

**The guarantees of realization of fundamental constitutional values on the level of state policy
and in the social practice**

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Honorable participants of the International Conference,

Honorable guests,

My report is very tightly linked with the report, which I presented at 10th Yerevan Conference, referring to some legal-political distortions of constitutionality in reforming social structures. I do consider that the topic is not exhausted, moreover, its urgency has increased, and the distortions of fundamental constitutional values in social practice of many transitional countries acquire systemic character.

It is obvious that for transitional countries the core issue is the establishment of constitutionality and guaranteeing stable constitutional development. The latter means that there is necessity of existence of political and constitutional culture, guaranteeing the rule of law through the democratic institutions, formation of an atmosphere of social agreement, mutual understanding and tolerance, ensuring the continuous mutual agreement on fundamental rules of coexistence and directing the potential of the society towards the progress and development.

It is clear what exactly is not recommended for this process, taking into account the principles of formation of the civil society. The constitutional developments cannot be served for the political reasonability. They cannot distort the balance of the separation of powers, produce misbalance, favor the accretion of administrative, economic and political powers. The constitutional-legal processes cannot weaken the guarantees of human rights protection, limit their freedom and obstruct the development of self-government. The concepts of “human rights”, “democracy” and “rule of law-based state” are represented as organic united trilogy, and the purpose of adoption of liberal, democratic constitutional doctrine in the country is to guarantee the abovementioned.

The adoption of this or that constitutional doctrine for a certain country in its turn infers the adoption of certain constitutional-legal values, which manifests the perceptions about the organization and development of the society and the state comprehended and understood in public conscience, as well as on governmental level. The general problem is to what extent it was evaluated on the level of state policy and how it is going to be guaranteed in social practice on one hand, and to what extent the civil society is ready to live by that system of values, on the other hand.

In the present report we will try first of all to refer to the comprehension of fundamental constitutional values and to the guarantees necessary for their realization from the point of view of theory of state, meaning not only the sole doctrinal approach, but also the fundamental, systemic and multifactor nature of the approaches and understanding to mentioned problem on the level of state

policy.

The research of the axiological problems of the Constitution first of all requires sorting out those value cornerstones, upon which the whole constitutional system is construed.

Unfortunately the constitutional axiology has not yet emerged into an independent branch of science, and almost no research has been conducted in this field. However, it is almost impossible to solve the problems linked with the constitutionalization of social relations without deep axiological analysis of the Constitution.

The concept “Constitution” itself does have axiological content. It does not simply mean to constitute, establish or set borders, or install. The authors of the Dictionary on New Armenian Language, published in Venice in 1837 had excellent understanding of the axiological meaning of the said concept, which defined the “Constitution” as “Definition of borders and the Lord’s Providence”. It is obvious that here we face not only with a constituting supreme “definition”, i.e. with legal regulation, but also the Divine cognition, the value system granted from the Lord, the Divine Providence underlie it. Accordingly, guaranteeing the supremacy of the Constitution means the guaranteeing the fundamental constitutional values in the legal system, as well as ensuring their systematic realization of those values. The descriptive features of those values are the following: they do not have subjective discretionary character, and they turn into general and imperative characteristics of objective reality and coexistence. The next main features is that those values cannot be manifested separately, they are systematized on the constitutional level and become apparent in complementary and interdependent manner. Hence, it is impossible to achieve success through excluding this or that constitutional value or by distorting that in social practice, and being governed by other values.

The main axiological determinants of the Constitution, as a rule, first of all are being enshrined in the preamble of the Basic Law, in the form of norm-purposes. They find their further systematized stipulation in constitutional norm-principles, as well as in legal norms and provisions regulating the fundamental legal relations.

We tried to conduct the comparative analyze the axiological determinants of constitutions of around 140 countries. The **first** generalization is that it is very hard to find a Constitution of a country, where the axiological approaches are identical with other country. Each country adopts its own doctrine of constitutional axiology. It is quite natural and certifies that the Constitution is not an importing or exporting good, but a mutual agreement on the main rules of coexistence construed upon the value generalizations of certain social community, certain state.

Second, substantial part of the countries (USA, Spain, India, Argentina, Russian Federation, Moldova, Armenia etc.) tried to enshrine the axiological foundations of the Basic Law in the preamble of the Constitution in the form of norm-purpose. In addition to, the emphasis is being made no the following values: fairness, liberty, equity, brotherhood, tolerance, civil peace, political pluralism, security of the country, the welfare of the generations, democracy, rule of law, human dignity, respect and protection of human rights, international cooperation etc. The reality is that in preamble of constitutions of different countries the emphasis is made on some of the mentioned

values depending on the priorities of the values for a certain society.

Third, in number of countries the Constitution in certain articles stipulates the corpus of values, which underlies the legal regulation of constitutional-legal relationships. For example Article 1 of the Constitution of South Africa enshrines that South Africa is democratic state based on such values, as: human dignity, legal equity, guaranteeing of progress of rights and freedoms, exclusion of racism and discrimination, supremacy of the Constitution, authority of the statute, as well as universal electoral right, united national electoral register, multi-party system. And Article 3 the Constitution of Croatia provides that the liberty, equity, national legal equity, peacefulness, social justice, respect towards human rights, inviolability of property, protection of nature and the environment, rule of law and democratic multi-party system are the supreme values of the constitutional order of the Republic of Croatia.

Article 3 of the Romanian Constitution also stipulates that Romania is rule of law-based, democratic and social state, where the human dignity, human rights and freedoms, free development of a person, fairness and political pluralism are considered as supreme values and are guaranteed.

Article 2 of the Constitution of France states that the main mottoes of the Republic are: “Liberty, Equity, and Brotherhood”. The mottoes of French Revolution have been evaluated on the constitutional level as general qualitative guidelines for social coexistence. They infer the inner world of person, all his social connections, the evaluation of social existence and all the manifestations of self-realization in that atmosphere first of all should be based on mentioned values in a congestive way. This is also to certify that the fundamental constitutional values in fact turn the Constitution into living reality. The indicated concepts acquire real content in constitutional layer, as value, social-cultural fundamental guidelines of the social community.

The members of Convent for drafting the European Constitution also chose the way of certifying and enshrining the fundamental constitutional values in concrete provision, which stipulated the values of the Union in Article 2 of the Constitutional agreement, which was then referred to member states for ratification, under that Article: “**The Union is based on such values as: human dignity, liberty, democracy, equity, rule of law and respect for human rights. These values are common for member states, where the distinctive features of the society are non-discrimination, pluralism, tolerance, justice and peacefulness**”. Disregarding the fact that this document was not realized in life and the 2007 Lisbon Agreement on European Union does not content such Article anymore, anyway it is obvious that a clear and comprehensive definition had been made on the level of European Constitutional axiology, which is an axiological basis for civilizational orientation, and according to our opinion is a significant step in the area of constitutional science.

Fourth, many countries do not stipulate the main axiological characteristics of the Constitution in one Article, they do refer to that in several Articles, instead. By the way, the most common approach is that a very special attitude is chosen towards human rights and fundamental freedoms. For example, Article 2 of the Constitution of Russian Federation enshrines that the human, his/her rights and freedoms are considered as supreme values. It is the obligation of the state

to recognize, guarantee and protect the rights and freedoms of a person and citizen. Under Article 3 of the Constitution of the Republic of Armenia: «The human being, his/her dignity and the fundamental human rights and freedoms are an ultimate value. The state shall ensure the protection of fundamental human and civil rights in conformity with the principles and norms of the international law. The state shall be limited by fundamental human and civil rights as a directly applicable right». We can meet adequate wordings in Constitutions of number of countries (e.g. Art. 1 Germany, Art. 7 Georgia, Art. 3 Ukraine etc.). Such kind of provisions, being based on the doctrine of natural law, do make certain the axiological approaches of a rule of law-based, democratic state with regard to fundamental constitutional solutions, putting in the base the principle of the rule of law. This kind of approach can be found even in such international documents as the Universal Declaration of Human Rights, European Convention on protection of human rights and fundamental freedoms, the International Covenants of 1966 etc.

The common approach is as follows, the fundamental constitutional principles are being called to life only through constitutional rights, freedoms and other constitutional institutes, and the overcoming the collision among the latter is one of the most important purposes of guaranteeing the supremacy of Constitution, which is being performed based on the principle of the rule of law.

Fifth, the principles of democracy, separation and balance of powers, guaranteeing of general, equal and direct electoral right, supremacy of Constitution, ensuring the political pluralism, recognition and protection of the right to property, exclusion of deprivation a person from rights etc., are especially important for axiological generalization in constitutional solutions of a rule of law-based, democratic countries. The mentioned principles, as a rule, are the basis of the constitutional order of the mentioned countries. The mentioned principles are differently localized in Constitutions of different countries, but they still have the same axiological basis in their essence.

In all above mentioned manifestations the fundamental constitutional values form system integrity and they turn the Constitution into living reality, when the whole legal system, the law-implementing practice, the whole complex of interpersonal and individual-state relationships are based upon those values, when those values become engine of lifestyle for each individual.

Now we will try to address this issue from the point of view of social practice. Such kind of analysis I represented at Yerevan International Conference of 2005. Now I would like to emphasis:

- 1** First, to what extent the fundamental constitutional values adequately are understood and consecutively realized on the level of state policy?
- 2** Second, to what extent the axiological perceptions are harmonized by the society and powers?
- 3** Third, what main tendencies and features exist in this area in transitional countries and which those main challenges are?

For answering to the posed issues first of all I would like to introduce an analysis. We studied the processes which have taken place during the last 8 years in 29 countries. The main characteristic of

those countries is that they were the bearers of communal social relations and currently those countries are in three different systems. The first group form the EU member countries of Eastern Europe. The second group consists of Balkan countries, which are not members of EU yet. The third group is represented by CIS countries (Commonwealth of Independent States). For the analysis we used the information received from a US organization US House of Liberty. According to calculations conducted by that organization the character of the integral level of democracy in 2008 in countries of the first group is 2.51 times higher in comparison with the third group and 1.75 in comparison with the second group. At the same time if in the first group during the last 8 years the level has increased by 3, in second group by 17 %, while in CIS countries we have 10 % decrease of the same level.

The qualitative characteristics of the civil society in 1st and 3rd groups is deterred 2,9 times, in 1st and 2nd groups 1,79 times. The dynamics of the mentioned characteristics during the past 8 years is the following : improvement by 4 % in the first group, improvement by 22 % in the second group, while in the third group the condition became worse by 13 %.

Let us bring one more comparison. The character describing the independence of the judiciary is 2,61 times higher in the 1st group compared with the third group, and 1,98 times compared with the second group. The dynamics within the last 8 years is as follows: improvement in the 1st group by 6 %, improvement in the second group by 15 %, and the condition was worsened in the third group by 9 %.

We face almost the same tendencies in the sphere of media independence, nature of governance, struggle against corruption and in other areas. The all abovementioned certifies that notwithstanding that on the constitutional level the axiological positions are identical or adequate, however the constitutional practice does have totally different image.

We think there are several reasons for that. **First** to what extent consecutiveness is manifested on the constitutional level with regard to guaranteeing the coherence of the fundamental constitutional values, as well as for guaranteeing the realization and application of the norm-principles and norm-purposes enshrined in the Constitution. The latter relates to both to constitutional norms regulating concrete legal relations, to the system of checks and balances and to the institute of limitation of human rights and freedoms. This means that in the area of constitutional “diagnostics” the first analysis should be conducted from the discovering of the in constitutional self-defense problems. The fact is that the number of gaps and unsolved problems in this area is substantial, which can be subject to separate discussion.

Second, the main distortions especially for transitional countries do happen during the process of norm creation, when “seemingly forgetting about” the fundamental constitutional values, the legal regulation is steamed from mere suitability. This is the reason, that in many countries, including Armenia, the legislative, executive and judicial branches of the power, as well as in the level of local self-government, do refer to constitutional problems almost forcibly, when they directly face constitutional problems. Soon it will be three years that in Armenia after Constitutional amendments the President, 1/5 of the members of National Assembly, the Government, Judges,

Prosecutor General, Human Rights defender, Local self-governing bodies have the right to apply to the Constitutional Court for determining the constitutionality of normative acts. The institute of individual applications was also introduced. Within the mentioned period the National Assembly, the Government, the local self governing bodies have not yet raised an issue of constitutionality of a law or subordinate legislation before the Constitutional Court. During these three years period the Prosecutor General and Judges filed by one application at the Court. In that case when the requirement of article 117 of the Transitional Provisions of the Constitutions has not been fulfilled, i.e. the legislations has not been brought in conformity with the Constitutional amendments of 2005. At the same time the Constitutional Court has received more than 3000 individual applications, and dozens of legislative provisions have been declared unconstitutional and void based on more than 40 applications filed by the citizens.

One of the essential features of transitional societies is, that the fundamental constitutional values are being established in condition of constitutionally guaranteed political and ideological pluralism, which in its turn is still in embryonic stage of formation. In such conditions very often necessary level is not ensured for the discussions and system regulation of fundamental problems in the stage of adoption of laws. For example, we can refer to purely formalistic discussions and adoption of amendments to judicial, criminal and civil procedural codes on extraordinary sessions of the National Assembly. The result was that couple of months later the Constitutional Court declared number of provisions of the procedural codes contradicting the constitutional and void.

Third, the “distortions of the second stage” continue in the law-implementing practice, when so called “legislative suitability” is applied from the point of view of realization of “subjective suitability” and mercantilist interests. In this layer the fundamental constitutional values play a role of “smoky cover”, for the purpose of realizing individual and personal suitability by the name of law. The level of axiological perceptions of the Constitution and culture is very low, which often entails antagonism of the understandings of those values on governmental and social levels. In result the accumulation of negative social energy increases, which can create explosive situations, when they reach to critical mass. It is not random that Constitutional Courts in many countries often consider the provisions of laws as contradicting the Constitution within the content given to them by the law-implementing practice.

The fundamental constitutional values can be fully called to life in social practice only there and to that extent, where and to the extent the establishment of constitutional democracy is core issue of state policy, it cannot be conditioned by current suitability, where the real separation and balance of powers is ensured, where the democracy has turned into reality from being just a slogan, where each legal solution steams from the of rule of law, having as a purpose the establishment of fair society, which is the main guarantee for sustainability and development.

What impedes that? We think there is a number of reasons; and we would like to emphasize some of them:

- 1 the inertia of thinking, mentality and the insufficiency of constitutional culture,
- 2 the low level of legal conscience and insufficient political will of the state power for

raising it up;

- 3 insufficient activity of the democratic state structures and imperfection of political bodies;
- 4 imperfect constitutional and legislative solutions, the distorted perception and application of fundamental principles of constitutional democracy in legislative policy and law-implementing practice;
- 5 such kind of convergence of economic, political and administrative forces, which impedes the realization of fundamental constitutional values without distortions in social practice;
- 6 the high level of corruption, protectionism and shadow relationships;
- 7 the insufficient condition of immune system of the social order, conditioned by the mentioned factors, the deepening of negative social tendencies and irrational developments because of insufficient solution of the current problems etc.

Fourth, the most dangerous for transitional countries is not that in the area of constitutional democracy the achievements are very modest and are not coherent with the present challenges. More dangerous is that when there are opposite tendencies, when there is a concession (retreat), when the constitutional values being distorted in social practice are being reproduced as anti-values. This is already a social metastasis, which certifies about the flagrant immune deficiency of the society. The main purpose of the constitutional diagnostics in transitional countries is the timely discovery of such phenomena and their prevention. And for that purpose an acting system of constitutional control and supervision should be established, as an obligatory precondition, considering as the supreme purpose of each state body to bring real contribution to the establishment of the supremacy of Constitution. Only in this case it is possible to turn the Constitution into living reality and to achieve serious results in the process of the establishment of constitutional democracy in the country.

Thank you for your attention.