

## **ROLE OF THE CONSTITUTIONAL DIAGNOSTICS IN PROVIDING SUSTAINABILITY TO SOCIAL DEVELOPMENT**

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System unsustainability, diverse crises, multi-color revolutions, social degradation, value-system uncertainty have become the main characteristics of the modern world. Human life as a supreme value has turned into the tool of fight for some ideals imperceptible by the social majority.

Establishment of universal peace and concordance is a major challenge to modernity. As far the humanity is approaching to what extent concerted efforts are comparable to the real threats of instability. It is rather difficult to find unambiguous answers to these questions. However, we believe that non-allowance of the imbalance is more effective way than any fight for overcoming its consequences. Such an opportunity arose at a certain level of development while forming a proper public consciousness. This opportunity stems from the constitutionalization of public relations.

Fixing the purposes and fundamental principles of social being which start with integrity of the system of values of a specific society, the Constitution establishes the main rules of the public behavior, features of interrelations of an individual and the state, order and the limits of the administration of the power, and within the civil consent creates an environment necessary for the progress and sound manifestation of the creative essence of a human being.

“Construction” of public relations, **establishment of obligatory rules of behavior at a general consensus**, proceeding from their character, form, circle of scope, condition of application and value-system orienteers form a relevant constitutional culture.

The Basic Law of the country shall be based on the entire system of fundamental values of a civil society and guarantee their sustained and reliable protection and reproduction. These values, in turn, are formed over the centuries; each generation reinterprets them and by its complements guarantees the further development. Success accompanies those nations and people, where this circuit does not interrupt or is not seriously distorted. Hence, the notion of “the constitutional culture” can be characterized as historically developed, sustained, enriched by experience of generations and all the mankind, certain valuable system of belief, ideas, the legal conscience which is a basis of the given particular society in the process of establishing and ensuring basic rules of democratic and legal behavior by the social consent. The constitutional

culture characterizes also the quality and level of relationship of the constitutional subjects and institutions, a degree of "maturity" of the legal relationship between them.

The constitutional culture is not an abstract concept; it appears in axiological foundations of the Constitution itself, in all spheres of the life of the society, on a solid foundation of the developed, suffered, verified within centuries values and ideals. The constitutional culture finds its subject manifestation in the adopted laws and other legal acts, in the observance of the fundamental principles of international law, in the political system of the state, activity of the political institutions and authorities, their relationship, in the social status of a person and his legal capacity.

If until XVIII century the development of the political and legal thought had led to the adoption of constitutions and to the idea of establishment of the public concordance of a social society through the Basic Law, the main challenge of XXI century is warranting of constitutionalism in the country, which is a basis of the sustainable development of the society.

Constitutionalism, which is an embodiment of the constitutional culture, in its turn, is a complex socio-political and public-legal phenomenon. First, it implies the establishment of the constitutional democracy throughout the entire state system. This goal inspires all the countries, which have chosen the route of the social progress. However, realization of this goal, in particular, demands such mandatory guarantees as recognition and ensuring the constitutional purposes and fundamental principles, presence of the state power which is in conformity with the corresponding constitutional principles, establishment of the legal system based on the principle of rule of law, reliable defense of the constitutional order, ensuring of supremacy of Constitution, etc.

The question is not only what kind of constitutional order is stipulated by the real Constitution<sup>1</sup> and what kinds of principles are taken as the basis in the relationship of law and power. The way the constitutional order appears in the public life is essential as on the basis of this, the fundamental principles are enveloped into flesh and blood.

The task of elaboration and implementation of integral system of the constitutional diagnostics becomes of great importance with which it is possible to identify, evaluate and restore the disturbed constitutional balance and ensure the dynamism of development and stability in multidimensional social society. This is a paramount task of all governmental and non-governmental institutions and the society.

The concept of "diagnostics" originates from the Greek (*diagnostikos*) and **characterizes a certain process of revelation of system integrity and functional capacity of the examined**

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<sup>1</sup> On the issue of constitutional "Romanticism – Realism" see Gadis Gajiyev, Innovative way of development of constitutional law // *Comparative Constitutional Review*, M., 2010, N 5 (78), pp. 3-9.

**object with due regard for correlation of the main parameters of its functioning with the criteria basis of the programmed and natural state of the given object. In the medicine,** the concept of diagnostics implies the process of establishment of diagnosis, i.e. conclusion in the relation of deviation from the established norms, revelation of the essence of the disease and the patient's condition, expressed in the accepted medical terminology.

**In technical-technological aspect,** the given concept represents the sphere of knowledge, which includes data of methods and means of the evaluation of the technical condition of [machines, mechanisms, equipments, constructions](#) and other technical objects.

**In economy,** the diagnostics also implies the process of discernment of the problem and its designation with the usage of recognized terminology, i.e. establishment of deviations from the normal state of the examined object or process.

**The notion of constitutional diagnostics covers the entire process of the evaluating of constitutionality in the society, revelation of correspondence of the real public relations with constitutionally established norm and principles.** The constitutional diagnostics is a means and ability to determine the degree of functional capacity of the social organism as a whole. Primarily, it is necessary **to identify the true condition and trends of development of constitutionalism in the society.**

The public life in general and in particular functioning of the institutions of power is the **object of constitutional diagnostics.**

People as the source and carrier of the power, public authorities and local self-government, the institutes of the civil society and each human being are the **subjects of constitutional diagnostics.**

In the condition of the public transformation the **main tasks** of constitutional diagnostics are:

- Identification of the deficit of constitutionalism in the ideological sphere;
- of intra-constitutional deformations, identification of the causes of these deformations and elaboration of the mechanisms to overcome them;
- of the deficit of the constitutionality in the sphere of legislation and other law making activity;
- prevention of deformation of the constitutional values and principles of law-enforcement practice;
- overcoming of the deformed perception of the fundamental constitutional values and principles in the society, increasing the level of the constitutional awareness;
- ensuring of the necessary level of constitutionalization of political behavior of the institutions of power and social behavior of an individual;

- system ensuring of the constitutionality of the government;
- identification and consideration of the transnational criteria of the assessment of the social behavior of a person and the authorities;

Up to years and multi-aspect analysis of the mentioned problem has brought us to the conclusion that ensuring of the systematic and full value of constitutional diagnostics is possible only in the profound consideration of the following circumstances:

1. Functioning of the social system implies multi-aspect hierarchic nature, the basis of which are ensuring and guaranteeing of rule of law.
2. Each subsystem of the social society has definite resources of self-defense, in the case of exhaustion of the latter the entire defense system of the organism is turned on;
3. The main mission of the immune system of the public organism is protection of functional constitutional balance and stability as non-renewal of the disturbed balance causes the accumulation of negative social energy, which when the critical mass is accumulated can bring to social cataclysms.
4. System of constitutional diagnostics as a controlling system should function in the order of continuity peculiar to it and relatively independently.
5. Any public pathology should strengthen and activate the entire system of the constitutional self-defense.

**Constitutional diagnostics should be based on the following main principles:**

- in continuous operation to identify any violation of the constitutional balance;
- identification of the character of violation;
- proposal of the mechanisms and means of restoration of constitutionality;
- ensuring prevention of new violations while restoration of functional balance.

For the implementation of the consecutive constitutional diagnostics, such **a group of indicators** must be highlighted, which is able to characterize the constitutionality of the analyzed public relations comprehensively and holistically. The system of such indicators is often used by a number of international organizations. Annual research of “Freedom House” an American organization can serve as a good example concerning the tendencies of development of the constitutional democracy worldwide. We have also attempted to present a scientific methodology of such an analysis, the essence of which is the following. Firstly, the choice of the evaluation indicators. Secondly, the choice of the model approaches of the system comparison of these indicators with the normative parameters (benchmarks) and on the basis of the deviations

to provide with the substantiated diagnosis of the system<sup>2</sup>.

As it has been said, diverse approach to the integral assessment of stability of human development exists<sup>3</sup>. The main idea is that on the basis of the system of indicators on sustainable development a common characteristic of the constitutional balance in the society has been defined. The difficulty concerns the elaboration of integral index of comparative assessment of sustainable development of not only on the basis of legal parameters but also with generalization of economic, social, environmental, social-political and other indicators.

For the complex assessment of sustainability and identification of factual level of constitutional balance of the social system, it seems to us that we need a system of indicators on the following levels:

- social characteristics of the society;
- indicators of realization of democratic values in the society;
- indicators of legal protection of the Constitution, human rights and freedoms.

**Integral index** is computed from the system of enumerated indicators, taking into consideration the correlation connections between separated indices likewise and looks as:

$$U_i = \sum_{j=1}^m \left[ \frac{(X_{ij} - X_j^{(\Theta)})}{\sigma(X_j)} \prod_{\substack{\beta=1 \\ \beta \neq j}}^m (1 - \gamma_{\beta j}) \right],$$

where  $U_i$  - integral level of the constitutional sustainability,

$x_{ij}$  - characteristics of j indicator in i state (system),

$X_j^{(\Theta)}$  - characteristics of standard indicator,

$\gamma_{\beta j}$  - coefficients of a twin correlation.

The suggested method allows likewise solving the issue on manageability of processes, definition of the influence of each indicator on the integral level of sustainability.

Along with the methodological and methodic statement of the question, it seems to us that it is necessary to consider a number of aspects of implementation of constitutional diagnostics which are connected **with the ensuring in the dynamics** of functional balance of the power.

With appearance of the first constitutions, ensuring of the functional separation and balancing of the state power was and remains the fundamental task of the constitutional architecture.

<sup>2</sup> The details of the given methodological approach see G.Harutyunyan, A. Mavčič – THE CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS), Yerevan, Ljubljana, 1999, p. 385-392.

<sup>3</sup> See also Indicators of Sustainable Development. The Wuppertal Workshop, 15-17 Nov. 1996.

Firstly, it is necessary to state that among the dozens of different doctrinal approaches to a specific constitutional model of separation of the powers only the theoretical statement of necessity of checking and balancing the powers is the acknowledged and non-disputable. Specific approaches, forms and methods as well as practical solutions considerably differ in every constitutional system<sup>4</sup>.

We should accept that one of the highest achievements of the American constitutionalism is that the doctrine of separation of powers in the US Basic Law has acquired a system integrity and with the introduction of system of checks and balances has added a feature of dynamic regulations to the Constitution and has moved the constitutional system on the rails of developing balancing.

How is solved the issue of separation and balance of powers in our days taking into consideration that the objective reality that the specialized institutions have appeared worldwide which shall ensure the supremacy and direct effect of the Constitution?

We are convinced that, in fact, nothing has changed and the American doctrine of constitutional separation and balance of powers is fully viable in our days. In our opinion, the basic requirements for the effective functioning of the system are concluded in the following assumptions:

First, separation of powers is primarily functional rather than institutional process, which is often confused even at the level of constitutional decisions. Some separate constitutional and legal functions may be implemented by different constitutional institutions.

Second, the main task of the constitutional architecture is ensuring, first of all, the balance in the system of **function-institute-powers**.

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<sup>4</sup> The ancient philosophers, in particular Aristotle, expressed the idea of "separation of powers". In its turn, the member of the RA Constitutional Court R.A. Papayan believed that the roots of the system of separation of powers are found in the Bible itself. He concluded that "... the triad God the Father, God the Son and God the Holy Spirit, marked as the three branches of heavenly power, are celestial equivalent of legislative, judicial and executive authorities" (See Papayan R.A. Christian Roots of Contemporary Law. Moscow, Norma, 2002, p.218).

However, the genesis of the theory of separation of powers associated with the appearance in the XVII century of political and legal theories of J. Locke in England whose ideas on the necessity and importance of the separation of powers were set out in his main work "Two Treatises on Polity" (1690). However, it is generally recognized that its classic form of the doctrine of separation of powers takes on the theory of Ch. Montesquieu. Developing the idea of John Locke, Montesquieu concludes that only the separation of governmental responsibilities between different government agencies can ensure harmony in a pluralistic society, human rights and freedoms, rule of law in public life.

In its turn, I. Kant defines the separation of powers as a requirement of the Pure Reason and fundamental principles of the state. The state, as he notes, comprises three powers, i.e. the will, which is combined in a triple person: the sovereign power (sovereignty) in the person of the legislator - the people, the executive - in the person of the Ruler, the judiciary is presented to persons appointed by the Ruler or elected by the people. Kant believed that **the development of the freedom necessary that the mentioned powers were separated. Nevertheless, this division of power should not be deprived of mutual interconnection. In their interaction is the benefit of the state.**

Further philosophical and legal research in the theoretical terms, in our view, did not make any significant adjustments to the concept.

Thirdly, the issue of a clear delineation of the functional constraints on power and counterbalance of the constitutional institutions of government and ensuring of optimal balance of these powers is a principle one.

Fourth, the introduction of competent and effectively functioning mechanism of the intra-constitutional self-defense is the urgent task of modern constitutionalism to ensure timely identification, assessment and restoration of functional constitutional balance in the dynamics. This is, by essence, the main purpose of the constitutional diagnostics and the main task of constitutional as a whole.

The main criteria features to provide the prerequisites listed above are:

- 1) to ensure functional independence of the branches of power;
- 2) guarantee the completeness and compliance with the functional authority of the constitutional institutions;
- 3) ensuring the continuity and the inviolability of the constitutional balance of the functional dynamics in a real social life, this, in turn, suggests avoiding the so-called alienation of the Constitution from real life.

How are these fundamental approaches for guaranteeing the constitutional democracy and sustainable development in different countries ensured, on our opinion? We tried to find the answer to the question posed in the first place, based on comparative constitutional analysis.

Countries conditionally divided into the following groups:

- 1) U.S., Canada and Western European countries;
- 2) Eastern European countries;
- 3) Latin American countries;
- 4) African countries;
- 5) the countries of Central and East Asia;
- 6) Arab countries;
- 7) post-Soviet countries.

In terms of study of analyzed subject matter, the last five groups, with a few exceptions we have combined into a single conditional group - a group of states of young democracy, taking into account the results of similar constitutional diagnostics.

How is the first group distinguished?

Firstly, in this group, as well as the very inner structure of the Constitution and all the specific constitutional decisions are clearly based on a functional separation of powers of the constitutional institutions of government, regardless of the form of government.

Secondly, this group differs also on the high level of constitutional traditions and constitutional culture that generates an appropriate environment of constitutional perception of social processes in society.

Thirdly, ensuring of balance of freedom, power and law is the general philosophical framework of the constitutional decisions.

Fourth, in this group, continuity, eligibility, accountability, and changeability of power, that are the basis for the establishment of constitutional democracy, are functionally and institutionally guaranteed.

Fifth, there is no real antagonism between the constitutional decisions and public practice. Constitutional values and principles have become the norm of social behavior of society.

For the second group of countries, the tendencies of approximation are characterized with the criteria basis that has been mentioned in the first group.

For the third summarized group is common that these foundations, to some extent, are deformed mainly on three levels: on the level of the Constitution itself (which also includes a system deformations while choosing and impermanence of forms of state power), deformation in general law system; deformed perception and implementation of fundamental constitutional values and principles at law enforcement level.

The third group of the countries is characterized by the fact that in terms of establishing the constitutional democracy, they are at the stage of social transformation.

The study of the constitutions of these countries shows that, at this level, the formally law of law state, democracy, rule of law, human dignity, freedom, constitutional democracy, separation of powers, social harmony, equality, tolerance, pluralism, solidarity, and other universally recognized values in their organic unity became the basis for constitutional decisions. However, the reality is different in these countries, it occurred in another dimension. In most of these countries, self-sufficiency of the Constitution has not fully achieved, and, there is significant isolation between the fundamental constitutional values and principles of the social reality. Low level of constitutional culture, system inadequacy of mechanisms to ensure the rule of law, the existence of a deformed, internally inconsistent legal system, lack of a unified system of values and understanding of the social orientation of public development are characteristic features of the latter.

A number of examples can be brought. Structural analysis of the constitutions can serve as an example. For instance, the structure of the Constitution of Armenia, in terms of functional balance, in our opinion, is illogical and inconsistent. After the chapters on the foundation of constitutional order and human rights, the constitutional institutions of the President, Parliament,



Government follows, and along with them, judiciary power stands as a separate chapter. Not only the structural logic of the Constitution itself is violated, but institutions that do not administer justice are included in the functional system of judicial power. Such a structural inconsistency is also observed in the Constitutions of Bolivia, Greece<sup>5</sup>, Bulgaria, Croatia, Georgia, Uzbekistan, Russian Federation, Japan and other countries. Along with this, there are countries in the study group that not only have constitutionally enshrined a clear functional structure of separated powers, but also with a separate article or chapter of the Constitution have disclosed the nature of the separation of powers. Article 49, Section 3, Chapter I of the Mexican Constitution, which states that for its implementation the supreme power of the Federation is divided into the Federation at the legislative, executive, and judicial branches, can serve as an example. Two or all three powers can never be united in the hands of one person or one corporation, and the legislature can not be given to one person, except for the cases of authorizing the executive authorities of the Federation with emergency powers in accordance with the provisions of Article 29. In no other case, except for the cases enshrined in Paragraph 2, Article 131, the executive cannot be granted emergency powers to enact laws.

With a distinct statement of the constitutional nature of the separation of powers, guarantees of the practical implementation of this doctrine are definitely rising. It seems to us that, despite the chosen form of government and level of development of constitutionalism, the better choice have made those countries that have laid the basis for structuring either the constitutional or institutional approach (Italy, Portugal, Belgium, Poland, etc.), or the functional approach (Austria, Brazil, Slovakia and others).

However, for the third group of the countries, the existing antagonism between the Constitution and the legal reality is the main problem in general.

General negative characteristics of systemic transformation in these countries, in our opinion, are:

- Instability and uncertainty in social development and the deepening crisis of confidence;
- Serious omissions and flaws in the implementation of value-system transformation;
- Inadequacy of the civil society;
- Inconsistency of social landmarks society constitutionally enshrined democratic and legal values, as is a substantial deficit of constitutionalism;
- Low level of functional and institutional capacity of institutions of power;

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<sup>5</sup> It is necessary to consider that Article 26 of the Constitution of Greece defines that the legislative functions are administered by the Parliament and President of the Republic, executive functions by the President of the Republic and the Government but the judicial functions are administered by the courts, the decisions of which are implemented on the behalf of the Greek people.

- Antagonism between policy and constitutionality of decisions;
- As a consequence of all this - the accumulation of certain negative social energy, which sometimes leads to the colorful social and political explosion, with the inevitable tragic consequences.

In public practice fundamental constitutional values can be guaranteed to be embodied in the life to the extent where and to what extent the approval of a constitutional democracy is a core objective and is a relevant public policy agenda. They can not be conditioned with the current expediency to serve to bureaucratic, clan and criminal interests. Providing real separation and balance of powers and establishment of democracy from the slogan should become a living reality. Any legal decision should be based on the principle of rule of law, which is the main guarantee of stability and development. Where the rule of law ends, the tyranny begins. It is also ensured by an adaptation of the constitutional form of government to the current political interests.

The countries in transition shall overcome more challenges to undergo the Constitution until the real constitutionalism. Life itself clearly shows that the development of constitutionalism can not serve to the current political expediency. It can not violate the balance of separation of powers; promote the fusion of political, administrative and economic forces, which inevitably leads to the formation of a corrupted state pyramid.

Constitutionalism as a basis of civil society cannot develop progressively in the conditions of weak capacity of governmental democratic structures and deformation of the political institutions themselves.

The main task of the successful implementation of social transformation is a consistency in the constitutionalization of social relations to overcome the conflict between the Constitution, legal system and law enforcement in general. Only under these conditions the necessary capacity of the system of separation and balance of powers can be provided and can be guaranteed the necessary stability and dynamism of the social development.