CONSTITUTIONAL COURTS AND POLITICS: THE EXPERIENCE OF ARMENIA

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Dear participants of the international conference!

Ladies and Gentlemen!

First of all, on behalf of the Constitutional Court of Armenia, I would like to express my gratitude to the organizers of this international conference in this wonderful city where the spirit of Roman and Western European medieval civilization has perfectly been maintained, to Professor Reiner Arnold for warm reception and perfect organization. The constitutional judicial experience of other countries, including the German one, is eternally a subject matter of our research. For years the practical relations were established between the Constitutional Court of Armenia and Federal Constitutional Court of Germany, inter alia, with the support of famous organization - GIZ. The cooperation with IRZ is a new possibility for deepening these relations with the aim of extension of the experience with regard to the development of democratic principles of justice.

Dear Colleagues!

Ancient Roman thinkers considered that the law is a God-given art of kindness and equity. Inherently, the moral characteristic of the law is given in the concerned wording. Ideally, the interaction of politics and law should lead to their mutual strengthening, and make the politics nourished and ennobled by the principles of kindness and equity.

The issue of the place and the role of the constitutional court in the political system of the society, the character of its activity, alike the one concerning the correlation of it's "purely" legal and political activity, is well-known in the theory of state and law and its practice. It occurred immediately after the formation of the first constitutional court. Advancing the co-called Pure Theory of Law Hans Kelzen formulated the idea of the separateness of the law from the social conditions such as politics, economy and culture. The public practice and development of the law has proved the dynamism of the latter long ago. It refers to the ability of the law to react to the appearance of new relations or disappearance of outdated ones in the sphere of the operation of the law. The development of public conditions has objectively "changed" the content of the

law, which is directly reflected in the law enforcement practice, including the sphere of constitutional justice.

It is generally accepted that the institution of the constitutional justice is a fundamental democratic value. Therefore it is objectively necessary to examine this institution comprehensively. As mentioned by my colleagues here, the issue of the correlation between the constitutional courts and politics should be researched not only from the perspective of jurisprudence but also from the position of political science. The legal researches are devoted mainly to the legal status of the constitutional court, however the way of the constitutional justice functioning in real public and political life makes sense. On my opinion for the achievement of the indicated purpose the following main problems should be solved:

1. To reveal a ratio between political and legal components in the activity of the constitutional court,

2. To disclose the political-legal content of the constitutional justice functions,

3. To base the thesis on the political independence of the constitutional court as a necessary condition for it's efficient functioning in the political system of the society.

What does the official theory speak of and what does foreign practices of many years testify? What does the quite significant experience of West Europe indicate in this matter? On my opinion, the analysis of the theory and activity practice of the Constitutional Courts of Austria, Germany and some other western countries, for example, gives the following results. The official theory does not always correspond to the daily practice. The theory is guarding the constitutional court against the political collisions and disputes by all possible means and is representing the court as "purely" legal institution, whereas the constitutional practice with its numerous examples constantly indicates that the court often acts as political, rather than legal institution. What are the arguments of the theory and what is their essence? In short, their essence is in the establishment of the following thesis: "the court should be out of politics and above it" and in the aspect of constitutional-legal stipulation of "non-political character of the constitutional court activity".

The thesis "the court is out of politics and above it" is called to "legalize" the judicial practice. It is aimed to show and prove that the constitutional court is not an "ordinary", politicized state institution but a special official body standing highly above everyday political vanity.

The analysis of the foreign legislation also shows that usually the non-political character of constitutional courts activity is firstly emphasized, while identifying the place and role of the constitutional courts in the political system of the state. In certain cases it is done simply through the indication of the **prohibition of CC members from joining any political association** or **involving in any other political activity.** In other cases it is done via the simultaneous indication

of the inadmissibility of the CC members' involvement in political associations and the accentuated attention on the non-political character of the decisions made by court. Similar regulative provisions are stipulated in the Constitution of Armenia, as well as in the Law on Constitutional Court of the Republic of Armenia.

At last, it is important to pay attention to the fact, that the western researchers legitimately specify also the factor of political views and preferences of judges, while challenging the "pure" legal character of the constitutional court activity.

The problem of the involvement of the constitutional court in political process, the character of its activity and degree of its coherence by "the political line" and political decisions is rather a new and little-investigated one in Armenian politico-legal theory and practice. It is resulted from a rather simple and prosaic reason, which refers to the traditional absence of the constitutional court in the historical system of Armenian governmental machinery and a relatively young (16 years-old) institution of the constitutional justice.

How is the judicial-constitutional power practically implemented in Armenia? According to the RA Constitution and the RA Law on the Constitutional Court the Court administers the judicial power via the consideration in sessions of the cases concerning the constitutionality of the international treaties and normative acts; disputes arising of the outcomes of the referenda and the decisions adopted with regard to the elections of the President of the Republic and Deputies of National Assembly and providing the conclusion on the existence of grounds for impeaching the President of the Republic, on incapacity by the President to discharge his powers, on the grounds to discharge the head of community, as well as making decision on suspending or prohibiting the activities of a political party. Hereby, in the activity of Constitutional Court of Armenia there are objectively certain "risks" of being involved in the political processes as each of the above-listed main functions of the constitutional court contains legal and political aspects. Otherwise, both **the politics, and the law** is more or less apparent in each of the constitutional court functions, in particular:

1. *Protective function* which refers to the protection of the constitution, human rights and freedoms against the infringements;

2. *Arbitral function* which refers to the settlement of politico-legal conflicts in the society;

3. *Constraining function* which refers to the restraint of dysfunctional activity of the subjects acting in politics;

4. *Law adjusting function* which involves an adapting subfunction of conformation of the constitution and laws with the changing public conditions, and a regulating subfunction of the formation of new legal positions aiming to regulate the public relations.

Considering the constitutional court as a purely legal institution, from the viewpoint of jurisprudence we may assume it to be impossible to have choices in the constitutional court activity. Being a body administering justice it should hold the only fair ruling, meaning *fair decision* best corresponded to the criterion of equity under the given concrete circumstances. Nevertheless, the analysis of the practice of our constitutional court and I am convinced, of other countries' courts as well, shows that in fact, this body has the possibility to choose between several options of the final decision. This choice refers to its ability to take or not to take a matter under consideration, the content of the adjudicated decision and its reasoning. Though the contradiction between these options is not excluded, each of them will correspond to the Constitution to a certain extent, as well as will be assessed as a fair one by particular stakeholders. As from the perspective of legal political science the achievement of the constitutional stability is the target in the constitutional court activity. The constitutional stability is a balanced status of political and legal system of the society, and the body administering constitutional justice should promote its achievement and maintenance as much as possible.

However, contemporary practice indicates, that the Constitutional Court of Armenia, while solving exclusively legal matters, is influenced by the politics that is reflected in the reasoning, legal positions and the conclusions contained in its decisions. This influence is mainly explained by the political character of laws and other normative legal acts as such, which are assessed by the Court. In many cases the assessment criteria used by the Constitutional Court while examining the constitutionality of legal provisions, also promote this matter. These criteria include, for instance, the constitutional-legal principles of **equity, equality and proportionality,** inter alia, in cases of the assessment of conformity of the legal provisions concerning the social, economic, political rights and freedoms of the person with the Constitution of Armenia, as well as the politico-legal requirements of **reasonability and rationality**. During the assessment of the constitutionality of legislative restrictions of human rights and freedoms the Constitutional Court of Armenia interdependently applies the constitutional-legal principle of proportionality and the politico-legal requirement of reasonableness. While the Court applies the principle of proportionality for the legal assessment of conformity of the normative act with the Constitution of Armenia, in confirmation of necessity and proportionality of legislative restrictions of human rights and freedoms to the constitutionally significant objectives, the requirement of reasonableness increasingly enables the Court to assess the legal propriety of those restrictions and to prevent the irrational consequences of appropriate norms application.

In addition, The Constitutional Court of Armenia is called to assess the constitutionality of the laws and other normative acts, which are the embodiment of political will. This fact compels the Court, while assessing the constitutionality of those acts, to consider the certain historical conditions of the adoption of challenged provisions, the peculiarities of the state politics developed in the specified period in different spheres of the state and public life, as well as the state financial resources. All of those mentioned have an impact on the positions and

conclusions formulated by the Constitutional Court of Armenia, which frequently have a political hue.

I would also like to note that in its practice the Constitutional Court has formulated the crucial legal positions on a number of cases which, in our opinion, can be determinants for the politico-legal and constitutional disputes resolution, namely:

1. **Prevention of the constitutional courts transformation to the electoral courts**, i.e. to the Courts of Facts. We are convinced that electoral disputes on facts should be resolved in Administrative Courts, and the Constitutional Courts if entitled should give constitutional and legal assessment of disputes arising from decisions on the results of elections and referenda.

2. **The disputes of legal character shouldn't be resolved in political environment and visa versa.**

3. Anyway, it is extremely important **to confer the exclusive right to officially interpret the constitution to the constitutional court at the constitutional level**, such as in Germany (Article 93 of the Constitution of FRG) and in some other European countries.

Summing up, I would like to notice that experiencing the well-known influence of the politics, the decisions of the Constitutional Court of Armenia and the legal positions expressed in them objectively have not only legal but also great political significance. They aren't limited by the above-mentioned means and forms of influence on the behavior of law subjects. These decisions increasingly become legal organizational instruments for maintenance of political stability within the general community, which is the constitutional-legal mission of the Court as such.