence and establishment of civil society are enshrined in the essential values of Christianity. As R. Papayan states: "The ten commandments, which are the basis of biblical legislation, affirm the truth that the rights proclaimed by God are universal and apply equally to all men since, rather than pointing to the rights of the person they address, they grant similar rights to all men that surround the latter."⁹⁸ ("You shall not commit murder" does not mean "You have the right to live" but, rather, "Everyone has that right;" "You shall not commit adultery" means that everybody's families are immune; "You shall not steal" spells a requirement to respect the property rights of others).⁹⁹ **Guaranteeing others' rights become a limit on regulating the social behavior of an individual.** At the same time the imperative of unreservedly abiding by the law is emphasized, which pertains to everyone and, first and foremost, to those endowed with authority.

4. At all stages of the historical development of state power a most important role was reserved to maintaining law and order, their enforcement and the protection of lawfulness. Contemporary legal theory views the separation and balance of powers as an axial issue in exercising state authority. The idea of three branches of government, with the same functions that exist in current-day theory and practice of state, is clearly stated in the Bible: "The Lord our judge, the Lord our law-giver, the Lord our king," Isaiah 33:22.¹⁰⁰

5. An individual is the axis of the ideological system of values of Christianity, he shall construct his life on the basis of legal rules and norms that are pleasing to God. Nevertheless an important role is also reserved to listening to vox populi, taking it into account ("All the elders of Israel met and came to Samuel [...] and said to him, "You are now old and your sons do not follow in your footsteps; appoint us a king to

⁹⁷ Ներսեսյանց Վ., Իրավունքի եւ պետության տեսություն, Երևան, 2001, էջ 75.

⁹⁸ Պապայան Ռ., Արդի իրավունքի քրիստոնեական ակունքները, Երևան, 2002, էջ 272:

⁹⁹ Ibid.

¹⁰⁰ Ibid, p 287.

govern us.” Samuel prayed to God and God answered him: “Listen to the people and all that they are saying,” 1 Samuel 8:4). But, according to interpretations of the Bible, “grass roots” messages cannot contradict the utterance of God, or circumnavigate the divine instruction which emphasizes, as a principle of justice: “You shall not be lead into wrongdoing by majority,” Exodus 23:2. It is clear that **democracy is discharged by the people based on underlying ultimate unalterable values**. It is noteworthy that the constitutions of several modern states (e.g. Germany, Article 1; Georgia, Article 7; the Russian Federation, Article 2, 18, etc.) enshrine that human rights constitute an ultimate value, whereas the **people** and the state, in administering their authority, shall be **bound** by human rights and fundamental freedoms, as having direct effect.

6. Christianity deems that the principal mission of man is to regain paradise, making no distinction between the spiritual and a secular expression of the latter’s existence. **Inserting such a wedge would constitute ungodliness**. The Christian ideology only accepts functional demarcation between heavenly power and earthly authority, within the common goal of assuring individual existence in conformity with godly values.

The ideological approaches in the legal mind, illustrated above, indicate that the Christianity, deeming the creation of the necessary prerequisites for unleashing man’s creative potential to be the main mission of mankind’s collective existence, proposed systemic legal approaches and solutions for it. Christianity symbolized a qualitatively new stage in man’s self-cognizance. By viewing the axis individual society in organic unity and linkage, it laid the value foundations for the emergence of civil society. Nerses Melik-Tangian states: “As an ethical-religious-administrative institution the church, in order to restrain arbitrariness, eradicate personal whim, and lead its congregation in a particular direction, considers it its duty to define by law the relation of each member to the church, to each other, as well as to other individuals and circles outside of the church. Thus boundaries are set for the rights and procedures for

the obligations of each individual and the collective entity.”¹⁰¹ The author also emphasizes that the law, on the one hand, ensures man’s freedom, “preventing others from trampling upon the sacred rule,” and, on the other hand, it restrains man’s individual whimsy against the common good, keeps him within stipulated norms.

We would like to draw particular attention to the fact that **Christianity established a holistic system of overpowering, infrangible, enduring values as the basis for all rules of human interaction and co-existence, something that possesses a constituting essence in its juridical significance**. As reverend father Vahan Bastamian states in his preface to Mkhitar Gosh’s “Armenian Lawbook:” “Christianity, as it is well known, brought about a great revolution in the religious, ethical, familial, social and political life of the Armenian nation. The nation’s statehood and popular existence acquire a religious dimension: the religion and the Church become the “Hymn of the Nation. [...] Thus the church, having an impact on the ethical, intellectual, familial and political aspects of the nation’s existence should, of course, exercise great influence over its “legal arrangements”. ”¹⁰² This influence was significant throughout the entire subsequent course of our nation’s history, and the embryo of Armenian constitutional culture has matured within its scope.

2.2. THE CONSTITUTING ROLE AND SIGNIFICANCE OF NATIONAL ECCLESIASTICAL COUNCILS

The Armenian historiography contains many reflections on the circumstances of convening national ecclesiastical councils, with the main emphasis on the presentation of factual material, evaluating their role and significance, the analysis of respective historical periods and some other particularities. Certain attention has been paid to a general legal

¹⁰¹ Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Շուշի, 1903, էջ 7.
¹⁰² Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւարանական հետազոտութիւնը հանդերձ ծանօթութեամբ Վահան Ծ. Վարդապետի Բատամանեց, Վաղարշապատ, 1880, էջ 68.

analysis of the canons enacted by these councils. Nevertheless we consider it a great omission that no adequate attention has been paid so far to the constituting role of national ecclesiastical councils. After all it is exactly these councils that have laid the foundation for the formation of the Armenian constitutional culture.

We shall attempt to focus on this issue in the light of the latter statement, departing from the following criteria:

- a) to what extent does the council in question perform a “constituting” role, to what extent is it representative of the society, how is its “legitimacy” assured as a body adopting common rules of behavior upon national consent?;
- b) to what extent are the rules thus adopted lawful and universally binding, do they possess, if at all, overpowering “delineating” significance?

According to historiography the first official national ecclesiastical council was the Council of Ashtishat held in 365 A.D. and chaired by Nerses the Great, with the participation of the clergy and lay representatives.¹⁰³ In view of the latter circumstance Melik-Tangian emphasizes: “this glorious principle remained a principal item in all subsequent councils through the course of our history, lay people have always participated in all councils deciding not only on procedural, but also doctrinal issues. This principle is underscored from the perspective of other churches, which may view it with jealousy and strive to accomplish the same, since when we say church we imply a congregation of believers, and only through the participation of both classes can we resolve all issues and problems of the church.”¹⁰⁴

Historiography also testifies that “the practice of resolving issues of the church through councils has originated in the time of the followers of the apostles: they came together for the first time and decided to prohibit Christians from performing Mosaic rites¹⁰⁵ (circumcision).”

¹⁰³ Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Ծուշի, 1903, էջ 313.

¹⁰⁴ Ibid, p 314.

¹⁰⁵ Ibid, p 307.

The emergence of such councils as a general Christian phenomenon expressed itself in the Armenian context with the following peculiarity: **the proclamation of Christianity as a state religion (or, as stated by Melik-Tangian, “The Armenian land was the first to make Christianity the civil religion”)¹⁰⁶ has invariably lead to the requirement that spiritual and secular rules emanate from a common source, that the civil laws contribute to the spread of Christianity, and that the rules of the church become binding, as civil laws, for all Christian subjects.** The historiographers state that the intention of the rulings of the Ashtishat Council was also to strengthen Christianity and save the country from disintegration. **“The Council of Ashtishat lays the foundation in Armenia for holding councils which stipulate official rules”¹⁰⁷** (our underscore, G.H.). Similar councils were convened in the course of the subsequent centuries, on which we shall reflect in due course. We would like, however, specifically to emphasize here that “councils which stipulated official rules” were convened in exceptional cases, upon the existence of an extreme necessity, and enjoyed national representation.

Pawstos Buzand has left us the most complete testimony about the Council of Ashtishat: “They came together in the village of Ashtishat, where a church was built for the first time. [...]They all came willingly to the council and deliberated profitably together so as **to perfect there the secular regulations of the church and the uniformity of beliefs.** (At this council) they **put in order, compiled, canonized and set down regulations** and turned the entire population of the land of Armenia into the likeness of an universal order of solitary-communities...”¹⁰⁸ (our underscore, G. H.). The original Grabar version of the phrase “(At this council) they put in order, compiled, canonized and set down regulations and turned the entire population of the land of Armenia into the likeness of an universal order of solitary-communities...”¹⁰⁹ is remarkable here.

¹⁰⁶ Ibid, p 308.

¹⁰⁷ Ibid, p 313.

¹⁰⁸ Փավստոս Բուզանդ, Հայոց պատմություն (թարգմանությունը եւ ծանոթագրությունները Ստ. Մայիսայանի), Երևան, 1987, էջ 119.

¹⁰⁹ Ibid p 118.

As characterized by Pawstos Buzand, the results of this council (“**put in order, compiled, canonized and set down**”)¹¹⁰ best represent the law-making role and constituting essence of the Council of Ashtishat, which in the modern Armenian translation (“outlined law and order, and organized”) narrows down to a rather administrative-organizational function. The notions “put in order, compiled, canonized and set down” did characterize in medieval Armenian manuscripts the types of lawmaking activity, regulation of relations, and determination of the rules of behavior. The national ecclesiastical councils had a special role, the canons they enacted had a universal, prevailing, “delineating” legal power. In this respect national ecclesiastical councils are comparable to constitutional conventions, and one may safely conclude that they were the prototypical for the latter.

Here is what Movses Khorenatsi has to say about the Council of Ashtishat: “In the third year of the reign of Arshak, Nerses the Great, son of Atanagines, son of Husik, son of Vrtanes, son of Saint Gregory, became Archbishop of Armenia. Having returned from Byzantium to Caesarea, he came to Armenia and restored all the just administration of his fathers, and he went even further. For the good order that he had seen in the land of the Greeks, especially in the royal city, he imitated here. Summoning a Council of bishops in concert with the laity, by canonical **constitution (regulation)** he established mercy, extirpating the root of inhumanity, which was the natural custom in our land.”¹¹¹

In the subsequent modern Armenian translation Khorenatsi’s phrase “established through constitutional canon,” was translated as “established through canonical limits,”¹¹² which makes almost no

110 The forms «Օրինեցին» (*orinetsin*) and «յարինեցին» (*haurinetsin*) are encountered in the meaning of establishing in an orderly manner in various monuments of Armenian bibliography. In particular, the history of Abraham Kretatsi states: “...they established two ranks [starting] from the reed fence of the khan up to one bowshot and more; the Ottomans call [these regiments] *alay*. All of them had big rifles in their hands.” (According to the materials of Classical Armenian Bibliography www.digilib.am, version 1.0).

111 For the Modern Armenian text see: Մովսես Խորենացի. Հայոց պատմություն, Ե դար, Երևան, 1997, էջ 225:

112 *Ibid.*

sense in legal terms. A faithful translation of the original, that is ‘summoning a Council of bishops in concert with the laity, by canonical **constitution** he established,” proves undeniably that **the national ecclesiastical Council of Ashtishat was nothing else but a representative constitutional convention which adopted constitutional canons.**

Writing about Catholicos Nerses and his work, Hakob Manandian mentions: “he chaired at the first **constitutional convocation** (our underscore, G. H.) that took place at Ashtishat, and its canonical rulings pertained not only to religious or ecclesiastical matters, but also to secular life and social relations.”¹¹³ Attention is paid here to the lawmaking role of the people, rather than to the constitutional nature of canons, something that is explicitly captured by Khorenatsi.

The Council of Ashtishat, being the first of its kind, set an important precedent in the Armenian reality for having effective domestic legislation even in absence of a nation-state. The initiative of holding that council came exclusively from the Catholicos, and here is how Pawstos Buzand described his ultimate properties even before becoming a Catholicos: “He had the fear of God in his heart, he strictly observed the commandments, he was humane, saintly and virtuous, very sagacious, impartial, judging fairly, meek, sweet, humble, charitable, lawful in matrimony, overwhelmed with love for the Lord.”¹¹⁴

The tradition of the Council of Ashtishat was best developed in the Council of Shahapivan, reported to have been convened in 444-447 A.D. With respect to this council Nerses Melik-Tangian mentions: “The Council of Shahapivan was one of the most glorious Armenian councils.”¹¹⁵ The representative presence at the Council of Shahapivan is described as follows: “And there came 40 bishops and many priests, deacons, ardent ministers and the entire clergy of the holy church, all princes, provincial governors, supreme justices, treasurers, generals, intendants, village

113 Հակոբ Մանանդյան, Երկեր, գիրք Բ, Երևան, 1978, էջ 164.

114 Փավստոս Բուզանդ, Հայոց պատմություն, Երևան, 1987, էջ 109.

115 Ներսես Մելիք-Թանգյան, Հայոց եկեղեցական իրավունքը, գիրք Ա, Ծուշի, 1903, էջ 319:.

chiefs, and noblemen from various regions¹¹⁶.¹¹⁷ The purpose for convening the people was also clear: “The senior Nakharars of the Armenian land, who were zealous defenders of laws and sanctities, said this: “Restore the law and order established by Saints Grigor, Nerses, Sahak and Mashtots, and establish by your own will other goodly things, and we shall willingly and lovingly accept, since the church’s law and order has dwindled, and people have reverted to unlawfulness. You shall define laws pleasing for God and useful in calling the church to life, and we shall adhere to them and keep them strong. And if someone, be it a bishop or priest, a free man or a peasant, fails to strictly abide by the laws so established, let them be punished and pay a fine.”¹¹⁸ Incidentally, according to Nerses Melik-Tangian, all of the nakhararas took part in this council, including Vassak marzpan, Vahan intendant, and Vardan Mamikonian. It is also emphasized: “There never has been such a glorious council among any universal councils, enjoying the participation of the clergy with their classes as well as the rulers in numerous secular classes.”¹¹⁹ The author also provides important details on the convocation and organization of the council, its role and character. It is emphasized, in particular, that:

- a) this council was convened and chaired by the Catholicos;
- b) the council itself, as well as its “pre-procedure” enjoyed the participation of the ministry, as well as the secular “element,” “with all their classes;”
- c) this council **approved** “all [preceding] councils and Patriarchal canons which, although adopted by the nation before that day, were not ratified by popular endorsement.” It is remarkable that this council, by approving “the canon of the councils of Nicaea, Constanti nople, and Ephesus, as well as by the Illuminator, Nerses, Sahak, Mesrop and the Apostolic canon,” thereby assured their legitimacy, and the council exercised the function of ratification;

116 “Free men” refers here to both big feudal landlords, exempt from state taxes and levies, and the class of petty feudal landowners.

117 Ավագյան Ռ. Հ., Հայ իրավական մտքի գանձարան, Երևան, 2001, էջ 121.

118 Ibid.

119 Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Ծուշի, 1903, էջ 320.

- d) at this council “ecclesiastical canons acquire the binding nature of civil law, prescribing penalties and fines for transgressors;”
- e) “They even established corporal punishments of most merciless nature, which is completely at odds with the spirit of the Gospel, and nowhere to be found in contemporary foreign canons.”¹²⁰

H. N. Akinean makes an exceptionally interesting reflection on the Council of Shahapivan, stressing, in particular, that: “It was meant to be the first all-national **Reforming Council**”¹²¹ (our underscore, G.H.). The notion of “all-national Reforming Council” best characterizes the role and significance of constitutional conventions, with particular importance attached to the special (all-national) role and significance of legal relations thus regulated, as well as putting emphasize on the “reformative” nature of the process. The author ascribes specific importance to the fact that “The clergy and the Nakharars, the noblemen and peasants had stood up to request from the Council the re-establishment of ethical order, in complementing the Apostolic and Nicean canons: **impartial trial of the offenders and severe verdict along with a penalty, without prejudice to class or rank. Senior Nakharars, noblemen and peasants unanimously subscribed to all rulings of the Council**”¹²² (our underscore, G. H.). The author also expresses his rightful admiration for the Armenian legal mind of the time. In a bibliographic analysis preceding the above study, entitled “Canons ascribed to Saint Sahak” and published in the last 1946 issue of the same journal, H. N. Akinean maintains that the Council of Shahapivan “was the first ecclesiastical **constitutional convention**” (our underscore, G. H.), and without any reservation calls the document adopted at that council a **Constitution**.¹²³

120 Ibid, p 321.

121 Հ.Ն. Ակինեան, Ծահապիվանի ժողովի կանոնները: Մատենագրական ուսումնասիրություն: Առթիւ 1500 ամեայ տարեդարձին (444-1944) // ՀԱՆՐԱՊԵՏ ԱՄՍՕՐԵԱՅ (Հայագիտական ուսումնաթերթ), թիվ 4, 1949, Մխիթարեան տպարան, Վիեննա, էջ 79.

122 Ibid, p 81.

123 Հ.Ն. Ակինեան, Ս. ՄԱՀԱԿԻ ՎԵՐԱԳՐՈՒՄԾ ԿԱՆՈՆՆԵՐԸ: Մատենագրական ուսումնասիրություն // ՀԱՆՐԱՊԵՏ ԱՄՍՕՐԵԱՅ (Հայագիտական ուսումնաթերթ), 60 (1946), էջեր 48-70.

We shall reflect later on the canons enacted by the Council of Shahapivan, and their constitutional nature. Here we would like to acknowledge the fact that the Council of Shahapivan was not an ecclesiastical, but a national-ecclesiastical council and it had a pan-national representative nature. At the same time, compared to the Council of Ashtishat the Council of Shahapivan, in its representative composition and constitutional nature, represented a noticeable step forward, which made ever more salient the **emergence of a culture of adopting norms of constitutional significance, and guaranteeing through them an environment of social accord in medieval Armenia.**

By the end of the 5th century an event took place in Armenia, which was of exceptional importance from the perspective of the subject of our study. Before that the initiator of national ecclesiastical councils was the church, with the purpose of “restoring” all aspects of public life, whereas in the 5th century a similar initiative was set forth by King Vachagan. Movses Kaghankatvatsi recounts: “During the years of the Aghvan King Vachagan there were many conflicts between lay people and the bishops, priests and suffragans, the nobles and the commons. The king desired to convene a populous assembly in Aghven, which took place on the thirteenth day of the month of March.”¹²⁴

The outcome of that assembly was the adoption of a Canonical **Constitution**. Historiography dates this constitution, which contained 21 articles, to the year of 488.¹²⁵ The procedure for guaranteeing the authenticity of this document was also remarkable: the Canonical Constitution is concluded by the following article: «These terms were set in the presence of the King by bishops, priests, nobles. [...] This order was sealed with their rings by the King’s commander Moutsik, the Superintendent of the palace Mirhorik and the chiefs of clans Marout, Tirazd,

124 Մովսես Կաղանկատվացի. Պատմություն Աղվանից աշխարհի /թարգմանությունը, առաջաբանը եւ ծանոթագրությունները Վարագ Առաքելյանի, Երևան, 1969, էջ 65.

125 See Ռ. Հ. Ավագյան. Հայ իրավական մտքի գանձարան, հ. 1, Երևան, 2001, էջեր 132-137.

Sparakos, Ghama, Bakour, Ratan, Arches, the Ruler of Gardman brave Vardan, Khours, Germanosan, Khosken, Pirog, Nahapet, all the nobles of Aghvank, and the writing, for it to be more authentic, was also sealed with the ring of Vachagan, the King of Aghvank.”¹²⁶ The expression “the order was sealed with their rings” simply refers to the ratification of the universally binding nature of the norms thus adopted. It is also of the essence that special attention was paid to the question of ratification of rules that were the outcome of broad public accord and were of prevailing nature.

In this respect we would like to isolate the following considerations:

1. A situation had matured in the Armenian milieu by the middle of the 5th century, when attempts were made to address emerging conflicts between various strata of the society not through the dictate of force (including royal decrees or the use of the stick), but through legal means, by enacting constitutional laws. This first and foremost attests to the superior intellectual capacity and legal awareness of the author of this initiative, as well as to the fact that these properties were perceived by the society in an environment that was mature for this.
2. The adoption of a constitution by constitutional convention, an amazingly progressive occurrence for the given time, comes to prove that the regulation of social relations was based on the principles of social cohesion, rising above social or other kind of stratification.
3. No other modifier than **constitutional** is used to characterize the canons, affording them a special status, recognizing the supremacy of norms established through national consensus over any other norm or canon.

Firstly, what is remarkable is that the notion “constitution” gets established in the Armenian legal culture. As K. Ghahramanian and V. Hovhannisian rightfully mention: “Both in its name and the procedure

126 Մովսես Կաղանկատվացի. Պատմություն Աղվանից աշխարհի, էջ 69.

of adoption, as well as in its content this legal document shares common features with a Constitution as a legal instrument.”¹²⁷

It is remarkable that S. Hovhannisian has entitled one of his articles “The Canons of the **Constitutional Council of Aghven** and their Association with the Canons of Ashtishat” (our underscore, G. H.).

Discussing the similarities and differences in the canons adopted at the councils of Ashtishat, Shahapivan and Aghven, and paying most of the attention to clarification of the date of convening of the Aghven Council, the author did not reflect on data supporting the constituting character of the Council. Nevertheless, putting a particular emphasis on the fact that the king initiated the convention in his summerhouse, as well as drawing attention to the “method of convening the Aghven council,” and the ‘special way” of rulling out contradictions within the society, he unreservedly qualifies the council as a Constitutional council.¹²⁸

It is also interesting that in a valuable collection published in 1913 in Tbilisi, edited by Arsen Ghltjian, Doctor of Law, and entitled “Armenian Book of Canons,” the reflection on the canons enacted at the Council of Aghven is preceded by the following heading: “Albanian Canons,” followed by, in bold capitals, “Constitution.”¹²⁹

Having no purpose to reflect on the dates of convening those councils, neither on persons participating, nor various historical circumstances surrounding those relations, we would like to make several generalizations from the viewpoint of the criteria of constitutional studies:

1. all three councils, whether in Ashtishat, Shahapivan or Aghven, were convened with the purpose of regulating social relations, legal resolution of conflicts that had emerged;

¹²⁷ Ղահրամանյան Վ., Հովհաննիսյան Վ., 1500-ամյա հայկական Սահմանադրությունը. քննություն հանգամանքները և նշանակությունը, Երևան, 1999, էջ 17.

¹²⁸ Հովհաննիսյան Ս., Աղվենի սահմանադիր ժողովի կանոնները և նրանց աղերսը Աշտիշատի կանոնների հետ // Պատմաբանասիրական հանդես, 1967, N 4, էջ 274.

¹²⁹ Կանոնագիրք Հայոց/ Ղուկասեան մատենադարան, խմբեց Արսէն Ղլոճեան, Թիֆլիզ, 1913, էջ 192.

2. the councils were public, and enjoyed broad national representation;
3. the decisions were taken through national consensus, with a view of creating an atmosphere of mutual understanding and accord in the country;
4. in the degree of their “legitimacy” and legal effect these decisions superseded all other such decisions;
5. in their substance and legal significance the canons thus adopted possessed a foundational, legal, organizational functions, a clear ideological vector, which is characteristic of constitutional norms, they pertained to the most important issues and relations that were topical at the time.

The conclusion is unequivocal: while referring to these councils we are dealing with the **constitutional** conventions. We would also like to add here that the tradition of convening constitutional councils was quite persistent in the Armenian reality. The councils held in Dvin (6th, 7th c.c.), Partav (8th century), Sis (1243), Dzagavan (1268), and Jerusalem (1651) were of similar nature.¹³⁰ There is interesting testimony on the 1204 Council of Sis, the decisions of which were refuted, since it was not deemed “legitimate,” lacking the necessary national-ecclesiastical repre-

¹³⁰ Arsen Ghltjian distinguishes the following canonic groups: “1. St. Grigor’s Armenian Apostoles; 2. Council of Ashtishat’s (365); 3. St. Sahak’s, Armenian Patriarch; 4. Council of Shahapivan’s (447); 5. Hovhan Mandakouni’s (480-487); 6. of the Council of Karin (510-515); 7. of Patriarch Nerses and Bishop Nershapouh of the Mamikoneh (554); 8. of Armenian Catholicos Nerses (6th century); 9. of the Council of Dune (649); 10. Of Catholicos Sahak (677-703); 11. of Hovhan the Philosopher (Council of Dune in 719); 12. of the Council of Manazkert (727); 13. of the Council of Partav (768); 14. of the Council of Sis (1243); 15. of the Council of Jerusalem (1651).” (See Կանոնագիրք Հայոց, Թիֆլիզ, 1913, սուղարքան, էջ Բ): Levon Melikset-Bek, in his turn, mentions: “One should remember that among the Armenian Councils only those may have significance from the perspective of the history of law, on the basis of which canonic rules were designed, in particular laws of ecclesiastical legal nature. This may be judged from the materials adopted by the Councils of Ashtishat, Shahapivan, Dvin, Karin, Manazkert, Partav and others.” (Меликсет-Бек Л. Обисточниках древнеармянского права // Известия Кавказского историко-археологического института. Тифлис, 1917-1925, N 11, էջեր 156-157.

sentation.¹³¹ Whereas the decisions of the 1243 Sis Council, in order to assure the authenticity and universally binding nature of the 25 canons adopted thereat, were sent, with a cover letter by the Catholicos, to all Armenian bishops and princes, with a demand to seal their enforcement by an oath and ratify with a signature. All parties have unreservedly complied.¹³²

There exists noteworthy testimony to the finer nuances surrounding the convocation of the Partav Council (771): “We failed to hold Council in Dvin because of the barbarians, we went to Partav, the capital city of Aghvans, where the Aghvan catholicos Davit and their princes took part in the Council; **we unanimously established at the Council the following rules for the benefit of the leaders and their nation**”¹³³ (our underscore, G. H.).

The reference to the Dvin Council (648) states: “Nerses the Third [...] convened a Council with the participation of bishops and nakharars in order to: first, draft a response to be sent to Constantinople to the Emperor and the Patriarch,¹³⁴ second, to compile a doctrinal manual with factual reasoning and, third, to establish a special manual as guidance for all Armenians, so that the Armenian doctrine and its difference from the Greek one become clear to everyone.”¹³⁵

With the purpose of drawing some historical parallels we consider it necessary to stress that the authority to adopt a “constitution” in many countries was simply reserved to the monarch, who stipulated through a decree the prevailing rules of behaviour. The 1231 Constitution of Italian

king Federico the Second is typical in this respect, whereupon the king simply decrees that the rules he promulgated must be obeyed by everyone.¹³⁶ Irrespective of the substantive scope of the rules, the essential circumstance here is that they were imposed from top down, rather than being a result of social consensus.

Regardless of the historical circumstances under which national ecclesiastical councils were convened in Armenia, and the extent to which the decisions adopted thereat reflected contemporary social realities, one assertion is obvious: **they had become a forum for forging public consensus, and the role of those councils in consolidating, regulating, assuring national unity and solidarity, promoting the required public perception of the rules, of law and order, was exceptional.** These decisions and canons, feeding off concrete reality of public life, in their turn generated sustainable customary norms and traditions, which had a great role and significance in the historical destiny of the Armenian nation. Moreover, even in conditions of perished statehood the decisions of those councils retained the **significance of supreme national legal norms** that regulated public life.

The current European legal mind argues that a Constitution is not as much the Fundamental Law of a state, but rather the ultimate legal instrument of civil society. We shall later reflect on this proposition.

In relation to constitutional councils and their decisions it would be appropriate to stress that even in conditions of lost statehood for centuries the Armenian public life had abided by its canonical constitutions which, rather than being compilations of ossified prejudice, **were continually renovated through broad consensus and became the ultimate document comprising rules of common behavior.**

Especially in conditions of our decentralized national-political system, where centripetal forces were relatively weak, and strife was an eternal companion of our history, the national, political, legal role and

¹³¹ See: Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Շուշի, 1903, էջ 448, as well as: Մխիթար Գոշ. Դատաստանագիրք Հայոց /Իրաւաբանական հետազոտութիւնը հանդերձ ծանօթութեամբ Վահան Ծ. Վարդապետի Բատումեանց, Վաղարշապատ, 1880, էջեր 87-89.

¹³² See: Торосян Х., Суд и процесс в Армении в X-XIII вв., Ереван, 1985, էջ 33:

¹³³ Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Շուշի, 1903, էջ 426:

¹³⁴ This refers to letters by the Greek Emperor and the Patriarch addressed to Catholicos Nerses and to Theodoros Rshtun, where advise to be amicable with the Greeks, cease demonstrations of hostility by the Armenians towards the Greek troops deployed in Dvin.

¹³⁵ Ibid, p 391.

¹³⁶ See: Антология мировой правовой мысли, т. II, М., 1999, էջեր 492-495.

significance of national ecclesiastical councils was particularly important. It may be that, given the absence of a nation-state, we owe the preservation of our identities and even our existence to a great extent, among others, to national ecclesiastical councils and the canons they had adopted.

Considering all this one may only wonder at the fact that in the 21st century, in the newly independent Republic of Armenia, a more than a thousand page thick encyclopedia is published on the occasion of the "1700th Anniversary of Armenia's Great Conversion" entitled "Christian Armenia,"¹³⁷ without a single reference to the constitutional role of national ecclesiastical councils or to canonical **constitutions**.

While as early as in 1837, the New Dictionary of the Haikazian language, published in Venice, offered, in reference to the sources of our history of the Christian period, an unsurpassed definition of a constitution.

It is the same hand and the same impermissible approach: by failing to ascribe adequate importance to notions formulated in Classical Armenian, turning these into an object of simplistic and arbitrary interpretation, we eject a whole cultural phenomenon from our history, that of constitutional culture, whereas it constitutes an undeniable reality with roots that go very deep.

2.3. LEGAL CHARACTERISTICS OF CANONICAL CONSTITUTIONS

Any legal analysis of a constitution as the Fundamental Law of a country is called upon to reveal the essence and role of its founding, legal, organizational functions, the ideological vector, and constitutional nature of the norms therein. Special attention is to be drawn to the fact that constitutions have emerged in order to accomplish three fundamental missions:

¹³⁷ ՔՐԻՍՏՈՆՆՅԱ ՀԱՅԱՍՏԱՆ. Հանրագիտարան, Երևան, 2002.

1. to draw boundaries for the functions of the state, structures of power and public officials;
2. to determine procedures and mechanisms for the implementation of public functions;
3. to ascertain the limits on individual political, economic, social freedoms, guarantee inalienable human rights.

As a legal and political document of utmost importance, a holistic and dynamic model of social relations a constitution, based on the value system bearings of a particular social organism, contains three types of legal norms: norms-objectives, norms-principles and norms that regulate most important legal relations, and supersede all others.

In order to be called constitutional a norm must not only possess one of the above features, but also be adopted through a procedure intended for constitutional norms, reflect public consensus.

In examining the nature of national ecclesiastical councils we concluded that they were in essence constitutional conventions and have adopted, as an outcome of public consensus, universally binding rules of behavior of ultimate legal effect.¹³⁸ Let us corroborate this conclusion through a certain analysis of the substance of those rules.

In historiography there are many references to these canons as constitutional norms. Suffice it to mention, for example Khorenatsi in the 5th century, Hovhannes Odznetsi in the 8th century, Tovma Artsrouni in the 10th century, Oukhtanes in the 11th, Vardan Areveltsi in the 13th, Mikael Chamchians in the 18th, etc.¹³⁹ In the course of the preceding

¹³⁸ These canons are often called laws or rulings in literature. Nerses Melik-Tangian offers a clear commentary on this issue: "A canon in the church is what the law is in the state. The difference between the canon and the law has been clearly determined in the Roman law since the time of Justinian... In Codex Justinianus the term canon was ascribed only to ecclesiastical constitutions, which was paralleled by civil regulations that were called laws. See: (Հայոց եկեղեցական իրավունքը. Ներսես Մելիք-Թանգյան, գիրք Ա, Ծուշի, 1903, էջ 12). In interpreting the legal meaning of the term "canon," the author maintains that "the adjective "canonical" often modifies the edicts of the catholicoi, which contain purely ecclesiastical instructions and are binding, such as the Canonic Edict of Gevorg IV of 1868." Ibid, p 13.

¹³⁹ See on this in the appendix to the same book, as well as in: Գ. Հարությունյան, Սահմանադրական մշակույթ, Երևան, 2005, էջեր 75-83.

centuries many authors have reverted to the comparative and substantive analysis of canons enacted by the national ecclesiastical councils, to some of which we refer in this work within the scope of its subject. We look in this case for an answer to one fundamental question: what are the principal legal features of a canonical constitution, on the basis of the legal norms contained therein?

Firstly it's common that that these norms were **universally binding with their legal effect**, and any deviation there from was rejected and considered despicable by the society. Moreover, it is the deviation from these norms that underlay every negative development in public life that had a significant impact on the nation. For example, in his reflection on the behavior of Ashot Artsrouni following his return from captivity (868), Tovma Artsrouni states: "But now what can I say? Although they openly returned to the worship of Christ our God, they did not closely adhere to the constitution (canonical rules); not only Ashot but also all the Armenian princes who came home from captivity. They rejected the malignancy of apostasy but remained outside the constitution (canonical rules); their conduct was not truly Christian, for they indulged themselves with debauches and hard drinking, with defiled beds and pollution, with impure, awful, and repulsive copulation, with pederasty, with bestiality surpassing the vices of Jericho and Sodom. Men were shamelessly inspired with passion for men, bringing upon themselves endless fire is persing burning from heaven and perdition more devastating than the Flood."¹⁴⁰ As we can see, by staying away from the canonical constitution, Ashot, together with the other princes who returned from captivity "mixed adultery and intoxication into their shaky Christian behavior," for which the society admonished them.

The norms of canonical constitutions were not in effect customary norms, they **possessed binding legal substance**. In their essence these

¹⁴⁰ Presented on the basis of the materials in "Armenian Classical Bibliography," www.digilib.am, version 1.0.

norms first and foremost **established rules on permissible boundaries of behavior**. For example, the first rule adopted by the Council of Ashtishat to regulate matrimonial relations stipulates: "The Council ordered the nakharars, in order to preserve their heirloom, not to marry among next of kin." On the same issue the Council of Shahapivan, rather than proclaiming a norm-principle, prescribes a clear regulation, stating: "Nobody shall dare to marry with a sister, a nephew, a cousin or an aunt, or any other relative unless four times removed. Whoever associates with such a ceremony, blessing the matrimony or attending the wedding, whether bishop or priest, shall be deemed apostate, never to mix with officials."¹⁴¹

Not only the norm is clarified (defining a close relative, when is a relative enough removed), but there also are clearly defined sanctions, assuring the universal nature of enforcement. The constitutional Council of Aghven has also ruled on this fundamental issue, stipulating a norm of canonical constitution: "No man shall marry a female relation who is thrice removed, neither shall he marry his sister in law."¹⁴²

As early as in 1901 K. H. Basmajian, in an overview of studies by foreign authors on the Armenian law, mentioning the works of Ferdinand Bischoff, Dr. Kohler, Prof. Rodolphe Dareste and others, in his turn stresses, that "the principal element of Armenian law, from Vagharshak to the time of the Bagratids, is the patriarchal setup of the family, established upon traditions and especially the Scriptures, which **in turn has lead to Canonical Books**"¹⁴³ (our underscore, G.H.). In a voluminous 1913 study on the ancient Armenian law A. Ghltjian makes another noteworthy generalization; when reflecting on foreign scholars he essentially proposes that looking for foreign influence on the Armenian law is a redundant exercise, since the Armenian law, in its value basis, essence and integrity possessed a distinctive method and development ("The fact that the Ar-

¹⁴¹ See the work by: Ավագյան Ռ. Հ., էջ 128.

¹⁴² Ibid, p. 139.

¹⁴³ Բասմաջեան Կ. Յ., Հայկական իրաւունքի սկզբանէ մինչեւ մեր օրերը // ԲԱՆԱՍԷՐ, Փարիզ, 1901, պրակ Բ էւ Գ, էջ 68.

menians had their own law is attested to by ample evidence provided by our sources of law”).¹⁴⁴

S. Hovhannessian is quite right when he claims: “Every law or code is the product of its time. They answer to the spiritual and material needs of the ruling religious and secular classes, reflecting the balance of forces, the prevailing will. They bear upon them the seal of the legal awareness of the period.”¹⁴⁵ At the same time, comparing the norms of canonical constitutions enacted by various national ecclesiastical councils we may observe similarities both in the subject of regulation (it is particularly noteworthy that they all reflect on matrimonial relations,¹⁴⁶ the behavior of those vested with religious authority, etc), and in the value system underlying the legal mind. The latter is based on common Christian ideology and the imperative of creating the necessary legal and ethic prerequisites for calling the divine commandments to life. What also makes them similar is that the canonical constitutions, on the one hand, were supposed to strengthen Christianity and, on the other, to save the country from lawlessness, arbitrariness and destruction.

At the same time the analysis of canons thus enacted indicates that divine law was put in the foundation of all rules of human co-existence and interpersonal relations, the value axis of which, as we have already mentioned, is the human being, building his life upon legal norms and laws that are pleasing for the Lord.

Specific solutions, quite naturally, were dictated by the urgency and priorities of the fundamental problems of the particular period in question. Nerses Melik-Tangian, for example, in reflecting on the Shahapivan Canons, states that those canons clearly reflected the grave

¹⁴⁴ Արսեն Դյուճեան, Հայոց հին իրավունքը, Ալեքսանդրապոլ, 1913, էջեր 3-13.

¹⁴⁵ Հովհաննիսյան Ս., Աղվենի սահմանադիր ժողովի կանոնները եւ նրանց աղերսը Աշտիշատի կանոնների հետ // Պատմա-բանասիրական հանդես, 1967, N 4, էջ 270.

¹⁴⁶ The Council of Shahapivan pays special attention to this. It regulates issues pertaining to marriage between relatives, adultery, lechery, divorce in view of the wife's infertility, sinning with one's step-mother, the wife leaving her husband, marriage through abduction, etc.

situation Armenia was in. The Armenian Kingdom was ruined, the country had fallen under the Persian rule, the Persian governors and wanton Assyrian catholicoi have ransacked the country, disrupted the order set by the virtuous Patriarchs, and sowed alien, vicious, disorderly seeds. “According to historians” the numbers of divorcees, prostitutes, thieves, evildoers, apostates, nation-haters have risen, people reaped great tribute through the lightest of services, they converted to become Persian and oppressed their own people, demolished and desecrated churches, forced devout Armenians to convert. These were the reasons that made all the delegates unanimously approve procedures and rules, as well as sanctions that were unprecedented and never thereafter repeated in the history of the Armenian Church.¹⁴⁷

No less important for the canonical decisions was the fact that the **constitutional canons were not purely abstract, orientational-ethical significance**. One of the characteristic features of a constitutional norm is not only its universally binding character, but also its real regulatory role. Here again history testifies that the canonical constitutions did not remain merely compilations of wishful thinking, they enjoyed great significance in implementation. For example, when reflecting on the practical outcomes of the decisions of the Ashtishat council, Hakob Manandian states: “Pursuant to the decisions of that council charity institutions were established throughout Armenia. Hospitals and asylums were built for the lepers, people with epilepsy and the infected; sanctuaries and shelters established for the disabled, incapacitated and the poor; monasteries, schools and lodges were also founded. These institutions were supported by the revenue from the Church's properties, as well as a special tax levied on the people.”¹⁴⁸ Ascribing great importance to all that, as well as to the eradication of the practice of bitterly wailing over

¹⁴⁷ See: Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Շուշի, 1903, էջ 321.

¹⁴⁸ Հակոբ Մամանդյան, Երկեր, գիրք Բ, Երևան, 1978, էջ 164.

the deceased, Hovhannes Draskhanakertsi mentions: “after that our people could be seen not as barbarians, but as modest citizens.”¹⁴⁹

With respect to the canons adopted at Shahapivan Khachik Samu-elian mentions: “The canonical decisions of the Council of Shahapivan are characteristic in that they define the norms of not only ecclesiastical, but also of civil and penal law, the enforcement of which [...] becomes binding also for secular feudal lords.”¹⁵⁰ The 20 canons adopted by the Shahapivan Council pertain to urgent and important domestic issues of the Armenian life, such as regulation of matrimonial issues, activities of the ministry and regulation thereof, struggle against sectarianism, the issue of celibacy etc.

It is remarkable here that even the norms addressing penal issues were of constitutional nature: they clarified the right in question, the permissible restrictions, and prescribed the sanction against its violation (for example the rule on letting off a wife because of infertility stipulated: “if someone lets off a wife because of infertility, the wife may take all chattel she had brought with her, as well as her clothes, her silver, her maid and her livestock; if the wife has no other deficiency than infertility, the husband shall pay a penalty for the dishonor, a nobleman shall pay 1,200 drams, a peasant shall pay 700 drams.”

Reflecting on the canons enacted at the Council of Aghven, Varag Arakelian underlines that “The canons of Aghven demonstrate that Vachagan the Pious was an insightful and talented monarch, he was first and foremost concerned about the development of the country’s cultural life, the creation of legal norms, the strengthening of the Armenian Church... According to those canons it was prohibited to let off a wife, wail and weep over the deceased in pagan style, apply to sorcerers etc., all of which had tremendous civilizational significance in that period.”¹⁵¹

¹⁴⁹ Հովհաննես Դրասխանակերտցի, Հայոց պատմություն /աշխարհաբար թարգմանությունը եւ ծանոթագրությունները Գ.Բ. Թոսունյանի, Երևան, 1996, էջ 49.

¹⁵⁰ Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 122.

¹⁵¹ Մովսես Կաղանկատվացի, Պատմություն Աղվանաց աշխարհի, Երևան, 1969, ստաջարան, էջ XI.

In summary, we may state that the legal norms of canonical constitutions, however different from modern constitutional norms in their legal essence and content, still possessed the same, if not larger significance and role in guaranteeing the regular development of public life in their historical period, given the prevailing social relations of the time.

Emanating from the basic principles of the ideology and value systems of the time, they played a legal-regulatory role both in ecclesiastical and secular contexts. As generally characterized by Archbishop Tajat: “Having been deprived for centuries of our own living state, having remained for centuries as taxpayers to invading hostile nations, having lost secular government, we were governed, as a nation with its own Church and Culture, by our **National, Ecclesiastical and Community laws**”¹⁵² (our underscore, G. H.). Their entirety epitomized the essence of our constitutional culture for that historical period. In the absence of a nation-state or a ‘secular government’ one of the essential features of the Armenian constitutional culture was the existence, as a legal category, of “**national laws.**” This is something that may be difficult to grasp nowadays, but the historical reality was that “national laws” were enacted, enforced, amended and remained continually effective in legal regulation of Armenian social relations even in conditions of loss of statehood. They appeared as a ‘supra-state’ phenomenon. One may make an indirect, metaphorical comparison with current international law, in which international treaty norms are not only part of the domestic legal system, but also supersede domestic legislation. Historically our “national laws,” not enacted by the state authority, but by an all-national representative body, the national ecclesiastical council, to some extent and in relative terms, were expressions of direct democracy (especially characteristic in this respect is the testimony about the Council of Shahapivan). This feature is another important descriptor of constitutional culture.

¹⁵² Ազգային Սահմանադրութիւն Հայոց, Անթիլիաս, Լիբանան, 1968, էջ 7-8.

2.4. TYPICAL FEATURES OF CONSTITUTIONAL CULTURE IN THE PAGES OF THE ARMENIAN LEGAL- POLITICAL THOUGHT

The history of the Armenian nation is a record of not only achievements but, alas, also of great losses. The loss of a nation-state for several centuries has carved a particularly deep scar on the qualities of our organized existence. Nevertheless it is perhaps the hardship and supernatural efforts in preserving one's identity that have kept, as we saw, the constitution a continual living reality in the Armenian existence, and there were unique expressions of constitutional culture that have great significance today, asking to be expounded¹⁵³ We shall attempt to continue our discourse on certain realities of the early Christian period of our history, in view of the need to reflect on their value in the context of current-day problems. But we deem it necessary to once again emphasize that **elements of constitutional culture, as part of a reasonably perceived system of values, a reality of social accord about co-existence, have existed since the dawn of human society and are also present in the "unwritten" constitutions of states.**

The history of our nation (not only of the Christian period) also offers ample proof to this. As early as in the 28-27th centuries B.C. Aratta, a country in the Armenian highland, was known to the Sumerians, the oldest nation in southern Mesopotamia, as "the country of sacred laws." According to most ancient records of Sumerian epics, the country of Aratta was governed by administrators who bore the title of "En" (high priest).¹⁵⁴ The high priest of Aratta decided most important issues

¹⁵³ As prof. Kh. Samuëlian rightfully mentions: "Armenian law has not reached as in a codified format like the Roman Corpus Juris, or the Hammurabi Code of the law of Babel, or the laws of other ancient nations, enacted by the state and neatly compiled. Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 3. Nevertheless "...Armenian law possesses its own place in the legal science." Ibid, p 4.

¹⁵⁴ Մովսիսյան Ա., «Հնագույն պետությունը Հայաստանում», Երևան, 1992, էջ 53.

of statecraft, like declaring a war, making peace etc., **in consultation with the Council of elders.**

The Sumerian epic contains vague references to the fact that these laws were written down in pictograms. It would be difficult today to surmise what exactly were those 'sacred laws" in effect in Aratta, which amazed the neighbouring nations. But one may safely assume that we deal here with the most ancient expressions of customary law.

Khachik Samuelian, a renowned expert in the history of the Armenian law, has written: "Not every custom may be indiscriminately acknowledged as a source of law, but only those which are applied and preserved in social existence as certain norms that are of binding effect".¹⁵⁵ Pre-historic men, while collectively struggling for survival over millennia, developed rules of co-existence, where the main function of regulating relations between people was reserved to customs that were handed down from generation to generation.

Following the emergence of rudimentary states certain customs were ratified and incorporated into legal norms, which, as a body of norms that were mandatory and had a special system for their preservation, have been since described in the history of law as customary law.

It would not be difficult to imagine the response in the neighboring countries to the laws already in effect in Aratta, when the famous legal monument of the ancient world, the "Hammurabi Codex," took another millennium to develop.¹⁵⁶

Some information about the legal system of Hayasa-Azzi, another state formation of Armenian ethnic groups, may be found in a bilateral treaty concluded in the 14th century B.C. between the Ruler of Hatti Suppiluliumas (1380-1340 B.C.) and the King of Hayasa Huqqana (Hakana).¹⁵⁷ According to the treaty the King of Hayasa wedded the sis

¹⁵⁵ Սամուելյան Խ., «Հին հայ իրավունքի պատմություն», հ. 1, Երևան, 1939, էջ 26.

¹⁵⁶ See, in particular: Մամուսյան Մ. և Վահանյան Ռ. Բ. Արևիկյան Ռուբեն, Արևիկյան Ռաֆայել: Источники правовой мысли протоармян Древней Месопотамии и Армянского нагорья // ЕФ МНЮИ - XXI ВЕК, N 23, март, 2005, էջեր 51-62:

¹⁵⁷ История Древнего Востока; т. 2. М., 1988, էջ 146.

ter of the Hittite king, pledging to stay loyal to Suppiluliumas, offered him military assistance, extradited fugitive slaves to Hatti (presumably they were granted free status in Hayasa, otherwise it would not make sense to flee there). It is interesting that in this treaty Suppiluliumas addresses the “people of Hayasa,” which, in the opinion of scholars, must refer to the “popular assembly.” There is also a reference in Hayasa-Azzi to a “Council of elders.” These two bodies resemble the *tulia* (a council comprising the king’s inner circle and princes of the court)¹⁵⁸ and *pankus* (the popular assembly, which gradually transformed into a military council) of the neighboring Hittites.

Unfortunately, little is known about the state and legal order of the kingdoms of Ararat and Van (Urartu). In the opinion of the Urartian scholar H. Karagyozyan, the inscribed monuments with “malediction formulas,” erected beside irrigation and other structures, as well as vineyards, represent fragments of the state’s royal-priestly code of law. A full text of a Code per se has not been unearthed yet.

There also exists an opinion that in the pantheon of the Araratian Kingdom the deity responsible for law and order was Ardi, and goddess Bardzia determined the position and rank of mortals.

The absence, in the course of the subsequent centuries of our history, of a collection of legal norms in effect is not a sufficient reason to believe that Armenia had lacked the prerequisites for wide-ranging legal activities. Armenia did regulate its social relations through certain legal norms. The Armenian bibliography indicates that the Armenian kings did pass laws through this period. Khorenatsi, for example, ascribes to king Vagharshak (2nd century B.C.) the “approval and appointment” of Armenian *nakharars* (it would be more appropriate to write “re-approval” and “re-appointment,” since many of the Houses of Armenian *nakharars* were known as early as in the Araratian Kingdom).

¹⁵⁸ Войтех Замаровский, “Тайны хеттов”. М., 1968, էջ 254:

He also “endorsed laws in his royal house,” “determined military ranks,” “appointed umpires in the royal house, and umpires in the cities and towns.”¹⁵⁹

Nevertheless the norms of customary law played a far more compelling role in Armenia. As Kh. Samuelian writes: “...the traditional role of customary law in social relations was so strongly rooted, that no need was felt to reduce it to writing. The dearth of lawmaking activity by the Armenian kings may perhaps be ascribed to such a proliferation of customary law.”¹⁶⁰

Notions encountered in our bibliography, such as «ancestral law,» «ancestral order,» «established boundaries» did not denote an ossified corpus of laws; they rather compelled and crystallized in the thick concentrate of ethical and aesthetic criteria of the nation, bearing the seal of its wisdom, coming from the depth of time. And if today we admire the «humane» provisions, unusual for their time, in the criminal codes of Mkhitar Gosh or Smbat Gundstable, the reason is that they contain numerous norms of Armenian customary law. The statement by Mkhitar Gosh «... We took from oral sources whatever seems not [to be taken] from canons.» (Lawbook, Chapter 109) confirms the great role reserved to customary law in the Armenian reality.

The Armenian ethnography contains vast riches of customary law material, which, unfortunately, is still waiting to be adequately explored from this point of view. **An analysis of our national epic would suffice to open a hidden treasury of customary law norms and perhaps even to answer the question why the “Daredevils of Sassoun,” as opposed to heroic epics of other nations, are to such an extent free of bloodcurdling scenes of murders and wars, human cruelty and treachery, or rivers of blood.**

Within medieval Armenian context a special place was reserved in the system of customary law to **canonical (constitutional) custom,**

¹⁵⁹ Մովսես Խորենացի, «Հայոց պատմություն» « գիրք 2, գլ. Է, Ը.

¹⁶⁰ Սամուելյան Խ., «Հին հայ իրավունքի պատմություն», հ. 1, Երևան, 1939, էջեր 34-35.

on which S. Tigranean has made an interesting comment.¹⁶¹ Whereas, as M. Aghaneants mentions: "...whether in prehistoric times or later every nation and society had their if not written, then at least oral laws, which defined relations between people."¹⁶²

Nevertheless a particular legal system and constitutional elements therein have come into existence over a lengthy historical period and, as we have witnessed, have expressed themselves with particular consistency in the Armenian reality, and especially so following the adoption of Christianity as a state religion, in conditions of the need for defining uniform rules for ecclesiastical and secular life.¹⁶³ There are remarkable reflections on law, justice, inescapability of punishment, proportionality of sanction to the guilt, linkage between the notions of "reason" and "law" and their role in governing a state, assuring the stability of the society, in the writings of Mesrop Mashtots (362-440), Yeznik Koghbatsi (circa 380-450), Yeghishe (410-475), Movses

Khorenatsi (circa 410-495), and other celebrated medieval Armenian thinkers. Moreover, by making a distinction between divine and human justice, it was stressed: "the law of kings punishes the culprit, whereas the Lord punishes both the culprit and the nation; he punishes the culprit as a lawmaker, and the nation as the possessor of original knowledge."¹⁶⁴ One of the characteristic features of this period is that great **importance was attached to the role of law and justice in establishing social solidarity, assuring sustainable development of the state.**¹⁶⁵

161 See: Միրական Տիգրանեան, Կանոնական իրաւունքը եւ նրա աղբյուրները // Արարատ [Ararat] 35 (1902), թիվ 1, էջեր 18-24.

162 Մ. Աղանեանց, Հայաստանեայց եկեղեցու կանոնագիրք // Լոււմայ, 2 (1897), էջ 282.

163 "Canonical activity and canonical rulings, as sources of canonical law, played a salient role in the Armenian history in general and particularly in the history of Armenian law." Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 43.

164 Եղիշե, Սրբոյ իօրն մերոյ Եղիշի Վարդապետի մատենագրութիւնը, Վենետիկ, 1859, էջ 336.

165 See, in particular: Միրումյան Վ., Հայ քաղաքական մտքի պատմությունից, Երևան, 2002, էջ 108.

For example, the proper purpose of the Aghven Council, as we have mentioned, was to overcome the "many conflicts" in the society through constitutional canons. In order to attain this general canons were defined that would determine the actions of the clergy and lay people, who would thereafter be **restricted** by those canons. The latter make no distinction of master and servant before the Lord ("On Sunday both master and servant shall go to the cathedral, pray and perform remembrance in the church"), stipulate clearly-defined approaches to moral co-existence ("No man shall marry a female relation who is thrice removed, neither shall he marry his sister in law"), clarify the scope of powers ("The nobles shall not, without the bishop, remove or appoint a priest, albeit in their own estate, and neither shall the bishop remove or appoint without them"). More than a dozen norms were established to regulate ecclesiastical and secular relations.

To define canons and set limits to actions, do it through a representative assembly,¹⁶⁶ to have the compromise thus attained ratified by all the nobles of Aghvank, to seal the "writing, for it to be more authentic," with the ring of the king, these are no mere attestations to the birth of the phenomenon of Constitution and the basic elements of constitutional culture in the history of Armenian and world law.

We deal here with a legal and philosophical reality that suggests remarkable parallels, for example, between the arguments in favor and the procedure of adopting a Constitution in Aghvank in 488 and the adoption of the U.S. Constitution in 1787, the Polish and French Constitutions in 1791, and constitutions of other countries later on.

The overall philosophy is the same; to establish basic rules of social existence that override other laws and canons, as well as to set a limit on the acts of the authorities, keeping them within the scope of constitutional canons, accomplishing it all in conditions of transparency and broad public consensus through a Constitutional Convention summoned by a head of state.

166 As stated by Kh. Samuelian, in the medieval Armenian reality in general "National Church Councils reserved themselves lawmaking functions." Op. cit., p 45.

One may draw historical parallels between this Constitution and Aristotle's "Athenaion Politeia" (Constitution of the Athenians).¹⁶⁷ It is also known that Aristotle had at least 158 other "politeias" under his disposal, which described the social order of city-states in the ancient Greek world, as well as of other countries, from the state arrangements in Carthage to the "Constitution" of India. Of these the text of only the Athenian constitution has survived to our days. It was discovered in 1890 among the papyri brought to the British Museum from Egypt, and published in 1891 by the British scholar F. Kenyon, to be fully interpreted only by the end of the last century. Most probably Aristotle could not make himself the vast amount of the work involved. Perhaps the 158 constitutions were studied upon his instructions and under his immediate supervision, whereas the Athenian constitution may have been written or at least edited by him. In any case ancient authors invariably ascribed this work to Aristotle.

Aristotle undertook this remarkable work with a special purpose: to write, after analyzing the entire material, his fundamental opus entitled "Politica." Anyway, the significance of even the Athenian Constitution that has reached us is invaluable for us whether in terms of history, the legal science, history of law, philology or other disciplines.

The Athenian Constitution breaks down into two sections, the first forty chapters are devoted to the history of the constitution of Athens, a summary of which is made in chapter 41 (unfortunately, the opening parts of the work have not survived). In the second section Aristotle describes at great length the politeia or the constitution of Athens of his days. Aristotle mentions eleven iterations of the Athenian constitution, not counting the legendary Ionic social order, considering it to be the baseline. According to Aristotle the order was slightly amended by the no less legendary Theseus. This was followed by Draco's constitution, when the first compilation of law was made. The third was Solon's politeia, from which "democracy" originated. The fourth was the tyranny of Pisistratus, the fifth the constitution of Clisthenes, which was more democratic than

¹⁶⁷ See: Արիստոտել, Աթենական հասարակարգը, Երևան, 2000.

that of Solon. The sixth, established in the wake of the Persian Wars, was the rule of the Areopagus Council. The seventh constitution was outlined by Aristides, which Epilates improved, overthrowing the tyranny of the Areopagus. The eighth was the rule of the four hundred, followed by the ninth, the restored democracy. The tenth was the tyranny of the Thirty and the two dozen. The eleventh was the democracy, finally established for good, under which everything was governed through a vote, whether in the Assembly or the courts. This time the supreme authority was dissected and transferred to various courts, that is, there was no monopoly over ultimate centralized power. Nevertheless supreme authority was vested in the **Popular Assembly**, which, in fact, was a continually open referendum. As Aristotle mentions, "...when democracy has the power to vote, it becomes the ruler of the order."¹⁶⁸

In the Armenian reality the ancient Greek democratic-legal culture was developed, to a certain extent, in canonical constitutions, where it was **argued by a specially assembled Constitutional Convention that embodied public consensus and had the "power to vote."**

By the end of the 18th century civilization linked the emergence of the fundamental law of the state, the Constitution, with the need to assure a country's sustainable and dynamic development on the basis of public accord. Essentially the same purpose was pursued in the Armenian reality of the early middle ages. **History bears witness to the fact that on sound legal grounds and in the existence of public accord the country has flourished and accomplished great successes, whereas in conditions of tyranny, "misunderstandings," and various conflicts loss and destruction has always been inexorable.**

Movses Khorenatsi starts the Armenian history with words of scorn addressed to "the senseless ways of our first kings and rulers" and goes on to pay tribute to those, "by reading the writings of which **we acquire knowledge of the world order and learn political order**"¹⁶⁹ (our underscore, G. H.). There is no doubt that King Vachagan was one of

¹⁶⁸ Ibid, p 26.

¹⁶⁹ Մովսես Խորենացի, Հայոց պատմություն, Երևան, 1997, էջ 70.

these, and the lessons to be learnt from his wisdom have contemporary resonance.

The testimony of Mateos Urhayetsi is also of exceptional value; speaking about the circumstances of the period when the Aghven Canon Constitution was adopted, he mentions: "it was in the times when the Seat of Saint Grigor was divided into four parts... it was in the times when sensible sheep succumbed to canine morals, the beasts acquired the nerve, became impetuous and started to bark in the face of the patriarchs. ...but such tribulations and distress failed to come into the land of Aghvans, which is called the Inner Armenian Land."¹⁷⁰

Casting a renewed glance at constitutional assemblies and canonical constitutions, one may generalize that in medieval Armenian reality we deal with concrete expressions of constitutional culture, the existence of **important elements of a constitution**, irrespective of the existence or loss of statehood.

The opinion of foreign scholars on social relations in mediaeval Armenia is noteworthy. As stated by I. Kohler: "Armenia's political failure is closely linked to its social and legal composition. Already in the ancient times, during the existence of kingdoms, as early as the Haikazian dynasty, which dates back to mythical times, there already existed a cluster of sovereign hereditary princes, the nakharars, who enjoyed complete independence within their domains. They had to pay taxes to the king and go to war together with him, but the latter lacked the *fief ultima ratio*, he had no lien on their fiefdoms against unpaid taxes."¹⁷¹ It is obvious that extreme decentralization of the social order posed serious threats and the value of centripetal vectors under the circumstances increased exponentially. Together with the Armenian Apostolic Church, the independent role of national ecclesiastical councils and the consolidating impact of canonical constitutions were of great significance in this.

170 Մատթեոս Ուռհայեցի, Ժամանակագրություն, Երևան, 1991, էջ 247.

171 Գոլեր [Ի. Կոհլեր], Իրաւունք Հայոց, Վիեննա, 1890, էջ 3.

It is also conclusive that whenever in Armenian history the emphasis was put on regulating all social turnover by the rules acquired through compromise, there was apparent progress attained in all areas of life.

Even though being embryonic, the constitutional culture played a pivotal role in our existence and development since the dawn of human history.

Conversely, discord or attempts to overpower have invariably led to failure.

In his lament over the collapse of the Arshakunyats kingdom the Father of Armenian Scripture quotes the following reasons: "peace was disrupted, disorderliness reigned, orthodoxy was undermined, ignorant praise for vice became dominant."¹⁷² Khorenatsi's generalizations are of exceptional importance and hold serious lessons, since, as R. Miroumian rightfully mentions: "As opposed to Metrodorus of Scepsis, who modeled the future of Armenians on the reading of their present, Khorenatsi foresaw the future of the Armenian nation through the validation of its past, since he believed the past to contain the rationale for the project of restoring the nation's statehood."¹⁷³

Reflecting once again on the adoption of canonical constitutions by the national ecclesiastical councils, we consider it necessary to mention that after embracing Christianity as a state religion, when ecclesiastical and secular rules were mostly enacted together, one of the most characteristic and remarkable circumstances was that the **factor of public consensus was put in the foundation of legal regulation**, this being one of the axial expressions of constitutional culture. Relations within society were regulated through accord acquired on a popular level, rather than through coercion and unilateral dictate. The key for understanding this is handed to us by Movses Khorenatsi, in his reference to the Ashtishat Council ('summoning a Council of bishops in concert with the

172 Մովսես Խորենացի, Հայոց պատմություն, Ե դար, Երևան, 1997, էջ 275.

173 Միրումյան Ռ.Ա., Պատմափիլիսոփայական հայեցակարգերը XIX դարի հայ փիլիսոփայության մեջ. Մեթոդաբանական վերլուծություն, Երևան, 2003, էջ 42.

laity, by canonical constitution [Great Nerses,] established mercy, extirpating the root of inhumanity”).¹⁷⁴ We have already mentioned that the council prohibited wedlock between close relatives, it condemned treachery, intrigues, greed, gluttony, usurpation, homosexuality, gossip, fervent alcoholism, lying, prostitution, bloody murder, as well as bound the nakharars to treat their workers with mercy, and the servants to obey their masters. It was decided to build hospitals for the feeble, orphanages and asylums for orphans and widows, hotels for aliens and guests, and levies and taxes were imposed to support all these. To spread enlightenment in the country it was decided to establish schools in Armenia with instructions in Greek and Assyrian languages (the purpose was to offer quality education domestically, to prevent the drain of young people). All of these measures in combination created a completely new environment and incentives for the subsequent development of constitutional culture.

There are other substantial testimonies in medieval history of Armenia to preventing ignorant praise for vice, with an emphasis on following the rules defined through public accord. The “Book of Canons” by Armenian Catholicos Hovhannes Odznetsi (Hohvan Imastaser (Philosopher) Odznetsi), which was endorsed at the 6th Council of Dvin in 719, is especially remarkable in this sense. As rightfully stated by R. Avagian, one may safely claim that “Hohvan Philosopher Odznetsi was among the first in the world after Byzantine emperor Flavius Justinian (482-565) and the first in Armenia to systematize the Armenian Corpus Juris Canonici, a compilation of laws which was promulgated by the head of hierarchy, the Catholicos, and contained the canons adopted and ratified by the Armenian ecclesiastical councils.”¹⁷⁵

The Armenian Book of Canons is an exceptional phenomenon first and foremost because it consolidated canons of constitutional nature and significance and became a distinctive crystallization of Armenian consti-

¹⁷⁴ Մովսես Խորենացի, Հայոց պատմություն, Ե դար, Երևան, 1997, էջեր 224-225.

¹⁷⁵ Ավագյան Ռ. Հ., Հայ իրավական մտքի գանձարան, հ. 1, Երևան, 2001, էջ 144.

tutional mind of the 4th-8th centuries. The book of canons also affirmed that canonical constitutions contained viable norms anchored to distinct value bases, which, in their implementation as basic rules of social behavior, had played a great role in ensuring an organized course of the nation’s collective existence. Through collecting and harmonizing already existing rules, thus emphasizing their importance for the time and the circumstances in question, the book of canons, the first comprehensive legal document in our history, elevated the Armenian constitutional culture and the role of overriding legal rules in social life, in ecclesiastical and secular milieus to a qualitatively new level.¹⁷⁶

One of the principal legal-philosophical features of the book of canons is that it emphasizes qualities of human essence. An individual with his dignity and his social role is viewed as a high value, and the main purpose of legal regulation becomes, as stated by V. Hakobian, “to prevent possible breaches of the rules of human cohabitation through guidance, moral censure or penance.”¹⁷⁷ There is no doubt that this legal mindset constitutes proof of high civilizational qualities and considerable values underlying the legal culture. V. Vardanian is quite right in stressing: “The powerful intellect and wisdom of Odznetsi have tempered the Armenian legislation, systematized procedural law, the legal norms and canonical definitions that regulate the inner life of the people.”¹⁷⁸

The history of the Armenian nation, however full of violence and destruction raised upon it, stayed immune to distortions of principal qualities of the nation’s identity. It has always predominantly been shaped by

¹⁷⁶ Catholicos Hovhan Imastaser Odznetsi not only developed the 32 canons of great legal value, but also consolidated 24 groups of canons into a compilation, the “Armenian Book of Canons,” which was approved by the Fifth Council of Dvin in 719. In the 10th century it was augmented by 226 new groups of canons, and in the middle of the 17th century the “Armenian Book of Canons” already contained 98 groups of canons.

¹⁷⁷ Տե՛ս Կանոնագիրք Հայոց / աշխատասիրությունը՝ Վազգեն Հակոբյանի, Երևան, 1964թ., հատոր Ա, էջ XII.

¹⁷⁸ Վարդանյան Վ., Հայոց եկեղեցու պետաիրավական և գաղափարական շահերի պաշտպանությունը Հովհաննես Օձնեցու կողմից // Մուրթ Հովհաննես Օձնեցի Հայրապետը և իր ժամանակը (2003 թ. հունիսի 3-5-ի գիտաժողովի նյութերը): Ս. Էջմիածին, 2004, էջեր 25-26

humaneness, profound philosophical perception of phenomena, faithfulness to spiritual values and lawfulness.

The understanding of the fact that “the door through which souls are lost is much wider than the one for bodies: when one deviates from the spotless and straight faith of the Father, the Son and the Holy Spirit, professed by the apostles”¹⁷⁹, has always represented an unwavering value in the Armenian reality. A millennium ago Grigor Narekatsi in his Book of Lamentations crystallized best of the spiritual dimensions of the Armenian identity, when “disparaging everybody’s most varied passions,” he emphasized that the sins committed by humans, however diverse and many, constitute their misfortune, not their crime. Putting in the lips of the Armenian nation “the loudest prayer to the Lord,” Narekatsi was begging God for the way to turn man around and make him live like a man. He considered it possible only in conditions of having at place solidarity, justice, adherence to laws and a society “doctored by the spirit,” where justice can not “wear out and disappear” and “the pan of the scale with the rights can not get substantially lighter,” causing the “pan with the wrongdoings” to get heavier.

According to historiography “The Canonical Statutes”¹⁸⁰ by David Alavkavordi was written in 1130, it contains a preface and 97 articles. It is considered to be the first attempt aimed to creating an independent Armenian Code¹⁸¹ based on customary law. It created serious prerequisites for legal struggle against aberrant phenomena that grew unprecedentedly deep in the society. For Armenia it was a period, when, in the words of Movses Kaghanakatsi, “three vicious warriors: famine, the sword and death, were at a ruthless rampage.”

Strict laws and clear order was required to assure sane morals and to establish lawful behavior. In the Armenian reality it was also deeply

understood that good laws and procedures were not enough, the people acknowledged the need to abide by those laws, and this realization was not imposed upon, but rather embraced by them.

It should have been anchored to stable values, pleasing to the Lord and dictated by human reason. As beautifully formulated by Patriarch Poghos Adrianapolsetsi, “Man’s behavior is guided internally by conscience and externally by the law. If conscience, succumbing to aberrant will, rises against straight reason, the law scorns and restrains it, bringing obeisance. Conscience is the internal judge appointed by nature, and the law is the external adjudicator established by God,¹⁸² and they both keep the plates of the scale in balance.”¹⁸³

It is through ascribing special importance to this circumstance, that Nerses Shnorhali (Nerses the Fourth Klayetsi) in the 12th century addressed his words not only to God, but also, through his

“Encyclical” (1166), addressed his commandments to the ministry, the “princes of the world” and the people. This Encyclical was his first, an epitome of his prose writing, and it has exceptional significance in terms of conceptualization of legal and constitutional culture. This document is unique in its conceptual-programmatic scope, value system generalization, and harmony between norm-objectives, norm-principles and “behavioral” norms. Establishing canons and guidance addressed to all strata of the society (“To the clergy,” “To the leaders of holy orders of monks,” “To the leaders of the Church,” “To the rank of the military,” “To farmers,” “To women,” etc) that were based on high spiritual and moral grounds, Shnorhali was certain that one might expect to succeed only through abiding by those requirements, overcoming the perils of

179 Թովմա Արծրունի եւ Անանուն, Պատմություն Արծրունյաց տան, Երեւան, 1999, էջ 123.

180 See: Ավագյան Ռ. Հ., Հայ իրավական մտքի գանձարան (մ.թ.ա. IX դ.-մ.թ. XIX դ.), Երեւան, 2001, էջ 182.

181 See: Ղազինյան Գ.Ս., Քրեական դատավարության պատմական եւ արդի հիմնախնդիրները Հայաստանում, Երեւան, 2001, էջ 21.

182 Of special interest is also the phrase: “and the law, as an external adjudicator approved by the Lord.” In fact at the end of the 18th, beginning of the 19th centuries Patriarch Poghos of Adrianople refers to the “natural law,” stressing that only through abiding by the law can man “be in the likeness of God, a man of God.” The basis of law are lasting divine values, “whoever strays from the direct mind and the instruction of the law, goes against God and his own nature.” Պողոս Պատրիարք Ադրիանուպոլսեցի. Խրատի թանգարան, Ս.Էջմիածին, 2002, էջ 163-164.

183 Ibid, p 163.

“evil and polyarchy” and proceeding through the “orbit of justice.” He advised the lay people “not to perform evil deeds, not to deprive, not to use wicked agents, not to judge unfairly, to protect the widows and the poor, not to cut the pay of the worker, to treat everyone with an even eye, not to abandon the spiritual for the sake of the bodily.”¹⁸⁴ One may, without exaggeration, acknowledge that the Encyclical contains numerous norms on human rights and the obligations of the authorities. “To the princes of the world” he, in particular, advised: “not to treat your subjects unlawfully by levying heavy and cumbersome taxes, but **judge everyone by law, commensurate to his capacity**” (our underscore, G. H.), “Do not deprive any body and do not further divest the poor and the disenfranchised,” “Do not appoint wicked and lawless administrators and governors over your domains,” “Do not judge anyone lawlessly, but adjudicate rightly,” “Do not ignore the rights of widows and the poor,” etc.¹⁸⁵ Shnorhali’s approaches to judging only by the law, the retroactive effect of law, the degree of responsibility, proportionality of sentence and other fundamental legal issues are remarkable (“never rule prompted by anger or unfair law, or punish someone or sentence to death, since the New law does not allow for this, whereas the Old law, although it allowed to rule for punishment or death sentence, but not unduly, only in accordance with the gravity of the crime”).¹⁸⁶ Moreover, the substrate of all commandments is the human being, with the acknowledgment of the need to meaningfully organize his rational existence and spiritual pureness.

It invariably follows from the testimony quoted here, that public accord in Armenia’s medieval reality resulted not only in the adoption of laws and canons, but that the need for the latter, determined by a variety of factors, was ascribed particular importance, and that such public demand and the necessary understanding were put in the basis of defin-

¹⁸⁴ Մաղաքիա Արքեպիսկոպոս Օրմանյան, «Ազգապատում», հատոր Ա, Ս. Էջմիածին, 2001, էջեր 1647-1649.

¹⁸⁵ Ս. Ներսես Շնորհալի, Թուրթ ընդհանրական, «Գանձասար» հանդես, 1991, էջեր 103-123.

¹⁸⁶ See, in particular, *ibid*, p 112.

ing these canons.¹⁸⁷ One of the basic reasons for the creation of Mkhitar Gosh’s “Lawbook” (1184) was that “evil has generally grown stronger” and it has extinguished “the natural law inside us” or “the knowledge that we had from nature.” The same evil, which contributed to deficiencies of the soul, eradicated perfection and compassion, placed hatred in love’s stead. The Law book should help restore the feeling for natural law, perfection, and replace mutual hatred with love and compassion.”¹⁸⁸ Together with that it requires a judge to “be of age, skilled, well taught, have a touch of genius, be knowledgeable, well versed in laws, be kind, virtuous, free of jealousy, attentive, alert, impartial, strict, incorruptible, and patient.”¹⁸⁹

Here is how Mkhitar Gosh explains the need to write the Lawbook in its preface, chapter 2:

Firstly we, Armenians, have been reproached many times both by infidels and Christians for not having a penal code in writing;

Secondly, evil among people, evil in general has developed and “evil has extinguished the knowledge that we had from nature, and sin has made the perfect creation imperfect, and hatred has prevented love and compassion.” (Lawbook, p. 10).

Thirdly, because of lenience people do not train in law, are not aware of the laws, therefore their decisions are not right or deviate from the law, “for that reason, we wished as if to wake them up from sleep by this lawbook” (*ibidem*).

¹⁸⁷ Speaking about the role of canonical law and its significance as a source of law, S. Hovhannisian rightfully stresses: “Foreign and national groups of canons provide a possibility to outline important institutions of Armenian matrimonial, criminal, civil law, acquire an understanding of how the Armenian Church was implementing the “great function of adjudication” during the existence of the kingdom, as well as throughout the period of deprivation of statehood.” See: Հայ ժողովրդի պատմություն, 8 հատորով: Երևան, 1967-1984, հ.2, էջ 482.

¹⁸⁸ Մխիթար Գոշ, Գիրք Դատաստանի / աշխատասիրությամբ Խոսրով Թորոսյանի, Երևան, 1975, էջ ԺԴ.

¹⁸⁹ Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւաբանական հետազոտութիւնը հանդերձ ծանօթութեամբ Վահան Ծ. Վարդապետի Բաստամեանց, Վաղարշապատ, 1880, էջ 130.

Fourthly, Mosaic Law, the word of the prophets and the Gospel, having been once proclaimed, have remained static and ossified thereafter, whereas human circumstances and behaviour have changed with time, depending on the nation and country in question. Therefore a code is needed that will capture these changes.

Fifthly, the Holy Spirit affected men in the past and helped them to judge properly, the Spirit was the law written in people's hearts, therefore there was no need for written laws. The Spirit no longer has this influence; people have 'strayed' away from brotherly Christian love and righteousness, "which is the reason why we had to write" the Lawbook.

Sixthly, judicial cases are made decisive also through the oath, but evil among men has grown and, although God has prohibited taking oaths, people take oaths whether necessary or not, often in perjury. The Lawbook was written to restore disrupted legal order.

Seventhly, The Lawbook is written for Armenians not to go to foreign courts.

Eighthly, one of the most important reasons, "we see that some bishops, vardapets, priests, distinguished laics and princes pervert justice by partiality, bribes and ignorance. This is why we decided to write down briefly this lawbook, so that it reproaches and corrects them" (Lawbook, p. 12). That is the Lawbook was called upon to restore lawfulness and order, for justice to be impartial, incorruptible and fair.

The remaining reasons are also noteworthy, but the above do uncontestedly indicate how profound was the need for the Lawbook in that period, the 12th century, in order to restore the Armenian statehood and re-establish law and order in social life.

It is remarkable that the legal-political conceptual outlook of Mkhitar Gosh was anchored to the theory of natural (divine) law, the main principles of which are equality of men (before God), freedom, the right to life, inviolability of property, etc. Therefore, **positive law should emanate from the principles of natural law, which are constant**

and unchangeable.¹⁹⁰ Positive law is created by men, and it bears the imprint of time and particular social conditions.¹⁹¹ Such a profound understanding of the conceptual differences between the notions of the Right and the Law is lacking even in our times. Another exceptionally important generalization is that, according to Mkhitar Gosh, every nation and country should have its own legislation and legal norms, to choose adjudication according to "the time, the nation and the land."¹⁹²

According to V. Bastamyants, Mkhitar Gosh "knows well that the Lawbook is created for the people, that it should contain the nation's ideology and approaches to legal relations, that it should develop and improve along with the nation's legal and intellectual progression."¹⁹³

Mkhitar Gosh's Lawbook became the basis for the creation of the law book of Polish Armenians in 1518, when the Polish government granted legal autonomy to Armenians living in Poland.¹⁹⁴

Important qualities of the Armenian legal mindset of the 12th century were also expressed in the writings of Nerses Lambronatsi (1153-1198). Considering everything to be relative in the natural world, likewise in socio-political and ethical domains, Lambronatsi at the same time maintained that men are vested from above with freedom of choice (will), and are therefore fully responsible for all their actions, deeds and the consequences thereof. He ascribed great importance to the role of upbringing in overcoming and eradicating unlawfulness and injustice in the

190 According to Mkhitar Gosh the law "...is known to every man by instinct and does not require written constitution." Մխիթար Գոշ, Դատաստանագիրք Հայոց / Իրաւարանական հետազոտութիւնք հանդերձ ծանօթութեամբ ք Վահան ծ. Վարդապետի Բատասանանց, Վաղարշապատ, 1880, էջ 94.

191 See: Միրումյան Վ., Հայ քաղաքական մտքի պատմությունից, Երևան, 2002, էջեր 174-176.

192 Մխիթար Գոշ, (last reference), նախադրություն գրքը դատաստանի, էջ 3.

193 Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւարանական հետազոտութիւնք հանդերձ ծանօթութեամբ Վահան ծ. Վարդապետի Բատասանանց, Վաղարշապատ, 1880, էջ 93.

194 The Latin translation of this Code was presented to the Polish King Sigismund the First and, with some amendments, was approved by him in 1519. See the records of the Armenian court in Kamenets-Podolsk, Կամենեց-Պոդոլսկ քաղաքի հայկական դատարանի արձանագրությունները (XVI դ.). աշխատասիրությամբ Վ. Գրիգորյանի, Երևան, 1963, էջեր 54-55.

society. He also believed that ignoring and camouflaging deficiencies in the society lead to deepening the existing faults and vices.

The Lawbook (1265) of Smbat Gundstable was also called upon to fight against arbitrariness and violations of law. It was of great practical significance in the 13-14th centuries for the strengthening of and empowering the statehood of the Cilician Armenia.¹⁹⁵ Moreover, scholars of the period rightfully state that while Mkhitar Gosh's legal mind and the system he had created not only lean on the theory of natural law, but are also permeated by it, Smbat Gundstable's system, though departing from the principles of natural law, falls fully within the domain of positive law.¹⁹⁶

The Armenian legal mind of the 14th century, embodied by Grigor Tatevatsi (1346-1409), ascribed particular importance to relations between the individual and the society, proposing a conceptual approach, by which the most important matters of national importance (reforming the country, war and peace etc.) should be addressed by a **collective reason and resolved by collective will**. Moreover, the subject of law is not the autocratic monarch, but the people, their collective will. According to this concept the monarch is deprived of unilateral authority or the power to resolve issues of national dimension on his own. Some authors rightfully claim that we deal here with qualities of constitutional monarchy.¹⁹⁷ Tatevatsi too makes a distinction between "divine law" and positive law enshrined in various legislative instruments. Divine laws are unchanging and absolute, and all people are equal before them. **The norms of positive law should be anchored to and emanate from divine laws**, truthfully reflecting socio-political realities.¹⁹⁸ Tatevatsi's legal and philosophical views contain stipulations, which, under modern criteria, clearly qualify as possessing the significance of constitutional principles.

195 See: Смбат Спарапет: Судебник I / աշխատասիրությանը Ա.Գ. Գալստյանի, Երևան, 1958, էջ 195.

196 See, in particular: Միրումյան Շ., նշվ. աշխ., էջ 240.

197 Ibid, p 215.

198 See: Գրիգոր Տաթևացի, Գիրք հարցման, Կ. Պոլիս, 1729, էջ 12.

For centuries on end one of the important qualities of our identity and one of the essential features of the Armenian legal mind was that the main vehicles for fighting "unlawfulness" and for "living in love" were the "laws pleasing for God and useful in calling the church to life," rules that conform to "the rational nature of man,"¹⁹⁹ and the firm social determination and willingness to hold on to them was deemed important.²⁰⁰ This legal philosophy underlies the decisions of the Councils of Dvin (6th, 7th c.c.), Partav (8th century), Sis (1243), Dzagavan (1268), and Jerusalem (1651).

In the absence of a nation-state for many centuries, the continual impact of exogenous factors prevented this rich legacy of legal thinking to epitomize, through a Constitutional Convention, into the country's unified holistic Constitution. The entire historical period that had passed since was characterized by incomplete, from the perspective of current constitutional culture, and partial solutions. It was nevertheless impossible to curtail the insights of the legal mind's eye. In the Indian city of Madras in 1773 father and son Shahamirians embarked upon, and in 1788 completed an exceptional monument, a Constitution of a sovereign Armenia they had dreamt of, comprising 521 articles, which they called the "The Entrapment of Vanity." This work is a unique achievement in the history of the social-legal mind; it proposes ideas, arranged into a neat system, which, apart from being the result of profound theoretical conceptualizations, also represents a pivotal value in international constitutional developments. The title itself, in the assessment of the renowned expert in constitutional law professor Dominique Rousseau, represents a

199 Scholars have paid attention to the fact that the impact of spiritual values on medieval Armenian perception of law was very significant. For example, Kh. Samuelian states "In the opinion of Mkhitar Gosh law is an ethical category: the notions of law and morality are a uniform inseparable whole." Մամուկյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 87.

200 Incidentally, for Mkhitar Gosh's Law Book, likewise for many subsequent legal monuments (including the Astrakhan Armenian Code, created in the 1760s and containing 1135 articles) the principal source of law was the customary law of the Armenian people. See: Դատաստանագիրք Աստրախանի Հայոց, աշխատասիրությանը Ֆ.Գ. Պողոսյանի, Երևան, 1967, էջ ԾԴ.

whole legal theory. This constitution was called upon to guarantee “the possibility to preserve freedom” and to create an “inescapable entrapment for all evil people, so that they are forced to succumb to the yoke of beneficial activity.”²⁰¹ It was called upon to play an axial role in governing through fair acts, natural law and justice.²⁰²

We consider it necessary particularly to stress the important fact that the Armenian constitutional culture in the 18th century adhered to the principle of the rule of law, the understanding of the supremacy of natural laws, the separation of powers, assuring proper equilibrium of checks and balances. “The Entrapment of Vanity” is not a reverberation of the impact of European legal mind; it generalized, in its own way and utilizing cognitive scholarly methodology, the productive outputs by the councils of Aghven, Ashtishat, Shahapivan, Dvin, Partav and others, by Hovhannes Odznetsi, Hovhannes Sarkavag, Davit Alavkavordi,²⁰³ Mkhitar Gosh, Nerses Shnorali, Nerses Lambronatsi, Smbat Gundstable and many other devotees of Armenian social-legal mind. Article 389 of the Shahamirian’s Constitution contains a great generalization, stating; “Every provision of law contains numerous details that may be explained by wise men. All explanations of law, provided they pursue a useful objective and are pleasing to the will of the House of Armenians,²⁰⁴ shall deserve honor, but not those explanations, which go against man’s nature.”²⁰⁵

This not only defines a classical rule for the interpretation of law, but also stresses that the latter shall be based on human nature. Let us emphasize that natural human rights and freedoms constitute the baseline for current constitutional law as well.

²⁰¹ Որոգայթ փառաց, Երևան, 2002, էջ 15.

²⁰² Ibid, p16.

²⁰³ Here is what Manouk Abeghian states about the Canonical Regulations of Manouk, son of Alavk: “...this work was a novelty in the history of old Armenian literature, which gave birth to a new stream of thinking.” See: Հայոց հին գրականության պատմություն // Արեւիյան Մ., երկեր, հ. Գ, Երևան, 1970, էջ 85.

²⁰⁴ The House of Armenians was a representative lawmaking body, therefore the interpretation of the law could not have contradicted the legal content set in its foundation by the legislature.

²⁰⁵ Ibid, p 192.

Reflecting on the power of the people, the rule of law, representative democracy, separation and functional independence of powers, social protection, even on constitutional justice and many other fundamental constitutional principles, a holistic and orderly system of norms of constitutional law was thus presented for the first time in Armenian reality, which not only generalized the advancements in the mainstream legal mind, but also laid the foundations for the new mentality of statecraft. Only “the fruits of the tree of law and justice” may become the basis for upright actions by “fair governments,” seeking individual and collective happiness in justice and lawfulness, subscribing to the imperative of “living our lives in law and justice,” this is the biggest message of “The Entrapment of Vanity.” “In order to live our lives as rational and dignified men [...] we have to choose behaviour, order and law ourselves,”²⁰⁶ “not be lead by disorderliness and unlawfulness,” be able “to come together to listen about the law, to compose laws.”²⁰⁷ How to the point, how much in harmony with the progressive legal mind of even the 21st century! The only way for the establishment of a rule of law state is, before “composing laws,” to hearken to the advice “listen about the law,” and follow it profoundly. The conclusion is that “let there be or appear no one among us or in our land, who, being a wayward and arbitrary man in his deeds, would remain unpunished under law, and let our laws be our king and our Lord, and we shall not accept anyone above our laws, but for our Lord the Maker.”²⁰⁸

More than topical is another generalization from the preamble to the “The Entrapment of Vanity:” “how much more **kindness** do we need **to control our lives with laws and freedom**, to become worthy of the Lord’s praise”²⁰⁹ (our underscore, G. H.). And these laws have to be expounded “in harmony with man’s nature, to the liking of our natural spirit.”²¹⁰

²⁰⁶ Ibid, p 20.

²⁰⁷ Ibid, p 35.

²⁰⁸ Ibid, p 48.

²⁰⁹ Ibid, p 38.

²¹⁰ Ibid, p 71.

Extremely noteworthy is the reflection by the Shahamirians on the Roman experience: ‘so long as, emboldened and strengthened with love and faithfulness, they did not depart an inch from their laws, they developed from a negligible baseline, multiplied and became happy thanks to their laws,’ but when the Roman senators allowed for the Cesar’s throne to “become hereditary,” “a great darkness penetrated their light, evil - their kindness, schism - their unity, ostracism - their equity, there came ups and downs, superiors and inferiors. [...]

This paved the way for impiety to enter them.”²¹¹

Being a Constitution of a state with a parliamentary system of governance, “The Entrapment of Vanity” provides a clear procedure for election to the House of Armenians²¹² (legislature), with a three-year term, explicit powers, procedures for enacting laws and making appointments, etc. The legislature shall form the executive and judiciary branches of government, in a procedure stipulated by law. Every public body operates within the scope of competence clearly prescribed by the law: “a Patriarch, a nakharar, a bishop, landowners, priests, princes, no one shall issue orders irrelevant to their office, or exceeding the powers granted to them according to their class by the Church or the House of Armenians” (Article 364). A particular principle setting the hierarchy of legal acts is defined: “Every instrument, whether on trade, forging alliance, or any other act, shall not be valid, whoever it may be signed by, if it contradicts the law of the House of Armenians or **goes against man’s rational nature**”²¹³ (our underscore, G. H.). By ascribing priority to “man’s rational nature” a clear and full formulation is offered for the constitutional principle of **equality in rights** (Article 3): “every human being, whether Armenian or alien, born in Armenia, or emigrated to Armenia from foreign countries, whether male or female, shall live equal and free in all their endeavors, no one shall have the right to rule over anyone else, and the work of their hands shall be paid for accord-

²¹¹ Ibid, p 47.

²¹² Ibid, p 180.

²¹³ Ibid, p 133.

ing to every labor, under Armenian law.”²¹⁴ Even the rights of convicts did not escape the Shahamirians’ focus: “the prison for offenders shall be a clean structure, so as not to harm the health of the inmates”²¹⁵ (Article 148). There are certain constitutional regulation norms to secure property rights, afford social protection, at the same time the issue of national-state priorities is ascribed particular importance. Article 127, in particular, stipulates: “The House of Armenians shall render assistance to all specialists, especially in philosophy, astronomy, medicine, music, and rhetoric.”²¹⁶

Putting above anything else the “equalizing” and restraining role of statute, basing it on the law and values “in harmony with man’s nature,” concepts of **natural law (divine law) and public alliance**, the Shahamirians laid out their constitutional rules for “governing the Armenian land,” which, apart from representing an exceptional value of constitutional culture, are of lasting encyclopedic significance in bridging the legal mind of the past with the present, taking instructive lessons from the past in securely traversing the road toward the establishment of an independent nation-state.

In the second half of the 18th century the “Astrakhan Armenian Code,” containing 1135 articles, was of exceptional importance in the social life of the Russian Armenians. It was created by Yeghiazar Grigorian, Grigor Kanpanian and Sargis, son of Hovhannes between 1747 and 1765.²¹⁷ In view of exceptional historical situation, the autonomy granted to the Armenians by Empress Catherine the Second, the founding of the “Common Armenian-Asian Court” in 1765 and, in 1800, of the Armenian Magistrate, as well as the practical role played in that period by the “Code,” one may conclude that:

1. this Code was of great legal and political significance;

²¹⁴ Ibid, p 75.

²¹⁵ Ibid, p 138.

²¹⁶ Ibid, p 134.

²¹⁷ See Դատաստանագիրք Ասորիսանի Հայոց, Երևան, 1967, 359 էջ: Ավագյան Ռ. Հ., Դատաստանագիրք Ասորիսանի Հայոց // Իրավական գիտահանդես «Վասն արդարութեան», 2003, N38, էջեր 8-11.

2. it was the expression of continual development of Armenian legal mind;
3. rules of permissible behavior were established by respecting and accounting for the national values, tradition and customs, and sanctions were prescribed against violation thereof;
4. the legal regulation pertained to an ethnic community that had lost its statehood;
5. it was constructed over lasting principles of Christian ideology and perception of law, and was humanistic and progressive in its legal-regulatory role and significance.

For Armenians living in the Russian and Ottoman Empires the development of national ‘statutes’ acquired vital importance. In this respect in the 1850-60s there was a remarkable constitutional movement of the Armenians in the Ottoman Empire to develop versions of a “National Constitution.” The National Constitution was viewed by Armenians as a safeguard for the preservation of their collective existence, their identity. In legal terms the National Constitution of 1863, approved and enacted by the sultan, satisfied the definition of the notion of “Constitution,” which, as characterized by Grigor Otian, was called upon to offer the possibility “for a nation or any individual in a state to enjoy and exercise their natural rights.”²¹⁸ In a conclusive assessment by Nerses Melik-Tangian the National Constitution had the advantage of having developed common principles, and the operation of political and religious councils was subjected, under the supervision of the Patriarch, to the oversight of the “Assembly of Delegates.” The Constitution, however, offered the skeleton, rather than the spirit, for the governance of ecclesiastical-social relations, deprived of all flesh and blood: “under this tremendous word you will not find procedures and laws for the formation of courts or for litigation, no sanctioning and sentencing guidelines, no rules to address the administrative, economic,

²¹⁸ Отян Г. На смертном пути. Зограб и Ваджес // Газета «Наше время». Баку, 1919, 27 апреля.

ministerial, parochial, landowning issues of the church, everything remained as it was, with a guise of constitutionalism pulled over it. That’s your Constitution.”²¹⁹

There were varying opinions about the National Constitution, it was compared to a cart with square wheels, its provisions were qualified as vague, extremely abstract, even the title became a matter of controversy: “Constitution” or “Statute?” Nevertheless the National Constitution, as mentioned by Nikol Aghbalian, “was recognized as the principal law of the Armenian community” (Collected Works, Vol. 4, page 400). It was the product and an expression of progressive, democratic development. The definition of the principles for the interaction of the state and an individual (a nation), clarification of the constitutional status and competences of the Church, the establishment and clarification of the powers of a National Ecclesiastical Assembly, Political Assembly, Educational Council, Economic Council, Judicial Council, Monastic Council, Financial Trustees, Inheritance Trustees, Hospital Trustees, District Councils, General National Assembly, as well as the norms pertaining to the procedure for amending the Constitution indicate that we deal here with comprehensive, serious and progressive expressions of constitutional culture.

In this respect, as opposed to the “Entrapment of Vanity,” the constitutional norms did not remain as expressions of personal wishful thinking, they acquired real implementation significance.

Throughout the periods presented above the history of our nation, as we have mentioned, represented a succession of losses, persecution by aliens, survival, through miracle, of a collective entity deprived of a nation-state. The more than a seven-hundred-year-long loss of statehood has had a deep impact on the social consciousness of the people. Many civic properties have been distorted involuntarily. Developing and implementing canonical constitutional norms on a national level, the law of the state was nevertheless perceived as an alien imposition and an impediment for full-fledged expression of identity.

²¹⁹ See Հայոց եկեղեցական իրավունքը, Սերսես Մելիք-Թանգյան, գիրք Ա, Շուշի, 1903, էջ 735.

In historical retrospect we have to acknowledge that our national values were either being reduced to a bibliography on parchment, or were predominantly generated and reproduced in alien harbors, naturally without facilitation or nurturing by the state.

The reality is that although we, as the Armenian ethnos, as a nation, re-established our independence on the threshold of the third millennium, we still are not the bearers of civic properties that are necessary for a full-fledged citizen of an independent state. These properties are not easy to acquire. Apart from the daunting task of shaking off the centuries-old dust of lost statehood, re-thinking the mentality and the weltanschauung, there is serious programmatic effort required to forge a true citizen of the state.

Without dwelling on the analysis of what makes up such a citizen, we would nevertheless like to emphasize, within the scope of the material discussed, the special importance of the legal culture of a state. As we saw, constitutionalism is in itself a cultural phenomenon.²²⁰ It is also undeniable that the legal culture constitutes an inseparable component of the national-public cultural landscape of a state. Historically the Armenian legal culture has generated remarkable achievements of universal human appeal. Nevertheless legal culture, as an organic component of national culture, has been **detached from the cultural environment of a nation state**, for lack of one during a quite lengthy period of our history.

Current priorities of the establishment of statehood include the formation of constitutional legal culture, which, feeding off lasting values accumulated over the centuries, the canonical principles of living under divine commandments, enjoying public consensus and solidarity, shall become the basis for the formation and strengthening of an individual's civic qualities, become a prerequisite for the establishment of legal democracy. The establishment of democracy is not sufficient and is not an

²²⁰ See Дик Ховард. К конституционной демократии во всем мире: американский взгляд. Вопросы демократии. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г., <http://usinfo.state.gov/journals/journalr.htm>.

end in itself. It should be a **legal, constitutional democracy, adding completeness and the necessary liberal qualities to the system.**

In order for constitutionalism to be entrenched in a country it is also necessary to have in place an equivalent political culture, a political system that goes with it, as well as a clear social demand for both.

Constitutionalism assumes a social environment described by **absence of discrimination, pluralism, tolerance, justice and solidarity.**

Their assurance must be of a systemic nature, permeate every aspect of social relations, and become the main safeguard for faith and optimism.

These qualities constitute the main criteria for characterizing a political system, and their establishment and rooting is the ultimate goal of a state. Their absence in a country indicates the lack of constitutionalism; their distortion signifies the low level of constitutional culture and incompleteness of constitutional democracy.²²¹

Having in mind these considerations, as well as the lessons of history, we consider it necessary to dwell in detail on the fundamental issues pertaining to the place and role of constitutional culture in contemporary Armenian context. This mainly refers to constitutional and legal developments in the Armenian reality of the 20th century, as well as the current trends thereof.

The analysis of fundamental issues of the development of constitutional culture in the Armenian reality at this stage may only become complete and well reasoned if it is performed in line with reflecting in the background on the developments in the European value system, since current European processes have become a decisive factor in our geopolitical orientation.

²²¹ As rightfully mentioned by Dick Howard: "To make constitutional liberal democracy work, the people must have a level of mutual trust, and ability to cooperate, rather than fragmenting into camps of hate and hostility." (Дик Ховард. К конституционной демократии во всем мире: американский взгляд. Вопросы демократии. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г., <http://usinfo.state.gov/journals/journalr.htm>).

**CHAPTER 3. CONSTITUTIONAL CULTURE
IN THE BACKGROUND FOR THE
FORMATION OF RULE-OF-LAW,
DEMOCRATIC STATE
AND ESTABLISHMENT
OF CONSTITUTIONALISM**

**3.1. CONSTITUTIONAL CULTURE IN THE SYSTEM
OF THE CONTEMPORARY EUROPEAN
LEGAL THOUGHT**

European constitutional culture, having deep roots, has nonetheless undergone unique developments in conjunction with the deepening of European integration and legal globalization. A study of current expressions and development trends thereof is of exceptional importance not only from the perspective of our country's value system orientation, but also because the European constitutional culture represents a supreme civilizational value, offering a bearing for the future of human community.

Current international developments in the legal mind continue, in their general outline, to maintain two basic systemic vectors, determined by the nature and specifics of classification of the sources of law. In general terms, the main properties of Anglo-Saxon and Continental (European) legal systems have emerged over the course of centuries. And these have also left an imprint on constitutional solutions. Nevertheless, the main trend of current legal globalization is that these differences are gradually acquiring a relative nature, and general constitutional principles and values come to the forefront, getting rooted in social practice.

The most general feature of international constitutional and legal mind is the fact that now, more than ever before, it is considered important to have sound guarantees of constitutional principles and norms in social practice. Their so-called constitutionalization is the prerequisite for the establishment of the rule of law, of democratic state systems. If, prior to the 18th century, the development of the legal and political mind had led to the idea of adoption of constitutions, acquiring social cohesion through the Fundamental Law of social community, the main challenge of the post-constitutional period was **guaranteeing constitutionalism in the country through the Constitution**, which elevated constitutional culture to a qualitatively new level. It acquired real content, became an important component of cognition, a living reality for the members of the public.

During the last centuries, consistent solutions to this challenge have become the axial direction of legal developments in Europe. Unfortunately, in their current qualitative expressions these solutions are only now beginning to acquire a topical nature for us here, since they may essentially apply only to independent states under value system orientation.

The reality of constitutionalism first and foremost assumes the establishment of **constitutional democracy** in the entire state system, in all aspects of social relations. This objective is pursued by countries that have chosen the path of social progress. Reaching this objective, among others, requires certain mandatory guarantees to be in place, such as the recognition of and adherence to constitutional objectives and fundamental principles both by the state and the entire society, the existence of state authorities in compliance with constitutional principles, the construction of a legal system following the principle of the rule of law, reliable protection of constitutional order and the supremacy of the Constitution etc.

The issue is not only what exactly is the constitutional order enshrined by the Constitution or what principles underlie the relations of

the authorities with the law. What is essential is how does the constitutional order in question translate into social reality, to what extent do fundamental constitutional provisions acquire flesh and blood, who is the real source and bearer of power, to what extent is human dignity protected or guaranteed, how separate, independent and balanced are the branches of state government? **Safeguards for the above constitute the basic benchmark that makes it possible to assess the real standing of constitutionalism and the meaningful perception of constitutional culture by the public at large.**

From the viewpoint of analysis of the dangers threatening the constitutionalism in the new millennium, to our mind, summarizations of the President of the Constitutional Court of the Russian Federation Professor V. Zorkin are also worth mentioning, according to which, among those threatens he, particularly, mentions the following²²²:

1. Attacks on the Westphalian system of the world order²²³ and establishing network governance principles while solving global issues;
2. Attacks on constitutional human rights in the context of the fight against new challenges and dangers, “legalisation” of the breach of these rights within the frames of the fight against terrorism;
3. The issue of realization of the constitutional principle of the ‘social state’²²⁴;

²²² В. Зорькин - Роль конституционного суда в обеспечении стабильности и развития Конституции // Конституционное правосудие, 2004, N2, 15-28, Зорькин В.Д. - Об угрозах конституционному строю в XXI веке и необходимости проведения правовой реформы в России // Журнал российского права, 2004, N6, 13-17, Зорькин В.Д., Современный мир, право и Конституция. - М.: Норма, 2010. - С. 54-68.

²²³ In this context the author speaks about Westphalian agreements signed in 1648, which became the political and legal basis, according to which the state is the main institute of the organization of the social society, as well as the international relations, and the foundation of this system is the principle of the sovereignty of the state.

²²⁴ The author means the necessity of the formation of a certain environment of social tolerance in the society, emphasizing that the absence of the social state can become a reason for the collapse of the rule-of-law state.

4. The slow process of legal reforms or their absence, which particularly concerns the transitional systems.

These reviews of the author are typical for newly independent states and are more interesting from the aspect of the international integration of these countries. At the same time, the new phenomena of internationalization were more actively expressed particularly in Europe, where the economic, political, humanitarian and, in general, value system co-operation based on the joint interests led to such a quality of supranational co-operation when the established joint economical, legal, structural base is quite naturally making the necessity of establishing supranational Constitution urgent. This is quite a new quality of legal globalization, which is still typical just for the European Union. However, **the supranational legal order** with its peculiarities and the charge of active influence is gradually becoming dominant in the whole world.

Developments of set of values of societies first and foremost find their illustration in the Basic law of the country, **which can rightly be considered the collective biography of the given nation and people**²²⁵. Therefore, in order to make a full reference to the peculiarities of constitutional reality in transitional systems, we emphasize the need of particular targeted comparative constitutional research, by deviating to some extent from the traditional approaches. In this case the issue is not about what constitutional-legal solutions are present in a concrete country. It is of utmost importance to discover throughout the last decades especially in various European countries what social-administrative issues originated and in their time what constitutional solutions were given. In this case we give importance not to the comparative analysis of constitutions, but of constitutional amendments.

²²⁵ The full texts of constitutions with amendments of all European countries are presented in the two-volume edition published by The Venice Commission of Council of Europe (See, Constitutions of Europe. Martinus Nijhoff Publishers. LEIDEN-BOSTON, 2004, Volume I, II)

From the study of constitutional amendments and constitutional laws of the last decades in i.e. Austria, USA, Germany, Denmark, Spain, Italy, Greece, Portugal, France, Finland and a number of other countries, as well as the constitutions of various other countries of Eastern Europe and the former USSR (Poland, the Czech Republic, Bulgaria, the Russian Federation, Lithuania, Estonia, Georgia, Kyrgyz Republic, etc), it can be concluded that from the perspective of formation and development of constitutional culture, there exists a number of stable and universal tendencies:

1. the axis of social-administrative relations becomes the human being, with his or her inalienable dignity and rights. The latter are constitutionally enshrined and declared as directly applicable rights, restricting the exercise of power by the people and the authorities, acquire reliable guarantees for domestic and international protection, act as main criteria for the evaluation of the given. In the value system of human community, the principle of rule of law becomes dominant. The main criterion for the establishment of civil society in this case is not the restriction of the law by power, but of power by the law,
2. democratic values become the foundation for the constitutional order and the safeguard for human rights, a general trend is observed of gradually restricting central authorities, of decentralization of power (political, administrative, economic), expanding room for possibilities of self-governance and strengthening guarantees,
3. consistent implementation of the principle of the separation of powers, ensuring their functional balance, reasonable checks and balances become a universal requirement. The developments in representative democracy ascribe paramount importance to the improvement of political structures in the society and the protection of political rights of individuals,

4. the issue of ensuring the independence of the judiciary, its systemic integrity and completeness, as well as its viability become subjects of special attention,
5. local self-governance, as a specific form of democratic autonomy, is attached with a paramount importance,
6. guarantees of stability within the Constitution get stronger, a potent legal system is entrenched for identification, evaluation and restoration of disruptions in the constitutional guarantees of human rights and in the constitutional balance of powers, the constitutional order acquires a most viable "immune system", the right to constitutional justice becomes especially important among human rights,
7. solutions to the problems of assuring the "immune sufficiency" of the social organism are sought within the constitutional framework, and in its turn, every modification of national constitutions receive broad international resonance,
8. an increasingly greater place and role is given to international law within the national legal systems. A noticeable trend appears of using identical basic constitutional notions. Harmonization takes place in the selection of approaches to the criteria for the separation of powers and restriction of human rights. At the same time attempts are made to seek "conciliation" between national specifics and supra-national approaches.

Alongside the general trends mentioned above, issues of developing institutions that perform the functions of the branches of government, clarifying their functional roles and assigning them sufficient competences also acquire great importance. On the other hand, the interaction of authorities gets increasingly anchored to the principle of partnership and solutions that assure a dynamic equilibrium.

Such regularities, first of all, have received a systemic new quality in European law. Altogether the European Union is also currently in the stage of search of different changes. They refer to values and trends enshrined in founding treaties, specifically Treaty on European Com-

munities (which were essentially changed by the unified European acts, Treaty on European Union, Treaty of Amsterdam and Treaty of Nice) and Treaty on the European Union (which was essentially changed by Amsterdam, Nice treaties and the Treaty of Lisbon).

Because of current trends, by overcoming certain discrepancies, for the first time an attempt was made to make the Union's Constitution, the first legal document of the European Union. One of the important achievements of legal-philosophical thought and social practice, was the clarification of the value system which in its turn is the foundation of constitutional order. Article 2 of the Draft of the Constitution is simply entitled "The Union's Values." It enshrines on a constitutional level that: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity prevail." These are not merely words, but values that constitute the basis of an entire civilizational system, and in any country aspiring to become a full member of the European family these values must become viable bearings of fundamental significance.

Although the above stated constitutional agreement was not fully implemented and "yielded" its place to the Treaty of Lisbon, nevertheless from the perspective of values the European trends did not record any change. Furthermore, current European developments claim, that if there is no culture towards respect of human rights, everything else becomes irrelevant. People should enter constitutional relations as bearer of a certain culture, specifically the culture of coexistence, culture of self-knowledge and culture of dignity.

To what extent are those valuable trends typical in transforming social systems?

No matter how the world order was transformed because of the collapse of the communist social system, the viewpoint and the ideology of millions of people have not changed. Europe in this sense, is not merely a geographic perception, it is a system of civilizational

values and the bearer of those values should be a citizen of a state which has chosen the path of development of democracy and rule of law. Those values are not alien to us, Armenians, they have deep roots in the folds our history and have in terms of philosophical perceptions have been best displayed especially in the work "The Entrapment of Vanity"²²⁶ by Hakob and Shahamir Shahamiryans. However there is a need of thorough analysis and signification in order to understand whether they are still living and viable values nowadays, what is their place and role in our modern world perception and organization of the social life by the state.

In order to be in line with modern European developments in terms of legal-philosophical approaches and to make clarifications for ourselves in terms of values it is necessary to explore and understand the nature of European constitutionalism and especially the scientific generalizations of the nature of law at least in the last couple of centuries even if it is only in regard to their main approaches.

It is certain that historically the legal understanding has gone through serious evolution. Legistic legal thinking, which was dominant in Europe up until the beginning of XIX century²²⁷ accepted the idea that a man is an object which is subordinate to the authority and not a free being. Per legism the law is the demonstration of the will of the authority, the latter's order²²⁸. This doctrine was anchored in the legal relations that arose from the foundations of feudalistic property. The feudal owned all means of production including the serf and the will of the proprietor was highest law.

Developments of XIX century, specifically entrenching of contractual labor relations, recognition of certain rights of the human being as

²²⁶ Written in 1773 in Madras with the aim of "Awakening the wise from indifference and to exhort them to create a perfect chariot going along the way of fair laws in harmony with our rational nature by their wit and wisdom" (The Entrapment of Vanity, Yerevan, "Armenia" publishing house, 2002, page 16).

²²⁷ Important figures of this path were D. Austin, Sh. Amos, B. Windshide, A. Zitelmann, K. Herber, A. Holmsten and others.

²²⁸ More precisely see Austin J. Lectures on Jurisprudence or the Philosophy of Positive Law. L., 1873. p. 73.

a social phenomenon, the necessity of separation of powers, entrenching and attaching importance to democratic values, made certain corrections in the general philosophy of legal understanding. The legal positivism (law based on the will of state) became dominant, which interpreted rights as a result of subjective understanding, a creation of the power, a grace passed by them. The will of the power which had received the form of a law, was declared as a right, and political compromise had the nature of state compulsion.

However, Europe was forced to approach positivistic legal thought with serious reservations, accepting the fact of presence of non-legal laws. It is a tormented saying that Hitler came to power through law. It is non-debatable that because of seizing rights, fascism was approved with the assistance of law. In the continental legal system, where judicial precedents are not direct sources of law, and laws are a mere result of political compromise, where often there are no judicial counterbalances (including constitutional), equivalent to the lawmaking process, the almost inevitable consequence of which is the presence of a non-legal law, and the endorsement of such laws is full of social dangers.

Despite being an advanced trend, the positivistic legal thought continued to lean not on the essence of objective law, but on its discretionary perception and expression of will of the power.

However, the general approach was that the law and the state must be lawful, guarantee equality, freedom and justice, and the value system underlying these shall be based on the supremacy of inalienable human rights²²⁹. Moreover, a legal system becomes complete and viable when these values become constitutional values, receive constitutional guarantees of recognition and protection. The success of that mission is conditioned by how constitutional values are explicitly expressed in the norm-principles of the Constitution and to what degree do the latter become living values implemented in social life. In this regard the characterization given by the former President of The Former Yugoslav

²²⁹ On this also see: Политико-правовые ценности: история и современность (Под ред. В.С. Нерсесянца). М. 2000, pages 5-29.

Republic of Macedonia H. E. Mr Branko Crvenkovski on June 3, 2004 in Skopje, during the opening ceremony of the international conference was very accurate, it was stressed that "We need a operating Constitution, not a mirage".

We consider it necessary to make a special reference to the reality, that even in specialized literature often the interpretation of the constitutional principle of the rule of law is strictly narrowed, mostly it is presented from the aspect of its protection.

It is noteworthy, that the first comprehensive document related to this issue, was the declaration adopted by France, which was titled "Declaration of the Rights of Man and of the Citizen", Article 2 of which specifically states that: "The goal of any political association is the **conservation** of the natural and imprescriptible rights of man". Adopted by the General Assemblies Resolution 217 A (III) of 10 December 1948 a universal document of fundamental importance in terms of international law was titled "Universal Declaration of Human Rights". Therein was considered baseline that "... the inherent dignity and equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world". Based on the legal-philosophical generalizations of the Declaration, the subsequent constitutional developments emphasized on four main components²³⁰:

- constitutional recognition of human dignity and rights as a fundamental and inalienable value, as a directly applicable right,
- the guaranteeing of those rights, which determine the meaning, content, nature of application and the nature of operation of legislative and executive branches,
- definition of constitutional criteria regarding possible limitations of human rights, based on the fundamental principles of civil society

²³⁰ Particularly see: Constitution of Federal Republic of Germany, article 1, Constitution of Portugal, article 18, Constitution of Poland, article 30, Constitution of Slovakia, article 12, Constitution of Slovenia, article 15, Constitution of Russian Federation, article 18 *et cetera*.

- assurance of institutional guarantees and justice system for protection of human rights and fundamental freedoms.

The harmonious co-existence of a Constitution, which is the safeguard for the establishment of civil society and is anchored to the principle of the rule of law, and of constitutional democracy equivalent to it, implies the presence of certain necessary and sufficient pre-conditions. The baseline among these is the establishment of liberal legal thinking and the degree of its public perception and acknowledgment. Such legal thinking underlies current European constitutional developments and expressions of constitutional culture. An important phase commenced throughout Europe in the theoretical philosophical perception of law and legal interpretation as early as in the middle of the 17th century. One of the characteristic features of this period was that a most complete outlook took shape about natural law and that, in fact, the feudal approach to law was rejected. The following stood out among the bearers of the new approach: Niccolò Machiavelli (1469-1527), Hugo Grotius (1583-1645), Baruch Spinoza (1632-1677), Thomas Hobbes (1588-1679), John Locke (1632-1704), Charles-Louis Montesquieu (1689-1755), Jean Jacques Rousseau (1712-1778), Thomas Jefferson (1743-1826), Thomas Paine (1737- 1809), Immanuel Kant (1724-1804), Georg Hegel (1770-1831) and others. Hugo Grotius believed that natural law emanated from the essence of man, which pushes the latter toward mutual relations.

The recognition of natural law conferred legal studies the status of science. Whereas the legist approach to law failed to reach out to its academic roots²³¹.

During more than 300 years the development of economic relations, the creation of free and competitive milieu, the acknowledgment of human rights as a criterion for restricting authorities, as well as the gradual emergence of other elements of liberal values in the European

²³¹ Гроций Гуго Де Гроот. О праве войны и мира // Антология мировой правовой мысли. Т. III. М., 1999, pp. 21-26.

system of values, crystallized in constitutional norms and principles, which, beginning with the second half of the 20th century, no longer remained merely mottoes, turning rather into living values. As Y. Tikhomirov has rightfully stated, the 17th century brought forth the ideas of natural law; the 18th century set the need for the liberal state, embodied in Rousseau's concept of popular representation and Montesquieu concept of the separation of powers; the first third of the 19th century gave birth in Germany to the theory of the *reschtsstaat*; but these centuries were themselves riddled with wars, coup d'états, tyrannical rulers, and the concepts remained confined to books...²³². Values characteristic to civil society, the qualities of the rule of law, democratic state, have come into being over the course of centuries, but they only became systemic regulators of social life especially through the several last decades of the previous millennium. In fact, beginning with the 1950s, universal democratic values and principles of the rule of law state have found their most systemic and concrete incarnations in the constitutional solutions of European countries, with due notice given to the many specificities characteristic for the system in question. And as Professor Dick Howard mentions, democracy and the rule of law in Europe have become dominant following the Second World War²³³.

European constitutional culture is rooted in the rich legacy of Hellenic, Roman, English, German, French and some other countries' constitutional cultures. It also made a weighty contribution to international constitutional studies, has left a deep impact on the development of global constitutional culture. Serious contributions to the formation of contemporary European constitutional culture were made by the adoption of the 1791 Polish and French, 1814 Norwegian, 1831 Belgian, 1866 Swedish, 1868 Luxemburg, 1874 Swiss, 1901 Australian and, later on, some other countries' constitutions. Many of these are still in effect and have shaped sustainable constitutional values.

²³² Тихомиров Ю.А. Теория компетенции. М., 2004, p 10:

²³³ Ховард Д. Конституционализм и развивающаяся демократия // Конституционное правосудие, 2004, N 3, p. 20:

Nevertheless, for Europe, which has witnessed two world wars within the 20th century, has learned certain lessons from it, has made democracy and the rule of law its pivotal values, the main motto of constitutional culture became the statement that the law and the state must be lawful, guarantee equality, freedom and justice, and the value system underlying these shall be based on the supremacy of inalienable human rights²³⁴. Moreover, a legal system becomes complete and viable when these values become constitutional values, receive constitutional guarantees of recognition and protection. For Europe of the 20th century the establishment of civil society and a rule of law, democratic state, became common ideals, a precondition for the welfare of the human community and the best possible discharge of man's creative potential. It is not incidental that, following the Second World War, constitutions that were adopted or substantially reviewed everywhere in the world, but especially in Europe, enshrined as a norm-objective and norm-principle the need for the rule-of-law State, and acknowledged the supremacy of the norms of international law over provisions of domestic legislation. European constitutional culture became characterized by the recognition of human dignity, man's constitutional rights and freedoms as having direct effect, and they were granted serious domestic and pan-European legal and structural guarantees. Specialized institutions of judicial constitutional review became an important component of European constitutional culture: these were the constitutional courts, which made it possible to perform abstract, ex ante, obligatory and elective constitutional review, assumed the responsibility for guaranteeing the supremacy and stability of the constitution.

As it was succinctly acknowledged during an international round table held in India in December 2001, the main characteristic feature of European constitutional culture is that the ultimate among constitutional values is the human being, with his dignity and rights²³⁵.

²³⁴ Политико-правовые ценности: история и современность / под ред. В.С. Нерсесянца. М., 2000, гл. 5-29

²³⁵ <http://www.nls.ac.in/ncrwc/justice-iyer-paper.htm>.

The Constitution of the European Union (through the Treaty of Lisbon) became the epitome of European constitutional culture, it not only represents a new advance in the constitutional mind, but also a qualitatively new stage in the development of constitutional culture. The integration of value systems; economic, political, humanitarian and of general systemic cooperation, anchored to common interests, has led to such a quality of supra-national interaction, that the resulting common economic, political, structural groundwork also dictated the need for the creation of a supra-national Constitution (Constitutional Agreement). A purpose was set to promote peace, the values of the Union: welfare, freedom, an environment of security and justice, a common free market without internal borders and distortion in competition, assure even economic growth, sustainable development, social market economy, social progress and prosperity, high level of internal and external security, the best possible representation of the common interest on the international scene. As stated by Francis Snyder, European constitutional culture currently comprises three tiers: the first is the general contemporary legal culture; the second is the Western legal culture; and the third is the legal culture shaped through the regional integration within the European Union²³⁶.

The expanded European Union appears, with its development trends, as a qualitatively new type of constitutional order, which brings the peoples of its member states together, without disrupting the existing specificities of their political institutions, cultural and linguistic customs that are the product of the development of European civilization. What is especially distinguishing is that, because of European integration, the Constitution became a supra-national phenomenon, which emphasizes the fact that it is the Fundamental Law of not the state, but of civil society, an entirety of behaviour principles and rules that are the product of a common agreement of the civil society consolidated within the European Union. This is a reality, the proof of a new stage of social development, a new quality

²³⁶ <http://www.eurozine.com/article/2004-02-19-snyder-en.html>

of constitutional and legal relations, new principles of interaction between the universal and the national. This reality, expressed on a qualitatively new civilizational level, has yet to be studied at length and validated, and also taken notice of in every country's practice of legal developments. At the same time the expansion of the European Union continues to remain the subject of discussions and academic debate. One of the important arguments pertains to the formation of legal and particularly constitutional culture. The main concern of various authors in this respect is that it should take much more time to be able to bring together the specifics of constitutional cultures of England, other countries of Western Europe and the countries of Eastern Europe, that have been forged during many centuries²³⁷. There is no doubt that that this issue will be resolved the easiest after all EU countries will have ratified the Constitution, forming one unified and whole system of European constitutional culture and the constitutional 'subcultures' of individual countries. We may state, by way of generalization, that already in the beginning of the 20th century European democratic processes created the conditions, along with the expansion of liberal economic relations, for adopting the liberal-legal type of the understanding of law²³⁸. The latter's essence boils down to the recognition of natural human rights as ultimate values, as having direct effect, as the basis for positive law²³⁹. The invariable logic of democratic developments made guaranteeing the rule of law an axial value in the European legal system. Article 3 of

²³⁷ http://www.iue.it/LAW/Events/WSWorkshopNov2003/Dupre_paper.pdf, <http://www.eurozine.com/article/2004-02-19-snyderen.html>, German Law Journal - ESSAY Postnationalism, (Dis) organised civil society and Democracy in the European Union Is Constitutionalism Part of the Solution or Part of the Problem?, http://www.germanlawjournal.com/past_issues.php?id=192.

²³⁸ V. Goloskokov proposes an interesting classification of legal and political concepts that have come into being in the 20th century, putting the main emphasis on the theory of natural law and various incarnations of legal positivism. See: Голоскоков Л.В. Правовые доктрины: от Древнего мира до информационной эпохи. М., 2003, pp. 79-82

²³⁹ On this see: Արսենյանց Վ.Ս., Իրավունքի և պետության տեսություն, Երևան, 2001, pp. 30-47

the Statute of the Council of Europe, signed in London on May 5, 1949, clearly stated, as we have mentioned, that every member of the Council of Europe must acknowledge the principle of the rule of law. This approach added a new quality to the subsequent course of international relations, setting a clear value bearing at their basis. Human dignity, freedom, democracy, equality, the rule of law, respect towards human rights, in their turn, became value bases for constitutional culture; values that are characteristic of a society built upon principles of non-discrimination, pluralism, tolerance, justice and solidarity, values which were in the foundation of what is one of the most important accomplishments of the 21st century, the Constitution of the European Union. Europe arrived at these principles and made the current qualities of legal perception the basis for social existence through a gradual, evolutionary process of development, which, in Hegel's terms, resulted in a great leap to new quality.

3.2 MANIFESTATION OF THE NATURE AND SPECIFICS OF CONSTITUTIONAL CULTURE IN THE CONDITIONS OF THE ARMENIAN NEW REALITY

With a view of completing the picture of historical development of constitutional culture in the Armenian reality and analyzing it in the context of European legal thinking, we consider it necessary to make a brief reflection on the nature and specifics of expression of these phenomena within the last century through the succession of the First Armenian Republic, Soviet Armenia and the newly independent Republic of Armenia. This was the period of history when, following the centuries-long of non-statehood, new opportunities emerged to restore it and to develop the qualities of our identity within a system of a nation-state. A. Vagharshian has made an interesting observation on this, having particularly studied the history of Armenia's constitutional developments through the first,

second and third republics²⁴⁰. The author acknowledges: “these were the phases that Armenia’s constitutional development has gone through” and arrives at the conclusion that “this development lacks historical succession, since subsequent constitutional-legal phenomena and institutions did not derive from the preceding ones. The disconnect between them prevents us from viewing Armenia’s constitutional developments in the framework of a single historical process since, by historical, political and ideological circumstances, every new stage in this development represented an utter rejection of the previous one²⁴¹”. Without reflecting on the issue of “utter rejection,” we think it necessary to underline that in statements like this one completely overlooks the internationally acknowledged factor of “unwritten constitutions,” the fact that a constitution is not merely a document or a collection of norms; it is also a system of values, a mindset, a form of existence, a component in the nation’s cultural system.

And as we saw, expressions of all these dates back millennia in the Armenian reality.

As for the 20th century, it is beyond doubt that we deal with new realities there. Although the First Armenian Republic did not enact its own Fundamental Law in time²⁴², its legislature (the Armenian Council and, since August 1, 1919, the Parliament) of the newly independent Republic of Armenia, struggling for survival in grave historical circumstances of 1918-1920, enacted many laws that contained constitutional norms and were remarkable expressions of constitutional culture. Of interest among these is the Law on approving the Act of Independence of United Armenia,” of May 26, 1918. It not only spells out the system of governance and the nature of state power, but also enshrines the legal statuses of the parliament and the cabinet as “the ultimate legislative and

executive authorities uniting the Armenian nation²⁴³”. For the first time in the Armenian reality the separation of powers was regulated by the law. A number of subsequently enacted laws were also of constitutional nature, such as: “On the introduction of trial by jury in the territory of the Republic of Armenia” of July 12, 1918; “On state language” and “On elections to the Parliament of the Republic of Armenia” of January 26, 1918; “On extraordinary courts and their jurisdiction” of May 20, 1919; “On the four provinces of the current territory” of May 25, 1920; “On temporary suspension of independence of judicial office” of May 30, 1920; “On transferring certain ministerial functions to provincial autonomies” of June 5, 1920; “On Citizenship” of June 7, 1920; “On crimes by officials” of October 21, 1920; “On transferring the functions of the High Military Tribunal to the Senate of Armenia” of October 26, 1920, and several other laws. Acknowledging a certain departure from democratic principles in some of those laws, there were also provisions therein which still retain our attention today. An example may be the law on the holidays, enacted on February 7, 1919, which, alongside general holidays, also recognized the specific holidays of ethnic minorities²⁴⁴. The challenges of the time were reflected in the program of the cabinet of H. Kajaznoui, the first Prime Minister. They required to overcome the danger of famine and epidemics in the shortest time possible; to create minimal living conditions for 3000,000 refugees; sort out sensitive issues with the minorities; create conditions for the country’s sustainable development, using all available internal and external possibilities. The analysis of more than 1,200 laws enacted in the years of the First Republic indicates that their predominant majority pertains to either the powers of the government or the resolution of pressing challenges. This was firstly determined by the critical situation in the country (as an example, here is the agenda of the morning session of the Armenian Council on September 10, 1918:

²⁴⁰ See Վաղարշյան Ա.Գ. Հայաստանի սահմանադրական զարգացման որոշ հիմնահարցեր, Երևան, 2003

²⁴¹ Ibid, p. 13

²⁴² A similar attempt was made in the early 1920s, when the minister of justice A. Chilingarian initiated the process of drafting a Constitution, which was left unfinished.

²⁴³ See Հայաստանի Հանրապետության պառլամենտի օրենքները (1918-1920 թթ.), Երևան, 1998, p. 212

²⁴⁴ See Հայաստանի խորհրդի հաստատած օրենքները, 1918-1919թթ., մաս 1, Երևան, 1919, p. 48

1. Weekly report of the medical-sanitary commission; 2. Weekly report of the provisions commission; 3. Weekly report of the refugee commission; 4. Bill by the education commission on the organization of school administrations; 5. Current issues). Secondly, under the imperative of the time, the legislature had in theory delegated its powers to the executive for lengthy periods of time (The Armenian Council for one month, starting from April 27, 1919, and once again from June 5 to August 1, 1919; and the Parliament, elected by a proportional system and operating since August 1, 1919 - from May 5, 1920 until the fall of the First Republic). Thirdly, attempts were also made to fill the legislative gaps through replication. For example, the session of the legislature on December 6, 1918, upon the motion of its legislative commission, enacted a law, which stipulated: "Russian laws shall be effective in the Republic of Armenia, with the amendments adopted by the Russian Provisional Government, the Transcaucasian Seim and Commissariat, and the Armenian Parliament²⁴⁵".

Alongside assigning high importance to situational issues, in terms of the country's legal and political orientation the Armenian Parliament acknowledged, in particular, in its grand session on January 25, 1920: "The Armenian democracy is an equal member of the global family of free democracies. Armenia shall be truly free and democratic, and all nations living within its borders shall enjoy equal rights²⁴⁶". Nevertheless, several of its laws, as we have already mentioned, contained deviations from this principle. In the context of the subject material of our study the most characteristic feature of the period is that constitutional culture was rather expressed not so much through legal acts, as in the supervisory role of the parliament, its practical daily work and the legal principles it was based on. At the same time A. Vagharshian is quite right, stating that Armenia, being a parliamentary republic, nev-

²⁴⁵ See Հայաստանի խորհրդարանի արձանագրությունները, 1918թ. (ՀՀ ՄԳ գրադարան), p. 169

²⁴⁶ See Հայաստանի խորհրդարանի արձանագրությունները, 1920թ. (ՀՀ ՄԳ գրադարան), p. 48

ertheless adhered to the principle of the "responsible government²⁴⁷". It would also be appropriate to recall S. Vratsian's reading of the time: "Of course, had we had today's mentality and experience, we probably would not have done many things the way we did back then. But every historical phenomenon must be regarded and judged in the substantive and subjective context of its time. The worst history is that which is made in hindsight by belated prophets²⁴⁸". We deal with a completely different reality after the establishment of Soviet rule in Armenia, departing diametrically from the logic of development of the constitutional mind through the preceding millennia. Without aspiring to offer a systemic analysis of constitutional developments in Soviet Armenia²⁴⁹, we consider it necessary to stress that:

1. its ideological contradictions and twists notwithstanding, the Soviet period created a new opportunity for the revival of the Armenian nation, something not determined by having or not having a Constitution, but rather by relative systemic stability, a certain slackening of exogenous threats to survival, the possibility to enjoy conditions for peaceful work;
2. in the absence, for centuries on end, of a nation-state constitutional rules, enacted by national ecclesiastical councils through canonical constitutions, were the reality. And, although there was no state to speak of, the national Constitution, in a certain sense, existed and remained in effect. Whereas in the Soviet period another reality took shape: there existed a written Constitution, which nonetheless had little to do with real life, while customary law and tradition prevailed in interpersonal relations;

²⁴⁷ See Վաղարշյան Ա.Գ. Հայաստանի սահմանադրական զարգացման որոշ հիմնահարցեր, Երևան, 2003, p. 30

²⁴⁸ See Վրացյան Ս., «Հին թղթեր նոր պատմության համար», Բեյրութ, 1962, p. 15

²⁴⁹ This pertains to the Constitutions of Soviet Armenia of 1922, 1937 and 1978, as well as the processes that unfolded on their bases, which, in their essence, were identical throughout the Soviet Union in their legal, philosophical and ideological content.

3. constitutional norms and principles, apart from being merely declaratory in nature, were politicized to such an extent, that their regulatory role was substantially eroded;
4. constitutional developments of the preceding centuries were anchored to the principles of the rule of law, recognition and constitutional safeguards of man's natural (divine) rights, whereas the Soviet constitutional order was based on absolutisation of the role of state authority and the mono-party political arrangement, while human rights appeared merely as an indulgence granted by the state;
5. detached from social practice, the Constitution lost its mission of holding the authorities in reign, and it could no longer appear as a vehicle for and expression of social accord.

As for the condition and nature of general legal relations in the Soviet context, we separated several generalizations about it:

1. many countries within that territory had not gone through the process of development of market economy relations, something that took more than two hundred years in Europe. Most of them moved from the feudal system to 'socialism;'
2. property relations that came forth were of a completely different nature. In conditions of predominant state ownership of instruments of production, people became alienated from the state and turned, from its subjects, to being objects of the exercise of power.²⁵⁰ The true owners of all property were not the people or even the state, but the authorities. The law therefore

²⁵⁰ The legal and philosophical mind has proven long ago that the development of democracy in Europe and North America is organically linked to private property and the establishment of market relations. See, in particular: Страшун Б. Перспективы демократии и конституционное правосудие // Альманах - Конституционное правосудие в новом тысячелетии. Ереван, 2002, էջ 217.

was called upon to protect not the people and their property, but the authorities,²⁵¹

3. the cumulative legal thinking of many centuries was replaced by distorted dogmatic legist-positivist legal mindset, based on atheistic perception of the world;
4. under the one-party system the absolute will of political power became the only source of law. The party's supreme organ, possessing unlimited and unhinged power, became the true norm-setting body.²⁵²

Quite naturally, over the course of decades the mindset of legism, in its politicized and garbled forms, became deeply ingrained not only throughout the former USSR, but also in Eastern Europe.²⁵³ And this became a serious cause of systemic legal distortions also in the post Soviet period.

Following the collapse of the Soviet Union, certain features determined by the realities of the transformation period also became a serious factor. Throughout the history of mankind systemic changes in the society were usually compared to earthquakes, referring to a mainly sudden emergence of a qualitatively new situation characterized by inconclusiveness, unruliness, disintegration or absence of institutional systems,

²⁵¹ Many scholars are quite right to maintain that in these circumstances the law and the power converge and become identical, the law is interpreted as an expression of legalized power. See: Четвернин В. Российская Конституция: концепция правопонимания // Конституционное право: Восточноевропейское обозрение, вып. 4, 2003, էջ 28.

²⁵² In practice a single body has centralized the functions of both political and economic governance, and the resulting uber-centralized corporate system reproduced itself under the dictate of the authorities' interest, making ever deeper the contradiction between the interests of the society and those of the authorities. It is not incidental that this kind of a system is described as totalitarian socialism in literature. See, in particular, Чиркин В.Е. Общечеловеческие ценности и современное государство // Государство и право, 2002, N2, էջեր 5-13.

²⁵³ V. S. Nercissian is quite right instating that, their external differences notwithstanding, soviet legal concepts possess profound internal unity "in the sense of rejecting the law, its objective nature and meaning." Մերսիսյան Վ.Ս., Իրավագիտություն, Երևան, 2002, էջ 220.

confusion of values and approaches, unpredictable twists in the situation, neediness and extreme social tension, etc. This amounts to social stress across the board, the first stage typically being that of shock, followed by anxiety and indecisiveness, which, once overcome, yield to stability and development. Almost all the post-communist countries surrendered to this situation, but it was most pronounced in the former USSR constituents. The latter experienced a double collapse: first, of the system of social relations and, second, of the structures of state. If the first implied a transition to market economy relations and the advancement of social relations characteristic of a democratic, rule of law (also social, in some countries) state based on the principle of the separation of powers; the second compelled urgent measures to be taken in order to graduate from a part to a whole, build one's own state machinery, overcome a broad range of hazards. Solutions to these problems asked for the entire arsenal of crisis management tools to make the transition manageable, mitigate the inescapable detrimental effects of systemic change, overcome the political, economic, psychological and general value system indeterminations, clarify the new rules of cohabitation, establish new structures to replace those in ruin, and address a multitude of other importunate issues. An extreme concentration of effort was required to maintain the momentum of being, and find new bearings in time and space. That which was common to all newly independent countries was multiplied in Armenia by the earthquake, the war, the blockade, nonviable economy, and the new geopolitical realities.

In a situation like this crisis management approaches come to the forefront (something that also characterized the First Armenian Republic), proposing a twofold solution to the problem. First, one needs to prevent chaos and, minimizing the losses, come out of the situation in an organized and managed manner. Second, it is necessary to clarify the priorities in the shortest possible time, prepare the state machinery for operating in the regime of functional management, and put in place the legislative and institutional framework that is appropriate for the new relations. The solution to these problems in the former communist

states of Europe was peculiar because, on the one hand, they had clearer understanding of what was needed to be done and of their own future, since their collective memory was not yet purged of the values that had to be restored, and there still existed many bearers thereof. On the other hand, there existed holistic systems of nation-states, economies based on relatively independent structures, larger opportunities for integration into progressive European systems of values, and a more favorable geopolitical environment. Whereas for the republics of the USSR not only the factor of previous momentum played a greater role, along with the impact of fundamental problems that had been covered up for decades and surfaced anew, but also the room for independent maneuver was much narrower. This was determined, on the one hand, by the fact that economic links and their impact are relatively independent from political processes and there is a certain time lag between them. And, on the other, a mismatch of interests had emerged since the new solutions and the way to get there were not altogether clear yet. The newly independent Republic of Armenia took the first steps by attempting to lay solid and stable foundations for the legal system of a nation-state. The first document in this spirit was the Declaration of Armenia's Independence, adopted on August 23, 1990 by the Supreme Soviet of the Republic of Armenia. To draft the Declaration and consolidate various proposals an ad-hoc parliamentary commission was created. The nature of the latter's work, as well as the procedure for discussing various drafts, was largely similar to the practice of Armenian constitutional conventions, first and foremost in assuring the atmosphere of public accord.²⁵⁴ It is therefore quite justified that the Declaration was adopted with great enthusiasm. In its substance, the Declaration of Independence brought a qualitatively new page in the history of Armenian constitutional culture. It represented the systemic sum of fundamental, consistently systematized norms and principles, which contained profound generalizations of the logic of

²⁵⁴ As a member of the Parliament who had submitted an individual draft, as a member of the drafting commission of the Declaration, I can state without hesitation that the Declaration of Armenia's Independence is an unprecedented attestation to national consensus.

history, considered the priorities of national identity, and was entrenched in the logic of international constitutional and legal developments. It will never lose its historic and practical legal significance. We consider it necessary to dwell at greater length on several individual provisions of the Declaration. It is as “the expression of the unified will of the Armenian people.” Putting acclaimed norms and principles of international law in the foundation of independent statehood, pursuing the objective of “creating a democratic, lawful social order,” it was proclaimed: “The bearer of Armenian statehood is the people of the Republic of Armenia, which exercises its power directly and through representative bodies, on the basis of the Constitution and laws of the Republic of Armenia.”

In constitutional and legal terms, exceptional importance is attached to the Declaration’s approaches to the status of citizenship, the principle of non-discrimination, freedom of speech, press and conscience, political freedoms, the country’s sovereignty, it being the subject of international law, constitutional bases of economic, social, cultural relations, and several other fundamental issues. They set the principal bearing for new constitutional developments. The Declaration committed to assure, in the Republic of Armenia, “the separation of the legislative, executive and judicial branches of government,” thus laying the foundation for a qualitatively new legal system, which was to become the safeguard for the implementation of the Declaration’s goals.

The Declaration of Independence is not only characterized by adherence to national origins, but also by its strong intrinsic completeness and complementary nature of its norms and principles, alignment with progressive legal solutions and international trends of constitutional development. Prior to the adoption of the Constitution of the Republic of Armenia, the norms of the Declaration were further expanded upon in the Constitutional Law of the Republic of Armenia on fundamental provisions of independent statehood, enacted by the Supreme Soviet on September 25, 1991 (nullified by Article 116 of the Constitution of the Republic of Armenia). This Constitutional Law enshrined the constitutional order of the Republic of Armenia as an independent democratic state: the power

of the people, separation of powers among the branches of government, equality of people before the law, non-discrimination, recognition and protection of rights and freedoms were acknowledged as the basis of social relations. Another important constitutional principle was enshrined: the bodies of public administration could only exercise the powers reserved to them by law. Article 5 of this law stated: “The President of the Republic of Armenia is the highest public official of the Republic of Armenia and the head of the executive power; he shall represent the Republic of Armenia in the country and in international relations.” In practice this constitutional law laid the foundations for the formation of a new system of public administration and became the safeguard for dismantling the uniform pyramid of power built by Soviet laws, with the Supreme Soviet at the tip, allowing separation of the legislative, executive and judicial branches of government. The years that followed, until the adoption of new constitutions, were spent, whether in Armenia or in many other newly independent states, on sporadic reforms and relative stabilization of the situation. The legislative framework for transforming social relations was significantly strengthened, the institutions of state governance were mostly put in place, economic independence acquired a new quality, particularly thanks to the introduction of national currency and the rooting of independent financial and banking transactions, active international relations took shape, which also set the vector for economic reforms. This stage possessed its own internal reefs and hazards. For Armenia, this was determined not only by the ancillary consequences of the war in Karabakh. Legislative lacunas, imperfection of institutions, errors in governance and obtuse solutions to some issues created fertile ground in the society for the emergence and deepening of numerous negative deviations and value system distortions, which became deeply rooted in a very short span of time. On July 5, 1995, the Constitution of the Republic of Armenia was adopted through a national referendum. This was preceded by four years of heated discussions on a number of issues of principal importance, such as the form of governance, the separation of powers and their respective competences, the foundations of constitu-

tional order, and human rights. Although the new Constitution was not accompanied by the same atmosphere of public accord that surrounded the Declaration of Independence, and it failed to overcome the Soviet inertia of legism in lawmaking, life, nevertheless, demonstrated that the Constitution of the Republic of Armenia played a decisive role in assuring the country's subsequent sustainable development, as well as finding constitutional solutions in a number critical situations. The preamble to the Constitution stated: "The Armenian people, recognizing as a basis the fundamental principles of Armenian statehood and the national aspirations enshrined in the Declaration of Independence of Armenia, having fulfilled the sacred message of its freedom-loving ancestors for the restoration of the sovereign state, committed to the strengthening and prosperity of the fatherland, in order to ensure the freedom, general well being and civil solidarity of future generations, affirming their faithfulness to universal values, hereby adopts the Constitution of the Republic of Armenia." International constitutional practice has varying approaches to the legal effect of constitutional preambles. We strongly believe that the norm-objectives engrained in the preamble to the Constitution represent the baseline for regulatory legal norms and possess the ultimate legal effect characteristic of the Fundamental Law. Several provisions of the Constitution /with the amendments of 2005/, which are included in the foundations of constitutional order, merit special attention. These stipulate that: - The Republic of Armenia is a sovereign, democratic, social, rule of law state (Article 1). - In the Republic of Armenia power belongs to the people (Article 2). - A human being, his dignity, fundamental rights and freedoms are ultimate values. The state guarantees the protection of fundamental human and civil rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law. The state is restricted by fundamental human and civil rights and freedoms, which gave direct effect (Article 3). - The elections of the President, the National Assembly and local self-governing bodies of the Republic of Armenia, as well as referenda, are held based on the right to universal, equal and direct suffrage by secret ballot (Article

4). - State power shall be exercised in accordance with the Constitution and the laws based on the principle of the separation and balance of the legislative, executive and judicial powers (Article 5). - The Constitution has supreme juridical force, and its norms are direct effect (Article 6). - Ideological pluralism and the multiparty system are recognized in the Republic of Armenia (Article 7). - The right to property is recognized and protected in the Republic of Armenia. The freedom of economic activity and free economic competition are guaranteed in the Republic of Armenia (Article 8). - The foreign policy of the Republic of Armenia shall be conducted in accordance with the principles and norms of international law, with the aim of establishing good neighborly and mutually beneficial relations with all states (Article 9).

We shall reflect on these and several other provisions of the Constitution later in this text. At this point we would like to draw attention to the following circumstances:

1. Based on the criteria of constitutional studies, as well as the problems and priorities in our country's development, one should consider the provisions quoted above a great accomplishment, with a specific importance attached to the unalterable first and second articles, as well as the legal philosophy of articles 3 through 5.
2. After the Second World War the pivotal value of European constitutional developments is that most of Western and Eastern European countries, during the new waves of reforms in the 50s and the 90s, based their constitutional solutions on several important principles, such as: - human dignity and rights are ultimate and inalienable; - these rights have direct effect; - the main criterion for restricting these rights is guaranteeing the rights of others; - the separation and balance of powers shall be ensured through a dynamic equilibrium in the function-institution-competence axis; - guaranteeing the supremacy of the Constitution is the main requirement for ensuring constitutionalism and establishing constitutional democracy in a country. These principles were enshrined in the Constitution of the Republic of

Armenia with the necessary clarity, depth and conceptual consistency in the result of the constitutional amendments of 2005.

3. Subsequent developments proved that the initial slant towards positivist legal approaches did not create the necessary constitutional safeguards to assure the rule of law and consistently apply the principle of the separation of powers.

L. Reznichenko has a remarkable observation, according to which many newly independent states were also characterized by the expressions of the so-called “negative constitutionalism,” which implied that the primary purpose of adopting a constitution was to overcome the negative charge, to prevent the resurgence of tyranny, which is why the constitutions of those countries emphasized the proclamation of human rights and the judicial oversight there of, ascribing secondary importance to guaranteeing true separation of powers. Another essential characteristic is that in newly independent states fundamental constitutional issues were excessively politicized. This has resulted in distorted perception of many constitutional values in such countries. The party (communist) dictatorship was replaced by the dictate of the majority, while common people remained as disenfranchised as before.²⁵⁵ All the above was characteristic for the countries in transition that were taking their first steps in clarifying the system of constitutional values, determining their concepts on political organization of a state, crystallizing new constitutional doctrines. One may still encounter resurgent expressions of the momentum of those phenomena.

It’s necessary also to state that from the aspect of the foundations of constitutional order of the Constitution 2015 constitutional amendments didn’t have fundamental nature, but partial clarifications were made based on recent developments of the science of constitutional law to make the system of axiological characteristics, norm-goals and norm-principles more complete. The evidence of this are, particularly, the following provisions:

²⁵⁵ Резниченко Л. Права человека и конституционное право (Обзор материалов журнала “Конституционное право: восточноевропейское обозрение”), <http://www.hrighs.ru/text/b9/Chapter4.htm>.

- The Republic of Armenia is a sovereign, democratic, and social state governed by the rule of law /Article 1/.

- In the Republic of Armenia, the power belongs to the people.

The people shall exercise its power through free elections, referenda, as well as through state and local self-government bodies and officials prescribed by the Constitution.

Usurpation of the power by any organization or individual shall be a crime /Article 2/.

- The human being shall be the supreme value in the Republic of Armenia. The inalienable dignity of the human being shall be the integral basis of his rights and freedoms /Article 3/.

- The protection and the respect for the fundamental rights and freedoms of the human being and the citizen shall be the duty of the public power /Article 3/.

- The public power shall be bound by fundamental rights and freedoms of the human being and the citizen as the directly applicable law /Article 3/.

- State power shall be exercised in accordance with the Constitution and the laws, based on the separation and balance of the legislative, executive, and judicial powers /Article 4/.

- The Constitution shall have supreme legal force /Article 5/.

- Laws shall conform to constitutional laws and sub-legislative legal acts shall conform to constitutional laws and laws /Article 5/.

- If a ratified international treaty provides norms that differ from those provided by laws, then the treaty norms shall be applied /Article 5/.

- State and local self-government bodies and officials shall have the power to perform only such acts for which they are empowered by the Constitution or laws /Article 6/.

- Elections of the National Assembly, and community councils, as well as referenda shall be held based on universal, equal, free and direct suffrage, by secret vote /Article 7/.

- All the types of property are recognized and equally protected in the Republic of Armenia /Article 10/, etc.

From the viewpoint of systemic completeness of constitutional culture the system of governance that a country has selected is not so important: whether it is presidential, semi-presidential or parliamentary. It is, however, very important, whatever the form, for fundamental constitutional principles to be consistently applied, intra-constitutional contradictions and gridlocks to be excluded, and for the Constitution to become a dynamic organic whole. The constitutional developments in newly independent Armenia shall, perhaps, become a subject of a separate, more in-depth study. Nevertheless, one should derive serious lessons from the fact that transitional social systems of our, as well as a number of other countries, were impaired by certain constitutional legal distortions, which were determined by the following three groups of factors:

1. the inertia of legal thinking and implementation practice;
2. distorted or incomplete constitutional and legal solutions;
3. mechanical borrowing or replication of progressive legal values, without the creation of the value systems and prerequisites necessary for their implementation; taking no account of national constitutional culture; which, in real life, resulted in a whole range of distortions in basic constitutional principles and such solutions being detached from real life and deprived of viability. In such circumstances, we encounter not the rooting of democracy, but an "experiment in democracy," which is doomed to fail from the beginning.

Unfortunately, in several countries with transitional societies the systemic collapse has not yet lead to a change in the mentality. The inertia of the mindset and weltanschauung is tremendous, distorted positivism continues to rule the legal scene, which often is incarnate in salient expressions of legism. Turning the notion of the rule of law state into a motto on a conceptual level, no serious perception emerges of the need for guaranteeing the supremacy of law, restricting government by the rights, constitutionalization of social relations. Ideas on government

remain on the plain of the use of force and exercising pressure. Democracy is viewed as a favor by those in power, a possibility for the people to express themselves within the limits granted to them by the authorities. This is not the way to proceed towards transforming Europe, this rolls back to regressive medieval values.²⁵⁶ At the 59th Plenary Session (July 17-19, 2004) of the European Commission for Democracy through Law (the Venice Commission) the representative of the Parliamentary Assembly of the CoE stated, quite to the point, that: "the biggest issue in the countries of transition is that they fail to discern the difference between "the rule of law" and the 'supremacy of the law." Without guaranteeing the "rule of law" authorities in any country, even formed by most democratic principles, shall proceed towards the establishment of dictatorship."

It would be difficult to disagree with this statement. Let us add, though, that international practice acknowledges three different ways for the establishment of democracy: 1) evolutionary development (typical for the most of European countries); 2) transition through chaos and anarchy (a number of countries in the post-communist area); and 3) transition through establishment of dictatorship (Portugal, Spain and Chile are classical examples). The problem is that each has a price and takes its time. In countries that choose the 2nd and 3rd options the people always pay the highest price, often without reaching the desired outcome. Today's Europe adamantly rejects those ways. The main approach is that democracy may be attained only upon lawful bases. Wherever the law is violated, democratic slogans are merely instruments for the establishment of dictatorship. The transitional systems are characterized by the fact that soviet mentality often finds fertile soil

²⁵⁶ For a transition state the creation of democratic infrastructure is not yet sufficient, since they are often put in place deformed. It is more important to have the necessary civil qualities rooted and to transform the mentality. Failing that democracy may turn from being an important value, a prerequisite for the full enjoyment of human rights and freedoms into an instrument in the hands of the authorities for suppressing those rights and freedoms. On this see, in particular, Ежи Мачкув. Демократия и авторитаризм в посткоммунистических трансформационных системах // Конституционное право: Восточноевропейское обозрение. 2003, N2, էջեր 2-7.

for reproduction. This is largely determined by what it is exactly that the authorities strive to achieve. If the goal is assuring the rule of law, then inertia may easily be overcome. If the goal is to impose the will of the authorities, the soviet legal institutes have no match in achieving this. The specifics and complexity of the situation is in that we deal here not only with inertia that is deeply rooted, but also in the fact that the systemic collapse had led to the need for re-distribution of wealth, which in turn lead to additional new phenomena. On the one hand, the establishment of private property objectively leads to the need for democracy, on the other the soviet system, which was mainly geared to protect the state and its property, had lost its object and, having preserved its main features and institutional system, became an instrument in the hands of the authorities that re-distribute property.²⁵⁷ This situation was the greatest brake on democratic developments.²⁵⁸ The primary prerequisite for overcoming it was access to European legal standards, an understanding of the fact that the law is not a monopoly of the authorities; it belongs to everyone regardless of his or her association with the authorities or the lack thereof. Academician V. Nersisyan, writes: "As the entire history of civilization has proven, the freedom of men may only be recognized and expressed in a lawful way: through formally acknowledging both individuals and the state, which are de facto disparate, as equal subjects of the law. The law, as an expression of formal equality, represents the universal equal measure of freedom and justice in social relations. In the social life of men, except for the legal way, there is no and there can possibly not be another way for the expression or the existence of equality, freedom and justice. In the history of mankind the law is the math-

²⁵⁷ It would be appropriate here to recall the statement by Aristotle: "The law cannot turn violence into law present power as the source of law."

²⁵⁸ As rightfully mentioned by A. Salmin, the fundamental issue of the real existence of modern democracy is in the relations between state authority, the bureaucracy, civil society and politics. See: Салмин А. Современная демократия. М., 1997. С. 270.

ematics of freedom..."²⁵⁹ So long as citizens of a state fail to appear in social interaction as individuals endowed with full legal capacity, they will be practically disenfranchised, and there can not be any meaningful discourse on liberalism, rule-of-law state, or supremacy of the law, while all statements about civil society shall remain empty shells.²⁶⁰ Neither is there any future in shifting the emphasis to a legal revolution through "importing" democracy, without putting in place the respective system of values and prerequisites for the latter. The only possible outcome in this case would be botched replication. The problem should be addressed not on the level of mentality or political awareness, but through overcoming semantic distortions. Therefore the shortest way for the establishment of a lawful, democratic state is not the futile attempt to leapfrog over the centuries, neither it is turning certain values and principles, based on their purely conceptual perception, into paper mottoes or a means to cover up reality, but rather the recognition of European civil society values within the framework of one's own system of values and national constitutional culture; consistently and with full determination making them the meaningful assets of the members of the public. This should be the priority programmatic objective of the policies and undertakings of a newly independent state. The constitutional solutions, in turn, may only be constructed upon such values, containing an internal impetus to push the systemic development of the society in a particular direction, and to be perceived by it. International practice indicates that any country attempting to emphasize mechanical replication of constitutional solutions is bound to encounter serious problems. We would like once again to stress that a constitution represents a particular system of values characteristic of the social community in question, with its concrete specifics, problems, and approaches for their solution. It does not spell absolutization or

²⁵⁹ See Արսեսյան Վ. Ս., Ցիվիլիզացիոն մանիֆեստը, Երևան, 2001, էջ 21.

²⁶⁰ The materials of a round table on these issues, organized by two authoritative Russian magazines, deserve attention. See: "Круглый стол" журналов "Государство и право" и "Вопросы философии" // Государство и право, 2002, N1, էջեր 12-50.

ossification. Ignoring general principles, international best practices, requirements of international law, international case law and international constitutional culture would be impossible. What matters is to try and, instead of mechanical replication, harmonize all the above with one's own system of values, assuring systemic progress. As Professor V. Osyatkin rightfully mentions, borrowing is inevitable, since there exist universal constitutional principles and mechanisms, which have been known way back in time, they are universally acknowledged and appear as the so-called standards or norms and principles of international law.²⁶¹ Professor Cheryl Saunders, President of the International Association of Constitutional Law, underscoring the linguistic and substantive similarities in the constitutions of various countries, stresses that an examination of the history of their creation proves that they all are ancillary to each other, with the exception, perhaps, of the archetypal constitutional systems of the United Kingdom, USA and France.²⁶² The first to be borrowed, of course, are the constitutional notions and general principles. Nevertheless, the ultimate goal is for these to be in harmony with the system of values of the society where they become constitutional norms and principles. Failing that they will remain on paper and will not enter life, become a living reality. Moreover, by contravening with the value system of the reality, they may morph from stimuli for progressive transformation into catalysts for profound social contradictions or instruments of compulsion in the hands of the authorities. Often fundamental constitutional principles and provisions are borrowed in a distorted way, to fit local conditions and perceptions. Therefore, the understanding and perception of fundamental constitutional principles should come in the context of international legal criteria, only then followed by a profound study of approaches that various countries have used to solve concrete constitutional problems looming before them, assuring their countries' sustainable development. In

²⁶¹ See Осятыньский В., Парадоксы конституционного заимствования // Сравнительное конституционное обозрение. 2004, N 3, т. 53.

²⁶² Ch. A. Saunders Constitutional Culture in Transition // Constitutional Cultures / Ed. by M. Wyrzykowski. Warsaw: ISP, 2000. P. 37.

this respect the study of international practice of constitutional amendments in various countries is of utmost importance. For example, it follows from the constitutional amendments and constitutional laws of several last decades in Austria, the USA, Belgium, Germany, Denmark, Spain, Italy, Greece, Portugal, France, Finland, Slovakia and a number of other countries, as well as from the study of the constitutions of a number of other countries of Eastern Europe and the former USSR (Poland, Slovenia, Czech Republic, Bulgaria, Russian Federation, Lithuania, Estonia, Georgia, Kyrgyzstan, etc), that there exist a number of stable and universal trends for the formation of constitutional culture:

1. the axis of social-administrative relations becomes the human being, with his or her inalienable dignity and rights. The latter are constitutionally enshrined and declared as directly applicable rights, restricting the exercise of power by the people and the authorities, acquire reliable guarantees for domestic and international protection, act as main criteria for the evaluation. In the value system of human community, the principle of rule of law becomes dominant. The main criterion for the establishment of civil society in this case is not the restriction of the law by power, but of power by the law,
2. democratic values become the foundation for the constitutional order and the safeguard for human rights, a general trend is observed of gradually restricting central authorities, of decentralization of power (political, administrative, economic), expanding room for possibilities of self-governance and strengthening guarantees,
3. Consistent implementation of the principle of the separation of powers, ensuring their functional balance, reasonable checks and balances on power become a universal requirement. The developments in representative democracy ascribe special importance to the improvement of political structures in the society and the protection of political rights of individuals. The issue of ensuring the independence of the judiciary, its systemic

integrity and completeness, as well as its viability comes to the forefront. Local self-governance, as a specific form of democratic autonomy, becomes especially important,

4. guarantees of stability within the Constitution get stronger, a potent legal system is entrenched for identification, evaluation and restoration of disruptions in the constitutional guarantees of human rights and in the constitutional balance of powers, the constitutional order acquires a most viable “immune system”, the right to constitutional justice becomes especially important among human rights,
5. solutions to the problems of assuring the “immune sufficiency” of the social organism are sought within the constitutional framework, and in its turn, every modification of national constitutions receive broad international resonance,
6. an increasingly greater place and role is given to international law within the national legal systems. A noticeable trend appears of using identical basic constitutional notions. Harmonization takes place in the selection of approaches to the criteria for the separation of powers and restriction of human rights. At the same time attempts are made to seek “conciliation” between national specifics and supra-national approaches.

Alongside the general trends mentioned above, issues of developing institutions that perform the functions of the branches of government, clarifying their functional roles and assigning them sufficient competences also acquire great importance. On the other hand, the interaction of authorities gets increasingly anchored to the principle of partnership and solutions that assure a dynamic equilibrium. Considering the exceptional role of the stability of government in transitional societies, one may unfailingly acknowledge that the general trends listed above are extremely pertinent in the context of the creation of conceptual approaches to constitutional reforms and the prerequisites for ensuring the supremacy of the Constitution in the countries of transition. The problem, though, is in the need for these

solutions to be in harmony with the system of values of the society in question, becoming the product of social consensus, rather than that of social coercion.

This problem may only be effectively resolved when the country’s development priorities and the underlying system of values are clarified through public agreement; when conceptual approaches towards projects to advance social progress based on above priorities become definite. This is especially necessary for the social systems in transition, where indefiniteness and confusion in the system of values prevail. This circumstance requires an extremely serious approach to the Constitution’s norm-objectives and norm-principles. These, apart from being in tune with international constitutional achievements, should add programmatic nature to the formation and development of the entire legal system, be consistently implemented in the norms of material law, become clear road signs for the establishment of the rule of law state and civil society. It is not at all incidental that in many countries the first section or chapter of the Constitution is entitled “Foundations of Constitutional Order.” This is where all fundamental principles are laid out, which constitute the fundamentals of the constitutional order of a country and are the baseline for all other sections and the regulation of legal relations of any other nature. Even in cases when intra-constitutional inconsistencies or contradictions emerge, there is no doubt that the constitutional norm-principles prevail. This principle is clearly enshrined in the constitutions of many countries. For example, Article 16 of the Constitution of the Russian Federation unambiguously states that no other provision of the Constitution may contradict the Foundations of Constitutional order of the Russian Federation. There is particular attention paid to this circumstance in Article 68 of the Law of the Republic of Armenia “On the Constitutional Court,” which provides that, in assessing the constitutionality of normative acts the constitutional court shall, among other factors, consider the protection of human and civil rights enshrined by the Constitution; the grounds for and the framework of their permissible restriction; as well as the constitutional principle of the separation of

powers, the acceptable limits on the powers of state bodies and officials; the need to ensure the direct effect of the Constitution.

The above stated accents are especially important for our reality, because the textual constitutional developments and the constitutional legal thinking are not harmonized which is extremely dangerous for ensuring the steady development of the state.

3.3. CONTEMPORARY PERCEPTIONS OF PIVOTAL VALUES OF THE CONSTITUTION OF THE RULE-OF-LAW, DEMOCRATIC STATES

One of the axial issues of constitutional developments and establishment of constitutionalism is the appropriate value system perception, interpretation and consistent implementation in social practice of the fundamental principles laid out by the Fundamental Law. This first and foremost pertains to the democratic, lawful, social character of the state, the principles of democracy, the rule of law, and the separation of powers, which are currently of baseline significance for constitutional regulation of social relations. The constitutional and legal perception and interpretation of the above notions acquire principal importance; they have to emanate from the current logics of international constitutional developments and acquire equivalent materialization in concrete legislative and Constitutional norms. Attaching importance to the conceptual apparatus of constitutions, we would like to firstly underline that the philosophical essence of any concept is to reflect the properties of a phenomenon (the object of examination), each one of which is necessary, and all together - sufficient, for the phenomenon in question (the object) to be discerned, identified as a qualitative whole. A conceptual generalization of the highest degree becomes a category, the broadest and most comprehensive abstraction in characterizing the phenomenon in question. With respect to the object of our study it expresses the collective essence, quality, and nature of objectively existing relations. Regardless of the degree of our cognizance, these

relations, given the presence of necessary preconditions, do exist, emerge or operate. The extent to which we recognize, model and meaningfully formulate these, contains an answer to the question of what our cognizance, freedom of action and the possibility to affect objective processes are like. Departing from the given level of cognizance and regulation of relations, it may be accepted by the public as a binding rule of behaviour²⁶³. In other words, a legal norm is the characteristic of regulated, particularly defined state of social relations. Moreover, since these relations exist in dynamics, a legal norm can not simply appear as a registration of fact, as it expresses cognizance, a format or principle of approach, indicates a vector of motion or a destination, records the nature of behavior in a shifting situation, according to which the qualities of constitutional culture are expressed. In performing a systemic analysis of current constitutional culture the views, first and foremost, about axial constitutional concepts are of preponderant importance. Let us reflect on some of these.

The constitutional concept of "democracy, "as a descriptor of social relations and modus of governance, is perceived and interpreted in a variety of completely differing ways, often even transforming into groundless demagogy and judgmental attitudes (the issue at stake is not only understanding the essence, but also maintaining the right measure). Democracy is one of the greatest accomplishments of civilization, it signifies the emergence of civil society, where every individual acquires value as a rational being, as a social subject, as an equal member of the public²⁶⁴, where relations are clarified and regulated, where

²⁶³ We do not refer here to traditions or the rules of ethical behavior. The reference is to the plain of legal relations.

²⁶⁴ It would be appropriate here to remember that currently in the countries with progressive democratic social relations, which have attained great achievements of civilization, particularly in Japan, only a select few could enjoy human rights or represented a social value until the 16th-17th centuries. The majority of the people had no right even to have names, they were known by their occupation. Notwithstanding this, already Plato had stipulated that a state should not be constructed for only a few to be happy, it should ensure the happiness of everybody (Платон. Государство/ Собр. Соч., т. 3, М. 1994, р. 189). It is of exceptional importance that neither Plato, nor later Aristotle, divided the state from the society, viewing them in inalienable unity.

order is well defined, as are the rules to maintain it, along with the framework of civil liberties and individual autonomy. Only that state shall become like this, in which the format, structure and operation of government answer the will of the people, correspond to the universally recognized human and civil rights and freedoms, where the people bear authority, exercising and controlling it at the same time, through their collective will and the right to self-governance, which is implemented based on the legal equality of all members of society. This should be enshrined in the Constitution and be guaranteed by the laws and the necessary structural systems shall be at place. What is of axial importance is for the power to be exercised by the people based on the principle of continuity, direct democracy, and control over the operation of representative bodies in conditions of feedback. The principal characteristics of such a state are: guaranteeing immediate democracy; genuine representative democracy (a situation when the people render legitimacy to exercise of power through elected institutions, control the latter and assure feedback channels); guaranteeing continuity of the exercise of power by the people; as well as guaranteed protection of the rights of human beings (as a social value) and citizens (as subjects of law in the social arrangement in question). It follows from the above that only a state may be considered democratic, if the society is constructed or is being constructed over relations regulated by legal laws, where there is guaranteed room for individual's natural expression and autonomy; and where every person, without alternative, represents social value as a public subject; where social progress is based on harmonization by the state of the interests of individuals, groups and the entire society. In a society like this human rights and freedoms are subject to restrictions only there and then where and when it is necessary for assuring others' rights and freedoms. This social system shall invariably be lawful, and the democratic values will enjoy safeguards for legal protection. The rule of law state is that where all activity is anchored to the law, the main goal of which is respect towards and guaranteed protection of human and civil rights.

The notion of *rechtsstaat* (rule of law state) is a product of the end of the 18th, beginning of the 19th centuries. The idea itself, however, had preceded it by far²⁶⁵. The theory of law assumes certain legal regulation of social relations, as well as a reliable and flawless operation of their implementation systems. Only in this case the subjects of law may be free. Only the recognition of objective social relations, legal regulation and knowledge thereof grants people the possibility and the prerequisites to act freely. The basic principle of a rule of law state is the harmonization of individual subjective rights with assuring objective prerequisites by the state for their implementation, the clarification of the limits on people's freedom and on state power. Another characteristic feature of a rule of law state is that the state should be responsible for the activities of its officials; a guaranteed system of liabilities and control over the exercise of rights should be put at place. The description of democratic, legal and social functions of the state may not be confined to a single norm or be viewed individually, as a separately expressed quality. These principal fundamental qualities shall permeate every molecule of regulation of social relations, be reflected in every step taken by the state, become an inalienable presence in the life of every member of the society. They should become the national mentality and axis of action. In other words, they shall be reflected in every norm of the Constitution and its implementation mechanisms.

The mandatory characteristics of a rule of law state are: the separation of powers; the lawfulness of government and the supremacy of law; independence of the judiciary; safeguards for the protection of human rights; the existence of a comprehensive and potent system of constitutional review, etc. The proclamation of a constitutional rule-of-law state first and foremost testifies to the nature of the state and the specifics of social relations, it is the expression of the specific features of state organization, the affirmation that the statute and the law are

²⁶⁵ Almost all countries that have constitutionally enshrined the principle of the separation of powers the Fundamental Law directly or indirectly define the legal nature of the state.

in the basis of relations within the society in question. For a state like this the objective is to submit to this principle the social behavior of the state and the society, to clarify for the individual the rules of behavior in civil society and the framework of his/her freedoms, and to ensure those freedoms.

It is incontestable that any country's constitution is first and foremost observed as the embodiment of public consensus over the rules of cohabitation. It is a representation of the entirety of the desires, approaches and methods, objectives, principles, and certain generalizations. For every state, the Constitution becomes a source of lawmaking, the principles enshrined therein are not merely recordings of facts, they are fundamental rules of behavior. These rules pertain not only to the authorities, but also to every subject of law representing the state, whether an individual, a citizen, or various combinations of the latter, becoming their social profile, the form and content of their self-expression. In a rule of law state the social community acquires a particular regulated representation, which is characterized as the social order, and an individual becomes the subject of law, his/her relations with other members of the society acquire the nature of legal relations regulated in a particular manner. Such a society must invariably have an institutional system that assures the continuity of oversight over constitutionally regulated legal relations, which plays the role of an original immune system of the social organism. The notion of 'social state' is a product of the end of the 19th, beginning of the 20th centuries. It testifies to the emergence of a new quality of the state, per which the state commits to care for the social protection of its citizenry. This quality is not typical for an extremely liberal rule-of-law state, where priority is assigned to production and market liberties. Although it does not follow from the above that no social issues are considered or resolved on state level in a liberal rule-of-law state. Furthermore, suggesting such an antithesis would be incorrect. The issue is that the constitutional endorsement of the

social nature of the state renders the entire social system a completely distinctive substance²⁶⁶.

A clear substantive interpretation of the term social becomes very important here. It is often used in combination with completely different notions (social environment, social structure, social psychology, social issue, etc). In practical relations, it is sometimes perceived as a specific sector related to services intended for people (education, health, science, sport, culture, etc), sometimes it refers to a social group or stratum, yet other times the implication is that of a human community brought together over a common interest, system of values, rules of existence, common objectives, etc. What is common to all these is that the emphasis is on various incarnations of relations between an individual, a group and the society; as well as the various plains of intersections of interests, stressing in every case that we deal with relations between the society made up of rational subjects and its constituent members²⁶⁷. Departing from various interpretations of the term social, the phrase social state is often understood to denote a state that assumes responsibility for the existence of the society (in this case social is perceived as public)²⁶⁸. Still the basic approach is that by referring to a social state one should understand a system of human cohabitation, where relations are mutually agreed upon, where there exists a reciprocal commitment to help the needy, to affect the re-distribution of public economic

²⁶⁶ One should not forget the fact that after the Second World War the entire mankind lived through a period of profound social transformation, caused not only by the overthrow of fascism, but also the collapse of colonialism and the emergence of new value systems of human cohabitation. The term "social state" under these circumstances should be considered not only as a pledge to assume simple duties to address certain social issues, but as an essentially new quality of social relations, the axis of which is the recognition of human dignity and constitutional assurance that the state will treat it in a new manner respectively.

²⁶⁷ Incidentally, there also exists an opinion that termite families or beehives may also be considered to be social communities, where the biological unit, the insect, ceases to reproduce or exist outside of the community. That is the irrefutable law of nature on the preservation and harmonious improvement of the species through reproduction also applies to the society.

²⁶⁸ Publishers И. Изензее, П. Кирххоф, Государственное право Германии., С.1, М., 1994, p. 64

benefits based on principles of fairness, which create guarantees of a dignified life for everyone. In our opinion, when a state constitutionally proclaims itself to be social, it not only pledges to harmonize the interests of individuals, their groups and the public, excluding their opposition and subjection to each other, but also undertakes measures to consistently implement all these. The recognition of the social function of a state and its constitutional formulation is more characteristic of nation-centric state systems and is, perhaps, the main guarantee for its harmonious development,²⁶⁹ assuring organic unity between the past, the present and the future. This is determined by the natural patterns of preserving the human kind and identity, of harmonious development. The ultimate expression of public humanism and the highest achievement in the progress of civilization is the formation of a social state, where the members of the society, based on the constitutional agreement, determine the objective of their advancement, clarify the relation between the purposes, preconditions and means. This represents a higher quality of social cohabitation. Only that state may be social, which has put in place a complete and potent system for guaranteeing the protection of human rights, where the entire system of state governance is anchored to the principle of harmonization of public interests. The social state implies higher degree of harmonization between the interests of an individual and the society, an individual and the state. It must be recognized, perceived and protected by every constituent of the society, it must become the binding rule of behavior: everything that is unlawful is not fair and has no place in the social state.

During various international discussions, an opinion is voiced that the principle of the social state is in intrinsic contradiction with the constitutional principles of the rule-of-law, democratic state. We refute these statements and believe that the problem here is in the perception of the notion ‘social state’ and its interpretation. What this constitutional principle assumes is not the assurance of socialist equality, but a social orienta-

²⁶⁹ One should state that even in the Middle Ages the Armenian social mind ascribed essential importance to the need to be guided by “Traditional National Law and Order” in implementing the goals pertaining to the society. See, in particular: «ԿԱՆՈՆԱԳԻՐՔ ՀԱՅՈՑ», հ. Ա., Երևան, 1964, էջ XV.

tion of the means of production in the society; the rooting, instead of the principle “production for the sake of production,” of the principle “production for the sake of social welfare.” This also implies that market economic relations are not the goal, but the means for attaining efficient economic activity along with desirable social outcomes. Therefore, we do not think it incidental that Article 3 of the Draft Constitution of the European Union, laying out the goals of the Union, also stresses that “The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive **social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment.” (our underscore - G. H.). Social market economy is the basis of the social state. This is the current general denominator of European developments.

In this context, the constitutional reforms adopted through the referendum of December 6, 2015 provided a new impulse for strengthening the principle of social state in the Republic of Armenia. It is of importance that Article 11 enshrined in the foundations of constitutional order of the Constitution stipulates that “The basis for the economic order in the Republic of Armenia shall be the social market economy...”.

Only that society is deemed to be truly civil, where the individual, rather than opposing the society with his interests, acquires the highest possibility for self-expression, in conditions of harmonization of the interests of the individual and the society.²⁷⁰

The social function of the state is often presented in opposition to the function of assuring the freedom of the members of the society, which, in our opinion, is not justified. Democratic freedom also assumes guaranteed social protection of a member of the society, which is one of the basic characteristics of the human community. What makes civil liberty different from natural freedom is exactly the fact that within society the activities of an individual should not lock into antagonism with the right to freedom for other members of civil society. Civil society

²⁷⁰ Семигин Г. Ю. Социальное партнерство в современном мире. М., Мысль, 1996, էջ 35.

must have a harmonious system for the free self expression of its members, which is impossible without guaranteed provision by the state of social protection to the members of the society. This in turn means that an individual within the society cannot possibly view himself/herself in isolation; the natural state of his/her existence is in interaction, interrelation with others, and also in being responsible for the present and the future of the society. Along with that, E. A. Lukashova, a Doctor of Law, is quite right when she stresses that today there exists a vacuum on the theoretical level as well and that there are no fundamental provisions on the relations between the citizen and the state in the post-soviet society²⁷¹. In a situation like this the state usually fails to clearly discern not only its future, but even its current obligations before a member of the society; whereas the citizen, in his turn, is in the dark about the opportunities for the state to meet his requirements, or the degree to which his needs and expectations may be justified or fair. Such a situation is a major and dangerous trigger for social discontent. Therefore, public policy priorities in a transition period should ascribe an exceptionally important place to the development and deployment of a system of relations between a citizen and the state that is clear and accessible for everyone. The axis is that in a social state every solution should focus on the human being, with his/her rights and freedoms recognized by the state, constitutionally enshrined, and enjoying the necessary guarantees of protection; accompanied by the obligations he/she has towards the society.

In our opinion, from among various basic characteristics of a social state it is necessary to single out the following:

- a) ensuring legislative guarantees for increasing social protection and well being of people;
- b) creation of necessary public and non-public institutional systems for social protection, assuring their orderly operation (this mainly refers to the system of social protection dealing with upset destinies: disability, sickness, loss of breadwinner, unemployment, insecure old age, etc., as well the existence of a viable system of social insurance, which addresses the social risk);
- c) securing the minimum sustenance level;
- d) guaranteeing conditions for the free development of an individual, unimpeded enjoyment of one's inclinations and religious confession, as well as for intellectual self-expression;
- e) assuring the irreversibility of application of the above principle;
- f) judicial safeguards for human rights and freedoms;
- g) assuring the social nature of market economic relations, etc.

It is noteworthy that during the transition period the issue of protecting people's economic rights, as an important function of a social state, acquires exceptional significance. The transition to market relations, in conditions when market infrastructure is not yet fully established, when there exists no clear system of social protection, when monopolistic pressures continue to prevail in many sectors, when serious profound structural transformations are underway, the psychological inertia and the momentum of customs become quite salient, and the possibilities for violating social and economic rights multiply on the background of incomplete market relations. The absence of systems of social protection of employees is more troublesome. In this situation, the relations employer-employee very often attain a feudalistic character. Hence, the state must have an active participation in the solution of transitional problems and create a necessary system of guarantees to ensure the protection of human rights, to reach the point when people, with equal rights, become bearers of the new economic relations, as well as contractual relations gain vitality.

Therefore, the state must actively intervene in the resolution of the problems of transition and must create the necessary system of guarantees to assure the protection of people's rights, to arrive at a situation when people, possessing equal rights, become the bearers of new economic relations.

During the transition period a socio-psychological situation emerges, when the operation of any subject authorized by the govern-

²⁷¹ See Социальное государство и защита прав человека. М., 1994, лр 9.

ment is identified with the state, and they are treated the same as the state, with all the associated eventualities. This also indicates that states do not pay enough attention to the manageability of transition relations, neither is a system of protecting human rights or overseeing the activities of legal persons put in place. What is unfortunate is that the failure to prevent such phenomena in a timely manner invariably leads to social metastases. The state is threatened not as much by the fissures inherited from the past, which are inertial in nature and phase out, as by the unlawfulness that has emerged and feeds off the fertile environment within the new reality. This disease rapidly graduates to a cycle of irrational reproduction and, if at all curable, can be treated only through surgical intervention. Unfortunately, many newly independent countries underestimated this circumstance at the time, and Armenia was no exception. The solution for the state, under any circumstances, is to first and foremost care for preventing the immune deficiency of the society, and the main prerequisite for this would be to adopt a systemic approach to the establishment of the mechanisms of governance.

In reflecting on the main characteristic of a social state one should perhaps single out the descriptor of social equality, which had become the axis of revolutionary struggle during the last two centuries. This quality has been perceived and interpreted from diametrically opposing positions. Often the simplistic perception of the principle of social equality and its presentation as the ultimate value of social fairness results in a variety of vulgar and twisted interpretations of the nature and development patterns of social relations. There is undeniable truth in the statement that, to assure social equality, the socialist state put up a fight against wealth (proven by 70 years of experience), whereas the social state fights poverty. A social state can not rule out the principle of equality of its members, although it should not be raised to the absolute, but rather be observed as the right of every member of society, and the creation of the necessary conditions for its exercise must become the duty of the state. This principle also assumes that the duty of

the state is to guarantee that individual members of the society, social or other groups are not treated with a bias. In fact, the social state, on the one hand, assuring a certain environment of social protection, setting, so to say, the internal threshold, on the other hand shall create the necessary environment for every individual, possessing equal rights, to enjoy room for self-expression commensurate to his/her intellectual ability and legal capacity. This is what assures harmony between freedom and equality.

The democratic, rule of law, social state triad offers full harmonization of the principles of individual's existence: freedom and equality. The isolation and unilateral absolutization or juxtaposition of any one of these qualities represents a grave error in methodology and may lead to (as attested to by bitter historical experience) extreme, distorted and, as a rule, inaccurate conclusions. The social state, assuming responsibility for the social protection of an individual, must first and foremost be concerned with securing conditions for the self-cognizance and self-expression of a rational being. But the most daunting issue is: where shall be, the line drawn on state's intervention in socioeconomic affairs, in order, on the one hand, to assure guaranteed delivery of its social function and, on the other, for it not to impede the natural development of market relations. It would be futile to look for solutions to this matter that are valid once and for all. Such a balance should be attained through a comprehensive analysis of every country-specific situation. This is exactly why governance is an art in its own right. What is universal, though, is that the social state must come up with active programmatic participation in the system of social reproduction. This pertains to production, circulation, as well as distribution. This acquired particular importance in the German context, when the country proclaimed itself a social, rule of law state. The social state, as Hesse Conrad mentions, not only implements specially designed policies in addressing social problems, but is generally a state that governs, produces and distributes²⁷².

272 Хессе Конрад. Основы конституционного права ФРГ. М., 1981. pp. 111-112

As for the transition period, and especially situations of crisis management, the challenge of social protection by the state acquires high priority. Moreover, the experience of European countries indicates that the social function of the state was particularly emphasized and constitutionally enshrined during systemic transformations, since the ultimate goal of those transformations was the human individual, the satisfaction of his/her needs and, as it was figuratively stated: "the humanization of society..." Therefore, in the transition period the main issue for the state is to balance the trust towards the market with a reliable system of social protection. Failing that every reform in the economy will be distorted or downright jeopardized, especially if it pursues the objective of creating a market economy operating in a healthy competitive environment. In this respect looking at the German experience is once again of interest. Being the first to constitutionally enshrine that Germany is a democratic and social federative state (Article 20), it considered assuring the minimum sustenance level for every citizen to be the issue in the first stage of development of its statehood. Moreover, it is implied that every adult must work and take care of his or her needs. In case that is not possible in view of incapacity, then the state should assume its share of care. At the same time the state shall assure conditions for individual self expression, mutual assistance, assembly and joint action. No state in this world possesses the scale to weigh the extent to which it may be social. One is either headed that way or not, the state either assumes that function or not. If it does, then the objective of the state becomes to assure, on the one hand, the creation of a guaranteed system of social protection and, on the other, the creation of an environment conducive for the self-expression of the rational being in its capacity of a social subject. Naturally this is asking for an approach both to production and distribution relations.

If a state does not consider itself to be social, then the society attempts to resolve the above issues through other means and ways, which mostly become the consequence of self-regulation. In other words, what matters most is the determination of the nature of social

relations in a constitutional norm, which shall characterize its qualitative features and the internal logics of development. And, what is most important, a state which considers itself social can not fail to produce a programmatic approach to social development, can not assume the passive role of registering the outcome of self-regulated relations, relegating everything to the control of the omnipotent market²⁷³. The establishment of a social state also assumes bringing forth the issue of rational expectations and demands. Knowing the expectations of the members of the society, forging rational expectations, and the need for respective new value systems of cohabitation, are asking for coordinated programmatic approaches not only in the economy, politics, but also and especially in ethics. The reason is that situations specific for the transition period, such as a disrupted system of reproduction; an economy in need of radical reorganization, which lacks structural basis; the factor of indefiniteness; distorted public mentality; collapsed systems of values, etc., dictate the need for active and systemic formation of new principles of interaction between the state and an individual. Without this it would be impossible to overcome the extreme polarization of approaches and intolerant opposition, to mitigate social tensions, assure harmonious development. Moreover, political and other types of motivations increase to tumble the entire society into a stressful situation and keep it there indefinitely, and the failure to find a recipe for an ingenious solution makes disastrous consequences inevitable, leading to the emergence of immune deficiency of the society.

Medical science has long ago proven that for normal operation of the human brain 60% of all emotions must be neutral, 35% positive, and only 5% might be negative. Whenever this proportion is skewed towards increasing the share of negative emotions, various diseases inevitably appear. A state considering itself social can not afford to ignore this is-

²⁷³ One should mention that almost no country with a liberal economy has elevated this issue to such an absolute as some newly independent countries did. In the USA, as early as from the times of President Jefferson, and throughout the post-war period, the economic mind did not reject the idea of state interference in economic relation, it allowed for a measure of regulation.

sue. Especially in civil society one of the fundamental functions of the state becomes to manage the emotions and expectations of the members of the society. It is not accidental that this issue is considered one of the axial questions of social science, and in 1995 renowned US economist Robert Lucas was awarded the Nobel Prize exactly for his contribution to the theory of rational expectations.

The integrity of the social characteristic of a state is also determined by the values and action approaches adopted by its every member, each link, the entire society. Especially in the transition period one of the most important functions of the state becomes the managed shift towards market economic relations. It cannot work any other way, whether we accept it, or not, whether we realize the need for it, or not; that is the way life goes ahead, and if we needlessly oppose it, we then have to overcome the redundant hurdles set by our own selves. The object of the state's concern must become the issue of lessening and overcoming stress in the society, and the artificial agitation thereof, regardless of its format and the forces responsible for it, should result in up to specific legal consequences. Apart from expressing specific qualities of the nature of social relations in a state on their own, the "rule of law," "social," "democratic" modifiers of the state, in combination acquire a new quality. It assumes that for such a state the following is typical:

1. The system of reproduction operates by market rules, free entrepreneurship and competition is assured, monopolistic pressure is overcome, and the guarantor of all of the above is the state;
2. Lawful regulated intervention of the state is required in relations of distribution;
3. There is an assumption that, on a national scale, the efficiency of economic solutions shall be paralleled by their social consequences (guided by the criteria of socio-economic efficiency of public production);
4. The issue of optimal decentralization of economic, administrative and political power comes to the forefront;

5. A need arises to clarify, on a state level, the priorities of development;
6. Mechanisms are developed and deployed to assure the supremacy and stability of the Constitution etc.

A look at the experience of various countries comes to suggest that the main priorities of the economic system of a democratic, social, rule of law state are: The standard of living (prosperity), freedom, security, equality and assistance to the needy.

Naturally, these priorities and their successive order have their own specific expressions in every country, determined by its past, present and future. If we attempt to approach this issue from a broader perspective, covering the entire social-state system, the following may be ranked as development priorities for the Republic of Armenia in strengthening its statehood and national re-assertion: unity,²⁷⁴ national security, freedom, equality, prosperity, assistance to the needy. Their entirety becomes the purpose of national-social-state activity, and concrete programs and steps towards their implementation embody the policies and constitutional solutions corresponding to the period in question. In case of Armenia it is of exceptional importance to observe in harmonious trinity or, rather, full unity the national, social and state goals and interests. Their separation from, or, moreover, opposition to each other may eventually become fatal. In summarizing all that was mentioned above, we arrive at the conclusion that in enshrining in the Constitution of the Republic of Armenia that "the Republic of Armenia is a sovereign democratic, social, rule-of-law State, "the first decisive and, thankfully, accurate characteristic was given to the social relations that we wish to establish conditions for, and which shall be the guarantee of our national and state progress.

²⁷⁴ There may be opponents to the idea of considering unity the main priority, naively thinking that it is merely an ethical motto. Not in the least. The approach to this issue is far more serious and profound. We strongly believe that our national destiny, the future of our identity, the issue of natural reproduction of our self, the need to accumulate the critical mass for development, are all a factor of our national unity, and especially of the organic link Armenia-Artsakh-Diaspora. In conditions of new geopolitical realities this is dictated by numerous endogenous and exogenous factors.

This approach represents one of the best incarnations of our constitutional culture. The problem is for every practical step to be headed in this direction, emanate from the essence of these notions, and contribute to the development of the society in this direction.

Lawmaking efforts, systemic structural and organizational transformations, practical mechanisms and methods for their implementation, the behavior of the society and of every individual legal subject should converge on this purpose. The philosophy of constitutional developments should be outlined on this basis.

Another important condition for assuring constitutionalism is the clear constitutional definition of the notions, enshrined in the foundations of constitutional order, of the "power of the people" and the "power of the state," excluding their identical interpretation. Each of these notions has specific legal content and legal characteristics, and the level of their perception, their constitutional guarantees and practical implementation shall mostly describe the state of constitutional culture in a given state.

Democracy implies that we deal with only one holder of power, the source and sole bearer of thereof. The classical constitutional formulation is not limited by merely stressing that "the power belongs to the people and its usurpation by an organization or an individual constitutes a crime. "The constitutions of many democratic states particularly emphasize: "the people are the only source of power," "the people shall exercise their power through referenda, other forms of direct democracy and through representation." A comparative constitutional analysis indicates that on the level of norm-principles democracy first and foremost assumes that:

- all power belongs to the people;
- the people are the only source of power;
- the people may exercise power either directly, or through representation;
- no one may take the power from the people or restrict it, if so, it shall be deemed as a grave crime;

- state power is one of the forms of expression of the power of the people, which too may be exercised by the people directly, or through representation:

By clearly delineating the "power of the people" and the "power of the state" in constitutions, the emphasis is made on the fact that state power is ancillary to the power of the people, and that it shall be exercised under the principle of the separation of powers.²⁷⁵ The power of the people may not be restricted by state power.²⁷⁶ State power is also delegated by the people and is exercised on the basis of constitutional principles and norms that are the product of social agreement. In their turn elections and referenda are viewed as the principal forms of direct democracy. At the same time the international practice of constitutional justice indicates that referenda and elections are two quite different forms of direct democracy that cannot be viewed in contrast to each other. One of these cannot possibly impede with the other. It is the people who make the choice between them. Nevertheless, if, because of this choice, deepening distrust begins to prevail, these forms allow for complementing and substantiating one another, especially through public surveys and elective referenda. Moreover, a referendum may transform from an effective expression of the power of the people to an instrument, a "truncheon," when it is used only by the authorities for their own purposes, when the people are deprived of their entitlement of being its implementing subject and become merely the object of a referendum, when the scope of the questions posed at a referendum is defined exclusively by the state. The existence and the level of constitutionalism and therefore of constitutional culture in a country are greatly determined by the degree to which the people act as the true bearers of the power that belongs to them. The importance attached to the role

²⁷⁵ We ascribe great importance to an observation by Leonid Mamut, Doctor of law, who claims that there often appears an erroneous perception that there exist two powers, the power of the state and the power of the people. In reality there is only one power, the public power of the people embodied by the state, which it exercises through state bodies, not state power. See: Л. Мамут. Публичная власть, государство и разделение властей // Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, с. 262).

²⁷⁶ Чиркин В.Е. Конституционные проблемы власти народа // Государство и право, 2004, N 9, с. 10:

of direct democracy is particularly characteristic of Swiss constitutional culture, and it is attracting increasingly more attention²⁷⁷.

It should be noted that the 2015 constitutional developments in the Republic of Armenia, attached paramount importance to the place and role of direct democracy in our country. The main institute of direct democracy the referendum, per the Constitution of the Republic of Armenia previously in force is considered the exclusive legal means for adopting Constitution or making amendments therein, as well as a means of adopting laws.

However, the role of a referendum as an effective means of direct democracy needed to be further enhanced. Having regard to the current constitutional and legal developments, this role should be viewed in the context of balancing the branches of government and, furthermore, in the context of checks and balances over institutions of representative democracy. The ultimate objective is to benefit to the maximum from the balancing impact of direct democracy on the exercise of state powers. It should be directed at preventing the representative government from undertaking unbalanced actions which may adversely affect democratic processes. Along with the development of the civil society, this becomes a vital necessity for establishing a rule-of-law State, and presents the need for preventing probable extreme measures and speculations in this sphere.

Issues that needed to be addressed for the development of the institute of referendum in the context of constitutional reforms included the following:

- (a) clarification of substance and scope of the objects and subjects of referendum;
- (b) clarification of the scope of powers of state authorities and the scope of civil initiative in relation to referendum.

The main conceptual approaches for the development of the institute of referendum include the following:

²⁷⁷ See in particular: Saunders Ch. A. *Constitutional Culture in Tradition* // *Constitutional Cultures*. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000. Pp. 41-42:

- giving priority to such an option of clarifying the scopes of referendums per which issues regarding accession to international organizations resulting in partial restriction of state sovereignty are subject to referendum;
- specifying in the Constitution the scope of issues which may not be put on a referendum;
- establishing the practice of organizing referendums by civil initiative;
- establishing constitutional and legal basis for presentation of a prior resolution by the National Assembly concerning the issue or draft law put on a referendum by civil initiative.

All the stated issues received concrete solutions in Articles 202-208 of the Constitution.

For a rule-of-law state the consistent implementation and protection of all norm-principles enshrined in the “foundations of constitutional order” segment of the constitution is of preponderant significance. This is necessary for ensuring constitutionalism in the country, and for this reason even constitutional amendments become, in several countries, the subject of mandatory preliminary constitutional review²⁷⁸. From this aspect, also noteworthy amendments were made in the Republic of Armenia in the result of 2015 constitutional reforms. Particularly, Article 168, Paragraph 2 stated that the Constitutional Court shall, in accordance with the procedure prescribed by the Law on the Constitutional Court “prior to the adoption of the Constitutional amendments draft, as well as drafts of legal acts put to the referendum, determine their conformity with the Constitution”.

²⁷⁸ See in particular: Бутусова Н.В. Основы конституционного строя Российской Федерации как правовой институт и предмет конституционно-правового регулирования // *Вестник Московского университета. Серия право*, 2003, N 6, 17-29. For example, Article 61 of the law of the Republic of Azerbaijan “On the constitutional court” states that if the President or the Parliament have proposed constitutional amendments on the basis of Article 153 of the Constitution, the opinion of the constitutional court must be sought in advance. Moreover, in conducting a referendum on this issue the ballot should also include a summary of the opinion of the constitutional court.

3.4. MAIN ISSUES OF THE NEW STAGE OF CONSTITUTIONAL DEVELOPMENTS IN THE REPUBLIC OF ARMENIA

The 20 years' experience of constitutional developments in the Republic of Armenia evidenced that the shortcomings and semi-solutions of the previous stages haven't been overcome, moreover, also new problems, which need systemic solutions, have evolved. These solutions were necessary:

- to ensure the stable development of the state,
- to essentially improve the system of guaranteeing, ensuring and protecting human rights and to raise it to a qualitatively new level, to guarantee the rule of law, to have a human-centered constitutional system,
- to make the system of state governance more effective, to increase the public-legal responsibility of state power, to limit the power by law,
- to overcome the super-concentration of political power and to form a democratic political system,
- to establish civilized relations between the political majority and political minority in the National Assembly on behalf of the stable development of the state and on behalf of the establishment of parliamentarism in the state,
- to establish more effective justice system in the state and to strengthen the independence of courts,
- to introduce a more trustable electoral system,
- to strengthen the constitutional guarantees of more effective realization of the principle of direct democracy,
- to essentially enhance and strengthen the role of civil society in the sphere of solution of nationwide problems,
- to create prerequisites for the dynamic, evolutionary constitutional development of the state.

The constitutional solutions of, particularly, the last issue, existing in Armenia, were considered as one of the worst solutions, and many problems in social life were conditioned by them.

The mentioned aims were impossible to realize without constitutional reforms. Moreover, many problems existing in the state were conditioned by the constitutional semi-solutions, imperfections, internal controversies, which, had been reproduced in legislation and law-enforcement practice and became a reason for the lack of constitutional legitimacy and serious social displeasure.

The last 20 years' experience of constitutional-legal developments evidenced that we could not reach a real restriction of the power by law in the Republic of Armenia. At the end of the last century and at the beginning of the 21st century the dictation of the force of state power, supremacy of mercantile interests became more characteristic, and the democratic romanticism of the first years of the independence was gradually subordinated to the subjective discretion. This situation became a subject of concern also for international society.

The important commandment of Claude Helvetius that "The reforms of manners should be started by the reforms of laws" has repeatedly been reaffirmed throughout the world. This, particularly, concerns the Basic Law of the state.

The constitutional-legal problems existing in Armenia before the 2015 constitutional reforms which had to unconditionally be amended were:

- In view of international constitutional developments and the Armenian constitutional culture, we had still not found safeguards for ensuring stable development of constitutional-legal relations. As a constant and continuous process, constitutional developments have taken place in the international practice in line with the developments of society in the following main ways:
 - a) Adoption of new constitutions;
 - b) Amendments and/or additions to the existing Constitution;

- c) Consistent and coordinated constitutionalization of legal acts and the law - application practice;
- d) Adoption of organic or constitutional laws;
- e) Official construal of the constitutional provisions; and
- f) Resolution of disputes arising between the bodies of government in matters of constitutional powers.

The last three of the listed six paragraphs were not present in Armenia. The constitutional-legal safeguards for the performance of paragraph “c” were insufficient. This situation created serious problems for the constitutional evolution and dynamic developments. Safeguarding constitutional developments in the areas mentioned in paragraphs “a” and “b” were brought to the forefront, which was problematic, and the constitutional process **turned into a purely political one**. The international experience and modern constitutional studies have shown the vital necessity of safeguarding constitutional developments in the areas “d” and “f” for strengthening the rule of law.

- In methodological terms, **a consistent transition should be made from a power-centered system of constitutional solutions to a human-centered system**, which could not be fully achieved through the constitutional reforms in 2005. In turn, it required creating sufficient and necessary constitutional-legal prerequisites for implementing the principle of the rule of law, which necessarily required:
 - a) Safeguarding the direct application of fundamental rights in systemic integrity, strengthening the constitutional foundation for their protection, and clarifying the positive obligation and public-legal responsibility of the state in this matter; and
 - b) Confining the discretion of the power by law. The main principle of this approach is that the safeguarded protection of rights ensures the democratic freedoms and the direct application of rights, and limits discretion and manifestations of the subjectivity of the power.

- c) It was necessary to put in place clear constitutional safeguards for the consistent implementation of the constitutional principle of the social state and implementing specific programmatic and goal-oriented policies.
- d) It was necessary, in the context of systemic integrity, to implement the constitutional principle of the separation and balance of powers more consistently, **to guarantee harmony in the function-institution-authority chain, to balance the functional, the mutually-balancing and mutually-checking powers of government bodies, and to strengthen the efficiency and functional independence of the various branches of power**. The necessary constitutional prerequisites should be created for overcoming expressions of shady relations and subjectivity in the performance of state power functions, as well as safeguarding public-legal accountability and programmatic and goal-oriented activities of the state power²⁷⁹.
- e) It was necessary to ensure the consistent implementation of the requirements of Article 2 of the Constitution (which may not be amended) and to preclude the performance of state power functions through state bodies not stipulated by the Constitution.
- f) The Constitution had not overcome the excessive personality focus and excessive concentration in the political system of the Republic of Armenia. There is obvious disproportion between the real volume of powers of various constitutional bodies and their political responsibility.
- g) The constitutional bases of the executive government system were inadequate. It also lacked a solid internal logic and clear

²⁷⁹ The reality that the shadow governance gains a huge scale alongside with the shadow economy, which is also one of the main reasons for corruption, is characteristic for transformative social systems. Our estimates indicate that in the majority of the Eastern European and Post-Soviet states the harmony of the chain “function-institution-vested powers” is significantly distorted and the shadow governance is 50 and more percents.

delineation of functions and powers. There was an urgent issue related to the lack of clarity and the ambiguity between the functional roles, authority, and responsibility of the executive power.

- h) The role of the National Assembly of the Republic of Armenia should be enhanced to the necessary level, in line with the current requirements of parliamentarism, in areas such as effective law-making activities, oversight, and formation of government bodies, whilst creating sufficient and required constitutional safeguards for the effective functioning of the parliamentary minority and the enhancement of its balancing role.
- i) Reforms of the electoral system and the institution of referendum should ensure an effective democratic process in which the government is elected, accountable, and changeable, alongside the active role of civil society in carrying out adequate public oversight of the activities of government.
- j) Together with the formation of a justice system enjoying an appropriate level of public trust, the balancing role of the judiciary vis-à-vis other branches of power should be safeguarded constitutionally in line with the standards of the rule of law. The safeguards of the functional independence of the judicial power will suffer serious negative consequences if the constitution lacks clarity regarding the functions of judicial authorities, and if the institutional solutions and procedures are imperfect.
- k) The gap between the Constitution and real life should be overcome in principle. Constitutionality and the constitutionalization of social relations should help to find legal safeguards for solving political, social, economic, and other issues, based on the fundamental truth that **overcoming the deficit of constitutionality is the guarantee of stable development**. In a state that ensures the rule of law, the political, economic and administrative potentials may not become integrated. The con-

stitutionality of the goals and activities of political forces must be guaranteed and secured.

- l) The Republic of Armenia should draw necessary conclusions from the experience of constitutional developments of other former USSR countries. Except for the Baltic States (Estonia and Latvia) and Moldova, the other post-Soviet countries, including Armenia, adopted and subsequently preserved semi-presidential or presidential systems of government. In four of them, the same individuals have been holding the presidential post for over 20 years. In two of them, according to the analysts, so-called “hereditary monarchies” have formed. The ideas of M. Krasnov regarding the monarchization of the presidential power is certainly comparable with this situation²⁸⁰. In three other countries (Ukraine, Georgia, and Kyrgyzstan), they were more persistent in implementing and reforming the constitutional solutions for a semi-presidential system of government. However, they have experienced the so-called “color revolutions,” while constitutional developments focused on entrenchment of the parliamentary system of governance.

The thorough legal assessment of the existing situation got also an important positive reaction of the Venice Commission of the Council of Europe at its plenary session of 10 October 2014, which valued the importance of such constitutional-legal analysis for all the transformative social systems.

The international constitutional practice shows that at the present stage the top priority of constitutional developments is to establish the rule of law in the state. This, particularly, concerns the Republic of Armenia. The Constitution of the Republic of Armenia /including its amendments of 2005/ didn't ensure necessary prerequisites for guaranteeing the direct application of human rights. Fundamental and other rights were not clearly differentiated, adequate procedures of their judicial

²⁸⁰ Михаил Краснов, “Монархизация” президентской власти // Сравнительное конституционное обозрение, N5(108) 2015. Ст. 87-103.

protection were not prescribed. The important constitutional principle of limitation of power by law, which is one of the main characteristics of the rule-of-law state, was remained as just a slogan. All this is typical for the newly independent states as at the initial phase the problem of strengthening the institutions of state power was axial for constitutional solutions. That's why these constitutions are characterized as "power-centered constitutions". As a rule, further constitutional developments overcame this situation and guaranteeing the principle of rule of law became the axis of constitutional solutions. This issue was more than urgent also in the Republic of Armenia. For solving it 2015 constitutional reforms, particularly, had an aim:

- to clarify the classification of constitutional rights in order to prescribe adequate procedures for their direct application and protection, taking into account the nature of human and citizens' inviolable constitutional rights, the peculiarities of their insurance and protection,
- to essentially improve the constitutional solutions regarding the limitation of rights, taking into account the modern trends of international constitutional developments and having as a basis the principles of proportionality and certainty,
- to constitutionally guarantee the inviolability of the essence of fundamental freedoms and rights,
- to create all the constitutional-legal prerequisites in order to provide guarantees for effective protection of violated human and citizens' rights in the national legal system.

Without the realization of these aims it's not realistic to expect essential moves in the sphere of guaranteeing, ensuring and protecting human rights in the state.

One of the main aims of constitutional reforms is guaranteeing the stable development of the state. For its realization, the following was prescribed:

- to ensure the dynamic, evolutionary development of the Constitution parallel to the development of social values and rela-

tions via introducing the concept of organic /constitutional/ laws, prescribing legal procedures for solving disputes between constitutional bodies regarding constitutional powers, prescribing procedures for overcoming inadequacies between Constitution, legislation and law-enforcement practice more effectively,

- to raise the constitutional solutions of the separation and balance of powers to a qualitatively new level, ensuring necessary harmony in the chain "function-institute-vested power", raising the functionality of counterbalancing and restraining powers,
- to prescribe constitutional guarantees:
 - a) to exclude political monopoly, super-concentration of power, shadow relations in implementing state power authorities,
 - b) to limit essentially the scopes of subjective discretion, the possibility of super-personification of state power with various manifestations of subjectivism,
 - c) to raise the public-legal responsibility of state power bodies, prescribing functional legal procedures of political, constitutional, criminal responsibility connected with implementation of official duties,
 - d) to exclude integration of political, economic and administrative power and establishment of oligarchic system of state power, which becomes a danger for the state's national security,
 - e) to form a constitutional economic system, enhancing constitutional guarantees of free enterprise, excluding possibilities of involvement of monopolistic dictation and corrupted economic relations,
- to make the principle of rule of law a basis for the human social behavior, political behavior of political institutions and public behavior of power, ensuring effective monitoring of their realization.

All the above-mentioned are important guarantees for changing the public atmosphere in the state, to ensure harmonization between the interests of the individual and the society, to make the human creative potential as an important factor for the state's progress.

The role of constitutional reforms is huge in effective fight against corruption and protectionism in the state. These phenomena are great evils for a lot of states. International studies on determining the index of rule of law show that in almost 60% of the states the level of corruption is higher than 50%. This concerns legislative, executive, judicial powers, army and police²⁸¹.

Corruption and protectionism firstly flourish in such systems where, particularly,

- the frames of discretion of state power are not clear, and there is a great role of subjectivism,
- the power is not restricted by the law and its public-legal responsibility is not clear,
- fundamental human rights do not apply directly and adequate legal and structural guarantees have not been created for it,
- counterbalancing and restraining powers of state bodies are not clear and functional,
- the justice system is not independent and effective,
- parliamentary supervision systems are imperfect, etc.

Without qualitative corrections of these issues the cure of this social illness is impossible. In its turn, all their roots are hidden in constitutional solutions. One of the primary aims of the reforms is establishing constitutional guarantees in order to eradicate them and to exclude the possibilities of their reproduction in real life.

Among the axial goals of constitutional reforms are also strengthening parliamentarism and its continuous development. This is the main highway for strengthening a democratic state. The main gap in constitutional solutions existing in Armenia was the fact that the role of the parliamentary minority was minimized. The absence of the

institute of organic /constitutional/ laws deprived the minority of any real impact on even the legislative policy.

The culture of parliamentarism is a culture of civilized dialogue, the fundamental legal prerequisites of which firstly should be constitutionally stipulated. The system of political confrontation had rooted in Armenia, which had a negative impact on the role of the legislative body and was a serious ban for the stable development of the state.

The constitutional reforms, were, particularly, aimed to:

- strengthen the role of bodies of the National Assembly regarding the legislative activities;
- enhance the role of the National Assembly in formation of state authorities and public administration bodies;
- extend the scope of supervisory powers of the National Assembly;
- strengthen constitutional guarantees for the rights of parliamentary minority;
- seriously reform the existing procedure of the elections of the members of the National Assembly.

Because of the above-mentioned the political role of the Parliament as a legislative, as well as a supervisory body will be essentially enhanced, the role of the opposition will be significantly reinforced. This is the main path for establishing a real parliamentarism.

In conditions of the present international systemic crisis constitutional reforms had a goal to significantly raise the quality of economic relations, minimize the role of the subjective factor, to overcome the political and economic possible monopoly, administrative-authoritative interference with the economic relations.

This requires enhancement of the role and responsibility of the government in the spheres of ensuring the stable development of the state, specifying the interim and perspective priorities and implementing the programmatic policy adequate to them.

²⁸¹ World Justice Project, Rule of Law Index, website - worldjusticeproject.org

Reforms of the judicial and legal systems, particularly strengthening the guarantees for the protection of the right to property, can significantly contribute to enrooting a wholesome economic competition.

Ensuring more functional preconditions for the implementation of the constitutional principle of a social State was one of the priorities of constitutional reforms.

Certain constitutional-legal landmarks derive from the principle of a social State, which the legislator should consider via concrete social regulations, providing social help to people in need, as well as via the development of social services and means of social insurance.

For several years social basic rights and objectives of the State were enshrined without any distinction in a number of Articles of Chapter 2 of the Constitution, moreover, in many cases social objectives of the State were formulated in the Constitution as basic social rights. There was a necessity to overcome this situation and to strengthen the guarantees of the protection of social rights. It should, particularly, be considered that there are several basic rights relating to the social field which are directly effective rights (for example, right of freedom to choose occupation or the right to strike) and which may be protected by way of constitutional justice.

The constitutional reforms gave importance also to the circumstance that the peculiarities of a modern social State are the social market economy and its normal operation. Free development of an individual is inevitably connected to emergence of inequalities. A social State is called to mitigate these inequalities through different measures by implementing a targeted policy concerning social security, social insurance and social aid in order not to allow disproportionate deepening of the social lamination. Strengthening the constitutional-legal guarantees for overcoming the social lamination via an unearned income, corruption manifestations, abuse of the official position and by other non-legitimate ways is also an important guarantee in the frames of this issue.

Among the most important objectives of constitutional reforms were strengthening the public confidence in courts, as well as strengthening the functionality of the justice system.

The public confidence in courts is essentially conditioned by the existence of independent and impartial courts and an adequate judicial power. Ensuring the latter was considered as one of the most important objectives of constitutional reforms. For a number of years, the constitutional solutions of the Republic of Armenia had emphasized the issues regarding formation of the institutes of the judicial branch. The necessity of reforms dictated the principal approach, per which specifying the functions of justice and ensuring adequate guarantees for their implementation gained priority. It was necessary to strengthen the functional, structural, material and social independence of the judicial branch, to raise its role in balancing other branches of state power. Only a judicial branch complimented with the necessary and sufficient functional, structural, material and social independence may guarantee the rule of law, efficient justice and fair trials in the country.

The establishment of more effective appeal system, as well as system of judicial protection of human rights, ensuring the compliance of the judicial acts with the principle of legal certainty, as well as fundamental improvement of the functions and the activities of the Council of Justice are essential for impartiality of courts.

The low level of public confidence towards the judicial branch is mainly conditioned by functional uncertainties, structural instability and insufficient independence of the judicial branch, deficiencies in court procedures, as well as a number of negative aspects conditioned by subjective factors.

The solution of all these issues is possible only in the result of adequate constitutional amendments. No other ways, particularly, just a wish and political or administrative interference can't solve the issue, and the existence of courts won't overcome the deficit of justice.

The constitutional reforms should continuously ensure the restriction of state power by law, as well as make the human being, his or her dignity the axis of constitutional solutions. The restriction of state power by law is the cornerstone of the rule-of-law state. Unfortunately, in conditions of unchangeable Article 1 of the Constitution of the Republic of Armenia, the direct application of fundamental rights and their adequate judicial protection were not constitutionally guaranteed and ensured. Such a situation made the proper insurance of the supremacy of Constitution and the decisive role of the natural and inviolable human rights in restricting state power non-realistic. The same concerned human dignity as an inviolable basis for human rights and freedoms.

The constitutional reforms were aimed at making fundamental corrections in these issues. The aim was to make the principle of rule of law a basis for the social behavior of an individual, political behavior of political institutions and public behavior of the bodies of state power.

The US President Ronald Reagan was once asked: "... is the government able to solve the existing problems?". He answered: "No, as the government is a problem itself". If constitutional solutions are imperfect themselves, the normal evolutionary development of constitutional law is blocked, consistent constitutionalization of social relations faces constitutional deadlocks, as well as when the direct application of fundamental human rights and the rule of law are not constitutionally guaranteed, there are no clear mechanisms of public-legal responsibility of the bodies of state power, when individual and political hegemony becomes dominant, then "better" implementation of the effective Constitution can only be considered as authoritarian ambition and an overvalue of the subjective factor. Yes, separate semi-solutions can also be found even by this way. They, however, will certainly be inadequate to the existing challenges of strengthening the rule-of-law state. Due to the imperfection of the system of governance, political monopoly causes an economic monopoly. The latter, in its turn, creates a fertile ground for corruption, protection-

ism, arbitrariness, discrimination and permissiveness. The human being finds himself/herself in the core of relations dictated by subjective expedience, being alienated from his/her constitutional rights and freedoms. The state can not have a perspective of development and establishment of a fair regime by this way.

We would like to touch upon one more issue: whether and to what extent constitutional reforms become a public requirement? Political speculations in this issue reach up to extremes. It is natural that all the people, irrespective of their education and position, can't be constitutionalists and to be clearly aware of various legal regulations of the Constitution, their role, systemic co-relations, the necessity of their reforms. All the members of the social society, however, certainly feel the, so called, light and dark of "fair" or "unfair" public-state relations. This is particularly evident in relatively small social systems, like the Republic of Armenia is. No matter how different is the comprehension of fairness, the absolute majority of people links its future with a free and legally protected society. Such a society is possible exceptionally in conditions of an adequate constitutional order. We fully agree with the conclusion of Professor A. Selivanov, according to which "the confidence of people in Constitution is measured by the fact that the law of the power is permissible to the extent that it is a power of law"²⁸². This is the main and objective criterion of the legitimacy of the Constitution. When people feel that the power is not a power of law any more and constitutional solutions are unable to prevent this or are subordinated to the subjective factor, the necessity of the review of these solutions itself becomes a requirement for strengthening the legitimacy of Constitution and implementing necessary reforms. One can make judgments whether and to what extent people want to reform the Constitution just based on this requirement.

²⁸² Селиванов А.А. Конституционные проблемы в современной теории права. Киев, Логос, 2013. Ст. 38.

CHAPTER 4. GLOBAL CHALLENGES FOR GUARANTEEING CONSTITUTIONALISM

4.1. INTERRELATIONS BETWEEN STATEHOOD AND CONSTITUTIONALISM

At present, European legal thought evidences that in a globalizing world the Constitution is not so much the basic law of the state as it is the supreme legal instrument of civil society. We will further reflect on this issue as well. However, if we try to draw historical parallels, then in relation to constituting assemblies and the decisions adopted by them, we can emphasize that we are dealing with such a reality where, even in the conditions of loss of statehood, Armenian public life has for centuries been guided by its canonical constitutions which, rather than being compilations of ossified prejudice, **were continually revamped through broad national consensus and developed into a key instrument encompassing rules of common behavior.**

In such conditions, should we even speak about the so-called “incompatibility” of statehood and constitutionality? We believe there is no need. Statehood is a certain structured existence of societies, which requires also its own fundamental rules of co-existence. However, if the absence of state mechanisms does not lead to fundamental distortions of the identity value system, the public co-existence of societies is anchored on the rules of behavior dictated by this very value system.

The national, political, legal, and even statehood-theory role and significance of national ecclesiastical councils have been particularly important especially amid our decentralized national-political system

where centripetal forces have been relatively weak, and disunion has been an eternal companion of our history. These were councils which converted national values and identity traits into the backbone of national co-existence. Perhaps, we greatly owe the preservation of our identity and national existence in the circumstances of absence of statehood to these very national ecclesiastical councils and the canons they adopted.

The aforementioned legal-historical journey and the international experience in the development of constitutionalism evidence the existence of two conceptual approaches. The first approach was brought to life within the framework of the American constitutional doctrine, viewing the Constitution as the basic law of the state. This approach was significantly distorted under constitutional monarchies and totalitarian political regimes, where the state was identified with power, and the Constitution was viewed as a tool in the hands of the authorities for implementing their will. This mindset has not been overcome in many countries of new democracy, where the imperfection of the political system leads to political dictatorship, employing the potential of the Constitution to this end.

The new developments of international public integration, the latest trends in the globalization of social relations, value systems, economies, and politics, and the present-day constitutional developments — particularly the conclusion of the Treaty of Lisbon within the framework of the European Union — have created, as we noted, a new reality in terms of constitutional law. Its key characteristic feature is that the legal regulations of constituting nature “are not confined” within the scope of state functions but viewed as a regulation of the fundamental behavior of the integrated community and civil society. By setting a limit to the powers and specifying the boundaries of the freedom of the person, the Constitution performs functions that are much broader than those concerning state-power relations only.

When narrowing the public and legal significance of the Constitution, the nature of constitutionalism is also distorted. We have noted that “constitutionalism” is the presence of fundamental rules of democratic

and legal behavior established upon social consensus, their existence as a living reality in public life, in the civil behavior of each individual, in the process of exercising state power. It is the systemic and meaningful existence of constitutional values in public life, a general legal principle for describing the social behavior of society. **Insofar as there are mutually recognized fundamental rules of behavior and these are reflected in real life, the Constitution and constitutionalism will also exist as a reality, regardless of the state of political organization of the society.**

It is beyond argument that the mechanisms of social consensus and their axiological bases are different at various stages of the development of statehood. However, it does not imply that in modern state systems the Constitution carries only the function of state power.

For instance, the emergence of national ecclesiastical councils in Armenian reality and their universal significance in the implementation and development of constitutionalism appear to be remarkably harmonious with the rationale of the current European constitutional developments and implicitly prove the importance of the Constitution as the basic law of civil society.

As already stated, one may only wonder at the fact that in the 21st century, in the newly independent Republic of Armenia, an encyclopedia of over a thousand pages — “Christian Armenia”²⁸³ — is published on the occasion of the “1700th Anniversary of the Great Conversion of Armenians,” and there is no single reference to the constitutional role of national ecclesiastical councils and canonical **constitutions**. Meanwhile as early as 1837, the New Haigazian Dictionary, published in Venice, offered an unsurpassed definition of the Constitution, making references to the beginnings of our history of the Christian period. It is the same hand and the same impermissible approach: by failing to ascribe adequate importance to concepts formulated in Classical Armenian, turning these into an object of simplistic and arbitrary interpretation, we outthrust an entire cultural phenomenon from our history, namely the constitutional

283 ՔՐԻՍՏՈՆԵՅԱ ՀԱՅԱՍՏԱՆ. Հանրագիտարան, Երևան, 2002.

culture of universal significance, whereas it constitutes an undeniable and deeply rooted historical reality.

However, returning to our main topic, we believe the key conclusion is that supra-state manifestations of constitutional axiology appear to be an objective reality in terms of both separate historical manifestations and the current evolution of social development within the globalized world. The primary logic of current developments suggests that these are translated into legal norms by virtue of multilateral international treaties, resolutions adopted by the UN and various regional organizations and, even more, the founding documents for unions bringing together common currency and economic territories.

The other typical feature of current developments is that various state and supra-state contradictions so far remain insurmountable; institutional systems for integration are still in the process of formation and development; different conflicts of interest call for more efficient resolution mechanisms. These issues are clearly manifested, for instance, in the European Union which has acquired a new quality over the course of the past decade. At the same time, we also witness how common legislative actions, integration of justice systems, mutually agreed policies in the executive power and humanitarian field achieve unprecedented outreach and quality within the European Union.

Most importantly, sovereign European states have either found or are in the process of finding civilized solutions for the integration of their national constitutional systems and supranational constitutional relations, by joining their efforts for the welfare of their people, the establishment of democracy and rule of law.

It is also noteworthy that such “constitutional integration” is possible **when the emphasis is placed on common axiological perceptions of the Constitution**, when it becomes a reality that the Constitution is the proof and the instrument of civilized co-existence of civil society and social community. At present, this integration has already turned into reality, demonstrating new qualities of development.

4.2 THE NEW FACE OF SUPRANATIONAL CONSTITUTIONALISM

Over the past years, legal globalization has brought about a number of noteworthy standards in the field of constitutional law, which are gradually acquiring systemic nature. The following standards are especially striking:

1. the axiological foundations of national constitutions undergo harmonization in parallel with the development of liberal legal thought;
2. the collaboration in the field of constitutional law and constitutional justice has acquired new quality, leading to the establishment of common approaches and international constitutional standards in the field of constitutionalism;
3. international law, especially in the field of human rights, as well as international judicial precedence, in particular the case law of the courts of Strasbourg, Luxembourg, and the Hague, acquire a qualitatively new role both for national justice systems and as a source of law;
4. in the field of constitutional law, the limitations set by national boundaries are falling apart, mainly in parallel to the expansion of Europe-wide cooperation, shaping the European standards of legal thought;²⁸⁴
5. there is a common understanding that the “deficit” and distortions of constitutionalism lead to social cataclysms which trig-

²⁸⁴ In this regard the legal philosophy behind Protocol No. 16 to the Convention on the Protection of Human Rights and Fundamental Freedoms is also interesting, where the highest courts or tribunals of member states, prior to rendering a decision, can submit a request to the European Court for Human Rights for advisory opinion. In the context of supranational constitutional developments, the approaches of Gunther Teubner are especially noteworthy in particular with regard to human rights at supranational level /See: “Гюнтер Тойбнер, Контуры конституционной социологии: преодоление исключительности государственного конституционализма // Сравнительное конституционное обозрение. 2016, N1(110), с. 41-55”.

ger revolutionism, they are accompanied by bloodshed and create widespread instability.

Obviously, we deal with two parallel but at the same time conflicting phenomena. On one hand, exceptional importance is attached to the role and significance of the supremacy of law in supranational legal relations and constitutional developments, whereas, on the other hand, concrete interests and the practice of satisfying these interests, even if through the use of force, still remain predominant in supranational relations.

An extremely interesting and qualitatively new process started in particular during the period of drafting the Constitution of the European Union. The final draft introduced rather intricate yet very interesting results in legal terms. However, it was destined to fail from the outset since the process of political accord orchestrated by the existing interests played a decisive role in this matter. As a result, the Treaty of Lisbon, in terms of its legal effect, qualified more as an international treaty rather than a constitutional act.

Further, constitutional acts are the ultimate result of law-making activities and originate within the scope of application of the principle of separation and balance of powers. Supranational legal acts are primarily the result of mutual agreement reached by the representative executive body, regardless of subsequent ratification procedures. In such conditions, we can hardly speak about the possible emergence of a supranational Constitution as a single common legal act. Classically, we may only refer to the existence of a tacit supranational constitution as a value system. It is obvious that the presence of the Basic Law in each individual country in Europe shapes a universal quality of constitutional culture, which serves as a precondition for the existence of the appropriate quality of constitutionalism. Consequently, the new face of supranational constitutionalism is inherently interrelated with the development of new qualities of supranational constitutional culture. The latter, in its turn, is conditional upon the individual’s redefined social role and function within society, the degree to which his inalienable rights are guaranteed, the practical possibility of limiting power by virtue of law not only within the state but also in the dimension of supranational relations.

Over the past years, heads of separate European countries have voiced concerns about the collapse of multicultural societies turning into a reality; however, we do not believe that this concern is justified. This is a political and a rather dangerous evaluation of existing reality. The truth is that politics is often based on double standards, and fundamental constitutional values and principles are perceived and put into effect from that perspective. In an environment where human rights are recognized as the ultimate value and unconditionally exercised, the other cultural qualities of identity cannot create impediments for social co-existence. Quite the contrary, the **gap between an individual and mankind gradually diminishes**, and at this point the creation of artificial barriers, orchestrated by political motives, is unlikely to be successful and is doomed to failure. This is true also in regard to the recognition of peoples' collective right – in particular, their right to self-determination – which constitutes the legal essence of Article 1 of the International Covenant on Civil and Political Rights of December 16, 1966.

4.3. THE GUARANTEEING OF CONSTITUTIONALISM AS A STANDARD FOR THE RULE-OF-LAW STATE

The consistent implementation and protection of all norm-principles prescribed in the Constitution's foundational principles of constitutional order is a benchmark for a rule-of-law state. It is indispensable for ensuring constitutionalism in a country, and therefore, in a number of countries even constitutional amendments have become a subject matter of mandatory *ex-ante* constitutional review.²⁸⁵

²⁸⁵ See, in particular: Бутусова Н.В. Основы конституционного строя Российской Федерации как правовой институт и предмет конституционно-правового регулирования // Вестник Московского университета. Серия право, 2003, N 6, pages 17-29. For example, Article 61 of the Law of the Republic of Azerbaijan "On the Constitutional Court", adopted on December 23, 2003, stipulates that where the President or the Parliament propose constitutional amendments on the basis of Article 153 of the Constitution, the opinion of the Constitutional Court must be sought in advance. Moreover, when holding a referendum on this issue, the ballot should also include a summary of the opinion of the constitutional court.

The guaranteeing of constitutionalism in a country through consistent implementation of constitutional norm-principles is particularly essential for newly independent countries. As we have mentioned, it is of utmost importance to, first of all, clarify and guarantee the norm-principle of a **"rule-of-law state."** A mere aspiration is insufficient for the establishment of a rule-of-law state; it is necessary to have a certain legal culture which should undergo the process of natural development.

The aforementioned proves that it is the requirement of the main principle of a rule-of-law state, in most general terms, that state power should be restricted, and **the boundaries beyond which the authorities may not go should be precisely defined.**²⁸⁶ The entire constitutional review system is called for the protection of these very boundaries which constitute the inalienable human rights. **The limitation of power by law is the key characteristic feature of a rule-of-law state.** Constitution may turn into a compilation of well-graced words if the **"constitutional principle - law - authorities"** chain lacks harmonious coherence and complementarity, by virtue of which the guaranteeing of rights becomes the essence of the activities of authorities. Ultimately, constitutions have been called into existence to accomplish the following three principal missions:

- guarantee human rights and freedoms;
- limit the powers and activities of those exercising it;
- define the foundations of state order and regulate the exercise of state functions.

Based on the realities and generalizations referred to above, the following may be viewed as mandatory and fundamental conditions for the establishment of a rule-of-law state in each post-communist country:

- recognition and respect of human dignity, safeguarding human rights and fundamental freedoms, guaranteeing the supremacy of law;

²⁸⁶ See: Сущинская С.И. Понятие и сущность правового государства и соответствие ФРГ критериям правового государства с точки зрения ее конституционных характеристик // Конституционное право зарубежных стран. 2001, N 1, С. 42-48.

- separation and balance of powers, optimal decentralization of political, economic, and administrative forces;
- electivity and controllability of authorities;
- existence of an independent judiciary;²⁸⁷
- guaranteeing the supremacy and stability of the Constitution.

These preconditions are interrelated, and if any of them is missing, disregarded, or distorted in any way whatsoever, it may negate the existence of the rest and indicate the presence of a non-democratic political regime. These are perhaps elementary truths crystallized by progressive international legal thought and social practice. Yet, the foremost importance among these should be attached to the profound doctrinal interpretation of especially those key features of a rule-of-law state which constitute the constitutional principles of the “supremacy of law” and the “separation and balance of powers.”

Bearing in mind that we have already, to some extent, covered the issue of the supremacy of law²⁸⁸, we will further focus our attention only on several baseline factors, and examine the fundamental issue of the separation and balance of powers, **and securing of the functional balance**, which is of preponderant importance in light of the current constitutional developments.

First, what do the lessons of history suggest? As it is perfectly phrased in Article 2 of the 1789 French Declaration of the Rights of Man and of the Citizen, “[t]he aim of all political association is the preservation of the natural and imprescriptible rights of man.” The latter constitute the core substance of any Constitution and the supreme objective of the state system. To secure this in real life it is necessary, firstly, to have a clear methodological approach to the concept of “law,” as well as to the understanding of the preeminence of natural human rights.

²⁸⁷ As stated by Thomas Jefferson, the judicial branch must be independent of other branches of government, but not independent of the nation itself. In pure republics the will of the nation is embodied in the Constitution and in laws.

²⁸⁸ See, in particular, also: Հարությունյան Գ., Իրավունքի գերակայության սահմանադրական երաշխիքները, Երևան, 2003.

The theoretical debate around the concepts of the “supremacy of right” or the “supremacy of law,” constituting the crux of the issues in question, has deep historical roots, which indeed has fundamental importance for providing an exhaustive answer to the issue we have raised.

One of the first and biggest generalizations of the pre-Christian era social thought was the definition of Democritus (470–366 BC) **that the standard of fairness in politics, ethics, and law is its coherence with nature**²⁸⁹. He saw justice and truth in what was natural; he considered law to be artificial; he made distinction between “truth” and “public opinion,” between **the natural truth** and **law**.²⁹⁰

If subsequently Socrates associated the reflection of truth in law with knowledge, Plato, through delineating the “world of forms” from the “world of ideas” and characterizing the truth as every person having the mission of doing his own work, **presented the law as reason embodied**.²⁹¹ According to Plato, where the law is subject to some other authority and has none of its own, **the collapse of the state is not far off**.

Aristotelian philosophical thought postulated that political justice is possible only among free and legally equal people of the same community. Characterizing political justice as a political right, Aristotle divided political right into natural and conventional rights, formulating the exceptionally important generalizations, firstly, **that the law may not turn violence into right** nor **present power as a source of right** and, secondly, **that conventional rights must be in harmony with natural rights**. Political justice must lie at the basis of the law. We should not forget that Aristotle referred to political justice or political rights as justice and right in general. Aristotle stated very clearly and unequivocally that the **rights must constitute the basis of every law**, and that the **rights must be protected by virtue of the law**. In today’s terms, Aristotle would acknowledge as a rule-of-law state only one **where the law that**

²⁸⁹ Материалисты Древней Греции. М., 1955, С. 53-178.

²⁹⁰ Нерсесянц В.С. Философия права. М., 1997, С. 404.

²⁹¹ Платон. Государство, Законы, Политик. М., 1998, С. 171.

prevails is the one that protects the right. The quintessential foundation of democracy was considered not only the fact that people were equal in rights (slaves were also equal in terms of their disenfranchisement), but also, and even more so, the fact that they possessed **legal ability**.²⁹²

Aristotle saw the democratic essence of law exactly in the extent to which it corresponded to its legal content, becoming a binding rule of behavior for everyone²⁹³.

It is well-known that ancient Roman law not only came forth as an independent academic discipline which made a clear delineation between public and private law, but also presented the **natural law** in the entirety of its natural origin.²⁹⁴

Without dwelling on the details of brilliant generalizations of the giants of ancient Greek and Roman philosophical and legal thought, let us add that 17th-18th century theorists John Locke, Montesquieu, Jean-Jacques Rousseau and subsequently also Kant and others distinctly specified not only the idea of the separation of powers, but also that of the supremacy of law; their understanding of the substance of natural law acquired a new quality, preserving the common theme of **the law being the embodiment of the right**.

In the history of Armenian legal thought, as we have mentioned, special attention should be given to certain views by Mkhitar Gosh as well as Hakob and Shahamir Shahamiryans on the supremacy of natural (Divine) rights and the constitutional formulation of this approach in the "Entrapment of Vanity."

Whatever legal philosophical characterization we try to give to the concept of right, it is, in reality, a social phenomenon²⁹⁵, which has a natural foundation and is the prerequisite and means for the self-expression of the social essence of a rational being.

²⁹² Аристотель. Этика, Политика, Риторика, Поэтика, Категории. М., 1998, С. 616, 623, 624.

²⁹³ Արիստոտել, Աթենական հասարակարգը, Երևան, 2003, էջ 26-27.

²⁹⁴ Гарольд Дж. Берман. Западная традиция права: эпоха формирования. М., 1998, С. 28-34.

²⁹⁵ Алексеев С.С. Философия права. М., 1999, С. 2.

Incidentally, in Christian thought (Bible, Old Testament, Book of Genesis, Chapter 1) the man is created in the image of God and as such deserves respect. The proem to the Book of Leviticus states: "The Lord of holiness, the Lord of love and life wants to turn His people into participants of His holiness, for them also to turn into the bearers of life, love, and holiness."²⁹⁶

It is for this reason that the Bible prompts and teaches the rules of proper living, humane and dignified living. And one of the best lessons to be learnt from this is that **the state should exist for the man, rather than the man for the state**.

Legal and philosophical thought have transformed the crux of relations between the law and the right into an issue to be discussed from the ethical standpoint. The reason is that a legal law "...increases to a solemn level the moral significance of power,"²⁹⁷ harmonizes and brings to a common denominator the mutually acknowledged and publicly acceptable interests of individuals, becomes a criterion for justice and a foundation for administration of justice.

As precisely defined by B. Chicherin, the entire moral significance of the power is based on the fact that it holds in its hands the sword of justice [*gladium justitiae*], whereas justice implies that each person is entitled to whatever belongs to him.

And if this sword, which is called upon to protect the right, turns into an instrument for its violation, it thereby destroys its high moral power in the eyes of the people, which is destructive both for the disenfranchised and for the authorities themselves²⁹⁸.

This brief historical background, apart from helping to acknowledge the principal lessons learnt, intended to clearly identify the following irrefutable truths, generalized by legal and philosophical thought:

- the human, as a social being, enters into social relations with his natural and inalienable rights;

²⁹⁶ Աստվածաշունչ, Մայր Աթոռ Ս. Էջմիածին, 1994, էջ 117.

²⁹⁷ Чичерин Б. Н. Курс государственной науки. Ч. 3. М., 1898, С. 401.

²⁹⁸ Ibid, pages 133-134.

- the state is bound to recognize the human rights as an ultimate and inalienable value, as a constitutionally enshrined directly applicable right;
- every law derives from these rights, protects these rights, and restricts these rights solely and exclusively inasmuch as it is necessary for recognizing and safeguarding the rights of others and for harmonious social co-existence;
- natural human rights constitute the basis for the exercise of power by the people and the state. It is the power that is restricted by virtue of law, rather than the law by virtue of power²⁹⁹,
- the direct effect of constitutional human rights is guaranteed by the Constitution, laws and by the judiciary practice;
- these rights are universal and there are not only domestic but also international guarantees for their protection.

The Constitution, enshrining a particular methodological approach for the recognition and protection of human rights, pre-determines legislatively the nature of their materialization, institutional support and systemic guarantees. The Constitution itself must not turn into an impediment for the comprehensive and full-value effectiveness of the principle of the rule of law. Hence, we consider it necessary to focus on purely the constitutional approach to human rights and freedoms.

As we have mentioned, the principle of legal equality appears to be materialized in combination with legal ability (since slaves are also equal). In democratic and rule-of-law systems this means the legal equality of legally capable subjects, with rights that are recognized and respected, and protected by guarantees. The law not only recognizes the right but also rationally restricts it so as to prevent the violation of the

²⁹⁹ As mentioned by academician V. Nersessiants: "...the law (that which is defined as positive law) may either conform to, or contradict the right... The law (positive law) becomes lawful only as a form of expression of the right... It is not the law that is the consequence of official-authoritative bondage, but the opposite (See: Մերսեսյանից Վ. Ս., Իրավունքի եւ պետության տեսություն, Երևան, «Նաիրի», 2001, էջ 41-43).

rights of others. **The quintessential issue here is the recognition of natural human rights, their legal definition, practical safeguards, and guaranteed protection.**

We consider that perhaps an example of the best, well-founded, and comprehensive constitutional formulation may be the following: **"...the state shall recognize and guarantee the principle of the supremacy of law and the rule of law."** Such wording is a guarantee for the appropriate methodological approach, acknowledgment of the priority of natural rights, recognition of the right as the substance of law, accentuation of public accord regarding its restriction, establishment of a clear conceptual framework for the freedom of rights and restriction of power. The law becomes the safeguard for an individual's freedom, security, and property, and **the guarantor for the exercise of his rights.**³⁰⁰

The key constitutional requirement is the recognition and stipulation of the supremacy and priority of these rights, as well as their fundamental nature and inalienability. The lack of such recognition will inevitably lead to the establishment of a dictating role of the right to rule and, in this case, the Constitution will "set a limit" not for the right to rule but for human freedoms. With this it will perpetuate the principles of autocracy.

In these circumstances the state will likewise involuntarily appear not as a regulator dictated by the general demands of the society but rather a natural self-reproducing necessity, which starts to act with the logic of self-preservation and unrestrained strengthening of its influence.³⁰¹ This will lead to a situation where the law will simply become an instrument for repressing the right. The above-mentioned historical and logical analysis comes to prove that **the law must be the safeguard of freedom, rather than of its restriction and abuse.**

³⁰⁰ Четвернин В.А. Понятия права и государства. Введение в курс теории права и государства. М., 1997, С. 26.

³⁰¹ A state cannot be fashioned with a view of making a few happy citizens. Its goal is to make the society happy. (Платон. Государство. Собр. соч. Т. 3. М., 1994. С. 189).

This issue appears to be more acute and pressing in the continental legal systems. In the Anglo-Saxon common law system it is the case law that constitutes the basis for the materialization of the law, whereas in the continental system it is the positive law resulting from political compromise. Under such circumstances, the clarity, integrity and internal systematization of constitutional norms and principles gain an exceptionally important significance.

What does the international practice of law suggest? A comparative analysis of the constitutions of more than a hundred countries proves that in almost all countries the constitutions or declarations on human rights, that have the nature of constitutional norms, enshrine a conceptual approach to human rights, and the constitutions of more than sixty-five countries contain a clear approach towards the constitutional principle of human dignity. A number of articles dedicated to the latter specifically emphasize the inviolability of human dignity as an inalienable right, the obligation of the state to respect and protect it, as well as its standing in relation to human rights and freedoms.

In the first place, it is worth distinguishing the examples of the countries that have clearly defined constitutional positions on the priority and supremacy of the law in terms of the harmonious connection between the law and the right.

Paragraph 1 of Article 1 of the Constitution of Germany enshrines that human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority. Paragraph 2 of the same Article stipulates that the German people therefore acknowledge **inviolable** and **inalienable** human rights as the basis of every community, of peace and of justice in the world. Paragraph 3 completes this conceptual approach, enshrining that the following basic rights **shall bind the legislature, the executive and the judiciary as directly applicable law**.

We find that this is a classical, complete, consistent, and exemplary approach. A similar approach is reflected in Articles 18 and 21 of the Russian Constitution, Article 3 of the Armenian Constitution, Article

10 of the Spanish Constitution, Articles 1 to 3 of the Czech Constitution, Article 7 of the Georgian Constitution, Article 8 of the Ukrainian Constitution, Article 30 of the Polish Constitution, Article 1 of the Romanian Constitution, Article 15 of the Slovenian Constitution, and Article 1 of the Portuguese Constitution. As an example of explicit and all-encompassing wording, we would like to point to Article 7 of the Georgian Constitution, which states that “[t]he state shall recognize and protect universally recognized human rights and freedoms **as eternal and supreme human values**. While exercising authority, **the people and the state shall be bound by these rights and freedoms as directly acting law**.”

Article 3 of the Armenian Constitution stipulates:

“1. The human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his or her rights and freedoms.

2. The respect for and protection of the basic rights and freedoms of the human being and the citizen shall be the duty of the public power.

3. The public power shall be restricted by the basic rights and freedoms of the human being and the citizen as directly applicable law.”

Apparently everything is clearly and unambiguously stated. The following aspects may be distinguished:

1. the human being is constitutionally recognized as the highest value;
2. his dignity is inalienable and constitutes the integral basis of his rights and freedoms;
3. human rights are directly applicable rights;
4. these rights and freedoms play a restricting role for the exercise of public power.

Evidently, the main philosophy of this constitutional approach implies that, as we have already mentioned, **it is the power which is restricted by the law, rather than the law restricted by power**. We strongly believe that the constitutions where these methodological approaches are not adopted with such certainty are deficient and essentially imperfect.

The main conclusion here also suggests that the legal foundation of the Constitution is anchored on the very recognition and stipulation of the supremacy of the law. It is exactly in this respect that safeguarding the supremacy of such Constitution will also guarantee the safeguarding of the supremacy of law. Therefore, for judicial and legislative practice, it is extremely important to have clearly defined criteria for the supremacy of the Constitution. For instance, Professor Yuri Tikhomirov distinguishes seven such criteria: 1) reflection of constitutional principles and ideas in a legal act; 2) proper use of constitutional concepts and terms; 3) adoption of acts by the competent entity; 4) taking into account the position of the act within the legal system and the requirements pertaining to its form; 5) adherence to the procedures for drafting, adopting and enacting the act; 6) substantive conformity between the norm of the legal act and the corresponding constitutional norm; 7) stability of the judicial interpretation and explanation of the substance of legal norms.³⁰² Ultimately these criteria, in their substantive integrity, offer an answer to the following fundamental question: to what extent is the normative act legal in terms of its form and substance, a formalization of the essence of law, a manifestation of law? If this is the case, it undoubtedly emanates from the principle of guaranteeing the supremacy of law and may be considered to be in conformity with the Constitution. In fact, it is through the Constitution and by safeguarding its supremacy that the principle of the supremacy of law is materialized in legal acts.³⁰³

³⁰² See: Тихомиров Ю.А. Коллизионное право. М., 2001, С. 257.

³⁰³ Incidentally, part 7 of Article 68 of the Law of the Republic of Armenia "On the Constitutional Court" stipulates that while rendering a decision with regard to the cases specified in part 1 of this Article, the Constitutional Court shall determine the compliance of the challenged act or certain provisions thereof with the Constitution, in particular, taking account of the following: 1) the required type of the legal act; 2) the observance of the procedure for adopting and putting into effect the legal act provided for by the Constitution; 3) the necessity to ensure and protect the rights and freedoms of the human being and the citizen enshrined in the Constitution, the free exercise and the admissibility of restrictions thereof; 4) securing the separation and balance of powers provided for by the Constitution; 5) the permissible limits of the powers of state and local self-government bodies and the officials thereof, 6) the necessity to ensure the direct application of the Constitution."

Let us make references to international legal instruments as well. The preamble to the Universal Declaration of Human Rights states: "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world". Further it is also added that, "[...] **human rights should be protected by the rule of law.**" Articles 1, 6, 8 and 29 of the Declaration not only clearly enshrine the principles of inalienability of natural human rights, their freedom and legal equality, but also the duties to the community and their recognition as persons before the law. Article 8 unequivocally stipulates the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

The same methodological approach is reflected in the UN Charter, the preamble to which also reaffirms faith in fundamental human rights, in the dignity of the human person. The International Covenant on Civil and Political Rights (December 16, 1966) likewise stipulates that **the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, and that these rights derive from the inherent dignity of the human person.** Article 16 of the Covenant defines the principle of recognizing the human being as a person before the law. The Covenant, proceeding from the fundamental principle that "... in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights," provides also for the permissible limits in restricting these rights by law.

Having acceded to the Council of Europe, Armenia adhered to the Statute of the organization, signed on May 5, 1949 in London; and Article 3 of the Statute unequivocally states: "Every member of the Council of

Europe must accept the principles of the **rule of law** and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”

Perhaps it is necessary to particularly emphasize also the Convention on the Protection of Fundamental Human Rights and Freedoms (November 4, 1950), the preamble to which not only enshrines the principles mentioned above, but also emphasizes such concepts and definitions as the “universal and **effective** recognition and observance of the Rights,” “[h]uman rights [...] are best maintained [...] by an effective political **democracy**,” “freedom and the **rule of law**,”³⁰⁴ etc. The last wording is especially noteworthy: it is used in the preamble to the Convention to represent the political traditions and ideals of European countries, their **common understanding of values**. This Convention is also special in that its norms have direct application and are protected by the European Court of Human Rights. Enshrining the fundamental human rights and freedoms, the Convention also defines the permissible limitations on the use of restrictions on rights and derogations from obligations in times of emergency. Moreover, these restrictions must be defined by law, be proportionate, and they should not distort the essence of the right. The Convention also requires delineating the basic rights from the social and economic, and cultural rights, by applying to each of them the relevant approaches defined under the norms and principles of international law. The Convention and its Protocols contain norms on fundamental human rights and principles, the direct application of which must be guaranteed in every member state of the Council of Europe. Consequently these norms must find their clear and profound stipulation and protection in the constitution.

The Charter of Paris for a New Europe (November 21, 1990) is also particularly noteworthy. The new democratic processes taking place in the world made it necessary to enshrine in the Paris Charter, at the level of international legal norms, that the “[h]uman rights and funda-

³⁰⁴ Сборник документов Совета Европы в области защиты прав человека и борьбы с преступностью. М., 1998, С. 34.

mental freedoms are the birthright of all human beings, are inalienable and are **guaranteed by law**,” “[t]heir protection and promotion is the **first responsibility of government**,” “[r]espect for them is an **essential safeguard against an over-mighty State**,” and “[t]heir observance and **full exercise are the foundation of freedom, justice and peace**.”

Let us also add that the 1789 French Declaration of the Rights of Man and of the Citizen perfectly makes the point by stating that “ignorance, forgetfulness or contempt of the rights of man are the sole causes of public misfortunes and the corruption of Governments.”

All the above-mentioned examples unambiguously attest to the fact that the fundamental issue of safeguarding the supremacy of the Constitution eventually boils down to the guaranteed protection of human rights and freedoms through ensuring the harmonious interaction of separated powers, and since these rights are “... directly applicable rights,” the primary safeguards for their protection are their constitutional stipulation and the existence of a viable justice system.

In particular, the experience of European countries in recent decades irrefutably shows that the protection of human rights is best guaranteed when the human being has the constitutional right to judicial protection of his violated rights. Hence, access to justice becomes an important guarantee for the protection of human rights³⁰⁵. However, such a statement is nevertheless imperfect and incomplete if it is anchored on the discretionary perception of human rights. The fact of the matter is that the rights of the human being and the citizen — even if not fully reflected in the Constitution (the Constitution of the Republic of Armenia, Chapters 2 and 3) — **may not, through alienation from them, turn into a function of public administration**. If these rights are recognized and enshrined in the Constitution, if the limits for their restriction are defined by the Constitution, and if these rights may also be violated not only by various actions or inaction, but also by laws or normative acts

³⁰⁵ Justice is the right in effect, in the process of exercise. See: Алексеев С.С. Право: азбука-теория-философия: Опыт комплексного исследования. М., 1999. С. 50.

that are the “result of political accord,” the protection of these rights will be guaranteed solely and only when the human being is endowed with access to constitutional justice.

The fundamental issues of guaranteeing the rule of law and the possible restrictions of human rights are currently in the focus of constitutional developments across the globe. During an international conference held in Yerevan on October 3-4, 2003, specialists from more than two dozen countries and a number of international organizations discussed the fundamental issue of the criteria for restriction of human rights³⁰⁶. Since this issue is more imperative, it also became the crux of discussions during the Congress of Conference of European Constitutional Courts held in May, 2005, in Nicosia, where all the countries had submitted their national reports on this issue. The fundamental issue of guaranteeing the rule of law was touched upon, and more than 20 reports of various countries were discussed during the international conference organized by the Venice Commission of the Council of Europe and the Constitutional Court of the Republic of Armenia in Yerevan, in October 2004.³⁰⁷ The initial two-year (2000-2001) discussions on the constitutional reforms in the Republic of Armenia with a group of Venice Commission experts, from 7 countries, were also focused on these very issues as the axial and baseline areas for guaranteeing the implementation of the norm-principles enshrined in Article 1 of the Constitution of the Republic of Armenia. The issue was also revisited during the discussions on the concept paper on the constitutional reforms of the Republic of Armenia, which was organized with the members of the Venice Commission in February-June 2014.

The aforementioned discussions, as well as the trends of international constitutional developments irrefutably prove that the core issue for the establishment of a democratic state based on the rule of law

³⁰⁶ See: Конституционное правосудие в новом тысячелетии. Международный Альманах - 2003, Ереван, 2003.

³⁰⁷ See: Конституционное правосудие в новом тысячелетии. Международный Альманах - 2004, Ереван, 2004.

is to uphold the supremacy of the law. Meanwhile, the latter can be achieved if:

- (a) the direct application of basic human rights is guaranteed, and there are adequate judicial procedures for safeguarding and protecting these rights;
- (b) there is also a clear concept about the possible restrictions of rights.

The primary approach here is that the natural, divine rights of the human being apply to every individual who is an organic particle of the social community, and they may only be restricted inasmuch as they render the exercise of others' rights and natural cohabitation impossible. In other words, **the only and foremost criterion for restricting human rights is the guaranteeing of others' rights and natural cohabitation**. This approach also lies at the heart of the Universal Declaration of Human Rights, Article 29 of which stipulates: “In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

We believe that the pursuit of finding different criteria only leads to conceptual confusion.

Nevertheless there is a need to delineate the concepts of the “criterion,” “principle,” “condition,” and “ground” for the restriction of rights.

Considering the abovementioned criterion as central, various “principles,” “conditions,” “grounds” are intended to assure and guarantee the ruling out of any deviation from that criterion. The answer to this question is offered by international constitutional practice which, proceeding from the mentioned criterion, defines the following principles for restricting rights (the so-called golden rules):

- exigency;
- adequacy to the situation emerged;

- inviolability;
- pursuing a fair and legitimate objective;
- lawfulness;
- balance of interests;
- preciseness and clearness;
- reasonable time limits;
- selection of the optimal limit;
- adequacy of the compensation;
- implementation on the basis of law.

More generally, this means that the restrictions may only be imposed by law, for a legitimate objective provided by the Constitution and necessary in a democratic society; moreover, such a restriction must not result in the right losing its essence and must not jeopardize the existence of the right or distort its essence.

It is also of utmost importance how this mentioned criterion and the principles for its implementation are perceived, interpreted, and enforced in the practice of constitutional justice.

According to the international practice of constitutional justice, **a state may restrict a right, if the restriction is justified by the protection of other rights or the protection of another constitutional value, or by a constitutional objective, unless such protection or objective may be effected by other means, based on the principle of the supremacy of law.**

The following is the structure of the system of rights subject to restriction at the level of constitutional solutions:

- (a) rights that may be unconditionally restricted by law. In this case, the legislature has a wide margin of discretion;
- (b) rights that may be restricted by law only under certain conditions, for particular purposes or by specific means;
- (c) rights that may not be restricted by law. In view of the risk of a potential conflict between the exercise of these rights and the rights of third persons, these rights are still not absolute and could be restricted. Since these rights may not be restricted

by law, the restrictions on their exercise are enshrined on a constitutional level;

- (d) the protection of human dignity and a number of rights are beyond the scope of the system of distinctive restrictions since these fundamental rights are not the subject of any restriction.

The conditions for restricting each specific right are defined for that particular right only, yet the overarching scope of restriction of all rights is outlined in the Constitution. This means that the law which restricts a right must apply to a general case, not a particular one. The essence of the right may under no conditions be distorted.

In various countries, the scope of the so-called absolute rights not subject to any restriction may vary. In particular, the 2005 Constitution of the Republic of Armenia stipulates the scope of the rights subject to restriction by law (Article 43. Fundamental human and citizen's rights and freedoms enshrined in Articles 23-25, 27, 28-30, 30.1 and in the third part of Article 32 may be restricted only by law where it is necessary in a democratic society for the protection of state security, public order, for the prevention of crimes, for the protection of public health and morals, constitutional rights and freedoms, honour and good reputation of others. Restrictions of fundamental human and citizen's rights and freedoms may not exceed the scope laid down under international commitments of the Republic of Armenia.)

It also stipulates the scope of rights not subject to any restriction (Article 44. Certain fundamental human and citizen's rights and freedoms — except for those referred to in Articles 15, 17-22 and 42 of the Constitution — may be temporarily restricted, as prescribed by law, at the time of martial law or state of emergency, within the scope of international commitments assumed with respect to derogating from obligations in emergency situations). This means that even under the conditions of martial law or state of emergency no restriction may, even temporarily, be applied to the right to life, the prohibition of torture, the right to privacy, the right to fair trial, the right to presumption of innocence, the principle of proportionality of punishment, etc.

The 2015 constitutional amendments have clearly defined the scopes for restriction of every specific right; moreover, in Article 76 provides that “[d]uring state of emergency or martial law, basic rights and freedoms of the human being and the citizen — with the exception of those referred to in Articles 23-26, 28-30, 35-37, part 1 of Article 38, part 1 of Article 41, part 1, first sentence of part 5 and part 8 of Article 47, Article 52, part 2 of Article 55, Article 56, Article 61, Articles 63-72 of the Constitution — may be temporarily suspended or subjected to additional restrictions under the procedure prescribed by law, only to the extent required by the existing situation within the framework of international commitments undertaken with respect to derogations from obligations during state of emergency or martial law.” At the same time, Article 77 stipulates that “[t]he use of basic rights and freedoms for the purpose of violent overthrow of the constitutional order, incitement of national, racial or religious hatred or propaganda of violence or war shall be prohibited.”

The issue of proper application of the principle of proportionality when restricting rights is extremely relevant at the level of constitutional solutions and judicial practice. A review of the practice of constitutional justice in Western European countries shows that when applying the principle of proportionality the constitutional courts must first determine whether the legitimate objective is commensurate with the lawful measure. The chosen measure must be sufficient for achieving the objective in question, that is, the objective must be attained through the chosen restrictive measure. It is considered that there is exigency when, out of all available measures, the one that restricts the least the right in question is selected. Thereafter, it is the obligation of the court to determine whether the restriction of an individual’s rights is commensurate with the public interest pursued.

Besides, when restricting rights and freedoms, it is exceptionally important for the legislature not to lay down a regulation that may encroach upon the essence of the right or lead to the loss of its essence. Public interests may justify the restriction of a right if the restriction complies

with the requirement of fairness, is proportionate to, and commensurate with constitutionally significant values and has no retroactive effect.

The principle of proportionality has three components:

- the restriction must pursue a legitimate objective;
- the restriction must be necessary to achieve the objective since there are no other restrictive measures to achieve the legitimate objective in question;
- the chosen restrictive measure must be a fair measure.

When assessing adherence to the principle of proportionality, the Constitutional Court must answer the following questions:

- whether there are real reasons for restricting the right;
- whether there is another measure of restriction that might have the same effect;
- whether the chosen measure of restriction is effective for achieving the legitimate objective in question;
- whether the restriction acquires such dimensions that are unacceptable in terms of the legitimate objective in question.

In order to avoid disproportionate restrictions, the restrictive norm must be formulated in compliance with the requirements of legal technique, be clear and precise, ruling out broad interpretation and arbitrary application.

In this regard, Article 79 of the Constitution of 2015 clearly stipulates that “[w]hen restricting basic rights and freedoms, laws must define the grounds and extent of restrictions, be sufficiently certain to enable the holders and addressees of these rights and freedoms to display appropriate conduct.”

Restriction of rights is associated with a number of dangers. The first is the interpretation of the provision “necessary for the protection of state and public security, public order, for the protection of public health and mores, rights and freedoms, as well as honor and reputation of others,” as well as of the provision “restrictions may be imposed for a legitimate objective provided for by the Constitution and necessary in a democratic society.”

In both cases the main method of avoiding the danger is the consistent application of the principle of proportionality both by the lawmaker and the tribunal administering justice.

The issue of restricting rights in emergency situations is a special case. The Committee of Ministers of the Council of Europe, which adopted the Guidelines on human rights and the fight against terrorism³⁰⁸ on July 11, 2002, clarified this matter to a certain extent. Paragraph 2 of Clause XV of this document clearly defines that states may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.

For the entire legal system of a country, it is of utmost importance that the Constitution clearly defines the following:

- the rights that are not subject to restriction;
- the rights, the scope and procedure for the restriction of which are defined by the Constitution;
- the rights that are restricted by law, and the conditions for such restriction;
- the limits and the procedure for restricting rights in emergency situations.

In particular, with respect to the last case, special attention should be paid in the Constitution to the safeguarding of effective functional checks and balances for the restriction of rights. The lack of this may, together with constitutional uncertainty, drive the system of constitutional justice into a very grave situation, with extremely conflicting legal principles and political realities.

What kind of approach should be used for the fundamental issue of separation and balance of powers? Undoubtedly, the separation and balance of powers are of crucial importance for constitutional

³⁰⁸ Руководящие принципы Комитета Министров Совета Европы в области прав человека и борьбы с терроризмом (утверждены на 804-м заседании Комитета Министров 11 июля 2002 г.).

solutions in any country³⁰⁹. It is more than just setting boundaries for the functions of public authorities. It represents a systemic solution, a system of complementarity and balance of functions.

More than 200 years have passed since this principle was enshrined in a constitution for the first time, but life nonetheless has shown that the separation and balance of powers has always been and still remains a cornerstone value for a rule-of-law state and increasingly acquires a new essence and significance, irrespective of various interpretations. About 20-25 years ago, the Soviet jurisprudence considered the separation of powers as a “bourgeois principle” that was common for foreign constitutional models. This is the legacy of old legal thought, which is not easy to overcome. As A. Blankenagel, professor of the University of Berlin, rightfully mentioned, in our days, the separation of powers is one of the major achievements in the development of a constitutional state.³¹⁰ The essence of this principle is eventually in setting forth the idea of restricting state power through mutual checks and balances of its separated branches.³¹¹ **This allows overcoming the risk of concentration of power and creates the necessary preconditions for the exercise and protection of human rights and fundamental freedoms.**

One of the greatest contributions of the Fathers of the American Constitution is their doctrine of “the system of checks and balances” that supplemented the theory of the separation of powers, becoming a cornerstone value of the 1787 Constitution.³¹² What is of major importance here is that the “static” separation of powers acquires a “dynamic” character through the system of checks and balances. Hegel has once expressed his concern that if the “living unity” of powers were to be ignored, their static balance would always be jeopardized. In his turn Professor O. V.

³⁰⁹ See, in particular: Алебастрова И.А. Основы американского конституционализма. М., 2001, С. 83-85.

³¹⁰ See: Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, С. 5.

³¹¹ See: Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, С. 256.

³¹² See: Алебастрова И.А. Основы американского конституционализма, М., 2001, С. 9.

Martishin rightfully maintains that an inefficient application of the system of checks and balances and the establishment of only a static balance of powers shall invariably lead to paralysis and crisis of power³¹³.

The separation and balance of powers is essentially interconnected with the optimal decentralization of political, administrative, and economic powers representing different manifestations of the same phenomenon. Moreover, the merely formal approach to this issue, as well as the existence of a centralized interconnection of political, administrative, and economic powers will make it impossible to avoid intolerance, corruption, mafia, clans, and criminal autocracy on the one hand and infringed human rights and dignity, excessive buildup of negative social energy, and danger of its outburst on the other hand.

President of the Constitutional Court of the Russian Federation V. Zorkin maintains that, irrespective of its diverse manifestations, the separation and balance of powers exist only where:

- the law has supreme legal force and is adopted by the legislature (representative body);
- the executive is mostly engaged in the implementation of the laws, is limited to adoption of secondary legislation norms, and is accountable to the Parliament or the President;
- the balance of power is secured between the legislative and executive branches of power;
- the judiciary is independent and, within the scope of its powers, autonomous;
- legal measures are put in place to secure the mutual counterbalance between the branches of power.³¹⁴

First of all, the separation and balance of powers show the level of constitutional democracy and the development of parliamentarism in any country. This principle is specifically manifested in intra-parlia-

³¹³ See: Мартышин О.В. Конституция Российской Федерации 1993 г. как памятник эпохи // Государство и право, 2004, N 4, С. 13-16.

³¹⁴ Зоркин В. Реализация конституционного принципа разделения властей в практике Конституционного Суда России. Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, С. 17.

mentarian relations. The point is that a certain functional role is also reserved to the parliamentary minority in order to secure the balance of power in general. It should be competent and enjoy the possibility of keeping the political majority within the framework of constitutionalism, by counterbalancing its lawmaking activity, acting with full legal capacity to apply for the judicial review of the constitutionality of legal acts. Otherwise, there will be a *de facto* one-party parliament, with all the detrimental consequences thereof.

International practice shows that the issue of the separation and counterbalance of powers is more difficult to address in the so-called semi-presidential systems of governance, where disputes over constitutional powers are most frequent and acute. In practice, the semi-presidential system has a dual nature: it constitutes a parliamentary system with dual executives, namely the President and the Government (France, Ireland, Poland, Lithuania, Russia, Ukraine, Armenia, etc.)³¹⁵. The principal characteristic feature of this system is that in the case of a major dispute between the Government and the Parliament, not only the Parliament may seek non-confidence against the Government, but also the President may dissolve the Parliament. As a rule, in semi-presidential systems the President is elected by popular vote, possesses mostly counterbalancing powers, as well as some functional powers in the executive branch.

The experience of international constitutional developments also evidences that even in such systems, regardless of their complexity, there have also been efficient solutions that have withstood the test of social practice. However, what is of primary importance here is that, first of all, **the issue of harmony of the “function-institution-powers” system should be addressed**. Second, **it is necessary to clarify and harmonize the scopes of the functional powers, as well as the**

³¹⁵ Armenia, having a semi-presidential system of governance according to many indicators, also has essential differences from other countries having the same system. This first and foremost pertains to the indefinite and unbalanced position and role of the President in the constitutional system, something that is a separate topic of serious discussion.

powers of checking and balancing of each branch of power so as to secure the relatively independent and full-scale operation of each branch of power, without disrupting the equilibrium in the “function-institution-powers” system, on one hand, and to maintain that equilibrium in dynamics through necessary and sufficient checks and balances, on the other hand.

Regardless of the type of governance system and the level of perception of the principle of the separation and balance of powers, **the issue of not only separating, but also of balancing the powers is an indisputable necessity for democratic societies and rule-of-law states.** As Egidijus Kuris, the President of the Constitutional Court of Lithuania, rightfully indicated, “the principle of separation of powers implies not only independence of branches of state power, but also a balance among their respective powers, thus all state institutions have certain powers *vis-à-vis* one another.”³¹⁶ In the opinion of Jan Mazak, the President of the Constitutional Court of Slovakia, there is a need for such a balance between the branches of power, which will guarantee their equilibrium.³¹⁷

Moreover, the following main criteria³¹⁸ for the separation of powers, which we have formulated, are currently considered the most acceptable in the theory of constitutional law: **(a) relative independence of the branches of power; (b) existence of necessary constitutional institutions with full and adequate functional accordance with their powers; (c) guarantee of the continuity of the balanced functioning of state power** which, in its turn, assumes stipulation of such intra-constitutional safeguards that will allow to properly identify and overcome the disrupted functional balance. Only under such circum-

³¹⁶ Эгидиус Курис. Доктрина разделения властей в практике Конституционного Суда Литвы. Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, С. 106.

³¹⁷ Ян Мазак. Разделение властей в решениях Конституционного Суда Словакии. Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, С. 167.

³¹⁸ See: G.Harutyunyan, A.Mavčič. THE CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS), Yerevan - Ljubljana, 1999, page 382.

stances will it be possible to ensure dynamic and harmonious development, avoid massive political and social “outburst.”

The principle of separation and balance of powers is also considered as one of the basic constitutional principles, that is, one of the foundations of constitutional order, enshrined in the Constitution of the Republic of Armenia. This principle should be interpreted as a restriction and balance of the actual influence of state authorities, their cooperation and interconnection. It is not coincidental that, in their constitutions, most of the countries emphasize not the principle but rather on the real separation and balance of powers, on safeguarding their collaboration and enshrining this conceptual approach in the Basic Law. For example, Article 10 of the Constitution of the Russian Federation states: “The state power in the Russian Federation shall be exercised on the basis of its division into legislative, executive and judicial powers. The bodies of legislative, executive and judicial power shall be independent.” Moreover, the constitutions of many countries also stress interdependence (Portugal, Article 111), cooperation (Moldova, Article 6), interaction (Kyrgyzstan, Article 3), balance (Poland - Article 10), balance (Estonia, Article 4), etc., of the branches of power. Such multifarious approaches are the result of differences between the conceptual frameworks for the theoretical interpretation and the practical application of this important constitutional principle and the criteria for the separation of powers. Special importance is attached to the clear definition of constitutional checks and balances and the safeguarding of a dynamic equilibrium between functional, balancing, and checking constitutional powers. Unfortunately, theoretical literature does not provide sufficient explanations for these issues. **In our opinion, the constitutional counterbalance represents the state institution’s constitutional power of non-functional nature, which is intended to maintain the dynamic constitutional balance of the separation of powers. Conversely, the constitutional checks represent the state institution’s constitutional power of non-functional and non-balancing nature, which is intended to prevent possible**

disruption of the constitutional balance of the separation of powers should the system of counterbalances fail to secure it. Hence, the major role of constitutional architecture lies in safeguarding the dynamic functional equilibrium of the branches of power. To this end, every constitutional functional power must be checked and counterbalanced through respective powers of other branches of government.

Many theorists of contemporary constitutional law (particularly the German constitutional lawyer K. Hesse) believe that the main characteristic features of the principle of separation and balance of powers are considered to be the coordination of joint activities and the discipline in individual activities, identification of separate branches of power, determination and restriction of their jurisdiction, general regulation of common activities, balance of the legal capacity of state bodies and, consequently, the integrity of limited state power³¹⁹. The point is that the separation of powers is not made absolute. This principle also implies interaction and balance of various branches of the integrated government, endowed with functionally specified and independently implemented powers. In this respect, the international practice attempts to constitutionally define the limitations of power, create a system of interconnection between state powers and “binding” coordination of their actions (approval of the Government Program by the Parliament, the President’s right to veto, the right of the Parliament to override the veto of the President, the right of the President to dissolve the Parliament, the right of the Parliament to seek non-confidence against the Government, etc.). However, the existence of an effective system for identifying, evaluating, and rectifying, through constitutional jurisdiction, the disruptions of the balance of the constitutional powers of state authorities constitutes, in its turn, a critical condition for safeguarding the balance of power. And this is possible only if each of the three branches of the government possesses sufficient powers to such minimum extent that is necessary for ensuring its essence³²⁰.

319 See: Хессе К. Основы Конституционного права ФРГ. М., 1981, С. 237.

320 See in particular, the ruling of the Constitutional Tribunal of Poland on the case 6/94 of November 21, 1994.

The most dangerous deviation is the quest for a new branch of government beyond these three branches, which is nothing more but an exclusion of such equilibrium, nostalgia for various forms of domination, and the green light for a system of corporate governance through the centralization of political, administrative, and economic powers. These approaches are extremely dangerous and have nothing in common with the principles of establishing lawful democracy and the axiological approaches of civil society. The theoretical and philosophical generalizations of the principle of the separation of powers are anchored on the objective laws underlying social relations, not on subjective perceptions of individual thinkers (including J. Locke, Ch. Montesquieu, and others). If Ohm’s proposition is beyond doubt, according to which there is a certain correlation between an object’s dimensions and resistance, then no less indisputable is the continuously and essentially effective standard identified by social sciences, according to which the establishment of a rule-of-law state and civil society is impossible without true separation and balance of powers.

According to another approach (for example, according to the English political scientist M. Vile), the matter is not limited to the formal-legal study of interrelationships of the legislative, executive, and judicial authorities, rather it is viewed in the context of the interaction of the entire legal, social, and political system in terms of the establishment of a “balance” between the state and the society.³²¹

In the most general terms one may state that two models for applying the principle under consideration have been developed in international constitutional practice: “flexible” and “rigid” separation of powers, depending on the nature of the system of state power. The first one is based on the ideas of John Locke on the interaction of powers with the supremacy of the legislative power, and the second one derives from the treatises of Charles-Louis Montesquieu on the balance and more distinct separation of powers. The European constitutional and political practice

321 See: Vile M. G. *Constitutionalism and Separation of Powers*. Oxford, 1967, pages 1-10.

is based on both models, and the most classical example of the second model may be found in the United States.

Each of the said models operates under certain conditions such as: the political culture of society, the level of development of political institutions, legal traditions, and thinking, psychology, level of legal awareness, development trends of various branches of power, the dialectics of their functional and structural developments, etc.

One of the most prominent tendencies of the recent decades in some countries is the relative strengthening of the executive power. In Britain, this process is characterized as a transition from the "system of cabinet governance" to the "system of the Prime-Minister's governance," a fact which is particularly common to contemporary Great Britain.³²²

The disruption of the balance between the legislative and executive powers in Great Britain is stated in many studies.³²³ At the same time, the dominant role of the Government vis-à-vis the Parliament does not serve as an evidence of repudiation of parliamentarism. The Parliament retains the function of overseeing, adjusting, and ratifying the Government policy. The political responsibility of the Government before the Parliament is also preserved.

Similar processes of strengthening the vertical executive power are also noticeable in the constitutional practice of non-parliamentary states or monarchies. The gradual expansion of the nature and scope of presidential powers in the United States is viewed by American constitutional law and political science as one of the main characteristics of American constitutional practice and the Constitution itself, when the process of expansion of presidential powers takes place without constitutional amendments. Several American scholars affirm that such an expansion of powers may endanger liberty and democracy in the country³²⁴. Many American theo-

³²² See: Rush M. Parliamentary government in Britain. N. Y., 1981. Политическая система Великобритании, С. 111, 147-153.

³²³ See: Beloff M., Peel G. The Government of the United Kingdom. Political authority in a changing society. L., 1980, 1981; Сэмпсон А. Новая анатомия Британии. М., 1975.

³²⁴ See: Cass Sunstein. Changing Constitutional Powers of the American President. EECR, Vd 2, N4. Fall 1993, Vol 3. N1 Winter, 1994, page 99.

rists of law consider the issue of interrelations between legal and political approaches in addressing the separation of powers as a serious subject for discussion, often to the extent of considering the Supreme Court as a political institution³²⁵. The question here is the extent to which the political expediency and constitutional principle are reconciled in discussing the issues pertaining to the functional roles of the branches of government. In any circumstance, it is impossible to guarantee the supremacy of the Constitution without subordinating expediency to principle. Even when expediency is a result of compromise, it should nonetheless emanate from the constitutional principle.

Some other trends in Western European countries are also quite noteworthy. For example, as a result of the 1992-1995 constitutional reforms, Finland transitioned from a semi-presidential system to a parliamentary form of republican governance. At the same time Italy has made great strides in favor of the opposite process, namely a transition from the parliamentary system to the semi-presidential republic. A similar transition took place in Slovakia in 2000. And in 2004, Georgia voiced its preference for a semi-presidential system in contrast to the presidential one.

It is obvious that these trends are the result of not only various interpretations of the principle of the separation of powers, but also and even more so the result of problems that have emerged in the state power system of each country. However, regardless of which model of state system is chosen, whether presidential, semi-presidential, parliamentary, or other, the general premise is that the separation and balance of powers, as well as the ensuring of their harmonious interaction is an unavoidable necessity and must be translated into reality through ensuring the systemic harmony within the triunity of "**function-institution-powers**," enshrining an optimal equilibrium of **functional, checking, and balancing** powers for each constitutional institution and, with the help of

³²⁵ See, in particular: Zoller E. Splendeurs et misères du constitutionnalisme. Les enseignements de l'expérience américaine // Revue du Droit Public. 1994. P. 177; Peretti T. J. In Defense of a Political Court. Princeton, N. J.: Princeton University Press, 1997, p. 73.

these, guaranteed maintenance of the dynamics of the constitutional balance within the scope of unconditional protection of and constitutional guarantees for the fundamental principles of democracy and the rule of law. In their turn, the clear-cut separation of powers, their dynamic balance and guaranteed protection are the most important prerequisites for the development and advancement of democracy. These solutions are of cornerstone importance for every country when establishing constitutional lawfulness and resolving disputes over constitutional powers.

Naturally, in this particular matter, the study of the international practice of the constitutional amendments of various countries acquires great importance in terms of clarifying the conceptual approaches to this issue. This study comes to prove that there are several constant trends:

- functional powers of the branches of power are made more precise, they are harmonized with the function of the given branch of power, and the guarantees for independently exercising such powers are strengthened;
- checking and balancing powers are made more precise and strengthened;
- guarantees of intra-constitutional stability are strengthened;
- interaction of the branches of power is to a greater extent anchored on the principles of cooperation and on solutions ensuring dynamic equilibrium;
- the system for identifying, evaluating, and rectifying the disruptions in the constitutional guarantees for human rights and in the constitutional balance of the powers of government is increasingly strengthened;
- there is noticeable increase in cooperation, based on the principle of the rule of law, among the branches of power in the field of normative-arbitrating activities.

Alongside these general trends, as we have mentioned, importance is attached also to the issues of developing the institutions that fulfill the functions of the branches of power, clarifying their functional roles, and vesting necessary and sufficient powers in them.

In any country that has embarked on the path to democratic development, the most refutable and dangerous event is when the separated branches of power are viewed not as institutions that bear authority and independently implement their functional powers, but as “instruments” in the hands of the “real” bearer of power, who, as a rule, happens to be the head of state. Another misperception is also quite widespread, according to which the executive pyramid exercises the real power, and the rest of the state institutions are simply necessary as “tools.” It is obvious that such models have also existed throughout the history of human society, and they still persist. However, such regimes have been disqualified as unlawful in legal theory a long time ago. No matter how great may be the desire for democratization, if there are no guarantees for the real separation of powers or safeguards for independence in the exercise of their powers, and the equilibrium thereof is not ensured through the system of checks and balances, various manifestations of autocracy, along with its major negative consequences, will become inevitable.

An important prerequisite for guaranteeing constitutionalism is that the norms of the Constitution, following its adoption, should:

- a) be brought to life effectively and without hindrance;
- b) enjoy reliable protection.

The Constitution should not stay on the level of formalized wishful thinking; it must guarantee and ensure the implementation of the objectives and principles enshrined therein. The main question is how to achieve it: how to guarantee that the Constitution becomes a living reality, reflecting also the principal trends of development in society? The answer to these questions is largely contingent upon the availability of the official interpretation of fundamental constitutional principles and its specific norms, as well as the existence of mechanisms for the reliable protection of the supremacy of the Constitution. In current international practice special importance is ascribed to the principles of **immediate abstract direct official interpretation of the Constitution and its evolutionary concrete interpretation**. Acknowledging the importance of doctrinal

or discretionary interpretation, nonetheless in this case we do not aim at making it a subject of discussion, since there are almost no profound polemics in this area. As to official interpretation, its principles, and formats, there are still diverse approaches, and several fundamental issues pending clarification.

One of the characteristic features of American constitutional culture is that the judiciary is reserved a great role in interpreting the Constitution. For example, in the opinion of Robert E. Nagel: "The legal profession monopolizes the opportunity both to present arguments to courts and to render authoritative interpretations. Lawyers therefore affect not only what the Constitution is, as a practical matter, but also how it is thought about and understood."³²⁶ The same author, making a distinction between interpreted and non-interpreted constitutions, emphasizes: "Effective legal argument can be penetrating; it finds ambiguities because a careful reading [of the Constitution] demonstrates that the text is less clear than first appeared, and it locates uncertainties in historical intent because history is rich and complex. Indeed intellectual sophistication is the main ally of those who see the Constitution as a "living document," flexible enough to be useful in modern conditions. [...] Because our conception of the Constitution is so shaped by argument about its meaning, interpretation seems indispensable. The most familiar content of the Constitution is simply a series of judicial interpretations."³²⁷

Constitutional principles may also surface during judicial implementation, when judicial interpretation, failing to attain particular significance, simply ratifies the legitimacy of preceding practice in applying the law. At the same time many constitutions acquire their meaning as a result of implementation rather than interpretation. The most important constitutional principles in the constitutional system mostly acquire their substance through extensive implementation, turning into established characteristics of the constitutional culture.

³²⁶ Robert F. Nagel, *Constitutional Cultures, The Mentality and Consequences of Judicial Review*, University of California Press, Berkeley 1993, page 7.

³²⁷ *Ibid*, pages 7-8:

We would like to particularly emphasize that constitutional culture — while undergoing its logical development whether in Armenian reality or in international practice — is based on a number of invariable characteristics, such as public accord and solidarity, restriction of power by law, existence of laws "harmonious with the human nature, and to our rational soul's liking," "infallible faithfulness" to them, the existence of the balance and separation of powers, the ability to "restrain our lives with the law and freedom." These are the values that lead us onto the thoroughfare to progress and development. Misunderstandings, "contradictions," "cynical" behavior, "depravity," "placing the will of the ruler above law," "praise to vice through ignorance," "schism in unity," and many other expressions of evil incompatible with the "human nature," pave a direct path to inevitable loss and recession. Unfortunately our history contains abundant testimony to all these.

We also consider it necessary to mention that constitutions are often written and amended in situations where society faces complex challenges requiring urgent solutions. Such situations call for especially careful and responsible approaches to the principal qualities of constitutional culture. Granting preference to current issues, political compromises around them often seriously imperil the future and the stability of the country's constitutional order in general. Prominent constitutional scholar Herman Schwartz is rightfully concerned that the desire to find quick fixes to current problems through constitutional amendments may prove to be inadequate in the long run.³²⁸ Political realities leave their imprint on the perception of the content and the forms of expression of legal principles. It is mostly political realities that determine the selection of the system of governance in a given country, the constitutional balance of powers in it, the enforcement of checks and balances, intra-constitutional safeguards for overcoming conflicts in the legal plain, the possibility for the dynamic harmonization of political and legal realities, etc. It was common of post-communist

³²⁸ Герман Шварц - Основные элементы конституции. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г. <http://usinfo.state.gov/journals/journalr.htm>

countries that, at the time of adopting their respective new constitutions, both the left revanchist opposition and the revolutionary liberalism coexisted there. Their interaction led to the creation of an environment of a certain political compromise around legal solutions. Almost in all of these countries not only left extremism gradually phased out, but also liberal romanticism yielded to moderate realism. The balance of political influences was significantly disrupted. The administrative and political leverage of the incumbent authorities gradually gained prevalence over the constitutional solutions and new changes, which was dangerous to the extent to which constitutional solutions were subjected to addressing current political problems, rather than being the result of public accord around general approaches.

Constitutional reforms must become the conduit for the establishment of public accord, overcoming political crises, rather than the victim of “contradictions.” The analysis of the experience of many countries indicates that the principal features of such crises are: decline in popular confidence towards political authorities, rampant corruption elevated to a systemic level (this includes political corruption), centralization and merger of political, administrative, and economic forces, the rooting of corporate clan-based governance in the system of state power, the high degree of shadow in the area of social relations and the like. The deepening of the negative vector of these phenomena annihilates the safeguards securing the continuity of the process of the establishment of constitutional democracy, which constitutes the highest danger for the countries in transition.

Discussions organized by the International Association of Constitutional Law in recent years evidence that the procedure for adopting and amending constitutions is becoming increasingly more important. The principal trend is that these processes should be detached from current political leverage and speculations. And to this end, preference is given to the establishment of the institution of the constituting assembly, which is an important safeguard in guaranteeing the country’s stability. This is proven by the experience of numerous countries, as

well as the modern history of the formation of constitutional culture. The need for such an institution becomes ever more apparent in conditions of existing imperfections in the political system of a country, low level of legal awareness and legal culture, necessity for clarifying and ensuring national and state priorities through political and social consensus. We believe that the establishment of a Constituting Assembly in the Republic of Armenia will also guarantee the efficient resolution of many issues and will greatly contribute to the sustainable development of the country.

Constitutional architecture has its own logic, principles, and boundaries. **The principal issue** in adopting or amending constitutions lies in securing the supremacy of law. In its turn, the existence of clear-cut constitutional guarantees for safeguarding human rights and fundamental freedoms is the key criterion for evaluating the viability of the Constitution. This is the primary and constant criterion. Any effort which is aimed at addressing whatever political objectives there exist through constitutional amendments, but which is not derived from the principle of the rule of law, may not be deemed constitutional and will be in conflict with the true democratic values. **One of the most important principles of international public law is that a constitutional amendment is impermissible if it weakens the protection of human rights or the safeguards for the exercise of those rights and freedoms.** As figuratively stated by the President of the Venice Commission at its 61st plenary session in December 2004, “those who have chosen the pathway of progress must have the words ‘**rule of law and democracy**’ inscribed on their flag.”

The second mission of constitutional amendments is to guarantee the functional capacity and effective performance of the authorities. This is possible exclusively through the consistent implementation of the principle of the separation of powers, balance of their powers, the development of an effective system of checks and balances. Every amendment in this direction should provide a clear answer to the following questions:

1. What changes are made in the functional powers of the branches of government and to what extent they may disrupt the dynamic equilibrium and impair the functional independence of any of the branches of government?
2. How to secure the systemic harmony in the **function-institution-powers** chain?
3. To what extent are the changes in the functional powers counterbalanced by balancing powers?
4. To what extent are the checking powers complete and reliable in conditions of the new equilibrium of functional and balancing powers?

These are the questions the answers to which will determine the rationale and effectiveness of every amendment aimed at reforming the system of governance. The true essence of the constitutional principle of the separation of powers lies in checking and restricting them to the benefit of the law. Therefore the answers to these questions also determine the extent to which the rule of law is guaranteed. In its turn, without an unwavering protection of constitutional norms and principles, the constitutional order will be deprived of a reliable system of self-defense.

The third important mission of constitutional amendments is to guarantee, to a possible extent, broad public accord around constitutional solutions and, at the same time, minimize and exclude intra-constitutional gaps and inconsistencies, surmount impasses, strengthen intra-constitutional stability, create fundamental prerequisites for guaranteeing the supremacy of the Constitution and establishing constitutional democracy. Specialists often make reference to the primary quality of American constitutionalism: its stability in terms of the fundamental principles, and its flexibility in terms of their practical application and compliance with the requirements of the time³²⁹. This is not only common of American constitutional practice, it is internationally considered

³²⁹ See, in particular: И.А. Основы американского конституционализма. - М., 2001, - С. 4.

to be an important quality of constitutional culture. Therefore, constitutional amendments must create guarantees for intra-constitutional stability whereby **constant and persistent protection of fundamental constitutional principles goes along with continuously safeguarding the dynamic development of constitutional democracy and the supremacy of the Constitution**. These qualities represent the main characteristic features of contemporary constitutional culture and have fundamental significance for a rule-of-law state.

The approaches for ensuring these qualities are used to assess the nature and degree of the meaningful perception of constitutional culture in a country, the determination in establishing constitutionalism, the importance attached to the environment of public accord, and the responsibility towards the future of the state and the nation.

Every constitutional amendment must be based on a clearly defined concept. The amendment must have a rationale as to why it is made and what issue it is addressing. An answer should be provided to the question: which are the underlying value system approaches, to what extent does the amendment in question ensure a more complete and consistent implementation of the fundamental principles of the constitution? Before embarking on the path to amendments, one should look into the solutions of the same issue in international constitutional practice, the existing global legal approaches, international case law, especially the legal positions of the European Court of Human Rights. Every single amendment pertaining to the powers of governmental bodies and their dynamic functional balance must be assessed from the perspective of its possible consequences and its potential in terms of ensuring new possibilities for the consistent implementation of three important constitutional principles: rule of law, democracy, and separation of powers.

The Constitution must include the entire system of profound, everlasting values of civil society and guarantee their stable and reliable

protection.³³⁰ Constitutional amendments must not be easy, and they must be strictly justified. Constitutional stability is the main safeguard for the stability of the country. On the other hand, the Constitution may not be ossified; it may not be irresponsive to social progress, by turning from being its driving force into its impediment. International practice has come up with a whole arsenal of means to address this issue. Among these means, the institution of constitutional interpretation acquired key importance particularly during the preceding century. Alongside conceptual and doctrinal interpretations, the institution of the official interpretation of the Constitution is of particular importance. The latter allows for the possibility to afford the Basic Law great flexibility, social dynamism, to significantly reduce the temptation of amending it. In the opinion of US constitutional scholars, the viability of their Constitution is greatly determined by the fact that for over 215 years the Supreme Court has continually augmented the Basic Law by its legal positions and interpretations, rendered in around 540 volumes of rulings. We would like to quote Professor Dick Howard's conclusion here: "Various devices have been used in an effort to keep a constitution's promises. These include popular will, separation of powers, and legislation. In the modern world, however, constitutions increasingly look to judicial review as a key means to enforce constitutional norms. [U.S. Supreme Court Chief Justice] John Marshall's insights in the legal case *Marbury v. Madison* have become a familiar part of constitutionalism around the world. **One may well suggest that no American contribution to constitutionalism has been more pervasive or important than this one.**"³³¹ (emphasis added - G. H.)

³³⁰ It would be appropriate to mention the emphasis by V. A. Chetvernin, "...the system of relations characterized as 'civil society' implies a historically developed situation, organized in the form of state and law, where the supremacy of human rights is acknowledged." (see: *Феноменология государства. Сборник статей.* Вып. 2. М., 2003, С. 20).

³³¹ Дик Ховард - К конституционной демократии во всем мире: американский взгляд. *ВОПРОСЫ ДЕМОКРАТИИ.* Электронный журнал Государственного департамента США. Том 9, N1, 2004 г., <http://usinfo.state.gov/journals/journalr.htm>, // Конституционное правосудие, 2004, N3, С. 27-28.

American constitutional thought unequivocally states that it is the possibility of judicial interpretation of the Constitution that instills stability and unwavering power to the Basic Law dynamic. Underestimating this factor means ignoring the principles of constitutional democracy and testifies to one's insufficient constitutional literacy. It would be appropriate to emphasize the common theme in the communications of the Japanese and Mexican representatives at the 61st plenary session of the Venice Commission of the Council of Europe, held on 3-4 December, 2004, where both countries, having embarked on serious processes of constitutional reform, considered the establishment of Constitutional Courts to be one of their main objectives (similar steps are also being initiated in Estonia). The main rationale for this is the vital importance of resolving constitutional disputes concerning powers and that of constitutional interpretation, and the creation of the necessary conditions.

European developments of recent decades also evidence that the role of constitutional courts is of exceptional importance for constitutional interpretation, and their legal positions become a vitally important source of constitutional law in the continental legal system. From among numerous international discussions on this subject, we would like to single out the international conference held in Moscow in February 2004.³³² With a view of revealing the role of constitutional courts in guaranteeing the stability and development of constitutions, the participants of the conference ascribed particular importance to the exceptional role of abstract and particular indirect interpretations of constitutions in the establishment and development of a rule-of-law state. It was also emphasized that, from among the 110 constitutional courts in the world, the most effective constitutional review is exercised by those institutions that have broad powers of ensuring the stability of the Constitution through its official interpretation. Incidentally, if all constitutional courts, without any exception whatsoever, have the pow-

³³² The materials of the Conference were published in the international journal «Конституционное правосудие» (2004, N2).

er of indirect interpretation of the Constitution, the right of abstract interpretation is reserved only to the constitutional courts of about 30 countries.

Official interpretation of the Constitution has so much importance in a number of newly independent countries that even individual Members of Parliament are empowered to apply to the constitutional court with such request. The experience of Moldova here is most typical. The study of their Constitutional Court decision of April 2, 2004 itself illustrates how, on the basis of an application by just one Member of Parliament, the court examined the issue of interpreting part 3 of Article 116 of the Constitution and resolved an issue that could have become the subject of numerous speculations. We ascribe importance here not as much to the issue in particular, but to the possibility of addressing and legally resolving similar issues. In these circumstances essential importance is attached also the authority and the supervisory role of the Parliament, the prevention of accumulation of negative social energy in society, the operation of a system of constitutional justice, etc. B. A. Osipyan is undeniably right in stating that "[...] even the most 'rigid' constitution must allow for the functional possibility to implement legislative reforms in order to avoid social cataclysms."³³³

One of the most important criteria for evaluating a rule-of-law state is the degree of existing shadow governance. The problem is in the extent to which real power is in the hands of constitutional institutions and the degree of its formality, which may lead to true power ending up in the hands of institutions and individuals in the shadow. Such an event may be in direct correlation to the degree of judicial independence and capacity to act, and may be prevented only by guaranteeing the latter.

³³³ Осипян Б. А. Идея саморазвивающейся правовой системы // Журнал российского права. 2004, N 4, С. 73.

4.4. THE GUARANTEES OF CONSTITUTIONALISM IN THE ANGLO-AMERICAN AND CONTINENTAL LEGAL SYSTEMS

International constitutional thought has actively focused on the issues of uncovering the characteristics of American and European constitutionalism. There are a number of factors underlying this, such as the general trends of globalization, instigation of the role and influence of international law, European integration processes, the new manifestations of the approximation of the continental and Anglo-Saxon legal systems, common approaches to liberal legal values, human rights and fundamental freedoms, human dignity, the fundamental principle of the supremacy of law, etc.

For many years there has been a firm belief that European constitutionalism mostly appears to be a distinctly intra-European phenomenon and is underpinned by the development trends of the European value system³³⁴. In our opinion, this is already history since a number of new circumstances evidence that there are intensive tendencies of globalizing what was considered to be pure European values. We have two common examples here. The first one refers to constitutional justice. During the past hundred years, constitutional courts were established in all the continents, in more than 110 countries worldwide, which, having originated within the continental legal system, were predominantly characteristic to the latter and became the essential constituent element of democratic legal systems. This phenomenon turned into a new quality in January 2009 when the 1st World Conference on Constitutional Justice was convened in Cape Town, South African Republic and attended by specialized constitutional justice institutions from 93 countries. In April of the same year, the first official discussions were initiated concerning the establishment of a global association of con-

³³⁴ Collection Science and technique of democracy, N 37. European and US constitutionalism. G. Nolte (Editor). European Commission for Democracy through Law. Council of Europe Publishing, 2005, p. 5.

stitutional courts, which was rendered a reality in 2011, after which the 3rd Conference was convened in Seoul in September 2014, which was attended by representatives from 114 countries and international organizations. The meeting of the Bureau of the World Conference, held at the Venice Commission on March 21, 2015, confirmed the official membership of constitutional and equivalent courts of 95 countries to this world organization.

The second important reality is the evolution of the membership composition and activities of the Venice Commission in recent years. The Venice Commission was established in 1990 as a legal advisory body of the Council of Europe and was dealing solely with the key issues of democratic developments in European countries, particularly newly established ones. Gradually, the issues of constitutionalism, in general, started to become the major focus of the activities of the Commission. Besides, constitutional courts in a number of countries in Africa, Asia, and Latin America, totaling 60, became members of the Commission. There have been also changes in the geography of the issues subject to consideration and international conferences organized.

Obviously, European constitutional culture, the constitutional fundamental values, and the guarantees for upholding the constitutionalism have ceased to be purely an intra-European phenomenon, and have their factual and effective impact on the international development processes of constitutionalism.

Certain peculiarities of American and European constitutionalism are the result of the differences of historical and social environments in which constitutional developments have taken place. Much has been written on the developments regarding the drafting of as well as preceding and subsequent events related to the US Constitution, the debates between the federalists and their opponents, the Bill of Rights and further constitutional amendments, the role of the Supreme Court in constitutional developments and so on. Jon Meacham's opinion was very characteristic: if it is the religion that unifies other nations, for the

American nation it is the Constitution that acts as the unifying force.³³⁵ **It was the Constitution that shaped the American nation on the basis of multiple nations and with commitments to the principles of statehood.**

This is not the case in European countries. **Here, the primary quality which unifies societies is national identity**, historical memory, and common spiritual values. **In Europe, the social community is nation-oriented, whereas in America this community appears to be person-oriented and even composed of secluded individuals that are united by communal and national coexistence.** Naturally, this social foundation did play a certain role in developments of constitutionalism receiving respective quality.

Undoubtedly, historical events have had their unique impact on constitutional developments in various European countries. We will make an attempt to focus our discussion on a number of new realities that are the most imperative in the context of general tendencies of global legal developments.

For the United States and some European countries the constitution has become the aggregate result of social value-system developments in terms of long-term spiritual, social, economic, political, and legal evolution. A vast number of Eastern Europe and former communist countries had to choose the path of establishing model constitutionalism and opted for a relevant constitutional model by taking into consideration the international experience, which, after being gradually transformed into reality, was intended to become meaningful public property. This, in its turn, required specific approach and long-term efforts in order to establish constitutionality.

The Basic Law of the Federal Republic of Germany is a serious contribution to the formation and development of European constitutionalism, **which is primarily distinguished by its solid axiological base and the integrity of systemic regulation of constitutional-legal**

³³⁵ Jon Meacham - The End of Christian America // Newsweek, April, 20, 2009, p. 10-14.

relations. As to its essence, it is neither a so-called “model” Constitution, which is common of the international constitutional developments of recent decades, nor built upon import and transplantation of constitutional values, **but represents rather a logical summary of historical developments, public accord on values which have become the meaningful rules of vital existence having withstood the test of time and experience.**

Furthermore, it represents a concentrated expression of the axiological qualities of European constitutionalism.

Contemporary German constitutionalism is anchored on the German theoretical and philosophical rich heritage of state and law. At the same time, bearing the effects of progressive European constitutional thought, the liberal-democratic qualities became common for the developments of German constitutionalism in the post-Napoleonian period (especially after signing the act on creation of the German Union of June 8, 1815), laying the foundation for the upcoming developments of constitutionalism.³³⁶

The human dignity, rights, and freedoms, the guaranteeing of the supremacy of law and the establishment of a rule-of-law state on the basis of liberal legal relations constitute the foundations of German constitutionalism. The main quality of liberal constitutionalism is the fact that the individual, with his rights and freedoms, preconditions for his conscious self-expression, becomes the criteria for all social and political experiences.³³⁷

Very often German constitutionalism is characterized as radical liberal³³⁸. This is supported by the fact that priority is afforded not to the role of the state but rather to human rights and freedoms. However, this deep value systemic orientation has become not only the cornerstone of

³³⁶ See: В.Г. Баев, Европейский конституционализм после Наполеона (на примере Германии) // Журнал Российского права, 2005, N7, с. 113-124.

³³⁷ Мишел Розенфельд, Андраш Шайо, Распространение либерального конституционализма: изучение развития права на свободу слова в новых демократиях // Сравнительное конституционное обозрение. 2007, N1, с. 103.

³³⁸ See: Теория конституционализма и философия государства в ФРГ // Закон и право, N5, 2001, с. 41.

the development of modern European constitutionalism but also a typical peculiarity of European law.

Nevertheless, German constitutionalism did not appear as secluded but managed to integrate all progressive generalizations of Western legal thought, in the meantime preserving its singularity. This primarily refers to the basic constitutional principles.

In many countries human rights were not stipulated in the constitution from the onset but were later codified in subsequent laws (bills), yet in the case of Germany we faced a completely different quality, since the very first part of the Basic Law was dedicated to human rights. This is not merely a symbolic and structural technique but a serious value system orientation.

Paragraph 1 of Article 1 of the Basic Law of Germany stipulates that human dignity is inviolable. To respect and protect it is the duty of all state authority. Paragraph 2 of the same Article stipulates that the German people therefore acknowledge **inviolable** and **inalienable** human rights as the basis of every community, of peace and of justice in the world. Paragraph 3 summarizes the entire conceptual approach, stipulating that the basic rights **bind the legislature, the executive and the judiciary** as **directly applicable law**.

This fundamental principle of a **rule-of-law state — to restrict power by virtue of law —** was stipulated for the first time in the Basic Law of Germany and became the cornerstone of European constitutionalism. Ultimately, constitutions have been called into existence to accomplish three principal missions:

- guarantee the human rights and freedoms;
- limit the powers and the activities of those exercising it;
- define the foundations of state order and regulate the exercise of state functions.

The following irrefutable truths, generalized by legal and philosophical thought, became the basic premise for German constitutionalism:

- the human being, as a social being, enters into social relations with his natural and inalienable rights;

- the state is bound to recognize the human rights as an ultimate and inalienable value, as a constitutionally enshrined directly applicable right;
- every law derives from these rights, protects these rights, and restricts these rights solely and exclusively inasmuch as it is necessary for recognizing and safeguarding the rights of others and for harmonious social co-existence;
- natural human rights constitute the basis for the exercise of power by the people and the state. It is the power that is restricted by virtue of law, rather than the law by virtue of power;³³⁹
- the direct effect of constitutional human rights is guaranteed by the Constitution, laws and by the judicial practice.

The emphasis put on the basic rights in the Basic Law is so explicit and unequivocal (as mentioned, it is one of the unique constitutions where the first chapter is dedicated not to the fundamentals of constitutional order but to human rights) that certain constitutional scholars consider the Basic Law of the Federal Republic of Germany from the point of view of “stipulating egoism legislatively.”³⁴⁰

One of the characteristics of German constitutionalism is that the rights are considered in action, in the entirety of their development trends and the responsibility to guarantee them. From this point of view, **addressing the abuse of rights in the constitution** is also worthy of note. It is quite rare in European constitutional practice but possesses a great preventive potential and deserves attention. This is in reference to Article 18 of the Basic Law, which stipulates that “[w]hoever abuses the freedom of expression, in particular the freedom of the press (paragraph (1) of Article 5), the freedom of teaching

³³⁹ As mentioned by academician V. Nersessiants: “...the law (that which is defined as positive law) may either conform to, or contradict the right. [...] The law (positive law) becomes lawful only as a form of expression of the right. [...] It is not the law that is the consequence of official-authoritative bondage, but the opposite (See: Արսեսյանց Վ. Ս., Իրավունքի եւ պետության տեսություն, Երևան, «Նաիրի», 2001, էջեր 41-43).

³⁴⁰ Теория конституционализма и философия государства в ФРГ // Закон и право, N5, 2001, с. 42.

(paragraph (3) of Article 5),³⁴¹ the freedom of assembly (Article 8), the freedom of association (Article 9), the privacy of correspondence, posts and telecommunications (Article 10), the rights of property (Article 14), or the right of asylum (Article 16a) in order to combat the free democratic basic order shall forfeit these basic rights.” This forfeiture of rights and its extent are defined by the decision of the Federal Constitutional Court.

Although such an approach resulted from the historical lessons and experiences of public life, nonetheless, it was alarming that in societal relations the extent and the harmoniousness are correlated, and they make it possible to prevent the accumulation of negative social energy, the formation of its critical mass, and social calamities.

For the first time, the constitutional principles of the restriction of basic rights were constitutionally stipulated in Germany (Article 19). Later, this approach became the premise for a complete theory of restriction of rights and for the establishment of the so-called three golden rules. These included the restriction of rights only by law, the proportional restriction, the exclusion of obstruction or such restriction that does not distort the essence of the right.

Human rights have also played a central role for the Constitutional Court of the Federal Republic of Germany. The legal positions of the latter are anchored on the fundamental principle that all legal norms must be based on and derive from the principle of the rule of law. The Basic Law obliges each state institution to respect and protect human dignity, recognize human rights as supreme and inalienable values, as the boundaries of power, as directly applicable law. This latter is also of exceptional importance nowadays and, unfortunately, it is not duly acknowledged and perceived in full depth in transitive legal systems.

Without hesitation we can generalize that **in the first third of**

³⁴¹ It should be noted that American constitutionalism has adopted a more liberal approach in this issue. Particularly, the United States Constitution stipulated in its first amendment that the Congress should not adopt laws restricting the freedom of speech or press.

the 19th century, after having withstood the test of time and experience, the complete and scientifically substantiated theory of the rule-of-law state was born in Germany and later, in 1949, was constitutionally stipulated in the Basic Law, which has become the singular highway for social progress in the current evolution of civilizations.

Europe, which faced two world wars in the 20th century, learnt the respective lessons from them, and regarded democracy and rule of law as cornerstone values, **acknowledged — as a general principle and as the main formula for constitutional culture — that the law and state shall be governed by rule of law and guarantee equality, freedom, and justice; their value system shall be based on human dignity, the supremacy of inalienable human rights.**³⁴² Moreover, the legal system appears to be complete and viable when these values become constitutional values, acquire constitutional guarantees for recognition and protection. Hence, in this regard, the role of the Basic Law of the Federal Republic of Germany is undeniable.

There is another important observation. As already mentioned, with theoreticians of the 17th-18th centuries, such as John Locke, Montesquieu, Jean-Jacques Rousseau and, later on, Kant and others, not only the understanding of the substance of natural law and the supremacy of law acquired new quality, preserving the common theme of **the law being the embodiment of the right**, but the concept of the separation of powers was clearly defined.

Later, American constitutional thought added a new quality to the practical application of the theory of the separation and balance of powers. The development of an effective mechanism of checks and balances and the dynamic balance introduced in the separation of powers became the cornerstones of American constitutionalism. Having regard to this rich heritage, many theorists of contemporary constitutional law (particularly the German constitutional lawyer K. Hesse) believe that

³⁴² See, in particular: Политико-правовые ценности: история и современность / под ред. В.С. Нерсесянца. М., 2000, С. 5-29.

the main characteristic features of the principle of separation and balance of powers are considered to be the coordination of joint activities and the discipline in individual activities, identification of separate branches of power, determination and restriction of their jurisdiction, general regulation of common activities, balance of the legal capacity of state bodies and, consequently, the integrity of limited state power³⁴³. The point is that in the conditions of liberal legal relationships the separation of powers is not made absolute. This principle also implies interaction and balance of various branches of the integrated government, endowed with functionally specified and independently implemented powers. In this respect, the international practice attempts to constitutionally define the limitations of power, create a system of interconnection between state powers and “binding” coordination of their actions (approval of the Government Program by the Parliament, the President’s right to veto, the right of the Parliament to override the veto of the President, the right of the President to dissolve the Parliament, the right of the Parliament to seek non-confidence against the Government, etc.). However, the existence of an effective system for identifying, evaluating, and rectifying, through constitutional jurisdiction, the disruptions of the balance of the constitutional powers of state authorities constitutes, in its turn, a critical condition for safeguarding the balance of power. And this is possible only if each of the three branches of government possesses sufficient powers to such minimum extent that is necessary for ensuring its essence.

Thus, the next essential circumstance is that the Basic Law of the Federal Republic of Germany is the first most complete constitutional act which comprises an efficient system for guaranteeing the supremacy of the Constitution and for identifying, evaluating, and rectifying the disrupted constitutional balance. Perhaps numerous studies could be dedicated to the systemic characteristics of the constitutional justice of the Federal Republic of Germany so as to demonstrate the role and importance of the system in the current stage of interna-

³⁴³ See: Хессе К. Основы Конституционного права ФРГ. М., 1981, С. 237.

tional developments of constitutional review. However, we would like to highlight one key issue that, in our opinion, is ultimately important yet not perceived.

The wording of paragraph 1 of Article 93 of the Basic Law of the Federal Republic of Germany still remains unprecedented as to its profundity and comprehensive resolution of the issue. It stipulates that, “[t]he Federal Constitutional Court shall rule on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or of other parties vested with rights of their own by this Basic Law or by the rules of procedure of a supreme federal body.”

Paragraphs 2-4 of Article 93 of the Basic Law included all other constitutional disputes, the judicial resolution of which is the most important guarantee of the country’s dynamic and sustainable development. This is especially true also in terms of guaranteeing the harmoniousness and stability of the interests in a country with federal structure.

For the first time, an important principle was stipulated constitutionally and withstood the test of time, according to which any internal political dispute regarding the principles of statehood must be subject to judicial resolution. **It is not the legal disputes that should be resolved within the political dimension, but rather the political disputes that should be resolved within the legal dimension.** This is an essential attribute of a rule-of-law state and one of the main prerequisites for ensuring the supremacy of the Constitution. This turned to be yet another important contribution of German constitutionalism to European constitutional developments.

Furthermore, another essential characteristic of German constitutionalism is that guaranteeing the supremacy of the Constitution has become a classical example for other countries in terms of its systemic entirety. In practice, this resulted in the golden rule that all constitutional institutions, as well as each person, become eligible to apply to constitutional court, and legal acts of all constitutional institutions become subject to constitutional review. This addressed three issues: to

ensure the constitutionality of legal acts, to protect constitutional rights as directly applicable law, to resolve disputes over constitutional powers arising among the authorities. All of these, taken together, constitute the essence and content of guaranteeing the supremacy of the Constitution. It is no overstatement that whatever the achievements in this field in Germany – with the adoption of the 1949 Basic Law and its subsequent amendments, in particular those of 1969 – have been unparalleled from a systemic point of view and an exemplary model for every country that has chosen the path of establishing a rule-of-law state. The constitutional solutions of the Federal Republic of Germany proved the absolute necessity of prerequisites for intra-constitutional stability that will guarantee the efficiency of a solid legal system for identifying, evaluating, and rectifying the disruptions of the constitutional balance, will endow the constitutional order with a more viable **“immune system,”** especially underscoring the importance of access to constitutional justice for all human rights.

Summing up the above, we can emphasize that as a result of such constitutional solutions the **German society of present days stands at a notably high level of constitutionalization. There, just like in the United States, constitutional values also have taken deep root in public life, and the Basic Law has not only become a living reality but constitutes great axiological power that unites the nation.** It is a particularly useful example for countries and nations in social transition.

4.5. CONSTITUTIONALISM AT THE CROSSROADS OF POLITICS AND LAW

It is undisputable that the Constitution is a legal and political document. Both its substance and the constitutional architecture are the result of the political orientations of the country, the interrelation of the approaches of political forces, the level of public awareness on funda-

mental constitutional principles, the general level of political and legal culture, and the like. The selection of the constitutional doctrine is based primarily on the imperatives for resolving the current and lasting real problems that the country and its political forces face. Therefore, the Constitution cannot but have political overtones. **However, this should not lead to confusion and create a situation where constitutional norms are interpreted as political statements.** No matter to what extent these norms are based on political overtones or result from political accord, after becoming a binding rule of conduct they, nonetheless, are merely and simply legal norms that have primary and major significance and underlie the nature and essence of the entire legal system. This fact is not acknowledged, in sufficient depth, especially by governmental and political actors of transformative social systems, **which often leads to situations where efforts dictated by legal exigency give way to political expediency.**

The essential characteristic feature of constitutional norms is that they should not be aimed at current political orientations nor be based on current political interests, but rather ensure the stable and dynamic progress of society by being targeted toward long-term orientations of the community.

One of the main difficulties of constitutionalizing social relations is that a certain conflict emerges among current and long-term political interests and orientations. As a result, fundamental constitutional values are perceived, interpreted, and realized differently. In particular, under the conditions of the so-called model constitutional doctrines, low level of political culture and inadequate level of the development of political institutions, the interpretation of constitutional provisions mainly in the realm of political priorities lead to a schism between constitutional axiology and its actual manifestation in public life.

The main conclusion here is that the key issue pertaining to politics and constitutionalism should be discussed in the ambit of a clear causal relationship of these phenomena and not in a remote context, by merely automatically comparing or contrasting them.

In a democratic state governed by the rule of law, politics itself should be constitutional, derive from the fundamental values and the principles of vital existence that, upon public accord, have become the basic rule of behavior. **Politics is a means and opportunity to provide guidance to the community in making its choice in its value system orientations. After making this choice, politics receives its natural limiting boundaries in order to manifest only and solely within the scope of constitutional democracy.**

In the continental legal system there are certain important characteristics as to the manifestation of the relationship between politics and constitutionalism. Every law, after all, is the product of political accord. The role of judicial precedent is relatively weak within the system of sources of law. Very often it is the political orientation of a political party that becomes a universally binding rule of conduct, when the given political party has a distinct majority in Parliament. In such systems the role of constitutional review increases to a considerable extent when it comes to **“keeping” the politics within the constitutional framework and guaranteeing the supremacy of the Constitution.** However, this is not sufficient for guaranteeing the supremacy of the Constitution. Constitutional developments and current challenges in the European continent, especially during the last century, show that the introduction of institutions for continuous constitutional diagnosis and monitoring becomes of vital importance, and we will further refer to this issue in more detail.

A number of factors are needed to avoid making the Constitution an instrument for such politics. First of all, it is necessary for the political system to be democratic. **All such political forces that establish authoritarianism within their political parties can hardly establish democracy in the country.** The political behavior of political institutions should be based on guaranteeing the rule of law. It is absolutely not a coincidence that Article 8 of the Constitution of the Republic of Armenia requires the structure and activities of political parties not to contradict democratic principles. This constitutional requirement will have an abstract nature in all cases when the institutional solutions for

the formation and activities of a political power fail to clearly guarantee its unequivocal implementation, when the political power turns into an irreplaceable person-centered pyramid. **Such a situation has nothing to do with a rule-of-law state, with the supremacy of law, democracy and, consequently, with the future of the state.**

Guaranteeing the democratic nature of political institutions is also of utmost importance. The Parliament has a special role here. In all the countries where the political minority is unable to keep the political majority within the framework of lawmaking processes, the Constitution will be jeopardized. The most dangerous manifestations of this occur especially in those countries where the Constitution and the amendments thereto are adopted by a Parliament where a political force has majority.

The next significant factor is connected with the consistent implementation of the principle of separation and balance of powers. Where this principle is not implemented systematically, the Constitution becomes merely an instrument in the hands of the political majority for the realization of its current political goals. Such a situation also has nothing to do with democracy and with a state governed by the rule of law. **First and foremost, it is necessary to effectively put into action all the factors that will legally safeguard the supremacy of the Constitution, securing that the Constitution is not “limited to” political expediency, and that political policy is implemented within the constitutional field.** We will cover this issue below.

We fully agree with the view that an essential feature of public law is that it predominantly relies on the value system of expediency³⁴⁴. However, in terms of constitutional law, this is primarily related to lawmaking processes. When enforcing a constitutional legal norm, **political expediency is incompatible with the fundamental principles of a rule-of-law state**, and any form of its manifestation should be ruled out.

³⁴⁴ See: Куриц С.Я, Воробьев В.П. Болезни государства: диагностика патологий системы государственного управления и права. М., 2009, С. 51.

4.6. CONSTITUTIONAL ROOTS OF PUBLIC ACCORD AND TOLERANCE

Historical, logical, and comparative-legal analysis of constitutional developments also reveal that another key quality of the Basic Law is that it is an attribute of a new level of civilized co-existence. Contemporary constitutions emerged only at the phase of the development of human society when:

- (a) its existence had become a recognized exigency;
- (b) such regulation of societal relations was made possible due to the adequate level of awareness of the objective relations of social community, and the legal-philosophical achievements in understanding them;
- (c) the necessary environment for the legal awareness of the society was developed.

Constituting relations in such a society also has a primary objective of transforming consensus into a central driving force for development. This is possible only when there is no gap between constitutional axiology and socio-cultural self-expression qualities of an individual. We have repeatedly emphasized that, first of all, the Constitution is the public accord on fundamental values of vital existence. These are qualities that do not have an abstract nature: they are a living reality and constitute the pillar of the social behavior of an individual. In this regard the Constitution appears to be not only an instrument of attributing a normative character to the fundamental rules of vital existence based on those values, but it should also become the guarantee for their implementation.

In terms of guaranteeing public accord, it is exceptionally important not only to define in the constitution, by virtue of rights, clear-cut limits for the powers, but also to clarify the boundaries of human freedoms through restricting the rights and ruling out the abuse thereof.

Since we have already covered the issue of the restriction of rights, here we would like to emphasize that mutual agreement and tol-

erance may exist only in a society where the limits of exercising the human rights are perceived by every member of society, and the observance of these rights is a recognized necessity. This is the very first proof of an existing civil society.

The concept of “tolerance,” in its turn, apart from socio-philosophical perceptions, also has constitutional-legal essence. The whole constitutionally stipulated system of checks and balances is intended to establish cooperation instead of exacerbation of various disagreements. Tolerance is relevant not only to interpersonal relations, but also to constitutional institutions. **In a rule-of-law state, the important principle that functional disputes do not have a political solution should underlie the cooperation between all of them.** Moreover, political consensus around them may be problematic from a legal aspect. Such disputes should be resolved within the legal framework. This is especially relevant to disputes arising among state authorities with respect to constitutional powers.

Only legal relationships based on consensus and tolerance will make it possible to have a strong state system, which has the power to:

- guarantee, secure, and protect human rights and freedoms;
- prevent criminality;
- fight corruption and various irregularities;
- harmonize the interests of an individual and the national interests of the country.

Tolerance may become an essential element of social behavior only in a rule-of-law state. The legal environment must guarantee the inviolability of everyone’s dignity, a level of self-consciousness where every person sees his rights in harmony with obligations. Public and state bodies as well as all the elements of the political system of the country must behave so.

The most explicit manifestations of intolerance in mutual relationships of political institutions can be observed especially in transformative social systems. Moreover, in parliaments, even if they are the full bearers of legislative power, only the parliamentary majority is

perceived as power therein, disregarding that the parliamentary minority is also supposed to exercise state authority. This is possible only in case of the existence of a certain culture of parliamentarism, civilized dialogue, rather than in conditions of political confrontation. The foundations for such dialogue also rest upon the Constitution, as well as upon current legal regulations.

It is also evident that, first of all, it is illegality that produces intolerance. If the constitutional-legal system guarantees the full-fledged implementation of the principle of rule of law, it may be a solid guarantee for turning public accord and tolerance into reality. These qualities are inherent to a society with a high level of civilization. In such a society the Constitution itself does not remain purely a collection of artificial or borrowed values, but assumes its axiological and legal-regulatory role in real life and becomes a living reality. As Khorenatsi would describe, with the help of this and owing to the Basic Law, people “will gain knowledge on secular orders,” “will learn about political order,” will make concord and solidarity the vital energy for existence and development, and “will establish mercy in the country”.

4.7. THE MAIN ISSUES OF THE CONSTITUTIONALIZATION OF THE SOCIAL BEHAVIOR OF THE INDIVIDUAL AND POLITICAL AND PUBLIC BEHAVIOR OF STATE AUTHORITIES

Currently, the social behavior of the person has become a subject of serious scientific discussions by philosophers, sociologists, psychologists, and representatives of other disciplines. However, in our opinion, no relevant approach — commensurate to its urgency — has yet been demonstrated towards attaching a value to the social behavior of the person from the legal perspective.

The social behavior of a person is, first of all, meaningful and rational behavior with an axiological background, motiva-

tion of manifestation, characteristic forms and ways of expression, which guide the self-expression of a person in multilayered social relations. The axiological basis of social behavior is the attachment of a meaning and a value to the place and role of the human being in public life, in accordance with the value system of his perception of the world.

It is well known that at the beginning of the last century the so-called “La Pierre Paradox” proved that the unvarying and core feature of the human social behavior is his axiological orientation, the value system underlying his rational self-awareness and self-expression.

Spiritual and physical needs of a human being, the diverse motivations of his expectations, interests, and goals dictate relevant *modus operandi*, which, in itself, has a meaningful axiological manifestation. The reality is that it is the values that shape the society and the individual. As it is perfectly said, “Show me a hero, and I will write you a tragedy.”

In its turn, the axiological motivation of an individual has not only a subjective but also an objective public aspect and significance. The core issue here is the nature of value orientation of the individual, the dialectic for satisfying his needs, the motivations for satisfying his needs that engage him in the dynamic process of social relations, deriving from the objective reality that every satisfied need creates new necessities. Taking this circumstance into consideration, at the end of the last century Nobel Prize laureate Robert Lucas, within the framework of the theory of rational expectations, proposed building government policy upon the concept of influencing the rational expectations of people.

The formula of achieving satisfaction and happiness through deterrence of needs has also become a spiritual value of millennia.

The public significance of the social interrelations of an individual and his social behavior is increasing in civil society, **in parallel with the acknowledgment of the value of his place and role**. In such a society, **the social behavior of the individual should be sustainable, predictable, and in harmony with his ideals, aspirations, expectations, and the meaningful orientations of social interrelation**.

This is possible only if there is a strong axiological basis for the rational human existence in conditions of the formation of an adequate social environment.

In this perspective, there is an urgent need for assessing and finding adequate solutions to pressing social issues, such as the demographic problems in case of our country.

Simultaneously, in a democratic society it is necessary that the value orientations of the social behavior of an individual be in harmony with the value system universally acknowledged in the community.

In this context, special attention should be paid to the fact that the social behavior of the person is not a spontaneous expression of his social psychology: **normativity is its key underlying attribute**. The latter is formed not only on the basis of customs, traditions, spiritual values, various influences to the social environment, but also, and primarily, as a result of legal regulation of the relationship between individuals and their groups.

Lessons of history suggest that the nature and need of legal regulation are also contingent upon the human social behavior, the axiological orientations of its manifestation, and the social environment where the person has to demonstrate himself as a being of rational and divine inception.

We do believe that the conclusion is unequivocal: social society may be a healthy, viable, naturally existing and developing system only in the case when **the social expectations of the individual are in harmony with the axiological orientations of society, and are built upon objective and also meaningful and thoroughly acknowledged values**. Understanding this truth is of utmost importance for nations that have lost their statehood for centuries and have no lasting traditions of life under statehood.

Both spiritual and secular thought of millennia have not yet found anything other than human rights and fundamental freedoms recognized as the highest and inalienable values for the axiological unity of the social community.

Recognition of the principle of the rule of law is the culmination of the meaningful self-expression of human self-awareness and social existence. Therefore, it is an indisputable truth: expecting social solidarity and development becomes senseless in a society where guaranteeing the rule of law does not constitute the cornerstone for both the individual's self-expression and his social self-expression, and where unlawful interference with the social behavior of the person becomes dominant.

In a rule-of-law and democratic state, by virtue of the Constitution and on the basis of the Basic Law of civil society, as a result of adequate public policy, a social environment should be created where the rule of law is the core for the generation and manifestation of the social behavior of individuals, their groups, authorities, and society as a whole. As Armenian thinker, great genius Narekatsi voiced in his Divine prayers in the 10th century, the human sins are the misfortune rather than the guilt of the individual. **For a normal and dignified life, a person needs the necessary environment and opportunities.** Nevertheless, the lessons of history show that this can only be guaranteed in a rule-of-law and democratic state.

The highest mission of the rule-of-law state is such regulation of the social behavior of the individual, society, and the state whereby the inalienable rights of the person become the main guarantees of his freedoms, when a social environment is created where **self-guidance, anchored on the rule of law** — and not external influence — becomes the highest form of guidance for the social behavior of the individual. In a society where the rule of law constitutes the primary premise for both the state and the individual, law-obedience, shame, and conscience have much greater and more decisive influence on the behavior of the individual than punishment and its preventive role.

In a rule-of-law state, within the framework adopting the principle of the rule of law, the legal regulations stipulated by law should make legitimate expectations of a person predictable to him. Legal regulations and judicial practice must be based on the fundamental approach that the principle of the protection of legitimate expectations is one of the

crucial elements both for a rule-of-law state and for guaranteeing the supremacy of law. Only in this case it will be possible to guarantee the legitimate expectations of the person.

The rule of law should be brought to life, first and foremost, in the Basic Law of the country: it should not be done through mechanical adoption, but by way of meaningful and systemic stipulation as a result of public accord and its undeviating translation into reality. However, it is more important, **on one hand**, to guarantee this in real life, to turn the constitutional fundamental values into the rule of life, into the norm of behavior of the individual, society, and the state, and, **on the other hand**, to securing a system of monitoring the guaranteeing of constitutionalism, which will constantly identify, assess, and rectify any deviation from this fundamental principle under the influence of various factors, thus endowing the social organism with the necessary and adequate immune system for its internal self-defense.

The one and only conclusion here is that the constitutional future of a country depends on the proper axiological guidance for the harmonious social behavior of both the individual and the citizen, with the rule of law being the underlying principle. However, despite it being a necessary condition, it is not a sufficient one. It is essential to have a consistent approach to the constitutionalization of the public behavior of authorities. This, in particular, implies the following:

1. political mindset and practices should be constitutional; the country's political institutions should be established and should operate solely within the scope of constitutional norms and principles;
2. the mindset of those holding state power should be anchored in constitutional axiology;
3. autocracy, political monopoly, the fusion of political, administrative, and economic potential should be ruled out in the country;
4. internal conflicts between the Constitution, the legal system, and judicial practice should also be excluded.

4.8. THE AXIOLOGICAL NATURE AND SPECIFICS OF NATIONAL CONSTITUTIONALISM

It is emphasized very often that the Constitution cannot have an imported or exported axiological foundation.³⁴⁵ It constitutes the consensus of the given society around the fundamental rules of vital existence, which is anchored on the historically developed value system and contingent upon the existence of objective preconditions. However, the main issue remains within the axiological framework of every specific Constitution: first, the reasonable harmonization of universal values and national peculiarities, and second, the promotion of sustainable social development through constitutional solutions. This approach gave the world the best examples of the United States and Germany, which we have already covered. Yet the historical constitutional developments in France and in a number of other countries are not less important; it is also evidence of the exemplary processes of the formation of national constitutional cultures.

This key issue may be analyzed on the example of each of the mentioned countries. However, we will try to discuss it at the level of various systems in order to strongly emphasize the importance of reasonably taking into account the axiological peculiarities of national constitutions. To this end, we refer to the primary axiological specifics of the Constitution of the People's Republic of China, which, in our opinion, have played an important role in the unprecedented economic development of this country.

Currently, the People's Republic of China appears to the world not only with its economic miracle of recent decades, but also and predominantly with its remarkable culture, with roots going back thousands of years: culture that is not a historical memory but a living reality. Many researchers have referred to the Chinese phenom-

³⁴⁵ In literature importance is attached also to the violent, forced "export" of the value system of different civilizations. (See, in particular: E. A. Лукашева, Человек, право, цивилизации: нормативно-ценностное измерение. М., 2013. - Ст. 11-38).

enon and admitted that this country and its people are beyond their understanding, comprehension, and any interpretation. We strongly believe that the key lies in that **the past and the present, the historical memory and the meaningful present, the complementary role of law, the tradition and custom are outstandingly consolidated in this country in all the manifestations of social existence.** Besides, these are all also complemented by the intra-systemic peculiarities inherent to large-scale social systems, ranging from cautious conservatism to the need for specific mechanisms of systemic stability.

China acquired new social quality as a result of the 1911 revolution, when the revolutionary movement led by Doctor Sun Yat-sen put an end to the feudal monarchy and established republican order in the country. In 1949, China was proclaimed the People's Republic of China.

The key guarantee for systemic developments in every country lies in the clear definition of the priorities and the value system in the evolution of time.

The 1980s were especially crucial for countries that had chosen the socialist path of development. All of them were facing the issue of making a choice of value system. The Eastern European countries, almost without exception, opted for the path of deepening integration with the European axiological system, which subsequently led to their inclusion in the European Union.

The former Soviet Union tried to bring to life its ideology of "developed socialism," however it turned out that it was an attempt destined to fail from the outset. The fact of the matter is that absolutization of the state, the power and one-party political force continued to be the premise of constitutional order at the axiological level. The Constitution, detached from social practice, **lost its mission of holding power within limits** and could no longer appear as an instrument and expression of public accord. The people continued to stay alienated from the power and turned from being the subject of the latter into the object of the

exercise of power.³⁴⁶ The true owners of property were not the people or even the state, but the authorities. Moreover, the law was designed to protect not the people and their property, but the authorities.³⁴⁷ The distorted dogmatic legalist-positivist legal mindset, built upon an atheistic worldview, remained dominant³⁴⁸. The core and system-shaping provisions of the Constitution of the Soviet Union continued to be **the ruling and guiding power of the Communist Party, the denial of multiple forms of property, and the exclusiveness of state power**.

The People's Republic of China did not follow that path; instead, in the late 1970s it took its unique and historically justified path. Progress was increasingly anchored on fundamental values hailing from the historical-cultural peculiarities of the Chinese people, **such as democracy, socialist market economy, socialist country under rule of law, perseverance in reform and hard work, coordinated development of material, political and spiritual civilizations, unity of the country, multi-party cooperation, peace and stability**. These became the axiological foundation of the Constitution adopted in December 1982.

Both the Preamble and Article 1 of the Constitution enshrine the principle of "people's democratic dictatorship." The comparative analysis of this principle's essence is of utmost significance in terms of uncovering the constitutional axiology.

³⁴⁶ The legal and philosophical thought has proven long ago that the development of democracy in Europe and North America is organically interlinked with private property and the establishment of market relations. (See, in particular: Страшун Б. Перспективы демократии и конституционное правосудие // Альманах - Конституционное правосудие в новом тысячелетии. Ереван, 2002, С. 217).

³⁴⁷ Many researchers are quite right to maintain that in these circumstances the law and the power become identical, the law is interpreted as an expression of legalized power. (See: Четвернин В. Российская Конституция: концепция правопонимания // Конституционное право: Восточноевропейское обозрение, вып. 4, 2003, С. 28).

³⁴⁸ In practice, the functions of both political and economic governance were centralized in the hands of one single body, and the resulting extremely centralized corporate system reproduced itself as dictated by the authorities' interest, deepening the contradiction between the interests of the authorities and those of society. It is not a coincidence that in literature this system is described as totalitarian socialism. (See, in particular: Чиркин В.Е. Общечеловеческие ценности и современное государство // Государство и право, С. 5-13).

In European constitutional practice, as we could see, the principle of democracy is clearly enshrined as the core value of a rule-of-law state.

The concept of "people," in its widest political-legal sense, implies citizens united in a single state. The government system, formed by the will of the people, must be transparent and accountable to the people. The state receives its power from the nation, exercises it through the nation, and for the sake of the nation.

In the constitutional-legal system of the People's Republic of China, the principle of "people's democratic dictatorship" is significantly different in terms of its essence and judicial significance from the principle of "dictatorship of the proletariat" and is comparable with the classical principle of democracy.

The aforementioned constitutional principle is not the only one at play. It constitutes one of the important elements of an entire axiological system. Special attention in this system should be paid to **the constitutional principle of the formation of a socialist country under the rule of law**, which, with its contemporary judicial significance, is in accord with the widespread European principle of the establishment of social market relations in a rule-of-law state. This principle is reflected in the constitutions of numerous countries, in the fundamentals of the constitutional order, and it has also been especially accentuated in the process of drafting the Constitution of the European Union and within the scope of the Lisbon Treaty. The key point is that both in the European Union countries and in China the establishment of the social state is not in conflict with the rule-of-law state, on one hand, and with the development of liberal market economic relations, on the other hand, which was not recognized and was absolutely unaccepted in the USSR. We strongly believe that **the reasonable harmonization between the liberalization of economy and the principles of the social state played an essential role** for the Chinese economic miracle. This was brought into life with justified caution and ensured unprecedented economic growth with a definite social orientation. This is the case when relations in terms of production and distribution are in harmony as it

comes to plan and target, and objective confrontation never develops into antagonism. The principal motto here appears to be producing for the achievement of social objectives rather than producing merely for the purpose of producing. What is important here is the right choice of the delicate boundary when social orientation of the system is not in conflict with the logic of market economy laws. Historical facts have proved that China has found the key to making the right choice in setting this boundary.

Moreover, during my first official visit to China in 1992, Premier Li Peng made an important observation during our private conversation when speaking about the conceptual approaches to the development of free economic zones. The primary essence of this observation was that China could not take any revolutionary approach when it comes to reform. In case of a mistake it would be impossible to halt the grand state gears in motion, affecting a population of about 1.5 billion, in order to rectify the mistakes and adopt new approaches. Therefore, **the model of the “expanding spiral” was adopted:** an economic innovation is tested multiple times at the level of one company, one city, one district, one region, and only after rectification of deficiencies and gaps this approach is put into operation at a nationwide level. This concept, stemming from the constitutional principle of guaranteeing the perseverance of reform, also proved to be fully effective, ensuring the sustainable dynamism in the development of the country. The ideological foundation for these reforms is the key principle enshrined in Article 6 of the Constitution, which provides the opportunity for diverse forms of ownership to develop side by side with public ownership.

It is common knowledge that the nature of economic relations depends on the form of ownership. The diverse forms of ownership, in their turn, constitute the objective precondition which creates an enabling environment where market economy laws are developed and implemented, and free competition becomes the principal impetus for the development of the economy. In 1982, the sustainable guarantees for such development were established in China at the constitutional level.

The provisions of Article 15 of the Constitution are especially noteworthy, according to which, “the State practices socialist market economy;” moreover, the emphasis is put on the state function of improving “macro-regulation,” and not on the “management” of the entire economic system. Their difference is enormous in terms of transition from command-and-control governance, with economic levers, to macroeconomic regulation. Article 18 of the Constitution also created legal preconditions for the promotion of foreign investments and their legal protection.

The brief analysis of the axiological specifics of the Constitution of the People’s Republic of China suggests that this country has adopted in time its own model of constitutional developments, deriving from the realities of public life, which is not only based on realistic objectives, but also profoundly relies on the historically developed value system characteristics of this social community. Constitutional solutions were based on real life, on the logic of developing social relations, and served as a catalyst for further development of those relations. This allowed China to avoid the negative consequences of introducing model constitutions.³⁴⁹

There is yet another obvious fact, that is, certain incompatibility of economic freedom and political polarization. Western legal thought suggests that economic competition, rule of law, and democracy cannot exist apart from each other since otherwise they become purely meaningless. In China, this hypothesis is not used in its classical understanding. The exceptionally huge influence of customs and traditions on public life creates new social and legal quality and determines the specific logic for the coordinated development of societal relations. What exists in China can hardly fall within the conceptual framework of “capitalism” or “socialism.” These relations, with their nature and systemic peculiarities, should be simply qualified as “**Chinism**” and viewed as an independent phenomenon that has certainly withstood the challenges of life.

³⁴⁹ See: Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. Киев, «Логос», 2011. – С. 119-120.

This example also evidences that the constitutional culture of every country represents a constituent element of the cultural heritage of its people, and the product of the coordinated meaningful existence of the social community over time. It should have its adequate realization at the level of constitutional solutions and become the axiological foundation for national constitutionalism and for the entire legal system.

Even in view of this example, we will try to identify the main objective impediments for the development of our own equivalent constitutional culture. The following, perhaps, are worth emphasizing:

1. the loss of statehood for centuries has left its unique mark on our collective self-consciousness and meaningful existence. This mark goes very deep and still has its continuing negative impact;
2. the basic qualities of identity are not yet clarified in our collective mentality, and we face a serious problem of self-awareness and self-acknowledgment;
3. building state-oriented mentality requires having citizens of the state. **We have a nation with self-glorifying and self-righteous qualities, but our individuals lack qualities of the citizen and are not the bearers of civil values.** The main reason for this is again the layer of dust coming from the depth of centuries. Yet the steps for wiping it away are not commensurate with the challenges faced in establishing statehood;
4. there is lack of a political system with constitutional mentality; politics is gradually turning into a political business, along with the growing fusion of political, economic, and administrative potential;
5. social acknowledgment of an individual fails to comply with the requirements of constitutional axiology, and the existing gap tends to grow deeper;
6. the fifth estate has an extremely large number of representatives who bear the influence of exogenous factors, speak about high values, yet pursue mercantile objectives.

These are public diseases which have entered a dangerous stage of development, and some of these may even require surgical intervention.

4.9. THE MAIN DISTORTIONS OF CONSTITUTIONALISM IN TRANSFORMATIVE SOCIAL SYSTEMS

The main theoretical philosophical generalizations of transitionology prove that in transformative social systems we are dealing with a completely different quality of social relations, the main characteristic features whereof include:

- the uncertainty of the objective prerequisites for legal relations and, as a result of it, the instability of social relations;
- axiological confusion and uncertainty (political, economic, social, psychological, etc.);
- the state of functional non-governability and the predominance of crisis management principles and tools;
- the enormous deficit of confidence and faith in almost all social relations, mistrust in reason, giving way to emotions, existence of unprecedented opportunities for the expansion of political demagoguery;
- the general dissatisfaction, social anxiety, and extreme tension, inevitable accumulation of negative social energy that may create a critical mass and lead to volatile outcomes;
- the need for newly independent countries to overcome the inevitable difficulties in making systemic transition manageable;
- the unprecedented social and economic polarization, and the real danger of the fusion of political, economic, and administrative potential;
- the inevitability of confronting negative exogenous factors all alone, etc.

Naturally, all these circumstances are diversely manifested in different countries. However, constitutional developments are a natural, dynamic, continuous process for each country. Countries need to find such ways and methods for the establishment of constitutionalism and for dynamic structural reform, which are democratic in their nature, le-

gal in their essence, and guarantee the progress and development of the given social community.

For countries with systems in transition, the ultimate issue in terms of transformation is the establishment of constitutionalism and the guaranteeing of stable constitutional developments. The latter, as noted, implies guaranteeing the rule of law through democratic institutions, creating an environment of public accord, mutual understanding and tolerance, continuously securing consensus on the fundamental rules of coexistence and, by virtue thereof, channeling the positive potential of the society towards progress and development.

There is no doubt as to what is ultimately detrimental for this process, in view of the principles of the establishment of civil society. Constitutional developments should not be employed for political expediencies of the time. They should not disrupt the equilibrium of the separation and balance of powers, create disequilibrium, contribute to the conjunction and fusion of political, administrative, and economic forces. Constitutional processes should not diminish the guarantees for the protection of human rights, should not restrict human freedoms, nor impede the development of self-governance. The concepts of "human rights," "democracy," and "rule-of-law state" appear as an organic triunity, and the aim of establishing constitutionalism is to guarantee this triunity.

The main legal and constitutional deformations in transformative social systems may be conventionally classified in three groups:

1. the mechanical borrowing or duplication of progressive legal values, without creating the necessary prerequisites for their implementation, which in real life leads to various deformations of basic constitutional principles;
2. distorted legal-constitutional solutions or shortcomings;
3. the inertia of legal thinking and judicial practice.

Studies of international analytical organizations (Freedom House, Rule of Law Index, etc.) show that in European countries and in countries of the former USSR, three apparent groups of countries may be distin-

guished in terms of the implementation of legal-constitutional values: the countries that have become new members of the European Union, the Balkan countries in transition, and the CIS countries.

If the overall dynamics of democratic developments in the first two groups of countries is positive, conversely, in the CIS countries not only is the level very low, but also the dynamics appear to be negative.

Despite the fact that the indicators of the Republic of Armenia favorably stand out as compared to many other countries in this group, there have been no tangible positive tendencies registered in this respect.

Obviously, such a situation needs serious reflection and professional assessment, which we will refer to later. We find it unnecessary to argue about the research methodology and the impact of the subjective factor. We believe that the methodology which we presented many years ago is scientifically more fundamental and objective.³⁵⁰ The objective and subjective reasons underlying the situation are also different. Nevertheless, it remains a fact that the conducted analyses evidence the existence of a **certain crisis of constitutionalism and obvious deformations of constitutional developments** in transition countries, especially in the CIS countries. This is the reality when the existence of the Constitution is emphasized but there is no constitutionalism, when the required level of constitutional democracy is not in place, and the constitutional principles and norms do not turn into a living reality. This is evidenced not only by accumulations of negative social energy and, as a consequence, various color revolutions, but also by the circumstance that although the constitutional principles of the rule-of-law state and democracy are declared the main motto, in practice there are evident deviation tendencies.

The analysis of the experience of constitutional developments in post-communist countries shows that it was common of them that, at the

³⁵⁰ See: G. Harutyunyan, A. Mavčič - THE CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS), Yerevan - Ljubljana, 1999, p.382-392.

time of adopting their respective new constitutions, both the left revanchist opposition and the revolutionary liberalism coexisted there. Their interaction led to the creation of an environment of a certain political compromise around legal solutions. Almost in all of these countries not only left extremism gradually phased out, but also liberal romanticism yielded to moderate realism. The balance of political influences was significantly disrupted. The administrative and political leverage of the incumbent authorities gradually gained prevalence over the constitutional solutions and new changes, which was dangerous to the extent to which constitutional solutions were subjected to addressing current political problems, rather than being the result of public accord around general approaches.

It is also typical that in these countries, as a rule, the political system is not yet firmly established. According to the definition of a German politician, the significant part of the political parties "... are either political sects or means for the self-assertion of separate ambitious individuals." There is a complete lack of political culture that would be in harmony with democratic values. Democracy is, in some sense, distorted into political dictatorship, when the political majority has every opportunity to realize its political will, whereas the minority is not endowed with even a counterbalancing potential for forcing the majority to remain within the constitutional framework, even by means of challenging the constitutionality of normative acts. Diverse manifestations of autocracy become common, the person comes to replace the state-power institution, whereas his will either directly or indirectly becomes law. This is a clan-based system, disguised under democracy, which began to take roots in Armenia in mid 1990s. In 2000s, it acquired a systemic nature, and even turned into a state machine with relevant legislative regulations, and so far continues its destructive course.

In such situations the schism between the people and the government grows deeper. The measures and the steps taken by the authorities are not commensurate with the challenges of the time. The resource nec-

essary and sufficient for serious political transformations is not generated, while the available opportunities are not effectively implemented in the absence of clear-cut priorities.

In such conditions the role of exogenous factors considerably increases, in particular, the active influence of European institutions on democratic developments of post-communist countries. The position of the Council of Europe's Venice Commission concerning the constitutional developments in Armenia and its actual results are a typical example of this.

The ultimate issue is that constitutional developments must be dictated by internally acknowledged exigency and become a measure for ensuring public accord and overcoming the political crisis.

The experience of European and former Soviet Union countries shows there are three main scenarios in terms of constitutional developments:

First,

- the practice of periodically making amendments and supplements to the Constitution is a reality;
- the institution for the adoption of organic (constitutional) laws is in place;
- the institution for the abstract interpretation of the Constitution is in place;
- the disputes among state authorities concerning constitutional powers receive constitutional solution;
- the legal position of the court becomes a source of constitutional law;
- in practice, international judicial precedent also becomes a source of national constitutional law.

Second, one or two of these six factors are not effective, and there arises a need for other complementary factors.

Third, all of the six factors are absent or almost absent, and constitutional developments have come to a deadlock. Such a situation can lead to a constitutional crisis.

We will put forward only several comparisons. During the period of 1995-2005 no constitutional amendments were made in the Republic of Armenia, there was no institution for organic laws, there was no official system for the official abstract interpretation of the constitution, the Constitutional Court received in total 8 applications during the course of 10 years concerning laws and other domestic normative legal acts, moreover, there was no application concerning normative legal acts adopted by the executive authorities (President, Government), the Constitutional Court lacked jurisdiction to resolve disputes arising with respect to constitutional powers.

Meanwhile, both the country's political forces and international organizations have repeatedly maintained that further progress of the country is largely conditional upon the establishment of constitutional democracy and guaranteeing real prerequisites for the rule of law. In this regard, new significant positive opportunities were opened only in 2005, as a result of constitutional reforms.

In fact, this example shows that **in all countries where negative trends in democratic processes are intensifying, constitutional developments are insufficient and non-commensurate for the existing challenges**. We strongly believe that the most effective way for addressing the situation is the achievement, to a maximum extent, of all the above-mentioned six targets regarding constitutional developments, and in particular, the proper acknowledgment of the role of constitutional justice and the reasonable use of its potential.

In general, the adoption of any constitutional doctrine for the given country means in itself recognition of a system of certain legal-constitutional values, representing the understandings of the organization and development of the state and society, which have been perceived in public consciousness and have become meaningful. The key issue here is the extent to which it has been valued at the level of state policy and how it will be guaranteed in social practice, on one hand, and the extent to which civil society is ready to live in compliance with that system of values, on the other hand.

First of all, we refer to the perception of constitutional guarantees at the statehood-theory level and securing the safeguards for their realization, taking into account not merely the doctrinal understanding but the fundamental, systemic, and multifaceted nature of attitudes and understandings when it comes to the given issue at the level of state policy.

First of all, the examination of the axiological issues of the Constitution requires distinguishing all those value pillars which the entire constitutional system rests upon.

Unfortunately, in our reality the constitutional axiology has not yet developed into an independent branch of science, there are almost no researches conducted in this field. However, it is almost impossible to address the issue of the constitutionalization of social relations without profound axiological analysis of the Constitution.

As already mentioned, the concept of "constitution," in itself, has an axiological essence. Therefore, guaranteeing the supremacy of the Constitution implies safeguarding the fundamental constitutional values, their systemic fulfillment within the legal system. What is common of these values is that they do not have subjective discretionary nature; upon public accord they become universally binding attributes of vital existence and coexistence.

The next major feature is that these values cannot be manifested in isolation, they are coordinated at the constitutional level and appear within complementarity and mutual agreement. It is therefore impossible to achieve any significant success by excluding any of the fundamental constitutional values through its distortion in social practice and by relying on other values.

First of all, the basic axiological features of the Constitution are, as a rule, reflected in the Preamble of the Basic Law mainly in the form of norm-objectives. They find their further systematized stipulation in constitutional norm-principles, as well as in legal norms and provisions regulating fundamental legal relations.

We tried to carry out a comparative analysis of the axiological determinants of the constitutions of around 140 countries.

The **first** generalization is that it is very difficult to find a Constitution of a country, where the axiological approaches are absolutely identical with those of another country. Every country adopts its own doctrine of constitutional axiology. This is quite natural and evidences that the Constitution is not a commodity that may be imported or exported, but a mutual agreement on the basic rules of coexistence built upon the value-system generalizations of a certain social community, a certain state.

Second, a considerable part of countries (United States, Spain, India, Argentina, Russian Federation, Moldova, Armenia etc.) have tried, first of all, to enshrine in the Preamble of the Constitution the axiological foundations of the Basic Law in the form of constitutional norm-objectives. Moreover, emphasis is placed on values such as justice, liberty, equality, brotherhood, tolerance, civil peace, political pluralism, security of the country, welfare of the generations, democracy, the rule of law, human dignity, respect and protection of human rights, international cooperation, etc. The reality is that in the preambles of constitutions of various countries the emphasis is placed only on some of the mentioned values, depending on the priorities of these values for the given society.

Third, in a number of countries the Constitution stipulates in certain articles the corpus of values, which underlies the legal regulation of constitutional-legal relationships. For instance, Article 1 of the Constitution of the South African Republic enshrines that the South African Republic is a democratic state founded on values, such as: human dignity, equality, advancement of human rights and freedoms, non-racialism and non-sexism, supremacy of the Constitution and the rule law, as well as universal adult suffrage, a national common voters roll, multi-party system. Article 3 of the Constitution of Croatia stipulates that freedom, equal rights, national and gender equality, peace-making, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law and a democratic multiparty

system are the highest values of the constitutional order of the Republic of Croatia.

Article 3 of the Constitution of Romania also stipulates that Romania is a democratic and social state, governed by the rule of law, in which human dignity, the citizens' rights and freedoms, the free development of human personality, justice and political pluralism represent supreme values and shall be guaranteed.

Article 2 of the Constitution of France stipulates that the maxims of the Republic shall be "Liberty, Equality, Fraternity." These maxims of the French Revolution were acknowledged at the constitutional level as general qualitative attributes for social coexistence. This implies that the inner world of the person, all his social relations, acknowledgement of social existence and all the manifestations of self-realization in that environment should, first of all, be meaningfully anchored on these values. This is also the best evidence that it is the fundamental constitutional values that, in the first place, turn the Constitution into a living reality. At the constitutional level the mentioned concepts acquire real essence as value-system, socio-cultural fundamental orientations of the social community.

The members of the Convent, drafting the Constitution for the European Union, also chose the path of clarifying and enshrining the fundamental constitutional values in the form of a specific norm, and in Article 2 of the Constitutional Treaty, referred to Member States for ratification, stipulated the values of the Union, according to which: **"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, and solidarity prevail."** Despite the fact that this document did not come to life, and the Treaty of Lisbon on the European Union of 2007 does not contain such an article anymore, it is obvious that a precise and comprehensive formulation was afforded at the constitutional axiological level of the European Union, which constitutes a value-system foundation for civiliza-

tional orientation and, in our opinion, represents a significant move in the field of constitutional law science.

Fourth, even if a large number of countries do not formulate the basic axiological determinants of the Constitution in a separate article, they touch upon them in different articles. Moreover, the basic approach is to emphasize human rights and fundamental freedoms. For instance, Article 2 of the Constitution of the Russian Federation stipulates that man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State. According to Article 3 of the Constitution of the Republic of Armenia:

“1. The human being shall be the highest value in the Republic of Armenia. The inalienable dignity of the human being shall constitute the integral basis of his or her rights and freedoms.

2. The respect for and protection of the basic rights and freedoms of the human being and the citizen shall be the duty of the public power.

3. The public power shall be restricted by the basic rights and freedoms of the human being and the citizen as a directly applicable law.”

Similar formulations may be found also in the Constitutions of a number of other countries (e.g., Article 1 of the Constitution of the Federal Republic of Germany, Article 7 of the Constitution of Georgia, Article 3 of the Constitution of Ukraine, etc.). Such norms, on the basis of the theory of natural law, clearly specify the axiological approaches of a rule-of-law, democratic state when it comes to fundamental constitutional solutions, building them upon the principle of the rule of law. This approach is also characteristic for fundamental international documents such as the Universal Declaration on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the 1966 International Covenants, and the like.

The general approach is that the fundamental constitutional values are brought to life through constitutional rights, freedoms, and other constitutional institutions, and overcoming the collision be-

tween them is one of the most important tasks in guaranteeing the supremacy of the Constitution based on the underlying principle of the rule of law.

Fifth, in constitutional solutions of democratic states governed by the rule of law, particular importance, in terms of value system generalizations, is attached to the principles of democracy, the separation and balance of powers, guarantees for universal, equal, and direct suffrage, the supremacy of the Constitution, safeguarding political pluralism, the recognition and protection of property rights, the exclusion of disenfranchisement and a number of other principles, which typically form the basis of the constitutional order of the country. Although these principles are differently localized in the Constitutions of various countries, they have the same axiological basis in their essence.

The fundamental constitutional values constitute a structural integrity in all the abovementioned manifestations and turn the Constitution into a living reality, when the entire legal system, the judicial practice, the entire complex of interpersonal and individual-state relationships are anchored in those values, when those values become the driving force in the life of each individual.

Now we will try to address this issue from the perspective of social practice and with the following main focuses:

- **First**, to what extent are the fundamental constitutional values adequately perceived and consistently implemented at the level of state policy?
- **Second**, to what extent is society's axiological perception of the Constitution in harmony with that of the authorities?
- **Third**, what are the main trends and characteristics in transition countries in this area and what are the main challenges?

To begin with, we would like to provide an analysis so as to answer the questions raised. We have examined the processes taking place in 30 countries during the past 10 years. The main characteristic of these countries is that they have been former bearers of communist societal relations and now they have appeared in three qualitatively different sys-

tems. The first group includes the Eastern Europe countries that have recently joined the European Union. The second group is represented by the Balkan countries that have not yet joined the European Union. The third group includes the CIS countries and former USSR non-Baltic countries. For the analysis we have also used the information of the US Freedom House organization. The integrated indicator of democracy calculated by this organization, in 2011, was 2.46 times higher in the 1st group of countries as compared to the 3rd group, and was 1.67 times higher as compared to the second group. At the same time, for the past 8 years in the 1st group this indicator became lower by 4.3 percent, while in the 2nd group it increased by 1 percent; moreover, in the third group, the decline was 7.2 percent.

The qualitative characteristics of civil society in the 1st and 3rd groups deviate by 2.64 times, while in the 2nd and 3rd groups by 1.7 times. The dynamics of these characteristics, for the preceding 8 years, is as follows: deterioration in the 1st group by 4 percent, improvement in the second group by 13 percent, and decline in the third group by 5 percent.

The level of democracy in electoral processes is lower in the 3rd group by 3.48 times as compared to the 1st group, and by 1.7 times as compared to the 2nd group. The dynamics for 8 years is the following: improvement in the 1st group by 3 percent, in the second group — by 2.7 percent, and decline in the third group by 7.5 percent.

According to another comparison, the level of independence of the judiciary in the 1st group is higher by 2.58 times as compared to the third group, and by 1.35 times — as compared to the second group. The dynamics for 8 years is as follows: decline in the 1st group by approximately 1 percent, improvement in the second group by 0.4 percent, and decline in the third group by 9.1 percent.

Almost similar trends are also observed in the areas of media independence, functioning of government, fight against corruption, etc. All these evidence that, at the constitutional level, notwithstanding the existence of adequate axiological positions, constitutional practice appears to have a totally different picture.

In our opinion, there are several reasons for this. **First**, to what extent has a consistent approach been demonstrated at the constitutional level, both in terms of guaranteeing the systemic integrity of fundamental constitutional values and in terms of guaranteeing the implementation of norm-objectives and norm-principles enshrined in the Constitution, ensuring the self-sustainability of the Constitution. This applies both to the constitutional norms regulating specific legal relations and the system of checks and balances as well as to the institution of limitations on human rights and fundamental freedoms. This also means that the first analyses in the field of constitutional diagnostics should start from identifying the problems as regards intra-constitutional self-defense. The fact remains that the gaps and unaddressed issues in this area are significant, which, perhaps, may become the subject of a separate discussion.

Second, especially for countries in transition the main deformations occur during law-making processes when, due to seemingly “forgetting” about the fundamental constitutional values, legal regulations are increasingly being built on mere expediency. This is also the reason that in many countries, including Armenia, the authorities at the level of legislative, executive, and judicial branches of power, as well as at the level of local self-governance, refer to constitutional problems almost reluctantly, encountering direct constitutional restrictions.

One of the essential features of transition societies is that the fundamental constitutional values are established in conditions of constitutionally guaranteed political and ideological pluralism, which in their turn, are still in the embryonic stage of their value system development. In these conditions, during the law adoption stage the required level of discussions and systemic regulation of fundamental problems is very often not ensured.

Third, the “deformations of the second phase” continue to evolve in judicial practice, when the so-called “legislative expediency” is brought into effect with the view of achieving “subjective expediency” and mercantile interests. Here, the fundamental constitutional values play the role of a smoke screen for achieving, in the name of law, own objectives

derived from political and personal expediency. The level of the axiological perceptions of the Constitution and culture is also very low, which often entails antagonism in the understandings of those values at governmental and social levels. This results in increased accumulation of negative social energy, which can create volatile situations by reaching a critical mass. It is not a coincidence that the Constitutional Courts of many countries often recognize a norm of the law as contradicting the Constitution, together with the substance attributed to it through judicial practice.

The fundamental constitutional values can be brought to life in social practice in a guaranteed manner only where and inasmuch as the establishment of constitutional democracy is the core issue of state policy, it does not depend on the current expediency, the real separation and balance of powers is safeguarded, democracy has turned into a living reality from being just a motto, every legal solution is derived from the principle of the rule of law so as to establish a fair society which is the key guarantee for stability and development.

What are the impediments for this? We think there are a number of reasons, and the following are worth mentioning:

- the inertia of thought, mentality, and the lack of constitutional culture. It is not only impossible to jump over the centuries, but also very often imported democracy is significantly distorted when it faces the protrusions of the previous value system;
- the primitive imitation or "localization" through "transplantation" of democracy, fundamental values of a rule-of-law state;
- the low level of legal awareness and the insufficient political will of state power to augment it;
- insufficient guarantees for the functioning of democratic state institutions and the inadequacy of political mechanisms;
- imperfect constitutional and legislative solutions, the distorted perception and implementation of the fundamental principles of constitutional democracy in legislative policy and judicial practice;

- the fusion of political, economic, and administrative forces, which obstructs the nondistorted implementation of fundamental constitutional values in social practice;³⁵¹
- the poor immune status of the public order, deepening of negative social trends and irrational behavior due to the failure to timely identify, evaluate, and rectify the disruption of constitutional equilibrium;
- high level of corruption, protectionism, and shadow relationships;
- discord of constitutional development with the existing challenges, etc.

Fourth, the greatest danger for transitional countries is not in the achievements in the field of constitutional democracy being modest and discordant for existing real challenges. It is much more dangerous when the opposite trends are emerging, when there appears to be regress, when fundamental constitutional values, being deformed in social practice, gradually undergo mutation and begin reproducing as anti-values. This is already a social metastasis, which speaks to the apparent failure of the immune system of society.

The major task of constitutional diagnostics in transitional countries is the timely identification of such phenomena and their prevention. To this end, it is necessary, as a mandatory precondition, to institute a potent system of constitutional monitoring and review, by recognizing that the major task of each state body is their real contribution to the establishment of the supremacy of Constitution within the scope of their powers. Only in this case will it be possible to turn the Constitution into a living reality and to achieve substantial results in the process of the establishment of constitutional democracy in the country.

³⁵¹ It would be appropriate to recall Aristotle's reasoning on oligarchy and its conjunction with the authorities, which we will refer to below.

4.10. THE MAIN AXIOLOGICAL ISSUES OF CONSTITUTIONAL DEVELOPMENTS FROM THE PERSPECTIVE OF CONTEMPORARY CHALLENGES

In our days, the low level of constitutional culture and constitutional morality, distorted perceptions of constitutional axiology, deformations of constitutionalism are typical symptoms of social reality. In this section, instead of elaborating on the main issue from a sensuous and sententious point of view, we will rather try to identify, in the context of systemic interconnection, not only the underlying causes of the situation, but — in light of the current imperatives of sustainable development and the typical characteristics of transformative social systems — put forward certain conceptual approaches for the establishment of constitutionalism and constitutional morality in the country, with a view to overcoming also the threats of “constitutional imitation.”³⁵²

There have been numerous speculations in professional literature on the main issue of constitutional axiology. The focus was first and foremost on identifying the epistemological nature and essence of the concept, the interrelations between the terms constitutional “value” and “principle,” constitutional morality, the specifics of the constitutionalization of social values, and a number of other issues. Nevertheless, we believe that the underlying characteristics of the manifestation and realization of constitutional axiology in transformative social systems, as well as the approaches to overcome the deriving challenges have not been studied in sufficient detail.

Generally, the **axiology of the Constitution** is the system of values that underlies constitutional legal regulations. Constitutionalization of social relations takes place on the basis of attaching meaning to the

³⁵² Борис Страшун - Конституционализм: идеал, реальность и возможная перспектива. Сравнительное конституционное обозрение, 2011, N5(84). С. 43-47.

fundamental values for vital existence and social consensus around them.³⁵³

By virtue of constitutional-legal norms, social values turn into universally binding rules of behavior of utmost importance, thus, upon social consensus, recognizing and guaranteeing social freedoms. The constitutional norms are the manifestation of the organic unity of society’s fundamental values and legal principles, whereas their axiological substance is the human being, his dignity.

The Universal Declaration of Human Rights states, “[...] the inherent dignity and [...] the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world” (Preamble). Meanwhile, it also stresses, “All human beings are born free and equal in dignity and rights” (Article 1). The Constitution of the Republic of Armenia recognizes the human being, his or her dignity, fundamental rights and freedoms as the highest values (Article 3). Human dignity is an absolute, “God-given,”³⁵⁴ self-sufficient value, and it sets forth commensurate claims for the manifestation of social morality and humanism. The moral legal order does not imply solely the existence of the subjective moral qualities of a person. The most important part is the existence of an adequate environment for their manifestation, the formation of such an axiological environment for the natural existence of a rational being where the individuals, the society, and the authorities are guided by the same value orientations.

Legal approaches, in their turn, may be moral if they derive from the objective nature of social relations and have been translated into a rule of life conceived by the society. Moreover, fundamental legal and moral values of human coexistence constitute the backbone of constitutional axiology. Social relations are being constituted; objectively existing social values are the axis of these relations, which are constantly going through a journey of obtaining meaning and being brought to life.

³⁵³ For details see Գ. Հարությունյան, Սահմանադրական մշակույթ. պատմության դասերը եւ ժամանակի մարտահրավերները, Երևան, 2005թ.

³⁵⁴ See the New Haigazian Dictionary, vol. 2, Venice, 1837, page 688.

The human being, as the **axis of constitutional axiology**, undergoes the process of self-recognition and acknowledgment of his worth through **attaching meaning to his own existence in the evolution of time**, in the meantime clearly determining the system of values that constitutes the basis for his collective existence in the given period. Fundamental values such as **equality, freedom, and justice** are the most important ones among them.

The Constitution must be **the embodiment of social consensus precisely around those fundamental values**, which, given the specific social reality, constitute the moral foundation and content of social behavior of the individual and the public behavior of the authorities (according to Kant, these become the inner moral law of their existence).

The history of constitutional developments *per se* is nothing else but history of the self-awareness of society, attaching meaning to public existence in the course of time and coexistence anchored thereon. Vertical ascent is not always the case. Ups and downs are not inevitable either. **The essential part is the lessons we learn from history so as to guarantee continuity.**

For instance, what are the currently relevant conclusions that Aristotle arrives at when elaborating on the history and state of constitutional developments of Athenian society³⁵⁵? These include:

1. the people, having secured the control of the state, established a constitution which exists at the present day (this is a historical path that lasted around 700 years, resulting in overcoming absolute monarchy and the establishment of Athenian democracy);
2. this path is difficult and full of reefs. It is important that the nation, misled by the demagogues, does not choose the wrong path;
3. the democracy has made itself the master of everything and administers everything by its votes in the Assembly (as the

³⁵⁵ See Aristotle, Constitution of the Athenians, Yerevan, "Armenia", 2000.

highest authority) and by the law-courts, in which it holds the supreme power. However, it is also important for the Athenian to hold civil duty and responsibility (in Athenian society, citizens did not have the right to abstain even during civil disunions, they had to support either one of the parties, otherwise they would be deprived of citizenship and haled into slavery);

4. adequate reforms are necessary to make the constitution much more democratic. However, it is impossible to change the customs without enacting new laws;
5. laws must be potent, they must be in compliance with the Constitution and never turn into a tool of violence;
6. if the control of the state is not in the hands of the nation, it is difficult to expect any progress;
7. as we have mentioned, it was Solon, the Founding Father of the Athenian democracy, who first noted that **the Constitution must be written taking into account the nation and the time**. The nation — with its collective axiological perceptions, and the time — with the degree of its comprehension.

We have already touched upon the fact that the crux of discussions at the summit of the International Association of Constitutional Law held in Santiago in 2004 evolved around the following subject: "Constitutionalism: new world, old doctrines." This topic will always be of relevance since the ongoing development of social relations also puts forward new challenges for constitutional doctrines. The most important part is to acknowledge that constitutional culture is a more stable phenomenon than concrete constitutional systems, although **their inner ontological connection is indivisible**.

An international conference was also organized in Algeria on November 24-25, 2014. The topic of the conference was "Constitutional Developments in Africa." We were most interested in the discussions held during this conference from the perspective of specific approaches of transitology.

Key conclusions included:

1. constitutions may not be standardized, they are phenomena with socio-cultural reach;
2. it is pointless to promote the idea of having a unified Constitution for Africa;
3. the country's future without constitutional developments is vague;
4. the key objective of reforms is to guarantee the country's stability;
5. the process of changing mores has to start from changing the laws;
6. in transitional social systems, achievement of social consensus is the guarantee for development;
7. the constitution must be stable, **yet not static stable**;
8. the constitution has value if it exists in real life;
9. the biggest problem of African countries is not the absence of constitutions but the crisis of constitutionalism.

In some sense, in all of these three examples, the axiological approaches have many common features: importance is attached to guaranteeing dynamic and evolutionary constitutional developments, to the need for attributing a meaning to the existence in the course of time and for transforming it into a rule of life.

We have thoroughly reflected on the fact that the phenomenon of "constitution" has historically deep roots and its emergence has also led to the formation of a certain constitutional culture, with an imprint of the value orientations and the legal mindset of the time.

For many countries of the world, the end of the second millennium and the start of the new millennium were characterized as a period of deep systemic transformations. It will still remain for a long time in the spotlight of comprehensive scientific research. However, even today, the main theoretical philosophical generalizations of transatology prove that we are dealing with a completely different quality of social relations and constitutional morality, which we have already touched upon.

Further, difficulties in integration to the new value system approaches create additional problems. These difficulties are of two types:

1. uncertainties in the new value system orientations and absence of objective prerequisites to move along the new path of systemic approach;
2. lack of ability to choose a new orientation and bring it to life.

Such a situation is characterized with a high level of corruption, low level of trust in the justice system, inadequate level of electoral culture and of transparency in the activities of the authorities, lack of the effectiveness of systems for reliable safeguarding, preservation and protection of human rights, imperfection of the political system.

Besides the overall situation, the following characteristics can also be considered common of Armenian reality:

1. loss of statehood for centuries, resulting in the lack of traditions characteristic for a state, ongoing battle against a foreign statehood (laws, Constitution), and the constant search for ways to adapt so as to preserve identity;
2. egocentric traits, with their diverse social manifestations;
3. the complex of being an honorable beggar or a savior or apostle;
4. distortions or distorted perceptions of the value system typical for the normal development of society, as a result of being deprived, for centuries, of the opportunity for normal development;
5. self-negation and xenomania, which have turned into a social quality, again under the influence of the social environment that has lasted and has been distorted for centuries, as well as the traits that Raphael Patkanian generalized with regret in his poem "Disappointment," written in the 1860s;
6. the uncertainties characteristic of a transitional period and particularly emphasized among us, the ambiguities of moral qualities and perception of values (perception and appreciation of the good and the bad, the right and the wrong, the

hero and the villain, love and hate, light and darkness), the reality of reconciling with the irreconcilable and indifference in interaction;

7. despite the existence of identity, an almost complete absence of the qualities of a citizen, manifestation of oneself as a guest in his own country, self-justification for everything and the urge to blame others;
8. the tremendous amount of influence of negative exogenous factors (regional and international), prohibiting one from attaching meaning to the life one has lived and will live in a peaceful environment and from transforming it into a rule of life;
9. undermining their own strengths, etc.

Among the positive qualities of Armenian identity in terms of the objective appreciation of the new reality and creation of necessary prerequisites for further advancement, perhaps the following can be highlighted:

1. the great genetic potential for self-understanding and adaptation, which turns into a strong self-mobilizing force in case of danger posed to the nation;
2. the great ability for in-depth philosophical understanding of social reality;
3. being the bearer, throughout the centuries, of unaltered, unique, and sustainable spiritual values;
4. the great genetic feature of preserving identity, in parallel with unique traits of honoring traditions, customs, reverence for family, parents, and children, as well as patriotism;
5. attaching importance, at least subconsciously, to the fact that rational qualities are our only potential for development, the materialization of which requires legally protected freedom;
6. the valuable lessons of history and powerful historical memory, particularly in the sense that sustainable development is impossible without adequate legal solutions. Khorenatsi's assessment of the Canonical Constitution

of Ashtishat ([...] mercy was established in Armenia), or Mateos Urhayetsi's judgements on the adoption of the Canonical Constitution of King Vachagan may be considered as classical examples;³⁵⁶

7. the condition of being scattered across the globe which, apart from its negative implications, is also an opportunity for more active interaction with world civilization and defining a nationwide factor by learning relevant lessons.

As it was noted, the Constitution is called upon to guarantee the dynamic balance in public life and **act as continuously renewed social consensus over the rules deriving from the fundamental values of existence which find their meaning over the course of time**. However, constitutional textual solutions and their substantive developments are not enough. The essential point is to overcome the barrier between those solutions and real life, which has now become one of the key issues on our state agenda.

The establishment and further development of statehood is a long and complex process. Every single systemic error may become a reproducing chain and bring devastating consequences, especially when it concerns axiological orientations. For the State of Armenia, the key objective is to harmonize its entire legal system with constitutional axiology, avoid distortions of fundamental constitutional values both in law-making policies and in law-enforcement practices, and ensure solid guarantees for the rule of law. It is an undeniable truth that law without democracy leads to dictatorship, and democracy without law is simply a farce. The invariant characteristic of the constitutional passport of our state is the establishment and development of a rule-of-law, democratic, and social state. These qualities constitute an organic whole and require proper conduct both on the part of the State and civil society. Any deviation from these traits is a threat to our future and our national security.

³⁵⁶ See Գ. Հարությունյան, Սահմանադրական մշակույթ. պատմության դասերը եւ ժամանակի մարտահրավերները, Երևան, 2005թ.

The current constitutional chronology of our state life shows that no matter how important the role of the Constitution has been in avoiding deep public crises, nevertheless, the schism between the Constitution and reality remains significant. This phenomenon is common of almost all countries of new democracy, which, based on objective realities, have chosen the path of implementing model constitutions. The current generalizations of transitology, however, show that in such situations greater efforts are needed for the constitutionalization of social relations, guaranteeing the self-sufficiency of the Constitution, and ensuring a new quality of constitutionalism, parliamentarianism, and justice. The imperative for an adequate response to the current challenges requires a qualitatively new level of interaction between the State and civil society, more active and coordinated steps towards strengthening democratic rule and the establishment of constitutional democracy. From the perspective of constitutional-legal solutions and the current state of constitutionalism, the following main issues are particularly crucial and pressing for our country:

- direct application of constitutionally enshrined fundamental human rights is not guaranteed and ensured;
- the principle of the rule of law has not become the backbone of the social behavior of people, the political behavior of political institutions, and the public behavior of the authorities;
- there are enormous gaps in the guaranteeing and ensuring of rights at the legislative level. The gaps in legislation, the incompatibility of legal regulations with the principle of legal certainty, the instability of legislative solutions, and the absence of specific concept papers particularly cause serious problems for guaranteeing, ensuring, and effectively protecting human rights;
- the boundaries of discretion of the authorities are extremely vague, the principle of limiting power by law is not applied effectively;

- there are entire legal institutions which, as a rule, do not function: for instance, the judicial institution of a new trial based on new evidence;
- a great schism has emerged between constitutional axiology and social practice, the criteria for constitutional morality are not clear and publicly perceivable;
- the fusion of political, economic, and administrative potential has even become a threat to national security, along with all its consequences.³⁵⁷

All of these are major obstacles for the establishment, further development, and sustainable progress of a rule-of-law state; they may not be subordinated to immediate interests and require urgent solutions.

What do the lessons of history and the international practice of constitutional developments suggest in the context of the current issues related to the development of Armenian constitutionality? They, in particular, dictate the following:

- the historical destiny of our nation serves as telling evidence of the fact that we have often failed to learn the lessons of our reality in a timely manner and thus, by drawing relevant conclusions, "...gain knowledge of world orders" and learn about "political orders";³⁵⁸
- it will be impossible to establish constitutional morality in the country without social consensus, mutual trust, tolerance, and civil solidarity;
- constitutional values may become a living reality only when these are perceived as acknowledged necessity for the state authorities, the political institutions of the country, and each member of society;

³⁵⁷ In particular, see Арутюнян, Угрозы корпоративной демократии //Международный вестник "Конституционное правосудие", 2006, N3, էջեր 38-46. G. Harutyunyan, Constitution and Constitutionalism in the Context of Constitutional Culture of the New Millennium /New Millennium Constitutionalism: Paradigms of Reality and Challenges", Yerevan, 2013/, pages 29-81.

³⁵⁸ Մովսես Խորենացի, Հայոց պատմություն, Երևան, «Հայաստան», 1997, էջ 70.

- overcoming the lack of harmony between the constitutional legal awareness of the members of society and the political and state institutions is a decisive condition for overcoming social discord and possible cataclysms in the country;
- the primary objective of the constitutional legal mindset must be guaranteeing, ensuring, and protecting human dignity, human rights and freedoms, and the limitation of power by law;
- it will be impossible to guarantee progress in the country without ensuring a dynamic constitutional balance;
- the Constitution shall not be viewed as a legal instrument in the hands of state authorities; it is the Basic Law of civil society, it sets, first of all, a limit on the authorities and guarantees the natural rights and fundamental freedoms of people;
- the centuries-old legacy — the change of mores has to start from changing the laws — is true.

Guaranteeing supremacy of the Constitution should first and foremost be the primary objective of state authorities. Pluralism, tolerance, solidarity, respect for human rights are among the pressing priorities of our state agenda. These, being cornerstone values for constitutionalism, demand urgent implementation, making the Constitution a living reality for each and every resident of our country as soon as possible.

The imperatives of our historical destiny are as follows: not to shatter the peace in the country and within ourselves, avoid establishing heresy through ignorance, stay true to our apostolic faith, and establish mercy in Armenia by means of the Constitution.³⁵⁹

There is simply no alternative.

³⁵⁹ See Մովսես Խորենացի, Հայոց պատմություն, Երևան, 1997, էջեր 225, 275-278.

5. THE IMPERATIVE OF GUARANTEEING THE SUPREMACY OF THE CONSTITUTION

5.1. CONTEMPORARY REQUIREMENTS OF CONSTITUTIONAL REVIEW

The ultimate principle of the existence and functioning of a democratic society and a rule-of-law state is, as already noted, the supremacy of the Constitution. All reasoning on constitutional culture will lose their value if the supremacy of the Constitution is not guaranteed in real life.

Supremacy is the universally binding nature of the Constitution, enshrined therein, which establishes the hierarchy of legal acts, reserves the Constitution the role of the most important source of law, and obliges those creating norms and enforcing laws to accept the Basic Law as the highest standard. The basis of this is the essence of the Constitution as a legal act of constituting force, the mandatory nature of which supersedes the legal force of any decision of public authorities. The supreme law of a rule-of-law state is the legal basis for the formation and implementation of the state will of public authorities and implies a special safeguarding function that acts as the ultimate control function in a rule-of-law state. One of the main achievements of the 20th century has been the emergence of designated specialized judicial structures aimed at accomplishing this mission. The role of such judicial constitutional review bodies is, first and foremost, to ensure the supremacy of the Constitution by **guaranteeing the compliance of legal acts with the Constitution, resolving disputes over constitutional powers within the system of state bodies, creating guarantees for the legal regulation of political disagreements arising within the society, guaranteeing constitutionally enshrined human rights and freedoms.** In other words, judicial constitutional review is a measure and an opportunity for ensuring the stability within society. This role is primarily implemented through reviewing normative acts that do not comply with the Constitution, through identifying, as-

sessing, and eliminating inconsistencies, and maintaining the constitutionally enshrined functional balance.

The specialized institutions for judicial constitutional review are specifically designated to ensure that constitutional courts are established and function for the purposes of protecting and ensuring the grounds for constitutional order, the rights and freedoms of human beings and citizens, guaranteeing the supremacy and the direct application of the Constitution, as well as upholding the main political and legal values proclaimed and guaranteed in the Constitution.

Currently, over 110 constitutional courts function in the world. They substantially vary in terms of their powers, mechanisms of formation, and operation; however, their functional role is the same, that is, **to ensure the supremacy of the Constitution through judicial constitutional review.**

Certain elements of constitutional justice date back to 1180, to the Old German state. In those times as well, the relevant legal institutions also regulated the disputes arising between bodies vested with power. With the Philips Code, Portugal introduced constitutional review back in the 12th century. In France, the initial forms of constitutional review were in place in the mid 13th century. In the 19th century, more serious systems of judicial constitutional review appeared in Norway, Denmark, and Greece.

The approaches of Hakob and Shahamir Shahamiryans in the book “Entrapment of Vanity” are exceptional from the point of view of the history of constitutionalism and especially from the perspective of the historical development of constitutional justice. As we have noted, this work — written in compliance with the principles of the theory of natural law — is in essence the first Constitution that includes the idea of a designated specialized court, namely “the High Court,” whose mission, based on today’s perception, is the exercise of judicial constitutional review. The title of this work itself is already an entire theory of constitutional review. The essence is that the authors create a constitutional “trap” for the bearers of power so that the latter remain

and act within the scope of their constitutional powers. In this unique document the check and balances, as well as functional powers are presented in astonishing harmony.

In 1867, the Federal Court of Austria was vested with the right to resolve disputes over powers, in protection of the political rights of the individual against the administration. Although certain initial elements of constitutional review were incorporated in the Swiss Federal Constitution of 1848, the Swiss Federal Court was granted wide powers only by the 1874 amendments of the Constitution. In Norway, judicial constitutional review originated in jurisprudence in 1890. Romania introduced the constitutional justice system before the First World War, based on the American model.

In the contemporary Anglo-American legal system, there are no specialized institutions of judicial constitutional review. The legal history in England, however, includes a number of elements, particularly the principle of the supremacy of the Constitution, which dates back to 1610 and is of major importance for the history of the development of constitutional law in England. The ideas of the supremacy of the Constitution and the right to judicial review were spread from England to the United States. There, the court had declared several English laws as void already in the 18th century (in the Northern United States). However, under the Constitution of 1787, the Supreme Court, as the Highest Federal Court, has no clearly expressed powers of constitutional review.

The case of Marbury vs. Madison (1803) had a decisive impact on the development of constitutional justice, when the U.S. Supreme Court reserved itself the power of exercising constitutional review in deciding the conformance of a law with the Constitution. This allowed using the authority of the U.S. Supreme Court for the judicial review of a law. Through this decision, the Supreme Court *de facto* declared as unconstitutional the section of the Judiciary Act of 1789 (Section 13) adopted by the Congress on the powers of the Supreme Court. The following statement made by the U.S. Supreme Court Chief Justice

John Marshall on the Decision held on February 24, 1803 has become a classical statement: "It is emphatically the province and duty of the judicial department to say what the law is... a law repugnant to the Constitution is void."

Taking into consideration the first decision rendered on the constitutionality of a legal act adopted by the U.S. Supreme Court and the new approaches in the century that followed, one can conditionally mark out the following phases of the formation and development of constitutional justice systems:

1. 1803-1920,
2. 1920-1940,
3. 1945-1990,
4. 1990 till present.

The **second phase** coincides with the establishment of the first specialized institution for judicial constitutional review. The Austrian Constitution of 1920 is marked by the establishment of the Constitutional Court of Austria, with the exclusive right to implement the constitutional review of laws (initially, of course, *ex ante* review). It mainly happened due to Austrian lawyer-theoreticians Adolf Merkel and Hans Kelsen. As a result, the period between the two wars was described as the "Austrian Period."

Before the Second World War, following Austria, judicial constitutional review was introduced in Czechoslovakia (1920), Lichtenstein (1925), Greece (1927), Spain (1931), Ireland (1931), and Egypt (1941). The Second World War interrupted the trend toward a broader introduction of constitutional review, and already established institutions failed to carry out their activities (for example, Austria did not exercise constitutional review during 1933-1945, and Czechoslovakia from 1938 onwards).

The **third phase** is the post-war period (1945-1990), when constitutional courts were almost simultaneously established in European states, and their key objective was to ensure the conformance of laws and other normative acts with the Basic Law.

Many other states also introduced a special system of constitutional review immediately after the Second World War, namely Brazil (for the second time in 1946), Japan (1947), Burma (1947), Italy (1948), Thailand (1949), Germany (1949), India (1949), Luxembourg (1950), Syria (1950), Uruguay (1952), France (1958), etc.

During this period, the formation of institutions of judicial constitutional review in communist states with single-party systems was considered a luxury of the bourgeois. In contrast, many European states (Austria, Germany, Spain, Italy, etc.) raised the concern that the protection of constitutionally enshrined human rights and freedoms must become the central issue of constitutional justice. Naturally, in the post-war period, not only were the constitutional courts of those countries granted such powers, but also citizens were granted the right to protect their rights, including in the Constitutional Court.

The **fourth phase** of constitutional justice coincides with the period of qualitatively new processes of democratization and the establishment of a great number of newly independent states. In view of the vast experience of European states, the young newly independent states found that the practical implementation of the principle of separation and balance of powers and the creation of a comprehensive system of constitutional review should be one of the first and major steps to be taken for the purpose of state-building and the development of democratic institutions. This was also based on the need to uphold the constitution which was developed and adopted in almost all states with certain difficulties, as well as on the need to resolve the issues that were brought about as a result of shifting social development from the dimension of crisis management to the dimension of social and state stability and dynamic development.

The final phases are also marked by political changes in certain European countries that introduced constitutional review after the fall of dictatorship: Greece (1968), Spain (1978), and Portugal (1976). During that period, constitutional review was also being in-

troduced in other states, such as Cyprus (1960), Turkey (1961), Algeria (1963), the republics of the former Yugoslav Federation (1963) and elsewhere.

At the same time, systematic review was introduced within the framework of the existing institutions of constitutional review (Austria, Germany, Sweden, France, and Belgium). As a result of political and social changes taking place in the 1980s, the process of introducing constitutional review was launched also in a number of Central American and South American countries, as well as in a number of Arab and African countries.

Already on the eve of the 21st century, a qualitatively new situation of constitutional-legal regulation developed in the world, when, by way of ensuring the supremacy of the Constitution, **an attempt was made to instill dynamic stability in the development of countries.**

In essence, there are two models of constitutional justice: American and European. In recent decades, far more countries have adopted the European model of constitutional justice, based on the need to establish a reliable system of guarantees for the sustainability of social development.

The American model of constitutional justice is characterized by the following features:

- it is comprehensive in nature, including not only laws but also normative acts of all levels;
- review is carried out in a decentralized manner, by any court, when trying a specific case, provided that the law or normative act is related to the specific interests of the plaintiff;
- it is relative by nature, since the court's decision is binding only for the parties to the case and does not extend to the entire judicial field;
- it is *ex post* review in nature.

What was the reason that Europe did not adopt the American model in the 20th century? There have been numerous attempts to answer this question. Some have tried to find the answer in the perspective of

the diverse perceptions of the concepts of "law" and "Constitution." In another case, emphasis is on the specifics of the judiciary and the activities of judges (specifically emphasizing the degree of the court's independence and the power of judges to render a decision on the issue of constitutionality of a law). In the third case, problems faced by the society and the specifics of their resolution are brought to the forefront. One way or another, for more than a century the function of judicial constitutional review has been exercised by courts of general jurisdiction. However, rapid changes in social life in the early 20th century, particularly amid the separation of powers, posed key issues for specialists:

1. it became possible to achieve great centralization of power through law, up to the usurpation thereof³⁶⁰;
2. in light of rapid changes in the social setting and accordingly in the legislative framework, review carried out on case-by-case basis was evidently insufficient for effectively guaranteeing the supremacy of the Constitution;
3. amid the separation of powers, the struggle for competencies among the branches of power became the main trigger for the destabilization of society.

Apart from the above, the methodology of the approach was also different. Emphasis was placed on the resolution of issues related to the interests of the individual along with the key issue of sustainable and dynamic development of society through ensuring the constitutionality of the entire legislative system.

The following three issues are considered a priority in the continental European legal system:

- (a) ensuring the constitutionality of normative acts and thus maintaining the constitutionally enshrined functional balance between various branches of power;
- (b) clear-cut regulation of the resolution of disputed issues related to powers among various state bodies;

³⁶⁰ It is also important that in the continental legal system the law is the exclusive product of political consensus, and the judicial case law as a source of law does not have a decisive role.

(c) creating a more integrated and reliable system for the protection of constitutional human rights.

The characteristic feature of the European system is not only in the review being exercised by specialized bodies through abstract, concrete, elective, mandatory, *ex ante*, *ex post*, procedure- and merit-based review systems for judicial constitutional review. What is also of special importance is the substantial shift in the role of constitutional justice within the system of state power.

The international practice of the specialized system of judicial constitutional review shows that the key objective of constitutional justice is to assist in the formation of a system of state power, which will have guarantees for the supremacy of the Constitution, protection of inalienable human rights and freedoms, creation of necessary prerequisites for the sustainable and dynamic development of society based on the principles of the rule of law, the separation and balance, election and accountability of powers, and **where the process of accelerated accumulation of negative social energy is overcome.**

This issue is currently gaining tremendous relevance, taking into consideration that mankind has entered into a new phase of development where it becomes a priority, on the one hand, to attribute a new meaning to the value system, whereas mutual connections and interactions, on the other hand, obtain a new quality. In particular, amid legal globalization, the system of judicial constitutional review of each country must become a solid guarantee for constitutional stability and meet certain common standards and requirements. The clear definition of standards and requirements, their scientific analysis, and **the formation of a continually operating comprehensive system of constitutional review** have become an urgent necessity.

In order to define the role and significance of the constitutional court in the establishment of constitutional democracy and stability, it is essential, in our opinion, to adopt a proper methodological approach for the identification of the systemic nature of the function of constitutional review. We believe that this issue has not received due attention in pro-

fessional literature. In this regard, it is necessary to bring to light two essential points.

First, as a comprehensive system the constitutional review can only be effective in case of the existence of necessary and sufficient functional equilibrium. We take into consideration here not only the place and the role of specialized institutions for judicial constitutional review, but also the functional role of the legislative and executive powers and other constitutional subjects in the field of constitutional review, as well as the procedure for and traditions of the preservation of moral, national and spiritual values. Throughout many centuries these values have been exceptionally important in terms of ensuring the systemic stability of social development based on rational values, but, unfortunately, in this new reality these values are drastically losing the momentum and influence they used to have.

Second, constitutional review — as a system, as an entirety of bodies with different powers requiring harmonious operation³⁶¹ — can exist and work effectively only in case of certain prerequisites. Among those, it is necessary to underline the following: the depth and systemic nature of the constitutional regulation of social relations; faithfulness to the democratic principles of social development; existence of a specific environment of constitutional democracy; independence of constitutional review, its comprehensive nature, and accessibility for the members of society; etc.

It is of fundamental significance to ensure the integrity of the system, the clear-cut functional interconnection among its main links, the rational interaction in maintaining the system's dynamic equilibrium, as well as the structural harmony of the system of constitutional review.

The study of the international practice of the formation and operation of the system of constitutional review in the 20th century, as well as

³⁶¹ We consider it necessary to emphasize that the bodies of constitutional review include, on the one hand, the President of the country, the Parliament, the Government, other constitutional institutions (as non-specialized bodies) and, on the other hand, the judiciary and especially the constitutional courts (as specialized bodies).

of the situation created in countries of young democracy clearly show that, unfortunately, many issues of constitutional review are viewed and resolved superficially, and no consistency is ensured in implementing the principle of separation of powers, which fails to produce the desired effect for **the establishment of an effective system of self-defense of the social organism**. This becomes especially problematic when the place and the role of judicial constitutional review within the system of constitutional review are underestimated.

It is often necessary to pinpoint the words of the former President of the Constitutional Court of Austria, Professor L. Adamovich: "...constitutional democracy is a necessary and the main environment for the proper functioning of constitutional courts." One may also add that without the implementation of an effective system of constitutional justice, it will be impossible to guarantee constitutional democracy and stability of the social system. As to the issue of guaranteeing constitutionality, the Constitutional Court has the final say. **If this is not ensured in any country, then there is no rule-of-law state**. This has been the conclusion reached during several international forums (particularly, Capetown 2009, Vienna 2013, Seoul 2014, etc.).

Let us elaborate on this approach with the help of the following thought-provoking comparison.

In recent decades, scientific thought in microbiology and medical science has come up with a number of serious generalizations that are also of exceptional importance in the systemic study of the main principles and mechanisms of inner self-defense of the social organism, from the perspective of ensuring the stability of the constitutionally stipulated functional equilibrium. These almost axiomatic principles include:

- the human being has the most perfect self-defense system, whose immune system has been developed in the course of almost two hundred million years;
- the functions of the human immune system, as well as that of other complex biological systems, extends to the entire organism and has a hierarchic and self-regulating nature;

- every cell in the organism possesses certain self-defense resources and the exhaustion of these resources triggers the defense systems of other interrelated structural elements of the organism;
- the **main mission** of the immune system **is the preservation of the natural balance and stability in the whole organism, since failure to restore the disrupted balance may cause accumulation of negative potential and irrational reproduction**;
- the physiological balance, immune and nervous systems of the organism are in a state of stable harmony;
- any pathology triggers and activates the entire system of self-defense;
- in the event of defensive reaction, the otherwise constant quantity of immunohormones increases up to the quantity necessary for the complete performance of the defensive function. However, if the defensive capacity is insufficient for restoring the functional balance, a diagnostic condition arises, requiring exogenous intervention;
- developed immune systems are characterized by a clear differentiation of self-defense and rationality, an exact sequence of targeted, programmed actions for ensuring the equilibrium and integrity of the functional balance of the organism and the cell system;
- any dynamically developing system must possess an adequate subsystem for ensuring internal functional balance and self-defense;
- the functional logic of the immune system is as follows:
 - (a) revealing the disrupted balance;
 - (b) determining the nature of the disruption and selecting the tactics and the "toolkit" for overcoming the disbalance;
 - (c) guaranteeing the prevention of new disruptions during the restoration of balance.

These principles, which we have studied for many months with physicians, biologists, specialists of system management, have been formed, as we noted, over the course of millions of years, parallel to the development of living organisms. The human society has existed for just a few thousand years and as a single organism, as a complicated system, it has not yet reached the level of systemic perfection and harmony. The example of the 20th century that as a result of social cataclysms claimed the lives of more than 130 million people, the current wave of international terrorism are salient proof that human society is suffering from immune deficiency. It is not coincidental that the emergence of the idea of establishing specialized institutions of judicial constitutional review coincides with the First World War period, whereas its systemic development turned into reality in the aftermath of the Second World War.

We believe that **mankind is**, to some extent “subconsciously,” **approaching the formation of a qualitatively new immune system of the social organism**. The entire 20th century convincingly proved that **religion, traditions, moral norms, and the entire value system of social behavior, other mechanisms of systemic self-defense have failed to fully ensure the dynamic balance and stability in the development of society under new realities**.

In fact, constitutional review gradually becomes one of the critical elements of civil society and the rule-of-law state. Constitutional review manifests itself in the sphere of “checks and balances,” and its primary objective is the permanent, continual, and systemic identification, assessment, and restoration of the disrupted constitutional balance. **Constitutional review excludes the irrational reproduction of functional violations and accumulation of negative social energy**, which, upon reaching critical mass, can “explode” and result in a totally new quality. **In practice, this represents a choice between dynamic, evolutionary, or revolutionary development**.

The operation of the entire system of constitutional review is called upon to guarantee constitutional stability and exclude social cataclysms, predominantly on the basis of constitutional principles such as the power

of the people, the rule of law, the separation and balance of powers, state sovereignty, supremacy of Constitution, etc.

The constitutional system of a democratic state must inevitably be open and possess the intrinsic capacity for self-development. Important prerequisites for this are that any violation of constitutional lawfulness and disruption of constitutional balance must receive an immediate response, be professionally assessed, and be overcome.

When ensuring the supremacy of the Constitution, constitutional review turns into an instrument for ensuring the stability of democratic society, which, based on fundamental constitutional values, provides for the consistent and uninterrupted dynamic development of such society. This is the main criterion for the effective functioning of constitutional review in general and of constitutional justice in particular, which is exceptionally crucial both for developing and developed democratic systems.

In newly independent countries, distortions of legal awareness often develop bizarre manifestations such as various constraints on the implementation of constitutional review and, particularly, on the performance of the functional role of the Constitutional Court, or simply its “isolation” from constitutional processes, are viewed as ways for authorities to show off their power. Unfortunately, the Republic of Armenia did not steer clear of such manifestations.

The existence of such psychology and mindset in the legislative and especially in the executive powers is not only lamentable and inconsistent with the fundamental principles of democracy and the rule-of-law state, but it is extremely dangerous since it is just half a step away from the establishment of autocracy.

One of the principal causes underlying such situations is that only constitutional courts are the product of the new reality within the system of judicial and legal bodies, and they do not bear the imprint of the totalitarian systems and the impact of inertia-driven processes. The emergence of Constitutional Courts is inseparably linked to choosing the path towards rule-of-law democracy. They establish themselves through

the struggle between the old and the new. The more society is inclined towards the old mindset and values, the harder is the path towards the establishment of viable constitutional justice and public perception. It is particularly difficult in systems **where democracy transforms from being a social necessity to an instrument for bending the law to the will of the authorities.**

The significance of specialized institutions of judicial constitutional review, as noted, lies in the fact that the court is established and operates for the purpose of protecting the foundations of constitutional order, the rights and fundamental freedoms of human beings and citizens, ensuring the supremacy and direct effect of the Constitution, that is, safeguarding and ensuring the fundamental political and legal values enshrined in and guaranteed by the Basic Law of civil society. The legal position of the Constitutional Court, direct or indirect interpretation of constitutional norms and provisions on the basis of identifying the legal content of basic constitutional principles, ensures not only the soundness of constitutional balance, but also determines the nature and direction of constitutional development in the country. **This reality must be perceived as a vital necessity by all institutions, as well as citizens, of the country that has chosen the path of democratic development.** The current trends of European legal developments, in particular, clearly indicate that the level of development of constitutional culture in the country is also measured by the degree of such perception.

It may be stated that the Constitutional Court is the principal body of state power, which on the ground of basic constitutional values and principles ensures the limitation of state power for the benefit of the principles of law, and through this guarantees the consistency and stability in implementing constitutional norms and principles. **Understanding this role and its rational implementation, with due consideration of the trends of international developments of constitutionalism, is one of the main directions of legal developments in the new millennium.**

Furthermore, as mentioned above, the system of constitutional justice may function fully, effectively and independently upon certain necessary and sufficient prerequisites. Some of these prerequisites include:

- functional, institutional, material, and social independence of judicial constitutional review³⁶²;
- consistency in the constitutional implementation of the principle of the separation and balance of powers;
- equivalence and comparability of fundamental constitutional principles and relevant constitutional mechanisms for the exercise of state power;
- proper and justified selection of objects of constitutional review;
- determination of the optimal scope of subjects eligible to apply to the Constitutional Court;
- systemic approach to ensuring the functional independence of judicial power;
- existence of clearly defined legislative policy and its implementation in the country;
- level of perception of democratic values within society.

The international practice in the field of constitutional justice indicates that in order to ensure reliable guarantees for the supremacy of the Constitution, the Constitutional Court should be entitled to:

- (a) determine the constitutionality of:
 - constitutional amendments;
 - international treaties;

³⁶² While speaking of the prerequisites for ensuring the independence of the judiciary, Justice of the Supreme Court of the United States Sandra O'Connor attaches particular importance to the fact that independence has both individual and institutional components. Individual independence, except for life tenure, is particularly important in the sense that the judge should be protected from any type of repression, any moral and any other pressure on him or her or threat thereof should be excluded, so that the judge, while rendering a decision, does not feel intimidated or terrorized (Сандры О' Коннор - Важное значение принципа независимости судебной власти. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г.).

- laws;
- other normative acts;
- (b) exercise review:
 - on the basis of individual applications,
 - upon requests of courts;
- (c) provide official interpretation of:
 - the Constitution,
 - laws;
- (d) resolve legal disputes among:
 - central bodies of authorities;
 - central and regional institutions;
 - regional institutions;
 - courts and other bodies;
- (e) ensure the constitutionality of democratic processes through:
 - review of the constitutionality of the activities of political parties;
 - review of the constitutionality of referenda;
 - review of the constitutionality and lawfulness of elections;
 - deciding on the constitutionality of removal from office (of the President, other officials);
 - ensuring guarantees for the independence of courts, local self-government bodies.

Not only do most of the European countries' constitutional courts have such powers, but there is also a tendency that the consolidation of powers should be consistent and **in line with the direction and degree of the country's democratization**. Constitutional justice is formal in nature and incomplete in such legal systems where the general attitude towards democracy itself is formal and inconsistent.

The structural analysis of cases adjudicated and applications filed with the Court shows that in the vast majority of countries there exist no constitutional or legislative impediments for the performance of the functions of the Constitutional Court. This is evidenced by the fact that it is possible to ensure both the continuity of assessing the constitutionality of laws and other normative acts, the possibility of resolving disputes

over powers, as well as the guaranteed protection of human rights. The situation that emerged in our country was unprecedented when, prior to constitutional amendments, even the limited powers of the Constitutional Court were not being exercised due to incomplete constitutional and legislative solutions. This also clearly spoke of the fact that the existence of the Constitution *per se* does not yet indicate existence of constitutionalism in the country.

An essential international trend is that the list of eligible applicants should not constitute a hindering factor for the performance of functions. However, we were faced with the exact opposite.

One should emphasize once again the fundamental importance of the fact that the viability of the constitutional review system is directly contingent upon the very constitutional solutions. Let us bring just an example to illustrate. For any Constitutional Court, the consistent implementation of the principle of the rule of law in the practice of constitutional justice has essential importance. In the 1949 Basic Law of Germany (Article 1, clause 3), as we noted, it was for the first time clearly stated that "[t]he following basic rights shall bind the legislature, the executive, and the judiciary as directly applicable law." This principle issue found its further development and systemic application in numerous instruments of international law. However, in our opinion, special attention should be paid to the wording of Articles 2 and 18 of the Constitution of the Russian Federation. Article 2 prescribes: "Man, his rights and freedoms are the supreme value. The recognition, observance and protection of the rights and freedoms of man and citizen shall be the obligation of the State." Whereas Article 18 develops this fundamental approach in the following manner: "The rights and freedoms of man and citizen shall be directly operative. They determine the essence, meaning and implementation of laws, the activities of the legislative and executive authorities, local self-government and shall be ensured by the administration of justice." We believe that this particular way of raising the issue is a valuable outcome of the development of constitutionalism, where not only the legal content of ensuring the rule of law is clearly defined, but also the functional

role of constitutional institutions in implementing this principle is accordingly adjusted. And this is of utmost importance for the practice of constitutional justice.

On the other hand, the distortions of constitutional principles and methodological foundations, internal contradictions, bottlenecks, and gaps in constitutions have their respective impact on the effectiveness of constitutional justice.

We share the opinion of Professor Georgi Boychev that the proper functioning of the Constitutional Court and the quality of its work are greatly dependent on the quality of the Constitution itself³⁶³. The main problem is that the Constitution is often presented as the Basic Law³⁶⁴ of the state political system, rather than that of civil society. This particular issue is of prevailing importance, and it characterizes the main direction of the development of constitutionalism in the new millennium.

One of the pivotal issues of the current developments of constitutionalism is the strengthening of the social nature of the Constitution, **shifting the emphasis from it being the Basic Law of the state to it being the Basic Law of civil society**. Current international developments, legal globalization trends, attempts to rethink the place and the role of the state lead to the conclusion that the human being is gradually becoming the key subject of international relations. The state as such is sidelined, with all the consequences thereof. Among these, the primary consequence is that the role of the state within civil society is inevitably revalued³⁶⁵. In such cases, the concept "Constitution" in real life is manifested, in a more comprehensive way, as social consensus over the fundamental rules of vital existence, and we encounter this phenomenon at the crossroads of our entire history. Therefore, in any country,

³⁶³ We believe that the Constitution is self-sufficient in its essence. Imperfection and internal contradictions are related to textual formulations, which need to be overcome also in the practice of constitutional justice.

³⁶⁴ Дайджест - Конституционное правосудие в странах СНГ и Балтии. 2004, N 12, С. 103.

³⁶⁵ Particularly see Гаврилов В.В. Развитие концепции правовой системы в зарубежной правовой доктрине второй половины XX - начала XXI века // Московский журнал международного права, 2004, N4, С. 19-35.

the Constitution must first and foremost guarantee opportunities for reaching unwavering public accord and contain solutions for overcoming any kind of social resistance. The Constitution cannot lead to constitutional impasses; it must be the most powerful impetus for the development of civil society. The existence of deformed civil society is also conditioned by the fact that incomplete constitutional solutions create a fertile soil for it.

To begin with, the supremacy of the Constitution must be guaranteed by the Constitution itself. **The Constitution must possess a necessary and adequate system for intra-constitutional self-defense.** Unfortunately, the constitutions of many post-communist countries lack the required potential.

In order to reveal the substance of this issue, it is also necessary to answer the following question: what are the criteria for evaluating the implementation of this principle? These should be found in **guaranteeing the rule of law, complete and independent exercise of separated and balanced power, ensuring the harmonious systematic nature of functions and powers, as well as the continual and balanced nature of state power.**

From the perspective of the issues raised in this section, if the criteria presented above were applied to the 1995 Constitution of the Republic of Armenia (prior to the amendments of 2005), then, from the point of view of the main issues under consideration, one could state that:

1. the constitutional guarantees for ensuring the rule of law were insufficient. The human being, his dignity, rights, and freedoms were not constitutionally recognized as highest and inalienable values. It did not contain the key constitutional provision that human and citizen's rights and freedoms have direct effect and determine the meaning, content, and application of laws, the functioning of legislative and executive powers, and that these are ensured through the administration of justice. This methodological approach failed to be implemented in a systematic way in other provisions of the Constitution as well.

2. There were certain inconsistencies between fundamental constitutional principles and concrete constitutional mechanisms for their implementation.

3. The principle of separation and balance of powers was implemented inconsistently; the necessary and adequate functional balance among state authorities was not ensured. In particular, the necessary prerequisites for the functional independence of legislative and judicial powers were not in place, and the system of checks and balances was imperfect.

There existed a certain misbalance in the system of “institution-power-function” with respect to almost all constitutional institutions of state power. The same also referred to the system of “functional-checking-balancing” powers. It would be no exaggeration to state that the main issue of systematic balance within state power was not effectively resolved in the Constitution of the Republic of Armenia.

4. The Constitution had failed to provide for a comprehensive and effectively functioning system of constitutional review. In this respect, constitutional solutions were incomplete and failed to reflect the leading global trends of strengthening the intra-constitutional self-defense system. Access to constitutional justice, for human beings and citizens, was neither recognized nor guaranteed.

5. There were absolutely no functional interrelations between the Constitutional Court and courts of general jurisdiction. Local self-governance was left out of the system of constitutional review; there were certain omissions in the definitions of the principles and procedures for constitutional proceedings, etc.

All of these manifestations, in combination with constitutional practice, the fact that since the establishment of the Constitutional Court and prior to the 2005 constitutional amendments, there had been no applications filed for determining the constitutionality of the President’s executive orders or Government decisions, and that in the course of eight years merely six applications had been reviewed on the constitutionality of a law, as well as the fact that the Constitutional Court was practically

isolated from the issue of guaranteeing human and citizen’s constitutional rights, **evidence that during the mentioned period the constitutional system of Armenia was suffering from serious immune deficiency.**

At that time, following the French model of the constitutional and legal system, whether knowingly or unknowingly, important mechanisms characterizing this system were omitted, such as the State Council, the Supreme Palace of Justice, the mandatory *ex ante* constitutional review of laws, the national committee on human rights, the Court of the Republic, the mechanisms of judicial oversight provided for in Chapter 10 of the Constitution, etc., whereas these were of key importance in terms of guaranteeing the stability and viability of the system. Currently, in view of the trends in international developments and best practices, as well as the challenges of the new millennium, France itself has undertaken serious steps towards systemic reform of the public administration system, in particular, introducing the system of individual constitutional complaints.

From the perspective of the main issue under consideration, the logic of further constitutional development should have focused on **ensuring the completeness, systemic nature, independence, effectiveness of constitutional justice.**

Given the situation that existed prior to the constitutional reforms, the Constitutional Court was obliged to refer to **the practice of broader interpretation of constitutional provisions** in order to protect the main constitutional values and ensure constitutional stability, having regard the fundamental constitutional principles and the provisions of Article 4 of the 1995 Constitution of the Republic of Armenia (which particularly prescribed that the State shall ensure the protection of human rights and freedoms based on the Constitution and laws, **in conformity with the principles and norms of international law**). A typical example of this was the review by the Constitutional Court of Armenia of the constitutionality of the European Convention for the Protection of Human Rights and Fundamental Freedoms, prior to its ratification, where the le-

gal positions of the Court on the Convention revealed also the main directions of further constitutional developments in the country with respect to the strengthening of the constitutional guarantees for the protection of human rights. The Constitutional Court particularly has emphasized that although states are bound by mutual obligations under the norms of international public law, the modern approach within the international public law system regarding the protection of human rights allows us to conclude that human rights and fundamental freedoms, which are based on the system of multilateral conventions, constitute objective criteria for the behavior of states rather than their mutual rights and obligations. The obligations of states under these conventions are rather directed to individuals under their jurisdiction than to the other participating states. From this perspective, the Convention of November 4, 1950 is called to protect persons and non-governmental organizations from the bodies of state power, which is one of the important features of a rule-of-law state, enshrined in Article 1 of the Constitution of the Republic of Armenia. Furthermore, the Convention and the Protocols thereto are based on such rights and criteria which are in line with the spirit and the letter of the human rights and fundamental freedoms guaranteed by the Constitution of the Republic of Armenia and the international treaties of the Republic of Armenia.

Summing up the above, we would also like to emphasize that the following serve as basis for the formation of an effective and independent justice system: systemic nature of constitutional review, rational nature of the system and its continuity, preventive nature of review, self-restrictive nature of the functioning of the system, functional independence of constitutional courts, organic combination of functional, institutional, organizational, and procedural principles in administering constitutional justice, ensuring full-fledged feedback from public practice, and excluding new violations of constitutional balance while restoring the disrupted equilibrium.

The 2005 constitutional amendments and the new Law "On the Constitutional Court," which entered into force on July 1, 2006, have

partially addressed the abovementioned issues. The issue not only refers to the powers of the Constitutional Court, the objects of proceedings, the subjects eligible to apply to the Court, the main principles for adjudication of cases by the Constitutional Court, but also to specific procedural peculiarities pertaining to different cases.

We would like to highlight a number of approaches that are systemic by nature:

1. Following the example of bodies administering constitutional justice in Austria, Denmark, United States, Argentina, Belgium, Finland, Ireland, Sweden, the Russian Federation, Norway, Malta, Turkey, and several others countries, the Constitutional Court of the Republic of Armenia as well enjoys such important guarantee of independence as the appointment of members under the principle of irreplaceability until attaining the age of seventy (sixty-five after the constitutional amendments)³⁶⁶. This provision gradually becomes more and more important in the international practice of constitutional justice. The Russian Federation has returned to this system. According to the Federal Law "On the Constitutional Court," the judges of the Constitutional Court shall hold office for an indefinite period of time, that is, until attaining the age of seventy.

It is necessary that the other components of independence of the Court also possess adequate viability. The general principle is that the independence of the courts implies exclusion of and protection from any type of influence. It should not be mechanically perceived. **It is a state of existence, essence, inner content, value system, quality.** Whereas the most important guarantee for the independence of a judge is his professional competence, knowledge, professional qualification. It also implies existence of a system for checking and raising the level of professional qualification. In general, an important guarantee for the independence of a judge is also the certainty towards the future both in terms of social protection and professional advancement (the opportunity to put

³⁶⁶ In several countries, for instance, in the United States, judges have life tenure once appointed.

to life his knowledge and experience). The culture of independence is, in its turn, dependent on the democracy, parliamentarism, and constitutional culture in the country. **The culture of independence is dependent on the culture of lawfulness.** Apart from being solely a public demand, independence must become an integral part of the culture of social thought.

Recently, issues pertaining to the powers of constitutional courts and the procedures for their exercise have become a subject of heated deliberations at the Venice Commission, especially within the framework of discussing the laws on the constitutional courts of Latvia, Azerbaijan, Moldova, Romania, Croatia, Armenia, and a number of other countries. The Report on Individual Access to Constitutional Justice³⁶⁷ adopted by the Venice Commission on December 18, 2010 at its Plenary Session was of principle importance in terms of this issue. This study included the entire international practice, identified the main trends of developments in Europe, and set forth the main pan-European criteria in the field of protecting human rights and guaranteeing the rule of law on the part of constitutional courts.

Taking into consideration the main trends of international developments in the sphere of constitutional justice, it can be concluded that **effective constitutional justice may be administered when all constitutional subjects are eligible to apply to the Constitutional Court and when the normative legal acts adopted by all constitutional subjects can become an object of constitutional justice.** Furthermore, since ensuring the supremacy of the Constitution is the main subject of constitutional justice, this issue will remain unresolved if the Constitutional Court fails to secure the guaranteed protection and ensure the constitutional human rights through effective exercise of the **individual right to constitutional justice,**

³⁶⁷ ON INDIVIDUAL ACCESS TO CONSTITUTIONAL JUSTICE, adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010). On the basis of the comments by Mr Gagik Harutyunyan (Member, Armenia), Ms Angelika Nussberger (Substitute Member, Germany), Mr Peter Paczoly (Member, Hungary).

and if it fails to resolve disputes over constitutional powers that arise among authorities.

The constitutional courts of more than fifty countries which have adopted the European system of constitutional review have the power to resolve disputes over constitutional powers among state authorities. For specific examples, see the Constitutions of the following countries: Azerbaijan (Article 130), Bulgaria (Article 149), Georgia (Article 89), Germany (Article 93), Italy (Article 134), Poland (Article 189), Russia (Article 125), Slovakia (Article 126), Slovenia (Article 160), Spain (Article 161), Tajikistan (Article 89), etc. Besides, constitutional courts of 29 countries are entitled to provide abstract or so-called absolute interpretations of the Constitution; these countries include Azerbaijan, Bulgaria, Gabon, Germany, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Russia, Namibia, Slovakia, Uzbekistan, etc. In many countries (Poland, Slovakia, Bulgaria, Croatia, the Czech Republic, Lithuania, Slovenia, Azerbaijan, etc.), the issue of compliance of other normative acts with not only the Constitution, but also with laws (often with international treaties as well) is also resolved by the Constitutional Court, and it is deemed inefficient to establish new bodies to this end (this opinion is also upheld by the experts of the Venice Commission).

Constitutional review of normative legal acts on the basis of individual complaints by citizens is practiced in 53 countries, including in all Western Europe and Eastern Europe countries that have constitutional courts. From among post-soviet countries, Armenia has partially regulated this issue through the 2005 constitutional amendments, within the scope of its commitments undertaken upon accession to the Council of Europe. The abovementioned report of the Venice Commission clearly concludes that further developments must take place by way of introducing the institution of full constitutional complaint. The latter implies that not only the legal acts applied against them, but also the direct protection of fundamental rights must become an object for constitutional complaints. Without that it will be impossible to ensure the direct effect of constitutionally enshrined fundamental rights. The latter cannot be

limited only to invoking those rights in the judicial practice. There have to be adequate procedures for the judicial protection of directly effective fundamental human rights. International practice evidences that the most effective path for it is the constitutional complaint, which becomes also an important tool for the person to exercise his right to constitutional justice.

2. With regard to subjects applying to the constitutional court, the principle approach accepted in international practice is that they need to ensure complete and effective implementation of the court's powers for constitutional review. From among more than 100 constitutional courts operating in the world, Armenia was a unique exception since its Constitutional Court had the narrowest scope of eligible subjects and **ranked last** in terms of their number and scope. This problem was radically resolved as a result of the 2005 constitutional amendments.

As a result of these amendments, Article 101 of the 2005 Constitution of the Republic of Armenia stipulates that, as prescribed by the Constitution and the Law "On the Constitutional Court," applications to the Constitutional Court may be filed by:

- (1) the President of the Republic, in cases provided by Article 100(1), (2), (3), (7), and (9) of the Constitution;
- (2) the National Assembly, in cases provided by Article 100(3), (5), (7), and (9) of the Constitution;
- (3) at least one fifth of the Deputies, in cases provided by Article 100(1) and (3) of the Constitution;
- (4) the Government, in cases provided by Article 100(1), (6), (8), and (9) of the Constitution;
- (5) local self-government bodies, on the matter of compliance with the Constitution, of the normative acts of state bodies violating their constitutional rights;
- (6) everyone, with regard to a specific case, where a final court act is available, all the judicial remedies are exhausted, and who challenges the constitutionality of a legal provision applied with respect to him or her upon such act;

- (7) courts and the Prosecutor General, on the matters of the constitutionality of the provisions of normative acts concerning a specific case pending before them;
- (8) the Human Rights Defender, on the matter of compliance of the normative acts referred to in Article 100(1) of the Constitution with the provisions of Chapter 2 of the Constitution;
- (9) candidates for the President of the Republic and for Deputies, on matters concerning them within the scope of Article 100(3.1) and (4) of the Constitution.

The Constitutional Court shall adjudicate the case only when a relevant application is filed.

3. The 1995 Constitution of the Republic of Armenia prescribed such norms of constitutional proceedings that were absent in all of the remaining constitutional courts of the world. In particular, it was stipulated that the Constitutional Court rendered decisions and opinions no later than within thirty days after the receipt of the application. A similar norm existed only with respect to the activities of the French Constitutional Council, which carried out *ex ante* normative review. No constitutional court carrying out *ex post* abstract review of normative legal acts is bound by such a constitutional restriction.

As a result of the 2005 constitutional amendments, Article 102 of the Constitution prescribed:

"The Constitutional Court shall adopt decisions and opinions within the terms and as defined by the Constitution and the Law 'On the Constitutional Court.'

The decisions and opinions of the Constitutional Court shall be final and shall enter into force upon publication.

The Constitutional Court may define a later term for repealing a normative act, or a part thereof, not complying with the Constitution.

The Constitutional Court shall adopt decisions on the matters provided by Article 100(1)-(4) and (9) and opinions on the matters provided by Article 100(5)-(8) of the Constitution. The opinions and decisions on the matters provided for by Article 100(9) of the Constitution shall be

adopted by at least two thirds of votes of the total number of members; the rest of the decisions shall be adopted by a majority of votes of the total number of members.

Where the opinion of the Constitutional Court is negative, the case shall be excluded from examination of the competent authority.”

In its turn, the Law of the Republic of Armenia “On the Constitutional Court” specified the time periods for the Constitutional Court to render decisions with regard to cases of a specific nature, taking into account also the international practice in this sphere.

4. Nowadays, issues concerning the nature of decisions rendered by constitutional courts, the main issues with regard to their enforcement, constitutional consequences of rendered decisions have also become a subject matter of serious discussions held at various international instances. Taking into consideration that Poland — where the reforms of this system have been debated since 1972 — had significant experience in judicial constitutional review, as well as the fact that among Eastern European countries Poland adopted its new Constitution at a relatively later stage (1997), and having in mind its vast experience in constitutional developments, the solutions found specifically in this country deserve particular attention also in terms of the mentioned issue, especially when it comes to the powers reserved to the Constitutional Court for prescribing the time period for its decision to take effect.

The Constitutional Court of Russia also followed the practice of prescribing the time period for entry into force of its decisions, since direct entry into force of decisions on a number of cases could lead to serious ancillary unconstitutional consequences. This, particularly, refers to the Decision rendered by the Constitutional Court of the Russian Federation on February 18, 1997 with regard to the Government Decision No 197.

A similar power is also reserved to the Constitutional Court of Germany, which is set forth in paragraphs 31 and 79 of the Federal Constitutional Court Act.

Article 68(12) and (13) of the new Law of the Republic of Armenia “On the Constitutional Court” prescribe the following: “12. The Constitutional Court shall be entitled to extend the application of the decision referred to in point 2 of part 8 of this Article to the legal relations preceding the entry into force of the decision, where non-adoption of such decision may cause grave consequences for the public or the State.

The administrative or judicial acts adopted and executed within three years preceding the entry into force of a decision of the Constitutional Court — rendered on the basis of the normative act declared as contradicting the Constitution and invalid upon the decision referred to in the first paragraph of this part, as well as on the basis of other normative acts ensuring the execution of the said act — shall be subject to review by the body having adopted the administrative or judicial act, as prescribed by law.

13. In case of adopting a decision on declaring the challenged provision of the Criminal Code or the law on administrative liability as contradicting the Constitution and invalid, these provisions shall be repealed upon entry into force of the decision.

The judicial and administrative acts adopted within the period preceding the entry into force of the decision of the Constitutional Court concerning the application of the said provision shall be subject to review as prescribed by law.”

At the same time, part 15 of Article 68 of the Law prescribes the following: “In accordance with part 3 of Article 102 of the Constitution, where the Constitutional Court finds that declaring the challenged normative legal act or any of the provisions thereof as contradicting the Constitution and invalid at the time of the publication of the decision of the Constitutional Court will inevitably cause such grave consequences for the public and the State that will distort the legal security to be established at that moment by abolishing the given normative act, the Constitutional Court may, declaring the given act as contradicting the Constitution, delay in its decision the repeal of the given act.

In this case, the act shall be considered as complying with the Constitution until such repeal.”

5. Nonetheless, the issue of ensuring the legal nature, substance, and enforcement of the decisions of the Constitutional Court is of higher importance. The international practice of constitutional justice and constitutional studies has confirmed that the decisions of the Constitutional Court have **precedential value and constitute an important source of law**³⁶⁸. International practice also evidences that the decisions of the Constitutional Court cannot become an object of discussion and interpretation by **state officials**. Such facts attest to the low level of constitutional culture and inconsistent application of the principle of the separation of powers.

The issue of the legal nature of the opinions of the Constitutional Court is also of exceptional importance. It has to be addressed not at the level of law, whether constitutional or organic, but on the level of the Constitution. If the decisions of the Constitutional Court, adopted by half of its members, are final and not subject to review, then its opinions, adopted by two thirds, cannot but have binding legal consequences. Otherwise, instead of contributing to the resolutions of political disputes in the legal dimension, the legal process leads to the opposite scenario, that is the legal issue is shifted to the political dimension, which is inconsistent with the concepts of the rule-of-law state and the principle of the rule of law. A proper approach has been formed in the legal practice of the Republic of Armenia, in particular, on the basis of Article 81 of the Rules of Procedure of the National Assembly, according to which if in the opinion of the Constitutional Court grounds for removing the President of the Republic of Armenia from office are absent, the item shall be removed from the agenda of discussion. The same approach is stipulated in Article 83. Nevertheless, the resolution of such an essential matter through ordinary laws may not only undermine the consistent implementation of the principles of legal resolution

³⁶⁸ See Зоркин В.Д. Прецедентный характер решений Конституционного Суда Российской Федерации // Журнал российского права, 2004, N 12, С. 3-9.

of political disputes, but also trigger political speculations, involving also the judiciary. Given these considerations, the issue was regulated on the constitutional level. International experience also evidences that the legal nature of the acts adopted by the Constitutional Court must be clearly stipulated in the Constitution.

6. As it was noted, guaranteeing the supremacy of the Constitution, in the most general terms, implies ensuring the constitutionality of legal acts, safeguarding the constitutionally enshrined human rights and freedoms, resolving disputes arising between state authorities with regard to constitutional powers. Without comprehensive implementation of these functions, it would be impossible to guarantee full-fledged constitutional justice in the country. Incidentally, if in the previous century and especially after the 1950s, Western European countries attached great importance to the issue of the constitutionality of normative legal acts, in particular, the issues of immediate guarantees by constitutional courts of constitutional rights and the resolution of disputes over powers have been brought to the forefront in the new millennium. Many Eastern European countries have adopted the relevant experience of Germany, Austria, Spain, and a number of other countries and made the necessary changes to their legal systems so as to create, in view of the above trends, reliable prerequisites for ensuring the supremacy of the Constitution. Recently, this example was also followed by a number of Eastern European and former USSR countries, widely introducing in the practice of constitutional justice the system of individual complaints, creating clear mechanisms for official interpretation of the Constitution and resolution of disputes over powers. In our country, the deliberations of political forces in this regard, the constitutional and legislative reform initiatives are not yet consistent with the generalizations of legal thought. The 2005 constitutional amendments resulted in the introduction of, as one might describe, the most cautious and most limited option of accepting and examining individual complaints, whereas the constitutional disputes over competences and, within their scope, the issue of abstract interpretation of the Constitution remained

unresolved, thus failing to create full guarantees for ensuring the supremacy and direct effect of the Constitution.

The coordinated resolution of the abovementioned issues has direct significance for the formation of a **comprehensive, effective, and independent** mechanism for judicial constitutional review. Those three manifestations are organically connected, and it is within their triunity that the completeness and effectiveness of constitutional justice, as well as the guaranteed nature of constitutional stability can be determined.

Summing up, we can not only conclude that constitutional justice is the most important and inalienable component of the immune system of civil society, but also that the real state of constitutional justice is one of the main criteria for measuring the constitutionalism and development of constitutional culture in the country. For example, in Germany the scientific thought has long before reached the conclusion that the Basic Law is in practice applied the way it is interpreted by the Federal Constitutional Court³⁶⁹.

New value system orientations and overcoming of the old mindset are not sufficient to prudently traverse the road leading from the existence of the Constitution to the establishment of true constitutionalism. To this end, it is necessary to have the following mandatory prerequisites:

1. guaranteed rule of law;
2. clear separation and balance of powers;
3. democracy has to shift from being a constitutional principle to a living reality, legitimacy of authorities has to be ensured³⁷⁰;
4. the system for guaranteeing the supremacy of the Constitution has to be comprehensive and viable;
5. the effectiveness and independence of the judiciary has to be guaranteed.

³⁶⁹ Robert Alexy, *A Theory of Constitutional Rights*. Oxford University Press, 2010, p. 373.

³⁷⁰ The concept of legitimacy of authorities is often interpreted in literature in an incomplete manner. It implies not only the legitimacy of forming the body of authorities, but the necessary and sufficient public trust in this process and in the authority in question (Конституционное право: Словарь / Отв. ред. В.В. Маклаков. М., 2001, С. 248).

In the absence of any of these prerequisites, the remaining become inconclusive, the Constitution turns from a living reality into a formality, and its existence no longer attests to the existence of constitutional culture, complying with the principles of constitutionalism, and the rule-of-law state.

5.2. THE DEVELOPMENT TRENDS OF THE SYSTEMS OF CONSTITUTIONAL JUSTICE

The comparative analysis of the international practice of constitutional justice allows to:

First, identify the common and the necessary prerequisites without which these systems will cease to exist as such;

Second, identify the specifics and characteristic features of the constitutional justice of individual countries that can be instructive and useful for other countries;

Third, sum up the lessons of the historical development of constitutional justice systems as an important condition for ensuring the sustainable progress of society.

Thus, before providing a brief overview of the future development trends of constitutional justice systems, let us make several generalizations.

International practice, the development dialectics of the two systems (American and European) for ensuring the constitutionality of the law, the new problems deriving from the specifics of the transitional period, and the logic of their resolution evidence that, conditionally, the main lessons of historical evolution are as follows:

1. in the early 20th century objective prerequisites were created for shifting to a qualitatively new system of constitutional justice. They were, first of all, related to the qualitative active transformations of societal relations, including to systemic changes, as well as the emergence of extreme situations of public administration simultaneously in several countries;

2. the issue of ensuring the constitutionality of the law and other normative acts ceased to be solely or predominantly an issue of human rights protection. The issue of instilling sustainable dynamism in the process of ensuring and strengthening social stability, and securing the active and coordinated participation of all state bodies and citizens in that process was brought to the forefront;

3. the issue of establishing intra-state mechanisms for human rights protection acquired new quality, where a specific role was attached to the specialized institutions of judicial constitutional review. The methodological approach that the inherent dignity of the human being is the source of his rights and freedoms was taken as a starting point; whilst the natural rights of the human being are constitutionally recognized as the highest value, as directly applicable right, which specify the nature and the content of exercising the power by the nation and the state, and have to be respected and protected. Hence, the access of the human being to constitutional justice becomes an important guarantee for the protection of his rights;

4. especially in transitional and extreme situations, the prevention of negative phenomena and the reduction of possible harm becomes even more important than overcoming the consequences. In this regard, the establishment and further development of the system of *ex ante* review is extremely important, which is, however, incompatible with the American model of constitutional review;

5. the specialized system of judicial constitutional review provides countries in transition, in particular, with maximum opportunities for finding legal solutions to political disagreements. In fact, a practical opportunity is created to find a legal, constitutional way out from all deadlock situations. The effectiveness of constitutional justice is not, in its turn, dependent on the number of cases adjudicated by the court or the number of applications filed. **The main criterion for evaluating the effectiveness of constitutional courts is their actual influence on social processes, which is directed at the maintenance of the constitutional balance, as well as the sustainable and dynamic progress of society;**

6. the ensuring of the supremacy of the Constitution under the new systems and the ongoing review of the constitutionality of the law and other normative acts changed the methodology of the approach as well; the issue was transferred from the dimension of judicial practice to that of public administration;

7. the formation of specialized systems allowed to demonstrate a comprehensive approach to the issue of ensuring the constitutionality of laws and other normative acts, not only making the issue of constitutionality a subject of consideration at all stages of their elaboration, adoption, and application, but also establishing wider democracy, essentially expanding the scope of subjects of constitutional review and that of subjects eligible to apply to the Constitutional Court for that purpose;

8. the specialized system of constitutional courts substantially increased the influence of constitutional review in the improvement of the legislative system, and, even more, in further improvement of constitutional solutions; **the decisions and the legal positions of the Constitutional Court became an important source of law;**

9. wider opportunities were created to maintain the separation and balance of powers and to effectively apply the mechanism of checks and balances. Of the circumstances substantially contributing to the solution of this problem, we would like to emphasize the practice of *ex ante* constitutional review of the regulations of parliamentary chambers, the opportunity provided to parliamentary minorities in terms of constitutional review, the oversight function of constitutional courts regarding the constitutionality of presidential elections and the activities of political parties, as well as the opportunity to resolve disputes between state authorities with the help of judicial constitutional review bodies, etc;

10. in a number of countries, the bodies of constitutional justice started to be overburdened with powers not typical of their functional role, which often produces a negative impact on the effectiveness of their activities;

11. as an important conclusion, we would also like to mention that consistent and effective functioning of constitutional review bodies may be expected where and when a comprehensive approach is demonstrated with respect to the formation of the system, and the full scope of powers and the real prerequisites for their exercise are clearly predetermined and enshrined in the Constitution. In this case, the approach must not be dictated by this or that political consideration of the time, but must rather have at its basis the demands suggested by the methodology of systemic management — a circumstance not guaranteed in the Republic of Armenia with the 1995 constitutional solutions. Notwithstanding the change in the political situation, the inviolability and independent functioning of the body of constitutional justice must be guaranteed. This is especially important in the transitional period. This problem also demands substantial improvements in the international cooperation of constitutional courts;

12. it is extremely important to acknowledge that **any society, including those in the pre-constitutional period, has had written and unwritten rules for the vital existence of society, as well as a comprehensive system for their observance and for supervision (or checks) over the authorities. The important components of this system have been the faith (church), norms of moral behavior, traditions (social, family), rules of behavior contingent on the specifics of either a small or large system, customary law, legal norms, etc.** Constitutional review should come to harmony with these and not oppose them. That means that in every country, taking into account its specifics, all the components should be identified and harmonized. Thus, it can also be concluded that the rules that may apply in sociocentric systems may never apply in egocentric systems;

13. **the main standards which should underlie the formation of viable systems of constitutional justice are as follows:**

- functional independence of constitutional courts, and harmony among the powers and the prerequisites for the exercise thereof;

- integrity of the constitutional review system and existence of clear functional interrelations among the bodies carrying out constitutional review;
- ensuring the continuity of the rational functioning of the system;
- ensuring the harmonized combination of functional, institutional, organizational, and procedural prerequisites in administering constitutional justice;
- ensuring constant feedback with societal practice;
- excluding the emergence of new unconstitutional situations in the course of restoring the disrupted constitutional balance;

14. **constitutional justice must be based on the principle of the supremacy of law**, and this principle must be the backbone of the Constitution. It must be indisputably accepted that the Constitution is legal law, it is anchored on the right and protects the inalienable natural human rights, which are, by virtue of the Constitution, recognized as directly applicable rights. Meanwhile, the Constitution must possess the necessary and sufficient guarantees of intra-constitutional self-defense, excluding, to the extent possible, internal contradictions and bottlenecks. In other words, **every organism, including social organisms (the Constitution being its dynamic generalized model), must possess inner immune system of maintaining stability, which will be able to reveal, assess, and restore the disrupted balance;**

15. **the constitutional justice system may function effectively only upon the existence of necessary and sufficient prerequisites.**

The following is especially emphasized among them:

- functional, institutional, material, and social independence of judicial constitutional review;
- constitutionally clear separation and balance of powers and ensuring the existence of prerequisites for cooperation;
- ensuring harmony between main constitutional principles and specific norms;

- complete and justified selection of objects of judicial constitutional review;
- determination of the optimal scope of subjects of constitutional justice;
- systemic approach to the formation of the judiciary and guaranteeing its functional integrity;
- existence of a clearly defined and planned legislative policy;
- due level of the recognition of democratic values and adequate level of the legal awareness of society;
- existence of clearly defined legal regulations and guarantees for the implementation of the decisions and legal positions of the Constitutional Court, etc;

16. the opportunities to establish an effective constitutional justice system in Armenia were to a great extent improved as a result of the 2005 constitutional amendments, when the list of subjects eligible to apply to the court was essentially expanded, and the system of individual applications was introduced. In the meantime, with the above-mentioned reforms the status of the Constitutional Court was only limited to the following definition: "In the Republic of Armenia, constitutional justice shall be administered by the Constitutional Court" (Article 93 of the Constitution of the Republic of Armenia). Whereas, taking into account the mission and the specific direction of the activities of the Constitutional Court, the main function of this judicial body carrying out constitutional review, which is *per se* ensuring the supremacy and the direct application of the Constitution, must be clearly enshrined in the Constitution as well, thus providing the necessary and adequate constitutional-legal guarantees for the implementation of such function.

As a result of the constitutional amendments adopted on December 6, 2015, more complete and consistent approaches were demonstrated with respect to the systemic developments of constitutional justice. Particularly, these were clearly reflected in Articles 167-170 of the amended Constitution. These Articles not only clarified the

main function of constitutional justice, but also established a more complete system of powers for guaranteeing the supremacy of the Constitution, a complete list of subjects eligible to apply to the Constitutional Court, as well as clear-cut approaches deriving from procedural peculiarities.

Thus, Article 168 of the Constitution provides that the Constitutional Court, as prescribed by the Law on the Constitutional Court, shall:

- (1) determine the compliance of laws, decisions of the National Assembly, decrees and executive orders of the President of the Republic, decisions of the Government and the Prime Minister, and secondary regulatory legal acts with the Constitution;
- (2) prior to the adoption of draft amendments to the Constitution, as well as draft legal acts put to referendum, determine the compliance thereof with the Constitution;
- (3) prior to the ratification of an international treaty, determine the compliance of the commitments enshrined therein with the Constitution;
- (4) settle disputes arising between constitutional bodies with respect to the constitutional powers thereof;
- (5) settle disputes related to decisions adopted upon the results of a referendum, those of the elections of the National Assembly and President of the Republic;
- (6) render a decision on termination of the powers of a Deputy;
- (7) render an opinion on the existence of grounds for removing the President of the Republic from office;
- (8) render a decision on the impossibility of exercising the powers of the President of the Republic;
- (9) decide on the issue of subjecting a judge of the Constitutional Court to disciplinary liability;
- (10) decide on termination of the powers of a judge of the Constitutional Court;

- (11) decide on giving consent for initiating criminal prosecution against a judge of the Constitutional Court or depriving him or her of liberty with respect to the exercise of his or her powers;
- (12) render a decision, in the cases prescribed by law, on suspending or prohibiting the activities of a political party.

This set of powers raises the effectiveness and the systemic integrity of constitutional justice to a qualitatively new level and ensures the most solid guarantees for ensuring the supremacy of the Constitution. Attention should be paid especially to the powers provided for by points 1, 2, 4, 6, 9 and 10 of the mentioned Article, which are either new by their nature or are essentially expanding the scope of judicial constitutional review.

Important progress has been made in terms of clarifying and expanding the list of subjects eligible to apply to the Constitutional Court, determining the boundaries of discretion in applying to the Constitutional Court, and providing citizens with ample opportunities to apply to the Constitutional Court. Part 1 of Article 169 of the Constitution prescribes that the following may **apply** to the Constitutional Court:

- (1) the National Assembly — in the cases prescribed by point 12 of Article 168 of the Constitution, and in the case prescribed by point 7 of Article 168 of the Constitution upon the decision adopted by majority of votes of the total number of Deputies, whereas in the case prescribed by point 10 of Article 168 of the Constitution upon the decision adopted by at least three fifths of votes of the total number of Deputies;
- (2) at least one fifth of the total number of Deputies — in the cases prescribed by points 1, 4 and 6 of Article 168 of the Constitution;
- (3) a faction of the National Assembly — in respect of disputes related to decisions adopted upon the results of a refer-

endum and those of the election of the President of the Republic;

- (4) the President of the Republic — in the cases prescribed by part 1 of Article 129, part 2 of Article 139, Article 150, as well as points 1 and 4 of Article 168 of the Constitution;
- (5) the Government — in the cases prescribed by points 1, 4, 8 and 12 of Article 168 of the Constitution;
- (6) the Supreme Judicial Council — in the cases prescribed by point 4 of Article 168 of the Constitution;
- (7) local self-government bodies — with regard to compliance with the Constitution of regulatory legal acts listed in point 1 of Article 168 of the Constitution, violating their constitutional rights, as well as in the cases prescribed by point 4 of Article 168 of the Constitution;
- (8) everyone — under a specific case where the final act of court is available, all judicial remedies have been exhausted, and he or she challenges the constitutionality of the relevant provision of a regulatory legal act applied against him or her upon this act, which has led to the violation of his or her basic rights and freedoms enshrined in Chapter 2 of the Constitution, taking into account also the interpretation of the respective provision in law enforcement practice;
- (9) the Prosecutor General — in respect of the constitutionality of provisions of regulatory legal acts related to specific proceedings administered by the prosecutor's office, as well as in the case prescribed by point 11 of Article 168 of the Constitution;
- (10) the Human Rights Defender — in respect of the compliance of the regulatory legal acts listed in point 1 of Article 168 of the Constitution with the provisions of Chapter 2 of the Constitution;
- (11) political parties or alliances of political parties having participated in the elections to the National Assembly — in respect

of disputes related to decisions adopted upon the results of elections to the National Assembly;

- (12) candidates for the President of the Republic — in respect of disputes related to decisions adopted upon the results of election of the President of the Republic;
- (13) at least three judges of the Constitutional Court — in the case prescribed by point 9 of Article 168 of the Constitution.

Parts 2-5 of the same Article **provides the duty to apply, and not the right**. The following provisions were stipulated:

- 2. The National Assembly shall, in the cases prescribed by point 2 of Article 168 of the Constitution, apply to the Constitutional Court in respect of amendments to the Constitution, membership in supranational international organisations, or territorial changes. The authorised representative of a popular initiative shall apply to the Constitutional Court with regard to the issue of a draft law put to referendum upon popular initiative.
- 3. In the case prescribed by point 3 of Article 168 of the Constitution, the Government shall apply to the Constitutional Court.
- 4. Courts shall apply to the Constitutional Court in respect of the constitutionality of the regulatory legal act applicable in a specific case they are seized of, if they have reasonable doubts on the constitutionality thereof and find that the adjudication of the case is possible only through the application of the regulatory legal act.
- 5. In the case prescribed by point 6 of Article 168 of the Constitution, the Council of the National Assembly shall apply to the Constitutional Court.

Such constitutional-legal solutions and the creation of clear legislative prerequisites for their implementation have exclusive importance in guaranteeing the supremacy of the Constitution and the rule of law in the Republic of Armenia.

Hence, what are the main international trends of the further development of the existing systems of constitutional justice, and what kind

of new objectives and approaches do these trends dictate to newly independent countries?

In this regard, we would like to emphasize the following:

- 1. the special or specialized bodies of constitutional justice become one of the exclusively important institutions within the system of state power that ensure the balance, stability, the rule of law and contribute to the establishment and deepening of democracy;
- 2. the development of existing systems moves towards the improvement of the forms of organization, a clearer definition of the complete set of powers, the improvement of principles, forms, and methods of review, the expansion of the list of subjects eligible to apply to court, the determination of the objects of review, the raising of the role of *ex ante* review, improvement of judicial procedures and towards the improvement of a number of other directions. Great importance is attached to the establishment of the proper balance of *ex ante* and *ex post* review, as well as to the reasonable harmonization of mandatory and optional review, and different countries continue their efforts in seeking rational solutions to this end;
- 3. the issue of implementing the decisions and legal positions adopted by the bodies of constitutional justice is of exclusive importance in ensuring the constitutionality of laws and other normative acts. In our opinion, the approach to this issue should differ depending on the type of the legal act and the form of the review, defining a comprehensive mechanism for the legal consequences of the decision and its implementation;
- 4. increasing importance is attached to the role and significance of preventive measures taken by constitutional courts with regard to resolving disputes between the authorities regarding powers;
- 5. the system of constitutional justice will be imperfect and incomplete until control over the protection of human rights becomes

its indispensable part. All the countries that seek to instill stability and impulse to the process of social development, that have acknowledged the necessity to build civil society, and where the issue of rational use of the society's creative potential is emphasized, strive to reinforce the guarantees for the protection of human rights and freedoms, making it also a subject matter of constitutional justice.

It is important for newly independent countries to take account of the fact that institutions of constitutional justice have been established during the past decades even in developed European countries, with firmly established traditions of democracy. Consequently, in order to avoid moving forward by constantly correcting mistakes, it is safe to be more active when taking into account their practice.

As we have mentioned, the role of constitutional justice is particularly important for ensuring the dynamic and harmonious development of society. This is one of the key characteristics of the new millennium. The current social processes attest to the exclusively major role of systemic constitutionalism and constitutional stability. In order to avoid explosive solutions, the ensuring of that role also requires assessment of the continuous impact of social practice and continuous discharge of accumulated negative social energy. What can also play an essential role here is the reasonable use of the opportunities that legal cybernetics has to offer³⁷¹. In particular, from the perspective of the subject material of our study, continuous oversight of legal, social, and democratic characteristics of the social system and the comparative analysis of those criteria are extremely important. The comparative analysis also provides an opportunity to set forth and meet the objective for the optimal change of those qualities of the social system.

The application of such an approach becomes more important from the perspective of setting forth the objective for the optimal management of the process of sustainable development. It is not surprising

³⁷¹ With regard to that, see particularly Основы применения кибернетики в правоведении, М., Юридическая литература, 1977г., Правовая кибернетика. Учебное пособие под ред. Н. С. Полевого, М., Юридическая литература, 1987г.

that even the specialists, for instance, express the opinion that the constitutional principles of a rule-of-law, social, and democratic state, enshrined in the first Article of the Constitution of the Republic of Armenia, are merely abstract by nature and, in the best case, can be viewed as the desirable goal. In reality, it is a discretionary and incorrect approach. No country in the world has reached or can ever reach the finish line of those characteristics, since it symbolizes the continuity of development. Another question is whether progress is in the right direction or not, or what level has been achieved in this direction. To answer this question, it is not only necessary to make such a brief assessment, but it is also important to understand what kind of efforts should be made to achieve the maximum result in the implementation of these constitutional principles. In this perspective, the issue of introducing a comprehensive system of constitutional monitoring, which will be addressed below, becomes more than urgent.

5.3. THE INTERPRETATION OF THE CONSTITUTION BY THE CONSTITUTIONAL COURT

One of the principal missions of the Constitutional Court is the interpretation of the Constitution, whereby the stability and development of the Basic Law are guaranteed. In this context we mean official interpretation, since this, in contrast with non-official interpretation, has a universally binding nature and is rendered by the special body authorized for this purpose and by the procedure prescribed by law.

It is worth mentioning that some authors, taking into account the distinguishing features of the institution under consideration, conclude that the Constitutional Court of the Republic of Armenia (as well as similar bodies of constitutional justice) is not entitled to render an official interpretation of the Constitution since the latter does not directly provide the institution of the abstract official interpretation of the Basic Law.

Even in 2013, it was declared at a high state level that the Constitutional Court is no way empowered to interpret the Constitution and its provisions, and a number of individual lawyers, presenting themselves as “constitutional scholars,” have joined in this mockery.

This fact, characteristic of the given historical period, evidences that in terms of the perception of the meaning and the content of constitutional justice, the current setting is not meeting the criteria of a rule-of-law state, and there is confusion in terms of understanding the specifics of concrete and abstract review.

As any targeted activity, the implementation of the law objectively requires also an understanding of its substance, which, in its turn, implies interpretation of the relevant legal, including constitutional norms, since without the interpretation of these norms it is impossible to identify the constitutional-legal substance of the given norm and come to any conclusion by means of comparing it with the constitutional-legal regulations – that is, the implementation of judicial constitutional review. In this respect, it is worth mentioning the opinion expressed in legal literature that the text can include numerous semantic structures and, consequently, numerous legal norms, among which the body applying the law should choose the legal norm to be applied. The applied norm does not exist until this choice is made; it is only the text that exists. In a certain sense, it is the interpretation itself that endows the text with a specific norm.³⁷² The practice established in the United States is remarkable. Both American and international constitutional scholars agree that the Constitution of this country would not exist without the interpretations of the Supreme Court, compiled in more than 550 volumes. These

³⁷² See Тропер М. Проблема толкования и теория верховенства Конституции // Сравнительное конституционное обозрение, N 4(53)2005, page 175. Here it is worth mentioning the opinion expressed in legal literature that constitutions can be perceived as “incomplete contracts.” They provide a general framework of rules, rights, and principles, the precise meaning of which will depend on agreements between political actors or interpretations by constitutional review bodies (see Raadt de J. Contested Constitutions: Constitutional Design, Conflict, and Change in Post-Communist East Central Europe. Enschede: Ipskamp Drukkers, 2009, <http://dare.uvu.vu.nl/bitstream/1871/18202/5/8594.pdf>, page 91).

interpretations have turned the United States Constitution into a living reality and have recognized the Supreme Court as the main body administering constitutional justice. The country also possesses the main characteristic feature of not having an institution of the abstract official interpretation of the Constitution. All interpretations are provided in the course of trying specific cases, where it becomes necessary to interpret a constitutional norm or identify the constitutional-legal substance of a norm of the law.

Consequently, the Court, interpreting the Constitution, exercises constituting power and, therefore, some authors conclude that the decisions of the Constitutional Court and the official constitutional doctrine encompassed therein are the “material” that form the entire constitutional law; figuratively speaking, constitutional law exists inasmuch as constitutional provisions are interpreted by the Constitutional Court.³⁷³

In view of the above, we will address in this context the main issue as to which body is authorized in the Republic of Armenia to officially interpret the Constitution. First of all, let us note that the point of view prevailing both in theory and in the constitutional justice practice of the majority of countries is that the power to interpret the Constitution is reserved to the body administering constitutional justice, and one may hardly come across a position refuting this approach. Furthermore, the important part is that the abovementioned conclusion is not contingent on the fact whether or not this power is directly stipulated in the legislation of the specific country and particularly in the Constitution. Moreover, in Germany, for instance, there is a widely held position in legal literature that the Constitutional Court, along with being an active “positive legislature,” has over time developed an entire constitutional system, interpreting and amending the Basic Law.³⁷⁴

³⁷³ See Курис Э. О стабильности конституции, источниках права и мнимом всемогуществе конституционных судов // Сравнительное конституционное обозрение, 2004, N 3(48), page 94.

³⁷⁴ See Fundamental Rights and Principles. Liber Amicorum Pieter van Dijk, 2013, Cambridge – Antwerp – Portland, page 532.

According to Article 93 of the Constitution of the Republic of Armenia (as amended in 2005), in the Republic of Armenia constitutional justice is administered by the Constitutional Court, whereas in accordance with point 1 of the Law of the Republic of Armenia “On the Constitutional Court,” the Constitutional Court is the highest body of constitutional justice that ensures the supremacy of the Constitution in the legal system of the Republic of Armenia and its direct application. It is obvious that the implementation of the given objectives is solely possible in case of the uniform perception and application of constitutional norms or, in other words, in case of the existence of a certain uniform constitutional doctrine: a circumstance, which, in relation to the constitutional-legal substance of constitutional norms, is ensured through the legal position of the Constitutional Court. In this respect, it is worth mentioning that both the above-mentioned objectives and goals, and the interpretation of the Constitution are, by their nature, constitutional-legal issues, and the body administering constitutional justice is specialized in the resolution of these issues. Thus, the interpretation of the Basic Law is the most important function of the Constitutional Court of the Republic of Armenia, without which it is impossible to imagine the implementation of its overall mission. This, in its turn, allows us to conclude that the administration of constitutional justice is *per se* impossible without the interpretation of the Constitution. The above-mentioned does not imply that it refers to the abstract interpretation of constitutional norms. It is a completely different institution, where certain procedural peculiarities must be taken into account and the scope of subjects eligible to apply to the Constitutional Court with respect to this issue must be precisely stipulated in the Constitution. The abovementioned assertions are related to the administration of justice in individual cases and the assessment of the constitutionality of legal acts. Besides, taking into account the mentioned circumstances and the regulation stipulated in Article 93 of the Constitution of the Republic of Armenia (Article 167 as a result of the 2015 constitutional amendments) whereby in the Republic of Armenia constitutional justice is ad-

ministered by the Constitutional Court, it should be mentioned that no other judicial body is, therefore, entitled to resolve constitutional-legal issues, and the Constitutional Court itself is the special body authorized to interpret the Constitution of the Republic of Armenia when trying individual cases. In addition, the legal positions of the Constitutional Court, being the most important constituent part of its decisions, are binding for all state and local self-government bodies, their officials, as well as natural and legal persons within the entire territory of the Republic of Armenia, and therefore they are endowed with a universally binding feature.

In view of the abovementioned and the fact that one of the main distinguishing features of official interpretation is its binding nature for the subjects to whom it is addressed, and that it is rendered by the special body authorized for that purpose, the interpretation of the Constitution of the Republic of Armenia by the Constitutional Court is thus official by its nature. Furthermore, the analysis given above allows us to conclude that the official nature of interpretation is not dependent on the fact whether or not the body carrying out constitutional justice has *proprio motu* power to abstract interpretation of the Constitution, or it identifies and clarifies the content of constitutional norms within the scope of exercising other powers.

We have already noted that in a number of countries the constitutional courts are also vested with *proprio motu* power to abstract official interpretation of the Constitution (for instance, Albania, Azerbaijan, Bulgaria, Germany, Russia, Slovakia, Uzbekistan, etc.). We believe that the existence of the mentioned *proprio motu* power may be effective in case when the interpretation of the Basic Law depends on the resolution of disputes among various authorities as regards their powers. In other words, it too is shifted to the dimension of the resolution of the specific constitutional-legal dispute. We believe that the institution of the absolute abstract interpretation of the Constitution is dangerous in the sense that the constitutional courts may, as a consequence, get involved in political processes, thus weakening their legal role.

It should be taken into consideration that the interpretation of the Constitution by the Constitutional Court of the Republic of Armenia and the observance of the principle of “expedient self-restraint” within the scope of the interpretation imply the identification of the substance of the constitutional norm and the resolution of the key constitutional issues on the basis of the substance of existing constitutional-legal regulations and the fundamental constitutional principles. Moreover, it is not mandatory for the Constitution to be interpreted literally. The interpretation may also be broad or limited. However, in all cases, the Constitution should be interpreted in such a way so as to ensure the stability, development, supremacy, and direct application of the Constitution of the Republic of Armenia, taking as a starting point the fact that the human being, his dignity, the fundamental rights and freedoms are the highest values, and recognizing the need to ensure the implementation of the principle of the rule of law and of the separation and balance of powers. Given that, part 7 of Article 68 of the Law of the Republic of Armenia “On the Constitutional Court” prescribes that while deciding on the issue of the constitutionality of legal acts, the Constitutional Court shall determine the conformance of the challenged act or the specific provisions thereof with the Constitution, particularly taking into account the following:

- (1) the required type of the legal act;
- (2) observing the procedure, provided by the Constitution, for adopting and bringing the legal act into effect;
- (3) the need for ensuring and protecting, and the free exercise of, the rights and freedoms of the human being and the citizen, enshrined in the Constitution, as well as the permissibility of limitations thereof;
- (4) securing the separation and balance of powers, provided for by the Constitution;
- (5) the permissible scope of the powers of state and local self-government bodies and the officials thereof;
- (6) the need for ensuring the direct application of the Constitution.

5.4. THE SETTLEMENT OF DISPUTES REGARDING CONSTITUTIONAL POWERS AS A GUARANTEE FOR CONSTITUTIONALISM

As already mentioned, prior to the amendments by the Referendum of December 6, 2015, the Constitution of the Republic of Armenia did not provide for a possibility to resolve disputes among constitutional bodies regarding their constitutional powers. In international practice, the power to resolve such disputes is exercised by the specialized bodies of constitutional review. Germany was among the first countries to provide (by part 1 of Article 93 of the Basic Law of 1949) that the Federal Constitutional Court shall rule on the interpretation of the Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body. Afterwards, many countries tried to follow that path, all the way to separating the functions of abstract interpretation of the Constitution and that of resolving disputes over powers.

In case of possessing such power, it is very important to clarify the scope of subjects eligible to apply to the Constitutional Court. In Germany, the following may apply to the Constitutional Court on the mentioned matter: the Federal President, the Bundestag, the Bundesrat, the Federal Government, and such parts of these organs that are vested with own rights pursuant to the Basic Law or the rules of procedure of the *Bundestag* and *Bundesrat*, the *Land* Government, the highest organs of the *Land* and those parts of these organs that are vested with own rights by the organ’s rules of procedure or by the *Land* constitution (Articles 63, 68, 71 of the Law on the Federal Constitutional Court).

Since this power — which is of utmost importance for guaranteeing the supremacy of the Constitution — has been reserved to the Constitutional Court of the Republic of Armenia by the 2015 constitutional amendments, and corresponding judicial practice has yet to be established, we find it necessary to elaborate on the experience of several

countries which provide for the possibility to resolve disputes among constitutional bodies over their constitutional powers.

Thus:

Article 146 of the Constitution of the Republic of Romania³⁷⁵ refers to the powers of the Constitutional Court. Point (e) of the mentioned Article prescribes that the Constitutional Court shall solve legal disputes of a constitutional nature between public authorities, at the request of **the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy (this body is similar to the Council of Justice of the Republic of Armenia)**. Article 34 of the Law of Romania “On the Constitutional Court”³⁷⁶ identically reflects the norm prescribed by point (e) of Article 146 of the Constitution.

Article 160 of the Constitution of the Republic of **Slovenia**³⁷⁷ refers to the powers of the Constitutional Court. Subparagraphs 7, 8 and 9 of the mentioned Article prescribe that the Constitutional Court decides:

- on jurisdictional disputes between the state and local communities and among local communities themselves;
- on jurisdictional disputes between courts and other state authorities;
- on jurisdictional disputes between the National Assembly, the President of the Republic and the Government.

Article 61 of the Law of the Republic of Slovenia “On the Constitutional Court”³⁷⁸ prescribes that a request for a decision on jurisdictional disputes between courts and other state authorities and on jurisdictional disputes between the National Assembly, the President of the Republic, and the Government, may be submitted by an affected authority to the Constitutional Court. The given regulations also apply *mutatis mutandis* to jurisdictional disputes

375 http://www.cdep.ro/pls/dic/site.page?den=act2_2&par1=5#t5c0s0sba142

376 <http://www.ccr.ro/Legea-nr-471992>

377 <http://unpan1.un.org/intradoc/groups/public/documents/UNTC/UNPAN014895.pdf>

378 <http://www.us-rs.si/en/about-the-court/legal-basis/constitutional-court-act/>

between the state and local communities and among local communities themselves.

Article 89 of the Constitution of the Republic of **Georgia**³⁷⁹ refers to the powers of the Constitutional Court. Subparagraph (b) of paragraph 1 of the mentioned Article prescribes that the Constitutional Court shall consider disputes on competence between state bodies. Article 34 of the Organic Law of the Republic of Georgia “On Constitutional Court”³⁸⁰ prescribes that **the President of Georgia, not less than one fifth of the members of the Parliament of Georgia, as well as other state bodies listed in Article 89 of the Constitution of Georgia, that is the Government, the Public Defender (Ombudsman), representatives of the higher representative bodies of Abkhazia and Ajara** may lodge a constitutional claim with the Constitutional Court concerning disputes over powers.

Article 130 of the Constitution of the Republic of **Azerbaijan**³⁸¹ prescribes the powers of the specialized body of constitutional review. Under point 8 of part 3 of the same Article, the settlement of disputes connected with division of authority between legislative, executive and judicial powers is envisaged among the powers of the Constitutional Court. Article 32 of the Law on the Constitutional Court of Azerbaijan³⁸² prescribes that the **President of Azerbaijan Republic, Milli Majlis of Azerbaijan Republic (the Parliament), Cabinet of Ministers of Azerbaijan Republic, Supreme Court of Azerbaijan Republic, Prosecutor’s Office of Azerbaijan Republic, Alli Majlis of Nakhchivan Autonomous Republic (the Parliament)** may apply to the Constitutional Court with respect to the cases prescribed by part 3 of Article 130 of the Constitution (including disputes connected with division of authority).

379 http://www.parliament.ge/files/68_1944_951190_CONSTIT_27_12.06.pdf

380 <http://www.legislationline.org/documents/action/popup/id/5491>

381 http://azerbaijan.az/portal/General/Constitution/doc/constitution_e.pdf

382 [http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/aze?fn=document-frame.htm\\$f=templates\\$3.0](http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/aze?fn=document-frame.htm$f=templates$3.0)

Article 149 of the Constitution of the Republic of **Bulgaria**³⁸³ refers to the powers of the Constitutional Court. Part 1 item 3 of the mentioned Article prescribes that the Constitutional Court shall rule on competence suits between the bodies of local self-government and the central executive branch of government. Article 150 of the Constitution of the Republic of Bulgaria prescribes the list of subjects eligible to apply to the Constitutional Court. The subjects referred to above are as follows: **not fewer than one-fifth of all Members of the National Assembly, the President, the Cabinet of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court, the Prosecutor General, the Municipal Council.**

Article 131 of the Constitution of the Republic of **Albania** refers to the powers of the Constitutional Court. Subparagraph 4 (ç) of the mentioned Article prescribes that the Constitutional Court decides on conflicts of competencies among the powers as well as between central government and local government. Article 54 of the Law on the Organization and Functioning of the Constitutional Court of the Republic of Albania³⁸⁴ prescribes that the application is presented to the Constitutional Court by **the entity in conflict or the entities directly affected by the conflict.**

Article 87 of the Constitution of the **Czech Republic**³⁸⁵ prescribes the powers of the specialized body of constitutional review. Among those powers, paragraph (k) of the same Article stipulates also deciding on jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body. Paragraph 2 of Article 120 of Constitutional Court Act³⁸⁶ prescribes the list of eligible subjects. The eligible subjects are as follows:

- **a state body** in a jurisdictional dispute between the state and a self-governing region or in a jurisdictional dispute between state bodies;

383 <http://www.parliament.bg/en/const>

384 [http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/aze?fn=document-frame.htm\\$f=templates\\$3.0](http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/aze?fn=document-frame.htm$f=templates$3.0)

385 <http://www.psp.cz/cgi-bin/eng/docs/laws/1993/1.html>

386 <http://www.usoud.cz/en/constitutional-court-act/>

- **the representative body of a self-governing region** in a jurisdictional dispute between that self-governing region and the state or in a jurisdictional dispute between self-governing regions.

Article 134 of the Constitution of the **Italian Republic**³⁸⁷ prescribes the powers of the specialized body of constitutional review. Paragraph 2 of the same Article prescribes that the Constitutional Court shall pass judgement on conflicts arising from allocation of powers of the State and those powers allocated to State and Regions, and between Regions. Section 37 of the Law on the composition and procedures of the Constitutional Court of Italy (Law No. 87 of 11 March 1953)³⁸⁸ essentially prescribes that the **representatives of different branches of Central government** may apply to the Constitutional Court in cases of conflicts over powers. As to conflicts of powers between the Central and regional governments, and between regional governments, Article 39 of the mentioned Law prescribes that **the body, which considers that there is a conflict**, may apply to the Constitutional Court.

Article 129 of the Constitution of the Republic of **Croatia**³⁸⁹ prescribes the powers of the specialized body of constitutional review. Among the powers of the Constitutional Court, paragraph 6 of the same Article envisages deciding on jurisdictional disputes between the legislative, executive and judicial branches. Paragraph 1 of Article 81 of the Constitutional Act on the Constitutional Court of the Republic of Croatia³⁹⁰ prescribes that if a jurisdictional dispute between the bodies of the legislative, the executive or the judicial branches occurs, each of these bodies may require that the Constitutional Court resolve the jurisdictional dispute.

387 https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf

388 [http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/aze?fn=document-frame.htm\\$f=templates\\$3.0](http://codices.coe.int/NXT/gateway.dll/CODICES/laws/eng/eur/aze?fn=document-frame.htm$f=templates$3.0)

389 <http://www.sabor.hr/Default.aspx?art=2405>

390 http://www.usud.hr/default.aspx?Show=ustavni_zakon_o_ustavnom_sudu&m1=27&m2=49&Lang=en

Similar power is also provided by the Constitution of the **Russian Federation**, which is also regulated in detail in the Federal Constitutional Law on the Constitutional Court of the Russian Federation. In particular, pursuant to the abovementioned legal regulations, the right to petition the Constitutional Court of the Russian Federation with an application to settle a dispute concerning competence shall be vested in **federal bodies of state authority party to the dispute, bodies of state authority of the Russian Federation, bodies of state authority of the subjects of the Russian Federation** (Article 125 of the Constitution of the Russian Federation, Article 92 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation).

Possibility of resolving conflicts over powers by the Constitutional Court is also provided in **Hungary**. Pursuant to Section 36 (1) of the Act CLI of 2011 on the Constitutional Court of Hungary, if - **with the exception of courts and public administration authorities** - a conflict of competence arises **between a state organ and local government organs**, the organs in question may request the Constitutional Court to resolve the conflict of competence.

Article 149 of the Constitution of the Republic of **Montenegro**³⁹¹ prescribes the responsibilities of the specialized body of constitutional review. Part 5 of the same Article prescribes that the Constitutional Court shall decide on the conflict of responsibilities between courts and other state authorities, between state authorities and local self-government authorities, and between the authorities of the local self-government units. Article 66 of the Law on the Constitutional Court of Montenegro prescribes that the proposal for determining upon the conflict of competencies may be lodged by one or more bodies in conflict, as well as person who because of acceptance or refusal of competencies cannot obtain its rights.

Article 189 of the Constitution of **Poland**³⁹² prescribes that the Constitutional Tribunal shall settle disputes over authority between

³⁹¹ <http://www.skupstina.me/images/documents/constitution-of-montenegro.pdf>

³⁹² <http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>

central constitutional organs of the State. Article 192 of the Constitution explicitly prescribes the scope of persons who may make application to the Constitutional Tribunal in respect of the specified matters, namely the following persons: the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, the First President of the Supreme Court, the President of the Chief Administrative Court and the President of the Supreme Chamber of Control.

Article 89 of the Constitution of the Republic of **Tajikistan**³⁹³ prescribes the powers of the specialized body of constitutional review. Subparagraph 2 of paragraph 3 of the same Article prescribes that the Constitutional Court shall resolve conflicts between governmental organs regarding their competencies. Article 40 of the Constitutional Law "On the Constitutional Court of the Republic of Tajikistan"³⁹⁴ provides that in case of disputes concerning competence, the right to apply to the Constitutional Court shall be vested in the Government of Tajikistan, ministries, other state bodies, the Majlis and chairmen of Autonomous Oblast, oblasts, towns and other districts.

Article 93 of the Constitution of the Republic of **Chile** prescribes the powers of the specialized body of constitutional review. Part 12 of the same Article prescribes that the Constitutional Tribunal shall resolve the conflicts of competence which arise between the political or administrative authorities and the tribunals of justice, which do not correspond to the Senate. Article 93 of the Constitution also prescribes that in case of the mentioned dispute, the parties to the dispute or the courts may apply to the Constitutional Tribunal.

Article 110 of the Constitution of **the Former Yugoslav Republic of Macedonia**³⁹⁵ prescribes the powers of the specialized body of constitutional review. Among these powers, paragraphs 4 and 5 of the same Article

³⁹³ http://www.constcourt.tj/rus/index.php?option=com_content&view=article&id=2:2009-06-24-11-12-07&catid=2:2009-07-13-05-22-34&Itemid=13

³⁹⁴ http://www.constcourt.tj/rus/index.php?option=com_content&view=article&id=3:2009-06-24-11-12-07&catid=2:2009-07-13-05-22-34&Itemid=14

³⁹⁵ <http://www.ustavensud.mk/domino/WEBSUD.nsf>

stipulate the settlement of conflicts of competency among holders of legislative, executive and judicial offices, as well as settlement of conflicts of competency among Republic bodies and units of local self-government. Article 62 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia³⁹⁶ prescribes that a proposal for a competence collision settlement among the legislators of the legislative, executive and court authority and among the Republic organs and self-government units, may be submitted by any of the organs between which the collision has occurred. A proposal may be submitted by anyone who due to non-acceptance or refusal of the competence of separate organs cannot achieve his right.

Article 169 of the Constitution of the Republic of Armenia provides that at least one fifth of the total number of Deputies of the National Assembly of the Republic of Armenia, the President of the Republic, the Supreme Judicial Council, local self-government bodies may apply to the Constitutional Court in respect of disputes regarding the constitutional powers.

Thus, the brief overview of the practice of different countries of the world shows that:

First, the resolution of disputes over constitutional powers has long ago become one of the most important pledges for guaranteeing the supremacy of the Constitution;

Second, without the precise exercise of such powers, the constitutional-legal disputes are shifted to the political platform and thus pose a serious threat to social stability;

Third, the existence of such powers contains great potential for the constitutionalization of societal relations;

Fourth, such a power can be brought to life both by way of general procedure for abstract constitutional review and by way of connecting it directly with the power of interpreting the Constitution in the manner provided for by the Basic Law of Germany. We believe that the latter approach provides more solid guarantees for the constitutionalization of societal relations and ensuring the consistent implementation of constitutional norms.

³⁹⁶ <http://www.ustavensud.mk/domino/WEBSUD.nsf/Strani/Legal%20Acts%20-%20Rules%20of%20Procedure?OpenDocument>

5.5. THE PRECEDENTIAL EFFECT OF THE DECISIONS OF THE CONSTITUTIONAL COURT

At the contemporary stage of the development of constitutional science, the decisions of the Constitutional Court are no longer perceived as documents merely determining the constitutionality or unconstitutionality of legal acts, but an even greater emphasis is placed on their precedential effect and on them being the most important source for the formation of a uniform constitutional doctrine and the development of the Constitution and legislation.

It should be noted that there is no absolute point of view in legal literature regarding the nature, features, and specifics of the legal concept under consideration.³⁹⁷

According to some authors, the legal positions of the Constitutional Court express the attitude of the Court towards the constitutional norm, as a result of its interpretation.³⁹⁸ Others consider it as a part of that body's decision, which is subject to mandatory execution and expresses the position of the judges in regard to the application of this or that norm of the Constitution.³⁹⁹ Several other authors find that the legal positions of the Constitutional Court reflect the attitude of the given body towards important constitutional-legal phenomena, and it is guided by this very attitude in the course of the adjudication of the relevant cases⁴⁰⁰. There is also another point of view in legal literature, according to which the legal positions of the Constitutional Court are a set of legal conclusions of general nature, resulting from

³⁹⁷ See also G.G Harutyunyan, A. A. Manasyan, *Constitutional Review*, Yerevan, 2015, pages 179-192.

³⁹⁸ See Витрук Н. Конституционное правосудие в России (1991-2000гг.): Очерки теории и практики. М., 2001, С. 104-124.

³⁹⁹ See Бастен И. Правовые позиции Конституционного Суда РФ. Понятие, виды, юридическая сила // Вестник Челябинского университета. Серия 9. Право. 2003. №2, С. 15.

⁴⁰⁰ See Кряжков В. А., Лазарев Л. В. Конституционная юстиция в РФ. М., 1998, С. 246.

the interpretation of the Constitution by the Court, within the scope of its powers, and the identification of the constitutional meaning of the provisions of laws and other normative acts; moreover, these are legal conclusions which eliminate constitutional-legal uncertainty and serve as a legal ground for the final decisions of the Constitutional Court.⁴⁰¹

The content of the term “legal positions” is also not clarified by the Constitution of the Republic of Armenia. However, a legal analysis of the specifics of the legal concept under consideration has been carried out within the scope of the practice of constitutional justice, which is worth mentioning in the given context. The Constitutional Court of the Republic of Armenia, in its Decision DCC-652 of October 18, 2006 states that “the Constitutional Court is vested, under the Constitution and the Law of the Republic of Armenia “On the Constitutional Court,” with the power to render a final legal position regarding the provisions of the Constitution when assessing the constitutionality of normative acts. **The content of those legal positions constitutes the official interpretation of the constitutional norm**⁴⁰²” (emphasis added). It is obvious that, with said decision, the body carrying out constitutional justice has limited the content of legal positions to the official interpretation of the constitutional norm: a conclusion that has been included also in the Annual Reports of the Constitutional Court concerning the execution of its decisions. However, it has also been stated there that the Constitutional Court — **through identifying in its Decision the legal content of the norm of the Constitution, or the constitutional content of the norm of the law — expresses its legal position**, which is binding both for judicial and law-making bodies.⁴⁰³ Thus,

⁴⁰¹ See Вятрук Н., the mentioned work, С. 111.

⁴⁰² See at <http://concourt.am/armenian/decisions/common/2006/sdv-652.htm>.

⁴⁰³ The abovementioned fact was stated in all Annual Reports of the Constitutional Court of the Republic of Armenia concerning the execution of the decisions adopted in 2006-2010 (see at <http://concourt.am/armenian/report/index.htm>).

emphasizing that the legal positions, by their nature, are regarded as **official interpretations of constitutional provisions**, the Constitutional Court has, at the same time, stipulated that these are expressed not only by way of identifying the legal content of the norm of the Constitution, but also by way of **identifying the constitutional content of the norm of the law**.

Unarguably, the activities of the Constitutional Court of the Republic of Armenia are anchored on the official interpretation of the Constitution. However, it is also obvious that constitutional justice implies an assessment of the constitutionality of the challenged legal act, which requires juxtaposition of the content of the constitutional provisions and that of the provisions of the challenged legal acts. And this, in turn, provides a basis to conclude that the content of the legal positions of the Constitutional Court may not be limited only to the scope of the official interpretation of constitutional provisions.

In terms of the analysis of the main issue under consideration, it is worth mentioning Decision of the Constitutional Court of the Republic of Armenia DCC-943 of February 25, 2011, which was of crucial importance from the perspective of the legal analysis of the content, nature, and specifics of the term “legal positions,” as well as in terms of their legal force and their role in the legal system, and in terms of identifying solutions for the complete regulation of newly emerged issues. As one of the specifics of the concept under consideration, the said decision regarded the fact that these are the official interpretations of the norms of the Constitution of the Republic of Armenia, but in the meantime, with regard to the content of the legal positions, it was stated that “the legal positions expressed in the Court’s decisions include, as a rule, the legal criteria that underlie the adjudication of the given case, which refer to:

- the identification of the constitutional-legal content of the norms of the Constitution of the Republic of Armenia, the obligations stipulated in international treaties, laws, as well as other acts of

legislation (Article 100(1) and (2) of the Constitution of the Republic of Armenia), the perception and application deriving from their constitutional axiology, the guaranteeing of the direct effect of the constitutional rights of the human being, and, as a result, the assessment of the constitutionality of the challenged norm (legal act);

- the evaluation of judicial (including judiciary) practice and the need to apply in that practice the norms of the Constitution of the Republic of Armenia, laws and other legal acts in accordance with their constitutional-legal content;
- the resolution of issues having constitutional-legal significance, and the assessment of facts.”

It is obvious that, in contrast to the acts that we mentioned and that were adopted before, in the mentioned decision the Constitutional Court of the Republic of Armenia presented in full the substance of the term “legal position,” including therein, apart from the official interpretation of constitutional provisions, the mentioned legal criteria as well.

Summing up the abovementioned, it should be noted that it is impossible, in our opinion, to exhaustively enumerate all the legal criteria that are being included in the legal positions of the Constitutional Court. In the meantime, it is obvious that these are not limited to the official interpretation of the provisions of the Constitution. Thus, while defining the concept of “legal positions” of the Constitutional Court, one should avoid giving an exhaustive list of the elements of its substance, and instead provide, in the given context, the general definition of the concept under consideration.

Taking into account the provided analysis and the fact that in the mind “position” constitutes a system of propositions with regard to the attitude towards anything or anyone⁴⁰⁴, we believe that the concept of

⁴⁰⁴ See Гринева А. Понятие и виды судебных правовых позиций: Вопросы теории (Автореферат диссертации на соискание ученой степени кандидата юридических наук). М., 2008, <http://law.edu.ru/book/book.asp?bookID=1294170>.

“legal positions” of the Constitutional Court characterizes the latter’s attitude towards concrete constitutional-legal issues, which finds its expression in the acts of the given body.

The next main issue that we consider necessary to address in this context is in what part of the decision of the Constitutional Court are the legal positions of the latter included: there is no absolute and commonly accepted perspective both in theory and in practice with respect to this issue. Some authors find that the legal positions are expressed both in the reasoning and operative parts of the decision.⁴⁰⁵ The others find that the legal position is not a conclusion on the non-compliance of the law with the Constitution, stipulated in the operative part, but it is an interpretation of the constitutional norm provided in the reasoning part, that is a logical action preceding this conclusion⁴⁰⁶. We believe that our definition of the term “legal positions” provides a basis to conclude that they may be included both in the reasoning and operative parts of the Constitutional Court decision. This fact is in line with the contemporary trends of the development of constitutional science, against the backdrop of which the decisions of the Constitutional Court are no longer perceived as documents merely determining the constitutionality or unconstitutionality of legal acts, but an even greater emphasis is placed on them being the most important source for the formation of a uniform constitutional doctrine and the development of the Constitution. In this respect, it is necessary to note that the mis-

⁴⁰⁵ See, for instance, Хабриева Т. Я., Волкова Н. С. Особенности казуального толкования Конституции Российской Федерации // Теоретические проблемы Российского конституционализма. М., 2000, № 42-43, Кампо В. Правовые позиции Конституционного суда Украины как необходимый элемент обеспечения судебно-правовой реформы // Конституционное правосудие: Вестник Конференции органов конституционного контроля стран молодой демократии, 1(47)2010, С. 27.

⁴⁰⁶ See about this Лазарев Л. В. Правовые позиции Конституционного суда России. М. 2003, page 72, Чернышев И. Правовые позиции Конституционного Суда России и Европейского суда по правам человека: генезис и взаимовлияние (Автореферат диссертации на соискание ученой степени кандидата юридических наук). СПб., 2010, http://elibrary.finec.ru/materials_files/349371422.pdf.

sion of the Constitutional Court to interpret the constitutional norm and identify the constitutional-legal substance of the provisions of the legal acts is not simply providing a conclusion on the constitutionality or unconstitutionality of the act. They are *per se* the most important instrument for ensuring the stability and development of the Constitution, and in this respect they are no less important than the abovementioned conclusions, while from the perspective of legal consequences they are equivalent to them. Moreover, the contemporary practice of constitutional justice indicates that often the operative parts of the Constitutional Court decisions not only stipulate whether the legal act is in compliance or non-compliance with the Constitution, but also other conclusions of the court are stipulated therein. It is obvious that they reflect *per se* the attitude of the given body towards the concrete constitutional-legal issues, thus acting as legal positions.⁴⁰⁷ The issue under consideration is even more emphasized against the backdrop of the decisions of the Constitutional Court of the Republic of Armenia, within the scope of which the body administering constitutional justice, declaring the challenged act as contradicting the Constitution, delays the repeal of

⁴⁰⁷ In this respect, it is worth mentioning, for instance, Decision of the Constitutional Court of the Republic of Armenia No DCC-984 of July 15, 2011, in the operative part of which not only the conclusion on the constitutionality of the relevant provisions was included, but also the constitutional-legal content was stipulated, within the framework of which Article 426.9(1) of the Criminal Procedure Code of the Republic of Armenia and Article 204.38 of the Civil Procedure Code of the Republic of Armenia comply with the Constitution of the Republic of Armenia, the content attributed to Article 244.33(1) of the Civil Procedure Code of the Republic of Armenia in judicial practice was mentioned, with regard to which that provision is declared as contradicting the requirements of Articles 3, 6, 13, 18, 19, and 93 of the Constitution of the Republic of Armenia and invalid; in addition, it was noted that in judicial practice, Article 426.9(1) of the Criminal Procedure Code of the Republic of Armenia and Article 204.38 of the Civil Procedure Code of the Republic of Armenia cannot be interpreted and applied otherwise which will contradict their constitutional-legal substance contained in the mentioned decision (see at <http://concourt.am/armenian/decisions/common/2011/pdf/sdv-984.pdf>).

such act⁴⁰⁸. In this case, the court expresses its attitude towards the specific constitutional-legal issue; moreover, it finds its expression in the operative part of the decision only. From the perspective of the main issue under consideration, it is noteworthy that Article 64(1) of the Law of the Republic of Armenia "On the Constitutional Court" of October 26, 2011 was supplemented with Point 9.2, according to which, in case of adopting a decision prescribed by Article 68(8)(1.1) of this Law, in the operative part of the decision a summary of the **constitutional legal substance** of the challenged act or its challenged provision should be provided.

In this context, it is worth to mention also that although the formulations of the decisions and the Annual Reports of the Constitutional Court of the Republic of Armenia⁴⁰⁹ may create an impression that the body administering constitutional justice considers as legal positions solely the conclusions set out in the reasoning part of the decision, however, in fact, the purpose of these formulations is not to stress the fact that the legal positions are included in the reasoning part of the decision

⁴⁰⁸ In this respect, it is worth mentioning, for instance, Decision of the Constitutional Court of the Republic of Armenia No DCC-984 of July 15, 2011, in the operative part of which it was stated: "Having regard to the fact that declaring the norm — declared as contradicting the Constitution of the Republic of Armenia and invalid under point 4 of the operative part of this decision — as contradicting the Constitution of the Republic of Armenia and invalid upon promulgating this decision, will inevitably entail unfavourable consequences in terms of resolving the issue of human rights protection and guaranteeing the necessary legal security, to set November 1, 2011 as the term for repealing part 1 of Article 204.33 of the Civil Procedure Code of the Republic of Armenia on the grounds of part 3 of Article 102 of the Constitution of the Republic of Armenia and part 15 of Article 68 of the Law of the Republic of Armenia 'On the Constitutional Court'" (see at <http://concourt.am/armenian/decisions/common/2011/pdf/sdv-984.pdf>).

⁴⁰⁹ For instance, in the Report concerning the execution of the decisions adopted in 2006, the Constitutional Court of the Republic of Armenia stated that "... state bodies and officials guarantee the execution of the decisions of the Constitutional Court in their entirety, having regard not only the operative part of the Decision, but also the legal positions set out in the reasoning part," whereas in the Report concerning the execution of the decisions adopted in 2008, it was noted that "State bodies and officials do not yet take due account of the legal positions expressed in the reasoning part of the decisions of the Constitutional Court...". (see at <http://concourt.am/armenian/report/index.htm>).

only, but to abolish the vicious practice when only the conclusions stipulated in the operative part of the decisions of the Constitutional Court are implemented, failing thus to pay due attention to the legal positions expressed in the reasoning part. The given perspective is also substantiated by the fact that the Constitutional Court of the Republic of Armenia, reflecting on the main issue under consideration, stated in its Report concerning the execution of the decisions adopted in 2011 state bodies and officials have to guarantee the execution of the decisions of the Constitutional Court, especially taking into account **the legal positions of the Court, which are expressed not only in the operative, but also in the reasoning parts of the decisions of the Constitutional Court.**⁴¹⁰

In this context, it becomes necessary to analyze another important point, namely the main issues concerning the binding force of the legal positions of the Constitutional Court. According to Article 6(5) of the Law of the Republic of Armenia “On the Constitutional Court,” the decisions of the Constitutional Court on the substance of the case are mandatory for all the state and local self-government bodies, their officials, as well as for natural and legal persons in the whole territory of the Republic of Armenia. Despite the fact that the mentioned legislative provision *per se* implies that it refers to the whole decision of the Constitutional Court and, consequently, to the legal positions expressed both in the reasoning and operative parts, the main problem in the field under consideration is, however, overcoming in theory and in practice the mindset and the vicious practice when solely the operative part of the Decision of the Constitutional Court is viewed as binding, and the implementation of the decisions is not guaranteed in their entirety, taking also into account the legal positions set out in the reasoning part. This is the reason that the Constitutional Court of the Republic of Armenia, in all its Annual Reports concerning the execution of the decisions, has addressed the given problem, stating that in order to guarantee the

⁴¹⁰ See the Report of the Constitutional Court of the Republic of Armenia concerning the execution of the decisions adopted in 2011, Yerevan, 2012, page 46.

proper execution of the decisions of the Constitutional Court it is necessary **to legislatively ensure that the state bodies and officials guarantee the execution of the decisions of the Constitutional Court in their entirety, taking into consideration not only the operative part of the decision, but also the legal positions set out in the reasoning part, which constitute the source of constitutional law and are considered, by their nature, as official interpretation of constitutional provisions.**⁴¹¹

We have already mentioned that at the contemporary phase of the development of constitutional science, decisions of the Constitutional Court are no longer perceived as documents merely determining the constitutionality or unconstitutionality of legal acts, but an even greater emphasis is placed on them being the most important source for the formation of a uniform constitutional doctrine and the development of the Constitution and the legislation. Therefore, the implementation of the mentioned mission requires due consideration of not only the conclusion on the issue of the constitutionality of the legal act, but also to the other legal positions of the Constitutional Court. These are the most important instruments for ensuring the stability and development of the Constitution, and in this respect they are no less important than the above-mentioned conclusions, whereas from the perspective of legal consequences they are equivalent to them.

In the context under consideration, it is also worth mentioning Decision of the Constitutional Court of the Republic of Armenia DCC-943 of February 25, 2011, which states that the legal positions expressed in the Court’s decisions are called upon to ensure a more complete and uniform understanding of the Constitution of the Republic of Armenia and constitutional legality in judicial practice, and purposefully direct judicial practice to understanding and applying normative acts in accordance with their constitutional-legal content. At the same time, it is highlighted that by declaring the challenged act as in conformity with the Constitu-

⁴¹¹ See the Reports of the Constitutional Court of the Republic of Armenia concerning the execution of the decisions adopted in 2006-2014 (see at <http://concourt.am/armenian/report/index.htm>).

tion, the Constitutional Court often reveals the constitutional-legal substance of the challenged legal norms through their interpretation and in the operative part of the Decision, declares these norms as in conformity with the Constitution or as in conformity with the Constitution within the framework of certain legal positions or partially within the framework of certain legal regulation, thus indicating:

- the legal limits of understanding and applying the given norm;
- the legal limits beyond which the application or interpretation of the given norm will lead to unconstitutional consequences;
- the constitutional-legal criteria, based on which the competent state authority is obliged to provide additional legal regulations for the complete application of the norm in question.

Therefore, it is not possible to fully execute the decision of the Constitutional Court without taking the abovementioned legal positions into consideration, which, in turn, implies that not only the legal positions expressed in the operative part are subject to mandatory execution, but also those expressed in the reasoning part.⁴¹²

In execution of Decision of the Constitutional Court of the Republic of Armenia DCC-943, a supplement was made to part 8 of Article 68 of the Law of the Republic of Armenia “On the Constitutional Court,” according to which the Constitutional Court can render decisions not only on finding the challenged act or its challenged provision in compliance with the Constitution or finding the challenged act fully or partially invalid and non-compliant with the Constitution, but also on **finding the challenged act or its challenged provision in compliance with the Constitution by virtue of the constitutional legal substance revealed by the decision of the Constitutional Court**. Moreover, part

⁴¹² In the context of the provided analysis, the regulation stipulated in part 2.1 of Article 61 of the Law of the Republic of Armenia “On the Constitutional Court” becomes highly important, according to which the decisions and resolutions of the Constitutional Court shall be in conformity with the requirements of the principle of legal certainty. We believe that for the purpose of establishing a proper system for the implementation of the legal positions of the Constitutional Court, due regard should be paid to the mentioned provision.

12 of Article 69 of the Law of the Republic of Armenia “On the Constitutional Court” prescribes that in the cases, defined by the Article, on recognizing the provisions of the Law applied against the Applicant as null and contradicting the Constitution, or when The Constitutional Court, in the operative part of the decision, by revealing the constitutional legal contents of the provision of the law, recognizes it in compliance with the Constitution and finds, at the same time, that the provision has been applied to him in a different interpretation, the final judicial act made against the applicant on the grounds of new circumstances is subject to review in accordance with the procedure prescribed by law.

The systemic analysis of the legal regulations regarding the issue under consideration provides a basis to conclude that they are aimed at the formation of a full-fledged system for the application of the legal positions expressed in the reasoning part of the decisions of the Constitutional Court and serve as an evidence of their binding force.⁴¹³

It should be mentioned that the practice of declaring the challenged norm in compliance with the Constitution within the framework of the legal positions expressed in the decision of the Constitutional Court is widespread within the scope of activities of constitutional courts of a number of other countries, including, for instance, Germany, Lithuania, Russian Federation, Slovenia, Spain, Hungary, Bosnia and Herzegovina. Although each of them has its peculiarities, the fact that the interpretation presented in the decision becomes binding for all other state bodies is common for all the mentioned courts. In this sense, the position of the European Commission for Democracy through Law (Venice Commission) regarding this key issue is noteworthy, according to which, “[a]n explicit

⁴¹³ As the examples of this work show, in most countries the legal positions of the Constitutional Court have binding force. Moreover, the practice, when this circumstance gains legislative regulation, is becoming widespread (see, for instance, Article 79 of the Federal Constitutional Law on the Constitutional Court of the Russian Federation, Article 32 of the Law of the Republic of Latvia “On the Constitutional Court”, Article 41a of the Act of the Slovak Republic on the Organisation of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the status of its Judges, Article 182² of the Statute of the Seimas of the Republic of Lithuania).

legislative – or even better constitutional – provision obliging all other state organs, including the courts, to follow the constitutional interpretation provided by the constitutional court provides an important element of clarity in the relations between the constitutional court and ordinary courts and can serve as a basis for individuals to claim their rights before the courts.”⁴¹⁴

The Report on the Rule of Law Checklist adopted on February 12, 2016 by the Venice Commission at its 106th plenary session opens up new perspectives for clearly evaluating the state of the rule of law, which creates, in this matter, important prerequisites for the clarification of pan-European criteria. As mentioned, it will have also particular importance for carrying out constitutional monitoring in practice.

5.6 THE NEW PHASE OF INTERNATIONAL COOPERATION IN THE FIELD OF CONSTITUTIONAL JUSTICE

International cooperation in the field of constitutional justice has exclusively important significance for a number of reasons:

1. these systems, as a new phenomenon, are in the phase of active development and have numerous theoretical and practical issues which should be addressed through joint efforts and comparative analysis of the experience of different countries;
2. the current legal globalization trends raise the issue of finding such solutions for the problem of guaranteeing the supremacy of the Constitution, which will also be in line with the norms and principles of international law;

⁴¹⁴ See CDL-AD(2010)039rev, Study on Individual Access to Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), ' 165, <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29039rev-e.pdf>.

3. the current course of constitutionalization of social systems and the processes of systemic transformations bring to the forefront the need to guarantee public security and jointly resolve the problems of conveying sustainable dynamism to the process of development.

The first independent institution for active cooperation among bodies of constitutional justice was the international organization “Conference of European Constitutional Courts,” which was established in 1972 in Dubrovnik, former Yugoslavia. The Constitutional Court of the Republic of Armenia became an associate member of this Organization in 1997, and a full member in May 2000. Currently, this Organization has more than 40 full members. The main sessions of the Conference are convened once every two years, in the country presiding over the given period.

The European Commission for Democracy through Law — better known as the Venice Commission of the Council of Europe — plays a particularly important role in the international cooperation of constitutional courts. The Venice Commission was established in 1990 to help the Eastern European and former Soviet Union countries in their democratic transformation efforts. The Commission is composed of independent experts and provides legal opinions on constitutions, draft constitutions, constitutional amendments, on the formation of democratic institutions, and numerous other issues. International seminars and joint discussions on various key issues are organized also for the participating constitutional courts. Since 1996, upon the initiative of the Venice Commission and the Constitutional Court of the Republic of Armenia, annual international conferences on the most urgent topics of constitutional justice have been jointly held in Yerevan. Three times a year, the Venice Commission publishes the Bulletin on Constitutional Case-Law, which contains summaries of the decisions taken by the constitutional courts; it also has an electronic counterpart, the CODICES database. The President of the Constitutional Court of the Republic of Armenia has been a

member of the Venice Commission since 1999, and a member of the Bureau since 2014.

Upon the initiative of the Constitutional Courts of Armenia and the Russian Federation, the international organization “Conference of Constitutional Control Organs of Countries of Young Democracy” was established in October 1997 in Yerevan, which played a major role for the newly-independent countries. Currently, the specialized bodies of constitutional review of all CIS countries are members of this organization. The Bulletin of the Conference — the International Journal “Konstitutionnoe Pravosudie” [*Constitutional Justice*] — is published in Yerevan, and it is sent to 38 countries and 8 international organizations of the world. Since establishment, the coordination of the activities of the Conference is entrusted to the Constitutional Court of the Republic of Armenia.

Another institution engaged in active international cooperation in this field is the international organization “Association of Constitutional Courts using the French Language,” which was founded in 1997. Newly-established constitutional courts of many African countries are also members of this organization.

Furthermore, the organization “South American Group of Constitutional Courts” was founded in 1992 and has 10 members. Since 2004, it has been renamed to the international organization “Ibero-American Conference of Constitutional Justice,” and more than twenty countries are members of this organization. On April 15-17, 2009, the VII conference of the organization dedicated to the main issues of the interpretation of constitutional norms took place in Merida, Mexico.

Currently, unions of the Constitutional Courts of Arabic, Asian, and Portuguese-speaking countries have also been established.

The International Association of Constitutional Law also plays a particularly important role in this field, and the Center of Constitution Law of the Republic of Armenia is an institutional member of this Association.

The 2009 was a landmark year. In January, the 1st Congress of the World Conference on Constitutional Justice was held in Cape Town, South African Republic. The participation of the constitutional justice bodies from 93 countries in this Congress proved the formation of a qualitatively new phase of international cooperation in this field. Currently, Constitutional Courts and equivalent bodies from 95 countries of the world hold membership to this Organization. In 2011 and 2014, the 2nd and the 3rd Congresses were held in Brazil and South Korea, respectively. In between the Congresses, the activities of the organization are managed by the Bureau, and in 2014-2015 the President of the Constitutional Court of the Republic of Armenia presided the Bureau.

This international institution — established upon the active initiative and cooperation of the Venice Commission of the Council of Europe as well as the Constitutional Court of the Republic of Armenia — has assumed an exclusively important role in discussing the most urgent issues of constitutional justice and putting forward adequate solutions.

CHAPTER 6. CONSTITUTIONAL MONITORING AS A NEW QUALITY OF THE EXPRESSION OF CONSTITUTIONAL CULTURE

6.1. ORGANIC LINK BETWEEN THE DEFINITIONS “CONSTITUTION”, “CONSTITUTIONAL CULTURE”, “CONSTITUTIONALISM”, “CONSTITUTIONAL MONITORING” IN THE CONTEXT OF SUSTAINABLE DEVELOPMENT

An opinion prevails in legal literature that the initial meaning of the verb *to constitute* (initiate, found) implies neither limiting political power for the sake of individual liberties, nor inducing the government to abide by common ethical norms⁴¹⁵. “To constitute” first and foremost means to

⁴¹⁵ See Стивен Холмс, Конституции и конституционализм //Сравнительное конституционное обозрение, 2012, N3(88), - P. 61

(Many valuable works on problems of contemporary constitutionalism have been published in the USA, where the problems of constitutionalism are mainly considered in the context of factual constitutional restriction of power. See Holmes S. *Constitutions and Constitutionalism* // The Oxford Handbook of Comparative Constitutional Law /Ed. by M. Rosenfeld, A. Sajo/. Oxford University Press, 2012; Michel Rosenfeld, *Comparative Constitutionalism: Cases and Materials*, (2d. Ed., West 2010) (with Baer, Dorsen, and Sajo); *American Constitutionalism: From Theory to Politics*. Book by Stephen M. Griffin. Princeton University Press, 1996; *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism*. Book by Robert Justin Lipkin. Duke University Press, 2000; *The Supreme Court and American Constitutionalism*. Edited by Bradford P. Wilson and Ken Masugi. The Ashbrook Series on Constitutional Politics Rowman & Littlefield. 1997 Softcover; *Progressive Constitutionalism*. Book by Robin West. Duke University Press, 1994; *Constitutionalism: The Philosophical Dimension*. Book by Alan S. Rosenbaum. Greenwood Press, 1988; *Liberalism, Constitutionalism and Democracy*. Book by Russell Hardin. Oxford University Press, 1999; *American Constitutionalism Abroad: Selected Essays in*

establish, set up. McIlwain claims that Cicero’s phrase “*Haeconstitutio*” was the first reference to the notion of “constitution” as applied to a form of governance⁴¹⁶. McIlwain claims that Cicero’s phrase “*Haeconstitutio*” was the first reference to the notion of “constitution” as applied to a form of governance⁴¹⁷. Citing historical background, S. Holmes concludes: “the primary function of ancient constitutions was not to limit existing power, but create power out of the lack thereof”⁴¹⁸.

Under this epistemological chain of thought the notion of constitution (*constitutio* – establish, set up, organize) is traditionally characterized as the Supreme Law of a **state**, endowed with ultimate legal power, the main features of which are determined by the fact that it establishes:

- the bases of state order;
- safeguards to protect the rights and fundamental freedoms of man and citizen;
- a system of state power, the functions, principles and organization thereof;
- a legal framework for the exercise of political power, as well as individual political, economic, social rights and freedoms.

Topical discussions in international forums and legal literature evolve around such subjects as “Axiological aspects of constitutional developments,” “Development trends of liberal constitutionalism,” “Constitution in the context of expressions of constitutional culture,” “Character-

Comparative Constitutional History. Book by George Athan Billias. Greenwood Press, 1990; *Progressive and Conservative Constitutionalism*. Journal article by Robin West, M. Tushnet, R. Epstein, Raoul Berger, Robert Bork. Michigan Law Review, Vol. 88, 1990; *American Constitutionalism: From Theory to Politics*. Stephen M. Griffin. One of Choice’s Outstanding Academic Books of 1997; *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*. Edited by Martin Laughlin and Neil Walker. Oxford University Press, 2008 and others).

⁴¹⁶ McIlwain Ch.H. *Constitutionalism Ancient and Modern*. Ithaca, NY: Cornell University Press, 1947, P. 25.

⁴¹⁷ McIlwain Ch.H. *Constitutionalism Ancient and Modern*. Ithaca, NY: Cornell University Press, 1947, P. 25.

⁴¹⁸ *Ibidem*, p. 62.

ristic features of European constitutionalism and constitutional culture,” “Patterns of expression of supranational constitutionalism,” etc⁴¹⁹. We intend to approach these problems exactly from the viewpoint of revealing the axiological essence and interdependence of fundamental notions of constitution, constitutional culture and constitutionalism, placing our understanding of these notions in the context of the Armenian historical reality⁴²⁰.

A study of Armenia’s legal thought, especially in the wake of the adoption of Christianity as a state religion in 301 A.D., opens up unique opportunities for revealing epistemological, axiological, spiritual and ethical essence of these notions.

From the point of view of legal axiology the emergence of constitutional culture is determined by the extent to which **“constituting relations” are evaluated in the legal sense, become commonly accepted rules of behavior**, irrespective of the fact that they may or may not be customary or universally binding behavioral rules⁴²¹. In literature,

419 See Стивен Холмс, Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88), - pp. 56-84; Кутафин О.Е. Российский конституционализм. - М., 2008; Танчев Е. Возникающий наднациональный конституционализм и современные системы конституционного контроля // Сравнительное Конституционное Обозрение, 2007, N4, p. 78-94; Розенфельд М., Шайо А. Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях // Сравнительное Конституционное Обозрение, 2007, N1. - pp. 102-120; Современный конституционализм и государство Израиль // Современный конституционализм, 2006, N2.- pp. 50-54; Теория конституционализма и философия государства в ФРГ // Закон и право, 2001, N5. - pp. 39-47; The Twilight of Constitutionalism?. Series Editors: Martin Loughlin, John P. McCormick, and Neil Walker. Oxford University Press, 2010; The Constitution in 2020. Edited by Jack M. Balkin, Reva B. Siegel. Oxford University Press, 2009; Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000; Constitutional Cultures: The Mentality and Consequences of Judicial Review. Robert F. Nagel. University of California Press, 1993; Collection Science and technique of democracy, N 37; European and US constitutionalism. G. Nolte (Editor). European Commission for Democracy through Law. Concil of Europe Publishing, 2005.

420 See Gagik Harutyunyan, Epistemological nature of constitutionalism in the context of historical evolution of constitutional culture. // The legal philosophy of the Pentateuch, edited by A. A. Husseinov and E. B. Rashkovskiy, Moscow, 2012, pp. 70-82.

421 See Политико-правовые ценности: история и современность / Edited by B. C. Нерсесянц. - М., 2000. - p. 5-30.

the Constitution itself is often deemed a cultural phenomenon only in the event when it is realized, becomes a living reality that is perceived and recognized, rather than remaining a compilation of pleasing language and smart ideas⁴²².

In the Armenian language, the notion Constitution first and foremost implies an act of not just merely constituting, but of **setting borders**. It is not incidental that in 1773 Hakob and Shahmir Shahamirians entitled their Constitution for the yet-to-be independent Armenia “The Entrapment of Vanity”. This implied outlining the “ultimate limits” not only of freedom, but also vanity. The authors of this unique historical document emphasized: “...We need a great measure of kindness to restrain our lives with the law and freedom, to become worthy of Lord’s esteem⁴²³.” These laws, in turn, had to be prescribed “in harmony with human nature, per the desire of our rational soul⁴²⁴”.

At the same time, **in the origins of Armenian constitutionalism, the notion of constitution possessed, above all, an axiological-systemic denomination**⁴²⁵.

The authors of *the New Dictionary of the Armenian Language*, published in Venice in 1837, provided a brilliant insight into the axiological nuances of constitution. They precede the relevant entry with multilingual equivalents, such as *determinatio, constitutio, statutum, dispositio*. Then follow with an exceptionally remarkable phrase: **“Regulatory determination of borders and Divine Providence”**⁴²⁶. It is evident that we deal here not only with a supreme “determination” of constituting nature and, hence, with legal regulation of such a scale, but that **it is based upon divine perception, a system of values granted from above, ultimate Providence**.

422 See Book Review - Höberle and the World of the Constitutional State, <http://www.germanlawjournal.com/print.php?id=227>.

423 The Entrapment of Vanities, Yerevan, 2002, p. 38 (in the Armenian language)

424 Ibidem, p. 71.

425 See G. Harutyunyan - CONSTITUTIONAL CULTURE: THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME. Yerevan, 2009;

426 See Նոր Բառագիրք Հայկազյան Լեզվի, Երևան 1981, p. 688.

It is obvious that the dictionary in question covers a broad scope for the notion of constitution, departing from several important components:

- it is a decision, order, statute;
- it possesses determining significance, precluding “decisions” that evade or are over and above it;
- the phrase “Divine Providence,” while augmenting the determining and ultimate nature of the “decision,” adds a particular emphasis to the existence of its underlying perpetual values that are granted from above. The semantic scope of this language originates in spiritual, ethical, philosophical, cognitive and Weltanschauung roots of the Armenian legal mind.

The elements of constitutionalism have come about during a lengthy historical period, in the Armenian reality they were expressed with a persistence, especially, as it was already noted, **following the adoption of Christianity as a state religion, in conditions of the need for establishing coordinated, uniform rules for secular and ecclesiastical lives.** Mesrop Mashtots (362-440), Yeznik Koghbatsi (circa 380-450), Yeghishe (410-475), Movses Khorenatsi (circa 410-495) and many other outstanding medieval Armenian thinkers have reflected on issues of law, right, justice, inevitability of punishment, recovery commensurate with the guilt, interdependence of the concepts of “reason” and “law,” and the role of all of the above in human life, governing a state and ensuring the stability of the society. By separating divine justice from human, they underscored that the law of kings was to punish the criminals, while the Almighty punished both the criminals and the people. It punished the criminals as the Lawmaker, and it punished the people as the Seer. One of the characteristic features of this period is that **great significance was ascribed to the role of the law and justice in affirming public solidarity, assuring the sustainable development of the state**⁴²⁷.

⁴²⁷ Միրումյան Կ., Հայ քաղաքական մտքի պատմությունից, Երևան, 2002, p. 108.

Movses Kaghankatvatsi recounts: “During the years of the Aghvan King Vachagan there were many conflicts between lay people and the bishops, priests and archbishops, the nobles and the commons. The king desired to convene a populous assembly in Aghven, which took place on the thirteenth day of the month of March⁴²⁸”. The outcome of that assembly was the adoption of a **Canonical Constitution**. Historiography dates this constitution, which contained 21 articles, to the year of 488 A.D.⁴²⁹.

In this respect, we would like to isolate the following considerations:

1. A situation had matured in the Armenian milieu by the middle of the 5th century, when attempts were made to address emerging conflicts between various strata of the society not through the dictate of force (including royal decrees or the use of the ‘stick’), but through legal means, by enacting constitutional laws. This first and foremost attests to the superior intellectual capacity and legal awareness of the author of this initiative, as well as to the fact that his properties were perceived by the society in an environment that was mature for this.
2. The adoption of a constitution by a constitutional convention, an amazingly progressive occurrence for the time, comes to prove that the **regulation of social relations was based on spiritual principles, ethical values and social accord.**
3. No other modifier than the constitutional is used to characterize the canons, affording them a special status, recognizing the supremacy of norms established through national consensus over any other norm or canon.

Evidently only that society is progressive and stable, which is based on ethical values and spiritual roots of legal perception. After the adoption of Christianity as a state religion, when the rules of eccle-

⁴²⁸ Мовсес Каланкатвадци. История Агвена. - Ереван, 1969. - p. 65.

⁴²⁹ Ռ. Հ. Ավագյան. Հայ իրավական մտքի գանձարան, հ. 1, Երևան, 2001, pp. 132-137.

siastical and secular lives were jointly set based on common Christian Weltanschauung, one of the most characteristic and noteworthy circumstances was that **the factor of social accord had become the foundation for legal regulation.** The relations within the society were regulated by an agreement forged at an assembly, rather than imposed through force by a sole dictator. For example, Movses Khorenatsi, referring to the Ashtishat Council of 365 A.D., states that in the third year of the reign of King Arshak, Nerses the Great, son of the supreme Patriarch Atanagines, ‘summoned a Council of bishops in concert with the laity, by canonical constitution he established mercy, extirpating the root of inhumanity⁴³⁰’. The Council prohibited wedlock between close relatives, it condemned treachery, intrigues, greed, gluttony, usurpation, homosexuality, gossip, fervent alcoholism, lying, prostitution, and murder. It also bound the nakharars (princes) to treat their workers with mercy, and the servants to obey their masters. It was decided to build hospitals for the feeble, orphanages and asylums for orphans and widows, hotels for aliens and guests, and levies and taxes were imposed to support all these.

In the first half of the 5th century the **Council of Shahapivan** was convened, where, per historical chronicles: “there came 40 bishops and many priests, deacons, ardent ministers and the entire clergy of the holy church, all princes, provincial governors, supreme justices, treasurers, generals, intendants, village chiefs, noblemen from various regions”⁴³¹. The senior Nakharars of the Armenian land, who were zealous defenders of laws and sanctities, said this: “Restore the law and order established by Saints Grigor, Nerses, Sahak and Mashtots, and establish by your own will other goodly things, and we shall willingly and lovingly accept. Since the church’s law and order has dwindled, and people have reverted to unlawfulness. You shall define laws pleasing for God and useful in calling the church to life, and we shall adhere to them and keep them strong”⁴³².

430 Мовсес Хоренаци. История Армении. – Ер., 1997. – р. 224-225.

431 Авакян Р.О. Памятники армянского права. – Ер., 2000. – р. 42-43.

432 Ibidem, р. 43.

The Council of Shahapivan enacted 20 canons, pertaining to such important, fundamental for their time, issues of Armenia’s internal life, as regulation of matrimonial relations, the operation of the clergy and control over it, struggle against sectarianism, etc.

In order not to “justify heresy with ignorance,” the Armenian medieval history provides other testimonies with an emphasis on adherence to spiritual-legal rules that are the result of public accord. The most salient among these is **the “Armenian Book of Canons” by Catholicos Hovhannes Odznetsi (Hohvan Imastaser Odznetsi), which was endorsed at the Third Council of Dvin in 719 A.D.** Odznetsi was among the first in the world after Byzantine Emperor Justinian the Great (482-565) and the first in Armenia to systematize the Armenian *Corpus Juris Canonici*, a compilation of laws which was promulgated by the head of hierocracy, the Catholicos, and contained the canons adopted and ratified by the Armenian ecclesiastical councils⁴³³.

One of the specific features of the *Armenian Book of Canons* is exactly in that it was a corpus of **canonic constitutions**, that had been adopted in the Armenian reality since 365 A.D. and, which is remarkable, they emphasized the divine nature of a reasonable being. A human being, with his spiritual origin, dignity and the social role, was observed as the ultimate value and the bearer of legal regulation. As emblematically noted by R. A. Papayan, “The framework of natural law had been established **before the creation of man**, since for not a single moment he should have existed in legal vacuum”⁴³⁴.

An unshakeable value for the Armenian reality was the understanding that “the loss of the soul when one deviates from the spotless and straight faith of the Father, the Son and the Holy Spirit, professed by the apostles, is more than the loss of the body”⁴³⁵. A thousand years ago Grigor Narekatsi in his *Book of Lamentations* brilliantly con-

433 See Армянская книга канонов. - Ереван, vol. I - 1964, vol. II - 1971.

434 Папаян Р.А. Христианские корни современного права. - М.: «НОРМА», 2002.- р. 210.

435 See Товма Арцруни и Ананун. История семьи Арцрунианц. - Ереван, 1999 - р. 123.

densed the spiritual perception of the Armenian identity, when referring to our various passions, he underlines that human sins, however many and diverse, are the misfortune, rather than the guilt, of an individual. Delivering “an ultimate prayer to God” through the lips of the Armenian people, Narekatsi begs Him to guide man towards the right path and a decent life. He deemed this possible in conditions of accord and justice in the society that abides by the laws and “is healthy in spirit,” where justice can not, however “waning, disappear altogether” or “the scale of the law to become too light, making heavier the scale of lawlessness”.

It was profoundly understood that a single good law or statute was not sufficient; it was necessary for the people to embrace the need of living by these laws, and for this attitude to be based on the confidence anchored to stable virtuous values prescribed by the reasonable essence of man. This is why Nerses Shnorhali (Nerses the Fourth Klayetsi) in the 12th century addressed his words not only to God, but also, through his “Encyclical” (1166), addressed his commandments to the ministry, the “princes of the world” and the people. This Encyclical was his first, an epitome of his prose writing, and it has exceptional significance in terms of studying legal and constitutional culture. This document is unique in its conceptual-programmatic scope, value system generalization, and harmony between norm-objectives, norm-principles and “behavioral” norms. Establishing canons and guidance addressed to all strata of the society, that were based on high spiritual and moral grounds, Shnorhali was certain that one might expect to succeed only through abiding by those requirements, overcoming the perils of “evil and polyarchy” and proceeding by the ‘sprouts of justice.’ He advised the lay people not to perform evil deeds, not to deprive, not to use wicked agents, not to judge unfairly, to protect the widows and the poor, not to cut the pay of the worker, to treat everyone with an even eye, not to abandon the spiritual for the sake of the bodily. “... Those who profess God only in words but not deeds, have stillborn faith”⁴³⁶.

⁴³⁶ Авакян Р.О. Памятники армянского права. – Ер., 2000. – р. 186.

One may, without exaggeration, acknowledge that the Encyclical contains numerous norms on human rights and the obligations of the authorities. In “To the Princes of the World” he advised: “not to treat your subjects unlawfully by levying heavy and cumbersome taxes, but judge everyone by law, commensurate to his capacity,” “do not deprive anybody and do not further divest the poor and the disenfranchised,” “do not appoint wicked and lawless administrators and governors over your domains,” “do not judge anyone lawlessly, but adjudicate rightly,” “do not ignore the rights of widows and the poor,” etc. Shnorhali’s approaches to judging only by the law, the retroactive effect of law, the degree of responsibility, proportionality of sentence and other fundamental legal issues are remarkable (“never rule prompted by anger or unfair law, or punish someone or sentence to death, since the New Law does not allow for this, whereas the Old Law, although it allowed to rule for punishment or death sentence, but not unduly, only in accordance with the gravity of the crime”). Moreover, **the substrate of all commandments is the human being, with the acknowledgment of the need to meaningfully organize his rational existence and spiritual pureness.**

It invariably follows from the testimony quoted here, that **the act of constituting social relations, the establishment through common consent of universally binding rules of behavior first and foremost emanate from the system of socio-cultural values of the society in question, the spiritual-moral origins of its behavior, and hence shape the appropriate level of constitutional culture.**

As mentioned in literature “...a value orientation is common to every constitution. Any constitution is trenched in basic provisions recognized by the authorities as values within the civilization in question, and it enshrines the former to this or that extent”⁴³⁷. **Regardless of the dimension of time, the culture of every na-**

⁴³⁷ See Конституция в XXI веке: сравнительно-правовое исследование: монография /Edited by В.Е. Чиркин/. – М.: Норма: ИНФРА-М, 2011. – р. 22.

tion boils down to its conscious existence, cognizant presence in time. It is this very cognizant presence, which, at a specific level of development, leads to the act of constituting the social behavior of man and the authorities. As stated by a corresponding member of the Russian Academy of Science Ye. A. Lukashova, "the socio-normative complex and the values generated by the social interaction of people are important components of culture⁴³⁸." It is with a notice to the value-systemic nature of constitutional legal regulation that professor Michele Rosenfeld and Andras Sajó underscored the topical nature of the problem of **the impact of transplanting liberal constitutional norms** on the propagation and strengthening of liberal constitutionalism⁴³⁹.

The constitutional culture is not an abstract notion; it is expressed in all spheres of social existence on the sound substrate of spiritual and material values and ideals that were developed, suffered through and honed through many centuries, irrespective of the existence of a written constitution or the will of the rulers⁴⁴⁰. That is the reason why a Constitution may not be commodity that yields itself to being exported or imported. And any transplanted element must be adequate to the host organism. On the other hand, as emphasized from a pragmatic point of view by Lech Garlicki, every national constitution proclaims a certain set of values that determine the significance of its provision. Since there exists no clear distinction between values, principles and norms, all constitutions contain several general notions, which may serve as a basis in the process of interpreting its provisions⁴⁴¹.

438 Лукашева Е.А. Человек, право, цивилизации: нормативно-ценностное измерение. - М.: Норма, 2011. - р. 12.

439 See Мишель Розенфельд, Андраш Шайо. Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях// Сравнительное Конституционное Обозрение. 2007. N1, - р. 102.

440 For more details see Gagik Harutyunyan - GONSTITUTIONAL CULTURE: THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME. Yerevan, 2009.

441 Лех Гарлицкий. "Конституционные ценности" и Страсбургский суд. A collection of communications "Конституционные ценности в теории и судебной практике". - М., 2009. - р. 221.

In the light of the current achievements of civilization the principal characteristic of constitutional culture is **that a country's Supreme Law must include the whole system of in-depth, enduring values of the society and guarantee their stable protection and reproduction.** These values, in turn, are formed during centuries, each generation re-thinks them and, through its own additions, securing the continuity of development. Success accompanies those countries and nations, wherein this chain remains unbroken or is not seriously disrupted. Therefore, **the notion of constitutional culture in a broader sense may be characterized as the entirety of the specific system of values, which underlies the convictions, awareness, legal perception, and legal consciousness of the social community, which were historically formed based on social accord, defining principal rules of behavior based on their spiritual and ethical intellectual absorption.**

The constitution itself must embody this system of values, become a product of cognizant presence of the society in question at the specific historical phase of its development, **become a result of social accord around fundamental values of social behavior of the state and the citizen.** This is the ideal one should pursue. But, as it is emphasized by Professor Stephen Holmes, 'so far no constitution has delivered on the promise of democratic constitutionalism or adjusted the interests of the rulers to those ruled over⁴⁴².' We shall return, in due course, to the reasons for this, at the same time it is necessary to mention that this conclusion spells the conceptual need for a method of approach to the constitution itself as the fundamental law of the **state** or as the **basic law of the society in question.**

In the contemporary world, the dialectic link between real social life and the constitution is expressed through the prism of relevant features of constitutionalism in the society in question. It seems obvious to us that the presence of a constitution does not determine the level and essence of constitutionalism in the society. One could not agree more with Peter Baren-

442 Стивен Холмс. Конституции и конституционализм //Сравнительное конституционное обозрение, 2012, N3(88). - р. 59.

boim over the following: "The causative relation and interdependence between implemented and bookish utopian ideas is one of the crucial issues in understanding utopianism as an important movement in the constitutional and socio-political discourse through the last three millennia"⁴⁴³.

The constitutionalism, however, does not boil down to utopian perception of ideas on the need for constitutional regulation of social relations. The constitutionalism is perceived as a systemic and intellectually absorbed existence of constitutional values in real social life, which is what the entire legal system is based upon.

The normative features of this principle assume the existence of necessary and sufficient guarantees for a cognizant exercise of rights and freedoms throughout the system of law and social relations. In a rule-of-law state any legal norm shall express itself as an element of constitutionally agreed system of legal and ethical behavior of man and state.

We also agree with the opinion of Professor N. S. Bondar: "...the value judgments on the constitution that prevail in the social conscience, the level of constitutional culture in the society and the state, the potency of ideas of constitutionalism are predominantly determined not by the fact *per se* of the existence or absence in a society of a legal constitution (basic law), neither, for that matter, by its "age": there exist far more important and profound, that is: socio-cultural origins of constitutionalism"⁴⁴⁴.

The **notion of constitutionalism** is currently associated with several legal phenomena, such as:

- the commonality of principles, rules of operation and structural mechanisms that are traditionally used with a purpose of limiting state power⁴⁴⁵;
- the constitutional means for the establishment of limits on state power⁴⁴⁶;

443 Баренбойм П.А. 3000 лет доктрины разделения властей. Суд Сьютера. - М., 2003. - п. 75.

444 Бондарь Н.С. Судебный конституционализм в России в свете конституционного правосудия. - М.: Норма; ИНФРА. 2011. - п. 24.

445 Шайо А. Самоограничение власти (краткий курс конституционализма). - М., 1999.

446 Barendt E. Introduction to Constitutional Law. - Oxford Univ. Press, 1998.-P. 14.

- a national-scale supra-partisan consolidating ideology⁴⁴⁷;
- a political-legal regime, one of the features of which is the introduction of essentials of harmony and justice into the society⁴⁴⁸;
- the existence of constitutional form of governance, state authority that is restricted by a constitution⁴⁴⁹;
- self-restraint of the state⁴⁵⁰;
- supremacy of law in all areas of socio-political life, implying priority of human rights and guaranteeing mutual responsibilities of individuals and the state⁴⁵¹;
- theory and practice of state and social life organization in conformity with the Constitution, or a political system leaning on a Constitution⁴⁵²;
- a principle of the rule of law, which assumes restriction of the powers of the leaders of the state and public authorities⁴⁵³;
- the existence of a Constitution (written or unwritten), its active impact on the political life of the country... constitutional regulation of the state system, the political regime, constitutional recognition of human rights and freedoms, the legal character of relations between citizen and state⁴⁵⁴.

447 Нерсесянц В. С. Конституционализм как общегосударственная идеология // Конституционно-правовая реформа в Российской Федерации. Сб. ст. / Edited by Ю. С. Пивоваров. - М., 2000. - pp. 6-8.

448 Сони́на Л. В. Конституционализм в Российской Федерации как политико-правовой режим: автореф. дисс. ... канд. юрид. наук. - Екатеринбург, 2001. - п. 7-8.

449 Пуздрач Ю. В. История российского конституционализма IX-XX веков. - СПб., 2004. - п. 7.

450 Шайо А. Транснациональные сети и конституционализм // Сравнительное конституционное обозрение. 2008. N 5 (66). - п. 123.

451 Ромашов Р.А. Современный конституционализм: теоретико-правовой анализ. <http://www.lawlibrary.ru/disser2000401.html> (09.03.2009).

452 <http://dic.academic.ru/dic.nsf/enc-law/1027/>.

453 Рассел Г. Конституционализм: опыт Америки и других стран - <http://www.infousa.ru/government/dmpaper2.htm> (09.03.2009).

454 See Кугафин О.Е. Российский конституционализм. - М., 2008. - п. 47. We also believe that in this phrase the term 'human being' would be more appropriate instead of the term 'person.'

Many authors also emphasize the supra-state components of constitutionalism⁴⁵⁵. Attention is drawn to expressions of exogenous and endogenous factors that affect political decision-making. Professor Stephen Holmes underscores that "...constitutionalism only emerged in the era of democratic revolutions over the last three decades of the 18th century. The principle of constitutionalism assumed not just a possibility to organize political life, but a certain ideal form thereof that subjected top politicians to a higher law, which they were emphatically forbidden to modify at their discretion"⁴⁵⁶. Developing this idea further, the author proposes a hypothesis, according to which "...constitutional restrictions appear and survive in cases when they cater to the interests of not all citizenry, but the members of society who comprise dominating social structures"⁴⁵⁷.

One may come up with other interpretations of the notion of constitutionalism. What matters most in all of these approaches is that they span the theory and practice of **constitutional law per se**. We believe that the **constitutionalism is the expression of particular constitutional culture commensurate to the cognizant existence of the society in question; it is the systemic, intellectually absorbed existence of constitutional values in real social life, upon which is based the entire legal system, this is the fundamental principle of contemporary law**.

It would be appropriate to recall Hegel's discourse on the substance of *das Recht*, whereupon he mentioned that a concept and its existence constitute two separate conditions which are only jointly sufficient for actuality⁴⁵⁸. Moreover, there must be a certain harmony between constitutional perceptions and social realities. Harmony between the de-

⁴⁵⁵ See Neil Walker /University of Edinburgh/- Taking Constitutionalism Beyond the State. *POLITICAL STUDIES*: 2008 VOL 56, 519-543; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) CDL-STD (2003)037, European and U.S. Constitutionalism, UniDem Seminar organized in Göttingen on 23-24 May 2003.

⁴⁵⁶ Стивен Холмс, Конституции и конституционализм //Сравнительное конституционное обозрение, 2012, N3(88). - p. 59.

⁴⁵⁷ Ibidem, p. 61.

⁴⁵⁸ Гегель Г. Философия права: Пер. с нем. - М., 1990. - p. 59.

sired and the real, between that which has acquired public acceptance, became a basic behavioral value and the actual behavior.

The system of baseline legal categories, concurrently with socio-cultural evolution, acquires a new appearance and new features. In this system, the notion of **constitutionalism as a general legal principal of societal behavior acquires a fundamental significance**. This notion is inalienably anchored to the constitutionalization of social relations and **qualitatively new incarnations of constitutional culture**.

With a view to the above, we believe that the notion of constitutionalism shall be perceived not as one of the basic principles of constitutional law, but as a fundamental principle of the law as such. One may paraphrase the well-known Latin phrase "*ubisocietasibi*" (if there's a society, law will be there) and claim "where there is constitutionalism, there will be a rule-of-law state." The constitutionalism determines the essence of coordinated behavior of the society, the character of its cognizant existence in time, the level of maturity of social relations and legal regulation thereof. This, first and foremost, is the ideal of civilized self-regulation, which the society must pursue.

Within this approach, **contemporary constitutionalism equals the presence of fundamental rules of democratic and legal behavior, set by a social accord, that exist as an objective living reality in social life, in civic behavior of each individual in the exercise of governance powers**.

The problem does not merely boil down to the implementation of the constitution, but rather to the formation of a social system in which constitutional axiology is enforced by every cell of the system **as a prerequisite for its own existence. This is the only time-tested safeguard for the implementation of constitutional premises and for the stable development based on the social accord**.

The genuine constitutionalism, as an incarnation of legal matter, is inherent to social systems that have attained a certain evolution of recognizing and guaranteeing social freedoms and social accord based on appropriate system of socio-cultural val-

ues. A condition for the legal effect of a system of norms is in that the pertinent norms are generally socially potent, that is they are socially actual⁴⁵⁹. As fairly stated by Professor Robert Alexy, a doctor of public law and legal philosophy, in a developed system the legal effect of norms is based on a constitution, whether written or unwritten, which determines the conditions under which a certain norm becomes part of the legal system and is therefore deemed legally effective⁴⁶⁰.

Any deformation of constitutionalism implies distortion of fundamental constitutional values in a society, departure from public accord over a system of socio-cultural values of co-existence, from ‘supreme Providence,’ which, upon reaching a certain critical mass, will invariably lead to social calamities.

Only through calling constitution to life, affirming constitutional-normative values as real-life rules, one may guarantee the supremacy of law and systemic stability. **The harmonization of social life with the constitutional solutions based on the supremacy of law was and remains an objective.**

In rule-of-law state the existence of *das Recht* as a necessary form of freedom, equality and justice in the social life, as a basis for co-existence in a dynamic social milieu acquires a new significance in human life.

Academician V. S. Nersessiants defines the essence of law as formal equity, which is interpreted and spelled out as a universal and equal measure of freedom and justice in the social turnover of men⁴⁶¹. The historical evolution has led to the emergence of the liberal-legal theory of the interpretation of law, under which *das Recht* is the universal and necessary form of freedom of men, whereas freedom in social life is only possible as the law and in the form of the law⁴⁶². In his turn

⁴⁵⁹ See Kelsen H. *Reine Rechtslehre*. 2. Aufl. Wien, 1960. S.219 (Russian edition: Чистое учение о праве Ганса Кельзена / A collection of translations. Issue. 2. M., 1988. - p. 91).

⁴⁶⁰ Роберт Алекси. Понятие и действительность права (ответ юридическому позитивизму). Translated from German - M., 2011. - С. 109-110.

⁴⁶¹ Нерсисянц В.С. Философия права. -М.: НОРМА, 2008. - р. 3.

⁴⁶² *Ibidem*, p. 30.

academician S. S. Alexeev states: **“mankind has no other way or medium to address global challenges and problems that jeopardize its existence than to install contemporary law right in the centre of peoples’ lives”**⁴⁶³.

Naturally, the essence of the rule-of-law state is exactly in the recognition of the supremacy of law and guaranteeing freedom through limiting power by the law. This theoretical premise acquires real substance when the society, in full realization and upon public accord, intends to live and create pursuant to this principle and the value-systemic criteria that it generates. The combination of the latter provides the foundation for the constitutional order of every society. **In a rule-of-law state the expressions of *das Recht* both as an essence and as a phenomenon are exactly characterized by the relevant level of constitutionalism.** This also determines the dialectics of the law and *das Recht*, the relation of constitutionalism to the Constitution as the Fundamental Law of the society. **The constitutionalism, like the law, is an objective social reality, the expression of the essence of civilized cohabitation, which possesses the necessary intrinsic potential for dynamic and stable development.** At a certain level of society’s development constitutionalism, as a fundamental principle of law, **acquires a systemic and universal character of legal regulation**, expresses and specifies the legal content of guaranteeing and assuring the supremacy of law and the direct effect of human rights, appears as the criterion of lawfulness of the behavior of the subjects of law, becomes the baseline for lawmaking and implementing activity, epitomizing the historical development of a society in question.

The constitutionalism is the expression of co-agreed and civilized society, which is based on the constitutional values and principles. The level and character of the real constitutionalism depends on the level of protection of the constitutionally established functional balance in the society. The public organism cannot dynamically develop, if it does not

⁴⁶³ Алексеев С.С. Восхождение к праву. Поиски и решения. - М.: НОРМА, 2001. - р. 710.

have required mechanism of revealing, assesment and restoration of the violated constitutional balance. This function in particular, that is the function of the public immune system shall be implemented by the systematic constitutional monitoring. The existence of such system is the manifestation of the highest constitutional culture and a guarantee of provision of true constitutionalism in the society. Taking into account the latter, it can be stated that the term “constitutional monitoring” includes the functional and institutional grounds of the legal regulation of mechanism of constant, systematic reaviling, assesment and restoration of the violated constitutional balance for provision of sustainable manifestation of constitutionalism in the society.

The discourse above boils down to the following primary premises:

1. Every nation’s culture is its cognizant existence, intellectually absorbed presence in time. The constitutional culture is perceived as the entirety of the specific system of values, which underlies the convictions, awareness, legal perception, and legal consciousness of the social community, which were historically formed on the basis of social accord, defining principal rules of behavior on the basis of their spiritual and ethical intellectual absorption.

Systemically the constitutional culture becomes incarnate at a certain level of development of civilization, when a **cognizant need** arises to establish, through public accord, basic principles and rules of behavior as universally and legally binding. In the legal respect this need has lead to the emergence of constitutions and constitutional regulation of social life.

The constitutional culture acquires a new quality in social-state systems where, **alongside constitutions there also exists constitutionalism**, where the constitution is not a tool in the hands of public authority, but rather a **Fundamental Law of the civil society**, the means to assure harmonious and stable development thereof, which not only sets basic behavior rules, but establishes limits on power, restricting it

by the law. In such cases, we deal with the notion of **Democratic constitutional culture**, which is characteristic of democratic social systems, where the features of national and mainstream global cultures converge.

In a rule-of-law state the notion of constitutional culture is seen as **a particular value system, representing the axis of public awareness, of historically formed, stable convictions, perceptions, legal insight, legal consciousness, enriched by the experience of generations and the entire mankind, that are the basis for the establishment and safeguarding, through public accord, of principal rules of society’s democratic and legal conduct.**

2. In this context **contemporary constitutionalism is the existence of fundamental rules of society’s democratic and legal conduct, established through public accord, as an objective living reality in public life, in each individual’s civic behavior in exercising state powers.**

The constitutionalism is the expression of particular constitutional culture that is commensurate to the cognizant existence of the society in question; it is the systemic, intellectually absorbed existence of constitutional values in real social life, upon which is based the entire legal system.

3. The normative characteristics of constitutionalism assume the existence of necessary and sufficient legal guarantees for cognizant exercise of rights and freedoms through the entire system of law and social relations. In a rule-of-law state every norm of the law must be expressed as an element of a constitutionally endorsed system of legal conduct of man and state.

4. **The notion of constitutionalism shall be perceived not as one of the basic principles of constitutional law, but as a fundamental principle of the law as such.** One may paraphrase the well-known Latin phrase “*ubisocietasibiis*” (if there’s a society, law will

be there) and claim **“where there is constitutionalism, there will be a rule-of-law state.”** The constitutionalism determines the essence of coordinated behavior of the society, the character of its cognizant existence in time, the level of maturity of social relations and legal regulation thereof. This, first and foremost, is the ideal of civilized self-regulation, which the society must pursue.

5. In rule-of-law state the existence of *das Recht* as a necessary form of freedom, equality and justice in the social life, as a basis for co-existence in a dynamic social milieu acquires a new significance in human life. Naturally, the essence of the rule-of-law state is exactly in the recognition of the supremacy of law and guaranteeing freedom through limiting power by the law. This theoretical premise acquires real substance when the society, in full realization and upon public accord, intends to live and create pursuant to this principle and the value-systemic criteria that it generates. The combination of the latter provides the foundation for the constitutional order of every society. In a rule-of-law state the expressions of *das Recht* both as an essence and as a phenomenon are exactly characterized by the relevant level of constitutionalism. **This also determines the dialectics of the law and *das Recht*, the relation of constitutionalism to the Constitution as the Fundamental Law of the society.**

6. The **constitutionalism, like the law, is an objective social reality, the expression of the essence of civilized cohabitation, which possesses the necessary intrinsic potential for dynamic and stable development.** At a certain level of society’s development constitutionalism, as a fundamental principle of law, acquires a systemic and universal character of legal regulation, expresses and specifies the legal content of guaranteeing and assuring the supremacy of law and the direct effect of human rights, appears as the criterion of lawfulness of the behavior of the subjects of law, becomes the baseline for lawmaking and implementing activity, epitomizing the historical development of a society in question.

7. The **constitutionalism, as an incarnation of legal matter, is inherent to social systems that have attained a certain evolution of recognizing and guaranteeing social freedoms and social accord based on the appropriate system of socio-cultural values.** Any deformation of constitutionalism implies distortion of fundamental constitutional values in a society, departure from public accord over a system of socio-cultural values of co-existence.

8. **The main mission of constitutionalism in the new millennium is exactly in ensuring the stability and dynamism of social development, strengthening morality in social relations, overcoming conflict-prone situations in intergovernmental and domestic relations.**

Surmounting the deficit of constitutionalism is the throughway for preventing the accumulation of negative social energy to its critical mass, **whereupon the social calamity becomes inevitable.**

9. In the contemporary world the so-called regressive reality is a result, first and foremost, of a systemic disruption of constitutional balance in social practice that was not identified and rectified on time. Which highlights the existence of **systemic deficit of constitutionalism** or a distortion thereof. This, in turn, means that the supremacy of the Ultimate Law of the land is not ensured. Whatever is being endeavored today by the constitutional courts, notwithstanding the exceptional-importance of their mission, is still **fragmented and sporadic**, failing to ensure the necessary persistence and systemic continuousness in identifying, assessing and redressing skewed constitutional balance in the society, assuring constitutionalism in conformity with the constitutional culture of the new millennium.

10. The public organism cannot develop dynamically, if it does not have the required mechanisms of revealing, assessment and restoration of the violated constitutional balance. **This function in particular, that is the function of the public immune system, shall be implemented**

by the systematic constitutional monitoring. The existence of such system is the manifestation of the highest constitutional culture and a guarantee of provision of true constitutionalism in the society. Considering the latter, it can be stated that **the term “constitutional monitoring” includes the functional and institutional grounds of the legal regulation of mechanism of constant, systematic reaviling, assesment and restoration of the violated constitutional balance** for provision of sustainable manifestation of constitutionalism in the society.

6.2. CONCEPTUAL APPROACH IN INTRODUCING SYSTEMIC CONSTITUTIONAL MONITORING

As rightfully noted by Professor E. Tanchev: “the problem of implementation of constitutional norms possesses at least two aspects. On the one hand, it pertains to the possibility of implementation of constitutional provisions, depending on their position in the body of the fundamental law and the content of other norms of law. On the other hand, of preponderant significance is the question whether the social reality allows for complying with all the requirements of the constitution⁴⁶⁴.” Professor Dick Howard, in his turn, identifies the following basic values of constitutionalism⁴⁶⁵:

- 1) popular consent, acquired through representative institutions, free organization of political parties, free access to voting and unencumbered discussion of political issues;
- 2) limiting the powers of government through the separation of branches thereof;
- 3) open society;
- 4) inviolability of a person;
- 5) equality and impartiality;

⁴⁶⁴ Евгений Танчев. Социальное государство (всеобщего благосостояния) в современном конституционализме // Сравнительное Конституционное Обозрение. 2007, N4. - p 63.

⁴⁶⁵ Дик Ховард А.Е. Конституционализм // Верховенство права: Collection: translated from English. - М.: Прогресс -Универс, 1992. - p. 53-65.

- 6) constitutional continuity combined with adjusting to new conditions, whether through amending language or by judicial interpretation.

With a view to the basic values of constitutionalism as identified by various authors, we have analyzed and revealed the main characteristics of deformation of the fundamental constitutional principles and values in social reality. This was done on the level of the Constitution per se (including the systemic deformations at the stage of choosing the form of governance and inconstancies thereof), as well as of deformations in the general legal system: distorted perception and implementation of fundamental constitutional values on the level of law-enactment practice⁴⁶⁶.

We have arrived at the conclusion that, especially in conditions of societal transformation, deformations of constitutionalism become the main factor contributing to instability and social calamity. Overcoming these requires the existence of viable and systemic constitutional monitoring, based on targeted and continual constitutional diagnostics. This is the lesson taught by history, as well as the challenge of time, requiring urgent attention and adequate action.

Our main conclusions converge on the following:

1. The existing models of constitutional review and supervision fail to fully ensure the systemic and uninterrupted nature of revealing, assessing and redressing disrupted constitutional balance in social practice, thus failing to adequately address the challenge of time.
2. The failure to restore, in a timely manner, disrupted constitutional balance, leads to the accumulation of negative social en-

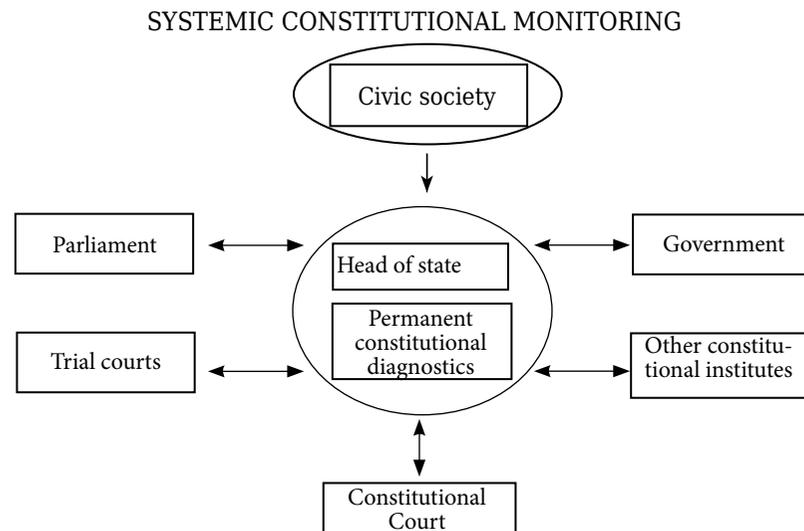
⁴⁶⁶ See Международный альманах “Конституционное правосудие в новом тысячелетии”. - Ереван: “Нжар”, 2005. - pp. 137-155; 2008. - pp. 27-36; 2009. - p. 40-47; Monthly Конституционное правосудие, КС РФ и ООО Publishers “Юрист”. М., 2010, N3 (15). - pp. 34-36; Евразийский юридический журнал, N 7 (26), М., 2010. - pp. 5-9; Gagik Harutyunyan MODERN CHALLENGES TO SYSTEMIC DEVELOPMENT OF CONSTITUTIONAL CONTROL (ARMENIA) // CONSTITUTIONAL LAW REVIEW, Aptil 2012, N5, p. 173-179.

ergy to its critical mass, which culminates in social explosions and instability.

3. There is a lack of systemic and organic interaction in the functional operation of institutes of power in ensuring the supremacy of the constitution.
4. Until the government recognizes and ensures the exercise of the individual right to constitutional justice, it would be impossible to guarantee realistically the supremacy of law.
5. The systemic nature and continuousness of constitutional review are only possible upon the introduction of a holistic system of permanent constitutional diagnostics and monitoring.

The introduction of the fifth premise assumes that the preceding ones have been adequately addressed through legal solutions. Of axial significance, here is penetrating the essence of institutional and functional support of systemic and continuous constitutional monitoring.

Schematically we imagine such a system of monitoring as the following⁴⁶⁷:



⁴⁶⁷ Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. - Киев: «Логос», 2011. - p. 53.

From the presented scheme, it is derived, that for the implementation of the systematic constitutional monitoring in line with the respective institutions of state power, the definite institutional and functional role belongs also to the civil society, as the required “nervous system” of the public organism.

6.3. MAIN ISSUES OF CONSTITUTIONAL MONITORING IN THE CONDITIONS OF SOCIAL TRANSFORMATION

The following are the **main purposes** of constitutional monitoring in conditions of social transformation:

- identification and assessment the deficit of constitutionalism in the political behavior of the society;
- assessment of intra-constitutional deformations, identification of the causes thereof and development of mechanisms to overcome these;
- surmounting distorted perception of fundamental constitutional values and principles in the society, increasing the level of constitutional awareness;
- ensuring the necessary level of constitutionalization of political behavior of institutes of power, as well as of individual behavior;
- removal of deficit of constitutionalism in legislature and other sectors of lawmaking;
- prevention of distortion of constitutional values and principles in the practice of implementation of laws;
- systemic assurance of constitutionality of public governance;
- identification and tracking of transnational criteria for the evaluation of social behavior of individuals and the authorities.

A comparative analysis of constitutional lawfulness in the countries of not only new, but also traditional democracies demonstrates that a certain systemic nature is lacking in addressing these challeng-

es. They end up as a subject of political scheming, rather than legal regulation.

An analysis of the scope of these problems has led us to the conclusion that ensuring the systemic nature and comprehensiveness of constitutional monitoring may only be possible, if the following factors were to be profoundly considered:

1. The functioning of the social system, as a holistic organism, possesses a multilayered hierarchic character, based upon ensuring and guaranteeing the supremacy of law.
2. The main mission of the immune system of the social organism is in preserving the function of constitutional balance and stability, since failure to restore disrupted balance leads to accumulation of negative social energy to its critical mass, whereupon social calamity becomes inevitable.
3. The control system of constitutional diagnostics and monitoring must function in its inherent regime of continuousness and relative independence, based on clear normative regulation.
4. Any social pathology must trigger and launch into action the entire system of constitutional self-defense.

We believe that this would constitute a new level of guaranteeing the supremacy of the living Constitution, when the entire system is based not on abstract constitutional norms, but their real incarnation in the society, **ensuring intellectually absorbed existence of fundamental constitutional values and principles in real social life.**

6.4. “‘CONSTITUTIONAL CONTROL’” AND “‘CONSTITUTIONAL MONITORING’”: INTERRELATION AND MANIFESTATION OF ITS ESSENCE

What is the difference between the notions of constitutional review and constitutional monitoring? We believe that the system of constitutional review, of which judicial constitutional review is one of the main components, may be viewed as a complete system of constitutional monitoring only at a certain level of systemic and continual operation. In this context “review” is the function, “monitoring” is the form of its implementation, and “diagnostics” is the mechanism for the implementation of this function. Essentially **the review is currently implemented through discrete juxtaposition of the object with the Constitution itself, whereas the monitoring implies systemic and continual identification of the real state of constitutionalism in the society.**

This system, in turn, requires a substantial revision of constitutional relations between the institutes of power, redefining the functional and institutional foundations of the operation of systemic and continual constitutional monitoring. In the proposed doctrine, the emphasis, first and foremost, is on the **role of the head of state in the system.** The president is the political guarantor of the supremacy of the Constitution. Which is why it is necessary, in particular, to charge with real constitutional-legal substance such constitutional provisions, as: “The President shall monitor compliance with the Constitution,” (see Constitutions of France (Article 5), Poland (Article 126, Clause 2), the Republic of Armenia (Article 49); “The President shall be the guarantor of the Constitution,” (see the Constitution of The Russian Federation (Article 80, Clause 2); “The President shall ensure the normal functioning of constitutional organs or democratic institutions” (see Constitutions of Portugal (Article 120), Slovakia (Article 101, Clause 1), etc.

In a rule-of-law state the main function of the president is exactly in guaranteeing progressive development of constitutionalism in the country. Considering the circumstance, that resolving this issue also assumes systemic identification, assessment and rectification of disrupted constitutional balance based on legal mechanisms, The President becomes a principal link in the chain of the societal organism's immune system. We maintain that, with a view to this circumstance, one needs to constitutionally provide for the power and the duty of the President to conduct continual constitutional diagnostics⁴⁶⁸, considering the functional powers of other institutes of government. Current generally accepted functional powers, as well as checks and balances at the disposal of the Head of State, including on the plain of relations between the Parliament and the President regarding lawmaking policies, as well as his powers of the initiator of constitutional amendments or a subject eligible to lodge constitutional complaints are insufficient to assure the full involvement of the President in the general process of constitutional monitoring. Currently, especially in the countries of young democracy, there exist informal, shadow mechanisms of constitutional diagnostics, which is very dangerous and is incompatible with the principle of the rule-of-law state. **The Constitution must bind the President to take care of conducting constitutional diagnostics, with a full consideration to the functional roles of constitutional subjects.** This shall also result in the Head of State assuming an active position in conducting abstract judicial constitutional review.

We would also like to emphasize on the functional role of other institutes of power regarding the operation of the system of continual constitutional monitoring.

First and foremost, the Parliament and the Cabinet, alongside their traditional functions, must continually, and not only in lawmaking, consider the results of constitutional diagnostics and the legal positions of the constitutional courts, moreover, based on their respective powers, they shall carry out the required control over the process

⁴⁶⁸ See Конституционное правосудие, 2010, N4. - pp. 28-42.

of constitutionalization of social relations. From passive institutes of constitutional review, they must transform into more proactive institutes of constitutional monitoring, keeping in mind the fact that the fundamental human rights and freedoms do define the meaning, substance and enforcement of laws and other legal acts, the performance of lawmaking and executive branches of power. All the above requires enshrining, on the level of constitutional provisions, concrete functional powers of the lawmaker and the executive in carrying out constitutional monitoring.

A special role in this concept is reserved for general jurisdiction courts and the Constitutional Court.

The general jurisdiction and specialized courts are supposed to uphold constitutional rights, guaranteeing access to the judiciary, effectiveness of litigation and uniform application of the law. It is judicial practice that is called upon to intercept existing discrepancies between the Constitution and the legal system in general. This firstly means, that the courts must play a more active role in the general system of constitutional review and, secondly, that their case law will become an important object of constitutional diagnostics.

The constitutional courts, in their turn, may fully deliver on their key mission of upholding constitutionalism in the country, provided the following is in place:

1. On the level of the Constitution one needs to guarantee systemic conformity between the functions and the powers of the Constitutional Court. The main function of the Constitutional Court is to guarantee the supremacy and direct effect of the Constitution. This may become possible if the following is ensured: the self-sufficiency of the Constitution; direct effect of fundamental human rights and freedoms; constitutionality of legal acts; and resolution of political disputes on the legal plain. Today in the world there exist a mere handful of Constitutional Courts (in Germany, Austria and some other countries), whose balance of functions, powers and procedural grounds for operation answer the current challenges of constitutional monitoring.

2. The viability of judicial constitutional review largely depends on the systemic completeness and effectiveness of the functioning of the entire system of constitutional review and control. In the proposed doctrine guaranteeing the systemic nature of continual constitutional monitoring is of preponderant importance.

3. The head of state, as the guarantor of effective functioning of the entire system of constitutional monitoring, must also become the guarantor of enforcement of the decisions of the Constitutional Court. A classic example of this is provided by Article 146 of the Austrian Constitution, which states: "The enforcement of judgments pronounced by the Constitutional Court on claims made in accordance with Article 137 is implemented by the ordinary courts. The enforcement of other judgments by the Constitutional Court **is incumbent on the Federal President....**"

4. The procedural mechanisms for judicial constitutional review must be fully adequate to the powers and functional role of the Constitutional Court in upholding the supremacy and direct effect of the Constitution. This problem is especially topical in the countries of young democracy.

This concept also assumes that the civil society shall play a crucial role in the development of constitutionalism in the country. This means, first and foremost, that the people, as the principal source and the bearer of power, are the main guarantor of compliance with constitutional values and principles. Every alert originating in the civil society with respect to any distortion of these values and principles must become the object of constitutional monitoring. One of the main ways to do this would be to recognize and guarantee the individual right to constitutional justice.

6.5. CONSTITUTIONAL DIAGNOSTICS AS A MECHANISM FOR IMPLEMENTATION OF SYSTEMIC CONSTITUTIONAL MONITORING

We believe that, with the purpose of implementing systemic constitutional monitoring, it is necessary to introduce in constitutional practice an adequate system of continual constitutional diagnostics.

The notion of **diagnostics** is of Greek origin (*diagnostikos*), it characterizes a **specific process for identifying the systemic completeness and functional viability of the object of study, with consideration given to the comparability of main parameters of its operation to the basic criteria of the intended and natural state thereof.**

In **medicine** the notion of diagnostics implies the process of arriving at a **diagnosis**, i.e. a conclusion on deviations from established norms, revealing the essence of the disease and the patient's condition, expressed in accepted medical terms.

In **technology**, this notion covers an area of knowledge that includes data on the methods and means of evaluating the technical condition of **machines, mechanisms, equipment**, structures and other technical objects.

Also in **economics** diagnostics implies the process of identifying and expressing a problem through recognized terminology, that is: determining deviations of the object or process in question from their normal state.

The notion of constitutional diagnostics covers the entire process of evaluating the state of constitutionality in the society, identifying conformity of real social relations with constitutionally prescribed norms and principles. Constitutional diagnostics provides the means and the possibility to determine the degree of constitutional-functional viability of the social organism. It is first and foremost necessary for **revealing the actual state and development trends of constitutionalism in the society.**

The **object of constitutional diagnostics** is the entire social turnover, the state of constitutionally established functional balance and, in particular, the functioning of the institutes of power⁴⁶⁹.

The **subjects of constitutional diagnostics** are: the people, as the source and the bearer of power; organs of state power and local administration; all institutes of the civil society; every individual.

The **main purposes** of constitutional diagnostics, especially in conditions of societal transformation or instability of constitutional balance, are, in particular, the following:

- identifying disrupted constitutional balance;
- evaluating the character and the form of disruption through multi-faceted assessment of the situation;
- identifying the causes of disruption and recommending toolkits for restoring the broken constitutional balance.

Constitutional diagnostics shall be based on the following principles:

- identifying, in a mode of continual operation, any disruption of constitutional equilibrium;
- determining the character of disruption;
- in restoring functional equilibrium, guaranteeing the impermissibility of further disruption.

To conduct persistent constitutional diagnostics one needs to single out a **set of indicators** that would comprehensively capture the constitutionality of social relations being examined. A system of such indicators is often used by international organizations. A good example may be the annual survey of development trends in constitutional democracy

⁴⁶⁹ Our approaches regarding the object of constitutional diagnostics have found broad resonance in the professional literature. Particularly, professor N.S. Bondar mentions: "As fairly stated by professor G.G. Harutyunyan in one of his speeches, the constitutional diagnostics of the social-economic and political processes in the country should be launched from the system of constitutionalism" /See Бондарь Н.С. Конституционная модернизация российской государственности: в свете практики конституционного правосудия. М., 2014.-р. 14/.

around the world by the American Freedom House Institute⁴⁷⁰, as well as the results of World Justice Project by determining the index of the rule of law⁴⁷¹.

We have attempted to present an academic method of such analysis, the essence of which is primarily in the following. Firstly, evaluation indicators must be selected. Secondly, one must choose a model approach towards a systemic comparison of these indicators with normative parameters (reference samples) and, considering the deviations, arrive at a well-reasoned diagnosis of the system⁴⁷².

As mentioned above, various approaches exist to integrated evaluation of the sustainability of human development⁴⁷³. The main idea is that, based on a system of sustainable development indicators, a determination is made of the general characteristics of constitutional equilibrium in the society. The difficulty is in designing an integrated indicator of comparative evaluation of sustainable development that would not only consider legal parameters, but also, in summary, economic, social, environmental, socio-political and other dimensions.

We believe that for a comprehensive assessment of sustainability and identification of constitutional equilibrium of a social system one may need system of indicators on the following levels:

- social characteristics of the society;
- indicators of embracing democratic values in a society;
- indicators of legal safeguards of the Constitution, human rights and freedoms.

We assume that for effective review of the state of constitutionality in a country one needs to, by the end of every year, apply the

⁴⁷⁰ See <http://www.freedomhouse.org/>

⁴⁷¹ See The World Justice Project /worldjusticeproject.org/, Rule of Law index, 2010-2015.

⁴⁷² For more details on the methodology, see Gagik Harutyunyan, A. Mavčič - THE CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS), Yerevan - Ljubljana, 1999, p. 385-392.

⁴⁷³ Also see Indicators of Sustainable Development. The Wuppertal Workshop, 15-17 Nov. 1996.

indicators listed below to reveal the real standing of the implementation of fundamental constitutional values and principles in the society, making the findings transparent for the public, a subject of multifaceted analysis and a basis for a programmatic policy to improve the situation.

By using, for example, the American Freedom House organization's methodology⁴⁷⁴, every indicator may be assessed on a scale of 0 to 7, where 0 corresponds to a better situation, while 7 is the worst.

Our studies indicate that the average ratio of constitutionalism in post-communist countries has been displaying descending trends in recent years. This attests to the deepening of legal, political and social crises and the great potential of accumulation of an explosive critical mass of social energy.

We do not aspire, within the limits of this paper, to present detailed outcomes of this analysis, suffice it to mention that the real assessment of the state of constitutionalism in a country must be carried out not only on a governmental level, but also by the civil society, on the basis, for example, of the following system indicators:

1. **Characteristics of the rule-of-law state:**

- the existence of necessary and sufficient prerequisites for ensuring the supremacy of law;
- safeguards to ensure the supremacy of the Constitution;
- the existence of actual separation of powers;
- the degree of real independence of the judiciary;
- the degree of merger between political, economic and administrative powers;
- the degree of corruption;
- shadow economy;
- the degree of legal awareness of the population;
- the criminal condition.

2. **Characteristics of democratic developments:**

- the level of development of parliamentarism;
- the degree of confidence in the electoral system;
- the level of maturity of political parties;
- freedom of press;
- freedom of internet;
- freedom of assembly;
- freedom of association;
- the level of civic activity and maturity of civil society institutes;
- transparency of government;
- the level of viability of democratic state institutions;
- religious freedoms;
- the level of protection of ethnic minority rights;
- the level of pluralism;
- the level of tolerance;
- the level of non-discrimination.

3. **Social characteristics:**

- the level of unemployment;
- migration;
- the level of price stability (level of inflation);
- average annual per capita growth of the gross national product;
- ratio of subsistence minimum to the minimum wage;
- ratio of pensions to average wage;
- the level of social protection of intellectual and creative work;
- proportion of the population with incomes below minimal consumption basket, per 100,000 people;
- ratio of annual income of the 10 richest percent of the population to the income of the remaining 90 percent;
- ratio of annual income of the 10 richest percent of the population to the annual budget appropriations for the social sector;

⁴⁷⁴ See <http://www.freedomhouse.org/>

- ratio of annual salaries of the officials in the legislative, executive and judicial branches of power to their total declared income in the same reporting period;
- ratio of total declared annual income of leaders of political parties to the national average wage;
- dynamics of assets of the members of the political elite while holding public office.

The latter indicators highlight the level of oligarchization of power, which in turn reflects the real status of the separation of powers. Our studies, in particular, indicate that when the average wage accounts for more than 80 to 90 percent of the annual income of officials in the legislative, executive and judicial branches of power, the peril of merger of the political, economic and administrative potentials is reduced to a minimum, and there exist real prerequisites for actual separation of powers. It is important that in conditions like these what really motivates holders of office is the effective implementation of their functions. Whereas, when the compensation for exercising the functions of public office descends below 50 percent of his/her income, it becomes obvious that the function in question is merely a smokescreen, securing their principal income. In some countries, this ratio in the judiciary branch amounts to 55-60 percent, in the executive it is 35-40, and in the legislative it gets down to 2-3 percent. Such a situation boils down to a litmus test, highlighting systemic metastases and dangerous distortions of fundamental constitutional values and principles.

It is also common knowledge that in many new sovereign states overall privatization has been accompanied by numerous corrupt practices, which subsequently led to other negative reproducible consequences. Therefore, to capture the real state of constitutional distortions in these countries, it is important to estimate the ratio of incomes of political leaders, officials in the legislative, executive and judicial branches of power (in combination with the incomes of their family members) within the last 20 years to the average annual growth of the national budget revenues. This may provide a peculiar indicator of the scale of the shadow sector.

Our estimates indicate that in countries where the level of the shadow economy is valued at 40 to 50 percent, the value of the ratio referred to above is higher than 2.5 or 3. In reality this attests to the higher level of the shadow sector, and consequently to rampant corruption in the system.

For a comprehensive academic analysis and multi-factor evaluation of the real state of constitutionalism it is important to juxtapose all of the features referred to above, as well as define on their basis an integrated summary indicator. The quantitative certainty of such an indicator may allow highlighting the bottlenecks that distort constitutionalism and launch a targeted programmatic policy to fix them⁴⁷⁵.

The **integrated indicator** is calculated out of the indicators proposed above, with due notice paid to correlations between certain indicators, and it looks as follows:

$$U_i = \sum_{j=1}^m \left[\frac{(x_{ij} - x_j^{(\ominus)})}{\sigma(x_j)} \prod_{\substack{\beta=1 \\ \beta \neq j}}^m (1 - \gamma_{\beta j}) \right],$$

where: U_i - represents the integrated level of constitutional stability;

x_{ij} - represents the "j" indicator of country (or group) "i";

$X_j^{(\ominus)}$ - is the reference indicator;

$\gamma_{\beta j}$ - are coefficients of correlation pairs.

The proposed methodology also allows resolving the issue of manageability of processes, determining the impact of each indicator on the integrated level of actual constitutionalism.

⁴⁷⁵ More on this in: Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. - Киев: «Логос», 2011. - pp. 99-100.

6.6. CONSTITUTIONAL MONITORING FOR GUARANTEEING THE RULE OF LAW

Constitutional law and international constitutional practice gives special importance to assurance of direct application of human rights. Only with this approach it is possible to safeguard the rule of law, from which arises the social behavior of the individual, political behavior of political institutions of the state and the public behavior of authorities. The human being, their dignity, fundamental rights and freedoms, recognized by the State as the highest value, **must ensure the strict implementation of the principle of rule of law and guarantee the restriction of State power by law.**

The issue of direct application of human rights demands a precise scientific position regarding the following questions:

First, what is the constitutional legal nature and content of the concept of “direct application”?

Second, what are the guarantees for direct applicability of human rights?

Third, what role do constitutional courts have in the process of assuring the direct application of human rights?

At first, we will try to make a short reference to international constitutional practice. As a fundamental constitutional provision in constitutions of various countries, the following is established:

- “The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law”/ **Constitution of Federal Republic of Germany, article 1, part 3.**
- “The constitutional principles regarding fundamental rights, freedoms and guarantees are directly applicable to, and binding upon, all public and private entities” / **Constitution of Angola, article 28, part 1.**
- “All the rights recognized in the Constitution are directly applicable and enjoy equal guarantees of their protection”/ **Constitution of Bolivia, article 109, part 1.**

- “While exercising authority, the people and the State shall be bound by these rights and freedoms as directly applicable law”/ **Constitution of Georgia, article 7.**
- “This Constitution’s provisions regarding rights, freedoms and guarantees shall be directly applicable to and binding on public and private persons and bodies.”/ **Constitution of Portugal, article 18, part 1.**
- “Human and civil rights and freedoms shall have direct force.”/ **Constitution of Russian Federation, article 18.**
- “The state shall be limited by fundamental human and civil rights as a directly applicable right.”/ **Constitution of Armenia, article 3.**
- et cetera.

The above mentioned and similar other constitutional provisions imply:

First, the absence of a unified approach regarding the nature of directly applicable rights, as well as its content. If in one section of countries, human and **civil fundamental rights** are considered directly applicable (Germany, Angola, Portugal, Armenia), in other cases all rights are considered that way (Bolivia, Russian Federation etc.)

Second, if one case specifically emphasises the condition of direct applicability of rights and to issues regarding its assurance (i.e. Bolivia, Russian Federation), in the other case the main emphasis is given to the issues on states limitation by those rights (i.e. Federal Republic of Germany, Angola, Georgia, Armenia etc.)

In both of those cases, we deal with such an organically interlinked legal reality, in which attempts to clarify the aim and main guarantee for its implementation on constitutional level. The aim is the assurance of direct applicability of rights. **The main guarantee is the fixation of its binding and restrictive nature for state authorities.** This is one of the main achievements of contemporary science of constitutional law.

One of the main characteristics of democratic, rule-of-law state’s constitutional systems is that even the people, who are bearers and sources of the power, cannot adopt a Constitution, which doesn’t guar-

antee the rule of law. Otherwise, **the direct applicability of human rights is restrictive factor also for the people, during realization of its own power.**

This condition has methodological significance in the aspect of assurance of the rule of law.

Constitutional norms should not only declare constitutional right, but **should most clearly define, its implementation guarantees, states obligations, the permissible scope of limitation of separate rights.** Human rights have to be considered as practicable rights, while its limitations should arise from norms of international law, have to be proportional, should not distort the content and meaning of the right, be clearly prescribed by law, combined with equivalent responsibilities of public authorities.

Regardless of the peculiarities of constitutional provisions (formulations), the direct applicability of human rights at least implies the following:

1. A person can refer to the direct applicability of his/her rights, and expect equivalent protection in court,
2. Functional and structural guarantees should be established on constitutional level for the judicial protection of directly applicable rights. The establishment of the full constitutional complaint is considered as one of the most effective type for the realization of the above stated aim⁴⁷⁶.

What is the situation from the aspect of international legal regulations.

International legal documents relating to human rights conditionally can be divided into two groups:

- a) Which require from the state parties to refrain from interfering with those rights (negative duty),

⁴⁷⁶ See Study on Individual Access to Constitutional Justice. Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010). On the basis of comments by Mr. Gagik Harutyunyan (Member, Armenia), Ms. Angelika Nussberger (Substitute Member, Germany), Mr. Peter Paczolay (Member, Hungary). Published by the Center of the Constitutional Law RA, 2012, p. 268.

- b) Which require from the state parties' affirmative actions for fulfillment of those human rights (positive duty).

However, it should be noted that in general the rights stipulated in those documents, are not given the force of direct applicability. In theory of international law, it is accepted that the issue of direct applicability of rights enshrined in international legal documents, is decided based on the type of duties undertaken by state parties regarding them.

So, **in the International Covenant on Civil and Political Rights, adopted in 1966**, the classical, basic human rights are presented, however, none of the 53 articles of the covenant regulates the question of direct applicability of those rights. Furthermore, while stating the duties of state parties to the covenant regarding human rights, the **terms "undertake to ensure" "undertake to respect"** are used.

In the International Covenant on Economic, Social, and Cultural Rights, the social human rights are presented, and none of the 31 articles of the covenant directly regulate its direct applicability. State parties' duties concerning the rights enshrined in the covenant the terms **"undertake to ensure" "undertake to take steps to the maximum of its available resources"** are used.

Similar regulations are provided **in the Revised European Social Charter, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and other prominent international documents.**

From the aspect of defining state duties, the **1950 Convention for the Protection of Human Rights and Fundamental Freedoms** differs from the mentioned documents relating to human rights.

Prima facie the mentioned international document also doesn't directly specify the direct applicability of the rights enshrined in it, however the first article of the Convention states **"The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention"**. It is noteworthy that while defining the duties of state parties, the term **'shall secure'** is used in place of "undertake to ensure" or "undertake

to respect". In theory of international law regarding the implementation of international documents relating to human rights, it is accepted that when the state duties are defined with the term "undertake to ensure" or "undertake to respect", it implies that the respective rights would be fixed in the level of national legislation, after which they become fully operative, while the terms 'shall secure'", ""guarantee"" imply the direct applicability of the respective norms. Thus, from the moment of its ratification the norms of the agreement apply directly, without even being fixed in the national legislation.

In the context of the above stated, it should be noted, that the European Court of Human Rights in its decisions has not directly refer to the question on direct applicability of human rights, however it **referred to the direct applicability of the rights stipulated in the Convention for the Protection of Human Rights and Fundamental Freedoms**. For example, in its judgment adopted on January 28, 1978 concerning **the Ireland v. the United Kingdom case, the Court explicitly specified that by substituting the words 'shall secure' for the words "undertake to secure" in the text of Article 1 (art. 1), the drafters of the Convention also intended to make it clear that the rights and freedoms set out in Section I would be directly secured to anyone within the jurisdiction of the Contracting States (Ireland v. United Kingdom, (5310/71), 18 January 1978, para. 239)**. From the stated judgment of the Court, we can imply that the rights and freedoms enshrined **in Section I of the Convention have the force of direct applicability among the Council of Europe member states**.

The agreements and relevant documents of the European Union are noteworthy as well. In **1963 Luxemburg's Court of Justice adopted a decision concerning Van Gend en Loos, in which the Court specified that Article 12 of the Treaty Establishing the European Economic Community must be interpreted as producing direct effects**. Later, this position was repeatedly reconfirmed by the Court of Justice and developed, and because of it the relevant

Treaties of the European Union can be considered directly applicable. Thus, the EU Charter of Fundamental Rights can be considered in that list of documents as well. It should also be noted, that Article 288 of the 2007 **Treaty on the Functioning of the European Union** specifies, that the regulations of EU shall have **general application and they are binding in their entirety and directly applicable in all Member States**. So, the rights enshrined in EU treaties (agreements), as well as in the adopted regulations, are directly applicable for member states.

The general conclusion is, that in national law and in international law, the assurance of the direct applicability of human rights is considered as the most important condition for safeguarding the rule of law. The problem is, how to ensure it.

This issue was given specific importance, in the process of drafting the Concept Paper of Constitutional Reforms in Armenia. The thing is, that in all countries, where on constitutional level, the classical fundamental rights and the social, economic, cultural rights are not separated, the result of it is that the requirement of implementation of direct applicability of fundamental rights is put under question. As a rule, basic social rights and rights to freedom in terms of the structural nature are absolutely different from each other. Basic rights to freedom, firstly, require from the State to abstain from interference into these rights, while most of the social basic rights, just the contrary, require positive actions of the State for the fulfillment of those rights.

The constitutional solutions require the separation of social fundamental rights and the states aims, based on the requirements of the principle of legal certainty. All provisions which concern the social sphere, which oblige only the legislature and the executive should be formulated as aims of the states policy, as these provisions are not direct legal requirements of a person, and include only aims, which the state should fulfill (in the limits of its available resources). Unlike the fundamental rights, the aims of the state are only objective-legal provisions and do not give rise to subjective rights.

At the same time, it has to be noted, that there are numerous fundamental rights which are related to the social sphere which are directly applicable (i.e. right to freedom to choose his/her occupation, the right to strike of employees) and which can be protected by the way of constitutional justice as well.

The risk of enshrining “classical” and social basic rights without any distinction is, on the one hand, that the strictly binding nature of the “classical” basic rights may give rise to frustrated expectations also in the case of social basic rights, whereas, on the other hand - just the contrary - a less binding nature typical to social basic rights may mitigate the strict requirements set in respect of “classical” basic rights.

One of the main solutions to this issue is the demarcation of “classical” fundamental rights on one hand, and on the other, the legislative guarantees and aims of the state in social sphere on the other hand. Such demarcation gives the opportunity to specify all the fundamental rights based on the direct applicability of which a person will be able to protect his/her constitutional rights, including through individual constitutional complaint.

The above-mentioned clarifications are also important in the aspect of limitation of constitutional rights. Considering the multiplicity of legitimate interests, which can be necessary for limitation of fundamental rights, the list of those requirements cannot be exhaustive. However, the Constitution must at least fix the requirements, which have universal recognition in contemporary constitutional law, and also in the first part of Article 51 of the EU Charter of Fundamental Rights. They include the precise fixation of the principles of proportionality, certainty and inviolability of rights. At the same, the constitution should specify special requirement for law regulating fundamental rights, the aim of which should be the creation of such prerequisites which would guarantee the effective operation of fundamental rights.

The rule of law, being the essence of the rule-of-law state, implies that:

- Human rights must be constitutionally stipulated, guaranteed by law, as well as ensured and protected by adequate structural solutions;
- The principle of equality of everyone before the legal law must be respected and guaranteed;
- Laws and other legal acts must be in conformity with the principle of legal certainty, must be predictable, clear and free from gaps and ambiguities;
- The administration of power must be hinged on the guaranteeing the harmonization of functions and vested powers;
- The principle of legitimacy must underlie the administration of public authority;
- The principle of prohibition of arbitrariness must be guaranteed and the extent of discretion of the public authorities must be clarified;
- The State must bear a positive obligation in respect of guaranteeing, ensuring and protecting rights and must assume adequate public-legal responsibility;
- Any interference with fundamental rights and any action of the authorities must derive from the principle of proportionality;
- There must be necessary mechanisms for effective solution of legal disputes exclusively through legal measures;
- The justice must be independent and impartial.

Guaranteeing the principle of rule of law implies the simultaneous existence of all these interdependent and complementary legal conditions **and the assurance of constitutional guarantees required therefore.**

The aforementioned approaches also derive from the positions presented in Resolution No 1594 (2007) of the Parliamentary Assembly of the Council of Europe regarding the rule of law, descriptive document CM (2008)170 of the Committee of Ministers of the Council of Europe as of 21 November 2008 and CDL-AD (2011)003rev. Report of the Venice Commission of the Council of Europe as of 4 April 2011 and the provi-

sions of the UN Resolution on Rule of Law adopted on 24 September 2012. The results of the discussions held at the forum on “Rule of Law as a Practical Concept” (London, 2 March 2012) held within the scope of the presidency of the United Kingdom in the Committee of Ministers of the Council of Europe and the forum on “European Standards of Rule of Law and the Limits of Discretion of National Authorities” (Yerevan, 3-4 July 2013) held within the scope of the presidency of the Republic of Armenia in the Committee of Ministers of the Council of Europe, are also taken into account.

In practical terms rule of law exists to the extent that the legitimacy of the authorities hinged on law is not at risk, laws are legitimate and derive from objective preconditions, and the judiciary is independent and impartial.

The Universal Declaration of Human Rights states, “the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”. It also stresses, that “all human beings are born free and equal in dignity and rights”.

The human dignity is the highest, self-sufficient value and submits proportionate claims towards manifestation of relevant public morality and humanism. A humane legal system does not imply only the existence of necessary subjective moral qualities of separate members of society. The most important thing is the existence of the adequate environment for their manifestation, formation of such background, in which every individual, authority, and the society as a whole will have the same axiological landmarks that build up upon the principle of the rule of law.

In real life, the Constitution should become the incarnation of social agreement regarding precisely those fundamental values which, in conditions of specific social reality are the moral foundation and the essence of the social behavior of an individual as well as the main characteristics of the social behavior of the authorities (defined by Kant, they are the moral law of their existence).

The history of constitutional development by itself is a history of self-knowledge of the society, history **of conscious being, and meaningful existence in time.**

The thousands year old words of Solon, the father of Athenian democracy, stated that Constitutions must be formulated considering the people and the time they are intended for: people with their perception of values, time given the level of its understanding.

In this context, what is the real situation regarding constitutional reality in our countries. The analysis shows that in most countries there is an underlined presence of crisis of constitutionalism, low level of constitutional and political ethics, deformation of constitutional development processes.

The typical features of social realities in many countries have become:

- High level of corruption;
- General apathy and discontent;
- Low level of political and electoral culture;
- Not appropriate level of transparency of powers;
- Absence of systemic integrity and safeguarding in the process of assuring protection of human rights;
- Distrust among citizens regarding the judicial system etc.

All the above leads to accumulation of public negative energy, which after collecting its critical mass, brings to social explosions. Such exact situation is formed in contemporary time in many regions of the world.

For avoiding such situations, social explosions and various “color revolutions”, it is necessary to evaluate objectively the situation and conduct equivalent preventive measures to overcome the deficit of constitutionalism.

To analyse the real situation, it is possible to refer to the results of the World Justice Project regarding the index of rule of law for the year 2015⁴⁷⁷.

⁴⁷⁷ See World Justice Project, Rule of Law Index 2015. The Index’s conceptual framework and methodology were developed by Mark D. Agrast, Juan Carlos Botero, and Alejandro Ponce. E-mail: aponce@worldjusticeproject.org

Only several summarized results will be presented. Firstly, the study covers 102 countries.

Second, to reveal general picture of evaluating the level of rule of law, 535 parameters were taken into account.

Third, all those parameters were grouped into the following eight groups:

- Level of separation of powers
- Level of corruption
- Protection of fundamental rights
- Transparency of administration
- Level of security
- Law-enforcement practice
- Criminal justice
- Civil justice

A short comparative analysis concerning some of the mentioned parameters will be presented.

Based on the conducted research in the year 2015, the summarizing index on rule of law had the highest level in Scandinavian countries – 85-87%.

In USA, the mentioned index constitutes 73% and the country is situated at the 19th place. From 102 countries in 62 the mentioned index constitutes 50% and lower. It should be taken into consideration, that such index is considered unsatisfactory result and is evidence of a dangerous deficit of constitutionalism.

What picture has been formed in relation to corruption? From 102 countries in 57 countries the situation is evaluated as unsatisfactory, the level of corruption is higher than 50%.

The most successful situation is in Denmark, Norway, Sweden, Finland and Singapore, where the level of corruption constitutes from 4 to 10%.

Based on what indicators is the following picture revealed? It is determined by considering 68 parameters, which are grouped into four generalized groups.

How much do state officials use their functions for personal gain?

- In the executive power;
- In the judicial system;
- In the army and police;
- In the legislative power.

The existing picture in 57 countries indicates the presence of social metastasis and deformation of constitutional values in real life.

Let us bring several other summarizations.

For example, regarding the rate of human rights protection the situation is the best in Finland, Denmark, Norway, Sweden as well as in Austria - 87-91%.

The United States holds the 26th place out of 102 countries and the degree of human rights protection is estimated at 73%. In countries of new democracy the level of the given indicator is estimated at below 50%.

Not only the given numbers, but also the results of several other researches convincingly show that modern challenges of ensuring the supremacy of the Constitution and establishing real constitutionalism in our countries are especially due to the low level of realization of the principle of rule of law, which in its turn implies the nature of urgent constitutional-legal and institutional steps, so that:

- a) the principle of the rule of law becomes the core of the social behavior of every individual
- b) political behavior of political institutions should be anchored on the principle of the rule of law
- c) the principle of rule of law would decide the nature and content of public behavior of the authorities.

In reality, only with this approach, it is possible to ensure the supremacy of the Constitution and establish real constitutionalism in our countries.

6.7. CONSTITUTIONAL MONITORING FOR ENSURING FUNCTIONAL BALANCE OF POWER

Along with the methodological reflection on the issue, we consider it necessary to review certain aspects of conducting constitutional diagnostics that pertain to **maintaining, in dynamics, of the functional equilibrium of power**. This largely depends on functional constitutional powers, checks and balances at the disposal of the institutes of power in maintaining constitutional functional equilibrium in the real life, and also on the real capacity of the civil society to exercise the general social potential of restricting and limiting authority. Professor Stephen Holmes has beautifully described the function of constitutional equilibrium, stating that: “the US Constitution, enacted in the 18th century, is based on three basic principles that remain valid to this day: 1) all people, including rulers, err; 2) all people, especially the political elite are loathing to admit their mistakes, and: 3) all people, especially the political elite currently in opposition, are delighted to point out the mistakes and false steps of their rivals from bureaucratic and political circles. The Constitution tries to make those principles serve to their cause, basically it’s a system that assigns the right to make mistakes to one branch and the right to correct mistakes to the other two branches (as well as to the free press and to the society)⁴⁷⁸.”

Upon the emergence of the first constitutions the fundamental objective of constitutional architecture was and still remains to ensure the functional separation and the balanced nature of state power. As emphasized in Article 16 of the 1789 French Declaration of the Rights of Man and Citizen **“A society in which the observance of the law is not assured, nor the separation of powers defined, has no Constitution at all.”**

Present-day liberal democracy is also based on three whales: the supremacy of law, the principle of the separation of powers and sovereignty of the people. Their balanced expression in social practice determines the nature of constitutionalism in a society.

⁴⁷⁸ See Стивен Холмс. Конституции и конституционализм //Сравнительное конституционное обозрение, 2012, N3(88). - p.68.

One also needs to acknowledge that among dozens of various doctrinal approaches to specific constitutional models of separation of powers the only unanimously endorsed and incontestable one boils down to the theoretical admission of the need for separating and balancing powers. The specific approaches, forms and methods and, moreover, practical solutions vary distinctively in each constitutional system.

We must admit that one of the highest achievements of the American constitutionalism is that in the Fundamental Law of the US, the doctrine of separation of powers has acquired systemic completeness and, with the introduction of the system of checks and balances it afforded the Constitution a quality of dynamic regulation of social relations, transferred the constitutional system onto the tracks of developing state of equilibrium.

How does one resolve the issue of separation and equilibrium of powers in our days, considering the recently emerged global objective reality of specialized state institutions, which are called upon to guarantee the supremacy and direct applicability of the Constitution?

We are convinced that, by the end of the day, nothing of essence has changed, and the American doctrine of constitutional separation and balancing of powers remains fully viable these days as well. The main requirements towards the effective functioning of this system, in our opinion, are embodied in the following prerequisites:

Firstly, the separation of powers is first and foremost a functional, rather than institutional process, which often becomes a matter of confusion on the level of constitutional solutions. Certain separating constitutional-legal functions may be implemented by different constitutional institutions.

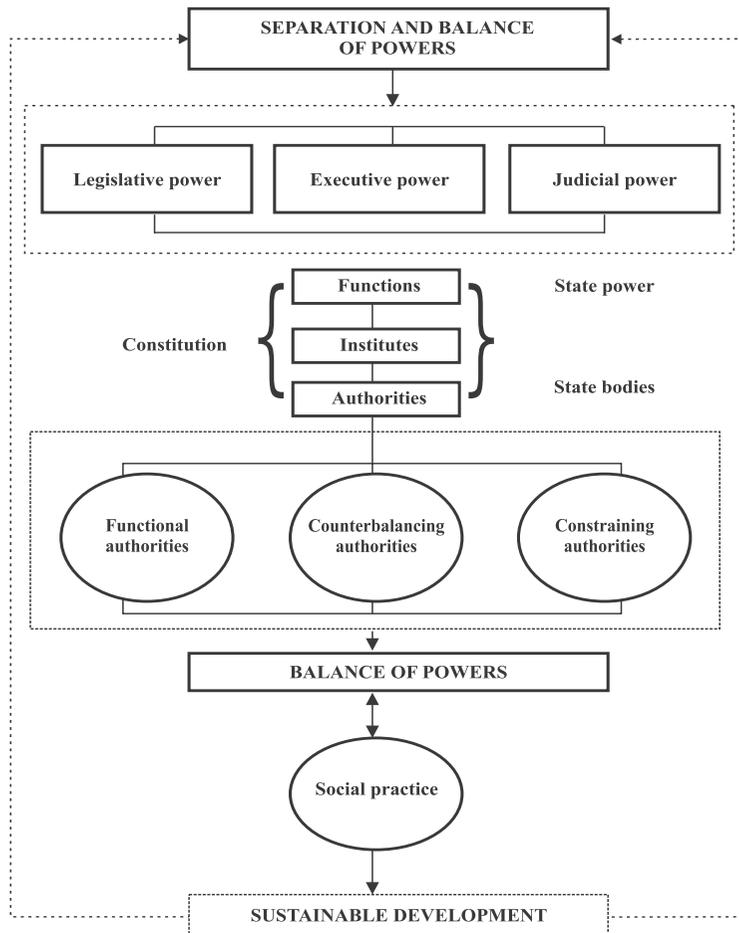
Secondly, the main objective of constitutional architecture is to ensure, first and foremost, the balanced nature of the system **function-institute-powers**.

Thirdly, the question of clearly-cut separation of functional, checking and balancing powers of constitutional institutes of government and ensuring their optimal equilibrium is of principal importance.

Fourthly, an urgent task of contemporary constitutionalism is the introduction of viable and effectively functioning mechanism of intra-constitutional self-defense, in order to guarantee timely intercepts, assessment and redress of functional constitutional balance in dynamics. This is essentially the main objective of constitutional diagnostics and the goal of constitutional review in general.

Schematically such a system has the following depiction:

THE MAIN GOAL OF CONSTITUTIONAL DEVELOPMENTS



The following represent the main criteria-worthy features that guarantee the conditions mentioned above:

1. ensuring the functional independence of branches of power;
2. guaranteeing the completeness and functional adequacy of the powers of constitutional institutes;
3. ensuring the continuity and inviolability of the functioning of constitutional balance in dynamics, in real social life, which, in turn, implies the impermissibility of the so-called alienation of the Constitution from actual life.

The study of constitutions of many countries of new democracy demonstrates that formally the rule-of-law state, sovereignty of the people, rule of law, human dignity, freedom, constitutional democracy, separation of powers, social accord, equality, tolerance, pluralism, solidarity and other commonly recognized values have become, in their organic unity, the basis for constitutional solutions at their level. However, the actual reality in these countries is different, it ended up in another dimension. In most of these countries the self-sufficiency of the Constitution is not fully ensured, and **there exists a significant rupture between basic constitutional values and principles and the social reality**. The latter is characterized by a low level of constitutional culture, systemic incompleteness of the mechanisms to assure the rule of law, the existence of deformed, intrinsically contradictory legal system, lack of a common value system based understanding of social bearings for the society's development.

One may illustrate this with many examples. A structural analysis of the constitutions themselves may provide one such insight. In our opinion, from the point of view of functional balance, the Constitution of Armenia, for example, is illogical and inconsistent. The chapters on foundations of the constitutional order and human rights are followed by those on the constitutional institutes of the President, the Parliament, the Government and, alongside these, the judiciary is singled out in a separate chapter. This not only violates the structural logic of the Constitution itself, but the functional system of the

judiciary in it includes institutes that do not administer justice. Such a structural inconsistency also exists in the Constitutions of Bolivia, Greece⁴⁷⁹, Bulgaria, Croatia, Georgia, Uzbekistan, the Russian Federation, Japan and many other countries. Alongside this there also exist several countries, which not only constitutionally enshrined a clear functional structure of the separation of powers, but devoted a stand-alone article or chapter of the Constitution to spelling out the nature of the separation of powers. A good example is Article 49, Chapter one, Title three of the Constitution of Mexico, which states that the supreme power of the Federation is divided, for its exercise, into legislative, executive, and judicial branches. Two or more of these powers shall never be united in one single person or corporation, nor shall the legislative power be vested in one individual except in the case of extraordinary powers granted to the Executive, in accordance with the provisions of Article 29. In no other case, except for those provided by Paragraph 2, Article 131, the executive may be given extraordinary powers of promulgating laws.

In the event of a clearly defined constitutional language on the essence of the separation of powers the safeguards for the practical realization of this doctrine significantly increase. We maintain that, notwithstanding the selected form of governance and the level of development of constitutionalism, a better choice was made by those countries, which based their constitutional structure on either the institutional approach (Italy, Portugal, Belgium, Poland and others), or the functional one (Austria, Brazil, Slovakia and others).

Nevertheless, for many countries the main problem is in the existing antagonism between the Constitution and the general legal reality.

We believe that the following are common negative features of systemic transformation in countries of transition:

⁴⁷⁹ One should keep in mind that Article 26 of the Greek Constitution stipulates that the lawmaking functions shall be implemented by the Parliament and the President of the Republic, the executive functions shall be implemented by the President of the Republic and the Government, and the judicial function shall be implemented by the courts, the rulings of which shall be enforced in the name of the Greek people.

- volatility and uncertainty in the social development and the deepening of the crisis of confidence;
- serious shortfalls and drawbacks in the implementation of value-system transformations;
- inadequacy of the formation of the civil society;
- disparity between the social bearings of the public at large and constitutionally proclaimed democratic-legal values, that is the existence of a significant deficit of constitutionalism;
- low level of functional and institutional viability of the institutes of power;
- antagonism between politics and the constitutionality of decisions that are taken;
- because of all the above, accumulation of certain negative social energy, which at times may result in a multicolored social-political explosion with inevitable tragic consequences.

The constitutionalism as a basis of civil society may not develop progressively in conditions of weak viability of democratic state structures and deformations of political institutes. As rightfully mentioned by Daniel Smilov, in conditions of social transformation quasi-constitutionalism and intensive propagation of political populism prevail⁴⁸⁰.

One of the characteristic features of constitutional deformation in countries of new democracy is the insufficient independence of the judiciary power. As noted by Stephen Holmes in the paper quoted above, already Montesquieu had stated that a king acting as judge and this violating the constitutional separation of the executive from the judiciary, could easily fall prey to bad faith witnesses and other participants of litigation attempting to subject public authority to unlawful private or corporate interests: "The laws are the eye of the prince; by them he sees what would otherwise escape his observation. Should he attempt the

⁴⁸⁰ See Даниель Смилов. Конфликт конституционализма и демократии в Восточной Европе: за пределами парадигмы переходного периода // Сравнительное конституционное обозрение, N4(89).2012. - pp. 29-44.

function of a judge, he would not then labor for himself, but for impos-
tors, whose aim is to deceive him⁴⁸¹.”

Another extreme peril lies in the total oligarchization of power. I
have entitled one of my articles, written in 2006, “The Perils of Corporate
Democracy⁴⁸².” I stated in it that “corporate democracy” (oligarchization
of all branches of power) poses a bigger hazard for the social system than
the totalitarian system, which nevertheless has its own rules however
irrational it may be in essence. It is at least not built on constitutional
values that are distorted in social practice.

The main peril of corporate democracy is exactly in that it consis-
tently deforms democratic values, which undergo mutations and eventu-
ally lose their significance, not only become unacceptable for the society,
but downright dangerous. This is further exacerbated by the low level of
legal awareness of the public, grave social conditions, high level of unem-
ployment, etc. In conditions of shadow economic relations, the individual
appears not as a full contractual subject endowed with natural rights, but
as a medium of production, dependent on the will and alms of the employ-
er. This quality, a feature of feudal relations, in conditions of quasi-consti-
tutionalism acquires a new form and tint through democratic packaging.

One of the biggest perils of corporate democracy is also the fact
that mutated values, in conditions of failure of the immune system of
the society, become reproducible. This is more dangerous phase, when
irrational developments acquire a progressive feature and rule out the
restoration of the system’s viability through the evolutionary path, while
genuine values are no longer claimed. This is taking place, to varying
degrees, in the countries where political institutes are formed along the
principles of corporate democracy, where, in parallel with the shadow
economy, political structures also succumb to the shadows, where the

⁴⁸¹ See Montesquieu. *Spirit of the Laws* / Trans. by Th. Nugent. New York: Hafner
Press, 1975. Vol. I. Bk. 6. Ch. 4. p. 73.

⁴⁸² See *Международный вестник “Конституционное правосудие”*, 2006г., N3. -
pp. 38-46. The reflections to the given article are also worth mentioning /See, in
particular, Бондарь Н.С. Конституционная модернизация российской государ-
ственности: в свете практики конституционного правосудия. М., 2014.-pp. 107
and 130/.

judiciary system is not an independent branch of power, but rather a
lever in the hands of the authorities, where the press from the means of
the freedom of speech transforms to an instrument of political terror. The
total oligarchization of the authorities leads to the total criminalization of
the social system, especially in the cases when presidents and other high
officials become the richest people in the state.

**The main way to avoid these perils would be to ensure real
separation of powers, excluding the merger of political, economic
and administrative authorities, creating the necessary prerequi-
sites for the natural maturing of society’s political and civic struc-
tures.** James Madison has stated a long time ago that the constitutional
equilibrium of conflicting and competing interests may restrain authori-
ties and guarantee freedom⁴⁸³.

Current trends in global and European constitutional develop-
ments allow to make several principal generalizations, among which the
following merit particular attention:

- 1) democracy, which has no alternative as a value of social exis-
tence, dictates its own criteria and approaches to legal regula-
tion of social relations;
- 2) constitutional democracy exists there and to that extent, where
and to which extent there prevails real separation and balance
of powers, optimal decentralization of political, economic and
administrative powers, independent judiciary system, free me-
dia, guaranteed free and fair electoral processes, authorities
controlled by the civil society;
- 3) establishment of constitutionalism without reliable guaran-
tees of the supremacy of the Constitution remains in the realm
of wishful thinking;
- 4) ensuring the rule of law entails due consideration of national
security issues and the need for certain harmony between in-
dividual and public interest;

⁴⁸³ See Рассел Г. Конституционализм: опыт Америки и других стран - [http://www.
infousa.ru/government/dmpaper2.htm](http://www.infousa.ru/government/dmpaper2.htm) (09.03.2009).

- 5) constitutional development processes may not be viewed without a proper systemic assessment of the growing role of global and regional legal systems;
- 6) without the creation of necessary and sufficient prerequisites and a certain value-based environment of constitutional democracy, with a profound and comprehensive evaluation of specific features of systems in transition, it would be impossible to overcome the momentum of systemic deformations and guarantee real constitutional development through the so-called "democracy import."

Currently one of the axial issues in transitology is how to consider the above trends as applied to social systems in transformation, so that constitutional development would provide a basis for society's progress, rather than fall prey to momentary political interest. In new democracies, the main expressions of irrational processes in constitutional practice are the following:

- distorted perceptions on democracy and the value system of the rule-of-law state⁴⁸⁴;
- abuse of said values as an excuse to enforce the will of the authorities;
- efforts to turn institutes of power, the press and the media into levers of the authorities;
- merger of politics, power and the shadow economy and, on the basis thereof, transformation of corruption into the authorities' main capital on the one hand, and, on the other, politicization of the shadow economy;
- formation of a new and most dangerous environment of limiting the rights and freedoms of man and citizen through the emergence of an atmosphere of fear, distrust, despair and impunity, the rooting of political and bureaucratic cynicism presented in democratic packaging.

⁴⁸⁴ This is also attested to by such skewed notions, most recently used by some politicians and scholars, as "transitional democracy," "national democracy," "partial democracy," etc

All the above is not just limited to specific acts, but is pervading into all corners of power, acquiring lawmaking and structured properties, engulfing the entire state machinery.

The perils of oligarchization is what already Aristotle had eloquently and convincingly laid out in his typology of oligarchy⁴⁸⁵:

*“**First type** - when moderate rather than substantial property is in the hands of the majority, thus the proprietors enjoy access to state governance, and since there are large numbers of such people, the ultimate power is in the hands of the law, not people;*

***Second type** of oligarchy - the number of people with property is less than in the first case, whereas their assets are larger and, possessing more power, these proprietors present bigger claims, hence they are the ones who pick from among other citizens those who are granted access to governance, nevertheless not being powerful enough to rule without laws, they set laws to their convenience;*

***Third type** - if tensions increase, that is the numbers of proprietors dwindle, while their assets grow, the third type of oligarchy emerges: all public offices concentrate in the hands of the proprietors, moreover, the law prescribes that their offspring inherit the office;*

***Fourth type** - when their assets grow beyond every proportion and they acquire a whole mass of associates, dynasties emerge, close to a monarchy, individual people rule instead of the law, and this is the type of oligarchy”.*

After several millennia, in many post-communist countries these processes are replicated under the guise of constitutional democracy. In some countries, supreme power is already in the hands of individuals, rather than the law. Those who concentrate the main economic, political and administrative power in their hands, become or attain the status of rulers. The social hazard of this situation is that, firstly, the potential of democratic change in the society is abused for the purpose such mergers. And, secondly, these processes unfold upon the existence

⁴⁸⁵ See Аристотель. Этика. Политика. Риторика. Поэтика. Категории. - Мн.: Литература, 1998. - p. 561 (in title «Politics», book four).

of a Constitution, which proclaims commitment to democracy, rule of law, sovereignty of the people and other fundamental values, which, in conditions of distortions of the principle of separation of powers and the establishment of “corporate democracy” do completely degrade in actual life.

Preventing such a merger is easier than overriding it. The latter requires tremendous efforts, time and systemic restoration of degraded realities. To avert such a situation, the main goal of successful social transformation should be the persistent constitutionalization of social relations and overcoming conflicts between the Constitution, the legal system and its implementation practice. Only this may secure the necessary viability of the system of separation and balance of powers, guarantee the desired stability and dynamism of social development. We believe that this may be accomplished **through the introduction of continually conducted systemic constitutional monitoring and diagnostics.**

6.8. CONSTITUTIONAL MONITORING AND CONSTITUTIONAL RESPONSIBILITY

The effectiveness of the functioning of a systemic constitutional monitoring largely depends on the presence of an efficient system of constitutional responsibility.

One of the consequences of constitutional monitoring is constitutional responsibility, which has both a preventive role and a mission of restoration and guarantee of constitutional balance.

The constitutional responsibility differs from the other types of responsibilities based on main characteristics (features) that:

1. Does not imply direct criminal-legal punitive consequences;
2. Concerns the field of public law, with peculiarities derived from it;
3. In its essence, it is classified as: constitutional, administrative, criminal responsibility (in separate cases of state practice, for example in Portugal, it also includes civil responsibility);

4. The constitutional responsibility cannot be efficient without guaranteeing the direct applicability of fundamental human rights enshrined in the Constitution, and the latter is considered a main criteria regarding the presence (or absence) of constitutional culture⁴⁸⁶;
5. The constitutional responsibility does not only relate to norms of the Constitution which regulate concrete legal relations, but also to the fundamental principles and values of the Constitution. The political and public behaviour of those bearing functions of state power, also have to be adequate to the values and fundamental principles of the Constitution;
6. The constitutional responsibility implies the states responsibility for conducting its positive duties and responsibility for the result of the exercise of functions of those bearing functions of state power (institute or individual);
7. The main criteria for constitutional responsibility, is the guaranteeing of the constitutional principle of proportionality, which should guarantee the proportionality of the act and responsibility.

The question of constitutional responsibility of public authority in international constitutional practice, during the last decades has become most pressing. This is evidenced by the amendment in the Constitution of France and the enshrinement of Chapter 10 (Articles 68-1, 68-2 and 68-3) in the year 1993, also Articles 198-201 of the new Constitution of Poland adopted on April 2, 1997, Articles 22 and 117 of the Constitution of Portugal, Articles 85 and 86 of the Constitution of Greece, Paragraph 101 of the Constitution of Finland, Article 108 of the Constitution of Romania, Article 111 of the Constitution of Croatia et cetera.

⁴⁸⁶ See Гаджиев Г.А., Конституционные основы юридической ответственности и конституционно-правовая ответственность. // Журнал российского права N 1, 2014, page 10.

The international constitutional practice shows, that the material criteria for responsibility of bodies of public authority and their officials regarding the fulfillment of official duties refer to civil, constitutional and criminal responsibility. In its turn responsibility, can be collective or individual. If individual responsibility can be political, constitutional and criminal, then collective responsibility can only be political.

The international practice also shows, that the legal regulation of constitutional responsibility has to be enshrined at the level of the Main law, by also clarifying:

- a) the scope of individuals who can be considered subjects of such responsibility
- b) the scope of subjects who can raise the question of such responsibility
- c) the constitutional institute which is authorized to examine such case and make decision.

These questions are most thoroughly regulated especially in the Constitution of Poland. First, Articles 199-201 of the Constitution provide the order of formation and operation of Tribunal of State. While article 198 clarifies the scope of subjects accountable for constitutional responsibility to the Tribunal of State. Among the latter are, the President of the Republic, the Prime Minister and members of the Council of Ministers, the President of the National Bank of Poland, the President of the Supreme Chamber of Control, members of the National Council of Radio Broadcasting and Television, persons to whom the Prime Minister has granted powers of management over a ministry, and the Commander-in-Chief of the Armed Forces.

Accountable for constitutional responsibility to the Tribunal of State are also Deputies, in cases when they violate the incompatibility requirement specified in Article 107 of the Constitution.

Constitutional responsibility of the President of the Republic refers to those grounds, when in cases of infringement of the Constitution or statute, commission of a crime, the National Assembly on the motion of at least 140 members (1/4) of the Assembly and by the 2/3 of the votes

can bring an indictment against the President and present it before the Tribunal of State (article 145, Constitution of Poland). The Tribunal of State can make a judgment on dismissal of the President of the Republic from office.

The Prime Minister, members of the Council of Ministers, and other state officials shall be accountable to the Tribunal of State for an infringement of the Constitution or statutes, as well as for the commission of a crime connected with the duties of his office (article 156). The Sejm by majority of three-fifths of the statutory number of Deputies makes a decision to refer a case to the Tribunal of State, based on the motion of the President of the Republic or at least 115 Deputies.

The details on application to the Tribunal of State and the mode of proceedings before it, shall be specified by law. The law also specifies, that the application is presented beforehand to the Commission on Constitutional responsibility of the Sejm for review.

In all cases, when the responsibility is conditioned by violation of the constitutional requirement of incompatibility, based on the judgment of the Tribunal of State the person can be dismissed or deprived of mandate.

When the state official had committed a crime or an administrative violation as a result of action or inaction while acting ex officio, then the question of criminal responsibility can also be raised.

The Constitution specifically defines the order of formation of the Tribunal of State (Article 199) according to which, the tribunal shall be composed of a chairperson, two deputy chairpersons and 16 members. The latter are elected by the Sejm for the current term of office of the Sejm. Members of the tribunal cannot be Deputies or Senators. The deputy chairpersons of the Tribunal and at least one half of the members of the Tribunal shall possess the qualifications required to hold the office of judge.

The First President of the Supreme Court shall be chairperson of the Tribunal of State.

In contrast to the Polish model, The Court of Justice of the Republic, which exercises the same mission, is formed by another principle. It consists of 15 judges, 12 of which are parliamentarians, who are equally elected from the National Assembly and the Senate. Three members are from the Court of Cassation, one of which is the chairperson of the Court of Justice of the Republic.

Any person, who finds that there is a crime or an administrative violation in the actions of the members of the government, can apply to the Petitions Commission. The latter after reviewing the complaint, makes a decision either to reject the complaint or apply to the Chief Public Prosecutor for referral to the Court of Justice of the Republic. The details are regulated by an organic law.

The Constitution of Portugal states (article 117), that political office holders shall be politically, civilly and criminally liable for their actions and inactions in the exercise of their functions. Such is also considered to be the non compliance with the incompatibility requirement.

In Greece, based in the manner prescribed by law, cases regarding constitutional responsibility are examined by courts established for that purpose, the 12 members of which are elected by the parliament from judges, and the chairperson is ex officio the President of Areopagus (Court of Cassation).

In Finland, according to Sections 101 and 113 of the Constitution, before the High Court of Impeachment for matters of unlawful conduct the President, Members of the Government, Chancellor of Justice, members of the Supreme Court and the Supreme Administrative Court are held responsible.

The President of the High Court is ex officio the President of the Supreme Court. The President of the Supreme Administrative Court, the three most senior-ranking Presidents of the Courts of Appeal and five members elected by the Parliament for a term of four years.

The brief analysis of international practice shows, that in all other countries the solution to the issue of constitutional responsibility of bodies of public authority also implies a specific constitutional regulation.

On the constitutional level the grounds for responsibility connected with the official duties of various constitutional institutes and state officials, also the order of formation and powers of the equivalent court have to be specifically defined.

The constitutional solutions of public-legal responsibility of state officials can be limited within the definition of procedure of constitutional responsibility presented below.

On the issues concerning their official duties, based on the grounds and manner prescribed by the Constitution and law, constitutional responsibility can be heard by:

- 1) The President of the Republic, when a charge was brought to the Court dealing with questions of constitutional responsibility by the National Assembly by at least two thirds of the total number of votes of the Deputies upon the recommendation of one fourth of the Deputies, in cases of intentional violation of the Constitution or the Law, or in cases of grave crimes. The given Court can decide on dismissal of the President of the Republic from office.
- 2) Deputies, in cases of violation of the incompatibility requirement provided by the Constitution, as well as in cases of unjustified absence from more than half of floor voting during a single regular session.
- 3) Prime-minister, members of the government, Chairman of the Central Bank, Chairman of the Control Chamber, members of autonomous specialized commissions, in cases of violation of Constitution or Law, as well as in cases of crimes related with their official positions, based on the application of the President of the Republic or based on a decision by more than half of the total number of votes by the Deputies of the National Assembly.

In all cases, when the liability relates to violation of the incompatibility requirement provided by the Constitution, the person may be dismissed from office or deprived of the mandate.

Regardless the organizational-structural type of the formation of the body of constitutional responsibility, it has to have constitutional status and such powers, that as a result of constitutional monitoring constitutional responsibility would be inevitable.

The presence of such responsibility is also guarantee for continuously renewable legitimacy for state power. Moreover, the watershed of ““Legitimacy”” and the power’s ““legality”” is , that if in the first case, the condition of legality of power is in the foreground, whereat in the second case besides being legal, the power must enjoy necessary and sufficient public trust.

The international practice shows, that the rapid changes in public life, also substantially affect the changes of public opinion regarding bearieres of power. The condition of population’s trust regarding the presidents of USA and France in the years 2014-2015, can serve as typical examples. In France the level of public trust in 2014, dropped down close to the level of 12%.

What are the reasons for such condition and what constitutional-legal conclusions can be made?

Such conditions are due to the inadequate response of the power’s institutes to the active changes taking place in social relations. Any issue of social nature is conditioned by certain factors, by the character and impact of its origin, inevitable consequences, and imperatives of its exclusion or mitigation.

The question is, to what extent was the bearer of power in the scope of its functions able to conduct adequate steps, by not permitting the emergence of accumulation of negative social energy. The social cataclysms have their evolution. An issue emerges and a solution to it is not given in a proper and timely manner. Inevitably it is followed by a crisis. The latter in case of certain accumulation of social negative energy can collect a critical mass, in which case explosions and destructions are inevitable. The main mission of the state is the timely identification and proper solution of issues and prevention of probable crises. The best method for it is enrooting of constitutional monitoring, which for its part is a fundamental guarantee for constitutionalization of specific legal relations.

INSTEAD OF A CONCLUSION:

ROLE OF THE RULE OF LAW CHECKLIST IN THE SYSTEM OF CONSTITUTIONAL MONITORING /CONCEPTUAL APPROACHES/

The Report⁴⁸⁷ on the “Rule of Law Checklist” was adopted at the 106th Plenary Session of the Venice Commission of the Council of Europe which was held this year on March 11-12, 2016. The statement of the President of the Constitutional Court of the Republic of Armenia on the concept of constitutional monitoring was presented at the same Session. Emphasizing the urgency of the topic and its direct concerns with the new approaches of the issue of the rule of law, it became important to once again touch upon the given issue at the 107th Plenary Session and examine possible conceptual approaches to convene a Pan-European conference on the issue of constitutional monitoring⁴⁸⁸.

In June 2016, within the framework of the 107th Plenary Session the Scientific Council of the Venice Commission examined the given issue based on the report of the President of the Constitutional Court of the Republic of Armenia on the conceptual approaches to convene a Pan-European conference. The Scientific Council stressed the importance to convene such conference and the participation of the experts of the Commission in the discussions. The statement on the Council’s conclusion was presented at the Plenary Session of the Commission.

It is obvious that the raised issue is more than urgent and it has received overall European appreciation.

⁴⁸⁷ See Report CDL-AD(2016)007 of the European Commission “Democracy through Law”, Strasbourg, 18 March 2016

⁴⁸⁸ Yerevan, 20-23. 10. 2016.

Within the framework of this publication, it is important to present the essence of the issue briefly and make several conclusions of conceptual significance⁴⁸⁹.

Which are the initial theses on which our conceptual approaches are based?

1. Many disasters, which the manhood faced in the new millennium, such as terrorism, forced migration of thousands of people, non-managed migration, corruption, extreme social stratification, social economic instability, concretion of civil, economic and administrative potential, diverse abuses of human rights, mutilated realization of the principle of the rule of law etc are mainly attributed with the deficit of constitutionalism, are acting as a gap between the axiology of the Constitution, fundamental principles and norms and reality.

2. In the new millennium it becomes more and more evident that the immune system of the human society is not sufficiently viable, and timely revelation, assessment and restoration of constitutional balance is not guaranteed.

3. Functional and institutional resolutions, which guarantee sustainable and dynamic development of the social society, are disharmonic with the new challenges not only in the real life but also at the constitutional level. This is confirmed not only by the results of assessment of the rule of law index in more than hundred countries, but also by the rise and fall of formation of the European Union state.

4. The scientific approaches regarding the solution of the issue are contradicting, and the elaboration of the unified doctrine is too far from being satisfactory. The report on the Rule of Law Checklist adopted at the 106th Plenary Session of the Venice Commission may be considered as crucial, which needs to undergo a long way for implementing it into life.

5. The notions "constitutionalism," "constitutional culture," "constitutional diagnosis," "constitutional monitoring" and other notions of pivotal essence, their interrelations and interdependence are rather different and, thus, the functional and commonly acknowledged solutions

for revelation, assessment and overcoming each violation of the constitutional balance in the country have not been found yet.

6. The systemic solution of the legal issues often creates grounds for the intimidations dictated by the political advisability which brings to further complication of the disease that affects the public organism when the operative intervention is needed.

7. The transition from authoritarianism to democracy is not conditioned just by new constitutional or legal solutions. First and foremost, these solutions per se should have new systemic quality and entirety. But the main issue is what changes they entail in real life. The transformation will continue so long as the index of rule of law has obtained a level higher than the critical one. The main criterion for the evaluation of the efficiency of transformations can be characterized exceptionally by an adequate increase of the index of rule of law.

8. From the perspective of guaranteeing self-sufficiency of the Constitution and constitutionalism, no equivalent solutions on realization of the potential of direct democracy and guaranteeing the constitutional role of civil society, establishment of the functional institutions of constitutional liability, ensuring of the dynamic balance of the branches of power, making the rule of law the cornerstone of public behavior and for a number of other issues have not been found yet in the states of new democracy.

We consider the following approaches pivotal for the basic notions for answering the question "What to do?"

A/ Despite the numerous features of the notion "**Constitution**" we do consider pivotal that the Constitution is the public consent on fundamental principles, values and rules of existence. Firstly it is the fundamental law of the civil society and must possess equivalent and functional mechanisms for protection and implementation into life. The Constitution, as the fundamental law of coexistence, serves as a warranty and remedy for ensuring the sustainable and dynamic development. And this is possible only in the case when, by the power of the Constitution, the rule of law becomes the grounds for social behavior of the per-

⁴⁸⁹ In detail, see G.G. Harutyunyan, "Constitutional monitoring," Yerevan, 2016

son, political behavior of political institutions of the state and the public behavior of authorities.

B/ In the rule of law state the notion **“constitutional culture”** is formulated as historically formed, sustainable, enriched by the experience, beliefs, imagination, legal perception and legal sense of the generations and entire manhood, which serves as the pivot of the public perception for the social society to define and guarantee the fundamental rules of its democratic and lawful behavior.

The new agenda of the sustainable development initiated by the international society will never come to life if in the international and national relations the necessary and sufficient level of the constitutional culture is ensured based on the principles of constitutionalization of the social life, justice and rule of human rights. On September 2015, the United Nations General Assembly unanimously adopted 17 Sustainable Development Goals and 169 targets (the 2030 Agenda), the implementation of which tends to create such a world where democracy, rule of law and good governance shall become the most important prerequisites for such development.

The obligation of State shall be to “Promote the rule of law at the national and international levels and ensure equal access to justice for all.” And this demands relevant level of constitutional culture.

C/ The notion **“constitutionality”** is defined as an ability **to lead the constitutional life in real life**. By the public consent “constitutionality” is defined as the presence of the fundamental rules of democratic and lawful behaviour, its existence as a living reality in the social life, in the civil behaviour of each individual in the process of implementation of state power established by the public consent. More precisely, **“constitutionalism” is a systemic and knowledgeable value in the public life. It is a general legal principle** of characteristics of social behaviour of the society. That is why the task is not the simple implementation of the Constitution but formation of such a social system, where the Constitution is implemented by each cell of that system as a term of its existence.

In our opinion, existence of constitutionalism firstly is of axiological nature and is linked to realities of the constitutional culture. The constitutionalism is not a mere the evidence of the written constitution but also characteristics of manifestation of constitutional culture, constitutional order and meaningful existence of its essential elements in the real life. **The constitutionalism, as well as the law, is an objective social reality, evidence of the level of civilised coexistence of the social society, which is the guarantee of sustainable and dynamic development of the society**⁴⁹⁰. **The constitutionalism is the characteristic of the essence of mutually agreed existence of the social society, the evidence of its meaningful existence in time, indicator of the level of maturity of social relations and their legal regulation.** The constitutionalism is the ultimate goal of the civilised coexistence which the society must constantly be anxious to achieve.

D/ The notion **“constitutional diagnosis”** constitutes the tools and entire procedure of assessment of constitutionalism in the society, **revealing of concordance of the public relations with the constitutionally envisaged values, principles and norms.** The constitutional diagnosis is necessary first of all for **revealing the real condition, tendencies of development and various distortions of constitutionalism in reality.**

The objects of the constitutional diagnosis are: the public life, constitutionally prescribed condition of functional balance, and, in particular, activity of the bodies of state power.⁴⁹¹

⁴⁹⁰ See G. Harutyunyan, Constitutionalism as a fundamental principle of right in the rule of law state // Constitutional justice, 2012, N 1. - P. 5-16. N. Bondar, The concept of judicial constitutionalism: methodology of research in light of the practice of constitutional justice. See also page 29.

⁴⁹¹ Our approaches on the object of constitutional diagnosis have found wide reflection in the professional literature. In particular, professor N.S. Bondar writes, “as Professor G.G. Harutyunyan mentions in one of his speeches, the constitutional diagnosis of the socio-economic and political processes shall start just from the system of constitutionality” /see. Бондар Н.С. Конституционная модернизация российской государственности: в свете практики конституционного правосудия. М., 2014- С.14/.

The subjects of the constitutional diagnosis are: people as the carrier and source of power, organs of the state administration and local executive power, all institutions of civil society, each individual.

Especially during the period of public changes or in the terms of unsustainable constitutional balance, **the main tasks of constitutional diagnosis are the following:**

- revealing the violated constitutional balance;
- assessment of the character and the form of revealing the violation based on multi-factual assessment of situation;
- revealing of the causes of these violations and raising the means for the restoration of the violated constitutional balance;

The constitutional diagnosis must be based on the following main principles:

- revealing of any violation of the constitutional balance in the regime of non-stop actions;
- assessment of the character of the violations;
- raising the remedies and ways of restoration of the constitutionalism;
- guaranteeing non-admission of the new violations during the restoration of the functional balance.

For conducting successive constitutional diagnosis, it is necessary to choose **such a system of indicators** which would diversely and fully characterize the constitutionality of the examined public relations.

E/ **“Constitutional monitoring”** is a remedy and possibility to guarantee overcoming the deficit of constitutionalism, ensuring stability and dynamic development based on the constitutional diagnosis of the constitutional balance in dynamics. The constitutional monitoring proposes:

- non-stop constitutional diagnosis for revealing the possible distortions of the constitutionalism,
- because of contrastive analysis and assessment of the outcome, presence of the functional and instrumental systems of restoring the violated constitutional balance,

- ensuring the feedback between the constitutional decisions and development of constitutional practice,
- presence of efficient systems of constitutional liability.

For conducting constitutional monitoring, it is important to clarify the approaches especially on three issues:

First, what methods and toolkits are required for conducting systemic constitutional diagnosis?

Second, what role and significance may the Rule of Law Checklist (adopted by the Venice Commission) have while conducting constitutional monitoring?

Third, what may the legal system of constitutional monitoring be in the aspect of functional and instrumental solutions?

We consider it a good idea to refer directly and independently the first question; hence, the second and third questions would be accented in this publication.

In our opinion, the answer to the second question shall be looked for both at the methodological and methodical levels.

In the methodological aspect, based on the perception of rule of law **as a common and fundamental principle of democracy**, on its characteristics and revealing of its essence in the international legal documents, comprehensive assessment of the peculiarities of realization, comparative analysis of its specification by a number of authors, for the first time the Rule of Law Checklist in the systemic integrity represents the multi-layer manifestations of the principle of the rule of law in the rule of law state. Initial conclusions are made, according to which, in particular,

- the principle of the rule of law must be applied at all levels of public power /Point 17/,
- despite diverse interpretations, united perceptions of elements of the rule of law are present. There are six of them:
 - legality,
 - legal certainty,
 - prohibition of arbitrariness,

- access to justice before independent and impartial courts,
- respect for human rights,
- non-discrimination and equality before the law /Point 18/,
- 2012 Declaration of the United Nations signifies that the “Rule of law applies to all States equally and to the international organizations” /Point 22/,
- the checklist is mainly directed at assessing legal safeguards / Point 25/,
- full achievement of the rule of law remains an on-going task, even in the well-established democracies /Point 29/,
- the rule of law would just be an empty shell without guaranteeing, ensuring and protecting human rights /Point 31/,
- the rule of law is linked to the entire legal system and all manifestations of restriction of power and protection of human rights by law /Points 33-37/,
- the rule of law can only flourish in a country whose citizens feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture /Point 43/.

All the mentioned conclusions are of pivotal importance from the perspective of implementation of the raised conceptual approaches.

In the methodological aspect, the provision stated by the Venice Commission is pivotal, according to which the Rule of Law Checklist is an innovative and efficient remedy for guaranteeing the rule of law in this or that country for **assessing in accordance with the united method**, taking into account the certain peculiarities of legal system of the certain country (Points 20, 25 and 34). Simultaneously, for realization of practical steps for assessment of the rule of law, the approaches stipulated in Points 43-120 of the Checklist, which have methodological significance, are of guideline significance.

In our opinion, the conclusion is unambiguous: The Rule of Law Checklist adopted by the Venice Commission opens qualitatively a new

page for a full, systemized and precise vision of realization of the principle of the rule of law in practice, multi-factual analysis as well as for effective and optimal management of the process of legal developments. It provides systemized and fully-fledged tools both for qualitative and quantity assessment of the state of rule of law.

Moreover, we are deeply convinced that such multi-layer disclosure of the status of the rule of law would also create full vision of the real status of constitutionality and the level of constitutional culture in the country. Therefore, for exercising constitutional monitoring, the Rule of Law Checklist becomes exceptionally pivotal both in the aspect of methodological approaches and methodic guidelines.

Constitutional monitoring should not be fragmentary and discrete, but **it should be conducted in accordance with the principles of continuity and clear periodicity**, as well as by the means of assessment of the condition of the rule of law revealing each violation of the constitutional balance, each distortion from the constitutional axiology and constitutional principles, each distortion of the constitutionalism.

What must the legal system of constitutional monitoring be in the aspect of functional and instrumental solutions?

The Rule of Law Checklist approved by the Venice Commission states that such informative sources may serve as grounds for the assessment of the rule of law for the European countries. If a stand-alone and one time study in annual context is made, then a single approach is needed, and if the monitoring is permanent and continuous, then the approach should be completely different.

The essence of the constitutional monitoring is that **continuous and systemized revelation** of the real condition of constitutionalism shall be applied in social life. **A certain function typical for the immune system of each organism should be performed.** The entire social organism should be involved in the process of dynamic maintenance of functional constitutional balance, revealing and assessing each violation of that balance and its restoration by equivalent lawful interference. The Rule of Law Checklist is an exclusive means and opportunity **for**

performing necessary **constitutional monitoring**, which follows from such function, and this is the necessary and initial phase of constitutional monitoring.

How should the constitutional monitoring be organized and performed?

We consider that in functional aspect all constitutional institutions of the state and the civil society should play essential role in the constitutional monitoring.

Today this task is partially resolved by the constitutional control. However, our researches allow concluding that in the constitutional control system the component of judicial constitutional control is mainly efficient. All other elements are not manifested by the logics of systemic integrity, and in their functional role and systemic integrity they do not comply with the requirements of the new challenges of overcoming distortions of constitutionalism and accumulation of negative social energy. Therefore, better approaches and solutions are needed.

The doctrine we propose is firstly focused on the resolution of two issues:

First, guaranteeing and ensuring self-sufficiency and dynamic emotional development of the Constitution,

Second, creating necessary functional and institutional guarantees for the timely revealing, assessing and overcoming the distortions of constitutionalism.

Each of them may become certain topics for serious discussion. In the first issue, we touched upon the concept of the latest reforms of the Constitution of the Republic of Armenia and we do think that the presented approaches may be of a great interest for every country.

In the framework of this publication, I would like to make a brief reflection to the second issue.

Our pivotal approach is that in the structural system of constitutional monitoring all constitutional subjects shall play relevant role, i.e. the human being, institutions of civil society, all bodies of public power. They shall act in the systemic integrity, with complementary functions

excluding the circumstance of non-reacting on any violation of the constitutional balance. In the aspect of the latter the role of each member of the society and institution of the civil society is exclusive, implementation of which should have necessary constitutional guarantees. For this uninterrupted activity of the nervous system of the social system is ensured and guaranteed.

The head of the state has a special significance in the system of public power. In the international constitutional practice, as a rule, the president acts as political guarantee for ensuring the rule of Constitution. Thus, it is necessary to provide efficient constitutional-legal contents for the constitutional provisions, such as: "The President of the Republic shall ensure due respect for the Constitution" (see the Constitution of France, (Article 5), Poland (Article 126 Point 2), Armenia (Article 123), "President shall be the guarantor of Constitution" (see Constitution of the Russian Federation (Article 80, Part 2); "The President guarantees ... the proper functioning of the democratic institutions..." (Portugal, Article 123), "President shall ensure the regular operation of Constitutional bodies" (Slovakia, Article 101 Part 1) etc.

The preservation of the Constitution is merely formal in all the cases when no consistent constitutional monitoring is conducted by the institute of President.

It should be emphasized that the establishment of the system of constitutional monitoring demands to assess anew the role of the rule-making and law-enforcement bodies, role and place of the judicial constitutional review, contemporary challenges of constitutionalization of the public relations, imperative of establishment of efficient system of constitutional liability.

These questions must become a subject of certain and independent thorough examination.

APPENDIX I

THE NOTION OF "CONSTITUTION" THROUGH THE ARMENIAN SOCIAL, POLITICAL, LEGAL AND PHILOSOPHICAL DISCOURSE

This appendix was compiled from the materials of "Armenian Classical Bibliography" at www.digilib.am, version 1.0. The appendix does not present a comprehensive and complete bibliography, our purpose was to provide, apart from the analysis contained in the body of this work, a sampling of select references to underscore that this notion has been used in its time not as a borrowed value, but, while encompassing a whole range of meanings, it was used in the Armenian context of "constituting," setting a terminal "border," "imposing limits." Naturally the references pertaining to legal regulation and "delineating" relations are the most interesting. In this respect we would like to single out the passage from Movses Khorenatsi, where he describes how Nerses the Great (St. Nerses, the Catholicos of Armenians between 353-373), who "in the third year of the reign of Arshak [...] became archbishop of Armenia," "established mercy, extirpating the root of inhumanity" through "canonical regulation." This is with reference to the Council of Ashtishat held in 365. Pawstos Buzand has best characterized the outcome of the Council: "**put in order, compiled, canonized and set down**" (They all came willingly to the council and deliberated profitably together so as to perfect there the secular regulations of the church and the uniformity of beliefs. At that time they **put in order, compiled, canonized and set down regulations** and turned the entire population of the land of Armenia into the likeness of an universal order of solitary-communities... *Pawstos Buzand, Armenian History, Ch. 4*). All

of these notions, as used in medieval Armenian written monuments, have described types of lawmaking activity, regulation of relations, definition of rules of behaviour. National Ecclesiastical councils played a special role in this, since the rules they enacted were of universal nature and possessed superior legal effect. Therefore it is not incidental that in defining the word "Constitution" The New Dictionary of the Haikazian Language (Venice, 1837) makes references to canonical regulations.

MOVSES KHORENATSI, *HISTORY OF ARMENIA (5th century)*

Concerning Saint Nerses and the Good Order Established by Him

III. 20. In the third year of the reign of Arshak, Nerses the Great, son of Atanagines, son of Yusik, son of Vrtanes, son of Saint Gregory, became archbishop of Armenia. Having returned from Byzantium to Caesarea, he came to Armenia and restored all the just administration of his fathers, and he went even further. For the good order that he had seen in the land of the Greeks, especially in the royal city, he imitated here. Summoning a council of bishops in concert with the laity, by canonical **constitution (regulation)** he established mercy, extirpating the root of inhumanity, which was the natural custom in our land. (Thomson 2006, 270)

AGATHANGELOS, *THE LIFE AND HISTORY OF SAINT GREGORY (5th century)* THE TEACHING OF SAINT GREGORY

694. "After this the Christian band of the Apostles, who by the grace of the Holy Spirit had advanced through all regions under heaven, with all signs and miracles and power of grace, made warning to each part, and announced the word of life, and encouraged the Christians with the hope of the resurrection. By their graceful words and deeds each

constitution (decision) fixed by the command of the Holy Spirit was revealed.” (Thomson 2001, 224)

322. “He created from one blood all the races of mankind to dwell on the face of the earth; and He established and ordered the times and **constitution (bounds)** of their dwelling for them to seek God, that perhaps they might search for Him and find Him” (Acts 17:26-27), “for his invisible [creatures] from the beginning of the world are understood and seen by the created things” (Rom. 1:20). (Thomson 2006, 89)

ANANIA OF SHIRAK,
HISTORY OF LEO THE GREAT (7th century)

Ventidius (Vigilius?), Pope of Rome, learning about his unsuccessful admonition, orders him to summon a council to confirm the blasphemy of the Council of Chalcedon and the apostasy of the Tome of Leo. So he, ordering the council to take place in Constantinople (which is called Fifth [Ecumenical] Council), gave an order that any bishop or patriarch not advocating the Council of Chalcedon among the Holy Councils was to be deposed from his rank. Then Anthimus, bishop of Constantinople, together with many [other] bishops preferred to be persecuted for the sake of truth. Among them was Julian, bishop of Halicarnassus (a city in Cyprus), who did not accept the impious **constitution (canons)** of the Council of Chalcedon. [...] And he sent armed forces [against] those who did not obey the Emperor’s command to acknowledge the much-talked-of **constitution (canons)** of the Council and to agree with the innovations in the feasts and ecclesiastical regulations established by the lawless Justinian together with those assembled in Constantinople for the Fifth Council; he shed blood in many places.

HOVHANNES ODZNETSI,
DISCOURSE OF THE BLESSED FATHER AND PHILOSOPHER JOHN, CATHOLICOS OF THE ARMENIANS, ON HIS EARLY LIFE, HIS ASCENTION TO THE PATRIARCHAL THRONE AND ON THE ESTABLISHMENT OF NUMEROUS AND VARIOUS ORDERS AND RITES OF THE CHURCH (8th century)

For we will not follow the strange custom established by controversy but, with **canonical constitution (regulations)** and chapter by chapter, we will abolish and remove the rooted disorder from the church of God, strengthening, instead, the decent and most useful things at their proper place.

MOVSES DASKHURANTSI,
HISTORY OF THE CAUCASIAN ALBANIANS (9th century)

3.8. Whoever in fear of God complies with this **constitution (canon)** shall be blessed by the Holy Trinity and by all the orthodox servants of God; and should any oppose this and err from the truth, he shall answer for it, whoever might he be, before God. (Dowsett 1961, 196)

2.33. When the saint saw this and realized that the vision was inspired from above, he revealed its meaning to him and showed him the same life-giving cross, but commanded him through **constitution (swearing an oath)** to tell no one. (Ibidem, 141)

TOVMA ARTSRUNI,
HISTORY OF THE HOUSE OF ARTSRUNI (10th century)

3.18. But Ashot went to fight against the seashore people called Utmanik, who fortified their positions in the impregnable cave of Amiuk (for according to the **constitution (borders drawn)** by Ptolemy and

Alexander [Pappus of Alexandria?] or by our Artashes, son of Sanatruk, that province is listed among the provinces of Vaspurakan; 100 years ago, it was separated by Arab rulers from the principedom of Vaspurakan).

(...) But now what can I say? Although they openly returned to the worship of Christ our God, they did not closely adhere to the **constitution (canonical rules)**; not only Ashot but also all the Armenian princes who came home from captivity. They rejected the malignancy of apostasy but remained outside the **constitution (canonical rules)**; their conduct was not truly Christian, for they indulged themselves with debauches and hard drinking, with defiled beds and pollution, with impure, awful, and repulsive copulation, with pederasty, with bestiality surpassing the vices of Jericho and Sodom. Men were shamelessly inspired with passion for men, bringing upon themselves endless fire-dispersing burning from heaven and perdition more devastating than the Flood.

ARISTAKES LASTIVERTSI,
HISTORY OF THE EVENTS CAUSED BY FOREIGN NATIONS
SURROUNDING US (11th century)

(...) For he was a devotee of the Chalcedonian **constitution (creed)**, strongly hating the true faith.

UKHTANES,
HISTORY OF ARMENIA (BISHOP UKHTANES, PART I:
HISTORY OF THE ARMENIAN PATRIARCHS AND KINGS)
(11th century)

Probus reigned after Tacitus, and Probus and Artashir divided our country between themselves by **constitution (fixing the borders)** and making peace with each other.

(...) For people say this based on stories told by elders: in the days of Abraham, Catholicos of the Armenians, when he ascended the patriarchal throne, the Georgian and Albanian catholicoi came to him. For at that time they were subordinate to the archbishop's throne of Saint Gregory; and according to the **constitution (canons)** and custom of the first fathers, they came to Abraham in the first year of his patriarchate to show him their love and obedience.

GRIGOR NAREKATSI,
THE BOOK OF LAMENTATION (11th century)

A Word to God from the Depth of My Heart
Here is my profession of faith, here,
the yearnings of my wretched breath to you
who constitute all things with your Word, God.
What I have discoursed upon before, I set forth again,
these written instructions and interpretations
for the masses of different nations.
I offer these prayers of intercession
in **[constituting]** the thanksgiving prayer below. *(translated by*
Thomas J. Samuelian)

MKHITAR GOSH,
ARMENIAN LAWBOOK (12th century)

If there is a village left by a deceased priest (which had been given to him for his office), it belongs as heritage to the Holy See, and the *vardapet* (archimandrite) has the right to give it to whomever he wishes. This **constitution (law)** also existed in the time of Khosrov and Heraclius. However, irrespective of what it was before their time, let it not be changed (for nobody knows it exactly); let people own whatever they had owned, but from their time on and forever, let this law be firm and let no one violate it.

If the divine lips curse people who trespass the boundary path fixed by their neighbor, trampling on and ignoring the **constitution (laws)** and commandments of the Creator of all, they should be recognized as [worthy of] great anger (and others, too, because of them).

VARDAN AREVELTSI,
HISTORICAL COMPILATION (13th century)

You should know beforehand that I have come to bless the church according to my law: the **constitution (canons)** of the Council of Chalcedon.

VARDAN AREVELTSI,
SERMONS AND PANEGRICS (13th century)

He also established the awesome mystery of the liturgy with bread (unleavened and without water), according to the Apostolic **constitution (canons)** and the venerable St. Gregory and his sons, until Ezer corrupted it in his insanity.

HISTORIOGRAPHER HETUM,
CHRONICLE (13th century)
CHRONOLOGICAL HISTORY WHICH I, THE HUMBLE SERVANT OF CHRIST HETUM, LORD OF KORIKOS, TRANSLATED FROM FRENCH IN THE YEAR 745 OF THE ARMENIAN ERA (circa 1296)

“In 1129 Innocent II became the Pope of Rome. He summoned a universal council in the Holy Savior Church and punished Peer Leo and his **constitution (law)**, holding his office for thirteen years, eight months and eight days.”

SMBAT SPARAPET,
LAWBOOK (13th century)

24. Now, see how many punishments there are for the priors and other judges of the church, in order that they should not distort the divine law for a bribe. One shall by no means dare change anything in the **constitution (canons)** of the church and in the decrees of dioceses without [the permission of] the Catholicos, who may do this by summoning the great synod.

NERSES PALIANENTS,
GENEALOGY: ARMENIAN PRINCEDOMS AND KINGS (14th century)

This Vagharshak was a valiant and prudent man; he established secular orders and hierarchies, also [appointing] ministers and administration in the royal palace. Furthermore, in the Armenian land he put many things in order, duly organizing the houses, families, cities, buildings, estates, armies, and prefectures, also making other similar and necessary arrangements and **constitution (regulations)**, about which we shall briefly speak, explaining them.

YAKOB GHRIMETSI,
COMMENTARY ON THE CALENDAR (15th century)

(...) First, one should know that the sun was created on the fourth day at dawn and was put on the same path and at the same point, where it until now rises at the same minute by the **constitution (decree)** of the Creator.”

(...) One should know that “point” is a polysemantic word, for it means many things. In the first place, “point” is “God of all creatures” (i.e., of those originated from Him, because there was no one before Him);

accordingly, “I am the first and the last” (Rev. 1:17). Second, “point” refers to eternity, for every eternity has as points its beginning and its end. Third, a man’s death too is called “point,” because it is said: “He reached the point of his destiny.” Fourth, “point” means “a moment and a short space of time, for Job says about lustful people: “They spend their days in prosperity and at the same point they go down to hell” (cf. Job 21:13). Fifth, “point” is also legislation, for [God] ordered Adam not to eat of the fruit till the point **constituted (determined)** by Him, [that is,] as long as He wished.

ARAKEL OF TABRIZ,
BOOK OF HISTORY (17th century)

Chapter 23

(...) But the vardapet (archimandrite) paid no attention to this, for he had high hope in the Lord; and every day he wandered and preached and built churches, and put everything in a correct order and **constitution (arrangement)**.

Chapter 24

(...) And the Christians of the upper part of our land, listening to their true preaching (for their deeds confirmed the truth of their words and preaching), all turned from their wrong ways and obeyed their **constitution (orders)** and rules – princes, bishops and priests, noblemen and all the common people.

Chapter 25

(...) And the monasteries abandoned long ago were filled with monks, and the towns and villages with priests, and day after day they still prosper thanks to the **constitution (order established)** by him [Catholicos Philip].

(...) And then truly loving one another, they have become compassionate brothers, respecting the **constitution (order established)** by the patriarch Philip; their love and unity is wonderful, and they have received the grace of the blessed God Christ.

GRIGOR DARANAGHTSI,
*CHRONICLE (THE CHRONICLE BY GRIGOR VARDAPET
KAMAKHATSI OR DARANAGHTSI) (17th century)*

(...) After some time Movses Vardapet (he who later on became catholicos) went there, and they stayed together for many years and became the illuminators of Upper Armenia. As if they were the embellishment and embellishers of the anchorites, men and women, and the correctors of all their **constitutions (rules)**.

(...) After these efforts the Devil, making the pseudonymous catholicos Melki (and not Sedek) his assistant, roused him against the saints of God, exposing them to many trials as if to torrents. For their conduct and piety and **constitutions (rules)** seemed evil [to the persecutors], because they looked askew at the just men, wishing to kill them. However, the Lord did not put [the saints] in their hands and they could not completely condemn them.

He was from the land of Baghesh (...) and was very humble and submissive in his heart and modest in his cloths; and he wandered on foot like Nerses the Pedestrian, with good deeds and holy conduct and as a gracious, merciful caregiver and consoler of all sufferers. And one day he took a journey to the great Rome in Italy, to see, greet and kiss the holy bodies of the Apostles Peter and Paul, and to meet the great Pope, patriarch of Rome. At first he was accepted by them but then was dishonored and persecuted. Being questioned with evil intentions about his faith and the order of **constitutions (canons)**, he gave true answers regarding the apostolic preaching on the rock of faith and the definition of faith by the holy fathers at the three [Universal] Councils and regarding the **constitutions (canons)** of our Holy Illuminator. And since he did not acknowledge the lawless Council of Chalcedon, they brought a big volume of the Chalcedonian creed and canons, written and sealed by the hand of the Catholicos Azaria, harmonious and in agreement with the pernicious Tome of Leo and the [Emperor] Marcian and the [Empress] Pulcheria and their seven councils; and they gave it to the Vardapet.

EREMIA KEOMIURTCHEAN,

THE DIARY OF EREMA KEOMIURTCHEAN (17th century)

The curse of the Apostles, patriarchs and our Holy Illuminator (who were the vicars of Christ and **constituted** the correct canons of the universal church) was upon them.

YOVHANNES HANNA,

BOOK OF THE HISTORY OF THE HOLY AND GREAT CITY OF GOD JERUSALEM AND THE HOLY DOMINICAL PLACES OF OUR LORD JESUS CHRIST (18th century)

And then once again he **constituted (confirmed)** with his signature and seal the regulations ordered by him; they are the following.

MIKAYEL CHAMCHEANTS,

HISTORY OF ARMENIA FROM THE BEGINNING OF THE WORLD TILL 1784, BASED ON THE WORKS OF VARIOUS AUTHORS (Written by Father Mikayel Vardapet Chamcheants of Constantinople, pupil of the most reverend Father Mkhitar the Great Abbot; in the dominical year 1786, on April 16) (18th century)

The **constitutions (canons)** of the synod of Sis were read before all of them, and the fathers of the synod, examining once again all the definitions of those canons and the letter of Grigor Anavarzetsi, accepted and reapproved them, and wrote everything more clearly on parchment, which they all signed together with princes, as it is stated in the true history of this synod.

Then, after many days' examination and conversations, and after a long consideration of the testimonies of the Divine Scriptures and of the holy fathers and teachers of the church, we considered it necessary to

briefly transmit by this **constitution (canons)** the truth of the orthodox faith unanimously approved the holy council of Florence and with the agreement of the same messengers, in order that henceforth there should be no doubt among Armenians about the true faith and in order that they should adhere to the same [creed] with the Apostolic See and always maintain this unanimity steadily and without any doubt.

ABRAHAM KRETATSI,

HISTORY (18th century)

Chapter 18

How we appeared before the Khan in Tiflis, how he consoled us and entrusted me and Holy Ejmiatsin to the Khan of Yerevan, giving us the necessary edicts

When we appeared before the Khan, he rejoiced and said many consoling words to us, giving useful and instructive orders. He also loudly announced the political laws and **constitution (statutes)** for everybody to hear.

Chapter 46

On the prayer that bodyguards recite when Valinamat enters the court or mounts a horse, and on the number of the troops

The **constitution (arrangement)** and order of the troops and the rites performed by servants are as follows.

Of particular interest is the varying usage of the notion "constitution" in the Book Of Canons by John Odznetsi. A study of volumes 1 and 2 of the "Armenian Ecclesiastical Canons," edited by Vazgen Hakobian, indicates that there are at least 15 occurrences of the notion "constitution" in various canons. With reference to the original text below one should note that it contains generalizations of this notion spread over several centuries.

ARMENIAN ECCLESIASTICAL CANONS

(edited by Vazgen Hakobian, volume 1, Yerevan, 1964)

Decrees and canons established by the holy universal church at the great Council of Nicaea, where they assembled by order of the great God-recipient Emperor Constantine (for his heart was filled with the grace of the Holy Spirit) together with holy patriarchs; and the heads [of the churches] arrived there to meet and to **constitute (establish canons)**: doctors and prelates, 318 bishops who teach laws to common people. They cleansed with penitence the rotten wounds and alleviated the heavy burdens of those who had committed various sins. (Canons of the Council of Nicaea)

Now, we have achieved unity of the **constitution (canons)** at the church of Gangra; our names are the following: Eusebius, Aelian, Eugenius, Olympius, Bithynicus, St. Gregory, Eulalius, Hypatius, Proaeresius, Basil, Bassus, Eugenius, Philetus, Heraclius, and Pappus. From east and west, south and north, we assembled and came by order of the Holy Spirit for the Council. We assembled and came to Gangra, and confirmed the canons of the great Council of Nicaea and sent them for the prosperity and perfection of the holy church. (Canons of the Council of Gangra)

Now, if a [deposed bishop] asks that his case be heard again and wishes to involve the bishop of Rome in the matter, the latter shall send presbyters on his behalf [to investigate the case]. It shall be in his power to do what he shall resolve; if he decides that someone should be sent to represent the matter to other bishops on behalf of [the bishop of Rome] by whom they had been sent, it shall be so. But if he believes he knows the case properly and can give a **constitution (final decision)**, let him do what he considers right according to his wise judgment. (Canons of the Council of Sardica)

If one unintentionally kills a [pregnant] woman, he shall be condemned to death. However, it is necessary to investigate the case properly, not in passing, and to involve the woman and find out whether the embryo

had been formed or unformed according to its age. In the [first] case it shall be considered a second murder; [though] such a person has to stay in penance until the day of his death, it shall be decreed to shorten that time, for [according to] the canon, perfect penance does not depend on the duration time but on the correct behavior of those who repent. (Canons of Basil of Caesarea)

Concerning priests who are in an unfitting marriage

They shall be subject to such **constitution (rules)**; for example, they shall be permitted to only share an office with others. (Canons of Basil of Caesarea)

44. *Concerning the **constitution** of canons* (Canons of Sahak Partev)

For it is necessary, according to the canonical **constitution (regulations)**, that every year when synods are convened, rural bishops should inspect the churches entrusted to them and examine the performance and order of religious rituals, i.e., how they are organized. They should demand account from priests and deacons concerning the appropriateness of the hours of preaching and praying and baptism one by one, as well as concerning the fitting service of the awesome mystery of the liturgy, so that they keep them unchangeable with ardent diligence and reverence. For if we are careless, we must answer for that, and if one turns out to be sluggish and backward in the mentioned wonderful rites, he must suffer strict punishment, whoever he be; he must be deprived of his office until the archimandrite accepts him. (Canons of Sahak Partev)

This also concerns the places of assemblage and chapels, which from ancient times have been habitually called churches; although, being in various villages and towns, they are many, those many are not divided into many, but the same mystery is performed in all. And none of them is called big or small according to the mystery, but according to the rank of the office; and this is arranged so and must be eternally maintained with much care. For these **rules** are not announced according to human opinion but are clearly repeated by us from the God-inspired Scriptures, and those who oppose it oppose not a human but a divine command, and

those who wish to oppose will suffer their punishment. (Canons of Sahak Partev)

This **constitution (regulation)** of the orders [of the church] was written at the command of the blessed Sahak, the great patriarch of the land of Armenia; he accepted them from Gregory, the fearless martyr of the Lord, and translated them from Greek into Armenian.

Now, if anyone disobeys this canon and wishes to make innovations in this **constitution (regulations)**, let him be deprived of his part of heritage in the kingdom of Christ and God. (Canons of Sahak Partev)

ARMENIAN ECCLESIASTICAL CANONS

(edited by Vazgen Hakobian, volume 2, Yerevan, 1971)

This **constitution (canon)** of the church also existed in the time of Heraclius, Emperor of the Romans, and Khosrov, King of the Persians. However, irrespective of what it was before their time, let it not be changed (for we do not know how [people] owned [something]); but henceforth they shall own in this way, as we have defined in the name of the Lord, and no one shall violate this canon. (Canons of Dvin)

Now, let the archimandrites and priests of the church announce the above-written canons of our **constitution (legislation)** into the ears of auditors; and those who listen to them and observe the commandments will be blessed by Christ, the holy archimandrites and our unanimous assembly. But if [some people] disobediently and arrogantly ignore them, they will be ignored by the holy martyrs and deprived of all spiritual blessings. (Canons of Dvin)

But if it occurs on Friday or Wednesday, let them celebrate it, per the supreme commandment, with fasting and not breaking [the fast] with food or drinks. And if any believer violates this canonical **constitution (rule)**, let him be cursed; for so it was commanded to the whole world by the holy Apostles and was handed down to us; and we follow what they have preached and established. (Canons of Karin)

Again, in addition to this tradition of all written commandments and besides what has been said, we hand down this canonical **constitution (rules)** to all the clerics of the holy church and the ministers of the sacramental altar. For we have heard an awful and grievous rumor that at certain places some of the heads the church, being misled by the Nestorians and Caledonians, defile the holy communion by adding leaven and water. (Canons of Karin)

All of the excerpts above incontestably indicate that in the Armenian bibliography the notion "constitution" refers to the meaning of setting, adopting, approving a particular order, canon, pattern of things and phenomena and, in some cases, in the meaning of establishing a boundary, a perimeter (for example, in the passages from Agathangelos). While the notion "to constitute" was used in a distinctive sense, to underline the special nature of "constituted" canons: "decision fixed by the command of the Holy Spirit," "order established by the patriarch," "the canons of the Council of Chalcedon," "endorsed by St. Gregory's apostolic constitution," "constituted by the Council of Sis," etc. In the New Haikazian Dictionary the notion of "սահմանադրութիւն" (Determino, constituo) is presented through the synonyms "to set a border," "determine," "regulate," "ordain," "make the law," "establish." Every one of these should be perceived in the context of defining a boundary, determining a perimeter, regulating relations of a terminal nature, defining the principal rules.

Any translation which presents the Grabar (classical Armenian) "սահմանադրութիւն" in the meaning of "define," "approve" and others, without ascribing importance to the bordering, terminal nature of the norm, canon or order, essentially narrows the meaning of the notion "սահմանադրութիւն," since in the Armenian bibliography the latter obviously pertains to defining special canons of ultimate significance characteristic of a constitutional norm: "a determination of borders and supreme oversight."

APPENDIX - II

Professor G. Harutyunyan's article, entitled "Role of the Rule of Law Checklist in the System of Constitutional Monitoring", was published in the edition of 3(73)2016 of Bulletin of the Conference of the Constitutional Control Organs of the Countries of New Democracy "Constitutional Justice". Furthermore, in the same edition of the mentioned bulletin the Rule of Law Checklist (adopted at 106th Plenary Session of the Venice Commission of the Council of Europe CDL-AD (2016)007)).

On 20-23 October 2016, the Yerevan International Conference was convened, hence engaging delegations from 30 countries and 10 Judges of the European Court of Human Rights in comprehensive and multilateral discussion related to the role and importance of the Rule of Law Checklist in implementing systemic constitutional monitoring.

While summing up the mentioned discussions, as well as taking into account the international practice (specifically, the experience of the World Justice Project related to assessment of the index of rule of law; the experience of the Freedom House related to assessment of the democratic processes in the world; the UN rule of law indicators and etc.), the author of given publication developed a system of indicators for assessing the level of constitutionalism within the society, which is one of the key layers of systemic constitutional monitoring.

The presented system of indicators can become a guideline for assessment of the level of constitutionalism and the real state of play of the constitutional culture in different countries around the world. Within the frames of the International Analytical Center "Constitutional Culture" and with the direct engagement of the Author, concrete researches in the given area are being conducted, as well as new methodical approaches for complex implementation of the given program are being developed.

SYSTEM OF INDICATORS FOR ASSESMENT OF THE LEVEL OF CONSTITUTIONALISM

I. Foundations of the Constitutional Order

1. What is the real role of the Constitution within the society?
2. Is the evolutionary constitutional development ensured?
3. Is there at place a real public engagement in the process of constitutional development?
4. To what extent is the self-sufficiency of the Constitution ensured?
5. Is the constitutionality of constitutional amendments provided?
6. Does the constitution create the required guarantees for realization of the principle of rule of law?
7. To what extent does the constitution guarantee the continuity of realization of the principle of separation and balancing of powers?
8. To what extent are the powers of executive branch constrained by the legislative branch?
9. To what extent are the powers of executive branch constrained by the judicial branch?
10. How is the functional balance of legislative, executive and judicial powers constitutionally ensured?
11. How is the balance of functional, checking and balancing authorities of public institutions ensured, constitutionally?
12. Is the potential of direct democracy fully exercised?
13. To what extent are the mechanisms of public control over the realization of public authority effective and functional?
14. Are there real mechanisms of constitutional responsibility?
15. Is there a deviation of state institutions from their constitutional status?

16. Is the direct application of fundamental rights and freedoms ensured?
17. To what extent are the public authorities limited by the law?
18. To what extent has the rule of law become a base of social behavior of individual?
19. To what extent has the rule of law become a base of political behavior of political institutions?
20. To what extent has the rule of law become a base of public behavior of the state agencies?
21. What is the level of parliamentary culture?
22. To what extent is the accountability of the public institutions towards the public ensured?
23. Is the inalienable human dignity considered as a real ground for individuals' rights and freedoms?
24. To what extent have the guaranteeing, ensuring and protection of fundamental human rights and freedoms become the responsibility of public authorities?
25. To what extent are the fundamental principles of democratic elections fulfilled?
26. To what extent are ideological pluralism and multi-party political system guaranteed both on constitutional and legislative levels?
27. To what extent do the structure and activity of political parties correspond to the democratic principles?
28. To what extent is the local self-governance guaranteed and how effective is it?
29. To what extent is the transition of authority in accordance with the democratic principles guaranteed constitutionally?
30. Is the system of guaranteeing the supremacy of constitution considered to be effective?
31. How are the constitutional guarantees of protection of property being implemented in practice?
32. Are there effective mechanisms for prevention of conflicts and resolution of disputes related to the constitutional powers between the institutions of state power?

33. To what extent the armed forces of a given state respect neutrality in the political matters and are under the civic supervision?
34. Is the freedom of activity of all religious organizations ensured?
35. To what extent is the development of civil society corresponding to the principles of legal, democratic state?
36. What is the level of "oligarchization" of the power?

II. Legal System

37. Is the conformity of the legislation with the Constitution ensured?
38. Are the legislative acts adopted without delays, in cases when it is required by the constitution?
39. Are the secondary legislative acts applied?
40. To what extent are the case law of international courts and the constitutional court considered by the legislator as a source of lawmaking?
41. Do the actions of the executive branch of power correspond to the constitution and laws?
42. Are the secondary legislative acts adopted without delays, in cases when it is required by the legislation and in accordance with the law?
43. Is there effective judicial control over the conformity of actions and decisions of the executive power with the legislation?
44. Is the judicial control covering also the actions and decisions of independent organizations and entities of private sector, which are implementing state functions?
45. Is the effective juridical protection of individual human rights from the encroachments of private sector actors guaranteed?
46. How stable are the laws?
47. How effective is the parliament in overcoming the legal gaps based on the legislative initiative?
48. Is there at place an effective system of monitoring for diagnosing, assessment and eradication of internal uncertainties and contradictions in the legislation?
49. Is the lawmaking process effective and what is the quality of the adopted laws?

50. What is the efficiency of the anti-corruption expertise of the normative legal acts?
51. To what extent do the civil society and individual citizens have opportunity to participate in the discussions of drafts of legislative acts?
52. To what extent do the adopted legislative acts correspond to the principle of legal certainty?

III. Compliance with the Laws

53. Are the procedures to be followed by the state power authorities stipulated by the law?
54. Are the powers of the state bodies defined by the law?
55. Can the bodies of state power act without the respective legal basis? Are these cases justified properly?
56. Are the bodies of state power fulfilling their positive obligations, thus ensuring compliance and effective protection of human rights?
57. Is the law defining authentic guarantees, in cases, when the state tasks are delegated to the subject of private sector?
58. Are the bodies of state power and local self-governance respecting the requirement of information transparency?
59. Are the legal means for overcoming of legislation violations effectively used?

IV. Corelation of International and National Legal Norms

60. Is the national legislation providing the respect of obligations undertaken by the given state within the international law?
61. Is the legislation providing respect of human rights norms, including the fulfillment of international courts decisions, which have mandatory force?
62. Are there certain norms in the national legislation in regard of implementation of the mentioned obligations?

V. Law Making Authority of the Executive Branch

63. Are the general norms of abstract character (not counting limited exceptions envisaged by the constitution) included in the law on the parliament or in the secondary legislative act based on it?
64. What are those exceptions? Are they conditioned by time-limits? Are they supervised by the parliament or by the judicial system? Is there practical mean for the protection from abuse?
65. Does the legislative act define concrete aims, content and amount of delegated powers, in cases when the legislative powers are delegated by the parliament to the bodies of executive branch?

VI. Legislative Procedures

66. Is the process of adoption of laws transparent, accountable, democratic and envisaging engagement of all interested parties?
67. Are there concrete constitutional norms of legislative procedure envisaged?
68. Is the supremacy of parliament ensured within the content of the law?
69. Is the role of parliamentary minority effective in the legislative process?
70. Is the system of expertise of law drafts effective?
71. Are the draft laws presented at the parliament discussed publicly and are the respective groundings for them provided (for example, in explanatory reports)?
72. Does the public have an access to preparation of the draft laws, at least after their submission to the parliament? Does the public have an opportunity to impact essentially on the content of the draft laws?
73. When it is necessary, is the assessment of the impact of laws made before their adoption (for example, impact in the field of human rights or on budget)?
74. Does the parliament participate in the process of drafting, adoption, incorporation in the legislation and implementation of the international treaties?
75. To what extent the right to petition is provided and fulfilled?

VII. Exceptions in Cases of Force Majeure

76. Are there any special national legislation provisions for the force majeure situations (wars or force majeure situations, which threaten the nation)? In accordance with the national legislation, are there any possible derogations from human rights in such situations? What are the circumstances and criteria defining the application of such exceptions?
77. Does the national legislation prohibit derogation of specific human rights even in emergency situations? Are the derogations adequate, that is, are they limited by time-limits, circumstances and scope?
78. Are the opportunities of the executive branch to violate the ordinary separation of powers in cases of emergency situations also limited by time-limits, circumstances and scope?
79. What is the procedure for declaring the state of emergency? Are there at place parliamentary and judicial control over the existence and length of state of emergency, as well as with specter of any derogations conditioned with it?

VIII. Obligation of Fulfillment of Law

80. Are there real mechanisms for providing fulfillment of law by the bodies of public power?
81. Are the obstacles for fulfillment of a respective law being examined before and after adoption of the law?
82. Are there at place effective legal remedies for the protection from non-fulfillment of laws?
83. Are there at place certain and concrete legislative sanctions for non-fulfillment of laws?
84. Is there at place solid and successive law enforcement system, which allows the bodies of state power to apply the given sanctions?
85. Are these sanctions successively applied?
86. How effective is the system of adoption of administrative decisions?

IX. Private Sector Entities Implementing State Tasks

87. Does the law guarantee, that the non-governmental entities, which fully or partially have undertaken the implementation of tasks traditionally typical for the state, actions and decisions of which have the same influence on lives of ordinary citizens, as the actions and decisions of state bodies, are under the effect of the requirements of rule of law and accountability in the same or almost similar amount, that the state bodies?

X. Accesibility of Legislations

88. Are all the legislative acts published before their entry into the force?
89. Are the legislative acts accessible, for instance, via Internet and/or by the means of official bulletin?
90. To what extent is accessible the official information?

XI. Accessibility of the Courts Decisions

91. Are the decisions of the courts accessible?
92. Are the existing exceptions grounded well enough?

XII. Predictability of the Laws

93. Are the law formulations understandable?
94. In the new laws, is it certainly indicated, that they annul or amend the previous legislations (and which one)? Are the amendments being included in the consolidated and publicly accessible version of the law?
95. To what extend do the laws correspond to the principle of legal certainty?
96. Do the courts often consider disputes in regard of legal gaps?

XIII. Stability and Continuity of the Law

97. Are the laws stable in the context that they are amended only after respective warning?
98. Is their application continual?

XIV. Lawful Expectations

99. Is the principle of lawful expectations being preserved?

XV. Absence of Retroactive Force

100. Is the retroactivity of the law prohibited in the criminal code?

101. To what extent is there also general prohibition of the retroactivity in the other laws?

102. Are there exceptions and if yes, what are the terms of such exceptions?

XVI. Principles of nullum crimen sine lege and nulla poena sine lege

103. Are the principles of nullum crimen sine lege and nulla poena sine lege (no crime - no punishment with the respective law) fulfilled?

XVII. Res judicata

104. Is the principle of res judicata fulfilled? (The principle of res judicata envisages a matter that has been adjudicated by a competent court and may not be pursued further by the same parties. The final decisions of the courts shall be implemented, unless there are no effective reasons for their reconsideration)

105. Is the respect of principle of ne bis in idem (no legal action can be instituted twice for the same cause of action) provided?

106. Can the final decisions of the courts be reconsidered?

107. If yes, in what context can it be done?

XVIII. Prevention of Abuse (Excess) of Powers

108. Are there at place legal guarantees against arbitrariness and abuse of power (détournement de pouvoir) from the state bodies?

109. Are there at place effective legal mechanisms to prevent merging of political, economic and administrative powers?

110. If yes, what is the legal source of such guarantees (constitution, statutory law, case law)?

111. Are there at place certain legal restrictions of discretionary powers, especially implemented by the body of executive power during the adoption of administrative measures?

112. Are there at place mechanisms of prevention, correction and punishment for abuse of discretionary powers (détournement de pouvoir)? Is there at place judicial control over the implementation of discretionary powers, when these powers are given to an official?

113. Shall the bodies of state power present the respective groundings of their decision, specifically when they touch upon the rights of individuals? Is the non-presentation of groundings a legitimate ground for appealing against such decisions at the court?

XIX. Equality before the Law and Non-Discrimination

114. Are the principles of equal treatment, the obligation of state to assist achieving the equality, as well as the citizens' freedom of non-discrimination stipulated by the constitution?

115. Is the discrimination forbidden by the constitution?

116. Is there effective legislative guarantee against discrimination?

117. To what extent does the law-enforcement practice guarantee the efficiency of fulfillment of the prohibition of discrimination?

118. Is there certain definition and unambiguous prohibition of direct, as well as indirect discrimination envisaged by the constitution or/and by the legislation?

119. Does the constitution contain a requirement for reflecting in the legislation (including secondary legislation) the principle of equality in the legislation? Does it envisage that all established criteria shall be objectively grounded?

120. Can a law, which violates the principle of equality in the legislation, be disputed at the court?

121. Are there individuals or groups, which have special legal privileges? Do these exceptions and/or privileges legal aim and is the principle of proportionality provided?

122. Are there envisaged unambiguous positive measures in favor of minority groups, including the national minorities?
123. What is the level of trust towards the institute of the Human Rights Defender?

XX. Equality before the Law

124. Does the national legal system envisage concrete compliance with the principle that the laws relate in equal terms to all citizens no matter of their race, skin color, sex, language, religion, political and other views, national or social origin, property and social status? Does it envisage that the established differences shall be objectively justified, shall be based on reasonable objective and shall comply with the principle of proportionality?
125. Are there at place effective remedies for legal protection against discriminative or inequitable application of the law?

XXI. Independence of Judiciary

126. Are the main principles of independence of judiciary, including the objective procedure and criteria of appointment of judges, terms of their office, disciplinary rules and displacement of judges stipulated by the constitution or by the ordinary legislation?
127. Are the judges appointed for life time term or is there a specifically prescribed pension age limit? Are the groundings for their displacement limited with grave violations of discipline or norms of the criminal proceedings stipulated by the law or with the circumstances when the judge is non-capable to continue his/her judiciary functions? Is the respective procedure clearly prescribed by the law? Are there remedies of legal protection of a judge from the decisions on his/her displacement?
128. Are the grounds for exercising disciplinary measures precisely defined and are the grounds for sanctions limited by committing an intentional crime and admitting gruff negligence?
129. Is the independent body in charge of the mentioned procedures?

130. Is the body consisting of only judges?
131. Are the appointment and promotion of judges grounded on essential factors, such as their abilities, integrity and experience? Are these criteria stipulated by the law?
132. In what circumstances is the transfer of judge to another court possible? Is the consent of the given judge prerequisite to make such transfer? Can the judge appeal the decision on his transfer?
133. Is there at place an independent judicial council? Is its existence based on the constitution or on the law on judicial bodies? If yes, is it ensuring adequate representation of judges, as well as lawyers and society?
134. Can the judges apply to the judicial council in cases of violation of their independence?
135. Is the financial independence of judiciary guaranteed? Are the funds allocated to the courts sufficient, and are there special budgetary lines for funding the judiciary, which excludes possibility of cuts upon the decision of the executive power, except the cases of general cut of wages? Are the judicial bodies or judicial council participating in the budgetary process?
136. Are the tasks of the prosecutors limited mainly based on the sphere of the criminal justice?
137. Is the judiciary perceived as independent? What is the population's opinion on a possibility of political influence or manipulation on appointment and nomination of judges/prosecutors, as well as on their decisions on specific cases? If the latter phenomena are on ground, does the judicial council provide effective protection of judges from such encroachments?
138. Do the courts implement systemic enquires of the prosecutor's office (accusatory)?

XXII. Independence of Individual Judges

139. Are there sufficient constitutional and legislative guarantees for independence of individual judges?

140. Are the activities of the courts - within the frames of consideration of adjudications - under the supervision of the court of higher instances, bodies of executive power or other state institutions?
141. Is the right to stand trial before a competent judge guaranteed by the constitution ("competent judge according to the legislation")?
142. Does the law have a certain definition of a competent court? Is the law defining rules of resolution of disputes in regard of conflicts of competences?
143. Are the amounts of wages of judges sufficient and just?
144. Is the distribution of cases made based on objective and transparent criteria?
145. Is the dismissal of the judge from case consideration possible, not counting the cases when the recusal of judge is recognized as justified?

XXIII. Impartiality of Justice

146. Is the constitution or the legislation prescribing a provision which ensures the impartiality of the judicial bodies?
147. What is the public perception of impartiality of judicial bodies and specific judges?
148. Do the corruption schemes exist within the judicial bodies? Are there at place concrete measures for fighting corruption at the judicial bodies (for instance, declaration of incomes and wealth)? What is the public perception of the given matter?

XXIV. Fair Court

149. Locus standi (the right to apply to a court). Does the citizen have an easy-accessible and effective opportunity to appeal authorities or other persons' actions, which affect his/her interests?
150. Is the right for protection, including effective legal aid, guaranteed? If yes, what is the legal source of such guarantee?
151. In cases when the interests of judiciary are at stake, is the legal aid accessible for the parties, not having sufficient financial means for paying for it?

152. Are the formal requirements, time terms and court fees reasonable?
153. Is the access to justice easy in practice? What are the measures undertaken to facilitate it?
154. Is the required information on the activities of the judicial bodies publicly accessible?

XXV. Presumption of Innocence

155. Is the presumption of innocence guaranteed by the law?
156. Are there certain and fair rules in regard of the burden of proof?
157. Are there means for legal protection not allowing the other branches of powers to make statements regarding the guilt of the accused?
158. Are the rights to remain silent and the right not to testify about him/her, his or her spouse or close relative guaranteed in practice?
159. Are there guarantees from excessively long period of detention before the trial?

XXVI. Judicial Proceedings

160. Is the equality of competitive opportunities guaranteed by the law? Is it guaranteed in practice?
161. Are there rules which exclude a possibility of using evidences, obtained via illegal way?
162. Are the judicial trials launched and judicial decisions delivered without delays? Are there means of legal protection provided from the excessive length of judicial proceedings?
163. Are the parties provided timely with the access to case materials?
164. Is the right to be heard at the court guaranteed?
165. Are the judicial decisions grounded sufficiently?
166. Are the hearings and delivered verdicts public, except of the cases, conditioned by Article 6.1 of the ECfHR or trials in absentia?
167. Is there a procedure envisaged to adjudicate, particularly in cases of criminal proceedings?
168. Are the court notifications provided timely and within the prescribed manner?

169. Are the reasonable time frames for consideration of judicial cases preserved?
170. How effective is the system of review of cases based on the new or newly revealed circumstances?
171. To what extent, in practice do the courts consider indirect effect of fundamental constitutional rights?

XXVII. Efficiency of Judicial Decisions

172. Are the decisions of courts implemented in fast and effective manner?
173. Are the applications to the national courts and the European Court of Human Rights regarding non-fulfillment of the judicial decisions common phenomena?
174. What is a public perception of efficiency and grounding of the judicial decisions?

XXVIII. Constitutional Justice

175. Do individuals have effective access to the constitutional justice for submitting an appeal against general laws, that is, can individuals demand to check the constitutionality of a given law via direct application or constitutional complaint to an ordinary court? How is their right to present an appeal defined?
176. Do individuals have effective access to the constitutional justice for submitting complaints against individual acts touching their interests, that is, can individuals demand to check the constitutionality of administrative acts or decisions of the courts via submission of direct application or constitutional complaint?
177. Are the parliament and bodies of executive power, while adopting new laws and normative provisions, obliged to consider arguments presented by the constitutional court or by equivalent body? In practice, do they take them into consideration?
178. Does the parliament or the bodies of executive power eliminate legal gaps revealed by the constitutional court or equivalent body within the reasonable time frame?

179. In cases when the decisions of the ordinary courts are annulled after the consideration of the constitutional complaint, are the cases renewed and reviewed by the ordinary courts considering the arguments presented by the constitutional court or by equivalent body?
180. If the constitutional judges are being elected by the parliament, is the qualified majority required during the voting and is there at place other guarantees for ensuring a balanced composition?
181. Is the preliminary control of constitutionality applied by the bodies of executive and legislative powers?

XXIX. Autonomy of Prosecutor's Service

182. Does the prosecutor's office have enough of autonomy with the state system? Are its actions based on the law, and not on political expediency?
183. Is there at place envisaged a possibility for the bodies of executive power to give concrete guidance to the prosecutors' office in regard of various cases? If yes, is this done in written form and are they under the public supervision?
184. Can higher ranked prosecutor give direct guidance on concrete cases to lower ranked prosecutors? If yes, is this guidance grounded in written form?
185. Is there a mechanism at place, per which lower ranked prosecutor can challenge such instructions based on their legal nature or absence of required grounds?
186. Can a prosecutor arguing against such guidance ask for his/her substitution?
187. Is the termination of the term of office of a prosecutor upon reaching the retirement age or because of disciplinary reasons allowed or are prosecutors, as an alternative, appointed for a relatively long period without a possibility to prolong authorities?
188. Are all these matters, as well as the grounds for displacement of prosecutors, clearly prescribed by the law?
189. Are there ways of legal protection of a prosecutor in cases of a decision on his/her displacement?

190. Are the appointment, transfer and promotion of prosecutors due to their professional service based on objective factors, specifically on ability, integrity and experience and not on political considerations? Are these principles stipulated by the legislation?
191. Is the financial remuneration of the prosecutors' fair and adequate?
192. Is there a sense within the society, that the prosecutor's office exercise selective enforcement of the law?
193. Are the prosecutor's actions subject to judicial review?

XXX. Independence and Impartiality of the Advocacy

194. Does a recognized, organized and independent Advocacy exist?
195. Is there at place a respective legislative basis for activities of the Advocacy, based on the principles of independence, confidentiality and professional ethics, without the conflicts of interest?
196. Is the access to Advocacy regulated in objective and open manner, including the matter of financial remuneration for providing legal aid?
197. Are there effective and fair disciplinary procedures envisaged within the Bar?
198. How effective is the activity of the institute of public defender?
199. What is the public perception of the independence of Advocacy?

XXXI. Corruption and Conflicts of Interest

200. What are the measures taken to fight against corruption?
201. Are there prescribed rules of behavior of state officials during their service? Are these rules envisaging:
 - encouragement of integrity in public life through performance of general duties (fairness, impartiality etc.);
 - restrictions on receiving gifts and other benefits;
 - protection from usage of public resources and information not envisaged for the public dissemination;
 - provisions on contacts with the third parties and individuals trying to impact on the decisions of state power, including the activities of the government and parliament?

202. Are there rules aimed to prevent conflicts of interest during the adoption of decisions by the state official, for instance, requirement for preliminary disclosure of any conflict of interest?
203. Are the above-mentioned measures covering all categories of public servants, for instance, the state officials, elected or appointed senior officials of the state and local levels, judges and other judges and other officials, performing judicial functions, prosecutors etc.?
204. Are the specific categories of state officials exposed to the requirement of disclosure of income, property and interests or to other requirements in case of undertaking or leaving state position or in the beginning or by the end of office, for instance, specific requirements to integrity and professional qualification at the moment of appointment, limitation of certain occupations after leaving office (for preventing "the system of circling doors" or so called "pan-touflage")?
205. Are the special preventive measures undertaken in specific areas at high risk of corruption, for instance for providing the necessary level of transparency and control in the process of implementation of state tenders or in case of financing of political parties and electoral campaigns?
206. To what extent is the bribery of a public official considered to be a criminal act?
207. Are there at place real prerequisites for preventing shadow economy?
208. Is the definition of corruption, corresponding to the international standards, provided within directives or other documents? Are there at place provisions of the criminal code which are aimed to promotion of integrity of public servants, furthermore more specifically are aimed to fight against abuse in influence for venal purposes, abuse of authority and violation of duties?
209. What is the list of state official who are under the force of such means, for example, state servants, elected or appointed high ranked state officials including the head of state, members of the

government and legislative bodies, judges and other state officials serving judiciary functions, prosecutors etc.?

210. What are the additional sanctions applied in case of delivery of conviction verdict on corruption crimes? Are there at place such additional sanctions, as prohibition from undertaking state offices or confiscation of proceeds?
211. What is the public perception within the country in regard of the compliance of measures and strategies aimed to fight against corruption?
212. Does the state recognize the results of international monitoring in the given sphere?
213. Are the criminal and administrative sanctions in regard of corruption and non-compliance with the preventive measures effective, proportionate and dissuasive?
214. Are the bodies fighting against corruption and providing integrity of public servants entitled with respective resources, including investigative powers, personnel and funding? Are these bodies entitled with the required level of independence from the executive and legislative powers?
215. Are there at place means providing accessibility of those bodies for individuals and promoting identification of possible acts of corruption, including "hot telephone lines" for appeal and the policy for protection of whistleblowers from harassment at workplace and other negative consequences?
216. Is the state implementing an assessment of efficiency of its anti-corruption policy, and in case of necessity, are adequate measures adopted for its correction?
217. Are there happenings that testify about non-effectiveness or dishonesty of anti-corruption efforts, for example, manipulation of legislative process, non compliance and non-fulfillment of judicial decisions and sanctions, prevention of actions of anti-corruption and other responsible authorities (including political intimidation), usage of respective state authorities for personal purposes, intimidation of journalists and members of civil society disclosing the corruption crimes and schemes?

218. Are the executive branch officials using their powers for personal gains?
219. Are the legislative branch officials using their powers for personal gains?
220. Are the judiciary officials using their powers for personal gains?
221. Are the armed forces officials using their powers for personal gains?
222. Are the police officials using their powers for personal gains?

XXXII. Collecting of Data and Strategic Surveillance

223. Are the main elements of strategic surveillance regulated by the statutory legislation, including the identification of bodies, authorized to collect such information, in detail identification of targets for which strategic surveillance can be implemented, and restrictions, including because of the principle of proportionality, which define the collecting, preservation and dissemination of the collected information?
224. Does the legislation cover also protection of information/private life of non-citizens/non-residents?
225. Is there a requirement to obtain preliminary allowance of the court or other independent body to implement strategic surveillance? Is there a mechanism of independent control and supervision prescribed?
226. Are there sufficient means of legal protection from possible violations of individual rights in case of strategic surveillance?

XXXIII. Collecting and Processing of Personal Data

227. Is the personal data subject to automatic processing protected sufficiently within the process of its collection, storage and processing by the state and the private sector entities?
228. What are the guarantees that:
229. the personal data is being processed in legal, fair and transparent manner regarding the subject of the given data (legality, fairness and transparency);

230. the personal data is collected for concrete, grounded and legal aims and is not processed further in a manner, which is not in compliance with the given aims (limited aims);
231. are adequate, appropriate and limited by the aims for which they are being processed (minimization of data);
232. are accurate, and if necessary, are kept up to dated (accuracy);
233. are kept in a form, which allows identification of the subjects of those data no longer than it is required for the aims for which the given data is being processed (storage limitation);
234. are processed via method, which ensures respective security terms of the personal data, including situations of accidental lose, deleting or damaging (integrity and confidentiality)?
235. As a minimum benchmark, the subject is provided with the following information:
- on existence of file of personal data and its main aims;
 - identification and contact information of controller and the person responsible for the information protection;
 - aim of processing of personal data;
 - time-limits within the personal data will be kept;
 - on existence of a right to demand from the controller an access to his/her personal data, as well as their correction or deleting, as well as a right to object to the processing of personal data;
 - on right to apply with the complaint to the higher ranked instance and contact information of such higher ranked instance;
 - on receivers or groups of receivers of personal data;
 - on source of such data, in cases when the personal data is not received directly from its subject;
 - any information necessary for providing fair processing of personal data.
236. Is there at place a specialized independent body providing compliance with the national law, reflecting international principles and requirements in regard of protection of individuality and personal data?
237. Are there means provided for legal protection in cases of violation of individual rights within the process of collecting of information?

XXXIV. Targeted Surveillance

238. Are the terms of targeted surveillance stated by the legislation and are they limited by the principle of proportionality?
239. Are there norms of procedural and other control?
240. Is it necessary to obtain a permission of a judge or an independent body?
241. Are there sufficient means of legal protection from possible violations of individual rights?

XXXV. Strategic Surveillance

242. Are the main elements of the strategic surveillance being regulated by the statutory legislation, including identification of bodies/agencies, authorized to gather such type of information, in detail identification of purposes, for which the strategic surveillance can be implemented, and restrictions, including by the principle of proportionality, which define the gathering, preservation and dissemination of the gathered information?
243. Does the legislation cover the protection of information/private life of non-citizens/non-residents?
244. Is it necessary to obtain a permission of a judge or an independent body for implementing strategic surveillance? Is there an effective mechanism of its independent control and supervision?
245. Are there sufficient means of legal protection from possible violations of individual rights in case of strategic surveillance?

XXXVI. Video Surveillance

246. Is the video surveillance made for safety and security purposes or for the prevention and control of crime, and is it subordinated by the law and in practice to the requirements, prescribed by Article 8 of the ECfHR?
247. Are the individuals being notified about video surveillance, which is done at the places accessible for the public?
248. Do the people have an access to the materials of video surveillance, which can have connection with them?

XXXVII. Features of Democratic Processes

- 249. Level of efficiency of realization of right of citizens to participate in the public administration affairs
- 250. Level of trust towards the electoral system
- 251. Level of freedom of establishing and functioning of political parties
- 252. Functionality of the institute of collective petition
- 253. Freedom of Press
- 254. Freedom of Internet
- 255. Freedom of assembly
- 256. Freedom of association
- 257. Freedom of religion
- 258. Level of civic activism and development of the institutes of the civil society
- 259. Transparency of activities of the public authorities
- 260. Level of functionality of state democratic institutions
- 261. Religious freedoms
- 262. Level of protection of rights of national minorities
- 263. Freedom and protection of private life
- 264. Level of pluralism with the society
- 265. Level of tolerance
- 266. Level of non-discrimination
- 267. Existence of functioning mechanisms of legal resolution of political and social conflicts

XXXVIII. Social Features of Constitutionalism

- 268. Level of legislative implementation of the constitutional principle of social state
- 269. Human development index
- 270. Social security level
- 271. Rate of unemployment
- 272. Rate of migration
- 273. Level of price stability (inflation rate)
- 274. Average monthly nominal and actual wages
- 275. Average annual growth in gross domestic product per capita

- 276. Ratio of the minimum subsistence level to the minimum wage
- 277. Ratio of pension to the average wage
- 278. Minimum consumer budget
- 279. Level of social protection of intellectual property
- 280. Share of the population with income below the minimum consumer budget per 100 thousand population.
- 281. Ratio of annual incomes of 10% of the richest persons to annual income of other 90% of population
- 282. Ratio of annual income of 10% of the richest persons to budgetary funds allocated to social sphere during the year
- 283. Decile coefficient - calculated by comparing the statistics of income 10% of the representatives of the richest segment of the population and income data of the same number of poor people.
- 284. Ratio of annual wage of officials of legislative, executive and judicial powers to declared overall income for the given year.
- 285. Ratio of declared annual income of the leaders of political parties to average wage in the given country
- 286. Dynamics of property of the given state's high ranked state officials and political elite during their years in office or while holding state positions
- 287. Standard of living of the population
- 288. Price indexes and tariffs on consumer goods and services
- 289. Level of depletion of natural resources
- 290. Expenditure on education expressed as a percentage of GDP
- 291. Expenses on science expressed as percentage of GDP
- 292. The average life expectancy
- 293. The mortality rate (total, children)
- 294. Level of protection of labor rights
- 295. Level of life protection of human life and safety
- 296. Level of intolerance in social relations
- 297. Level of co-agreement and co-understanding within the society.

XXXVIX. Economic Features of Constitutionalism

298. Level of freedom of economic activity
299. Legislative guarantees for free economic competition
300. Effectiveness of property protection mechanisms
301. Capacity of mechanisms to fight the shadow economy
302. Indexes of real amount of gross domestic product
303. Amount of total annual investments in relation to GDP
304. Share of budgetary means in investment programs
305. State external debt in relation to GDP
306. Ratio of mining and manufacturing industries
307. Ratio of import and export
308. Share of high-tech technologies in the structure of industrial products
309. Share of organic production in the structure of agricultural industry
310. Average percentage of bank credits of investment programs
311. Deficit of the consolidated budget
312. Predictability of the economic growth
313. Existence of targeted programs of sustainable development
3014. Freedom of entrepreneurship
315. Effectiveness of the fight against unfair competition
316. Investors protection index
317. Rating in the sphere of ensuring contract implementation
318. Rating in international trade
319. Stability of financial system
320. Level of trust towards the banking system.

РЕЗЮМЕ

Понятие «конституционная культура» нуждается в определенном переосмыслении и серьезном научном анализе в свете глобальных развитий нового тысячелетия. В XXI столетии в ряду вызовов, вставших перед человечеством, особенно важны гарантирование системной устойчивости и исключение социальных катаклизмов, чреватых беспрецедентными последствиями. На протяжении последних столетий эту роль в большей мере выполнял Основной Закон государства. Закрепляя цели и основополагающие принципы общественного бытия, исходящие из целостности цивилизационных ценностей конкретного общества, Конституция устанавливает основные правила общественного поведения, характер взаимоотношений индивидуума и государства, порядок и границы осуществления власти, создавая при общественном согласии среду, необходимую для прогресса и полноценного проявления созидательной сущности человека. Такая возможность возникла на определенном уровне развития цивилизации и соответствующего общественного сознания.

В юридической литературе есть доминирующее мнение, что первоначальное значение глагола «конституировать» (то есть учреждать, устанавливать) не связано ни с ограничением политической власти во имя индивидуальных свобод, ни с принуждением правительства следовать общим нравственным

нормам⁴⁹². «Конституировать» – значит, прежде всего, «устраивать», «образовывать». А по Макилвейну, слова Цицерона «это установление» (*haec constitutio*) являются первым упоминанием понятия «конституция» применительно к форме правления⁴⁹³. На основе определенного исторического экскурса С. Холмс приходит к выводу, что «первичной функцией древних конституций было не ограничение существующей власти, а создание власти из безвластия»⁴⁹⁴.

Исходя из гносеологической логики представленной позиции, понятие «конституция» («*constitutio*» – установление, учреждение, организация) традиционно характеризуется как “Высший Закон” **государства**, обладающий высшей юридической силой, основ-

⁴⁹² См. *Стивен Холмс Конституции и конституционализм // Сравнительное конституционное обозрение*, 2012, N3(88), - С. 61 (В США было опубликовано много ценных работ, посвященных проблемам современного конституционализма, в которых проблемы конституционализма в основном рассматриваются в контексте реального конституционного ограничения власти. См. Holmes S. *Constitutions and Constitutionalism // The Oxford Handbook of Comparative Constitutional Law* /Ed. by M. Rosenfeld, A. Sajo/. Oxford University Press, 2012; Michel Rosenfeld, *Comparative Constitutionalism: Cases and Materials*, (2d. Ed., West 2010) (with Baer, Dorsen, and Sajo); *American Constitutionalism: From Theory to Politics*. Book by Stephen M. Griffin. Princeton University Press, 1996; *Constitutional Revolutions: Pragmatism and the Role of Judicial Review in American Constitutionalism*. Book by Robert Justin Lipkin. Duke University Press, 2000; *The Supreme Court and American Constitutionalism*. Edited by Bradford P. Wilson and Ken Masugi. The Ashbrook Series on Constitutional Politics Rowman & Littlefield. 1997 Softcover; *Progressive Constitutionalism*. Book by Robin West. Duke University Press, 1994; *Constitutionalism: The Philosophical Dimension*. Book by Alan S. Rosenbaum. Greenwood Press, 1988; *Liberalism, Constitutionalism and Democracy*. Book by Russell Hardin. Oxford University Press, 1999; *American Constitutionalism Abroad: Selected Essays in Comparative Constitutional History*. Book by George Athan Billias. Greenwood Press, 1990; *Progressive and Conservative Constitutionalism*. Journal article by Robin West, M. Tushnet, R. Epstein, Raoul Berger, Robert Bork. *Michigan Law Review*, Vol. 88, 1990; *American Constitutionalism: From Theory to Politics*. Stephen M. Griffin. One of Choice’s Outstanding Academic Books of 1997; *The Paradox of Constitutionalism. Constituent Power and Constitutional Form*. Edited by Martin Loughlin and Neil Walker. Oxford University Press, 2008 and others).

⁴⁹³ McIlwain Ch.H. *Constitutionalism Ancient and Modern*. Ithaca, NY: Cornell University Press, 1947, P. 25.

⁴⁹⁴ См. указанную статью. - С. 62.

ные характеристики которого обусловлены тем обстоятельством, что им устанавливаются:

- основы государственного строя;
- гарантии по обеспечению и защите прав и основных свобод человека и гражданина;
- система государственной власти, ее функции, принципы и порядок организации;
- правовые границы осуществления политической власти, а также политических, экономических, социальных прав и свобод индивидуума.

Вместе с этим на международных форумах, а также в научной литературе актуальным является обсуждение таких проблем, как «аксиологические аспекты развития Конституции», «политические основы конституционализма», «тенденции развития либерального конституционализма», «конституция в контексте проявления конституционной культуры», «характерные черты европейского конституционализма и конституционной культуры», «закономерности проявления надгосударственного конституционализма» и др.⁴⁹⁵. Ав-

⁴⁹⁵ См. *Стивен Холмс. Конституции и конституционализм // Сравнительное конституционное обозрение*, 2012, N3(88), - С. 56-84; Кутафин О.Е. *Российский конституционализм*. - М., 2008; Бондарь Н.С. *Российский судебный конституционализм: введение в методологию исследования*. - М., 2012; Танчев Е. *Возникающий национальный конституционализм и современные системы конституционного контроля // Сравнительное конституционное обозрение*, 2007, N4. - С. 78-94; Розенфельд М., Шайо А. *Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях // Сравнительное конституционное обозрение*, 2007, N1. - С. 102-120; *Современный конституционализм и государство Израиль // Современный конституционализм*, 2006, N2. - С. 50-54; *Теория конституционализма и философия государства в ФРГ // Закон и право*, 2001, N5. - С. 39-47; *The Twilight of Constitutionalism?*. Series Editors: Martin Loughlin, John P. McCormick, and Neil Walker. Oxford University Press, 2010; *The Constitution in 2020*. Edited by Jack M. Balkin, Reva B. Siegel. Oxford University Press, 2009; *Constitutional Cultures*. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000; *Constitutional Cultures: The Mentality and Consequences of Judicial Review*. Robert F. Nagel. University of California Press, 1993; *Collection Science and technique of democracy*, N 37; *European and US constitutionalism*. G. Nolte (Editor). European Commission for Democracy through Law. Council of Europe Publishing, 2005.

тор также подходит к данной проблематике именно с позиции выявления аксиологической сущности и взаимообусловленности таких фундаментальных понятий, как «конституция», «конституционная культура» и «конституционализм», **с позиции осмысления данных понятий с учетом армянской исторической действительности**⁴⁹⁶.

Изучение истории армянской правовой мысли, особенно после принятия в 301 году христианства как государственной религии, открывает уникальные возможности выявления гносеологической, аксиологической, духовно-нравственной природы этих понятий.

С точки зрения правовой аксиологии, возникновение конституционной культуры обусловлено тем, **насколько “учредительные отношения” ценятся в правовом аспекте, становятся общеприемлемыми правилами поведения**, независимо от того, являются ли они обычаями или выступают как установленное правило общеобязательного поведения⁴⁹⁷. В литературе часто сама Конституция считается культурным явлением только в том случае, когда она реализуется, является действующей живой реальностью, воспринята и признана, а не является собранием приятных формулировок и умных мыслей⁴⁹⁸.

Понятие «конституция» в армянском языке, в первую очередь, подразумевает не просто «установление», а **«установление границы»**. Не случайно, что Акоп и Шаамир Шаамиряны свою конституцию 1773 года для будущей независимой Армении называли «Западня тщеславия». Этим подразумевалось, что были по-

496 См. также Арутюнян Г.Г. Аксиологическая природа конституционализма в контексте исторической эволюции конституционной культуры. В сборнике «Философия права Пятикнижия» (под ред. А.А. Гусейнова и Е.Б. Рашковско-го). - М., 2012. - С. 70-82.

497 См. Политико-правовые ценности: история и современность /Под ред. В.С. Нерсисянца. - М., 2000. - С. 5-30.

498 См. Book Review – Höberle and the World of the Constitutional State, <http://www.germanlawjournal.com/print.php?id=227>.

ставлены «предельные границы» не только свободы, но и «тщеславия». Как подчеркивали авторы этого уникального исторического документа, «...как много добра нам нужно, чтобы нашу жизнь сдерживать законом и свободой, чтобы стать достойными почитания Господа...»⁴⁹⁹. А эти законы должны диктоваться «...гармонично человеческой природе, согласно желанности нашей разумной души»⁵⁰⁰.

В то же время **в истоках армянского конституционализма понятие «конституция», прежде всего, имело ценностно-системное обозначение**⁵⁰¹.

Блестяще восприняли аксиологические нюансы конституции еще авторы изданного в 1837 году в Венеции Нового словаря армянского языка. Вначале приводятся разноязычные эквиваленты, как, например, *determinatio, constitutio, statutum, dispositio*. Далее дается исключительно интересная и ценная формулировка: **“Пределозначимые решения и Провидение Божие”**⁵⁰². Очевидно, что мы имеем дело не только с высшим “решением” конституирующего значения, значит с правовым регулированием подобного характера, но и **в его основе лежит Божественное познание, данная свыше ценностная система, Высшее провидение.**

Очевидно, что в указанном словаре понятие «конституция» имеет широкий смысловой охват, в основе которого лежит ряд важных составляющих:

- это решение, порядок, законоположение;
- оно имеет устанавливающее значение, не допускающее «решений», уклонившихся от него, выше него или сверх него;

499 Западня тщеславия. - Ереван, 2002. - С. 38 (на армянском языке).

500 Там же. - С. 71.

501 G. Harutyunyan - CONSTITUTIONAL CULTURE: THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME. Yerevan, 2009.

502 См. Новый словарь древнеармянского языка. - Ереван, 1981. - С. 688.

- выражение «Провидение Божие», взаимодополняя устанавливающий и высший характер подобного «решения», особо подчеркивает наличие лежащих в его основе неизменных, «посланных свыше» ценностей. Смысловой охват подобной формулировки исходит из духовно-нравственных, философско-познавательных, мировоззренческих корней армянской правовой мысли.

Наша рукописная традиция в ее грабарных (древнеармянских) вариантах была последовательна в вопросе осмысления понятия «конституция», что не сохранилось в переводах на ашхарабар (новоармянский). Типичным примером является приведенная из «Истории Армении» Мовсеса Хоренаци мысль, в которой беспрекословно говорится о явлении «конституция». В переводах понятие «конституция» было заменено словом «границы», что привело к полной утрате первоначального смысла.

«Новый словарь древнеармянского языка» под понятием «конституция» подразумевает «устанавливать», интерпретируется как ставить границу, решать, регулировать, упорядочивать, законодательствовать, конституировать. Все это, очевидно, в своей основе содержит значение регламентации, правового регулирования. Следовательно, перечисленные характеристики понятия «конституция» обладают также нормативным характером.

Конституционная культура не только предполагает определенный уровень общественного согласия и социальной роли человека, возможность гарантирования упорядоченного развития общественного бытия на основе разумно осмысленных ценностей и принципов, но и способность превратить эту возможность в реальность.

Основные элементы конституционной культуры - разумное осмысление социального общежития, наличие основополагающих ценностей бытия, общественное согласие от-

носителю них, их воспроизводство в образе жизни и образе действий посредством правил и норм общеобязательного поведения, придание им определенно систематизированного правового характера.

На заре человеческого общества основу бытия социального общества составляли обычаи, традиции, моральные нормы, духовные ценности, разнохарактерные правила и каноны, которые в человеческом общежитии исполнялись и сохранялись как обязательные условия поведения. Поскольку они относились ко всему обществу и имели системно упорядочивающее значение, они содержали в себе элементы конституционной культуры.

Конституционная культура, вместе с тем, более целостно проявляется на определенном уровне цивилизации, когда появляется осознанная необходимость в установлении при общественном согласии основных правил поведения как общеобязательных правовых норм. В правовой плоскости эта потребность привела к появлению конституций и конституционному упорядочению общественной жизни. На этом этапе конституционная культура получает новое качество в тех общественно-государственных формах, где наряду с Конституцией наличествует также конституционализм, то есть конституционные нормы и принципы становятся действенной реальностью, сформировалась необходимая и достаточная для конституционной демократии среда, где Конституция - не орудие в руках государственной власти, а Основной Закон гражданского общества, средство обеспечения гармоничного и стабильного развития общества, устанавливающее не только основные правила поведения, но и границы власти, ограниченные правом.

Элементы конституционной культуры формировались в течение длительного исторического периода и в армянской действительности проявились с особой последовательностью, особенно,

как подчеркивалось, **после принятия христианства как государственной религии, в условиях необходимости установления взаимосогласованных, единых правил светской и духовной жизни.** К вопросам закона, права, правосудия, неизбежности наказания, соизмеримого с виной возмещения, взаимосвязанности понятий «разумность» и «закон», а также к вопросам их роли в жизни человека, управлении государством и обеспечении стабильности общества обращались Месроп Маштоц (362-440), Езник Кохбацци (около 380-450), Египше (410-475), Мовсес Хоренаци (около 410-495) и многие другие выдающиеся армянские мыслители средневековья. Между тем, различая божественное правосудие от человеческого, ими подчеркивалось, что закон царей наказывает преступников, а Бог - и преступника, и народ: преступника - как Законодатель, а народ - как Провидец. Одной из характерных особенностей этого периода является то, что огромное значение придается роли закона и правосудия в деле утверждения общественной солидарности, гарантирования устойчивого развития государства.

Мовсес Каланкатвацци упоминает: «В годы правления царя Вачагана из Агвена между мирянами и епископами, священниками и архиепископами, дворянами и простолюдинами возникали многочисленные противоречия. Царь пожелал созвать многолюдное Собрание в Агвене, которое состоялось в мае месяце, 13 числа»⁵⁰³. Результатом этого Собрания стало принятие **Канонической Конституции**, включающей 21 статью. Историография считает датой принятия этой Конституции 488 год.

В связи с исследуемым материалом автор особо выделяет следующие обстоятельства:

1. К середине V века в армянской действительности сформировалась атмосфера, в которой была сделана попытка раз-

⁵⁰³ Мовсес Каланкатвацци. История Агвена. - Ереван, 1969. - С. 65.

решить возникшие между различными слоями общества “...противостояния” не силой или “административными” методами (в том числе указом Царя или дубинкой), а правовым путем - принятием конституционного закона, в основу которого заложены основополагающие духовные ценности.

2. Фактически, принятие Учредительным собранием Конституции - удивительно прогрессивное для своего времени событие - свидетельствует, что **в основу правового регулирования общественных отношений положены: духовное начало, нравственные ценности и принципы общественного согласия.**
3. Каноны характеризуются не иначе как конституционные, получая особый статус, с признанием верховенства установленных национальным согласием норм над любыми другими нормами и правилами.

Устанавливать правила и ставить границы действий, осуществляя это посредством представительного собрания, и достигнутое соглашение засвидетельствовать всеми дворянами Агванка и, «чтобы запись была более достоверной», закрепить ее царским перстнем - это не просто свидетельства рождения Конституции как явления в истории армянского права. Мы имеем дело с достойным особым вниманием событием, позволяющим провести аналогию между обоснованием необходимости и порядком принятия Конституции в 488 году в Агванке и принятием Конституций США 1787 года, Польши и Франции 1791 года, а в дальнейшем - и конституций других стран. Такова же общая философия: установить основные правила общественного бытия, которые верховенствовали бы над другими законами и правилами, как и ограничить действия носителей власти в рамках конституционных правил, осуществить это путем созыва Учредительного собрания и с общественного согласия.

Проводится параллель между этой Конституцией и «Афинской политией» (Конституция Афин) Аристотеля.

В армянской действительности, а именно в Канонической Конституции царя Вачагана, не только получила определенное развитие древнегреческая демократическо-правовая культура, но она была также дополнена имеющим «мощь голосования» и являющимся проявлением общественного согласия новым событием – созывом Учредительного собрания.

В конце XVIII века цивилизация связала появление Основного Закона государства, необходимость Конституции с необходимостью гарантирования устойчивого и динамичного развития страны на основе общественного согласия. По существу, та же цель преследовалась в армянской действительности раннего средневековья. Мовсес Хоренаци начинает свою «Историю Армении» словами осуждения «...немудрых нравов наших первых царей и князей» и достойно воздает тем, чьи «изложения читая, **получаем науку мирских порядков и изучаем политические системы**». Несомненно, одним из достойных был также Царь Вачаган, уроки мудрости которого имеют современное звучание.

Очень ценны также свидетельства Маттеоса Урхаеци, который, говоря об относящихся ко времени принятия Канонической Конституции событиях, отмечает: «Это было в те времена, когда на четыре части разделился Престол Святого Григора ... В те времена, когда разумные овцы стали развратными, у зверей появилось сердце, и стали дерзкими, и начали лаять в лицо патриархам. ... Однако подобный переполох и негодование не смогли проникнуть в страну Агвуна, которая называется Великая страна Армянская...».

Очевидно, что прогрессивно и устойчиво то общество, в основе которого лежат нравственные ценности и духовные корни взаимопонимания. Эта культура, отчетливо проявившись в армянской действительности в 488 году, в своей основе имела также серьезную

предысторию, которая начинается с принятия христианства в качестве государственной религии, разработки различных духовных и светских правил, особенно Канонов Собрании в Аштишате (365 г.), Канонов Шаапивана (446 г.), установленных собранием при участии армянской знати. Очевиден тот факт, что когда в армянской действительности акцент ставился на регулировании общественной жизни посредством правил, достигнутых взаимосоглашением, во всех сферах наблюдался значительный прогресс. Хотя и в зародышевом состоянии, однако конституционная культура для нашего существования и развития имела стержневое значение еще на заре истории человеческого общества. Напротив, несогласия или попытки их преодоления насилем стали причиной неудач. Во веки веков весомы слова Великого Отца армянской историографии в реквиеме по поводу распада Аршакидского царства, где в качестве основной причины случившегося отмечается то, что «разгневался мир, укоренился беспорядок, нарушилось православие, основалась невежеством ересь».

После принятия христианства как государственной религии, когда правила духовной и мирской жизни в основном устанавливались совместно на основе общехристианского мировосприятия, одно из наиболее характерных и достойных внимания обстоятельств заключалось в том, что в основу правового регулирования **был положен фактор общественного согласия**. Внутри общества отношения регламентировались соглашением, достигнутым на собрании, а не силой принуждения и единоличным диктатом. Мовсес Хоренаци, например, говоря о Собрании Аштишата 365 года, свидетельствует, что на третий год царствования Аршака сын армянского Верховного Патриарха Атанагинеса Нерсес Великий «созвал собрание епископов и мирян, канонической конституцией установил милосердие, искоренил жестокость»⁵⁰⁴. Собрание запретило браки между

504 Мовсес Хоренаци. История Армении. – Ер., 1997. – С. 224-225.

близкими родственниками, осудило коварство, доноительство, жадность, алчность, хищение, мужеложство, сплетни, заядлое пьянство, лживость, проституцию, убийство. Вместе с тем оно обязало нахараров /князей/ милосердно обращаться с тружениками, а слуг - быть покорными своим хозяевам. Было решено для немощных построить больницы, для сирот и вдов - сиротские и вдовьи приюты, для чужеземцев и гостей - гостиницы; для их содержания были установлены пошлины и налоги.

В первой половине V века созывается **Собрание в Шаапиване**, где, согласно историческим летописям, «собрались 40 епископов и множество иереев и дьяконов, ревностных служителей и весь причет святой церкви, все ишханы: областные правители, областные начальники, верховные судьи, казнохранители, военачальники, тысяцкие, предводители местностей, азаты из различных краев»⁵⁰⁵. Старшие нахарары Страны Армянской, которые были ревностными защитниками законов и святынь, говорили так: «Восстановите порядок, установленный святыми Григорием, Нерсесом, Сааком и Маштоцем, а также по вашей воле установите другие блага, и мы добровольно и охотно примем. Ибо ослабели порядки церкви и люди вернулись к беззаконию. Вы установите законы, угодные Богу и нужные в деле созидания церкви его, а мы подчинимся и будем соблюдать их твердо»⁵⁰⁶.

Собранием Шаапивана было принято 20 канонов, которые касаются таких важных основополагающих для тех времен вопросов внутренней жизни Армении, как регулирование брачно-семейных отношений, деятельность духовенства и контроль за ней, борьба против сектантства и другие.

Чтобы не «обосновывать ересь невежеством», армянская средневековая история имеет также иные свидетельства с акцентами на следование духовно-правовым правилам, явля-

505 Авакян Р.О. Памятники армянского права. - Ер., 2000. - С. 42-43.

506 Там же. - С. 43.

ющимся результатом общественного согласия. Среди них особо выделяется «**Армянская книга канонов**» **Католикоса Ованеса Одзнеци (Ован Имастасер Одзнеци), утвержденная Третьим Двинским Собором в 719 г.** Одзнеци был одним из первых в мире, после византийского императора Юстиниана Великого (482-565 гг.), и первым в Армении, кто создал армянский «*Corpus juris canonici*» - собрание законов, которое берет начало от возглавляющего иерократию католикоса и содержит ратифицированные и принятые на армянских национально-церковных собраниях каноны⁵⁰⁷.

Одна из основных особенностей «Армянской книги канонов» заключается именно в том, что она является **сводом канонических конституций**, принятых в армянской действительности начиная с 365 года, и, что примечательно, в них акцент ставится на божественную природу разумного существа. Человек со своим духовным началом, достоинством и социальной ролью рассматривался как высшая ценность и носитель правового регулирования. А как образно заметил Р.А. Папаян, «естественно-правовое поле было создано до сотворения человека, ибо он ни на миг не должен быть в правовом вакууме»⁵⁰⁸.

Для армянской действительности незыблемой ценностью было осознание того, что «...потеря души, когда уходят от чистой, прямой и проповедуемой апостолами веры в Отца и Сына и Святого Духа, больше, чем потеря тела»⁵⁰⁹. Тысячу лет назад Григор Нарекаци в «Книге скорбных песнопений» наилучшим образом представил сгусток духовных восприятий армянской идентичности: «обозначая самые разные страсти каждого», он подчеркивает, что совер-

507 См. Армянская книга канонов. - Ереван, т. I - 1964, т. II - 1971.

508 Папаян Р.А. Христианские корни современного права. - М.: «НОРМА», 2002. - С. 210.

509 См. Товма Арцруни и Ананун. История семьи Арцрунианц. - Ереван, 1999. - С. 123.

шенные человеческим естеством грехи, насколько бы они ни были многочисленны и разнохарактерны, - не столь его вина, сколь его несчастье. И устами армянского народа, прочитав «высочайшую молитву к Богу», Нарекаци молит Господа о том, чтобы Он наставил человека на путь истинный и чтобы человек жил по-человечески. А это он считал реальным в условиях согласия, справедливости в обществе, придерживающемся закона и «здоровым душой», где справедливость не может «убывая, совершенно исчезнуть» или «чаша прав на весах стать слишком легкой, делая более тяжелой чашу бесправия».

Глубоко осознавалось также, что одного хорошего закона и порядка недостаточно, нужно, чтобы люди также поняли необходимость жить по этим законам, чтобы осознание этого было бы продиктовано уверенностью, базирующейся на устойчивых и богоугодных, диктуемых разумной сущностью человека ценностях. Вот почему Нерсес Шнорали (Нерсес Д Клаеци) в «Соборном послании» (1166 г.) обратил свое слово не только к Богу, но и к духовному сословию, «князьям мира» и народу. «Соборное послание», будучи первым кондаком Шнорали и венцом его прозаических работ, имеет исключительное значение и в плане изучения правовой и конституционной культуры. Этот документ уникален своим концептуально-программным масштабом, ценностно-системным обобщением, взаимогармоничностью норм-целей, норм-принципов и норм «обхождения». Составляя правила и наставления, основанные на высоких духовных и моральных ценностях и обращенные ко всем общественным слоям, Шнорали был уверен, что только живя этой обязанностью и руководствуясь ею, можно чаять удачи, преодолеть тревогу «зла и многовластия», руководствоваться «ростками справедливости». Мирян он поучал не беззаконничать, не лишать, не использовать злые наставления, не совершать бессовестные суды, защищать вдов и бедных, не урезывать плату труженика, относить-

ся ко всем равно, не забывать ради телесного о душевном. «...Кто словами только исповедует Бога, а не делами, у такого вера оказывается мертвою»⁵¹⁰.

Без преувеличения можно констатировать, что «Соборное послание» содержит множество норм относительно прав человека и компетенции властей. «Князьям мира», в частности, обязывается: «Бессовестно не обращайтесь с подданными, устанавливая тяжелые и непосильные налоги, а каждого судите по закону и по его состоянию», «никого не лишайте и не притесняйте бедных и нищих», «не назначайте в вашей стране злых и бессовестных делопроизводителей и уездных начальников», «бессовестно не судите кого-либо, а прямо свершайте суд», «не пренебрегайте правами вдов и бедных» и т.д. Достойны внимания подходы Шнорали к вопросам суда только по закону, обратной силы закона, соразмерности ответственности и наказания и к другим правовым проблемам (чтобы не было так, что побуждаемые злостью и несправедливым правом выносили решение: или накажите одного, или выносите смертный приговор, поскольку Новый Завет это не позволяет, а Ветхий Завет хотя и позволяет любого осудить наказанием или смертью, но не без вины). Более того, **основа всех наставлений - человек с необходимостью осмысленной организации его морального образа, душевной чистоты, разумного бытия.**

Из приведенных свидетельств следует, что в армянской средневековой действительности результатом общественного согласия было не только принятие законов и правил, но также очевидно, что в основу определения этих правил положены подобное общественное требование и необходимое сознание. Одной из основных причин создания «Судебника» Мхитара Гоша (1184), являющегося одним из исключительных образцов правовой мысли, было также то, что «зло вообще обрело могущество и стало «сущ-

510 Авакян Р.О. Памятники армянского права. - Ер., 2000. - С. 186.

ностью человека». То же зло, переросшее в несовершенство души, уничтожило совершенство и на место сострадания и любви поставило ненависть. Судебник был призван способствовать восстановлению совершенства естественного закона и заменить ненависть друг к другу состраданием и любовью». Особого внимания достойно то обстоятельство, что политико-правовая концепция Мхитара Гоша базируется на теории естественного (божественного) права, основные принципы которого – равенство людей (перед Богом), свобода, право на жизнь, неприкосновенность собственности и т.д. Следовательно, позитивное право должно исходить из принципов естественного права, которые устойчивы и неизменяемы, а позитивное право создается людьми, и на нем ставят свою печать время и конкретные общественные условия. Еще одно исключительное важное обобщение заключается в том, что, согласно Мхитару Гошу, каждый народ и каждая страна должны иметь свое законодательство и правовые нормы, выбирать суд «согласно времени, и нации, и миру». Сегодня для изучения истории средневековой правовой мысли в мире особое место занимает судебник Мхитара Гоша, который, например, в Чехии включен в учебные пособия для высших учебных заведений.

Основные качества армянской правовой мысли этого исторического периода проявились также у Нерсеса Ламбронаци (1153-1198). Как в естественном мире, так и в социально-политической и моральной сферах **все считая относительным**, Ламбронаци в то же время полагает, что люди наделены свыше свободой выбора (воли), поэтому полностью ответственны за все свои действия, поступки и их последствия. Он считает важной роль воспитания в деле преодоления и уничтожения существующих в обществе беззакония и несправедливости. Он считал также, что игнорирование и маскировка имеющихся в обществе недостатков приводят к углублению существующих ошибок и пороков.

Бороться против произвола и правонарушений был призван также Судебник Смбата Спарапета, созданный в 1265 году и имевший в XIII-XIV веках большое практическое значение в деле укрепления и усиления Киликийской армянской государственности. Причем исследователи справедливо отмечают, что если у Мхитара Гоша правовое сознание и созданная система не только исходят из теории естественного права, но и пронизаны ею, то Смбат Спарапет, хотя и исходит из принципов естественного права, тем не менее созданная им система полностью относится к сфере позитивного права.

Армянская правовая мысль XIV века, в лице Григора Татеваци (1346-1409), особо важное значение придавала задаче взаимоотношений человек - общество и предложила концептуальный подход, согласно которому наиважнейшие общегосударственные задачи (благоустройства страны, мира и войны и т.д.) должны решаться **общим разумом и общей волей**. Причем субъектом права выступает не монарх-самодержец, а народ, его единая воля. Монарх, согласно этой концепции, лишается единовластия, права единолично решать общегосударственные вопросы. Правы те авторы, которые считают, что в данном случае мы имеем дело с признаками конституционной монархии. Татеваци также различает «божественное право» и позитивное право, которое закреплено в разных законодательных документах. Божественные законы неизменны и исключительны, перед ними все люди равны. Нормы позитивного права должны базироваться и исходить из божественных законов, одновременно отражая общественно-политическую действительность.

На протяжении веков одним из основных качеств нашей самобытности и существенных свойств армянского правосознания было то, что основным средством борьбы против «беззакония» и установления «жизни с любовью» являлись «угодные

богу и пригодные в деле призвания церкви к жизни законы», правила, соотносимые с «естественной природой человека», а также готовность «усмирять» и крепко удерживать их. Данный подход лежит также в основе решений Собраний Двина (VI, VII вв.), Партава (VIII в.), Сиса (1243 г.), Дзагавана (1268 г.), Иерусалима (1651 г.).

Вековая утрата государственности, длительное воздействие внешних факторов помешали воплотить посредством учредительного собрания это богатое наследие правовымышления в единую конституцию страны. Однако невозможно было сковать полет мысли. В 1773-88 гг. в Индии, в городе Мадрасе, отец и сын Шаамиряны создали исключительный памятник права - Конституцию независимой Армении, лелеемой в их мечтах, состоящую из 521 статьи и озаглавленную «Западня тщеславия». Эта работа - одно из немногих достижений общечеловеческой общественно-правовой мысли, выдвинутые в которой и приведенные в определенную систему идеи являются не только результатом глубоких теоретических обобщений, но и основополагающей ценностью международных конституционных развитий. Само название работы, по оценке известного профессора конституционного права Доминика Руссо, - целая правовая теория. Эта Конституция была призвана гарантировать «...возможность сохранения свободы» и создания «... неминущей западни для всех низких людей, чтобы они были вынуждены оказаться под гнетом полезной деятельности». Она должна была иметь краеугольное значение для руководства справедливыми законами, естественным правом и справедливостью.

Считаем необходимым особо подчеркнуть, что в XVIII веке армянская конституционная культура базировалась на принципе верховенства права, сознании приоритета естественных прав, разделении властей, гарантировании гармоничности конституционных функций, сдержек и противовесов. «Западня тщеславия»

- не отклик на влияние европейской правовой мысли, а в правопознавательном и научно-методологическом плане своеобразное обобщение результатов национально-церковных собраний Агвена, Аштишата, Шаапивана, Двина, Партава и др., плодотворной деятельности Ованнеса Одзнеци, Ованнеса Саркавага, Давида сына Алавика, Мхитара Гоша, Нерсеса Шнорали, Нерсеса Ламбронаци, Смбата Спарапета и многих других представителей армянской общественно-правовой мысли. Большое обобщение содержит статья 389 Конституции Шаамирянов, в которой закреплено: «Каждая статья закона включает многочисленные подробности, которые могут быть разъяснены мудрыми людьми. Все объяснения о законе, если преследуют полезную цель и соответствуют желанию Армянского дома [Парламента], должны быть удостоены чести, но не те объяснения, которые противоречат человеческой природе». Здесь не только устанавливается классическое правило толкования закона, но и подчеркивается, что его основа - разумная природа человека, верховенство его права.

В аспекте принципов власти народа, верховенства права, представительной демократии, разделения властей и их функциональной независимости, социальной защищенности и других основополагающих конституционных принципов, вплоть до конституционного правосудия, следует отметить, что впервые в армянской действительности представлена целостная и упорядоченная система норм конституционного права, не только обобщающая достижения армянской и мировой правовой мысли, но и формирующая начало нового государственного мышления. Только «плоды древа права и правосудия» могут стать основой благочестивой (праведной) деятельности «справедливых правительств», ищущих в справедливости и законности счастье индивидуума и общества, имея исходным императив «жить по закону и справедливости», - таков наивысший наказ «Западни тщеславия». Чтобы «жить как разумный и достой-

ный человек ...мы должны выбрать для себя поведение, порядок и закон», не руководствоваться «беспорядком и беззаконием», уметь «собираться - слушать о праве, составлять законы». Как метко и точно сказано, насколько гармонирует с прогрессивным правосмыслением даже XXI века. Единственный путь становления правового государства - до «составления» закона глубокое понимание и следование совету «выслушать о праве». Вывод таков, что «...ни у нас и ни в нашем мире пусть не будет и не выступает кто-либо, кто своими поступками будучи своевольным и своенравным человеком, не будет наказан по закону, и пусть наши законы будут нашим хозяином и царем, вне наших законов никого не признаем выше, кроме только Бога Создателя...»

Сегодня более чем актуальным является также другое положение предисловия «Западни тщеславия»: «...как много **добра** нам нужно, **чтобы нашу жизнь сдерживать законом и свободой**, чтобы стать достойными почитания Господа...». А эти законы должны диктоваться «...гармонично человеческой природе, согласно желанности нашей разумной души».

Особо привлекает внимание обращение Шаамирянов к римской действительности: «Пока они были непоколебимы и оставались верными своим законам, мужественные и подбодренные любовью, из незначительного положения возросли, размножились и благодаря своим законам осчастливились», однако когда старейшины (сенаторы) Рима позволили, чтобы должность императора «стала наследственной», то в их свет проникла тьма, в их добро - зло, в их единство - трещина, в их равенство - камнеметание, земля и небо, т.е. высшее и низшее. ...Этим непримиримость вошла в них».

Будучи Конституцией, предусмотренной для государства с парламентской формой правления, «Западни тщеславия» устанавливает строгий порядок выборов в Армянский дом (законодательный орган), трехлетний срок, определенные полномочия, регла-

менты принятия закона и осуществления назначений и т.д. Законодательный орган формирует исполнительную и судебную власть в установленном законом порядке. Любой орган власти действует в рамках своей компетенции, установленной законодательством: «Патриарх, нахарар, епископ, староста, священники, власть имущие, никто никому не должен давать приказ, не касающийся его положения и не более того, что дано каждому в соответствии с его положением как со стороны церкви, так и Дома Армении» (ст. 364). Устанавливается определенный принцип иерархичности правовых актов: «Каждый документ, касающийся либо продажи, либо заключения союза, либо любых других действий, кем бы он ни был подписан, не будет иметь цены, если противоречит Армянскому закону **или разумной природе человека**». Отдавая преимущество «разумной природе человека», дается точная и целостная формулировка принципа конституционного правового равенства (ст. 3): «Всяк человек, живущий в Армении, независимо от пола, национальной принадлежности и от того, родился ли он в Армении или нашел в ней убежище, был и останется свободным во всякой своей деятельности. Никто из людей не может быть собственностью других людей. Человек - хозяин лишь своего труда и результатов, а труд оплачивается по затратам, согласно армянским законам». Даже вопросы защиты прав осужденных не остались без внимания Шаамирянов: «Тюрьма правонарушителей должна быть чистой, чтобы не был нанесен вред здоровью заключенных» (ст. 148). Предусматривая определенные нормы конституционного регулирования осуществления права собственности, вопросов социальной защиты, в то же время важное значение придается национально-государственным приоритетам. Статьей 127, в частности, устанавливается: «Армянский дом должен содействовать всем специалистам, особенно в области философии, астрологии, медицины, музыки, ораторского искусства и др.».

Превыше всего ставя «всеобщеравную» роль и сдерживающую силу закона, ставя в основе этого право и «гармоничные природе человека» ценности, **основываясь на концепциях естественного (божественного) права и общественного союза**, Шаамиряны изложили свои конституционные правила «Для правления Армянской страной», которые, являясь исключительной ценностью конституционной культуры, вместе с тем имеют важное значение для увязки прошлого и современного правовымышления, для использования уроков прошлого в неуклонном движении по пути установления независимой правовой государственности.

Автором подчеркивается также, что более чем семивековая утрата армянской государственности оставила свою печать на общественном сознании людей. Поневоле деформировались многие гражданские качества. Закон воспринимался также как принуждение чужого и тормоз для проявления свой самобытности.

Бесспорно, что правовая культура - неотделимая часть **национально-государственной культуры**. Армянская правовая культура оставила достойные внимания памятники общечеловеческого масштаба. Однако правовая культура, будучи органической частью национальной культуры, в основном **была оторвана от национально-государственной культурной среды**, которую мы просто не имели в период утраты государственности. К современным приоритетам становления государственности необходимо, в первую очередь, причислить формирование такой конституционно-правовой культуры, которая послужит основой для формирования и укрепления гражданских качеств индивидуума, станет предпосылкой установления правовой демократии. Утверждения в стране демократии самого по себе недостаточно, и оно не является самоцелью. Это **должна быть правовая, конституционная демократия с системной целостностью и необходимыми либеральными качествами**.

Из приведенных рассуждений следует, что **«конституирование» общественных отношений, установление при всеобщем согласии общеобязательных правил поведения исходят прежде всего из системы социокультурных ценностей данного общества, духовно-нравственных начал поведения социума и формируют соответствующий уровень конституционной культуры**.

Как отмечается в литературе, «...общей для любой конституции является ее ценностная ориентация. Любая конституция исходит из базовых положений, признаваемых властями в качестве ценностей в данной цивилизации, в той или иной форме закрепляет их»⁵¹¹. **Независимо от временного измерения, культура каждого народа - это его осознанное бытие, осмысленное присутствие во времени**. Именно это осмысленное присутствие **на определенном уровне развития** приводит к конституированию социального поведения человека и власти. Как отмечает член-корреспондент РАН Е.А. Лукашева, «важными компонентами культуры являются соционормативный комплекс и ценности, порожденные социальным взаимодействием людей»⁵¹². С учетом именно ценностно-системной природы конституционного правового регулирования профессора Мишель Розенфельд и Андраш Шайо подняли актуальность проблематики **о влиянии трансплантации либеральных конституционных норм** на распространение и укрепление либерального конституционализма⁵¹³.

Конституционная культура - не абстрактное понятие, она проявляется во всех сферах бытия социального общества, проявля-

511 См. Конституция в XXI веке: сравнительно-правовое исследование: монография /отв. ред. В.Е. Чиркин/. - М.: Норма: ИНФРА-М, 2011. - С. 22.

512 Лукашева Е.А. Человек, право, цивилизации: нормативно-ценностное измерение. - М.: Норма, 2011. - С. 12.

513 См. Мишель Розенфельд, Андраш Шайо. Распространение либерального конституционализма: изучение развития прав на свободу слова в новых демократиях// Сравнительное конституционное обозрение. 2007. N1, - С. 102.

ется на прочной основе выработанных, выстраданных, выверенных за века духовных и материальных ценностей и идеалов независимо от наличия письменной конституции и воли правителей⁵¹⁴. Поэтому Конституция не может стать импортируемым или экспортируемым товаром. А любой трансплантационный элемент должен быть адекватным трансплантируемому организму. С другой стороны, как с позиции прагматического подхода подчеркивает Лех Гарлицкий, в каждой национальной конституции провозглашается некоторый набор ценностей, определяющий значение ее положений. Поскольку четких границ между «ценностями», «принципами» и «нормами» не существует, все конституции содержат те или иные весьма общие понятия, которые могут служить основой в процессе толкования конституции и ее положений⁵¹⁵.

В русле современных достижений цивилизации основная характеристика конституционной культуры заключается в том, что **«Высший Закон» страны должен включать всю систему фундаментальных ценностей гражданского общества и гарантировать их устойчивую и надежную защиту и воспроизводство**. Эти ценности, в свою очередь, формируются на протяжении веков, каждое поколение переосмысливает их и своими дополнениями гарантирует дальнейшее развитие. Удача сопутствует тем нациям и народам, у которых эта цепь не прерывается или серьезно не деформируется. Следовательно, **понятие «конституционная культура» более развернуто может характеризоваться как исторически сложившаяся, стабильная, обогащенная опытом поколений и всего человечества определенная ценностная система, лежащая в основе общественного бытия, способствующая установлению и реализации осново-**

⁵¹⁴ Более подробно см. Narutyunyan G. GONSTITUTIONAL CULTURE: THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME. Yerevan, 2009.

⁵¹⁵ Лех Гарлицкий. «Конституционные ценности» и Страсбургский суд. Сборник докладов «Конституционные ценности в теории и судебной практике». - М., 2009. - С. 221.

полагающих правил поведения на основе их нравственного и духовного осмысления.

Сама Конституция должна воплощать в себе эту ценностную систему, быть продуктом осмысленного присутствия данного общества на конкретном историческом этапе своего развития, **являться результатом общественного согласия вокруг основополагающих ценностей социального поведения государства и гражданина**. Это идеал, к которому необходимо стремиться. Но, как подчеркивает профессор Стивен Холмс, «до сих пор ни одна конституция не следовала обещаниям демократического конституционализма и не приспособливалась интересы правителей к интересам управляемых»⁵¹⁶. К причинам этого мы еще вернемся. В то же время необходимо подчеркнуть, что при таком выводе концептуальное значение имеет методологический подход к самой конституции – как к основному закону **государства** или как к **основному закону данного социума**.

Говоря о конституционных культурах, специалисты подчеркивают также системные особенности их формирования. Например, профессор Сандерс различает такие конституционные системы, как системы Соединенного Королевства, США и Франции, Роберт Гудин делает акцент на тождестве конституций разных стран. Однако, независимо от различий в акцентах, историческая действительность такова, что любая страна и любой народ прошли самостоятельный путь формирования конституционной культуры и утверждения конституционной действительности, в той или иной мере перенимая опыт других, делая ее более целостной и дополняя, исходя из своей ценностной системы. Основное, существенное в том, что конституционная культура и сама Конституция **не могут стать импортируемым или экспортируемым товаром**. Это действительность, которая формируется

⁵¹⁶ Стивен Холмс. Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88). - С.59.

на ценностной системе данного общества, конкретной социальной общности.

В настоящее время международная конституционно-правовая мысль более чем когда-либо придает важное значение надежному гарантированию конституционных принципов и норм в общественных отношениях, так называемой конституционализации этих отношений, как предпосылке гарантирования верховенства права, становления правовых, демократических государственных систем. Если до XVIII века развитие политико-правовой мысли привело к принятию конституций, к идее установления общественного согласия посредством Основного Закона социального общества, то основная задача постконституционного периода - гарантирование в стране конституционализма, который поднимает конституционную культуру на качественно новую ступень. К сожалению, во многих странах эта задача только недавно приобрела актуальность, поскольку она осуществима только в условиях независимой государственности.

Конституционализм, **который является воплощением конституционной культуры**, в свою очередь, - сложное общественно-политическое и государственно-правовое явление. Он, в первую очередь, подразумевает утверждение конституционной демократии во всей государственной системе. Это цель, к которой стремятся все страны, избравшие путь социального прогресса. Однако осуществление этой цели, в частности, требует таких обязательных гарантий, как признание и гарантирование государством и всем обществом конституционных целей и основополагающих принципов, наличие соответствующей конституционным принципам государственной власти, становление правовой системы, построенной на принципе верховенства права, надежная защита конституционного строя и верховенства Конституции и др.

Вопрос не только в том, каковы закрепленные Конституцией конституционные порядки и какие принципы положены в осно-

ву взаимоотношений права и власти. Существенно то, как в общественной жизни проявляется данный конституционный строй, насколько облекаются в плоть и кровь основополагающие принципы Конституции.

Совместное гармоничное существование Конституции, основанной на принципе верховенства права, выступающей гарантом становления правового государства и гражданского общества, и равноценной ей конституционной демократии предполагает наличие определенных необходимых и достаточных предпосылок. Среди них исходной является степень становления либерального правосознания и его общественного восприятия и охвата. Такое правосознание лежит в основе современных европейских конституционных развитий.

Важная стадия теоретико-философского восприятия и научно-правового толкования права началась в Европе еще в середине XVII века. Одна из характерных особенностей этого периода заключается в том, что сформировалось более целостное мировоззрение о естественном праве и отвергалось так называемое феодальное юридическое мировоззрение. Среди носителей новых взглядов особо выделялись Н. Макиавели (1469-1527), Г. Гроций (1583-1645), Б. Спиноза (1632-1677), Т. Гоббс (1588-1679), Дж. Локк (1632-1704), Ш.-Л. Монтескье (1689-1755), Ж.-Ж. Руссо (1712-1778), Т. Джефферсон (1743-1826), Т. Пейн (1737-1809), Э. Кант (1724-1804), Г. Гегель (1770-1831) и др. Г. Гроций, в частности, считал, что естественное право исходит именно из существа человека, которое и побуждает его к общению с себе подобными.

Признание естественного права **придало юриспруденции научный характер**. Волеустановленное право оказалось не в состоянии добраться до своих научных корней.

Развитие экономических отношений, создание свободного и конкурентного пространства, признание прав человека **в качестве**

критерия ограничения власти, как и постепенное укоренение других элементов либерально-ценностной системы в европейском правовомышлении на протяжении последних более чем трехсот лет кристаллизировались в таких нормах и принципах, которые со второй половины XX века сформировали качественно новый уровень европейского права.

Характерные для гражданского общества ценности, качества правового, демократического государства формировались на протяжении веков, однако стали системными регуляторами общественной жизни, особенно в последние десятилетия предыдущего тысячелетия. Фактически, начиная с 1950-х годов, общие демократические ценности и принципы правового государства нашли свое системное отражение в конституционных решениях европейских стран, с учетом особенностей конкретных стран. Однако общее для всех заключается в том, что закон и государство должны быть правовыми, гарантировать равенство, свободу и справедливость, ценностно-системная основа которых - приоритет неотъемлемых прав человека. Причем правовая система становится целостной и жизнеспособной, когда эти ценности становятся конституционными, получают конституционные гарантии признания, обеспечения и защиты.

Европейские демократические процессы, сопровождающиеся углублением рыночных экономических отношений, еще в начале XX века создали предпосылки для утверждения **либерально-правового типа правосознания**. Сущность последнего сводится к признанию естественных прав человека как высшей ценности, как непосредственно действующего права и основы позитивного права. Неизбежная логика демократических развитий заключалась в том, что в европейской правовой системе **гарантия верховенства права стала краеугольной ценностью**. В свою очередь, ценностно-системной основой конституционной культуры стали **человеческое**

достоинство, свобода, демократия, равенство, верховенство права и уважение прав человека - ценности, которые характерны для **общества, построенного на принципах недискриминации, плюрализма, толерантности, правосудия и согласия**. Эти же ценности положены в основу конституционных регулирований Европейского союза, считающихся большим достижением международной правовой мысли.

Автор анализирует также постсоветскую действительность и трансформационные особенности общественных систем. Выделяются некоторые обобщения:

- 1) многие страны, находящиеся на этой территории, не прошли тот путь развития либеральных рыночных отношений, который для Европы длился более двух столетий. Многие просто перешли от феодализма к «социализму»;
- 2) сформировались отношения собственности совсем иного характера. В условиях господства государственной собственности на средства производства народ был отделен от власти и из субъекта власти превратился в объект власти. Право же было призвано защищать не человека и его собственность, а власть;
- 3) сформировавшееся на протяжении веков правовышление уступило место построенному и сформированному на атеистическом мировоззрении догматическому легистско-позитивистскому правовышлению;
- 4) в условиях однопартийности источником права стала исключительно воля политической силы. Реальным нормотворческим органом стал высший орган партии, который имел неограниченную и несбалансированную власть.

Естественно, за несколько десятилетий волеустановленное правовышление своими политизированными и деформированными

проявлениями пустило глубокие корни во всем бывшем СССР, а также в Восточной Европе. Все это стало серьезной причиной правовых системных деформаций.

Основные конституционно-правовые деформации в трансформирующейся общественной системе можно условно разделить на три группы:

- 1) инерция правовымышления и правоприменительной практики;
- 2) искаженные конституционно-правовые решения и пробелы;
- 3) механическое заимствование или копирование прогрессивных правовых ценностей без создания необходимой ценностной системы и предпосылок их реализации и без учета национальной конституционной культуры, что в реальной жизни приводит к разнохарактерным деформациям основных конституционных принципов или к оторванности найденных решений от реальной жизни, следствием чего является их недостаточная жизнеспособность.

К сожалению, в ряде стран с переходным обществом системный распад еще не привел к перемене мышления. Огромна инерция мышления и миропонимания. На созерцательном уровне или при трансформации понятия правового государства в лозунг всерьез не воспринимается необходимость гарантирования верховенства права, ограничения власти правом, конституционализации общественных отношений. Представления о власти продолжают оставаться в плоскости возможности применения силы и давления. Демократия рассматривается как добродушное отношение власти, возможность людей выражаться в пределах, разрешенных властью. Это путь не к перестраивающейся Европе, а путь, устремленный к средневековым регрессивным ценностям.

Международная практика свидетельствует также о трех путях установления демократии: 1) эволюционное развитие (по которому пошли большинство европейских стран); 2) через революции, хаос и анархию; 3) через авторитарные режимы (классическими примерами являются Португалия, Испания, Чили). Задача в том, что каждый из них имеет свою цену и требует определенное время. Всегда несравнимо дорого платят народы стран, избравших второй и третий пути, при этом зачастую не достигая желаемого результата. Сегодняшняя Европа однозначно отвергает эти пути. Основной подход заключается в том, что к демократии можно прийти только и только на правовой основе. Там, где насилуется право, демократические лозунги становятся просто средством установления тоталитаризма.

Для переходных общественных систем характерно то, что советское правовымышление часто находит благодатную почву для самовоспроизводства.

Сложность и особенность ситуации заключается в том, что имеем дело не только с инерцией, имеющей глубокие корни, а также в том, что системный распад выдвинул необходимость перераспределения собственности, чем и обусловлено появление новых явлений. С одной стороны, установление частной собственности объективно выдвигает необходимость упрочения демократии, с другой стороны - советская правовая система, служившая главным образом защите государства и государственной собственности, в основном утратила свой предмет и, сохранившись в своих главных чертах и институциональной системе, стала орудием в руках власти, перераспределяющей собственность. Такое положение - самый большой тормоз демократических развитий.

Бесперспективно также акцентирование осуществления правовой революции путем "импорта" демократии без создания необ-

ходимой для этого ценностной системы и предпосылок. Это может привести только к неудачному копированию.

Задача должна решаться не только на уровне мышления или на уровне политического сознания, но и должны быть преодолены гносеологические искажения. Следовательно, оптимальный путь становления правового, демократического государства - не бесплодная попытка перепрыгнуть через века или превращение некоторых ценностей и принципов в бумажные лозунги и маскировку существующей действительности, а **признание европейских ценностей гражданского общества в рамках собственной ценностной системы и последовательное, непреклонное превращение их в осмысленную собственность членов общества**. Конституционно-правовые решения могут быть построены только на этих ценностях, заключая в себе внутреннюю энергию восприятия обществом и придания обществу определенного вектора системного развития.

Бывший председатель Международной ассоциации конституционного права, профессор Черил Сандерс, отмечая лингвистические и содержательные сходства конституций разных стран, подчеркивает, что исследование истории их создания свидетельствует, что они производны друг от друга, но они должны быть сообразны ценностной системе того общества, для которого предназначены установленные конституционные принципы и нормы. В противном случае они останутся на бумаге и не будут реализованы в жизни, не станут живой реальностью. Более того, несоответствие ценностной системе действительности может привести к тому, что они из стимула прогрессивных реформ превратятся в стимулятор глубоких социальных противоречий или в орудие принуждения в руках власти.

Основные конституционные принципы и положения зачастую заимствуются в искаженной форме, приспособляются к разным

условиям и представлениям. Предварительным условием является признание и восприятие основных конституционных принципов в контексте правовых критериев, и лишь затем глубокое изучение тех подходов, с помощью которых разные страны смогли решить вставшие перед ними конкретные конституционные задачи и обеспечить стабильное конституционное развитие страны. В этом плане очень важно изучение международной практики конституционных изменений разных стран. Например, из исследования конституционных изменений и конституционных законов последних десятилетий Австрии, США, Бельгии, Германии, Дании, Испании, Италии, Греции, Португалии, Франции, Финляндии, Словакии и ряда других стран, как и из изучения конституций ряда стран Восточной Европы и бывшего СССР (Польши, Словении, Чехии, Болгарии, Российской Федерации, Литвы, Эстонии, Грузии, Казахстана и др.) следует, что в плане формирования и развития конституционной культуры имеется ряд устойчивых и общих тенденций:

1. Все более доминирующими становятся демократические конституционные ценности. Принципы правового, демократического государства приобретают системный характер. Конституционные изменения и дополнения направлены на ограничение власти, децентрализацию политической, экономической и административных сил и одновременно на укрепление гарантий и расширение возможностей институтов самоуправления.
2. Принцип верховенства права приобретает реальное содержание, приводятся в соответствие основные конституционные принципы и конкретные механизмы конституционных правоотношений, повышаются требования к усилению конституционной ответственности.
3. Углубляется процесс конституционализации общественных систем, основные конституционные права и свободы чело-

века и гражданина приобретают непосредственно действующий характер, определяют смысл и содержание власти, укрепляются конституционные гарантии их защиты. **Конституционные определения о достоинстве личности как источнике ее прав и свобод, а также о характере непосредственного действия конституционных прав приобретают общепризнанное системообразующее содержание.**

4. Последовательно конкретизируются функциональные полномочия институтов государственной власти, и они приводятся в соответствие с функциями ветвей власти, укрепляются гарантии независимого осуществления этих полномочий. Приобретает системный характер сбалансированность функциональных, противовесных и сдерживающих конституционных полномочий, разделение властей осуществляется на более конкретной критериальной основе, обеспечивая динамичную функциональную сбалансированность различных ветвей власти. Функционирование институтов государственной власти больше базируется на принципах сотрудничества и взаимодействия.
5. Закрепляется целостный конституционный механизм выявления, оценки и восстановления нарушенного функционального конституционного баланса институтов власти с целью последовательного укрепления иммунной системы общественного организма, усиливаются механизмы внутриконституционной самозащиты, укрепляются гарантии конституционной стабильности.
6. Параллельно с углублением правовой глобализации наблюдается устойчивый поиск механизмов сочетания универсальных ценностей с национальными особенностями. Принципы и нормы международного права на основе об-

щих ценностей, стандартов и позиций играют все более возрастающую роль в национальных правовых системах. Меняются также характер и функции государства и права. Происходит интернационализация права. Укрепляются основы единой европейской системы конституционализма, идея надгосударственной европейской конституции приобретает реальный облик. В континентальной правовой системе физическое лицо становится субъектом международного права, а международная судебная практика в определенной мере становится важнейшим прецедентным институтом.

Естественно, приведенные обобщения не исчерпывают все основные тенденции конституционного развития в современной Европе, однако представляют основную суть и логику происходящих процессов, при этом констатируя, что верховенство права утверждается на основе **высокой правовой и конституционной культуры**. Правовая глобализация на европейском уровне создала все необходимые предпосылки, чтобы без всякого сомнения утверждать, что **формируется некая новая система права - права цивилизованных народов**.

Наряду с указанными общими тенденциями важное значение имеют вопросы развития институтов, осуществляющих функции ветвей власти, конкретизации их функциональной роли и наделения необходимыми и достаточными полномочиями.

Учитывая исключительную роль устойчивой власти в переходных общественных системах, можно признать, что отмеченные общие тенденции актуальны в плане формирования концептуальных подходов к конституционным реформам переходных стран и создания предпосылок гарантирования верховенства Конституции. Задача, однако, заключается в том, что эти решения должны быть гармоничны ценностной системе данного конкретного общества, ба-

зираться на необходимых предпосылках и быть результатом общественного согласия.

Эта задача может получить продуктивное решение только в том случае, если **общественным согласием конкретизированы приоритеты развития страны**, положенная в их основу система ценностей, когда определены концептуальные подходы для обеспечения развития общественной жизни на основе реальных программ, исходящих из этих приоритетов. Это необходимо особенно для переходных общественных систем, в которых господствуют неопределенность и ценностно-системный хаос.

Развитие конституционной культуры как в армянской действительности, так и в международной практике в своей основе имело стабильные характеристики: общественное согласие и мир, ограничение власти правом, наличие правовых законов, «гармоничных человеческой природе, соответствующих желанности нашей разумной души», «непоколебимая верность» им, способность сдерживать нашу жизнь «законом и свободой». Эти ценности выводят на путь прогресса и развития. «Противоречия», «распутное» поведение, «несогласие», «признание воли носителя власти выше закона», «утверждение иррационала невежеством», «трещина в единстве и взаимопонимании» и многочисленные другие не соответствующие человеческой природе проявления зла - прямой путь к неизбежным потерям и регрессу. К сожалению, наша история также сохранила многочисленные свидетельства этого.

Конституции часто пишутся и изменяются в таких ситуациях, когда перед обществом стоят требующие безотлагательных решений задачи. Подобные ситуации диктуют сверхосторожный и ответственный подход к основным качествам конституционной культуры. Отдавая предпочтение текущим задачам, формирующиеся вокруг них политические соглашения часто создают серьезные опасности для будущего, устойчивости конституционного строя страны вообще.

Политические события ставят свою печать на восприятии содержания и формах проявления правовых принципов. В основном политическими событиями обусловлены выбор в стране формы правления, конституционный баланс властей, практика применения сдержек и противовесов, внутриконституционные гарантии преодоления конфликтов в правовом поле, возможности динамичной гармонизации политических и правовых событий и т.д. Для посткоммунистических стран характерно, что на стадиях принятия новых конституций были и стремящаяся к реваншу левая оппозиция, и революционный либерализм. Их взаимовлияние сформировало определенную среду политического взаимосогласия правовых решений. Почти во всех этих странах постепенно не только ослаб левый реваншизм, но и либеральный романтизм уступил место умеренному реализму. Существенно нарушился баланс внутренних политических влияний. Над конституционными решениями, новыми изменениями постепенно стало господствовать административно-политическое влияние действующей власти, что опасно в той мере, в какой конституционные решения приспособляются к решению политических задач, не превращая их в результат общественного согласия относительно общих подходов.

Конституционные реформы должны стать средством достижения общественного согласия, преодоления политических кризисов, а не жертвой «противоречий». Изучение опыта многочисленных стран свидетельствует, что основные характеристики таких кризисов - это спад доверия народа к политической власти, расширение и системный характер коррупции (в том числе наличие политической коррупции), централизация политической, административной и экономической сил, укоренение корпоративно-кланового правления в системе государственной власти, высокий теневой уровень в сфере общественных отношений и т.д. Углубление этих явлений уничтожает гарантии непрерывности процесса становления конститу-

ционной демократии, что представляет большую опасность для переходных стран.

Конституционная архитектура имеет свою логику, принципы и границы. **Основная задача** принятия конституций или внесения в них изменений - гарантирование верховенства права. В свою очередь, наличие четких конституционных гарантий обеспечения прав и основных свобод человека - важнейший критерий оценки жизнеспособности Конституции. Любой шаг, направленный на разрешение каких-то политических задач путем конституционных изменений, но не исходящий из принципа гарантирования верховенства права, не может считаться конституционным и будет противоречить ценностям правовой демократии. **Один из важнейших принципов международного права заключается именно в том, что недопустимо какое-либо конституционное изменение, которое ослабляет защиту прав человека или гарантии осуществления этих прав и свобод.**

Вторая задача конституционных изменений - гарантирование дееспособности и плодотворной работы властей. Это возможно исключительно путем последовательной реализации принципа разделения властей, баланса их полномочий, укоренения действенной системы сдержек и противовесов. Любое осуществляемое в этом направлении изменение должно дать четкий ответ на следующие вопросы:

1. Какое изменение происходит в функциональных полномочиях ветвей власти и насколько они могут нарушить динамическое равновесие и нанести вред функциональной независимости той или иной ветви власти?
2. Как обеспечить системную гармонию цепочки **функция - институт - полномочие**?
3. Насколько изменения функциональных полномочий сбалансированы противовесными полномочиями?

4. Насколько сдерживающие полномочия целостны и надежны в условиях нового баланса функциональных и противовесных полномочий?

Третья важная задача конституционных реформ заключается в том, чтобы гарантировалось по возможности широкое общественное согласие относительно конституционных решений, одновременно были бы снижены до минимума или исключены внутриконституционные пробелы и несоответствия, преодолены тупиковые ситуации, укреплен внутриконституционный устойчивый, созданы основополагающие предпосылки гарантирования верховенства Конституции и установления конституционной демократии. Специалисты часто призывают в свидетели основную особенность американского конституционализма - устойчивость в плане принципиальных оснований и гибкость в их функциональных проявлениях в соответствии с требованиями времени. Это характерно не только для американской конституционной практики, но также считается важнейшим качеством конституционной культуры в международном масштабе. Поэтому конституционные реформы должны создать такие гарантии внутриконституционной устойчивости, **когда надежная и неукоснительная охрана основополагающих конституционных принципов сочетается с динамичным развитием конституционализма и конституционной демократии, последовательным обеспечением верховенства Конституции.** Эти качества - основные критерии современной конституционной культуры и имеют краеугольное значение для правового государства.

В современном мире диалектическая связь между реальной общественной жизнью и самой Конституцией проявляется через призму соответствующих признаков конституционализма в данном обществе. Очевидно, что наличие Конституции не определяет уровень и суть конституционализма в обществе. Нельзя не согласиться

с П.А. Баренбоймом, когда он подчеркивает, что «причинная связь и взаимозависимость между осуществленными и книжными утопическими идеями является одним из важнейших вопросов в понимании утопизма как важнейшего движения конституционной и общественно-политической мысли в течение последних трех тысячелетий⁵¹⁷».

Однако **“конституционализм” - это не утопическое восприятие идей о необходимости конституционной регуляции общественных отношений.** «Конституционализм» представляется как системное и осмысленное наличие конституционных ценностей в реальной общественной жизни, на чем базируется вся правовая система. Нормативные характеристики данного принципа предполагают наличие необходимых и достаточных правовых гарантий для осознанной реализации прав и свобод во всей системе права и общественных отношений. В правовом государстве любая норма права должна проявляться как элемент конституционно взаимосогласованной системы правового и нравственного поведения человека и государства.

При этом автор соглашается с мнением профессора Н.С. Бондаря о том, что «...господствующие в общественном сознании оценки конституции, уровень конституционной культуры в обществе и государстве, действенность идей конституционализма определяются в своей основе не самим по себе фактом наличия или отсутствия в государстве юридической конституции (основного закона) и даже не ее «возрастом» - есть значительно более важные, глубинные - социокультурные - истоки конституционализма»⁵¹⁸.

Сама система базовых категорий права, параллельно социокультурной эволюции, приобретает новый облик и характер.

⁵¹⁷ Баренбойм П.А. 3000 лет доктрины разделения властей. Суд Сьютера. - М., 2003. - С. 75.

⁵¹⁸ Бондарь Н.С. Судебный конституционализм в России в свете конституционного правосудия. - М.: Норма; ИНФРА. 2011. - С. 24.

В данной системе **принципиальное значение приобретает понятие «конституционализм» как общеправовой принцип социального поведения общества.** Это понятие неразрывно связано с конституционализацией общественных отношений и качественно новыми проявлениями конституционной культуры.

С учетом вышесказанного автором представляется, что понятие конституционализма необходимо воспринимать не как один из основных принципов конституционного права, а как фундаментальный принцип права в целом. Общеизвестную римскую формулу «Где общество, там и право» можно перефразировать следующим образом: **«Где конституционализм, там и правовое государство».** Конституционализм определяет суть взаимосогласованного поведения социума, характер его осмысленного существования во времени, уровень зрелости общественных отношений и их правового регулирования. Это, в первую очередь, идеал цивилизованной саморегуляции, к чему должно стремиться общество.

В рамках приведенной автором формулировки **современный конституционализм представляется как наличие установленных общественным согласием фундаментальных правил демократического и правового поведения, их существования как объективной и живой реальности в общественной жизни, в гражданском поведении каждого индивидуума, в процессе осуществления государственно-властных полномочий.**

Проблема сводится не просто к применению Конституции, а к формированию той социальной системы, в которой конституционная аксиология реализуется каждой клеткой этой системы как условие ее существования. Это единственная и прошедшая испытание веками гарантия реализации конституцион-

ных установок и стабильного развития на основе общественного согласия.

Истинный конституционализм, как образ правовой материи, присущ таким социальным системам, которые прошли определенный эволюционный путь признания и гарантирования социальных свобод и общественного согласия на основе соответствующей системы социокультурных ценностей. Условие правовой действительности системы норм заключается в том, что нормы, которые к ней относятся, в общем и в целом являются социально действенными, то есть они социально действительны⁵¹⁹. И как справедливо отмечает профессор, доктор публичного права и философии права Роберт Алекси, правовая действительность норм развитой системы основывается на писаной или неписаной конституции, которая определяет, при наличии каких предпосылок определенная норма составляет часть правовой системы и потому считается юридически действительной⁵²⁰.

Любая деформация конституционализма - это искажение основополагающих конституционных ценностей в обществе, отход от всеобщего согласия в отношении системы социокультурных ценностей общежития, от «Высшего провидения», что, набирая определенную «критическую массу», неизбежно приведет к социальным катаклизмам.

Лишь призывание Конституции к жизни, утверждение ценностей конституционно-нормативного характера в качестве правил реальной жизни позволит гарантировать верховенство права и системную стабильность. **Сверхзадачей была и остается гармонизация реалий общественной жизни конституцион-**

519 См. Kelsen H. *Reine Rechtslehre*. 2. Aufl. Wien, 1960. S.219 (русское издание: Чистое учение о праве Ганса Кельзена / Сборник переводов. Вып. 2. М., 1988. - С. 91).

520 Роберт Алекси. Понятие и действительность права (ответ юридическому позитивизму). Перевод с немецкого. - М., 2011. - С. 109-110.

ным решениям, основанным на обеспечении верховенства права.

Понятие “конституционализм” в настоящее время увязывается с рядом правовых явлений, таких как:

- общность принципов, порядка деятельности и структурных механизмов, которые традиционно используются с целью ограничения государственной власти⁵²¹;
- конституционные средства для установления ограничений государственной власти⁵²²;
- общегосударственная, надпартийная объединяющая идеология⁵²³;
- политико-правовой режим, одним из проявлений которого является внесение в общество начал гармонии и справедливости⁵²⁴;
- наличие конституционной формы правления, государственное управление, ограниченное Конституцией⁵²⁵;
- самоограничение государства⁵²⁶;
- господство права во всех сферах общественно-политической жизни, которое предполагает приоритет прав человека и гарантирует взаимную ответственность индивида и государства⁵²⁷;

521 Шайо А. Самоограничение власти (краткий курс конституционализма). - М., 1999.

522 Barendt E. *Introduction to Constitutional Law*. - Oxford Univ. Press, 1998. - P. 14.

523 Нерсисянц В. С. Конституционализм как общегосударственная идеология // Конституционно-правовая реформа в Российской Федерации. Сб. ст. / Отв. ред. Ю. С. Пивоваров. - М., 2000. - С. 6-8.

524 Соница Л. В. Конституционализм в Российской Федерации как политико-правовой режим: автореф. дисс. ... канд. юрид. наук. - Екатеринбург, 2001. - С. 7-8.

525 Пуздрач Ю. В. История российского конституционализма IX-XX веков. - СПб., 2004. - С. 7.

526 Шайо А. Транснациональные сети и конституционализм // Сравнительное конституционное обозрение. 2008. N 5 (66). - С. 123.

527 Ромашов Р.А. Современный конституционализм: теоретико-правовой анализ. <http://www.lawlibrary.ru/disser2000401.html> (09.03.2009).

- теория и практика организации государственной и общественной жизни в соответствии с Конституцией или опирающаяся на Конституцию политическая система⁵²⁸;
- принцип господства права, который предполагает ограничение властных полномочий руководителей государства и государственных органов⁵²⁹;
- наличие Конституции (писаной или неписаной), ее активное влияние на политическую жизнь страны, ... конституционная регламентация государственной системы, политического режима, конституционное признание прав и свобод личности, правового характера взаимоотношений гражданина и государства⁵³⁰.

Многие авторы акцент делают также на надгосударственные слагаемые конституционализма⁵³¹. Обращается внимание на характер проявления экзогенных и эндогенных факторов при принятии политических решений. В свою очередь профессор Стивен Холмс подчеркивает, что «...конституционализм возник только в эпоху демократических революций на протяжении последних трех десятилетий XVIII века. Принцип конституционализма предполагал не просто возможность организации политической жизни, но и некую идеальную форму ее организации, подчинявшую занимавших высокие посты политиков более высокому закону, который им ка-

528 <http://dic.academic.ru/dic.nsf/enc-law/1027/>.

529 Рассел Г. Конституционализм: опыт Америки и других стран - <http://www.in-fousa.ru/government/dmpaper2.htm> (09.03.2009).

530 См. Кутафин О.Е. Российский конституционализм. - М., 2008. - С. 47. Нам представляется также, что в данной формулировке вместо термина «личности» было бы уместным употребление термина «человека».

531 См. Neil Walker /University of Edinburgh/- Taking Constitutionalism Beyond the State. POLITICAL STUDIES: 2008 VOL 56, 519-543; EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW (VENICE COMMISSION) CDL-STD (2003)037, European and U.S. Constitutionalism, UniDem Seminar organised in Gottingen on 23-24 May 2003.

тегорически не было позволено односторонне изменять»⁵³². Развивая эту мысль, автор выдвигает гипотезу, согласно которой «... конституционные ограничения возникают и сохраняются в случае, когда они обслуживают интересы не всех граждан, а именно тех членов общества, которые входят в состав доминирующих общественных структур»⁵³³.

Автор считает, что можно привести и другие трактовки понятия «конституционализм». Но главное во всех этих подходах заключается именно в том, что они приводятся на плоскостях теории и практики **именно конституционного права**. По заключению автора, **“конституционализм” - это проявление определенной конституционной культуры, адекватной осмысленному бытию данного социума, это системное и осознанное наличие конституционных ценностей в реальной общественной жизни, на чем базируется вся правовая система, это фундаментальный принцип современного права**.

Вспоминаются рассуждения Гегеля о содержании права, в которых отмечается, что понятие и его существование - две стороны, различные и единые, как душа и тело, которые не могут существовать раздельно⁵³⁴. Более того, между конституционными восприятиями и общественными реалиями должна быть определенная гармония. Гармония между желаемым и реальным, между получившей общественное признание и ставшей фундаментальным правилом поведения ценностью и реальным поведением.

В правовом государстве существование права как необходимой формы свободы, равенства и справедливости в общественной жизни людей, как основы их сосуществования в динамичной социальной среде приобретает новую роль в жизни человека. Академик В.С. Нер-

532 Стивен Холмс. Конституции и конституционализм //Сравнительное конституционное обозрение, 2012, N3(88). - С.59.

533 Там же, ст. 61.

534 Гегель Г. Философия права: Пер. с нем. - М., 1990. - С. 59.

Нерсесянц определяет сущность права как формальное равенство, которое трактуется и раскрывается как всеобщая и равная мера свободы и справедливости в социальной жизни людей⁵³⁵. Историческая эволюция привела к формированию либерально-юридической теории правопонимания, при которой право – это всеобщая и необходимая форма свободы людей, а свобода в социальной жизни возможна и действительна лишь как право, только в форме права⁵³⁶. А академик С.С. Алексеев в свою очередь констатирует, что **«у человечества нет иного пути и иного способа решения глобальных проблем и трудностей, грозящих тяжкими последствиями для человеческого рода, как поставить в самый центр жизни людей современное право»**⁵³⁷.

Естественно, суть правового государства заключается именно в признании верховенства права и гарантировании свободы посредством ограничения власти правом. Данная теоретическая постановка приобретает реальное содержание, когда социальное общество осознанно и с общественного согласия намеревается жить и творить на основе этого принципа и исходящих из него ценностно-системных критериев. Их совокупность является основой конституционного строя каждого конкретного общества. **В правовом государстве проявления права как сущности и как явления характеризуются именно соответствующим уровнем конституционализма.** Этим обусловлена также диалектика закона и права, соотношение Конституции как Основного Закона данного общества и конституционализма. **Конституционализм, как и право, - проявление сущности цивилизованного общежития, объективная социальная реальность, имеющая необходимый внутренний потенциал динамичного и стабильного развития.** Конституционализм как

535 Нерсесянц В.С. Философия права. -М.: НОРМА, 2008. - С. 3.

536 Там же. - С. 30.

537 Алексеев С.С. Восхождение к праву. Поиски и решения. - М.: НОРМА, 2001. - С. 710.

фундаментальный принцип права на определенном уровне развития общества **приобретает системообразующий и универсальный характер правовой регуляции**, выражает и конкретизирует правовое содержание гарантирования и обеспечения верховенства права и непосредственного действия прав человека, выступает критерием правомерности поведения правосубъектов, является исходным началом правотворческой и правоприменительной деятельности, является результатом исторического развития данного общества.

В данной работе автор попытается также вкратце изложить свои концептуальные подходы относительно формирования институциональных и функциональных основ правовой регуляции для обеспечения устойчивого проявления конституционализма и соответствующей конституционной культуры на основе непрерывно действующего системного конституционного мониторинга, как гаранта стабильности и динамичного развития социального общества.

Исходными постулатами, вытекающими из приведенных выше соображений, являются:

1. Культура каждого народа - это его осознанное бытие, осмысленное присутствие во времени. А конституционная культура представляется как исторически сложившаяся, стабильная, обогащенная опытом поколений и всего человечества определенная ценностная система, лежащая в основе общественного бытия, способствующая установлению и реализации основополагающих правил поведения на основе их интеллектуального, нравственного и духовного осмысления.

Конституционная культура системно проявляется на определенном этапе цивилизации, когда возникает **осознанная потребность** в установлении общественным согласием основных принципов и правил поведения как общеобязательных правовых норм. В правовом аспекте эта потребность привела к возникновению конституций и конституционному регламентированию общественной жизни.

Конституционная культура приобретает новое качество в тех общественно-государственных системах, где **наряду с Конституцией существует конституционализм**, где Конституция является не орудием в руках государственной власти, а **Основным Законом гражданского общества**, средством гарантирования гармоничного и стабильного развития этого общества, не только устанавливая основные правила поведения, но и ставя пределы власти, ограничивая ее правом. В подобных случаях речь идет о **демократической конституционной культуре**, характерной для демократических общественных систем, в которых сочетаются также качества национальной и общечеловеческой культур.

В правовом государстве понятие “конституционная культура” представляется как **составляющая стержень общественно-го познания определенная ценностная система исторически сформировавшихся, стабильных, обогащенных опытом поколений и всего человечества убеждений, представлений, правосознания, которая является основанием для установления и гарантирования общественным согласием для социального общества основных правил его демократического и правового поведения.**

2. В приведенном контексте **современный конституционализм является наличием установленных общественным согласием фундаментальных правил демократического и правового поведения, их существования как объективной и живущей реальности в общественной жизни, в гражданском поведении каждого индивидуума, в процессе осуществления государственно-властных полномочий.**

“Конституционализм” - это проявление определенной конституционной культуры, адекватной осмысленному бы-

тию данного социума, это системное и осознанное наличие конституционных ценностей в реальной общественной жизни, на чем базируется вся правовая система.

3. Нормативные характеристики конституционализма предполагают наличие необходимых и достаточных правовых гарантий для осознанной реализации прав и свобод во всей системе права и общественных отношений. В правовом государстве любая норма права должна проявляться как элемент конституционно согласованной системы правового поведения человека и государства.

4. Понятие конституционализма необходимо воспринимать не как один из основных принципов конституционного права, а как фундаментальный принцип современного права в целом. Можно перефразировать общеизвестную римскую формулу «Где общество, там и право» следующим образом: **«Где конституционализм, там и правовое государство».** Конституционализм определяет суть взаимосогласованного поведения социума, характер его осмысленного существования во времени, уровень зрелости общественных отношений и их правового регулирования. Это, в первую очередь, идеал цивилизованной саморегуляции, к которому должно стремиться общество.

5. В правовом государстве существование права как необходимой формы свободы, равенства и справедливости в общественной жизни людей, как основы их сосуществования в динамичной социальной среде приобретает новую роль в жизни человека. Естественно, суть правового государства заключается именно в признании верховенства права и гарантировании свободы посредством ограничения власти правом. Данная теоретическая постановка приобретает реальное содержание, когда социальное общество осознанно и с общественного

согласия намеревается жить и творить на основе этого принципа и исходящих из него ценностно-системных критериев. Их совокупность является основой конституционного строя каждого конкретного общества. В правовом государстве проявления права как сущности и как явления характеризуются именно соответствующим уровнем конституционализма. **Этим обусловлена также диалектика закона и права, соотношение Конституции и конституционализма.**

6. Конституционализм, как и право, - проявление сущности цивилизованного общежития, объективная социальная реальность, имеющая необходимый внутренний потенциал динамичного и стабильного развития. Конституционализм как фундаментальный принцип права на определенном уровне развития общества приобретает системообразующий и универсальный характер правовой регуляции, выражает и конкретизирует правовое содержание гарантирования и обеспечения верховенства права и непосредственного действия прав человека, выступает критерием правомерности поведения правосубъектов, является исходным началом правотворческой и правоприменительной деятельности, основополагающей характеристикой социокультурного развития данного общества.

7. Основная миссия конституционализма в новом тысячелетии заключается именно в обеспечении стабильности и динамизма общественного развития, укреплении нравственности в социальных взаимоотношениях, преодолении конфликтогенности в межгосударственных и внутригосударственных отношениях.

Преодоление дефицита конституционализма - основной путь недопущения накопления отрицательной общественной энергии до формирования критической массы, **при которой неизбежны социальные катаклизмы.**

8. Конституционализм, как образ правовой материи, присущ таким социальным системам, которые достигли определенной эволюции признания и гарантирования социальных свобод и общественного согласия на основе соответствующей системы социокультурных ценностей. Любая деформация конституционализма - это искажение основополагающих конституционных ценностей и принципов в обществе, отход от всеобщего согласия в отношении системы социокультурных ценностей общежития.

9. Так называемая регрессивная реальность в современном мире, в первую очередь, - результат системного нарушения конституционного баланса в общественной практике, что своевременно не выявляется и не восстанавливается. Очевидно **наличие системного дефицита конституционализма** или его искаженное проявление. А это означает, что практически не обеспечивается верховенство Основного Закона страны. То, что делается конституционными судами сегодня, несмотря на архиважность этой миссии, все-таки **носит дискретный, фрагментальный характер**, не обеспечивает необходимой последовательности и системной непрерывности в выявлении, оценке и восстановлении нарушенного конституционного баланса в обществе, обеспечении конституционализма в соответствии с конституционной культурой нового тысячелетия.

Автор согласен также с мнением профессора Е. Танчева относительно того, что "проблема реализации конституционных норм имеет, как минимум, два аспекта. С одной стороны, речь идет о возможности осуществления положений конституции в зависимости от их места в тексте основного закона и содержания иных норм права. С другой стороны, большое значение имеет вопрос о том, позволяет ли социальная реальность выполнять все требования конституции"⁵³⁸.

⁵³⁸ Евгений Танчев. Социальное государство (всеобщего благосостояния) в современном конституционализме // Сравнительное конституционное обозре-

В свою очередь профессор А.Е. Дик Ховард выделяет следующие основные ценности конституционализма⁵³⁹:

- 1) согласие народа, которое обеспечивается представительными учреждениями, свободной организацией политических партий, свободным доступом к голосованию и свободным обсуждением политических вопросов;
- 2) ограничение полномочий органов государственной власти разделением властей;
- 3) открытое общество;
- 4) неприкосновенность личности;
- 5) равенство и беспристрастность;
- 6) преемственность в сочетании с адаптацией конституций к новым условиям как посредством изменения их текста, так и через судебное толкование.

С учетом раскрываемых разными авторами основных ценностей конституционализма автором были проанализированы и выявлены основные характеристики деформации основополагающих конституционных принципов и ценностей в реальной социальной действительности: на уровне самой Конституции (что включает также системные деформации при выборе и непостоянстве форм государственной власти); деформации в общеправовой системе; деформированное восприятие и реализация основополагающих конституционных ценностей и принципов на уровне правоприменительной практики⁵⁴⁰.

ние. 2007, N4. - С 63.

⁵³⁹ Дик Ховард А.Е. Конституционализм // Верховенство права: Сборник: пер. с англ. - М.: Прогресс-Универс, 1992. - С. 53-65.

⁵⁴⁰ См. Международный альманах "Конституционное правосудие в новом тысячелетии". - Ереван: "Нжар", 2005. - С. 137-155; 2008. - С. 27-36; 2009. - С. 40-47; Журнал Конституционное правосудие, КС РФ и ООО Издательство «Юрист». М., «Юрист», 2010, N3 (15). - С. 34-36; Евразийский юридический журнал, N 7 (26), М., 2010. - С. 5-9; Harutyunyan G.G. MODERN CHALLENGES TO SYSTEMIC DEVELOPMENT OF CONSTITUTIONAL CONTROL (ARMENIA) // CONSTITUTIONAL LAW REVIEW, April 2012, N5, - p. 173-179.

Автор приходит к убеждению, что особенно в условиях общественной трансформации деформации конституционализма становятся главным фактором дестабилизации и социальных катаклизмов. Их преодоление требует наличия действенного и системного конституционного мониторинга на основе целенаправленной и непрерывной конституционной диагностики. Это и урок истории, и вызов времени, требующие неотложного внимания и адекватных действий.

Основные заключения автора сводятся к тому, что:

1. Действующие в мире модели конституционного контроля и надзора не в полной мере обеспечивают системный и непрерывный характер в выявлении, оценке и восстановлении нарушенного конституционного баланса в общественной практике и не в полной мере отвечают вызовам времени.
2. Несвоевременное восстановление нарушенного конституционного баланса приводит к накоплению отрицательной общественной энергии, что, набирая критическую массу, приводит к социальным взрывам и дестабилизации.
3. Нет системного и органического взаимодействия в функциональной деятельности институтов власти по обеспечению верховенства конституции.
4. Пока государство не признает и не обеспечивает право человека на конституционное правосудие, невозможно реально гарантировать верховенство права.
5. Системность и непрерывность конституционного контроля возможны лишь при внедрении целостной системы постоянной конституционной диагностики и мониторинга.

Пятое из перечисленных положений предполагает, что по остальным положениям должны быть найдены адекватные правовые решения, чтобы внедрить данную систему. Тут ключевое значение имеет раскрытие сущности институционального и функционального

обеспечения системного и непрерывного конституционного мониторинга.

Схематично систему подобного мониторинга можно представить следующим образом⁵⁴¹:



Основными задачами конституционного мониторинга в условиях общественной трансформации, в частности, являются:

- выявление и оценка дефицита конституционности в политическом поведении социума;
- оценка внутриконституционных деформаций, выявление причин этих деформаций и разработка механизмов их преодоления;
- преодоление деформированного восприятия основополагающих конституционных ценностей и принципов в обществе, повышение уровня конституционного правосознания;

⁵⁴¹ Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. - Киев: «Логос», 2011. - С. 53.

- обеспечение необходимого уровня конституционализации политического поведения институтов власти и социального поведения личности;
- устранение дефицита конституционности в сфере законодательства и других формах правотворческой деятельности;
- недопущение деформаций конституционных ценностей и принципов в правоприменительной практике;
- системное обеспечение конституционности государственного управления;
- выявление и учет транснациональных критериев оценки социального поведения человека и власти.

Сравнительный анализ конституционной законности не только в странах новой, но и старой демократии показывает, что нет определенной системности в решении перечисленных задач. Они становятся больше объектом политических интриг, чем правового регулирования.

Анализ данной проблематики привел автора к выводу, что обеспечение системности и полноценности конституционного мониторинга возможно только при глубоком учете следующих обстоятельств:

- а. Функционирование социальной системы как целостного организма имеет многоплановый иерархический характер, основой которого является гарантирование и обеспечение верховенства права.
- б. Главная миссия иммунной системы общественного организма - сохранение функционального конституционного баланса и стабильности, так как невозможность восстановления нарушенного баланса становится причиной накопления отрицательной общественной энергии, что, набирая критическую массу, может привести к общественным катаклизмам.

- с. Система конституционной диагностики и мониторинга, как контролирующая система, должна функционировать в свойственном ей порядке непрерывности и относительно независимо, на основе четкого нормативного регулирования.
- d. Любая общественная патология должна активизировать и приводить в действие всю систему конституционной самозащиты.

Автор убежден, что это новый уровень гарантирования верховенства живой Конституции, когда вся система базируется не на абстрактных конституционных нормах, а на их реальном проявлении в обществе, обеспечивая **осмысленное наличие основополагающих конституционных ценностей и принципов в реальной общественной жизни.**

Чем отличаются понятия «конституционный контроль» и «конституционный мониторинг». Автор считает, что система конституционного контроля, одним из основных звеньев которой является судебный конституционный контроль, только на определенном уровне системного и непрерывного функционирования может представляться как целостная система конституционного мониторинга. В данном контексте «контроль» – это функция, «мониторинг» – форма реализации этой функции, «диагностика» – механизм реализации данной функции. По существу, **контроль в настоящее время осуществляется посредством дискретного сопоставления объекта с самой Конституцией, а мониторинг предполагает системное и непрерывное выявление реального состояния конституционализма в обществе.**

Данная система, в свою очередь, требует существенного пересмотра конституционных взаимоотношений институтов власти с определением функциональных и институциональных основ функционирования системного и непрерывного конституционного мониторинга. В предлагаемой доктрине, прежде всего, **акцент де-**

лается на роли главы государства в данной системе. Президент является политическим гарантом обеспечения верховенства Конституции. Поэтому необходимо, в частности, наполнить реальным конституционно-правовым содержанием такие конституционные положения, как: «Президент следит за соблюдением Конституции» (см. Конституции: Франции (ст. 5), Польши (ст. 126, пункт 2), Республики Армения (ст. 49); «Президент является гарантом Конституции» (см. Конституция Российской Федерации, ст. 80, пункт 2); «Президент обеспечивает нормальное функционирование конституционных органов или демократических институтов» (см. Конституции: Португалии (ст. 120), Словакии (ст. 101, пункт 1) и т. д.).

В правовом государстве основная функция Президента заключается именно в гарантировании поступательного развития конституционализма в стране. С учетом того обстоятельства, что решение этой задачи предполагает также системное выявление, оценку и восстановление нарушенного конституционного баланса на основе правовых механизмов, Президент становится принципиальным звеном иммунной системы общественного организма. Автору представляется, что с учетом этого обстоятельства необходимо конституционно предусмотреть полномочие и обязанность Президента по проведению постоянной конституционной диагностики⁵⁴² с учетом функциональных полномочий других институтов власти. Нынешние общепринятые функциональные, противовесные и сдерживающие полномочия Главы государства, в том числе на уровне взаимоотношений Парламент-Президент в области законодательной политики, а также как инициатора конституционных изменений или как обращающегося в Конституционный Суд субъекта, недостаточны для полноценного участия Президента в общем процессе конституционного мони-

⁵⁴² См. // Конституционное правосудие, 2010, N4. - С. 28-42.

торинга. Особенно в странах новой демократии ныне задействованы неформальные, теневые механизмы конституционной диагностики, что очень опасно и несовместимо с принципом правового государства. **Конституция должна обязывать Президента обеспечивать проведение постоянной конституционной диагностики с учётом функциональной роли всех конституционных субъектов.** Это приведет также к тому, что Глава государства займет активную позицию в осуществлении абстрактного судебного конституционного контроля.

В работе подчеркивается также функциональная роль других институтов власти в функционировании системы постоянного конституционного мониторинга.

В первую очередь Парламент и Правительство, наряду со своими традиционными функциями, должны не только в правотворческом процессе постоянно учитывать результаты конституционной диагностики и правовые позиции Конституционного Суда, но и, исходя из своих полномочий, обеспечивать необходимый контроль за процессами конституционализации общественных отношений. Они из пассивных институтов конституционного контроля должны стать более активными институтами конституционного мониторинга с учетом того обстоятельства, что основные права и свободы человека определяют смысл, содержание и применение законов и других правовых актов, деятельность законодательной и исполнительной власти. Все это требует установления на уровне конституционных положений конкретных функциональных полномочий законодателя и исполнителя по осуществлению системного конституционного мониторинга.

Особая роль в данной концепции отводится общим судам и Конституционному Суду.

Суды общей юрисдикции и специализированные суды призваны обеспечивать конституционные права, гарантируя доступность

судов, эффективность судопроизводства и единообразное применение законов. Именно судебная практика должна выявить существующие несоответствия между Конституцией и действующей правовой системой в целом. А это означает, что, во-первых, суды должны играть более активную роль в общей системе конституционного контроля, а во-вторых, судебная практика должна стать важным объектом конституционной диагностики.

Конституционные суды, в свою очередь, могут полноценно осуществлять свою ключевую миссию в обеспечении конституционализма в стране при следующих обстоятельствах:

1. На уровне Конституции необходимо гарантировать системное соответствие функций и полномочий Конституционного Суда. Основная функция Конституционного Суда – гарантирование верховенства и непосредственного действия Конституции. А это становится возможным, если обеспечивается самодостаточность Конституции, непосредственное действие основных прав и свобод человека, конституционность правовых актов, а политические споры и споры по конституционным полномочиям разрешаются в правовом поле.

Сегодня в мире существует лишь несколько конституционных судов (как в Германии, Австрии и некоторых других странах), где сбалансированность их функций, полномочий и процессуальных основ функционирования соответствует сегодняшним вызовам конституционного мониторинга.

2. Дееспособность судебного конституционного контроля во многом зависит от системной полноценности и эффективности функционирования всей системы конституционного надзора и контроля. В представленной доктрине принципиальное значение имеет гарантирование именно системности непрерывного конституционного мониторинга.

3. Глава государства, как гарант эффективного функционирования всей системы конституционного мониторинга, должен стать

также гарантом реализации решений Конституционного Суда. Классическим примером может служить статья 146 Конституции Австрии, в которой установлено: „Исполнение решений Конституционного Суда в отношении требований, предусмотренных статьей 137, осуществляется обычными судами. Исполнение прочих решений Конституционного Суда **возлагается на Федерального президента.....**

4. Процессуальные механизмы судебного конституционного контроля должны в полной мере соответствовать полномочиям и функциональной роли Конституционного Суда в обеспечении верховенства и прямого действия Конституции. Эта проблема актуальна особенно в странах новой демократии.

Данная концепция предполагает также, что гражданское общество играет принципиальную роль в развитии конституционализма в стране. Это, в первую очередь, означает, что народ как основной источник и носитель власти является основным гарантом соблюдения конституционных ценностей и принципов. Любой отклик, исходящий от гражданского общества в отношении всякой деформации этих ценностей и принципов, должен стать объектом конституционного мониторинга. Одной из основных форм реализации этой задачи является признание и гарантирование права человека на конституционное правосудие.

С целью осуществления системного конституционного мониторинга, по мнению автора, необходимо внедрять в конституционную практику адекватную систему постоянной конституционной диагностики и мониторинга.

Понятие «**диагностика**» имеет греческое происхождение (diagnostikos) и **характеризует определенный процесс выявления системной целостности и функциональной дееспособности исследуемого объекта с учетом сопоставимости основных параметров его функционирования с критериальными основами**

запрограммированного и естественного состояния данного объекта.

В медицине понятие диагностика подразумевает процесс установления диагноза, то есть вынесения заключения об отклонениях от установленных норм, выявления сущности болезни и состояния пациента, с употреблением принятой в медицине терминологии.

В технико-технологическом аспекте данное понятие представляет область знаний, включающую в себя сведения о методах и средствах оценки технического состояния машин, механизмов, оборудования, конструкций и других технических объектов.

В экономике также диагностика подразумевает процесс распознавания проблемы и обозначения её с использованием принятой терминологии, то есть установление отклонений от нормального состояния исследуемого объекта или процесса.

Понятие конституционная диагностика охватывает весь процесс оценки конституционности в обществе, выявления соответствия реальных общественных отношений конституционно установленным нормам и принципам. Конституционная диагностика - способ и возможность определения степени конституционно-функциональной дееспособности общественного организма в целом. Она необходима в первую очередь для **выявления истинного состояния и тенденций развития конституционализма в обществе.**

Объектом конституционной диагностики является общественная жизнь в целом, состояние конституционно установленного функционального баланса и, в частности, функционирование институтов власти.

Субъектами конституционной диагностики являются: народ, как источник и носитель власти; органы государственной власти и местного самоуправления; все институты гражданского общества; каждый человек.

Основными задачами конституционной диагностики, особенно в условиях общественной трансформации или нестабильного конституционного баланса, в частности, являются:

- выявление нарушенного конституционного баланса;
- оценка характера и форм проявления данного нарушения на основе многофакторной оценки ситуации;
- выявление причин этих нарушений и предложение инструментальных мероприятий восстановления нарушенного конституционного баланса.

Конституционная диагностика должна базироваться на следующих основных принципах:

- в режиме непрерывного функционирования выявление любого нарушения конституционного равновесия;
- определение характера нарушения;
- предложение механизмов и способов восстановления конституционности;
- гарантирование недопущения нового нарушения при восстановлении функционального равновесия.

Для проведения последовательной конституционной диагностики необходимо выделить такую **группу индикаторов**, которая в состоянии всесторонне и целостно охарактеризовать конституционность исследуемых общественных отношений. Система подобных индикаторов часто используется многими международными организациями. Хорошим примером могут служить ежегодные исследования американского института «Дом свободы» (Freedom House) относительно тенденций развития конституционной демократии в странах мира⁵⁴³, а также результаты Всемирного проекта правосудия по определению индекса верховенства права⁵⁴⁴.

⁵⁴³ См.: <http://www.freedomhouse.org>

⁵⁴⁴ См.: The World Justice Project /world justice project.org/, Rule of Law index, 2010-2015.

Автором тоже была сделана попытка представить научную методику подобного анализа, суть которого заключается, в первую очередь, в следующем: во-первых, выбрать оценочные индикаторы; во-вторых, выбрать модельные подходы системного сравнения этих индикаторов с нормативными параметрами (эталонными показателями) и с учетом отклонений дать обоснованный диагноз системы⁵⁴⁵.

Как было сказано, существуют различные подходы к интегральной оценке устойчивости человеческого развития⁵⁴⁶. Основная идея заключается именно в том, что на основе системы индикаторов устойчивого развития определяется общая характеристика конституционного равновесия в обществе. Трудности касаются разработки интегрального показателя сравнительной оценки устойчивого развития не только на основе правовых параметров, но и с обобщением экономических, социальных, экологических, общественно-политических и иных индикаторов.

Для комплексной оценки устойчивости и выявления фактического уровня конституционной сбалансированности общественной системы, нам представляется, необходима система индикаторов на следующих уровнях:

- социальные характеристики общества;
- индикаторы реализации демократических ценностей в обществе;
- индикаторы правовой охраны Конституции, прав и свобод человека.

Для эффективного контроля за состоянием конституционализма в стране, по нашему мнению, необходимо по окончании каждого года посредством нижепредставленных индикаторов раскрыть

⁵⁴⁵ Подробнее о данном методологическом подходе см. G. Harutyunyan, A. Mavčič - THE CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS), Yerevan - Ljubljana, 1999, - p. 385-392.

⁵⁴⁶ См. также Indicators of Sustainable Development. The Wuppertal Workshop, 15-17 Nov. 1996.

реальную картину реализации фундаментальных конституционных ценностей и принципов в обществе, сделать это прозрачным для общественности, предметом многофакторного анализа и основой программно-целевой политики улучшения положения.

Используя, к примеру, применяемую Американской организацией “Дом свободы” методику⁵⁴⁷, для каждого индикатора может быть выбрана 7-балльная оценочная система, где 0 – лучшее состояние, 7- худшее.

Проведенные автором исследования свидетельствуют, что средний коэффициент конституционализма в странах посткоммунистического пространства в последние годы имеет тенденцию ухудшения. Это свидетельствует также об углублении правовых, политических и социальных кризисных явлений и большом потенциале накопления взрывоопасной критической массы отрицательной социальной энергии.

Автор отмечает, что реальная оценка состояния конституционализма в стране должна осуществляться не только на государственном уровне, но и гражданским обществом, принимая, например, за основу следующую систему индикаторов:

1. Характеристики правового государства:

- наличие необходимых и достаточных предпосылок гарантирования верховенства права;
- гарантии обеспечения верховенства Конституции;
- характеристика реального разделения властей;
- степень реальной независимости судебной власти;
- степень сращения политических, экономических и административных сил;
- степень обеспечения реального равенства всех перед законом;
- уровень коррупции;

⁵⁴⁷ См. <http://www.freedomhouse.org/>

- уровень теневой экономики;
- уровень правосознания населения;
- криминогенная обстановка

2. Характеристики демократических развитий:

- уровень развития парламентаризма;
- степень доверия к избирательной системе;
- уровень становления политических партий;
- свобода прессы;
- свобода Интернета;
- свобода собраний;
- свобода объединений;
- уровень гражданской активности и становления институтов гражданского общества;
- прозрачность деятельности институтов власти;
- уровень дееспособности государственных демократических институтов;
- религиозные свободы;
- степень защищенности прав национальных меньшинств;
- уровень плюрализма;
- уровень толерантности;
- уровень недискриминации

3. Социальные характеристики:

- уровень безработицы;
- уровень миграции;
- уровень стабильности цен (уровень инфляции);
- среднегодовой рост валового внутреннего продукта в расчете на душу населения;
- соотношение прожиточного минимума к минимальной заработной плате;

- соотношение пенсий к средней заработной плате;
- уровень социальной защищенности умственного творческого труда;
- доля населения с доходами ниже стоимости минимальной потребительской корзины в расчете на 100 тыс. населения;
- соотношение годовых доходов 10 процентов самых богатых к годовым доходам остальных 90 процентов населения;
- соотношение годовых доходов 10 процентов самых богатых лиц к бюджетным средствам, выделенным на социальную сферу страны за год;
- соотношение годовой зарплаты должностных лиц законодательной, исполнительной и судебной власти к декларированным общим доходам за данный год;
- соотношение декларированных годовых доходов лидеров политических партий к средней заработной плате в стране;
- динамика имущества высших должностных лиц и политической элиты страны в годы занятия ими государственных должностей.

Последние показатели характеризуют уровень олигархизации власти, что в свою очередь отражает реальное состояние реализации принципа разделения властей. Наши исследования, в частности, свидетельствуют, что, например, когда в годовых доходах высших должностных лиц законодательной, исполнительной и судебной властей страны доля заработной платы выше 80-90 процентов, то угроза сращения политического, экономического и административного потенциала снижается до минимума и имеются реальные предпосылки для действительного разделения властей. Важно то, что в подобных условиях реальная мотивация носителя власти – эффективная реализация его функции. Однако когда плата, полученная за осуществление функции носителя власти, ниже 50 процентов его годовых доходов, очевидно, что функция стано-

вится дымовой завесой для осуществления деятельности, обеспечивающей его основной доход. В некоторых странах встречается такая картина, когда в системе судебной власти этот показатель составляет 55-60 процентов, в исполнительной – 35-40, а в законодательной – вплоть до 2-3 процентов. Подобная картина – это лакмусовая бумага, свидетельствующая о системных метастазах и опасных искажениях основополагающих конституционных ценностей и принципов.

Не секрет также, что во многих новых независимых государствах повсеместные процессы приватизации сопровождались многочисленными проявлениями коррупции, что в дальнейшем имело также другие негативные воспроизводящиеся последствия. Следовательно, в этих странах для характеристики реальной картины конституционных искажений важно рассчитать соотношение доходов политических лидеров, должностных лиц законодательной, исполнительной и судебной властей (вместе с доходами членов их семей) за последние 20 лет к среднегодовому росту доходной части государственного бюджета. Это может служить также своеобразным показателем оценки уровня теневого сектора. По нашим оценкам, даже в тех странах, где уровень теневой экономики оценивается 40-50 процентов, указанное соотношение больше 2,5-3. В реальности это свидетельствует и о более высоком уровне теневого сектора, и о коррумпированности системы.

Для комплексного научного анализа и многофакторной оценки реального состояния конституционализма важно сопоставление всех вышеотмеченных характеристик, а также определение на их основе обобщенного интегрального показателя. Количественная определенность подобного показателя позволит выявить узкие места искажений конституционализма и осуществить программно-целевую политику для их преодоления⁵⁴⁸.

⁵⁴⁸ Об этом см. Арутюнян Г.Г. Конституционализм: уроки, вызовы, гарантии. – Киев: «Логос», 2011. – С. 99-100.

Интегральный показатель вычисляется из системы перечисленных индикаторов, учитывая также корреляционную связь между отдельными показателями, и выглядит следующим образом:

$$U_i = \sum_{j=1}^m \left[\frac{(x_{ij} - x_j^{(a)})}{\sigma(x_j)} \prod_{\substack{\beta=1 \\ \beta \neq j}}^m (1 - \gamma_{\beta j}) \right],$$

где U_i - интегральный уровень конституционной устойчивости,
 x_{ij} - характеристика j -го индикатора i -той страны (группы),

$x_j^{(a)}$ - характеристика эталонного индикатора,
 $\gamma_{\beta j}$ - коэффициенты парной корреляции.

Предлагаемая методика позволяет также решить вопрос об управляемости процессов, определении воздействия каждого индикатора на интегральный уровень реального конституционализма.

Наряду с методологической и методической постановкой вопроса, рассматриваются также некоторые аспекты осуществления конституционной диагностики, которые связаны с **обеспечением в динамике** функционального равновесия власти. Это во многом зависит от функциональных, противовесных и сдерживающих конституционных полномочий институтов власти в обеспечении конституционного функционального равновесия в реальной жизни, а также от реальных возможностей гражданского общества в реализации общесоциального потенциала сдерживания и ограничения властей. Очень красноречиво описал функцию конституционной сбалансированности профессор С. Холмс, указывая, что «...принятая в XVIII веке Конституция США опирается на три принципа, действительных и в наше время: 1) все люди, включая политические элиты, склонны ошибаться; 2) все люди, особенно политические элиты, не любят признавать свои ошибки; 3) все люди, особенно

политические элиты, находящиеся в настоящее время в оппозиции, получают удовольствие от обнаружения просчетов и ложных шагов своих соперников из бюрократических или политических кругов. Конституция пытается заставить эти принципы служить своим целям, грубо говоря, дав прерогативу совершать ошибки одной ветви власти, а право исправлять их - двум другим (плюс общество и пресса)⁵⁴⁹.

С появлением первых конституций фундаментальной задачей конституционной архитектуры было и остается обеспечение функционального разделения и сбалансированности государственной власти. Как было подчеркнуто в статье 16 французской Декларации о правах человека и гражданина 1789 г., **«общество, где не обеспечена гарантия прав и нет разделения властей, не имеет Конституцию»**.

Сегодняшняя либеральная демократия также «базируется на трех основных китах» - верховенстве права, принципе разделения властей, народном суверенитете. Их сбалансированное проявление на социальной практике определяет характер конституционализма в данном обществе.

Необходимо также констатировать, что среди десятков различных доктринальных подходов к конкретной конституционной модели разделения властей единодушно признанной и неоспоримой является только теоретическая констатация необходимости разделения и сбалансирования властей. Конкретные подходы, формы и методы и, тем более, практические решения существенно отличаются в каждой конституционной системе.

По мнению автора, одним из высочайших достижений американского конституционализма является именно то, что доктрина разделения властей в Основном Законе США приобрела системную целостность и с внедрением системы сдержек и противовесов при-

⁵⁴⁹ См. Стивен Холмс. Конституции и конституционализм // Сравнительное конституционное обозрение, 2012, N3(88). - С.68.

дала Конституции характер динамичного регулирования общественных отношений, перевела конституционную систему на рельсы развивающейся сбалансированности.

Как решается задача разделения и сбалансированности властей в наши дни с учетом той объективной реальности, что в мире появились специализированные государственные институты, которые должны независимо гарантировать верховенство и непосредственное действие Конституции?

Автор убежден, что по большому счету, по существу, ничего не изменилось, и американская доктрина конституционного разделения и сбалансированности властей в полной мере жизнеспособна и в наши дни. Основные требования к эффективному функционированию данной системы, по мнению автора, заключаются в следующих предпосылках:

Во-первых, разделение властей - это, в первую очередь, функциональный, а не институциональный процесс, что часто путается даже на уровне конституционных решений. Определенную раздельную конституционно-правовую функцию могут реализовать различные конституционные институты.

Во-вторых, главная задача конституционной архитектуры - обеспечение, в первую очередь, сбалансированности в системе **функция-институт-полномочия**.

В-третьих, принципиальным является вопрос о четком разграничении функциональных, сдерживающих и противовесных полномочий конституционных институтов власти и обеспечение оптимальной сбалансированности этих полномочий.

В-четвертых, неотложной задачей современного конституционализма является внедрение дееспособного и эффективно функционирующего механизма внутриконституционной самозащиты, чтобы гарантировать своевременное выявление, оценку и восстановление функционального конституционного баланса в

динамике. Это является, по существу, главной целью конституционной диагностики и главной задачей конституционного контроля в целом.

Основными критериальными характеристиками обеспечения перечисленных выше предпосылок являются:

- 1) обеспечение функциональной независимости ветвей власти;
- 2) гарантирование полноты и функционального соответствия полномочий конституционных институтов;
- 3) обеспечение непрерывности и нерушимости функционального конституционного баланса в динамике, в реальной общественной жизни, что, в свою очередь, предполагает недопущение так называемого отчуждения Конституции от реальной жизни.

Изучение конституций многих стран новой демократии показывает, что на этом уровне формально правовое государство, народовластие, верховенство права, достоинство человека, свобода, конституционная демократия, разделение властей, общественное согласие, равенство, толерантность, плюрализм, солидарность и другие общепризнанные ценности в их органическом единстве стали основой конституционных решений. Но вместе с этим реальная действительность в этих странах другая, она оказалась в другом измерении. В большинстве этих стран не в полной мере обеспечена самодостаточность Конституции и **имеет место существенная оторванность основополагающих конституционных ценностей и принципов от социальной действительности**. Характерными чертами последнего являются низкий уровень конституционной культуры, системная неполноценность механизмов обеспечения верховенства права, наличие деформированной, внутренне противоречивой правовой системы, отсутствие единого ценностно-системного понимания социальных ориентиров общественного развития.

При четкой конституционной формулировке сущности разделения властей определенно повышаются гарантии практической реализации этой доктрины. Несмотря на избранную форму правления и уровень развития конституционализма, более правильный выбор сделали те страны, которые положили в основу конституционной структуризации или институциональный подход (Италия, Португалия, Бельгия, Польша и др.), или функциональный подход (Австрия, Бразилия, Словакия и др.).

Однако для многих стран основная проблема заключается в существующем антагонизме между Конституцией и правовой действительностью в целом.

Общими отрицательными характеристиками системной трансформации в переходных странах, по мнению автора, являются:

- неустойчивость и неопределенность в общественном развитии и углубление кризиса доверия;
- серьезные упущения и недоработки в осуществлении ценностно-системных преобразований;
- неполноценность формирования гражданского общества;
- несоответствие социальных ориентиров общества конституционно провозглашенным демократическо-правовым ценностям, то есть наличие существенного дефицита конституционализма;
- низкий уровень функциональной и институциональной дееспособности институтов власти;
- антагонизм между политикой и конституционностью принимаемых решений;
- как следствие всего этого - накопление определенной отрицательной общественной энергии, что порой приводит к разноцветному социально-политическому взрыву с неизбежными трагическими последствиями.

Конституционализм как основа гражданского общества не может развиваться прогрессивно в условиях слабой дееспособности государственных демократических структур и деформированности самих политических институтов. Как справедливо подчеркивает Даниэль Смилов, в условиях общественной трансформации доминирующими становятся установление квазиконституционализма и интенсивное распространение политического популизма⁵⁵⁰.

Одной из характерных черт конституционной деформированности в странах новой демократии является недостаточная независимость судебной власти. Как отмечает С. Холмс в вышеупомянутой статье, еще Монтескье в свое время утверждал, что король, действующий в качестве судьи и тем самым нарушающий конституционное разделение исполнительной и судебной власти, легко стал бы игрушкой недобросовестных свидетелей и других участников процесса, пытающихся заставить публичную власть служить незаконным частным или групповым целям: «Законы – это глаза государя, благодаря им он видит то, чего без них не мог бы увидеть. Присваивая себе обязанности судьи, он действует не в свою пользу, а в пользу своих обольстителей, во вред самому себе»⁵⁵¹.

Другая крайняя опасность - это тотальная олигархизация власти. Одну из своих статей 2006 года автор назвал «Угрозы корпоративной демократии»⁵⁵². В данной статье он отметил, что «корпоративная демократия» (олигархизация всех ветвей власти) более опасна для общественной системы, чем тоталитарная система,

550 См. Даниэль Смилов. Конфликт конституционализма и демократии в Восточной Европе: за пределами парадигмы переходного периода // Сравнительное конституционное обозрение, N4(89). 2012. - С. 29-44.

551 Montesquieu. Spirit of the Laws / Trans. by Th. Nugent. New York: Hafner Press, 1975. Vol. I. Bk. 6. Ch. 4. - P. 73.

552 См. Международный вестник «Конституционное правосудие», 2006г., N3. - С. 38-46.

которая имеет свои определенные правила, несмотря на то, что по своей сути также носит иррациональный характер. Однако последняя не построена на искаженных в общественной практике конституционных ценностях. Основная угроза корпоративной демократии заключается именно в том, что демократические ценности последовательно деформируются и впоследствии мутируются, теряют свое значение, становятся для общества не только неприемлемыми, но и опасными. Этому способствуют также низкий уровень правосознания общества, тяжелое социальное положение, высокий уровень безработицы и т. д. В условиях теневых экономических отношений индивид выступает не как полноценный договорной субъект со своими естественными правами, а как зависящее от воли и подаяния работодателя средство производства. Это качество, характерное для феодальных общественных отношений, приобретает новую форму и окраску в демократической упаковке в условиях квазиконституционализма.

Одной из наибольших опасностей корпоративной демократии является также то, что ценности, подвергшиеся мутации, в условиях сбоя иммунной системы общества становятся воспроизводимыми. Это более опасная фаза, когда иррациональные развития носят прогрессирующий характер и исключают восстановление жизнеспособности системы эволюционным путем, а истинные ценности становятся невостребованными. Это в той или иной мере имеет место в тех странах, где политические институты также формируются по принципам корпоративной демократии, где параллельно с теневой экономикой становятся теневыми также политические институты, где судебная система - не самостоятельная власть, а рычаг власти, где пресса превращается из свободы слова в инструмент политического террора.

Тотальная олигархизация властей приводит к тотальной кристаллизации социальной системы, особенно в тех случаях, когда

самыми богатыми людьми в государстве становятся высшие государственные чины и политическая элита.

Основной путь во избежание подобных угроз - обеспечение реального разделения властей и исключение слияния политических, экономических и административных сил, создание необходимых предпосылок естественного становления политических и гражданских структур общества. Еще в свое время Джеймс Мэдисон подчеркнул, что конституционная сбалансированность противоречивых и конкурирующих интересов может сдерживать власть и гарантировать свободу⁵⁵³.

Современные тенденции мировых и европейских конституционных развитий позволяют сделать ряд принципиальных обобщений, из которых особого внимания достойны:

- 1) демократия, не имеющая альтернативы как ценность социального общества, диктует свои критерии и подходы к правовой регламентации общественных отношений;
- 2) конституционная демократия наличествует там и в той мере, где и в какой мере имеет место реальное разделение и баланс властей, оптимальная децентрализация политической, экономической и административной сил, независимая судебная система, свободная пресса, гарантированные, свободные и справедливые избирательные процессы, контролируемая гражданским обществом власть;
- 3) установление конституционализма без надежного гарантирования верховенства Конституции останется лишь добрым пожеланием;

553 См. Рассел Г. Конституционализм: опыт Америки и других стран - <http://www.infousa.ru/government/dmpaper2.htm> (09.03.2009).

- 4) обеспечение верховенства права требует учитывать также проблемы национальной безопасности и необходимость определенной гармонии между индивидуальными и общественными интересами;
- 5) процессы конституционного развития не могут рассматриваться без надлежащей системной оценки и учета растущей роли международных глобальных и региональных правовых систем;
- 6) без создания необходимых и достаточных предпосылок и определенной ценностной среды конституционной демократии с глубокой и всесторонней оценкой особенностей переходных систем невозможно преодолеть инерцию системных деформаций и гарантировать реальные конституционные развития путем так называемого "импорта демократии".

В настоящее время одной из стержневых задач транзитологии является то, как учитывать указанные тенденции в преобразующихся общественных системах, чтобы конституционное развитие составляло бы основу прогресса общества и не стало бы жертвой текущих политических интересов. Дело в том, что в новых демократиях основными проявлениями иррациональных процессов в конституционной практике являются:

- искаженные представления о демократии и ценностной системе правового государства⁵⁵⁴;
- применение этих ценностей как завесы для исполнения воли власти;
- усилия превратить различные институты власти, прессу и средства массовой информации в орудие властвования;

⁵⁵⁴ Об этом свидетельствуют также используемые политиками и некоторыми исследователями в последнее время такие искаженные понятия, как «переходная демократия», «национальная демократия», «частичная демократия» и т.д.

- сращение политики, власти и теневой экономики и на этой основе, с одной стороны, перерастание коррупции в основной капитал власти, с другой стороны – политизация теневой экономики;
- формирование новой и наиболее опасной среды ограничения прав и свобод человека и гражданина посредством появления некоей среды страха, недоверия, безнадежности, безнаказанности, укоренение политического и бюрократического цинизма, которые порою преподносятся в демократической упаковке.

Все это не ограничивается рамками конкретных действий, а проникает во все звенья власти, приобретает законодательные и структурные качества и охватывает всю государственную машину.

Об опасностях олигархизации государственной власти еще в свое время убедительно и красноречиво говорил Аристотель, представляя виды олигархии⁵⁵⁵:

***“Первый вид** – когда собственность, не слишком большая, а умеренная, находится в руках большинства; собственники в силу этого имеют возможность принимать участие в государственном управлении; а поскольку число таких людей велико, то верховная власть неизбежно находится в руках не людей, а закона.*

***Второй вид** - число людей, обладающих собственностью, меньше числа людей при первом виде олигархии, но самый размер собственности больше; имея большую силу, эти собственники предъявляют и большие требования; поэтому они сами избирают из числа остальных граждан тех, кто допускается к управлению; но вследствие того, что они не настолько еще сильны, чтобы*

⁵⁵⁵ Аристотель. Этика. Политика. Риторика. Поэтика. Категории. – Мн.: Литература, 1998. – С. 561 (в разделе «Политика», книга четвертая).

управлять без закона, они устанавливают подходящий для них закон.

Третий вид - если положение становится более напряженным в том отношении, что число собственников становится меньше, а самой собственности - больше, то получается третий вид олигархии - все должности сосредотачиваются в руках собственников, причем закон повелевает, чтобы после их смерти сыновья наследовали им в должностях.

Четвертый вид - когда же собственность их разрастается до огромных размеров и они приобретают себе массу сторонников, то получается династия, близкая к монархии, и тогда властителями становятся люди, а не закон - это и есть четвертый вид олигархии».

Через тысячелетия во многих странах посткоммунистического пространства эти процессы повторяются под прикрытием лозунгов конституционной демократии. В некоторых странах верховная власть уже находится в руках не закона, а людей. Властителями становятся или добиваются этого личности, в руках которых сосредотачивается основная экономическая, политическая и административная сила. Общественная опасность подобной ситуации заключается в том, что, во-первых, для такого сращения используется потенциал демократических перемен в обществе. А во-вторых, подобный процесс происходит при наличии Конституции, в которой провозглашены приверженность демократии, верховенству права, народовластию и другим фундаментальным ценностям, которые при искажении принципа разделения властей и установлении так называемой «корпоративной демократии» в полной мере деградируют в реальной жизни.

Недопущение подобного сращения легче, чем его преодоление. Последнее требует огромных усилий, времени и систем-

ной реставрации деградированных реалий. Для недопущения подобной ситуации главная задача успешного осуществления общественной трансформации - это последовательность в конституционализации общественных отношений с преодолением конфликта между Конституцией, правовой системой и правоприменительной практикой в целом. Только этим путем можно обеспечить необходимую дееспособность системы разделения и сбалансированности властей, гарантировать желаемые устойчивость и динамизм общественного развития. А этого, по мнению автора, можно достигнуть **с помощью внедрения непрерывно действующего системного конституционного мониторинга и диагностики.**

Эффективность функционирования системного конституционного мониторинга во многом зависит от наличия действенной системы конституционной ответственности. Конституционная ответственность является одним из последствий конституционного мониторинга, который имеет и превентивное значение, и миссию восстановления и обеспечения конституционного равновесия.

Конституционная ответственность отличается от других видов ответственности следующими основными признаками:

- 1) не предполагает непосредственных карательных уголовно-правовых последствий;
- 2) относится к сфере публичного права с вытекающими из этого особенностями;
- 3) по своему характеру она классифицируется на конституционную, административную, уголовную ответственность (в отдельных странах, например в Португалии, включает также гражданскую ответственность);
- 4) конституционная ответственность не может быть реальной без гарантирования непосредственного действия за-

крепленных Конституцией основных прав, а последнее является одним из главных критериев существования (или отсутствия) конституционной культуры⁵⁵⁶;

- 5) конституционная ответственность касается не только норм Конституции, регулирующих конкретные правоотношения, но и основополагающих принципов и аксиологии Конституции. Политическое и публичное поведение лиц, осуществляющих государственно-властную функцию, также должно быть адекватным аксиологии и основополагающим принципам Конституции;
- 6) конституционная ответственность предполагает ответственность государства за исполнение своих позитивных обязательств и ответственность субъекта, осуществляющего государственно-властные полномочия (институт или индивид), за результаты исполнения своей функции;
- 7) основным критерием конституционной ответственности является гарантирование конституционного принципа соразмерности, который должен гарантировать соразмерность деяния и ответственности.

Вопрос конституционной ответственности публичной власти в международной конституционной практике в последние десятилетия стал более актуальным. Об этом свидетельствуют внесенное в 1993 году дополнение в Конституцию Франции и закрепление в ней главы 10 (статьи 68-1, 68-2, 68-3), а также статьи 198-201 принятой 2 апреля 1998 года новой Конституции Польши, статьи 22 и 117 Конституции Португалии, статьи 85 и 86 Конституции Греции, параграф 101 Конституции Финляндии, статья 108 Конституции Румынии, статья 111 Конституции Хорватии и т.д.

⁵⁵⁶ Гаджиев Г.А. Конституционные основы юридической ответственности и конституционно-правовая ответственность // Журнал российского права. N1, 2014. – С. 10.

Международная конституционная практика свидетельствует, что материальные стандарты ответственности в связи с исполнением органами публичной власти и их должностными лицами своих должностных обязанностей относятся к политической, конституционной и уголовной ответственности. В свою очередь, ответственность может быть коллективной или индивидуальной. Если индивидуальная ответственность может быть политической, конституционной и уголовной, то коллективная ответственность - только политической.

Международный опыт также свидетельствует, что правовое регулирование конституционной ответственности надо осуществлять на уровне Основного Закона, уточняя:

- а) круг лиц, являющихся субъектами такой ответственности;
- б) круг субъектов, поднимающих вопрос такой ответственности;
- в) конституционный институт, который правомочен рассматривать такой вопрос и выносить по нему решение.

Более обстоятельно эти вопросы регламентированы, в частности, в Конституции Польши. Во-первых, статьями 199-201 предусматривается порядок формирования и деятельности Государственного трибунала. А статья 198 уточняет круг субъектов, несущих конституционную ответственность перед этим Трибуналом. В их числе: Президент страны, Премьер-министр, члены Правительства, Председатель Национального банка, Председатель Высшей контрольной палаты, члены Всепольского совета радиовещания и телевидения, лица, которым Премьер-министр поручил руководить министерствами, а также главнокомандующий Вооруженными Силами.

Конституционную ответственность перед Государственным трибуналом несут также депутаты при нарушении предусмотренного статьей 107 Конституции требования несовместимости.

Конституционная ответственность Президента страны связана с такими основаниями, когда в случаях нарушения Конституции или закона, совершения преступления Национальное Собрание по предложению не менее 140 членов (1/4) и 2/3 голосов выдвинуло обвинение перед Государственным трибуналом (статья 145). Государственный трибунал может вынести решение об отрешении Президента от должности.

Премьер-министр, члены Правительства и другие должностные лица несут ответственность перед Государственным трибуналом за нарушение Конституции и законов, а также совершение связанного с занимаемой должностью преступления /статья 156/. По вопросу обращения в Государственный трибунал или на основании заявления Президента или своих 115 членов Сейм выносит решение 3/5 голосов.

Детали обращения в Государственный трибунал и процессуальные процедуры устанавливаются законом. Закон предусматривает также, что заявление предварительно представляется на изучение в Комиссию Сейма по конституционной ответственности.

Во всех тех случаях, когда ответственность обусловлена нарушением конституционного требования несовместимости, решением Государственного трибунала лицо может быть отрешено от должности или лишено мандата.

Если должностным лицом вследствие действия по должности или бездействия совершено преступление или деликт, то может быть поднят также вопрос уголовной ответственности.

Конституция четко устанавливает порядок формирования Государственного трибунала (статья 199), согласно которому Трибунал состоит из Председателя, двух заместителей и 16 членов. Последних избирает Сейм на срок своих полномочий. Члены Трибунала не могут быть депутатами или сенаторами. Заместители Председателя Трибунала и не менее половины членов Трибунала

должны иметь квалификацию, необходимую для назначения на должность судьи.

Председатель Трибунала по должности является Председателем Верховного Суда.

В отличие от польской модели, во Франции Суд Республики, который исполняет ту же миссию, формируется по иному принципу. Он состоит из 15 судей, 12 из которых – депутаты, поровну избираемые из своего состава Национальным Собранием и Сенатом, а также 3 судей из Кассационного Суда, один из которых председательствует в Суде Республики.

Любое лицо, считающее, что в действиях членов Правительства имеется преступление или деликт, может обратиться в Комиссию по жалобам. Последняя по итогам изучения заявления выносит решение отказать в заявлении или обратиться к Генеральному прокурору для возбуждения дела в Суде Республики. Детали регламентируются органическим законом.

В Конституции Португалии предусмотрено (статья 117), что лица, занимающие политические должности, за преступное действие или бездействие, совершенное ими при исполнении своих должностных обязанностей, несут политическую, гражданскую и уголовную ответственность. Таковым считается также неисполнение требования несовместимости.

В Греции в установленном законом порядке дело о конституционной ответственности рассматривает созданный с этой целью Суд, 12 членов которого из состава судей избирает Парламент, а Председатель по должности является Председателем Ареопага (Верховного Суда).

В Финляндии, согласно параграфам 101 и 113 Конституции, перед Государственным судом за правонарушения, совершенные при исполнении своих должностных обязанностей, несут ответственность Президент страны, члены Государственного совета (прави-

тельство), Канцлер юстиции, члены Верховного суда и Верховного административного суда.

Председатель Верховного суда по должности является Председателем Государственного суда. В его состав входят Председатель Верховного административного суда, 3 председателя надворных судов, а также 5 членов, избираемых Парламентом сроком на 4 года.

Краткий анализ международного опыта свидетельствует, что во всех остальных странах решение вопроса конституционной ответственности органов публичной власти предполагает также четкое конституционное регламентирование.

На конституционном уровне надо четко установить основания ответственности в связи с должностными обязанностями различных конституционных институтов и должностных лиц, а также полномочия и порядок формирования равноценной судебной инстанции.

Конституционные решения публично-правовой ответственности должностных лиц могут ограничиваться рамками установления нижеупомянутой процедуры конституционной ответственности.

По основаниям и в порядке, установленных Конституцией и законом, конституционную ответственность в связи со своими должностными обязанностями могут нести:

- 1) Президент Республики, если при умышленном нарушении Конституции или закона или совершении тяжкого преступления по предложению 1/4 депутатов Парламента и 2/3 от общего числа голосов выдвинуто обвинение перед судом, рассматривающим вопросы конституционной ответственности. Данный суд может вынести решение об отрешении Президента Республики от должности;

- 2) депутаты, когда нарушают предусмотренное Конституцией требование несовместимости, а также в случае неуважительного отсутствия как минимум с половины голосований в ходе одной очередной сессии;
- 3) Премьер-министр, члены Правительства, Председатель Центрального банка, Председатель контрольной палаты, члены специальных автономных комиссий - по предложению Президента Республики или 1/5 депутатов, на основании решения, принятого более чем половиной голосов от общего числа депутатов Парламента.

Во всех тех случаях, когда ответственность обусловлена нарушением конституционного требования несовместимости, лицо может быть отстранено от должности или лишено мандата.

Независимо от того, в какой организационно-структурной форме будет создан орган конституционной ответственности, он должен иметь конституционный статус и такие полномочия, чтобы в результате конституционного мониторинга конституционная ответственность была бы неизбежна.

Наличие такой ответственности является также гарантией постоянно возобновляемой легитимности. Причем водораздел "легитимности" и "легальности" власти заключается в том, что если в первом случае на первый план выдвигается то обстоятельство, что власть является правовой, то во втором случае власть, будучи правовой, должна пользоваться также необходимым и достаточным общественным доверием.

Международная практика свидетельствует, что быстрые изменения общественной жизни существенно влияют также на изменение общественного мнения о носителях власти. Типичным примером может служить состояние доверия населения США и Франции к Президентам этих стран в 2014-2015 годах. Во Франции уровень общественного доверия в 2014 году снизился вплоть до 12 процентов.

Каковы причины такого положения и какие конституционно-правовые выводы можно сделать?

Подобные ситуации в основном обусловлены неравноценной реакцией институтов власти на активные изменения в общественных отношениях. Любая проблема общественного характера обусловлена определенными факторами, характером их возникновения и воздействия, неизбежными последствиями, императивами их исключения или смягчения. Вопрос в том, насколько носитель власти в рамках своих функций был в состоянии осуществлять равноценные действия, не допуская накоплений отрицательной социальной энергии. Социальные катаклизмы имеют свою эволюцию. Когда возникает проблема и она не получает своевременного надлежащего решения, то за этим неизбежно следует кризис. Последний, как было отмечено, при определенных накоплениях отрицательной социальной энергии может набрать критическую массу, и тогда неизбежны взрыв и разрушения. Высшее призвание государства – своевременное раскрытие и надлежащее решение проблем и предупреждение возможных кризисов. Лучшим средством является внедрение системного конституционного мониторинга, что в свою очередь является основополагающей гарантией конституционализации конкретных правоотношений.

Основное заключение автора сводится именно к тому, что без внедрения механизма системного конституционного мониторинга невозможно преодоление дефицита конституционализма и укрепление иммунной системы общественного организма.

I would like to extend special words of appreciation and thankfulness to Anahit Manasyan and Armenak Minasyants for their kind assistance in compiling the English version of this Volume.

As the author, I would like also to express my gratitude to the interpreters, namely Artashes Emin, Stepan Khzrtian, Liana Abovyan, Armine Hovhannisyan and Lilit Topuzyan for assisting in translation of this Volume into English.

CONSTITUTIONAL CULTURE:
THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME



NJHAR
YEREVAN 2017

printmaster
publishing · printing · advertise