

Report for the Conference in Seoul, 4 September, 2008

**THE CONSTITUTIONAL CULTURE OF 21ST CENTURY AND NEW CHALLENGES OF
SYSTEMIC DEVELOPMENT OF CONSTITUTIONAL JUSTICE**

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Honorable participants of the international conference!

The topic of our discussion is very interesting and urgent. The tendencies of development of constitutional law in the new millennium has put forth the problem of such kind of separation of powers, which will ensure the balance of functions and competences of independent constitutional institutions and will not allow the merge of economic, administrative and political forces, which entails distortion of fundamental constitutional values and becomes an obstacle on the way of constitutionalization of social life. The detection, assessment and restoration of every violation of functional constitutional balance and ensuring of dynamic social development in the conditions of globalization are considered as one of the main tasks of constitutional diagnostics. This is one of the main requirements of constitutional culture of 21st century.

The fourth topic of our discussion has been chosen by me in order to present my understanding of interconnectivity of development of constitutional culture with the tasks of ensuring the rule of constitution in the new millennium.

The new millennium has suggested new challenges for mankind, among which should be emphasized the universalization of values, approaches, opinions, civilizational key points, social evaluation of human existence, as well as the necessity to resist the universal threats (dangers), from one hand and the diversity of human nature, maintenance of qualities of identity and the problem of reproduction of improved qualities in dynamic harmony on the other hand.

In legal field the globalization is manifested not only by the increase of the role of International Law, but also with new tendencies of development of national-legal systems, based on common legal principles and values. The core of the system of values of these processes is that there is no alternative to democratic route of development of social public. This is a universally recognized reality which has become the foundation for international and national legal systems.

The current processes of globalization create adequate problem for tendencies of development of constitutional culture, basic constitutional values and principles, which in its turn determines the nature and the route of system of constitutional justice.

For a social society the following values have become fundamental: legal state, democracy, rule of law, human dignity, liberty, constitutional democracy, separation and balance of powers, social agreement, equity, fairness, tolerance, pluralism, prohibition of discrimination, justice etc., which in the light of main tendencies of development of the civilization do not have alternative and are values which determine the present and the future of human community.

At the same time the level of their perception, guaranteeing and ensuring is conditioned by the nature of the whole system of social values of each certain country, by the qualities of national identity, priorities of survival and development.

The core task of constitutional development is to what extent the common and the particular obtain meaning and become harmonized constitutional values for a certain country , and to what extent those values turn into a living reality for members of society.

It is an axiomatic truth that the Constitution, fundamental constitutional values and principles cannot be subjects of import and export. Those are thoroughly comprehensible and historically sensed realities for a given country and society. I conducted an analysis of axiological peculiarities of the Constitutions of 140 countries in the world. It is impossible to find two absolutely identical, constitutions in this regard. In the preamble, in the norm-principles or in other certain articles of the Constitution of each separate country the value-system characteristics of the certain society are enshrined. The preamble and provisions of 1st chapter of the Constitution of South Korea can serve as a good example.

The analysis also indicates that new tendencies of development of constitutional culture have started to be formed on the level of the wording of the Constitution. However, constitutional culture acquires new quality in such social-state systems, where **along with the Constitution, the constitutionality is considered as a social reality as well**, where the constitutional norms and principles are living realities, a necessary and sufficient environment for constitutional democracy has been formed, where the constitutional rights of a person and a citizen have direct effect, and an adequate mechanism of constitutional control exists. In such kind of systems the Constitution does not appear to be an instrument in the hands of state power, **but as the Main Law of the civil society**, a means for ensuring the harmonized and stable development of the society, not only by prescribing rules of conduct, but by restricting the power with law.

The concept “**democratic constitutional culture**” steams out from the above mentioned common approach, which is typical for democratic social systems, where the

qualities of national and universal cultures are harmonized. And, the Constitution and constitutionality cannot be considered only from strict legal perspective, in the context of pragmatic legal-relationships or abstract concepts. Both are deep cultural phenomena, and have system-value related, interconnected deep roots, distinct civilizational benchmarks and level for their perception and cognition.

Most of the participants of this conference may remember that in 2004 the topic for discussion in the summit of the International Association of Constitutional Law convened in Santiago was "Constitutionality: new world, old doctrines" One of the important conclusions made there was, that there cannot be a comprehensive and ideal Constitution. It is the generalization of system of values of each society, which surely should also be based upon the certain common principles and approaches recognized by the international constitutional doctrine. The main purpose of the constitutional developments in these systems, where the constitutional democracy is still in embryonic condition, is to avoid from the distortion of the main principles and values, and to be conscious of that constitutional state is being formed by the adequate constitutional culture of the society.

The main determinant of constitutional culture in the context of present civilizational achievement is, that **the Main Law of the country should include the whole system of profound, permanent values of the civil society and guarantee their stable, reliable protection and reproduction, and should be self-contained.** Those values, in their turn are formed during the centuries; each generation reconsiders and guarantees the continuity of development with its own addendum. The fortune accompanies those nations and people, whose chain of development is not suspended or seriously distorted. Accordingly, **the concept of "constitutional culture of XXI century" can be defined as distinct system of historically formed, stable convictions, notions, legal conscience, enriched by the experience of generations and mankind, on which the social society is construed upon in the process of emergence and guaranteeing of rules of conduct through social agreement.**

Constitutional culture is not an abstract concept, it appears in all areas of the life of social community. First of all, it discovers the nature of system of values underlying the social relationships and activities of state power. The meaning and the content of constitutional solutions are conditioned by the level of constitutional culture, the progressive nature of the Main Law of a country. Constitutional culture is substantially manifested in the adopted laws and other legal acts, observance of the main principles of international law, political system of the state, political institutions and activities of the state bodies, relationships between the latter, social status and legal capacity of a person. The lessons of history certify that from now on, the main criteria for assessment of the level of constitutional culture is the level of constitutional democracy in the country, and the growth of the latter is the core requirement of constitutional development.

The history of Armenian nation contains useful examples of formation of constitutional culture, to which I devoted a separate monograph¹. Here I would like to recall only that after adoption of the Christianity as state religion in 301 A.C., in Armenian reality the first acts, which had constitutional nature, were passed in 365, 444, and 488 A.C. during national-ecclesiastical meetings, as well as during the upcoming centuries. It is worth mentioning that Catholicos Hovhannes Odznetsi in 8th century by summarizing the canonic constitutions, which had existed in previous centuries, drafted the Armenian Canonic book, or according to contemporary understanding - Main Law. By studying the order of adoption of such canonic constitutions during those meetings, as well as the constitutional-legal nature of adopted provisions, we reach number of important conclusions:

1. By their order of convening, nature of representativeness, working procedure, competence those meeting can fully be considered as constitutional meetings;
2. The adopted provisions are based upon common Christian values, coupled with national conscience and cognition;
3. The canonic constitutions were considered as Main Law for the whole nation and had their crucial role for the society not only during the existence of statehood, but also during the period when it was lost. It is worth mentioning that Armenians had lost its statehood for many centuries.

It is worth mentioning the reasoning stipulated in the introductory part of the Code drafted by Mkhitar Gosh in 1184 A.C. He explains the necessity of drafting the Code by the following reasons:

- The evil in human beings, the evil in general has gained power, and a Code is needed for obstructing the hatred and for establishing love ;
- Because of laziness people are not trained in science of code, they are not aware of laws, accordingly their decisions are wrong or obstructed from the law, hence the code is necessary for driving them out from such condition;
- The law of Moses, sayings of Apostles and the Gospel, after they had been created have not been changed until now; they stayed have petrified, while the conduct and morals of people are different and change during the time depending on people and country. Accordingly, such kind of a code is needed, which will express (stipulate) those changes;

¹ Арутюнян Г. Конституционная культура: уроки истории и вызовы времени. -Ереван, 2005.

- In the past the Holy Spirit influenced on humans and promoted the fair judging, and the Spirit was the law written in the hearts of people, hence there was no need for written law. Now, when the Holy Ghost does not have the same influence and people "are lead astray" from Christian brotherhood, veracity, I have decided to write this code;
- The litigations end with an oath, but the evil inside human beings has multiplied, and they disregarding the fact that the oath is prohibited by the Lord, they do take oaths necessarily and unnecessarily and very often they do it deceitfully. For the purpose of restoration of violated order the Code has been written;
- The code should establish lawfulness and order, in order the **justice to be impartial, uncorrupted and fair.**

I would like to repeat one more time, that these conclusions had been made at the end of 12th century.

It is interesting that the legal-political conception of Mkhitar Gosh is based on the doctrine of natural (Lord) law, basic principles of which are equality of people (in front of the Lord), liberty, right to live, the inviolability of the property etc. He considered that the **positive law should be steamed from the principles of natural law, which are permanent and unchangeable**, and the positive law is created by people and **the time and certain social conditions leave their seal on it**. Such kind of deep perception of conceptual difference between the positive and natural law (the law and statute), the understanding of necessity to consider the common values and certain social conditions for legal solutions is very often absent even in our days.

I do not want to abuse your time, but I would like to refer to the Constitution written by Hakob and Shahamir Shahamiryans in 1773-1788, which consists of 521 articles, and which is drafted based upon the principle of separation of powers and the supremacy of God's Law². Referring to power of people, rule of law, representative democracy, separation of powers and functional independence and social protection of powers, even to constitutional justice and to number of other constitutional principles, it was emphasized that only "the fruits of law and justice three" can become basis for functioning of "just governments", simultaneously looking for the happiness of an individual and the society in justice and rule of law, being governed by the imperative "...construing our life in accordance with the law and justice". This is the great advice of the mentioned constitution (which was titled as "Trap of Vanity").

² Авакян Р. Памятники Армянского права. – Ереван 2005. – с. 570-640.

Another introductory conclusion of the ,Trap of Vanityt is more than very contemporary: "...how more **kindness** do we need in **order to restrict our lives with law and liberty**, in order to deserve the Lord's belief..." (emphasised by me - G.H.). And those laws should be made ,"...in compliance of human nature, due to desire of our rational spirit".

The lessons of history evidently certify that the law, especially the Main Law, can realize its mission successfully when the core of that law is the human being, alongside with its social nature, qualities of identity, level of cognition, civil maturity, and legal culture and with trends to realize its creative nature.

It is evident that disregarding the high importance given to the role of common values and international law, and to the implementation of the latter into national legal system, in the current conditions of globalization, anyway, the implementation of international law cannot be replaced with implantation, i.e. the change of the national legal system by the way of artificial engraftment. Only organic coalesce and unification of the system of values can bring positive changes. Especially when on the national-state level the constitutional-legal values have been formed through centuries, they include the whole system of legal norms, traditions and customs and they underlie the maintenance of the qualities of identity and uniqueness. Hence, **the constitutional culture cannot be anti-national**. At the same time it is undisputable that it is the bearer of universal common values. Accordingly, first of all the Constitution should ensure the harmonization of supranational and national, reasonable combination of universal human values and national features, having as a purpose the creation of an environment necessary for the development of the certain social society.

Hence, the main purpose of guaranteeing the rule of the Constitution comes to assuring the harmonized system of values. This task conditions the difference between various models and types of judicial constitutional control in different countries.

The overall purpose of constitutional control all over the world is to guarantee the rule of Constitution. Today, in 110 countries, this task is being exercised through the European model of judicial constitutional control, i.e. through special agencies, and in 48 countries, through American model. But the number of features even within the European model is so high, that it becomes very difficult to view them in one level. Logical questions may arise:

- to what extent the establishment of Constitutional Courts was historical necessity
- which are the core descriptive features of their system role in the new millennium.

During the quest for the answers to mentioned questions we tried to refer to almighty nature and to carry out a comparative analysis. During the recent decades the science of microbiology and medicine made several very serious generalizations, which are exclusively important for conducting system research of the principles and mechanisms of internal self-defense of the organism, from the point of view of ensuring the sustainability of constitutionally prescribed functional balance.

The following principles are considered as almost axiomatic:

- human being is granted with the most ideal self-defensive system, the human immune system had been formed through two hundred million years;
- the functioning of human immune system, as well as of other complex biological systems, involves the whole organism and has hierarchic and self-governing nature;
- each cell of the organism has its own resources of self-defense, in case of consumption of the those resources defense systems of other interconnected parts of organism start to operate;
- the main mission of immune system is to ensure the native balance and sustainability in the whole organism, as failing to restore the destructed balance may entail accumulation of negative internal forces and may cause irrational reproduction;
- physiological balance, the immune and nervous systems of the organism are in sustainable harmonized condition;
- each pathology activates and puts into function the whole system of self-defense;
- the quantity of immune hormones in the case of defensive reaction always increases up to the quantity necessary for the full performance of defensive function. However, if the defensive capability is insufficient for restoring the functional balance, a pathologic condition starts to emerge, which requires exogenous intervention;
- developed immune system has the following features: clear differentiation of self-defense and rationalism, the sound consecutiveness of programmed and committed actions for the purpose of ensuring the integrity and coherence of the functional balance of the cellular system and the organism;

- each dynamically developing system should have internal functional balance and adequate subsystem of self-defense;
- the functional difference of the immune system can be represented in the following:
 - § discovering the destructed balance;
 - § deciding the nature of destruction and selection of tactics and "tools" for overcoming the misbalance;
 - § guaranteeing from new destruction during restoration of the balance.

These principles, which we considered for long months with physicians, biologists, specialists of system management, had been formed, as it has already been mentioned, through million years, simultaneously with the formation of the development of the organism. The human society exists only for several millennia and as a coherent organism, as a complex system it hasn't yet reached its system perfection and to a harmonized level. Only the example of 20th century, which took more than 130 million human lives in the result of social disasters, the wave of contemporary international terrorism, unresolved regional conflicts are the sound proofs of existence of social immune deficiency. It is not a mere contingency that the emergence of the idea of specialized agencies for constitutional control coincides with the period of the First World War, and the development of that system became reality after Second World War.

We come to the conclusion, that to some extent, the society subconsciously is approaching to the problem of formation of **qualitatively new immune system for the social organism**. The whole 20th century convincingly proved that **the religion, traditions, moral norms, the whole value system of the social conduct, other mechanisms of system self-defense ensured incompletely the dynamic balance and sustainability of the society in the light of new realities**. The main challenges of today's reality come to necessity of forming a capable internal system of self-defense of the social organism by considering the abovementioned principles.

It can also be stated that the constitutional control becomes one of the core elements of self-defense of the civil society and the legal state. The constitutional control exists in the area of "checks and balances", and the core purpose of it is the constant, continuous and system discovery, assessment and restoration of distorted constitutional balance. **Constitutional control does not allow irrational reproduction of functional distortions or accumulation of negative social energy**, which, by reaching to a critical mass can explode and entail a new quality. In practice this is choice between dynamic,

evolutionary or revolutionary developments, with each colorings and consequences of system cataclysms.

The functioning of the overall system of constitutional control is said to guarantee constitutional sustainability and to exclude social disasters, first of all being based upon such generally accepted constitutional principles, as democracy, rule of law, separation of powers etc.

Accordingly, functionally capable and full-fledged constitutional courts with their legal positions are called to provide us with real content to constitutional values. Only such kind of approach is able to guarantee the supremacy and direct effect of the Constitution of a democratic country, which is also a characteristic of 21st century constitutional culture.

Thank you for your attention!