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THE MODERN CHALLENGES OF THE INTERRELATIONS BETWEEN THE CONSTITUTIONAL JUSTICE AND POLITICES IN THE REPUBLIC OF ARMENIA

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Dear participants of the International Congress,

Ladies and Gentlemen,

First of all, I would like to express my gratitude to the organizers for the invitation to participate in this Congress and for the provided opportunity to deliver a report.

The chosen topic of the discussion is, indeed, actual and important. We do believe that various aspects of the problem will be analyzed throughout the participants' reports at the Congress and we will have the opportunity to learn more about the international experience and development trends.

We share the viewpoint that the issue of the constitutionality and the politics should become a subject for a separate discussion which is not isolated at mechanical comparison and opposition level of these two phenomena, but establishes a distinct cause-and-effect relationship.[1]

It is indisputable that the Constitution is a legal document. The Constitution, nevertheless, has a political context. The content of the Constitution is conditioned by the country's general level of political and legal culture, political orientations, real correlation of approaches of the political forces, etc. The constitutional doctrine primarily covers the imperatives of resolving the problems which the country and its political forces face. This statement does not mean, however, that the constitutional norms shall be interpreted in the light of political interests, or interpreted as political provisions. The policy is set of means and abilities to guide the community to make the right axiological choice, after which the

[1] See, in details, G. Harutytunyan, Constitutional Culture, Lessons of History and Challenges of Time, Yerevan, 2016 How Constitutions Change (A Comparative Study) / edited by Oliver D., Fusaro C., Oxford and Portland, Oregon, 2011, Кравец И. А. Российский конституционализм: проблемы становления,развития и осуществления. СПб., 2005.

same policy is, naturally, ultimately limited and revealed only within the framework of the constitutional democracy. In this regard the it is worth to mention the statement of well-known French lawyer Pierre Sandevuar, that " Politics formulate the law, but, at the same time, the law, in its turn, responds to the politics by introducing a regulatory element and making politicians act in an open, fair and responsible manner.".[2]

Despite of the fact that the constitutional norms are the products of political consensus, after becoming a mandatory rule of conduct they are mere legal norms and are of priority importance and determine the nature and content of the entire legal system.

A number of factors are required for not making the Constitution the tool of current policy. First of all, it is necessary that the political system is democratic, the political institutions are formed and function exclusively within the framework of the constitutional norms and principles, and the last but not least - the political thinking and practice shall be constitutional, and guarranteeing the rule of law, undoubtedly, shall be in the framework of the political behavior and political institutions. The next significant factor is conditioned with the consistent realization of the principle of checks and balances of the state powers. Wherever this principle does not find its systematic implication, the Constitution becomes a mere tool in the hands of the majority for fulfillment of its current political goals. Such situation has nothing in common with democracy and the rule of law of state.

For the Constitution not be shaped by the political expediency, it is necessary to guarantee the effective realization of all factors of the supremacy of constitution. And in this regard, of course, the Constitutional Court, as a body of constitutional justice, has its own specific mission.

So, which are the contremprorary challenges and development trends in Armenia when it comes to the topic of the discussion?

First, we shall refer to the political system and political institutions. In line with the positive solutions made as a result of the constitutional amendments in the Republic of Armenia on 1995 and 2005, the following issues, however, have not been overcome:

- hyper-centralization and hyper-personification of the political system,

- concretion of the political, administrative and economic potentials,

- absence of the sufficient and necessary guarantees for ensuring the credible electoral system,

[2] See, Сандевуар П. Введение в право/ Пер. с франц. М., 1994.

- disproportion between the actual volume of powers of various political bodies and their constitutional responsibilities,

- lack of the necessary and sufficient guarantees for strengthening the effective functioning and balancing role of the parliamentary minority.

The effectiveness of creation of the guarantees of the legal regulations by the constitutional justice in the political disagreements and ensuring efficiency of the policy in the constitutional domain, in the terms of existence of the above-mentioned issues, can not be considered as precise. This is on one hand. On the other hand, the level of the efficiency of the constitutional justice is conditioned, in particular, by the judicial independence of the Constitutional Court, nature of its powers, objects of the constitutional justice and scopes of the entities which are entitled to apply to the constitutional court, as well as by the legal consequences of the court decisions. In this regard, the priority shall also be given to a high level of the professional experience, will, principality and consistency of the judges of the Constitutional Court, as well as the precise maintenance of the constitutional legal requirements non-involving in the political activities, or regarding their activity to be influenced or intervened are of pivotal importance.

The procedure of composition and powers of the Constitutional Court are envisaged by the Constitution of the Republic of Armenia[3]. The Constitution of the Republic of Armenia envisages a comprehensive framework of the subjects who can apply to the constitutional court[4]. It should be noted that the RA Constitutional Court cannot examine a case on its own initiative. The Constitutional Court examines the case only based on the application of the subject to the Constitutional Court and adopts a decision on the issue raised in the application.

In terms of ensuring the effectiveness of constitutional justice in the Republic of Armenia, the constitutional regulations of 1995 and 2005 alongst with the positive solutions, a number of pivotal problems still have not been overcome. In particular, the main function of the Constitutional Court, ensuring the supremacy of the Constitution and the implementation of appropriate and sufficient powers, including the authority to resolve disputes over the constitutional powers between constitutional authorities was not envisaged at the constitutional level. At the constitutional level the functional,

[3] See, in particular, Point 10, Art 55, Points 1 and 2 Art 83, Art.100 of the RA Constitution (with the amendments on 2005)

[4] See, in particular, Art.101 of the RA Constitution (with the amendments on 2005)

institutional, tangible and social guarantees, necessary for the independence of the Constitutional Court, were not fully envisaged.

In our opinion, the necessity of the full implementation of the Constitutional Court entities active initiative approach, the legal possibilities of the Constitutional Court, as well as the need for full implementation of the decisions of the Constitutional Court, is important for ensuring the effectiveness of the constitutional justice in the context of the above-mentioned issues.

Within the scopes of respective topic we can state that the disputes regarding the decisions and issues of normative acts related to the results of elections of the President of the Republic of Armenia and Deputies to the National Assembly have become the subject of consideration at the Constitutional Court of the Republic of Armenia.

Throughout 20 years of its activity, in accordance with the prescribed procedure, on the basis of the applications of the the President of the Republic, candidates for the member of the parliament and political parties (blocs), the Constitutional Court of the Republic of Armenia has examined 43 electoral disputes amongst them 4 cases on election results of the President of the Republic, 4 cases on election results regarding proportional representation of the National Assembly and 35 cases on election results regarding the majoritarian representation of the National Assembly. The Constitutional Court invalidated the decisions of the relevant election commissions or the results of voting in 8 constituencies, as well as the results of voting in 40 polling stations.

As for the public assessment regarding the constitutional court's decisions on the above-mentioned cases, we may point out that the Constitutional Court stated that although the decisions on the national elections, were legally justified and argumented and contained the legal basic prvisions, however they were not unambiguously percieved by some layers of society. The reason for that phenomena is not only the current level of legal consciousness in the legal and political culture, but the objective reality that, the given perception is the reflection of the lack of confidence in the political system and the government, which has not yet been overcome. The problem requires such legal-political solutions that by the means of effective implementation of constitutional fundamental principles significantly enhance the guarantees of sustainable development and public confidence.[5]

The Constitutional Court examined the issue of constitutionality of 86 normative acts (14 challenged acts completely and provisions of 546 of acts) in its 235 decisions.

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[5] See, in particular, the decision DCC-1077 of 14.03.2013 of the RA Constitutional Court (www. concourt.am)

The examination of the mentioned issues was triggered mainly by the applications of physical and legal entities[6]. The implementation of the initiative of the political forces, unions, particularly, members of the National Assembly and parties (blocks) to apply to the Constitutional Court regarding the issuse of the constitutionality of the legal acts may not be considered as active.

The Constitutional Court examined the constitutionality of 56 legal provisions of 22 laws on the basis of applications of the deputies of the National Assembly, in 9 cases, and, 6 legal provisions of 4 laws,on the basis of the applications of the political parties, in 3 cases.

It should also be underlined that the Constitutional Court in 8 cases examined the constitutionality of legal provisions of 22 legal provisions of the RA Electoral Code, and they have been recognized as contradicting to the Constitution and invalid. In the mentioned cases, as well as in the cases on electoral disputes, the Constitutional Court referred to the main shortcomings of the electoral process and the core causes of the lack of public confidence regarding the process, set forward the doctrinal approaches, expressed pivotal legal positions and developed them consistently[7].

The legal positions of the Constitutional Court regarding the public mission of the political parties and the electoral process, in particular, are the following:

a) a democratic state system can not exist without the necessary political structures. No social stability can exist without the political forces which endow the political responsibility in democratic manner for the present and future of the state. The political party may fulfill its mission in the case when it has not only a program willingness but also necessary and sufficient capacity to endow political responsibility and it is visible and appreciable for the voter. The elections held by proportional system are called not only to form a sustainable and functional legislative power but play a decisive role for the establishment and strengthening of the political structure,

b) the state is obliged to provide such guarantees in order,

- to preserve from the shortcomings in the electoral legislation, hindering the effective exercise of the suffrage right;

- the current political activity shall be precisely separated from the electoral campaign;

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[6] Statistics introduced as of October 1, 2016

[7] See, in particular, the decisions DCC-703 of 10.06.2007, DCC-1028 of 31.05.2012, DCC-1077 of 14.03.2013 of the RA Constitutional Court (www. concourt.am)

- the combination of political and charitable activities shall be excluded and ensure transparency in the funding of the electoral process;

- any possibility for merging the political and business interests shall be prevented in all stages of the electoral process;

c) for the effective judicial protection of electoral rights it is necessary:

- to comprehend precisely the scopes of jurisdiction of each court,

- to implement remedies to protect the electoral right at the competent court, in accordance with the time-terms and procedure prescribed by law,

- to take into consideration that for judicial protection of electoral rights, the Constitutional Court does not act as a superior court in relation to the other courts, but, pursuant to the Constitution, exercises certain jurisdiction,

- disputes related to the election results can not be considered as disputes on the constitutionality of the legal provision, since for the solution of the latter, other constitutional requirements and procedures are prescribed.

We should state that many systemic and instutional amendments have been made in the legislation due to the legal positions of the Constitutional Court of the Republic of Armenia. Within the scopes of the matter at discussion, we would like to emphasize that the approach of the Constitutional Court is crystalized not to cross the scopes of legislative policy. It is specifically expressed in the legal positions of the Constitutional Court, regarding the legislative gap and the gap in the law. Referring to the corelation of the competences of the Constitutional Court and the legislative body in overcoming the gap in the law, the Constitutional Court of the Republic of Armenia has stipulated that in all cases, when the gap in the law is conditioned with the certain circumstances in the sphere of legal regulation, overcoming of such a gap is within the competence of the legislative body. The legislative gap may become the subject of examination of the Constitutional Court in the cases when the legislation does not prescribe other legal guarantees for filling the gap or in the case of availability of relevant legal guarantees in the legislation contradicting law enforcement practice is formed or when the current legislative gap does not ensure the possibility of implementation of this or that law. Otherwise, the issue of the constitutionality of the gap of the legal regulation is not a subject to examination of the Constitutional Court[8]. Based on the above-mentioned, we can state that in the framework of current constitutional-legal opportunities, the constitutional justice ensures implementation of the policy in the constitutional dimension.

[8] See, in particular, the decisions DCC-864 of 05.02.2010 and DCC-914 of 14.09.2010 of the RA Constitutional Court (www. concourt.am)

At the same time, it should be noted that ensuring of the high level of efficiency and adequacy of the mentioned process, in particular, requires:

- to exclude the political monopoly, while exercising the shadow relations of state power authorities;

- to raise public and legal liability of the authorities by providing legal procedures related to the performance of official duties, including political responsibility,

- to exclude entrechment of the oligarchic state-power system;

- to introduce a reliable electoral system, guarantee democratic processes of continuity of electiveness, accountability and volatility of the authorities,

- to establish civilized relations between political majorities and political minorities in the National Assembly for the establishment and continuous development of parliamentarism,

- to prescribe the precise and fundamnetal framework of the main functions and powers of the Constitutional Court necessary for the execise of its competence, the constitutional justice entities, as well as the optimal framework of constitutional justice entities,

- to prescribe precise functional, structural, material and social guarantees for the judicial independence of the Constitutional Court,

Today we can state that regarding the above-mentioned necessary preconditions, constitutional pivotal solutions have been adopted by the Constitutional Amendments referendum held on December 6, 2015. In particular:

- In accordance with the constitutional amendments, the Republic of Armenia has passed to the parliamentary system of governance. The latter, among other things, creates favorable opportunities for the political, ideological and institutional aspects to strengthen the political parties. It is constitutionally clearly stipulated that the party structure and activity shall not contravene the democratic principles.

According to the new constitutional solutions, the National Assembly is the only constitutional body that is directly elected by the people. The National Assembly will be elected by the proportional representation. According to this electoral system, the the guarantees for the formation of a sustainable parliamentary majority has been constitutionally stipulated.

Hence in the parliamentary system, the main political dividing line is not between the government and parliament, but between the political majority and the minority, thus pursuant to the new constitutional regulations the parliamentary minority enjoys the rights

equivalent to its assigned role. In particular, an important role has been assigned to the parliamentary minority in the adoption of the constitutional laws (the Rules of Procedure of the National Assembly, the Electoral Code, the Judicial Code, the Law on the Constitutional Court, the Law on Referendum, Law on Political Parties and the Law on the Human Rights Defender), as well as in election of the judges of the Constitutional Court, the Prosecutor General, the Human Rights Defender, the Chairs and the members of the Central Election Commission, the Television and Radio Commission, the Auditor Chamber and the President of the Central Bank. Such decisions shall be adopted by the qualified majority, i.e. at least three-fifths of the total number of deputies at the National Assembly. In addition, representation of the opposition in the National Assembly bodies is envisaged, in particular, one of the Vice-Presidents of the National Assembly shall be elected from the deputies of the opposition factions. Persuant to the new constitutional resolutions, the political minority, within the competence of the National Assembly, enjoys the right to clarify the matters of public interest and to establish the investigative committes, preside over, etc.

With regard to the constitutional justice, at the constitutional level, the fundamnetal function of the Constitutional Court is precisely stipulated, i.e. ensuring supremacy of the Constitution.

The order of formation of the Constitutional Court has been changed. Instead of being formed by the President of the Republic and the National Assembly, the constitutional amendments stipulate that the judges of the Constitutional Court shall be elected by the National Assembly, meanwhile, three judges will be elected upon the recommendation of the President, three upon the recommendation of the Government and three upon the recommendation of the General Council of Judges. This amendment follows the goal that the decision of the only representative body endowed with the primary mandate will enhance higher democtratic legitimacy in the state with the system of parliamentary governance. It is worth to mention that experienced and known lawyers will be represented in the composition of the Constitutional Court and the requirements to the age and professional experience has been increased.

The constitutional amendments restrict the term of office of the judges of the Constitutional Court by 12 years, with the possibility to be elected only once. This amendment is justified as a step aimed at strengthening of the independence of judges of the Constitutional Court, which also offers the possibility of a digenesis and ideological changes.

As an important step towards ensuring the independence of the judiciary, the procedure of election of the President of the Constitutional Court (as well as the Vice-President of the Constitutional Court), as well as procedures for the suspention of the office of a judge of the Constitutional Court are reviewed and are assigned to the Constitutional Court.

The pivotal constitutional amendments are also made in the powers of the Constitutional Court by expanding the scope of entities of constitutional justice. In particular, for the first time the Constitutional Court is endowed:

- to determine compliance with the Constitution and constitutionality of the draft amendments to the Constitution, as well as, before the adoption of draft laws submitted to referendum,
- to resolve the disputes regarding constitutional powers rising between constitutional authorities. It enables to overcome the above-mentioned disputes legally and excludes moving them to the political arena thus becoming a serious social instability threat,
- to resolve the issue of the suspension of the deputy’s powers,
- to resolve the issue of disciplinary sanctions of the judge of the Constitutional Court.

The constitutional amendments have also expanded the scope of the subjects entitled to appeal to the Constitutional Court. In particular, the following subject may apply to the Constitutional Court:

- the National Assembly faction related to the disputes on the results of the referendum and presidential elections,
- the Council of the National Assembly on the issue of making a decision on the termination of powers of the deputy,
- at least three judges of the Constitutional Court on the issue of disciplinary sanctions of the judges of the Constitutional Court.

The above-mentioned amendemnts are primary and necessarily incurred measures. It is, although, increasingly important to complete the legislative implementation of the new constitutional regulations, bringing to life these solutions and ensuring their law enforcement. They are yet to come. The outcome of all these is that we are certain that the establishemnt of the political settlement of the legal disputes and application of the policy in the constitutional field are efficiently ensured by the constitutional justice.

Thank you for attention.