CHARACTERISTICS OF CONSTITUTIONAL JUSTICE IN THE COUNTRIES OF YOUNG DEMOCRACY

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Dear colleagues,

This is the first time, in the wake of the First World Conference on Constitutional Justice, that a meeting of the Bureau of the Conference is convened. This provides a much appreciated opportunity to participate in the work of the Ibero-American Conference. I would like to thank the organizers for the invitation and the possibility of delivering a communication. Firstly, I would like to submit some general considerations. In 48 countries of the world constitutional justice is currently administered by the American model, i.e. by the courts of General Jurisdiction, whereas in more than 110 countries the European model prevails, i.e. by the specialized constitutional courts and councils.

The main peculiarity is of the European model is not in the establishment of specialized constitutional councils and courts. It is also essential that the methods and character of review are different. It is pivotal that if ex post concrete review is characteristic for the American system, in the European system, together with this, practices ex ante, ex post, abstract, obligatory, elective review, focusing on form and/or substance.

There are serious differences also in the principles of the constitutional review. The European system of constitutional review functions not only based on the principle of adversarial process, legal equality of arms, publicity, but also on the principle of clarifying the circumstances of the case ex officio. In this system, the supremacy of the Constitution must be guaranteed primarily by the Constitution itself. **The Constitution must possess a necessary and sufficient system of ensuring intra-constitutional self-defense**. In a number of European countries, the Constitution itself may become an object of constitutional review.

Considering the first ruling on the constitutionality of a legal act, taken by the US Supreme Court, and the new approaches that had emerged since, one may conventionally isolate the following phases of the formation and development of systems of constitutional justice:

1. 1803-1920;
2. 1920-1940;
3. 1945-1990;

4. 1990 - now.

The second phase coincides with the creation of the first specialized institution for judicial constitutional review. The Austrian Constitution of 1920 marks the establishment of the Austrian constitutional court, possessing exceptional powers of constitutional review of laws (initially only *ex ante*). This happened through the efforts exerted by the Austrian lawyers-theoreticians Adolf Merkel and Hans Kelsen, which is why the period between the two world wars is described as the "Austrian period."

Before the Second World War, following the example of Austria, constitutional review was introduced in Czechoslovakia (1920), Lichtenstein (1925), Greece (1927), Spain (1931), Ireland (1937), and Egypt (1941). The Second World War interrupted the trend of a much broader introduction of constitutional review, and the already established institutions failed to operate (for example, Austria had no constitutional review between 1933 and 1945, and Czechoslovakia had none since 1938).

The third phase encompasses the post war period (1945-1990), when constitutional courts were almost concurrently founded in European states, and their main task was to ensure the conformity of laws and other normative acts with the Fundamental Law.

Many other states also introduced systems of constitutional review immediately in the wake of the Second World War: Brazil (for the second time in 1946), Japan (1947), Burma (1947), Italy (1948), Thailand (1949), Germany (1949), India (1949), Luxemburg (1950), Syria (1950), Uruguay (1952), France (1958), etc.

In states with communist administration and a single party system in this period the formation of institutions of judicial constitutional review was considered a bourgeois extravagance. As opposed to the former, many European states (Austria, Germany, Spain, Italy, etc.) brought forth the proposition that the protection of individual constitutional rights and freedoms must become the axial task of constitutional justice. Naturally, in the post-war period not only the constitutional courts of those countries were granted such powers, but also the citizens received the right to seek protection of their rights before up to and including the constitutional court.

The fourth phase of constitutional justice coincides with qualitatively new processes of democratization, the period of emergence of a great number of newly independent states. In view of the experience accumulated by European countries, in building their states and in developing democratic institutions, the young newly independent states considered it their first and principal step the practical implementation of the principle of separation of powers and the creation of a comprehensive system of constitutional review. This was also determined by the need to protect the Constitution, which in almost all such states was designed and enacted with certain

difficulties, as well as by the need to resolve the issues of moving social development from the plain of crisis management to that of social stability and dynamic development.

The latter phases are also characterized by political transformations in some European countries, which have introduced constitutional review after the fall of dictatorships: Greece (1968), Spain (1978), and Portugal (1976). In this period, constitutional review was also introduced in other countries, such as Cyprus (1960), Turkey (1961), Algiers (1963), republics of the former Yugoslav Federation (1963) and elsewhere.

At the same time, within the framework of existing institutions of constitutional review the practice of systemic review was introduced (Austria, Germany, Sweden, France, and Belgium). Because of political and social changes in the 1980s, constitutional review began to be introduced also in Central and South American countries, as well as in some Arab and African countries.

There essentially exist two models of constitutional review: American and European. Within the recent decades, increasingly more countries subscribe to the European model of constitutional justice, which is determined by the need for the formation of a dependable system of guarantees for the stability of social development.

The following features characterize the American model of constitutional justice:

- its comprehensive nature, including not only laws, but any normative act at any level;
- the review is carried out in a decentralized manner by any court over any case, provided the normative act involved pertains to the plaintiff's specific interests;
- it is relative in nature, since the judge's ruling is binding only for the parties to the case and does not extend over the entire scope of enforcement;
- it is of concrete *ex post* review nature.

Why did Europe not adopt the American model in the 20th century? Many have attempted to answer this question. Some have tried to look for the answer on the plain of diverse perceptions of the notions of "law" and "Constitution." In some other cases, the emphasis was put on the specifics of the judicial system and the performance of judges (particularly stressing the degree of the court's independence and the power of judges to pass rulings on the constitutionality of laws). A third approach brings to the foreground the issues the society in question faces and the specifics of addressing these. This way or other, general jurisdiction courts in the world have implemented the functions of constitutional review for over a century. However, rapid changes in social life in the early 20th century, especially in conditions of separation of powers, posed a number of fundamental issues before the specialists:

1. it became possible to arrive at great centralization of power through law, up to its usurpation;

2. in conditions of rapid changes in the social situation and hence in respective legislative regulation, the review carried out over concrete cases was obviously insufficient for effectively ensuring the supremacy of the Constitution;

3. in conditions of separation of powers the struggle for competences between the branches of power became the main trigger for destabilizing society.

Apart from these reasons, the methodology of the approach was also different. Not only the solution of an issue pertaining to the interests of an individual, but also the fundamental issue of stable and dynamic development of the society through ensuring the constitutionality of the entire legal system were brought to the foreground.

The following three issues are deemed a priority in continental European legal systems:

a) ensuring the constitutionality of legal acts and maintaining through it the constitutionally enshrined functional equilibrium between the various branches of power;

b) clear regulation of the resolution of disputes between various branches of power on their respective competences;

c) the creation of a most comprehensive and reliable system for the protection of constitutional human freedoms. Therefore, as it has been mentioned, the system of constitutional justice may function fully, effectively and independently upon the existence of certain **necessary and sufficient prerequisites**. The following may be included among these:

- Functional, institutional, organizational, material and social independence of judicial constitutional review;
- Consistency in constitutional implementation of the principle of the separation of powers;
- Equivalence and compatibility between fundamental constitutional principles and the constitutional mechanisms for the exercise of state power;
- Appropriate and justified selection of the objects of constitutional review;
- Determination of the optimal circle of entities eligible to lodge complaints to the constitutional court;
- Systemic approach to ensuring functional adequacy of judicial power;
- The existence of clearly defined legislative policy and its implementation in the country;
- The level of perception of democratic values within the society.

The international practice of constitutional justice indicates that, in order to ensure reliable guarantees of the supremacy of Constitution, it is necessary to for the constitutional court to have the following powers:

a) to determine the constitutionality of:

- constitutional amendments;
- international treaties;

- laws;
- other normative acts.

b) to carry out concrete review in response to:
- individual complaints;
- requests by courts of law.

c) to resolve legal disputes between:
- national bodies of government;
- national and regional institutions;
- courts and other public agencies.

d) to ensure the constitutionality of democratic processes through:
- constitutional review of the activities of political parties;
- review of constitutionality of referenda;
- review of constitutionality and lawfulness of elections;
- determination of constitutionality of removal from office (of the President, other officials);
- ensuring guarantees of independence for the courts of law, for the bodies of local self-governance.

In accordance with these functions, the frame of the authorities of the constitutional courts and subjects addressing the court is formed.

The resolution of the issue of the structural formation of the court is also essential.

Following the example of the bodies administering constitutional justice in several countries: Denmark, USA, Argentina, Belgium, Finland, Ireland, Sweden, the Russian Federation, Norway, Malta, Turkey and a number of other countries, the constitutional court of the Republic of Armenia enjoys important guarantees of independence, such as the life tenure of its members until the age of 70 (65 after the constitutional amendments). This provision acquires increasingly more importance in the international practice of constitutional justice. They have returned to this system in the Russian Federation: the Federal law on the constitutional court provides for indefinite tenure for constitutional judges until the age of 70.

The remaining components of the independence of the court need to possess adequate viability as well. Issues pertaining to the powers of constitutional courts and procedures for their exercise have become the subject of active deliberations in discussions by the Venice commission, especially in considering the constitutional laws on the constitutional courts of Azerbaijan, Moldova, Romania, Croatia, Armenia and a number of other countries. In view of the main trends of international developments in this area one may conclude that **effective constitutional justice may be discharged when all constitutional subjects are eligible to apply to the constitutional court, and all normative acts adopted by all constitutional subjects may**

become the object of constitutional justice. Apart from that, since the main content of constitutional justice is in ensuring the supremacy of the Constitution, this issue will remain unresolved if the constitutional court fails to secure guaranteed protection of constitutional rights through the effective exercise of the **individual right to constitutional justice**, or fail to resolve disputes over constitutional competences between the branches of power.

Constitutional courts of more than fifty countries with the European system of constitutional review possess the power to resolve disputes pertaining to constitutional competences between bodies of state power. In particular, see the Constitutions of 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. Alongside these, the constitutional courts of 29 countries have the right of abstract, or so-called absolute interpretation of the Constitution, such as Azerbaijan, Bulgaria, Gabon, Germany, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Russia, Namibia, Slovakia, Uzbekistan, etc.

Besides, in 29 countries (Azerbaijan, Bulgaria, Gabon, Germany, Hungary, Kazakhstan, Kyrgyzstan, Moldova, Russia, Namibia, Slovakia, Uzbekistan, etc.) possess the abstract, the so-called competence of absolute interpretation of the Constitution.

The significance of judicial institutions of constitutional review is exactly in the court being created and operating with the purpose to protect the foundations of constitutional order, human and citizen’s rights and fundamental freedoms, to ensure the supremacy and direct effect of the Constitution, that is to protect and ensure the fundamental political and legal values enshrined in and guaranteed by the Fundamental Law of civil society. The legal disposition of the constitutional court, direct or indirect interpretation of constitutional norms and provisions, based on revealing the legal content of basic constitutional principles, not only ensures the strength of the constitutional equilibrium, it also determines the nature and direction of constitutional developments in the country. **This reality must be perceived as a vital necessity by all institutions, as well as citizens, of the countries that have chosen the road of democratic development**. Especially the current trends of European legal developments clearly indicate that the degree of such perception gauges the level of development of constitutional culture in a

I would like to emphasize the necessity of an official interpretation of the norms of the Constitution, especially in countries where a more complicated procedure of constitutional amendments is prescribed and there exists no institute of organic or constitutional laws in legislative practice. In such circumstances, an official interpretation through judicial process becomes the most efficient way of constitutional developments in the country. Anything below a full-fledged use of the potential can become the cause of a constitutional crisis.

The Constitution cannot stay on the level of recording wishful thinking, it shall ensure and provide the realization of stipulated aims and principles. The main question is how to achieve it, how to ensure that the Constitution becomes a living reality, reflecting the main trends of social development. The answer to these questions depends on the fundamental principles and specific norms for official interpretation and mechanisms of reliable protection of the supremacy of the Constitution.

One of the specific features of American constitutional culture is that in the interpretation of the Constitution essential role is reserved to legal power. The privilege of the court is not only to state what the Constitution is in reality, but also how it should be comprehended. The main position on the essence of the Constitution has been built during the dynamic development of the public relations on the reasoning of its meaning. This is the historically justified route of the Constitution for ensuring its self-sufficiency.

Especially during the last century, the institute of constitutional evolutionary concrete interpretation acquired an emphasis. The latter aids to provide more flexibility, public dynamism to the Fundamental law and essentially reduces the temptation of making changes.

In the opinion of US constitutional scholars the viability of their Constitution is greatly determined by the fact that, in the course of 215 years, the Supreme Court had come up with around 540 volumes of rulings, continually adding a fresh charge to the Fundamental Law through its legal positions and interpretations. 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**" (our underscore, G. H.).

The American constitutional mind unequivocally states that it is the possibility of judicial interpretation of the Constitution that affords the Fundamental Law dynamic stability and unwavering power.

The European developments of recent decades state that, in the issue of the interpretation of the constitutions, the role of constitutional courts is emphasized; the legal positions of constitutional courts become essential sources of constitutional law in the continental legal system. During international discussions dedicated to this issue, aiming to reveal the role of the constitutional courts in the stability and development of the Constitution, the exceptional role of the abstract and concrete-indirect interpretations of the Constitution is emphasized.

Alongside these, the constitutional courts of 29 countries have the right of abstract, or so-called absolute interpretation of the Constitution, such as 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) the issue of reviewing conformity with not only the Constitution, but also with the laws (often international agreements as well) of the remaining normative acts is also addressed by the constitutional court, and it is deemed inefficient to establish other bodies for that purpose (this opinion is also upheld by the experts of the Venice commission).

Constitutional review of normative acts based on individual complaints by citizens is practiced in 53 countries, and this includes all countries of Western and Eastern Europe that have constitutional courts. From among former soviet countries, Armenia, within the framework of its commitments before the Council of Europe, partially resolved this issue through the constitutional amendments of 2005.

The Constitutional Court shall, in conformity with the procedure defined by law (Article 100):

1) determine the compliance of the laws, resolutions of the National Assembly, decrees and orders of the President of the Republic, decisions of the Prime Minister and bodies of the local self-government with the Constitution;

2) prior to the ratification of international treaties determine the compliance of the commitments stipulated therein with the Constitution;

3) resolve all disputes arising from the outcomes of referenda;

3.1) resolve all disputes arising from decisions adopted with regard to the elections of the President of the Republic and Deputies;

4) declare insurmountable or eliminated obstacles for a candidate for the President of the Republic;

5) provide a conclusion on the existence of grounds for impeaching the President of Republic;

6) provide a conclusion on the incapacity by the President to discharge his/her responsibilities;

7) provide a conclusion on terminating the power of a member of the Constitutional Court, detaining him/her, agreeing to involve him/her as an accused or instituting a court proceeding to subject him/her to administrative liability;

8) provide a conclusion on the grounds to discharge the head of community;

9) in cases prescribed by the law adopt a decision on suspending or prohibiting the activities of a political party.

In international practice in the issue of the subjects, addressing to the Constitutional Court, such a principal approach is accepted which should ensure the full and effective implementation of the authorities of the constitutional review of the court.

Currently, pursuant to Article 101 of the RA Constitution, in conformity with the procedure set forth in the Constitution and the law on the Constitutional Court the application to the Constitutional Court may be filed by:

1) the President of the Republic - in cases stipulated in Clauses 1, 2, 3, 7 and 9 of Article 100 of the Constitution;

2) the National Assembly – in cases stipulated in Clauses 3, 5, 7 and 9 of Article 100 of the Constitution;

3) at least one-fifth of the total number of the deputies - in cases stipulated in Clause 1 of Article 100 of the Constitution;

4) the Government - in cases stipulated in Clauses 1, 6, 8 and 9 of Article 100 of the Constitution;

5) bodies of the local self-governance on the issue of compliance to the Constitution of the state bodies' normative acts violating their constitutional rights;

6) every person in a specific case when the final judicial act has been adopted, when the possibilities of judicial protection have been exhausted and when the constitutionality of a law provision applied by the act in question is being challenged;

7) courts and the Prosecutor General on the issue of constitutionality of provisions of normative acts related to specific cases within their proceedings;

8) the Human Rights' Defender – on the issue of compliance of normative acts listed in clause 1 of Article 100 of the Constitution with the provisions of Chapter 2 of the Constitution;

9) candidates for the President of the Republic and Deputies – on matters listed in Clauses 3.1 and 4 of Article 100 of the Constitution;

The Constitutional Court shall start proceedings only upon the receipt of an application.

Simultaneously, Article 102 of the RA Constitution stipulates that the Constitutional Court shall adopt decisions and conclusions in conformity with the procedure and terms stipulated in the Constitution and the Law on the Constitutional Court.

The decisions and conclusions of the Constitutional Court shall be final and shall come into force following the publication thereof.

The Constitutional Court may adopt a decision stipulating a later term for invalidating a normative act contradicting the Constitution or a part thereof.

On matters stipulated in Clauses 1-4 and 9 of Article 100 of the Constitution, the Constitutional Court shall adopt decisions, whilst on matters stipulated in Clauses 5-8, it shall

issue conclusions. The conclusions and the decision on matters stipulated in Clause 9 shall be adopted by at least two-thirds of the total number of the members whilst the remaining decisions shall be adopted by a simple majority of votes.

If the conclusion of the Constitutional Court is negative, the issue shall be removed from the scope of competence of the relevant body.

A number of countries followed the practice of setting the date of entry into force of the decisions of the Constitutional Court themselves, since if the latter were to be immediately effective as applied to a number of certain cases, it could have lead to serious ancillary unconstitutional consequences. A similar power is reserved to the German constitutional court, which is spelled out in paragraphs 31 and 79 of the constitutional law on the court.

In Armenia this issue has been distinctly regulated in the RA Law "On the Constitutional Court".

The issue of ensuring the legal nature, the content, and the enforcement of the rulings of the constitutional court is of even more importance. It has been confirmed by international practice of constitutional justice and by constitutional studies that the rulings of the constitutional court **have precedential value and constitute an important source of law**. International practice has also demonstrated that the rulings of the constitutional court cannot become the object of discussion or interpretation **by state officials**. Such facts may only illustrate the low level of constitutional culture and inconsistent application of the principle of the separation of powers.