

CONSTITUTIONAL CULTURE:  
THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME

Recommended for publication by the Academic Council of the Academy of Public Administration of the Republic of Armenia

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The subject matter of this study is the phenomenon of constitutional culture, viewed from philosophical, historical, logical, systemic-epistemological, comparative-constitutional, and legal implementation dimensions. An attempt is made, for the first time, to present the nature and specifics of the formation and expressions of constitutional culture in the Armenian reality, beginning with the Early Christian period. Current issues and challenges of constitutional developments are discussed. Trends in the systemic development of European constitutional culture are highlighted. Conceptual approaches are proposed for the perception of the value system integrity of constitutional culture in the Republic of Armenia; profoundly incorporating the lessons of history; accurately assessing the challenges of the time, developing the policies of constitutional and legal development, and establishing constitutionalism in the country.

GAGIK HARUTYUNIAN

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Revised English edition  
Yerevan 2009

UDC 342 5 (479.25)

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*Design and layout:* Samvel Partamian

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ISBN 978-99930-66-51-4

# TABLE OF CONTENTS

IN LIEU OF A PREFACE	7
1. EPISTEMOLOGICAL ESSENCE AND SUBSTANCE OF THE NOTION 'CONSTITUTIONAL CULTURE'	
1.1. LEGAL AND PHILOSOPHICAL PERCEPTIONS OF THE NOTION 'CONSTITUTIONAL CULTURE'	11
1.2. THE NATURE AND SPECIFICS OF EXPRESSION OF CONSTITUTIONAL CULTURE	26
2. HISTORICAL ROOTS FOR THE FORMATION OF CONSTITUTIONAL CULTURE IN THE ARMENIAN CONTEXT OF THE CHRISTIAN PERIOD	
2.1. PROCLAMATION OF CHRISTIANITY A STATE RELIGION IN ARMENIA: LEGAL AND POLITICAL SIGNIFICANCE	34
2.2. THE CONSTITUTING ROLE AND SIGNIFICANCE OF NATIONAL ECCLESIASTICAL COUNCILS	43
2.3. LEGAL CHARACTERISTICS OF CANONICAL CONSTITUTIONS	56
2.4. CHARACTERISTICS OF CONSTITUTIONAL CULTURE IN ARMENIAN LEGAL/POLITICAL DISCOURSE	63
3. CONSTITUTIONAL CULTURE ON THE BACKGROUND OF BUILDING A DEMOCRATIC, RULE OF LAW STATE, ESTABLISHMENT OF CONSTITUTIONALISM	
3.1. CONSTITUTIONAL CULTURE IN CURRENT EUROPEAN LEGAL MIND	90
3.2. THE CHARACTER AND SPECIFICS OF EXPRESSION OF CONSTITUTIONAL CULTURE IN CURRENT ARMENIAN REALITY	98
3.3. CURRENT-DAY PERCEPTIONS OF BASELINE VALUES OF THE CONSTITUTION IN A RULE OF LAW, DEMOCRATIC STATE	120
3.4. CHALLENGES OF CONSTITUTIONAL DEVELOPMENTS	139
3.5. SOME LEGAL AND POLITICAL DEFORMATIONS OF CONSTITUTIONALISM IN TRANSITION SOCIAL SYSTEMS	181
3.6. THE IMPERATIVE OF GUARANTEEING THE SUPREMACY OF THE CONSTITUTION	189
APPENDIX	219
THE NOTION OF "CONSTITUTION" THROUGH THE ARMENIAN SOCIAL, POLITICAL, LEGAL AND PHILOSOPHICAL DISCOURSE PEՅՈՒՄԵ	235



## IN LIEU OF A PREFACE

**F**requent references are made in recent international practice to the experience of constitutional developments and to the common trends and specifics of the development of constitutional practice. In particular, these issues were the subjects of comprehensive discussions in Rotterdam in 1999, in Santiago in 2004 and in Athens in 2007 at the summits of the International Association of Constitutional Law. In 1999 a special international conference particularly on issues of constitutional culture was convened in Poland.<sup>1</sup> In 2004 another conference took place in Warsaw to discuss the experience of constitutionalism and constitutional developments in the countries of Eastern Europe in the course of the preceding 15 years. Having participated in these, as well as a number of other conferences of the same caliber, and having experienced first hand the spirit of discussions at these forums, the general logic of setting forth and analyzing issues, and in view of the topical nature of the fundamental subject of those discussions in the context of Armenian reality, we considered it appropriate to embark on a comprehensive reflection on the fundamental issues of constitutional culture, the need for a serious discussion of which cannot be overestimated also from the perspective of transitology.

Our submissions to the conferences mentioned above were mostly aspiring not only to identify the principal trends of development of constitutionalism in European countries, the particulars of their expression in our context, but also reflected on the distortions thereof in transition countries, and the underlying causes. We have made an attempt to pay special attention to these issues in this work.

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<sup>1</sup> Constitutional Cultures. Ed. by M. Myrzykowski. Warsaw, ISP, 2000

A historical, logical and comparative analysis of the formation of constitutional culture in the Armenian reality is of particular interest, in view of the former's deep roots, rich traditions and enlightening lessons. Since this is a subject little explored, and asking for a meaningful analysis and evaluation from the perspective of contemporary legal mind and criteria, as well as appropriate exposure to foreign scrutiny, we assign great importance to a general historical overview of the formation of constitutional culture in the Armenian reality, which contains enlightening lessons from the viewpoint of current developments.

We do not subscribe to far-reaching approaches and are certain that constitutional culture may only acquire systemic integrity at a certain level of development of civilization, upon the establishment of constitutionalism and safeguards for the supremacy of the Constitution in a country. Nevertheless, as an intellectually evolving system of values, it has deep historical roots and is incarnate in 'unwritten constitutions,' customs, tradition, spiritual values and canon, statutes and rules of constituting significance. Constitution and constitutionalism should not be viewed within the four corners of the logic of the law. Constitutional culture is an important element of the entire intellectual and cultural heritage of a nation, of its collective memory, and its acknowledgment and absorption possesses a great charge of self-cognizance for just about every nation.<sup>2</sup>

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<sup>2</sup> Perhaps it is with this in mind that Shahamirian wrote this in his preface to the 18th century publication of the *Entrapment of Vanity*: "Here is my only request to the reader of this: when you acquire this book, first read it three times from cover to cover and, second, if the reader happens to have been born and nurtured in parts of the world controlled by barbaric tribes, I beseech him to look for and find someone living under the government of free Christians, someone who has seen the world, enquire him in person about every uncertain point encountered here and get, with the latter's assistance, the explanation and the beneficial meaning of every article I wrote." (Ռրոզայր փառաց, Երևան, 2002, էջ 16):



There are few studies in international literature devoted specifically to constitutional culture, among which one may single out, for example, “Constitutional Culture and Democratic Rule” (Stanford University, California), which discusses over a dozen of fundamental issues. These include, most notably, ‘Constitutional Democracy. Sources and Traditions,’ ‘The Formation of Constitutional Culture,’ ‘The Logic for the existence of a Democratic constitution,’ ‘The Structure and Content of a Constitution.’ A comparative analysis,’ Separation of powers and the independence of the judiciary,’ ‘Constitutional Amendments and the Stability of Constitution,’ etc.

Specific ramifications of the broader subject, such as ‘Fundamental issues of European constitutional Culture,’ ‘Constitutional culture and tradition,’ ‘Constitutional culture in various continents,’ ‘Constitutional Culture and Human Rights,’ ‘Religion and Constitutional Culture,’ ‘The Role of the Constitutional Court in the formation of Constitutional Culture,’ etc, have become the subject of discussions at international conferences and specialized literature.<sup>3</sup>

In these and other similar discussions and studies special attention is paid to the origins of constitutional culture, the particulars of its expressions, the formation of constitutional tradition, the comparative analysis of the Constitution in effect and the qualities of constitutionalism in a country. We have adhered to the same general principle, revealing the epistemological essence and substance of the notion ‘Constitutional Culture’ and attempting to perform a systemic analysis of the historical development of constitutional culture and constitutional tradition in the Armenian reality, to summarize and evaluate its lessons in the context of international trends of constitutional advancement and the current challenges that the newly independent Republic of Armenia and the international community are facing.

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<sup>3</sup> Constitutional Cultures. Ed. by M. Myrzykowski. Warsaw, ISP, 2000, pp. 4-5, Constitutional Cultures: The Mentality and Consequences of Judicial Review. Robert F. Nagel. University of California Press, 1993.

Catholicos Vazgen the First quite wisely stated in his article ‘Our Future:’ “In order to construct a future the first and foremost prerequisite is to have a foundation in the present, the past may only illustrate the extent of our potential.”<sup>4</sup> Which is why this monograph assigns special importance to a comprehensive analysis of current expressions of constitutional culture and the fundamental problems of ongoing constitutional developments, the imperatives of the establishment of a democratic, rule of law state in transition countries.

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<sup>4</sup> Ոգեղեն կյանք, Ս. Էջմիածին, 1998, էջ 68:

# 1. EPISTEMOLOGICAL ESSENCE AND SUBSTANCE OF THE NOTION “CONSTITUTIONAL CULTURE”

## 1.1. LEGAL AND PHILOSOPHICAL PERCEPTIONS OF THE NOTION 'CONSTITUTIONAL CULTURE'

In contemporary legal usage the notion of 'constitutional culture' is undergoing a certain re-valuation and is therefore in need of a serious academic analysis. It has become urgent, more than ever before, to assure a sustainable and meaningful existence of human community based on broad social accord, the imperative of using the gains of civilization to the benefit, rather than the detriment of mankind. Maintaining global stability and ruling out social cataclysms truly stand out among the challenges of mankind in this new millennium, since they may lead to unprecedented disastrous consequences. Which is why the 7th international congress of the International Association of Constitutional Law, held in Athens between June 11-16, 2007, paid special attention to the rethinking of notions 'constitutional conflictology' (viewing the constitution as an opportunity and means to overcome a whole range of disagreements and confrontations) and 'constitutional diagnostics' (assessing the real essence of social turnover from the perspective of constitutional values, discovering the real landscape of constitutionalism).

Within the last century the role of the safeguard for universal human stability was mainly reserved to the Fundamental Law of a state, a written constitution which, enshrining the goals emanating from the common civilizational values of a particular society and the

fundamental principles of social existence, stipulates the basic rules of social behavior, the nature of relations between the individual and the state, the procedure and the limits for the exercise of power, creating a necessary environment based on social accord conducive for the full implementation of the human potential for creation and progress. This becomes possible at a certain stage of development of civilization and social conscience. The human community, as a system of social cohesion, dates back to about ten millennia, whereas constitutionally regulated nation-states, in the modern sense of it, have been in existence for almost two hundred years. Nevertheless the phenomenon of a ‘constitution’ is deeply rooted in history and its emergence has also led to the formation of certain constitutional culture, with an imprint of the value indicators and the legal mindset of the time.

In Latin the word ‘constitution’ (*constitutio*) refers to founding, establishing. On the other hand, not every act of founding or establishing something culminates in constituting a ‘constitution.’ The latter is typically characterized as the Fundamental Law (or the entirety of laws) of a state, possessing ultimate legal power. The basic properties of such a law are determined by the fact that it shall define:

- the foundations of state order;
- the safeguards for the granting and protection of civil and human rights and fundamental freedoms;
- the system of public administration, its functions, organizational and procedural principles;
- the legal boundaries for the exercise of political power, the enjoyment of individual political, economic and social freedoms.

In the Armenian language the notion ‘constitution,’ սահմանադրութիւն (*sahmanadrutyun*) also implies ‘to establish’ in the first place. As noted by professor Kh. Samuelian, the Armenian Ecclesiastical Councils in the Middle Ages reserved themselves the significance of a ‘lawmaking factor’ and used the term սահմանը, which often was synonymous to ‘canon’ or ‘law,’ wherefrom in their canonic rulings one frequently encounters the verbs **սահմանել**, **սահմանարդել** (*sahmanel*, *sahmanadrel*) in the sense of “make laws

or rules.<sup>5</sup> At the same time the etymology of the notion *սահմանադրություն* (*sahmanadrutyun*) also allows for 'setting the borders,' drawing the limits of power and setting up a 'inescapable entrapment' for all those who may attempt to venture beyond the scope of their powers prescribed by law.<sup>6</sup>

The New Haikazian Dictionary of the Armenian Language offers a remarkable interpretation of the word *սահմանադրություն* (*sahmanadrutyun*).<sup>7</sup> It begins with a list of foreign-language equivalents, such as: *determinatio*, *constitutio*, *statutum*, *dispositio*. It then goes on to an exceptionally interesting and valuable characteristic: '**Determination of borders and Supreme oversight.**' This is followed by examples of historical usage, in particular a phrase used by Movses Khorenatsi with reference of the Ashtishat Council: 'established mercy through a canonical constitution,' or an expression 'Chalcedonic constitution' used by Aristakes Lastivertsi. It is obvious that the notion of 'constitution' in this dictionary embraces a scope of significant substance, characterized by the following important features:

1. *t* is a decision, a ruling, a 'pronouncement of law;'
2. it has a terminal meaning, there may be no other 'decision' beyond or above it;
3. the expression '**Supreme oversight**' complements the terminal, ultimate nature of the decision, emphasizing the fact that it is based on the existence of inalterable values 'granted from above.'<sup>8</sup>

Armenian historical bibliography in *grabar* (classical Armenian language) has been consistent in the meanings associated with the notion 'constitution,' something lacking in modern Armenian translations. A typical example, which we may use again later, is in a passage from Movses Khorenatsi's 'History of Armenians,' which undeniably

<sup>5</sup> Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 46:

<sup>6</sup> Որոգայթ փառաց (Հակոբ եւ Շահամիր Շահամիրյաններ), Երևան, 2002, էջ 15:

<sup>7</sup> Նոր բառագիրք հայկազեան լեզուի, հ. 2, Վենեցի, 1837, էջ 688:

<sup>8</sup> On this also see: «Բնական օրենք. գրաւական, տոհմային եւ ազգային իրավունք», աշխատասիրեալ Ի՛Հ. Եփրեմյա վարդապետէ ՍԷթ, Վենետիկ, 1851:

refers to a constitution. The subsequent translations have replaced the phrase 'through constitution' by 'through borders,' completely depriving the notion of its original meaning.<sup>9</sup>

The New Haikazian Dictionary bases the notion 'constitution' on the notion of սահմանադրել (*sahmanadrel*) interpreted as "to set a border," "determine," "regulate," "ordain," "make the law," "establish." All of the above essentially evolve around the idea of setting rules or legal regulation. Thus the features of the notion 'constitution' outlined above should be, according to this dictionary, augmented by the normative nature thereof, as the current characteristic goes.

According to Hrachia Ajarian, the notion 'constitution' comprises the roots սահման (*sahman*) (a determined measure, tip, end, canon, statute)<sup>10</sup> and դիր (*dir*) (set).<sup>11</sup> Eduard Aghayan offers the following explanation for constitution: '1. The fundamental law of a state, which establishes its social and administrative structure, electoral system, principles for organization and exercise of public authority, principal rights and duties of citizens. 2. Established order. 3. Determining, setting borders.'<sup>12</sup>

In Armenian bibliography and comparative linguistic analyses the notion 'constitution' clearly characterizes a certain order of things and phenomena, the circumstance of establishing, adopting a pattern or a canon, with an emphasis on its special, exceptional nature.

**It follows from this analysis that the existence of constitutional culture shall at least be preceded by the ability of the society to make 'terminal,' 'ultimate' decisions which 'set the borders' as well as the existence of certain prerequisites which will allow for the enforcement thereof.**

The notion 'constitution' in the Armenian reality was also used with relation to individual contracts or the bylaws of various institutions.<sup>13</sup>

<sup>9</sup> Տե՛ն Սուլսես Խորենացի, Հայոց պատմություն, Ե դար, Երևան, 1997, էջ 225:

<sup>10</sup> Աճառյան Հր., Հայերեն արժատական բառարան, հ. IV, Երևան, 1979, էջ 162:

<sup>11</sup> Ibid, հ. I, էջ 676:

<sup>12</sup> Աղայան Էդ., Արդի հայերենի բացատրական բառարան, Դ-Ֆ, Երևան, 1976, էջ 1271:

<sup>13</sup> See: Егиазаров С. А. Исследования по истории учреждений в Закавказье. Ч. II. Казань, 1891, էջ 36.

The notion 'constitution' has also been the subject of varying encyclopedic interpretation. An encyclopedic dictionary edited by doctor of philosophy M. Philipov in 1902 states, in particular, that the word constitution in chemistry denotes 'a grouping of particles, atoms,' in physiology and medical science 'the body build' or 'the ability of an organism to resist detrimental impact' (a remarkable definition, allowing for parallels with the society's organism), in public law "a state entity based on common law and a number of statutes, or a particular charter."<sup>14</sup>

The encyclopedic dictionary of constitutional law, edited by professor Maklakov,<sup>15</sup> first lists the Russian synonyms for the Latin word 'constitution: "установление, учреждение, организация." It then goes on to offer two groups of explanations for the notion.

First. It is viewed as a system of legal acts of the highest power of law regulating relations of ultimate importance pertaining to human rights and freedoms, the foundations, forms of administration and territorial organization of a state, the formation of bodies of public authority. Incidentally, such a system may comprise one general or several individual legal acts. The constitution tops the summit of the hierarchy of such legal acts, and all other acts shall be in conformity therewith.

Second. The example of France is used to demonstrate that legal acts of another nature may also be called constitutions, such as a statement or a resolution of a special nature adopted by a parliament, which, without altering the constitution, addresses an important issue. The example quoted is the 'Constitution of Broglie,' a law enacted on March 13, 1872, upon the initiative of duke A. de Broglie, a member of the parliament, which regulated the relations between the President and the Council.

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<sup>14</sup> Энциклопедический словарь (составлен под ред. М.М. Филиппова), т. III, приложение к журн. "Природа и люди" за 1902, т. 1741: There's a reflection on these aspects in another encyclopaedic dictionary: Ф. Брокгауз, И.А. Ефрон.

<sup>15</sup> Конституционное право: Словарь /Отв. ред. В.В. Маклаков. М., 2001, т. 230-231.

The encyclopedic dictionary of constitutional law edited by professor Avagian emphasizes the fact that a constitution is the fundamental law of a state which expresses the will and the interests of the people, is endowed with the appropriate ultimate legal effect, is enacted by parliament, a special constitutional assembly or directly by the people. It is also stressed that a Constitution is an instrument of both the state and society, which leads to the conclusion that the Constitution is a 'political document.' Four basic features are singled out from among constitution's principal characteristics, according to which a Constitution is:

1. a legal act;
2. of ultimate nature, possessing supreme legal force;
3. the basis for current legislation, determining the nature thereof;
4. enacted and amended through a special procedure.<sup>16</sup>

Encyclopedic dictionaries also make an important emphasis on the fact that a constitution appears as an organic entirety of constitutional goals, principles and ultimate legal norms, which regulate fundamental social relations in dynamic equilibrium.<sup>17</sup>

The basic features quoted are **necessary and sufficient** for affirming the existence of a constitution or ranking a legal act within the class of a constitution. These criteria may also be of utility in reflecting on historical developments and studying axiological specifics of the emergence of constitutional tradition. It is noteworthy, from the perspective of substance, that in interpreting the notion 'constitution' various authors assign particular importance to the fact that it determines the state and social order, electoral system, principles for the formation and operation of bodies of state authority of the country in question, as well as the human rights and freedoms.

It is also noteworthy that encyclopedic definitions of the notion 'constitution' sometimes contain language that describes it as a **set of**

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<sup>16</sup> Конституционное право. Энциклопедический словарь /Отв. ред. д.ю.н., проф. С.А. Авакьян. М., 2000, т.57р 313-315.

<sup>17</sup> See Арутюнян Г.Г., Баглай М.В. Конституционное право. Энциклопедический словарь. М., НОРМА, 2006, т.57р 228-231.



**constitutional customs.**<sup>18</sup> In international discourse this is also called the **unwritten constitution**. In this case the emphasis is on the fact that the community has succeeded in forging a general agreement around some basic rules of its existence, and that such rules are duly respected, protected and play an essential role in assuring a natural orderly course of life and development for the society in question. Beginning with the 17th century the British political establishment predominantly perceived the notion of 'constitution' not as a uniform legal and political act underpinning the existence of a state and individuals therein, but rather as a summation of principles and approaches along the fundamental axis of relations between society and state **which assure the freedom of men, the supremacy of law, the restriction of power.**<sup>19</sup>

American encyclopedic dictionaries present the constitution as an organic law established within the system of a state, an entirety of fundamental and specific principles of law through which and on the basis of which public authority is created. It represents different branches of public administration and the sovereign power of the people. In American law the notion 'constitution' signifies a written document, which is the principal source for the exercise of public authority.<sup>20</sup>

In yet another dictionary the Constitution is viewed as the fundamental law of a nation or state, **which may be written or unwritten**, establishing the character and conception of its government, laying the basic principles to which its internal life is to be conformed, organizing the government and regulating, distributing, and limiting the powers of its different departments, and prescribing the extent and manner of the exercise of sovereign powers.<sup>21</sup>

The above examples affirm that the main emphasis in these conditions is on the basics of state power being constitutionally organized.

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<sup>18</sup> Պողոսյան Վ.Վ., Սահմանադրական հասկացությունների համառոտ բառարան /խմբ. Գ. Հարությունյան, Երևան, 2001/, էջ 208-209:

<sup>19</sup> On this also see: Невинский В.В. Конституция Российской Федерации: испытание мировым опытом // Журнал российского права, 2003, N 11, էջ 65.

<sup>20</sup> Steven H. Gifis. Law Dictionary. New York, 1984, p 92:

<sup>21</sup> Henry Campbell Black, Black's Law Dictionary, WEST Publishing CO. 1968, p 384:

If we reflect on the legal and political nature of a constitution, it first and foremost serves the **function of establishing**, as the **embodiment of public accord around the basic principles of social existence**. Its enacting implies the emergence of a new legal and political status of the society, emanating from a set of certain civilizational values, goals and principles. Through such social accord the constitution enshrines the outcomes of communal social existence particular to the historical stage in question, the goals and directions of progress, safeguards the stability and dynamic development of the system. 'Establishing' legal documents were adopted as early as in Ancient Rome; they were viewed as representing an compromise between monarchic power and the landowners or individual cities.

The constitution is also called upon to implement a significant **organizational function**, under which it not only encapsulates the accomplished state, but sets forth new objectives before the society: to reorganize communal life in conformity with constitutional norms and principles; to identify appropriate structural arrangements and solutions; to put in place legal and political prerequisites necessary for guaranteeing constitutionalism.

The constitution offers clear guidance for *weltanschauung*, it contains norms-objectives and norms-principles which enshrine a particular system of societal values, as well as the means and approaches to help get there, it also adds clarity to the **ideological vector of the system**.

The constitution has a certain **foreign policy charge**, not only accommodating the international trends of constitutional and legal developments, but also defining the legal principles and the procedures for conducting a state's foreign policy.

The **legal function** of a constitution had always been historically significant and it currently enjoys especial significance. This function requires that the constitution not only provide the basis for the formation of the legal system and that its norms possess direct effect, but that it also determine the directions and nature of legislative developments.

'Laying the borders' of social relations, **setting binding rules of behaviour for everyone through general accord**, depending on its

nature, format, scope, application and value guidelines, contributes to the emergence of corresponding equivalent constitutional culture. **Constitutional culture is a certain system of values of the human community geared towards creative co-existence on the basis of common rules of social cohabitation acquired through mutual consent.**

Constitutional culture implies the existence of not only social accord and a certain level of social appreciation of man, a possibility to guarantee a regular development of social existence on the basis of meaningfully absorbed values and principles, but also of the capacity to transform such a possibility into reality.

**The principal components of constitutional culture comprise the intellectual absorption of social co-existence, the existence of fundamental values for organic subsistence, of social accord around them, the reproduction thereof through universal behavioral rules of living and acting, a rendering of a certain systemic legal nature thereto, and a particular attitude towards them within the society.** In social practice these components are historically expressed in their systemic integrity, as well as in a more fragmented manner.

Constitutional culture is viewed in literature as an incarnation of legal culture and is characterized as an expression of the attitude of the members of the public towards law, statute, the authorities, the state and to legal norms and constitutional principles in general.<sup>22</sup> Professor Francis Snyder also maintains that constitutional culture is part of general legal culture. At the same time he believes that Friedman offered the best definition of legal culture in 1969,<sup>23</sup> according to which legal culture pertains to **the values and attitudes which bind the system together, and which determine the place of the legal system in the culture of the society as a whole.**

Constitutional culture, in turn, defines the place of the law (in particular constitutional law) in the context of self-cognizance of the society within the system of its culture.

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<sup>22</sup> Steven H. Gifis. Law Dictionary. New York, 1984, p 92:

<sup>23</sup> <http://www.eurozine.com/article/2004-02-19-snyder-en.html>.

It is rightfully emphasized in literature that that the sole fact of the existence of a Constitution is not yet sufficient to launch a discourse about constitutional culture. The fact of the existence of constitutional culture needs to be validated by the attitudes of the members of the public towards the constitution, their willingness and real possibilities to live by its norms.<sup>24</sup> In a study published on the occasion of the 200th anniversary of the US Constitution Daniel Levin assigns particular importance to the fact that the Constitution is not merely a text, but rather a system of values that live, are reproduced and provide guidance for public life.<sup>25</sup> Whereas Roger Goldman maintains that American constitutional culture possesses three fundamental features:

- an emphasis on rights on the expense of duties;
- a central role of the judiciary in the protection of human rights;
- the perception of the Constitution as a “living document,” a development in progress.<sup>26</sup>

Professor Ch. Saunders, in her turn, comparing specific features of British and American constitutional cultures, stresses that British constitutional culture represents evolutionary, rather than revolutionary tradition, and **is anchored on gradual, historically shaped system of constitutional values.**<sup>27</sup>

At the dawn of human civilization customary and ethical norms were the basis of social existence, together with spiritual values and canon, which were applied and preserved in public co-existence as binding rules of behavior. Viewed from the perspective of their perception by the general public, inasmuch as they pertained to the

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<sup>24</sup> <http://www.claremont.org/writings/000901west.html>.

<sup>25</sup> REPRESENTING POPULAR SOVEREIGNTY: THE CONSTITUTION IN AMERICAN POLITICAL CULTURE by Daniel Lessard Levin. Albany: State University of New York Press, 1999. <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/levin99.html>.

<sup>26</sup> Roger Goldman - The Protection of Individual Rights as the Fundamental Element of the United States Constitutional Culture // Constitutional Cultures. Ed. by M. Myrzykowski. Warsaw, ISP, 2000, p 25:

<sup>27</sup> Saunders Ch. A. Constitutional Culture in Tradition // Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000. P. 41:

entire public and were of systemic regulatory significance, they contained ostensible components of expressions of constitutional culture. From the viewpoint of legal axiology<sup>28</sup> the emergence of constitutional culture is determined by the extent to which **“constituting” relations are legally appraised and become universally accepted rules of behavior**, irrespective of whether they are of customary nature or appear as an established rule of behavior that is universally binding. In literature the constitution per se is often considered a cultural phenomenon only if it is evoked in life, becomes an active, living phenomenon, is fully perceived and recognized, rather than being a compilation of nice language and smart ideas.<sup>29</sup>

Constitutional culture, nevertheless, is most fully fledged at a certain level of civilization, when a well-realized demand emerges to establish, through the vehicle of public accord, basic principles and rules of behavior as universally binding legal norms, and to abide by these. From the legal viewpoint this demand has led to the emergence of constitutions and constitutional regulation of public life. But the mere existence of a Constitution, as already mentioned, is not sufficient to consider a country or a state constitutional. **It is also necessary for constitutional norms to be evoked in real life, and for the public to adopt a stable attitude towards them, forming real qualities of public constitutional culture and elevating them to an organic component of national culture.**

At such a stage constitutional culture acquires a new quality in the social and state systems wherein, alongside **the Constitution, there also exists constitutionalism**, where constitutional norms and principles are a living reality, where an environment necessary and sufficient for constitutional democracy has come into being, where constitutional norms have direct effect and there exists an effective system of oversight, where the Constitution is not an instrument in the hands of the state, but a

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<sup>28</sup> See: Политико-правовые ценности: история и современность /Под. ред. В.С. Нерсесянца. М., 2000, с. 5-30:

<sup>29</sup> Book Review—Häberle and the World of the Constitutional State, <http://www.german-lawjournal.com/print.php?id=227>.

**fundamental law of civil society**, a means to assure harmonious and sustainable development of the society, not only through defining basic behaviour rules, but also drawing a border for the authorities, restricting them by law. In such case we deal with the notion of “**democratic constitutional culture**” characteristic of democratic social systems where national and universal cultural features are in harmony. Moreover, the Constitution and constitutionalism may not be viewed only from the narrow legalistic perspective, in the context of pragmatic legal relations or abstract notions. Both are profound cultural phenomena, deeply rooted in interdependent value systems, offering clear civilizational guidance and a level of their perception, comprehension and cognizance. It is in this framework of complementarity that constitutional culture in its turn determines the choice of the model of constitutional democracy and the strategy thereof.

The level of constitutional culture is also determined by the level of constitutional solutions, clarity and progressiveness of constitutional principles, solutions for their implementation within a constitution, and the so-called constitutional “maturity” and “taste.”

A lot has been discussed within the last few centuries about the “perfect” constitutional model for a democratic state. As early as in 1928 in his book “Verfassungslehre” Carl Schmitt speaks about the “perfect concept for the constitution of a civil rule of law state.” The axis of discussions at the summit of the International Association of Constitutional Law in Santiago in 2004 evolved around the subject “Constitutionalism, old doctrines, new world.” One of the important conclusions reached there was that a comprehensive and perfect Constitution is not at all possible. It is a quintessence of every society’s system of values, necessarily based also on certain general principles and approaches that have gained recognition in international constitutional studies. In systems where constitutional democracy is still embryonic the main issue at stake in constitutional developments is to avoid distorting fundamental values and principles, to **understand that a constitutional state is forged through an adequate constitutional culture of the society**. It is also essential that constitution-

al culture is more stable than constitutional systems, although **their inner axiological connection is indivisible.**

In the light of the current achievements of civilization the principal characteristic of constitutional culture is that **a country's Fundamental Law must include the whole system of in-depth, enduring values of the society and guarantee their stable protection and reproduction.** These values, in turn, are formed in the course of centuries, with each generation re-thinking them and, through its own additions, securing the continuity of development. Success accompanies those countries and nations, wherein this chain remains unbroken or is not seriously disrupted. Therefore **the notion of constitutional culture may be characterized as the entirety of the specific system of values which underlies the convictions, awareness, legal perception, and legal consciousness of the social community, which were historically formed on the basis of social accord, defining principal rules of behavior and the need to guarantee them.** Constitutional culture also characterizes the quality and level of relations between constitutional subjects and institutes, the level of "maturity" thereof in mutual legal relationship.

Constitutional scholars often use the notion of "constitutional culture" in the plural.<sup>30</sup> When talking about **constitutional cultures** the emphasis is put on the systemic properties of their formation. For example, the notion "Verfassung" in Germany acquired broad usage in the 17-19th centuries, when it was used to denote laws of fundamental importance, containing norms, which aimed at sustainable and lasting perspective. The term applied to the "Capitulation Act" of King Ferdinand III in the elections of 1648; the Peace of Westphalia, 1803; the Final Act of the Principal Royal Standing Committee etc.<sup>31</sup>

Professor Cheryl Saunders, in turn, singles out the constitutional systems of the United Kingdom, the USA and France.<sup>32</sup> Robert

<sup>30</sup> This was the conclusion of many among the participants of an international conference in Warsaw in 1999.// Constitutional Cultures. Ed. by M. Myrzykowski. Warsaw, ISP, 2000:

<sup>31</sup> <http://university.tversu.ru/misc/pravo/pravo.html>.

<sup>32</sup> Saunders Ch. A. Constitutional Culture in Tradition // Constitutional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000. P. 37-54.

Goodin stresses the existence of features that are common to constitutions of various countries.<sup>33</sup> Generally constitutional culture is of exceptional importance for comparative constitutional studies. The author of “Comparative Constitutional Traditions,” emphasizing that a constitution is an extrapolation of political, philosophical, sociological, economic and other ideas within goals and objectives of the highest order, performs a comparative constitutional analysis of eleven constitutional systems.<sup>34</sup> These include the constitutional systems of the USA, Great Britain, China, Canada, India, Japan, Nigeria, France, Germany, Mexico and Saudi Arabia. Such a classification, of course, is extremely conventional and may also be contested. The list of such systems can be substantially expanded. What matters under the circumstances is the emphasis on the fact that constitutional traditions and constitutional culture have undergone historical developments within certain systems of civilizational values.

Irrespective of the above emphases, the historical truth is that each country and nation has gone through its individual path of formation of constitutional culture and establishment of constitutional realities, borrowing to this or that extent the experience of others, making additions and amendments emanating from its own system of values. The essential and fundamental aspect is that **constitutional culture and the Constitution itself can not be a commodity that is imported or exported.** These realities are formed upon the basis of a particular society’s system of values. Failing that, however skillful those grafts may be, they cannot become viable and turn into a living reality. We shall return to this issue later. At this point we would like to specifically stress

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<sup>33</sup> Goodin R.E. *Designing Constitutions: the Political Constitution of a Mixed Commonwealth // Constitutionalism and Transformation: European and Theoretical Perspectives* / Ed. by R. Bellamy, D. Castiglione. Blackwell, 1996.

<sup>34</sup> *COMPARATIVE CONSTITUTIONAL TRADITIONS*, by James T. McHugh. New York: Peter Lang Publishing, 2002.  
<http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/McHugh504.htm>.



that in nation-state entities these value systems were formed in the course of centuries and are at the core of the preservation of identity features and one's "kind." Therefore **constitutional culture cannot be anational**. It is the Constitution that is first and foremost called upon to assure harmony between the national and the supra-national, a reasonable combination of universal values and national specifics, with a view of securing an environment necessary for the preservation of the "kind" and its reproduction with enhanced qualities, as well as necessary and sufficient prerequisites for the meaningful and guaranteed exercise of man's creative drive.

Constitutional culture is not an abstract notion: it is incarnate in the axiological foundations of the constitution itself, in all walks of social existence, it is expressed over the solid foundation of values and ideals that have been developed over the centuries through a painful process of validation.

**The culture of every nation is in its conscious existence, its mindful presence along the axis of time.** The value dimension of every sovereign nation's constitutionalism, considering its social and cultural specifics, affords a unique nature to its concrete constitutional solutions.

The contemporary notion of **constitutional culture is defined by us, in general terms, as a historically formed sustainable value system of convictions, perceptions, and legal awareness, enriched by the experience of generations, that constitutes the basis for the social community in the process of establishing and guaranteeing, through public accord, of the fundamental rules of democratic and lawful behaviour.**

## 1.2. THE NATURE AND SPECIFICS OF EXPRESSIONS OF CONSTITUTIONAL CULTURE

Constitutional culture is first and foremost incarnate and finalized in every legal system through the constitutional doctrine characteristic of that particular system. The doctrine includes an entirety of systematized knowledge, principles and approaches concerning the fundamental relations of being, as well as the content, legal nature, social mission and political significance of the Fundamental Law which is the result of the “formalization” of the former. The clarification of value system guidelines for a social community is an inseparable component of constitutional doctrine, along with spelling out the rules of individual behavior and restrictions on power. The constitutional doctrine includes theoretical and methodological foundations of the Constitution, the criteria for their implementation in social practice, standards for the determination of constitutionality, trends in the development of constitutional studies and constitutional culture, the nature and concrete specifics of constitutionalization of social relations. Constitutional culture acquires substance only in the event and to the extent, when and to which extent the Constitution or constitutional norms become a living reality. It would be appropriate to recall Hegel’s discourse on the substance of “das Recht,” where he emphasizes that a notion and its existence in real relations represent two different things, like the spirit and the body, which nevertheless cannot be separate from each other.<sup>35</sup> Moreover, there must be a certain harmony between constitutional perceptions and social realities. In other words constitutional culture characterizes real social relations.

As an expression of a certain level of cognizance of value systems in a social community, constitutional culture is determined by a number of factors:

1. trends in the development of the society and the degree of social validation of man;

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<sup>35</sup> Гегель Г. *Философия права*: Пер. с нем., М., 1990, с. 59:

2. the nature of relations between an individual and the society;
3. value system priorities of the social community;
4. the level of development of production relations;
5. the level of social protection of an individual;
6. the level of legal and philosophical perception of social phenomena and patterns;
7. the level of political culture and legal awareness within the society;
8. the existence of socio-economic prerequisites for the establishment of social accord;
9. the ideological orientation of state authorities and the level of their understanding of the responsibility for the society's future;
10. the nature of impact of universal values and the degree and possibility of harmonization thereof with the qualities of national identity;
11. the nature of impact by exogenous and endogenous factors on systemic stability, etc.

The most important challenge of constitutional architecture is for concrete constitutional solutions to be such as to allow constitutional norms, provided there exists a necessary and adequate level of constitutional culture, to be effective by default, with no "manual override," that is for the so-called "autopilot" mode to be engaged. In the absence of such a culture the Constitution turns into a compilation of fine language and wishful thinking or an instrument and leverage of governance, employed at the discretion of the authorities within the four corners of the problems they need to resolve. In such circumstances the nature of the phenomenon of a constitution is distorted and it may no longer be perceived as "a determination of borders and Supreme oversight." A certain disruption takes place of the unity between the phenomenon and its expression, between "body and spirit," which may lead to inevitably disastrous consequences for the system.

An important characteristic of the expression of constitutional culture is constitutional legal awareness. In most general terms the lat-

ter implies a realization of the need for constituting norms in social relations, a definition thereof, and willingness to live and abide by those norms, as well as to respect and protect them. All members of the society, their diverse formations and establishments including the state as incarnate in institutions of public authority, constitute subjects of constitutional legal awareness. Lack of harmony between the constitutional legal awareness of the members of the society and that of the state institutions may become a cause of social discord and calamity. One of the main features of civil society is that the state is guided by the constitutional legal awareness of the public, which is in turn based on the safeguards of the supremacy of law and the limitation of power by the law. One of the most important missions of state power is to contribute to the formation of constitutional legal awareness in each subject of constitutional relations, based on a profound, meaningful and uniform perception of fundamental constitutional values and principles and their consistent implementation.

Quite naturally a citizen, various bodies of public governance, as well as different subjects of constitutional relations are endowed with **varied constitutional legal capacity**. The latter is determined by the nature of their constitutional functions, the scope of competences, rights and duties. An important feature of constitutional culture is the extent to which the functions of various subjects of constitutional legal relations, rights and duties are harmonized and balanced, the extent to which maintaining such an equilibrium in its dynamics is guaranteed.

The historical experience of formation of constitutional culture in the Armenian reality attests to the fact that it has undergone serious evolutionary development, structural and systemic progress. The first steps were determined by the need to assign legal nature to fundamental customary norms and to clarify value system guidelines. It is not incidental that 7 out of the 30 canons ascribed to Gregory the Illuminator (301-325 A.D.) pertain to matrimonial and familial relations. Rules are prescribed on “leaving one’s second wife and returning to the first,” “a virgin and second marriage,” “abducted girls,” “the

effeminates (homosexuals),” “the wailing and the lamenters,” “those who distort the last will of the deceased,” etc. All these canons clarify and condense value system approaches and represent rules of behavior that characterize the ethical composition of an individual, the family and the society.

It is typical for the Armenian reality that, also through subsequent centuries, the constituting canons enacted by the national-ecclesiastical councils assigned a great place to matrimonial and family relations and the rules of ethics. It follows from an analysis of the rules enacted in the course of the 4th to 8th centuries that they were first and foremost devoted to assuring compliance with the divine commandments, strengthening the foundations of the system of values underlying individual and social behavior. This issue was ascribed more importance than the regulation of the forms and nature of governance.

Another important feature is that the continual risk of losing one's statehood, external pressures, the imperative of preserving identity qualities and a number of other factors have constantly pushed to the foreground the need to strengthen the family, preserve tradition, forge a healthy social environment, acquire clearly defined value system orientation. At this stage the basic expressions of the still embryonic constitutional culture pertain to the implementation of those social priorities. Assurance of man's divine representation, securing the pure qualities of his creative essence become the axial issue of canonical constitutions.

Beginning with 301 A.D., with the proclamation of Christianity as a state religion, a qualitatively new reality of co-operation between secular and church authorities emerged in the country which, through the course of the centuries, played a crucial role in the formation and development of Armenian legal and constitutional culture.<sup>36</sup>

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<sup>36</sup> Naturally, whether in the past or now, relations between religion and constitutional culture have their specifics in various countries. On this see: Penelope Foundethakis (*Panteion University, Athens*) - Religion and Constitutional Culture in Europe // *Constitutional Cultures*. Ed. by M. Myrzykowski. Warsaw, ISP, 2000, pp 169-191:

In the conditions of existence of statehood the clarification of foundations of the constitutional order of the state, the formation of a system of governance, the establishment of the main principles of citizen-state interaction, the regulation of the external and domestic functions of the state become the principal expressions of constitutional culture.

The lessons of history indicate that the birth of constitutions is often dictated by the need to address the most complex issues that challenge the society. In reality the adoption of the US Constitution in 1787 proclaimed to the world the emergence of a completely new type of a state. In September 1774 the British colonies convened the first continental congress in Philadelphia, which raised a voice of protest against the trampling of the rights of the colonies. Already in 1775 unconcealed struggle for independence broke out. The Second Continental Congress, convened in July of 1776, set forth the issue of the need for the adoption of a declaration of independence, which was enacted on July the 4th. The drafting and adoption in 1787 of the Constitution by the Constitutional Convention, which was subsequently ratified by the states, played a pivotal role for the ensuing close co-operation between American states, establishment of a unified state and the strengthening thereof. A study of the history of adoption and ratification of the Constitution, the unyielding struggle between the federalists and anti-federalists attests<sup>37</sup> to the fact that the establishment of a federal state was of fundamental significance for the formation of American constitutional culture, which is characterized by the separation and balance of powers through checks and balances, the existence of an independent judiciary and judicial constitutional review. For the first time in the world a presidential republic was formed on this basis. The first expressions of subsequent development of American constitutional culture pertain to the constitutional amendments that entered into force in 1791, enshrining fundamental human rights and freedoms and their safeguards (The Bill of

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<sup>37</sup> See, in Particular: Christopher Collier and James Lincoln Collier, *Decision in Philadelphia: The Constitutional Convention of 1787*, New York, 1987.

Rights). **The American experience in fact marked the dawn of a new quality of constitutional culture**, which is characterized by a constitutional system that includes the foundations of constitutional order and the procedure for the organization of state power, as well as the entire spectrum of relations between an individual and the society.

As we have mentioned, constitutional culture is a continually developing phenomenon, which acquires a qualitatively new essence and substance in conditions of a democratic state and civil society. The latter is determined by the role and significance of the Constitution in these societies. **The constitutionalization of social relations is an important accomplishment of democratic civilization** in the sense that such societies are characterized by non-discrimination, pluralism, tolerance, solidarity, respect toward human rights and freedoms and protection thereof, clear-cut and reliably guaranteed separation of powers, and the administration of justice prevails.

In a society like this the following become the main descriptors of constitutional culture:

1. the place and role reserved to an individual within social relations, recognition of and respect towards his dignity, guaranteeing rights and freedoms as ultimate values with direct effect;
2. restricting authority by law;
3. separation and balance of powers;
4. establishment of the power of the people, elected nature and accountability of government;
5. optimal decentralization of political, economic and administrative powers, guaranteeing free economic competition;
6. the existence of a judiciary system endowed with functional, structural, material and social independence;
7. harmonization of domestic legal system with international legal norms and principles;
8. assurance of a dynamic equilibrium in the chain functions-institutions-competences;
9. the degree of assuring Constitution's supremacy and stability.

These principal descriptors may be expressed differently in various

constitutional systems. But it is incontestable that a **Constitution is not a commodity that may be imported or exported**. It represents a dynamic conceptualized model of every country's particular system of values, called upon to secure the progress of such a system, its harmonious and sustainable development, taking into account the advancements of progressive ideas in this area.<sup>38</sup> Therefore constitutional solutions are also based on fundamental principles of nature, deviations from which may add a different quality to the constitutional system. For example, excluding the possibility of restricting authority by law is sure proof of the fact that we are not dealing in this case with a rule-of-law state, and without clearly defined separation of powers the establishment of constitutional democracy would be impossible. The formation of democratic governance is also impossible in the absence of appropriate constitutional culture. It is not incidental that in literature one encounters phrases like "anti-constitutional culture" or "constitutional anti-culture,"<sup>39</sup> This attests to the distortion of constitutional values and principles and as such their becoming an instrument in the hands of the authorities.

In view of the principal descriptors of constitutional culture, constitutional architecture should depart from the premises of first clarifying the constitutional objectives of a society. This should be followed by spelling out the principles that emanate from the value system orientation of a given society and are laid in the foundation of constructing a country's constitutional order. The degree of their implementation determines the true character and specifics of expression of constitutional culture in that country. The success of constitutional democracy in a state, in its turn, shall be judged by the level of

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<sup>38</sup> It would be appropriate here to refer to the statement by the representative of Senegal at the international conference in Santiago (*Constitutionalism, old doctrines, new world*, Chile, January 12-14, 2004) to the effect that all African countries have constitutions but there is no constitutionalism, since those constitutions are predominantly constructed on the basis of imported values and have the nature of mottoes.

<sup>39</sup> <http://university.tversu.ru/misc/pravo/pravo.html>.

<sup>40</sup> Բաստամեանց Վ., Դատաստանագիրք Սխիթար Պոչի. Իրաւաբանական հետազոտութիւն // «Փորձ», 1879, N6, էջ 66.



its constitutional culture, which in our times constitutes one of the important components of the national security strategy. Almost a century ago, reflecting on the Lawbook of Mkhitar Gosh, V. Bastamians wrote that when a nation's "legal culture" is adequate, it may "cleverly and beneficially enjoy liberal laws and a broader autonomy, requiring, as new phenomena emerge in its life, to have new laws put in place."<sup>40</sup>

Constitutional culture is not an abstract notion; it is manifested in all aspects of the existence of social organism. It reveals, first and foremost, the system of values that underlies social interaction and the operation of state machinery. The level of constitutional culture determines particular constitutional solutions, and the progressive nature of a Constitution as a country's Fundamental Law. Constitutional culture is incarnate in the laws and statutes enacted, the political organization of a state, the operation of and relations between political institutions and branches of government, the social substance and the legal capacity of an individual. Lessons learnt from history invariably indicate that, after all, the main yardstick for gauging the level of constitutional culture in a country is the degree of constitutional democracy, and raising it is the foremost requirement of constitutional culture.

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<sup>40</sup> Բաստամեանց Վ., Դատաստանագիրք Մխիթար Գոշի. Իրաւաբանական հետազոտութիւն // «Փորձ», 1879, N6, էջ 66.

## 2. HISTORICAL ROOTS FOR THE FORMATION OF CONSTITUTIONAL CULTURE IN THE ARMENIAN CONTEXT OF THE CHRISTIAN PERIOD

### 2.1 PROCLAMATION OF CHRISTIANITY A STATE RELIGION IN ARMENIA: LEGAL AND POLITICAL SIGNIFICANCE

Many authors have made the adoption of Christianity in Armenia an official state religion the subject of serious academic analysis in vast volumes of historiography. We do not intend here to reflect upon these in detail, refraining from reference to historical circumstances. We consider it more important, within the scope of the subject discussed, to look for answers to the following questions:

1. what is the political significance of proclaiming Christianity a state religion in Armenia in 301 A.D.?
2. what were the systemic approaches proposed to law and order and what were the foundations laid for developments in building a state and a legal order?

There have been reflections on the first question in literature.<sup>41</sup>

The overall conclusions mostly pertain to the:

- geopolitical situation that emerged around the country (Armenia between the hammer and the anvil: the crosshairs of expansionist interests of Rome and Persia);

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<sup>41</sup> See, in particular: Միրումյան Կ., Հայ ընդլայնական մտքի պատմությունից, Երեւան, 2002, էջեր 37-46.

- strengthening of Zoroastrianism in Persia and concerns about it being upgraded to the status of state religion;
- imperative of preserving Armenia's physical integrity and the fundamental issues of strengthening the power of centralized monarchy;
- need for a uniform, coordinated state ideology as a guarantee for the consolidation and strengthening the unity of all strata around the nation's common goals and interests.

Notwithstanding the existence of divergent interpretations and opinions, the overview of which does not belong in this study, the real political vector of the time was that **“the policy of forced introduction of Zoroastrianism in Armenia and its resistance thereto represented a conflict of not only differing religious ideologies, but also of the weltanschauung, cultural values and mental orientation. In this conflict Armenia appeared as the bearer and defender of Hellenistic tradition, a representative of the cultural Pax Hellenicum.”**<sup>42</sup> Moreover, as a result of the expansionist policy of Sassanid Persia by the second half of the 3rd century most of Armenia's territory was under foreign control. Armenian statehood was once again on the verge of destruction, and that raised the historic challenge of preserving state authority and national identity.<sup>43</sup> The historical reality was that, to meet this challenge, the proclamation of Christianity as a state religion in 301 A.D. was reserved an exceptional role as a consolidating religious and ideological factor, called upon to preserve and strengthen statehood. The new value system orientation created the necessary ideological preconditions for developing and implementing a uniform nation-state policy, turning the spiritual-ideological factor into a powerful instrument of consoli-

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<sup>42</sup> As K. Amatouni writes: “Armenia, ignited like a spark in the clash of two great empires, had the unfortunate fate of getting tempered in the competition between the Iranian East and the Roman West.” Կ. Ամատունի, Աղդեցութիւն Յուստինեան-Հոռմէական օրինաց Հայկական իրաւունքին վրայ եւ աստիճան այդ ազդեցութեան» // Բազմազէպ, 93 (1935) էջ 132.

<sup>43</sup> Ibid, p 38.

dating various social strata of the population, strengthening the country's sovereignty, ensuring the "salvation turnaround for the land of Hayastan." It is doubtless that in proclaiming Christianity a state religion and exerting great efforts to spread it and have it rooted king Trdat first and foremost pursued the objective of strengthening his nation-state. Nikoghayos Adonts states: "Armenia turned its face to the West when it became Christian. The threat of assimilation and oblivion had been looming over Armenia. There was no other way for salvation than to rely on Christianity."<sup>44</sup> Professor Kohler, a foreign author, has made the following remarkable generalization: "Here we have a nation that moved from Caucasian dependence to a civilized state when it adopted a highly sophisticated religion, and all the principles that came with it. It would not be an exaggeration to say that only through this the Armenians succeeded to emerge in the world as possessing their own civilization."<sup>45</sup> In reflecting on professor Karst's "On the history of Armenian legal mind" H. Assadourean writes: "It was of great significance for its history and law that the country converted to Christianity in a period when it was weak."<sup>46</sup>

In his research Prof. H. Hovsepiyan also concludes: "the spread of Christianity and its adoption as state religion early in the 4th century was of great significance for the development of Armenian legal and political mind."<sup>47</sup>

Overcoming the old mentality and switching to new value bearings was a tough call for all Armenia. In describing the painful aspects of Armenian reality during the transition of the first half of the 4th century; the general transformation, the penetration of Christian values, Pawstos Buzand notes: "there was hatred against each other and

<sup>44</sup> Նիկողայոս Ադոնց., Հայկական հարց, Երևան, 1996, էջ 148 (One should mention that the West essentially was Christianized much later).

<sup>45</sup> Գոլեր [Կոհլեր], Իրաւունք Հայոց, Վիեննա, 1890, էջ 14 (The material published in 1888 in the Journal of Comparative Law was entitled: Dr. I. Kohler. Das Recht der Armenier).

<sup>46</sup> Յ. Ասատուրեան, Պրոֆ. Կարստի Ուրվագիծ հայկական իրաւագիտութեան պատմութեան, // Բազմալեզու, 65 (1907), էջ 109.

<sup>47</sup> Овсебян О.А. и др.: Политико-правовая мысль Армении //История политических и правовых учений: средние века и Возрождение. М., 1986, с. 109.

jealousy, bad will, hostility, grudge, sniping, treachery amongst friends and brothers: the loved ones, neighbors, kin, in-laws, family, relatives, all conspired against each other. People craved each other's blood, spared no effort to harm one another, all because of evil behavior and wicked reason.<sup>48</sup> The burden of overcoming this situation, re-establishing hope, faith and solidarity was heavy on the shoulders of the state as well as the church.

The fact that Gregory the Illuminator was proclaimed a spiritual leader by popular consent in these circumstances is truly remarkable. As recounted by Agatangelos: "With the approval of his wife Ashkhen and his sister Khosrovdoukht king Trdat ordered all his troops to convene. Under orders everyone hurriedly converged from all over on the city of Vagharshapat in the Ayrarat province. The king too set out to reach there. The entire army was there: superiors, viceroys, governors, chiefs, princes, feudal lords, noblemen, judges and generals came and presented themselves to the king.

The king sought everybody's advice, in order to make haste and hurry to become heirs to the good deeds. Come, said he, let us, without delay, make Grigor, the guide of our lives granted to us by God, our pastor, so that he enlightens and restores us through baptism in the law-instructing sacrament of the Lord our Creator."<sup>49</sup>

The following are of interest in the above testimony:

- the Grabar (Classical Armenian) phrase «իրաման ետ ի ժողով կոչել միաբանութեամբ ամենայն զօրաց իւրոց» ("*braman yet i zhoghov kochel miabanutyamb amenayn zorats yurots*") is translated literally as "ordered all his troops to convene," seriously distorting its meaning. The subsequent text makes it clear that it refers to summoning the king's supporters with a purpose of arriving at a consensual decision, rather than a military gathering;
- the king wished to make "Grigor a pastor" by "seeking everybody's advice," to assure the establishment of public accord over this most important issue;

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<sup>48</sup> Փավստոս Բուզանդ, Հայոց պատմություն, Երեւան, 1987, էջ 55.

<sup>49</sup> Ագաթանգեղոս, Հայոց պատմություն, Երեւան, 1983 թ., էջ 445.

- a new phenomenon was born, the institute of National Ecclesiastical councils, which over the subsequent centuries played a decisive role in refining the values and qualities of our identity, defining through public accord the basic canons and principles of our lives, and ensuring their implementation.

By proclaiming Christianity the religion of the state, not only was the Christian doctrine embraced on a national level, but also - its entire value system, which includes the **Christian legal mindset**. We do not intend here to dwell on its details here.<sup>50</sup> We shall attempt to offer a general overview of the principal conceptual features of Christian perception of law, with a view of further expanding on their implementation in the Armenian reality.

A study of the fundamental principles in biblical heritage: the “legal,” historical, monitive, prophetic books of the Old and New Testaments, from the Genesis to the Revelation, comes to prove that:

1. A human being, whom God has made in his image and likeness, is the axis of any and all relations; an interminable system of values that are inalienable from man, constitute the essence of his existence, and violating which shall be an inhuman, illicit act going against the Creator. The conceptual basis for Christian legal thinking is the theomorphic<sup>51</sup> nature of man, and principles and practical approaches to issues like human rights, social co-existence, the role of state, the essence of power, the political system and, generally, any legal subject are interpreted in the former’s context.
2. The basis of statute is divine law, and only such statutes are lawful.<sup>52</sup> The formula of Christian perception of law is that law is the discipline of what is fair and kind, and these, in turn, are divine categories, since the source of law is the Lord. Over the course of centuries the philosophical and legal mind, setting forth the fun-

<sup>50</sup> See more on this in: Պապայան Ռ., Արդի իրավունքի քրիստոնեական ակունքները /գիտ. խմբ.՝ Գ.Գ. Հարությունյան, Ս.Ա.Ս. Էջմիածին, 2002:

<sup>51</sup> As stated by Davit Anghaght quite to the point in his time: “Philosophy means acquiring the likeness of God within human capacity.” Դավիթ Անհաղթ, երկեր: Երեւան, 1999 թ., էջ 45

<sup>52</sup> Whoever requires for the law to rule, is requiring the divine and the reason to rule. //Аристотель. Соч. в 4 тт. Т. 4, с. 481

damental question of correspondence between law and its legal content,<sup>53</sup> considering the “spirit of law” to be the basis for positive legislation,<sup>54</sup> ascribing importance to having laws that are “in harmony with the essence of man and to the liking of our rational spirit,”<sup>55</sup> viewing law as an “absolute notion, the current reality of free self-consciousness,”<sup>56</sup> believing that natural law emanates from the essence of divine creation of man, which pushes him towards reciprocal association,<sup>57</sup> characterizing law as “the mathematics of liberty in the history of mankind,”<sup>58</sup> has gradually arrived at the following generalization: assuring the rule of law is a pivotal value for the establishment of civil society.

3. Christianity proposed God-given principles for the establishment of law, construction of state power, organization of relations between people, for them not to be cut off from their original divine essence, to stay immune from self-denial and degeneration. And that is only possible if people measure and weigh what they do or intend to do by lasting values, following divine commandments (“I am the Lord your God [...] You shall have no other god” Exodus 20:3; “You shall not make a carved image [...] you shall not bow down to them or worship them” Exodus 20:4-5; “You shall not make wrong use of the name of the Lord your God” Exodus 20:7; “The seventh day is the sabbath of the Lord your God, that day you shall not do any work” Exodus 20:10; “You shall not commit murder” Exodus 20:13; “You shall not commit adultery” Exodus 20:14; “You shall not steal” Exodus 20:15; “You shall not give false evidence” Exodus 20:16; “You shall not covet anything that belongs to your neighbour” Exodus 20:17).

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<sup>53</sup> Արիստոտել, Աթենական հասարակարգը: Երևան, 2003, էջեր 26-27:

<sup>54</sup> Монтескье Ш. О духе законов // Монтескье Ш. Избр. произведения. М., 1955, с. 159:

<sup>55</sup> Որոգայթ փառաց, Երևան, 2002, էջ 71.

<sup>56</sup> Гегель Г. Философия права. М., 1990, с. 90:

<sup>57</sup> Гроций Гуго Де Гроот. О праве войны и мира // Антология мировой правовой мысли. Т. III. М., 1999, с. 21-26:

<sup>58</sup> Ներսեսյանց Վ.Ս., Ֆիզիկոսի մանիֆեստը, Երևան, 2001, էջ 21.

The clarification of the boundaries for the expression of rights, defining the principle of **permissibility of that which is not forbidden**, along with laying legal foundations for liberties, became the axis for harmonization of social relations. It follows from the divine principles of human co-existence that the state should also be constructed and organized under divine law (“natural law also implies the existence of a natural state”).<sup>59</sup> The fundamental principles of common co-existence and establishment of civil society are enshrined in the essential values of Christianity. As R. Papayan states: “The ten commandments, which are the basis of biblical legislation, affirm the truth that the rights proclaimed by God are universal and apply equally to all men since, rather than pointing to the rights of the person they address, they grant similar rights to all men that surround the latter.”<sup>60</sup> (“You shall not commit murder” does not mean “You have the right to live” but, rather, “Everyone has that right;” “You shall not commit adultery” means that everybody’s families are immune; “You shall not steal” spells a requirement to respect the property rights of others).<sup>61</sup> **Guaranteeing others’ rights becomes a limit on regulating the social behaviour of an individual.** At the same time the imperative of unreservedly abiding by the law is emphasized, which pertains to everyone and, first and foremost, to those endowed with authority.

4. At all stages of the historical development of state power a most important role was reserved to maintaining law and order, their enforcement and the protection of lawfulness. Contemporary legal theory views the separation and balance of powers as an axial issue in exercising state authority. The idea of three branches of government, with the same functions that exist in current-day theory and practice of state, is clearly stated in the Bible: “The Lord our judge, the Lord our law-giver, the Lord our king,” Isaiah 33:22.<sup>62</sup>

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<sup>59</sup> Ներսեսյանց Վ., Իրավունքի եւ պետության տեսություն, Երեւան, 2001, էջ 75.

<sup>60</sup> Պապայան Ռ., Արդի իրավունքի քրիստոնեական ակունքները, Երեւան, 2002, էջ 272:

<sup>61</sup> Ibid.

<sup>62</sup> Ibid, p 287.



5. An individual is the axis of the ideological system of values of Christianity, he shall construct his life on the basis of legal rules and norms that are pleasing to God. Nevertheless an important role is also reserved to listening to *vox populi*, taking it into account (“All the elders of Israel met and came to Samuel [...] and said to him, ‘You are now old and your sons do not follow in your footsteps; appoint us a king to govern us.’ Samuel prayed to God and God answered him: “Listen to the people and all that they are saying,” 1 Samuel 8:4). But, according to interpretations of the Bible, “grass roots” messages cannot contradict the utterance of God, or circumnavigate the divine instruction which emphasizes, as a principle of justice: “You shall not be lead into wrongdoing by majority,” Exodus 23:2. It is clear that **democracy is discharged by the people based on underlying ultimate unalterable values**. It is noteworthy that the constitutions of several modern states (e.g. Germany, Article 1; Georgia, Article 7; the Russian Federation, Article 2, 18, etc.) enshrine that human rights constitute an ultimate value, whereas the **people** and the state, in administering their authority, shall be **bound** by human rights and fundamental freedoms, as having direct effect.

6. Christianity deems that the principal mission of man is to regain paradise, making no distinction between the spiritual and secular expressions of the latter’s existence. **Inserting such a wedge would constitute ungodliness**. Christian ideology only accepts functional demarcation between heavenly power and earthly authority, within the common goal of assuring individual existence in conformity with godly values.

The ideological approaches in the legal mind, illustrated above, indicate that Christianity, deeming the creation of the necessary prerequisites for unleashing man's creative potential to be the main mission of mankind's collective existence, proposed systemic legal approaches and solutions for it. Christianity symbolized a qualitatively new stage in man’s self-cognizance. By viewing the axis individual-society in organic unity and linkage, it laid the value foundations for

the emergence of civil society. Neses Melik-Tangian states: “As an ethical-religious-administrative institution the church, in order to restrain arbitrariness, eradicate personal whim, and lead its congregation in a particular direction, considers it its duty to define by law the relation of each member to the church, to each other, as well as to other individuals and circles outside of the church. Thus boundaries are set for the rights and procedures for the obligations of each individual and the collective entity.”<sup>63</sup> The author also emphasizes that law, on the one hand, ensures man’s freedom, “preventing others from trampling upon the sacred rule,” and, on the other, restrains man’s individual whimsy against the common good, keeps him within stipulated norms.

We would like to draw particular attention to the fact that **Christianity established a holistic system of overpowering, infrangible, enduring values as the basis for all rules of human interaction and co-existence, something that possesses a constituting essence in its juridical significance.** As reverend father Vahan Bastamian states in his preface to Mkhitar Gosh’s “Armenian Lawbook:” “Christianity, as it is well known, brought about a great revolution in the religious, ethical, familial, social and political life of the Armenian nation. The nation’s statehood and popular existence acquire a religious dimension: religion and the Church become the “Hymn of the Nation. [...] Thus the church, having an impact on the ethical, intellectual, familial and political aspects of the nation’s existence should, of course, exercise great influence over its ‘legal arrangements.’”<sup>64</sup> This influence was significant throughout the entire subsequent course of our nation’s history, and the embryo of Armenian constitutional culture has matured within its scope.

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<sup>63</sup> Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Յանգյան, գիրք Ա, Շուշի, 1903, էջ 7.

<sup>64</sup> Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւաբանական հետազոտութիւնը հանդերձ ծանօթութեամբ Վահան Տ. Վարդապետի Բաստամեանց, Վաղարշապատ, 1880, էջ 68.

## 2.2. THE CONSTITUTING ROLE AND SIGNIFICANCE OF NATIONAL ECCLESIASTICAL COUNCILS

Armenian historiography contains many reflections on the circumstances of convening national ecclesiastical councils, with the main emphasis on the presentation of factual material, evaluating their role and significance, the analysis of respective historical periods and some other particularities. Certain attention has been paid to a general legal analysis of the canons enacted by these councils. Nevertheless we consider it a great omission that no adequate attention has been paid so far to the constituting role of national ecclesiastical councils. After all it is exactly these councils that have laid the foundation for the formation of Armenian constitutional culture.

We shall attempt to focus on this issue in the light of the latter statement, departing from the following criteria:

- a) to what extent does the council in question perform a “constituting” role, to what extent is it representative of the society, how is its “legitimacy” assured as a body adopting common rules of behaviour upon national consent?;
- b) to what extent are the rules thus adopted lawful and universally binding, do they possess, if at all, overpowering ‘delineating’ significance?

According to historiography the first official national ecclesiastical council was the Council of Ashtishat held in 365 A.D. and chaired by Nerses the Great, with the participation of the clergy and lay representatives.<sup>65</sup> In view of the latter circumstance Melik-Tangian emphasizes: “this glorious principle remained a principal item in all subsequent councils through the course of our history, lay people have always participated in all councils deciding not only on procedural, but also doctrinal issues. This principle is underscored from the perspective of other churches, which may view it with jealousy and strive

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<sup>65</sup> Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Ռանգյան, գիրք Ա, Հոշի, 1903, էջ 313.

to accomplish the same, since when we say church we imply a congregation of believers, and only through the participation of both classes can we resolve all issues and problems of the church.”<sup>66</sup>

Historiography also testifies that “the practice of resolving issues of the church through councils has originated in the time of the followers of the apostles: they came together for the first time and decided to prohibit Christians from performing Mosaic rites<sup>67</sup> (circumcision).” The emergence of such councils as a general Christian phenomenon expressed itself in the Armenian context with the following peculiarity: **the proclamation of Christianity as a state religion (or, as stated by Melik-Tangian, “The Armenian land was the first to make Christianity the civil religion”)**<sup>68</sup> has invariably lead to the requirement that spiritual and secular rules emanate from a common source, that civil laws contribute to the spread of Christianity, and that the rules of the church become binding, as civil laws, for all Christian subjects. Historiographers state that the intention of the rulings of the Ashtishat Council was also to strengthen Christianity and save the country from disintegration.

**“The Council of Ashtishat lays the foundation in Armenia for holding councils which stipulate official rules”**<sup>69</sup> (our underscore, G. H.). Similar councils were convened in the course of the subsequent centuries, on which we shall reflect in due course. But we would like to specifically emphasize here that “councils which stipulated official rules” were convened in exceptional cases, upon the existence of an extreme need, and enjoyed national representation.

Pawstos Buzand has left us the most complete testimony about the Council of Ashtishat: “They came together in the village of Ashtishat, where a church was built for the first time. [...] They all came willingly to the council and deliberated profitably together so as to perfect there the secular regulations of the church and the uniformity of

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<sup>66</sup> Ibid, p 314.

<sup>67</sup> Ibid, p 307.

<sup>68</sup> Ibid, p 308.

<sup>69</sup> Ibid, p 313.

beliefs. (At this council) they **put in order, compiled, canonized and set down regulations** and turned the entire population of the land of Armenia into the likeness of an universal order of solitary-communities...<sup>70</sup> (our underscore, G. H.). The original Grabar version of the phrase “(At this council) they put in order, compiled, canonized and set down regulations and turned the entire population of the land of Armenia into the likeness of an universal order of solitary-communities...<sup>71</sup> is remarkable here. As characterized by Pawstos Buzand, the results of this council (“**put in order, compiled, canonized and set down**”)<sup>72</sup> best represent the law-making role and constituting essence of the Council of Ashtishat, which in the modern Armenian translation (“outlined law and order, and organized”) narrows down to a rather administrative-organizational function. The notions “put in order, compiled, canonized and set down” did characterize in medieval Armenian manuscripts the types of lawmaking activity, regulation of relations, determination of the rules of behaviour. National ecclesiastical councils had a special role, the canons they enacted had a universal, prevailing, “delineating” legal power. In this respect national ecclesiastical councils are comparable to constitutional conventions, and one may safely conclude that they were the prototypical for the latter.

Here is what Movses Khorenatsi has to say about the Council of Ashtishat: “In the third year of the reign of Arshak, Nerses the Great, son of Atanagines, son of Husik, son of Vrtanes, son of Saint Gregory, became Archbishop of Armenia. Having returned from Byzantium to Caesarea, he came to Armenia and restored all the just administration

<sup>70</sup> Փավստոս Բուզանդ, Հայոց պատմություն (թարգմանությունը եւ ծանոթագրությունները Ստ. Սալխայանի), Երեւան, 1987, էջ 119.

<sup>71</sup> Ibid p 118.

<sup>72</sup> The forms «Օրինեցին» (*orinetsin*) and «յարինեցին» (*haurinetsin*) are encountered in the meaning of “establishing in an orderly manner” in various monuments of Armenian bibliography. In particular, the history of Abraham Kretatsi states: “...they established two ranks [starting] from the reed fence of the khan up to one bowshot and more; the Ottomans call [these regiments] alay. All of them had big rifles in their hands.” (According to the materials of Classical Armenian Bibliography [www.digilib.am](http://www.digilib.am), version 1.0).

of his fathers, and he went even further. For the good order that he had seen in the land of the Greeks, especially in the royal city, he imitated here. Summoning a Council of bishops in concert with the laity, by canonical **constitution (regulation)** he established mercy, extirpating the root of inhumanity, which was the natural custom in our land.”<sup>73</sup> In the subsequent modern Armenian translation Khorenatsi’s phrase “established through constitutional canon,” was translated as “established through canonical limits,”<sup>74</sup> which makes almost no sense in legal terms. A faithful translation of the original, that is “Summoning a Council of bishops in concert with the laity, by canonical **constitution** he established,” proves undeniably that **the national ecclesiastical Council of Ashtishat was nothing else but a representative constitutional convention which adopted constitutional canons.**

Writing about Catholicos Nerses and his work, Hakob Manandian mentions: “he chaired at the first **constitutional convocation** (our underscore, G. H.) that took place at Ashtishat, and its canonical rulings pertained not only to religious or ecclesiastical matters, but also to secular life and social relations.”<sup>75</sup> Attention is paid here to the lawmaking role of the people, rather than the constitutional nature of canons, something that is explicitly captured by Khorenatsi.

The Council of Ashtishat, being the first of its kind, set an important precedent in the Armenian reality for having effective domestic legislation even in absence of a nation-state. The initiative of holding that council came exclusively from the Catholicos, and here is how Pawstos Buzand described his ultimate properties even before becoming a Catholicos: “He had the fear of God in his heart, he strictly observed the commandments, he was humane, saintly and virtuous, very sagacious, impartial, judging fairly, meek, sweet, humble, charitable, lawful in matrimony, overwhelmed with love for the Lord.”<sup>76</sup>

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<sup>73</sup> For the Modern Armenian text see: Սովետն Խորենացի. Հայոց պատմություն, Ե դար, Երևան, 1997, էջ 225:

<sup>74</sup> Ibid.

<sup>75</sup> Հակոբ Սանաղյան, Երկեր, գիրք Բ, Երևան, 1978, էջ 164.

<sup>76</sup> Փավստոս Բուզանդ, Հայոց պատմություն, Երևան, 1987, էջ 109.

The tradition of the Council of Ashtishat was best developed in the Council of Shahapivan, reported to have been convened in 444-447 A.D. With respect to this council Nerses Melik-Tangian mentions: "The Council of Shahapivan was one of the most glorious Armenian councils."<sup>77</sup> The representative presence at the Council of Shahapivan is described as follows: "And there came 40 bishops and many priests, deacons, ardent ministers and the entire clergy of the holy church, all princes, provincial governors, supreme justices, treasurers, generals, intendants, village chiefs, noblemen from various regions"<sup>78</sup>." The purpose for convening the people was also clear: "The senior Nakharars of the Armenian land, who were zealous defenders of laws and sanctities, said this: 'Restore the law and order established by Saints Grigor, Nerses, Sahak and Mashtots, and establish by your own will other goodly things, and we shall willingly and lovingly accept, since the church's law and order has dwindled, and people have reverted to unlawfulness. You shall define laws pleasing for God and useful in calling the church to life, and we shall adhere to them and keep them strong. And if someone, be it a bishop or priest, a free man or a peasant, fails to strictly abide by the laws so established, let them be punished and pay a fine.'<sup>80</sup> Incidentally, according to Nerses Melik-Tangian, all of the nakhararas took part in this council, including Vassak marzpan, Vahan intendant, and Vardan Mamikonian. It is also emphasized: "There never has been such a glorious council among any universal councils, enjoying the participation of the clergy with their classes as well as the rulers in numerous secular classes."<sup>81</sup> The author also provides important detail on the convocation and organization of the council, its role and character. It is emphasized, in particular, that:

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<sup>77</sup> Ներսես Մելիք-Թանգյան, Հայոց եկեղեցական իրավունքը, գիրք Ա, Շուշի, 1903, էջ 319:.

<sup>78</sup> "Noblemen" refers here to both big feudal landlords, exempt from state taxes and levies, and the class of petty feudal landowners.

<sup>79</sup> Ավագյան Ռ. Հ., Հայ իրավական մտքի զանձարան, Երևան, 2001, էջ 121.

<sup>80</sup> Ibid.

<sup>81</sup> Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Թանգյան, գիրք Ա, Շուշի, 1903, էջ 320.

- a) this council was convened and chaired by the Catholicos;
- b) the council itself, as well as its “pre-procedure” enjoyed the participation of the ministry, as well as the secular “element,” “with all their classes;”
- c) this council **approved** “all [preceding] councils and Patriarchal canons which, although adopted by the nation before that day, were not ratified by popular endorsement.” It is remarkable that this council, by approving “the canon of the councils of Nicaea, Constantinople, and Ephesus, as well as by the Illuminator, Nerses, Sahak, Mesrop and the Apostolic canon,” thereby assured their legitimacy, and the council performed the function of ratification;
- d) at this council “ecclesiastical canons acquire the binding nature of civil law, prescribing penalties and fines for transgressors;”
- e) “They even established corporal punishments of most merciless nature, which is completely at odds with the spirit of the Gospel, and nowhere to be found in contemporary foreign canons.”<sup>82</sup>

H. N. Akinean makes an exceptionally interesting reflection on the Council of Shahapivan, stressing, in particular, that: “It was meant to be the first all-national **Reforming Council**”<sup>83</sup> (our underscore, G. H.). The notion of “all-national Reforming Council” best characterizes the role and significance of constitutional conventions, with particular importance attached to the special (all-national) role and significance of legal relations thus regulated, as well as stressing the “reforming” nature of the process. The author ascribes specific importance to the fact that “The clergy and the Nakharars, the noblemen and peasants had stood up to request from the Council the re-establishment of ethical order, in complementing the Apostolic and Nicene canons: **impartial trial of the offenders and severe verdict along with a penalty, without prejudice to class or rank.**”

<sup>82</sup> Ibid, p 321.

<sup>83</sup> Հ.Ն. Ակինեան, Շահապիվանի ժողովի կանոնները: Մատենագրական ուսումնասիրություն: Արթիւ 1500 ամեայ տարեդարծին (444-1944) // ՀԱՆՐԵՍ ԱՍՏՕՐԵԱՅ (Հայագիտական ուսումնաբերք), թիվ 4, 1949, Մխիթարեան տպարան, Վիեննա, էջ 79.



Senior Nakharars, noblemen and peasants unanimously subscribed to all rulings of the Council”<sup>84</sup> (our underscore, G. H.). The author also expresses his rightful admiration for the Armenian legal mind of the time. In a bibliographic analysis preceding the above study, entitled “Canons ascribed to Saint Sahak” and published in the last 1946 issue of the same journal, H. N. Akinean maintains that the Council of Shahapivan “was the first ecclesiastical **constitutional convention**” (our underscore, G. H.), and without any reservation calls the document adopted at that council a **Constitution**.<sup>85</sup>

We shall reflect later on the canons enacted by the Council of Shahapivan, and their constitutional nature. Here we would like to acknowledge the fact that the Council of Shahapivan was not an ecclesiastical, but a national-ecclesiastical council and it had a pan-national representative nature. At the same time, compared to the Council of Ashtishat the Council of Shahapivan, in its representative composition and constitutional nature, represented a noticeable step forward, which made ever more salient the **emergence of a culture of adopting norms of constitutional significance, and guaranteeing through them an environment of social accord in medieval Armenia**.

By the end of the 5th century an event took place in Armenia, which was of exceptional importance from the perspective of the subject of our study. Before that the initiator of national ecclesiastical councils was the church, with the purpose of “restoring” all aspects of public life, whereas in the 5th century a similar initiative was set forth by King Vachagan. Movses Kaghankatvatsi recounts: “During the years of the Aghvan King Vachagan there were many conflicts between lay people and the bishops, priests and suffragans, the nobles and the commons. The king desired to convene a populous assembly in Aghven, which

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<sup>84</sup> Ibid, p 81.

<sup>85</sup> Հ.Ն. Ակինեան, Ս. ՍԱՀԱԿԻ ՎԵՐԱԳՐՈՒՄԻՆ ԿԱՆՈՆՆԵՐԸ: Մատենագրական ուսումնասիրություն // ՀԱՆՂԵՍ ԱՍՍՕՐԵԱՅ (Հայագիտական ուսումնաթերթ), 60 (1946), էջեր 48-70.

<sup>86</sup> Սովսեն Կաղանկատվացի. Պատմություն Աղվանից աշխարհի /թարգմանությունը, առաջաբանը եւ ծանոթագրությունները Վարազ Առաքելյանի, Երևան, 1969, էջ 65.

took place on the thirteenth day of the month of March.<sup>86</sup>

The outcome of that assembly was the adoption of a Canonical **Constitution**. Historiography dates this constitution, which contained 21 articles, to the year of 488.<sup>87</sup>

The procedure for guaranteeing the authenticity of this document was also remarkable: the Canonical Constitution is concluded by the following article: «These terms were set in the presence of the King by bishops, priests, nobles. [...] This order was sealed with their rings by the King's commander Moutsik, the Superintendent of the palace Mirhorik and the chiefs of clans Marout, Tirazd, Sparakos, Ghama, Bakour, Ratan, Arches, the Ruler of Gardman brave Vardan, Khours, Germanosan, Khosken, Pirog, Nahapet, all the nobles of Aghvank, and the writing, for it to be more authentic, was also sealed with the ring of Vachagan, the King of Aghvank.»<sup>88</sup> The expression “the order was sealed with their rings” simply refers to the ratification of the universally binding nature of the norms thus adopted. It is also of the essence that special attention was paid to the question of ratification of rules that were the outcome of broad public accord and were of prevailing nature.

In this respect we would like to isolate the following considerations:

1. A situation had matured in the Armenian milieu by the middle of the 5th century, when attempts were made to address emerging conflicts between various strata of the society not through the dictate of force (including royal decrees or the use of the stick), but through legal means, by enacting constitutional laws. This first and foremost attests to the superior intellectual capacity and legal awareness of the author of this initiative, as well as to the fact that these properties were perceived by the society in an environment that was mature for this.
2. The adoption of a constitution by constitutional convention, an amazingly progressive occurrence for the time, comes to prove that the regulation of social relations was based on the principles of social

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<sup>87</sup> See Ռ. Հ. Ավագյան. Հայ իրավական մտքի գանձարան, հ. 1, Երևան, 2001, էջեր 132-137.

<sup>88</sup> Մովսես Կաղանկատվացի. Պատմություն Աղվանից աշխարհի, էջ 69.

cohesion, rising above social or other kind of stratification.

3. No other modifier than **constitutional** is used to characterize the canons, affording them a special status, recognizing the supremacy of norms established through national consensus over any other norm or canon.

Firstly, what is remarkable is that the notion “constitution” gets established in Armenian legal culture. As K. Ghahramanian and V. Hovhannisian rightfully mention: “Both in its name and the procedure of adoption, as well as in its content this legal document shares common features with a Constitution as a legal instrument.”<sup>89</sup>

It is remarkable that S. Hovhannisian has entitled one of his articles “The canons of the **Constitutional Council** of Aghven and their association with the canons of Ashtishat” (our underscore, G. H.). Discussing the similarities and differences in the canons adopted at the councils of Ashtishat, Shahapivan and Aghven, and paying most of the attention to clarifying the date of convening the Aghven council, the author did not reflect on data supporting the constituting character of the council. Nevertheless, putting a particular emphasis on the fact that the king initiated the convention in his summerhouse, as well as drawing attention to the “method of convening the Aghven council,” and the “special way” of evening out contradictions within the society, he unreservedly qualifies the council as a Constitutional council.<sup>90</sup>

It is also interesting that in a valuable collection published in 1913 in Tbilisi, edited by Arsen Ghltjian, Doctor of Law, and entitled “Armenian Book of Canons,” the reflection on the canons enacted at the Council of Aghven is preceded by the following heading: “Albanian Canons,” followed by, in bold capitals, “Constitution.”<sup>91</sup>

Having no purpose to reflect on the dates of convening those councils, neither on persons participating, nor various historical circum-

<sup>89</sup> Ղահրամանյան Կ., Հովհաննիսյան Վ., 1500-ամյա հայկական Սահմանադրությունը. ընդունման հանգամանքները եւ նշանակությունը, Երեւան, 1999, էջ 17.

<sup>90</sup> Հովհաննիսյան Ս., Աղվենի սահմանադիր ժողովի կանոնները եւ նրանց աղերսը Աշտիշատի կանոնների հետ // Պատմա-բանասիրական հանդես, 1967, N 4, էջ 274.

<sup>91</sup> Կանոնագիրը Հայոց/Ղուկասեան մատենադարան, խմբեց Արսէն Ղլտճեան, Թիֆլիզ, 1913, էջ 192.

stances surrounding those relations, we would like to make several generalizations from the viewpoint of the criteria of constitutional studies:

1. all three councils, whether in Ashtishat, Shahapivan or Aghven, were convened with the purpose of regulating social relations, legal resolution of conflicts that had emerged;
2. the councils were public, and enjoyed broad national representation;
3. the decisions were taken through national consensus, with a view of creating an atmosphere of mutual understanding and accord in the country;
4. in the degree of their “legitimacy” and legal effect these decisions superseded all other such decisions;
5. in their substance and legal significance the canons thus adopted possessed a foundational, legal, organizational functions, a clear ideological vector, which is characteristic of constitutional norms, they pertained to the most important issues and relations that were topical at the time.

The conclusion is unequivocal: in these councils we are dealing with **constitutional** conventions. We would also like to add here that the tradition of convening constitutional councils was quite persistent in the Armenian reality. The councils held in Dvin (6th, 7th c.c.), Partav (8th century), Sis (1243), Dzagavan (1268), and Jerusalem

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<sup>92</sup> Arsen Ghltjian distinguishes the following canonic groups: “1. St. Grigor’s Armenian Apostoles; 2. Council of Ashtishat’s (365); 3. St. Sahak’s, Armenian Patriarch; 4. Council of Shahapivan’s (447); 5. Hovhan Mandakouni’s (480-487); 6. of the Council of Karin (510-515); 7. of Patriarch Nerses and Bishop Nershapouh of the Mamikoneh (554); 8. of Armenian Catholicos Nerses (6th century); 9. of the Council of Dune (649); 10. of Catholicos Sahak (677-703); 11. of Hovhan the Philosopher (Council of Dune in 719); 12. of the Council of Manazkert (727); 13. of the Council of Partav (768); 14. of the Council of Sis (1243); 15. of the Council of Jerusalem (1651).” (See Կանոնագիրք Տայրոց, Թիֆլիզ, 1913, առաջարան, էջ Բ):

Levon Melikset-Bek, in his turn, mentions: “One should remember that among the Armenian Councils only those may have significance from the perspective of the history of law, on the basis of which canonic rules were designed, in particular laws of ecclesiastical legal nature. This may be judged from the materials adopted by the Councils of Ashtishat, Shahapivan, Dvin, Karin, Manazkert, Partav and others.” (Меликсет Бек Л. Об источниках древнеармянского права // Известия Кавказского историко-археологического института. Тифлис, 1917-1925, N 11, с. 156-157.

(1651) were of similar nature.<sup>92</sup> There is interesting testimony on the 1204 Council of Sis, the decisions of which were refuted, since it was not deemed “legitimate,” lacking the necessary national-ecclesiastical representation.<sup>93</sup> Whereas the decisions of the 1243 Sis council, in order to assure the authenticity and universally binding nature of the 25 canons adopted thereat, were sent, with a cover letter by the Catholicos, to all Armenian bishops and princes, with a demand to seal their enforcement by an oath and ratify with a signature. All parties have unreservedly complied.<sup>94</sup>

There exists noteworthy testimony to the finer nuances surrounding the convocation of the Partav council (771): “We failed to hold council in Dvin because of the barbarians, we went to Partav, the capital city of Aghvans, where the Aghvan catholicos Davit and their princes took part in the council; **we unanimously established at the council the following rules for the benefit of the leaders and their nation**”<sup>95</sup> (our underscore, G. H.).

The reference to the Dvin council (648) states: “Nerses the Third [...] convened a council with the participation of bishops and nakharars in order to: first, draft a response to be sent to Constantinople to the Emperor and the Patriarch;<sup>96</sup> second, to compile a doctrinal manual with factual reasoning and, third, to establish a special manual as guidance for all Armenians, so that the Armenian doctrine and its difference from the Greek one become clear to everyone.”<sup>97</sup>

With the purpose of drawing some historical parallels we consider it necessary to stress that the authority to adopt a “constitution” in

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<sup>93</sup> See: Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Ռանգյան, գիրք Ա, Շուշի, 1903, էջ 448, as well as: Մխիթար Գոշ. Դատաստանագիրք Հայոց Թրապիզանական հետազոտությունը հանդերձ ծանօթութեամբ Վահան Տ. Վարդապետի Բաստամեանց, Վաղարշապատ, 1880, էջեր 87-89.

<sup>94</sup> See: Торосян Х., Суд и процесс в Армении в X-XIII вв., Ереван, 1985, էջ 33:

<sup>95</sup> Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Ռանգյան, գիրք Ա, Շուշի, 1903, էջ 426:.

<sup>96</sup> This refers to letters by the Greek Emperor and the Patriarch addressed to Catholicos Nerses and to Theodoros Rshnun, where advice is to be amicable with the Greeks, cease demonstrations of hostility by the Armenians towards the Greek troops deployed in Dvin.

<sup>97</sup> Ibid, p 391.

many countries was simply reserved to the monarch, who stipulated through a decree the prevailing rules of behaviour. The 1231 Constitution of Italian king Federico the Second is typical in this respect, whereupon the king simply decrees that the rules he promulgated must be obeyed by everyone.<sup>98</sup> Irrespective of the substantive scope of the rules, the essential circumstance here is that they were imposed from top down, rather than being a result of social consensus.

Regardless of the historical circumstances under which national ecclesiastical councils were convened in Armenia, and the extent to which the decisions adopted thereat reflected contemporary social realities, one assertion is obvious: **they had become a forum for forging public consensus, and the role of those councils in consolidating, regulating, assuring national unity and solidarity, promoting the required public perception of the rules, of law and order, was exceptional.** These decisions and canons, feeding off concrete reality of public life, in their turn generated sustainable customary norms and traditions, which had a great role and significance in the historical destiny of our nation. Moreover, even in conditions of perished statehood the decisions of those councils retained the **significance of supreme national legal norms** that regulated public life.

The current European legal mind argues that a Constitution is not as much the Fundamental Law of a state, but rather the ultimate legal instrument of civil society. We shall later reflect on this proposition. In relation to constitutional councils and their decisions it would be appropriate to stress that even in conditions of lost statehood Armenian public life had for centuries abided by its canonical constitutions which, rather than being compilations of ossified prejudice, were **continually renovated through broad consensus and became the ultimate document comprising rules of common behaviour.** Especially in conditions of our decentralized national-political system, where centripetal forces were relatively weak, and strife was an eternal companion of our history, the national, political, legal role and significance of national ecclesiastical councils was particularly

<sup>98</sup> See: Антология мировой правовой мысли, т. II, М., 1999, с. 492-495.

important. It may be that, given the absence of a nation-state, we owe the preservation of our identities and even our existence to a great extent, among others, to national ecclesiastical councils and the canons they had adopted.

Considering all this one may only wonder at the fact that in the 21st century, in the newly independent Republic of Armenia, a more than a thousand page thick encyclopedia is published on the occasion of the “1700th anniversary of Armenia’s great conversion” entitled “Christian Armenia,”<sup>99</sup> without a single reference to the constitutional role of national ecclesiastical councils or to canonical **constitutions**. While as early as in 1837, the New Dictionary of the Haikazian language, published in Venice, offered, in reference to the sources of our history of the Christian period, an unsurpassed definition of a constitution.

It is the same hand and the same impermissible approach: by failing to ascribe adequate importance to notions formulated in Classical Armenian, turning these into an object of simplistic and arbitrary interpretation, we eject a whole cultural phenomenon from our history, that of constitutional culture, whereas it constitutes an undeniable reality with roots that go very deep.

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<sup>99</sup> ԹՐԻԱՏՈՆԵՅԱ ՀԱՅԱՍՏԱՆ. Հանրագիտարան, Երեւան, 2002.

### 2.3. LEGAL CHARACTERISTICS OF CANONICAL CONSTITUTIONS

Any legal analysis of a constitution as the Fundamental Law of a country is called upon to reveal the essence and role of its foundational, legal, organizational functions, the ideological vector, the constitutional nature of the norms therein. Special attention is to be drawn to the fact that constitutions have emerged in order to accomplish three fundamental missions:

1. to draw boundaries for the functions of the state, structures of power and public officials;
2. to determine procedures and mechanisms for the implementation of public functions;
3. to ascertain the limits on individual political, economic, social freedoms, guarantee inalienable human rights.

As a legal and political document of utmost importance, a holistic and dynamic model of social relations a constitution, based on the value system bearings of a particular social organism, contains three types of legal norms: norms-objectives, norms-principles and norms that regulate most important legal relations, and supersede all others. In order to be called constitutional a norm must not only possess one of the above features, but also be adopted through a procedure intended for constitutional norms, reflect public consensus.

In examining the nature of national ecclesiastical councils we concluded that they were in essence constitutional conventions and have adopted, as an outcome of public consensus, universally binding rules of behaviour of ultimate legal effect.<sup>100</sup> Let us

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<sup>100</sup> These canons are often called laws or rulings in literature. Nerses Melik-Tangian offers a clear commentary on this issue: "A canon in the church is what the law is in the state. The difference between the canon and the law has been clearly determined in the Roman law since the time of Justinian... In *Codex Justinianus* the term canon was ascribed only to ecclesiastical constitutions, which was paralleled by civil regulations that were called laws. See: (Հայոց եկեղեցական իրավունքը. Ներսես Մելիք-Ռաևզյան, գիրք Ա, Շուշի, 1903, էջ 12). In interpreting the legal meaning of the term "canon," the author maintains that "the adjective "canonical" often modifies the edicts of the catholicoi, which contain purely ecclesiastical instructions and are binding, such as the Canonic Edict of Gevorg IV of 1868." Ibid, p 13.



corroborate this conclusion through a certain analysis of the substance of those rules.

In historiography there are many references to these canons as constitutional norms. Suffice it to mention, for example Khorenatsi in the 5th century, Hovhannes Odznetsi in the 8th century, Tovma Artsrouni in the 10th century, Oukhtanes in the 11th, Vardan Areveltsi in the 13th, Mikael Chamchians in the 18th, etc.<sup>101</sup> In the course of the preceding centuries many authors have reverted to the comparative and substantive analysis of canons enacted by national ecclesiastical councils, to some of which we refer in this work within the scope of its subject. We look in this case for an answer to one fundamental question: what are the principal legal features of a canonical constitution, on the basis of the legal norms contained therein?

The first general property is that these norms were **universally binding in their legal effect**, and any deviation there from was rejected and considered despicable by the society. Moreover, it is the deviation from these norms that underlay every negative development in public life that had a significant impact on the nation. For example, in his reflection on the behaviour of Ashot Artsrouni following his return from captivity (868), Tovma Artsrouni states: “But now what can I say? Although they openly returned to the worship of Christ our God, they did not closely adhere to the constitution (canonical rules); not only Ashot but also all the Armenian princes who came home from captivity. They rejected the malignancy of apostasy but remained outside the constitution (canonical rules); their conduct was not truly Christian, for they indulged themselves with debauches and hard drinking, with defiled beds and pollution, with impure, awful, and repulsive copulation, with pederasty, with bestiality surpassing the vices of Jericho and Sodom. Men were shamelessly inspired with passion for men, bringing upon themselves endless fire-dispersing burning from heaven and perdition more devastating than

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<sup>101</sup> See on this in the appendix to the same book, as well as in: Գ. Հարությունյան, Աստվանադրական մշակույթ, Երևան, 2005, էջեր 75-83.

the Flood.”<sup>102</sup> As we can see, by staying away from the canonical constitution, Ashot, together with other princes who returned from captivity “mixed adultery and intoxication into their shaky Christian behaviour,” for which the society admonished them.

The norms of canonical constitutions were not in effect customary norms, they **possessed binding legal substance**. In their essence these norms first and foremost **established rules on permissible boundaries of behaviour**. For example, the first rule adopted by the Council of Ashtishat to regulate matrimonial relations stipulates: “The Council ordered the nakharars, in order to preserve their heirloom, not to marry among next of kin.” On the same issue the Council of Shahapivan, rather than proclaiming a norm-principle, prescribes a clear regulation, stating: “Nobody shall dare to marry with a sister, a nephew, a cousin or an aunt, or any other relative unless four times removed. Whoever associates with such a ceremony, blessing the matrimony or attending the wedding, whether bishop or priest, shall be deemed apostate, never to mix with officials.”<sup>103</sup> Not only the norm is clarified (defining a close relative, when is a relative enough removed), but there also are clearly defined sanctions, assuring the universal nature of enforcement. The constitutional Council of Aghven has also ruled on this fundamental issue, stipulating a norm of canonical constitution: “No man shall marry a female relation who is thrice removed, neither shall he marry his sister in law.”<sup>104</sup>

As early as in 1901 K. H. Basmajian, in an overview of studies by foreign authors on Armenian law, mentioning the works of Ferdinand Bischoff, Dr. Kohler, Prof. Rodolphe Dareste and others, in his turn stresses, that “the principal element of Armenian law, from Vagharshak to the time of the Bagratids, is the patriarchal setup of the family, established upon traditions and especially the Scriptures,

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<sup>102</sup> Presented on the basis of the materials in "Armenian Classical Bibliography," [www.digilib.am](http://www.digilib.am), version 1.0.

<sup>103</sup> See the work by: Ավագյան Ռ. Հ., էջ 128.

<sup>104</sup> *Ibid*, p. 139.

which in turn has lead to Canonical Books”<sup>105</sup> (our underscore, G. H.). In a voluminous 1913 study on ancient Armenian law A. Ghljtian makes another noteworthy generalization; when reflecting on foreign scholars he essentially proposes that looking for foreign influence on the Armenian law is a redundant exercise, since Armenian law, in its value basis, essence and integrity possessed a distinctive method and development (“The fact that Armenians had their own law is attested to by ample evidence provided by our sources of law”).<sup>106</sup>

S. Hovhannessian is quite right when he claims: “Every law or code is the product of its time. They answer the spiritual and material needs of the ruling religious and secular classes, reflecting the balance of forces, the prevailing will. They bear upon them the seal of the legal awareness of the period.”<sup>107</sup> At the same time, comparing the norms of canonical constitutions enacted by various national ecclesiastical councils we may observe similarities both in the subject of regulation (it is particularly noteworthy that they all reflect on matrimonial relations,<sup>108</sup> the behaviour of those vested with religious authority, etc), and in the value system underlying the legal mind. The latter is based on common Christian ideology and the imperative of creating the necessary legal and ethic prerequisites for calling the divine commandments to life. What also makes them similar is that canonical constitutions, on the one hand, were supposed to strengthen Christianity and, on the other, to save the country from lawlessness, arbitrariness and destruction.

At the same time the analysis of canons thus enacted indicates that divine law was put in the foundation of all rules of human co-exis-

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<sup>105</sup> Բասմաջեան Կ. Յ., Հայկական իրաւունք ի սկզբանէ մինչեւ մեր օրերը // ԲԱՍՄԱՅԵՐ, Փարիզ, 1901, պրակ Բ եւ Գ, էջ 68.

<sup>106</sup> Արսէն Ղլտճեան, Հայոց հին իրավունքը, Ալեքսանդրապոլ, 1913, էջեր 3-13.

<sup>107</sup> Հովհաննիսյան Ս., Աղվենի սահմանադիր ժողովի կանոնները եւ նրանց աղերսը Աշտիշատի կանոնների հետ // Պատմա-բանասիրական հանդես, 1967, N 4, էջ 270.

<sup>108</sup> The Council of Shahapivan pays special attention to this. It regulates issues pertaining to marriage between relatives, adultery, lechery, divorce in view of the wife's infertility, sinning with one's step-mother, the wife leaving her husband, marriage through abduction, etc.

tence and interpersonal relations, the value axis of which, as we have already mentioned, is the human being, building his life upon legal norms and laws that are pleasing for the Lord.

Specific solutions, quite naturally, were dictated by the urgency and priorities of the fundamental problems of the particular period in question. Nerses Melik-Tangian, for example, in reflecting on the Shahapivan canons, states that those canons clearly reflected the grave situation Armenia was in. The Armenian kingdom was ruined, the country had fallen under Persian rule, the Persian governors and wanton Assyrian catholicoi have ransacked the country, disrupted the order set by the virtuous Patriarchs, and sowed alien, vicious, disorderly seeds. “According to historians” the numbers of divorcees, prostitutes, thieves, evildoers, apostates, nation-haters have risen, people reaped great tribute through the lightest of services, they converted to become Persian and oppressed their own people, demolished and desecrated churches, forced devout Armenians to convert. These were the reasons that made all the delegates unanimously approve procedures and rules, as well as sanctions that were unprecedented and never thereafter repeated in the history of the Armenian Church.<sup>109</sup>

No less important for the canonical decisions was the fact that **constitutional canons should not have been of purely abstract, orientational-ethical significance**. One of the characteristic features of a constitutional norm is not only its universally binding character, but also its real regulatory role. Here again history testifies that canonical constitutions did not remain merely compilations of wishful thinking, they enjoyed great significance in implementation. For example, when reflecting on the practical outcomes of the decisions of the Ashtishat council, Hakob Manandian states: “Pursuant to the decisions of that council charity institutions were established throughout Armenia. Hospitals and asylums were built for the lepers, epileptics and the infected; sanctuaries and shelters established for the disabled, incapacitated and the poor; monasteries, schools and lodges were also founded. These institutions were supported by the revenue from the Church’s

<sup>109</sup> See: Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Ռանգյան, գիրք Ա, Շուշի, 1903, էջ 321.

properties, as well as a special tax levied on the people.”<sup>110</sup> Ascribing great importance to all that, as well as to the eradication of the practice of bitterly wailing over the deceased, Hovhannes Draskhanakertsi mentions: “after that our people could be seen not as barbarians, but as modest burgers.”<sup>111</sup>

With respect to the canons adopted at Shahapivan Khachik Samuelian mentions: “The canonical decisions of the Council of Shahapivan are characteristic in that they define the norms of not only ecclesiastical, but also of civil and penal law, the enforcement of which [...] becomes binding also for secular feudal lords.”<sup>112</sup> The 20 canons adopted by the Shahapivan Council pertain to urgent and important domestic issues in Armenian life, such as regulation of matrimonial issues, activities of the ministry and regulation thereof, struggle against sectarianism, the issue of celibacy etc.

It is remarkable here that even the norms addressing penal issues were of constitutional nature: they clarified the right in question, the permissible restrictions, and prescribed the sanction against its violation (for example the rule on letting off a wife because of infertility stipulated: “if someone lets off a wife because of infertility, the wife may take all chattel she had brought with her, as well as her clothes, her silver, her maid and her livestock; if the wife has no other deficiency than infertility, the husband shall pay a penalty for the dishonour, a nobleman shall pay 1,200 drams, a peasant shall pay 700 drams.”

Reflecting on the canons enacted at the Council of Aghven, Varag Arakelian underlines that “The canons of Aghven demonstrate that Vachagan the Pious was an insightful and talented monarch, he was first and foremost concerned about the development of the country’s cultural life, the creation of legal norms, the strengthening of the Armenian Church... According to those canons it was prohibited to let off a wife, wail and weep over the

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<sup>110</sup> Հակոբ Մանանդյան, Երկեր, գիրք Բ, Երեւան, 1978, էջ 164.

<sup>111</sup> Հովհաննէս Դրասխանակերտցի, Հայոց պատմություն /աշխարհաբար թարգմանությունը եւ ծանոթագրությունները Գ.Բ. Թոսունյանի, Երեւան, 1996, էջ 49.

<sup>112</sup> Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երեւան, 1939, էջ 122.

deceased in pagan style, apply to sorcerers etc., all of which had tremendous civilizational significance in that period.”<sup>113</sup>

In summary, we may state that the legal norms of canonical constitutions, however different from modern constitutional norms in their legal essence and content, still possessed the same, if not larger significance and role in guaranteeing the regular development of public life in their historical period, given the prevailing social relations of the time. Emanating from the basic principles of the ideology and value systems of the time, they played a legal-regulatory role both in ecclesiastical and secular contexts. As generally characterized by Archbishop Tajat: “Having been deprived for centuries of our own living state, having remained for centuries taxpayers to invading hostile nations, having lost secular government, we were governed, as a nation with its own Church and Culture, by our **National, Ecclesiastical and Community laws**”<sup>114</sup> (our underscore, G. H.). Their entirety epitomized the essence of our constitutional culture for that historical period. In the absence of a nation-state or a “secular government” one of the essential features of Armenian constitutional culture was the existence, as a legal category, of “**national laws.**” This is something that may be difficult to grasp nowadays, but the historical reality was that “national laws” were enacted, enforced, amended and remained continually effective in legal regulation of Armenian social relations even in conditions of loss of statehood. They appeared as a “supra-state” phenomenon. One may make an indirect, metaphorical comparison with current international law, in which international treaty norms are not only part of the domestic legal system, but also supersede domestic legislation. Historically our “national laws,” not enacted by state authority, but by an all-national representative body, the national ecclesiastical council, to some extent and in relative terms, were expressions of direct democracy (especially characteristic in this respect is the testimony about the Council of Shahapivan). This feature is another important descriptor of constitutional culture.

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<sup>113</sup> Սովսեն Կաղանկատվացի, Պատմություն Աղվանաց աշխարհի, Երեւան, 1969, առաջաբան, էջ XI.

<sup>114</sup> Ազգային Սահմանադրութիւն Հայոց, Անթիլիաս, Լիբանան, 1968, էջ 7-8.

## 2.4. CHARACTERISTICS OF CONSTITUTIONAL CULTURE IN MEDIEVAL ARMENIAN LEGAL/POLITICAL DISCOURSE

The history of the Armenian nation is a record of not only achievements but, alas, also of great losses. The loss of a nation-state for several centuries has carved a particularly deep scar on the qualities of our organized existence. Nevertheless it is perhaps the hardship and supernatural efforts in preserving one's identity that have kept, as we saw, the constitution a continual living reality in the Armenian existence, and there were unique expressions of constitutional culture that remain of great significance today, asking to be expounded.<sup>115</sup> We shall attempt to continue our discourse on certain realities of the early Christian period of our history, in view of the need to reflect on their value in the context of current-day problems. But we deem it necessary to once again emphasize that **elements of constitutional culture, as part of a reasonably perceived system of values, a reality of social accord about co-existence, have existed since the dawn of human society and are also present in the "unwritten" constitutions of states.**

The history of our nation (not only of the Christian period) also offers ample proof to this. As early as in the 28-27th centuries B.C. Aratta, a country in the Armenian highland, was known to the Sumerians, the oldest nation in southern Mesopotamia, as "the country of sacred laws." According to most ancient records of Sumerian epics, the country of Aratta was governed by administrators who bore the title of "En" (high priest).<sup>116</sup> The high priest of Aratta decided most important issues of statecraft, like declaring a war, making peace etc., **in consultation with the Council of elders.**

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<sup>115</sup> As prof. Kh. Samuelliian rightfully mentions: "Armenian law has not reached as in a codified format like the Roman Corpus Juris, or the Hammurabi Code of the law of Babel, or the laws of other ancient nations, enacted by the state and neatly compiled. Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երեւան, 1939, էջ 3. Nevertheless "...Armenian law possesses its own place in the legal science." Ibid, p 4.

<sup>116</sup> Սովսիսյան Ա., «Հնագույն պետությունը Հայաստանում», Երեւան, 1992 , էջ 53.

The Sumerian epic contains vague references to the fact that these laws were written down in pictograms. It would be difficult today to surmise what exactly were those "sacred laws" in effect in Aratta, which amazed the neighbouring nations. But one may safely assume that we deal here with the most ancient expressions of customary law.

Khachik Samuelian, a renowned expert in the history of Armenian law, has written: "Not every custom may be indiscriminately acknowledged as a source of law, but only those which are applied and preserved in social existence as certain norms that are of binding effect".<sup>117</sup> Pre-historic men, having collectively struggled for survival over millennia, have developed rules of co-existence, where the main function of regulating relations between people was reserved to customs that were handed down from generation to generation. Following the emergence of rudimentary states certain customs were ratified and incorporated into legal norms, which, as a body of norms that were mandatory and had a special system for their preservation, have been since described in the history of law as customary law.

It would not be difficult to imagine the response in the neighbouring countries to the laws already in effect in Aratta, when the famous legal monument of the ancient world, the "Hammurabi Codex," took another millennium to develop.<sup>118</sup>

Some information about the legal system of Hayasa-Azzi, another state formation of Armenian ethnic groups, may be found in a bilateral treaty concluded in the 14th century B.C. between the Ruler of Hatti Suppiluliumas (1380-1340 B.C.) and the King of Hayasa Nuqqana (Hakana).<sup>119</sup> According to the treaty the King of Hayasa wedded the sister of the Hittite king, pledging to stay loyal to Suppiluliumas, offer him military assistance, extradite fugitive slaves to Hatti (presumably they were granted free status in Hayasa, other-

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<sup>117</sup> Սամուելյան Խ., «Հին հայ իրավունքի պատմություն», հ. 1, Երևան, 1939, էջ 26.

<sup>118</sup> See, in particular: Авакян Рубен, Авакян Рафаэль: Истоки правовой мысли протоармян Древней Месопотамии и Армянского нагорья // ЕФ МНЮИ - XXI ВЕК, N 23, март, 2005, с. 51-62.

<sup>119</sup> История Древнего Востока, т.2 М. 1988. с. 146.



wise it would not make sense to flee there). It is interesting that in this treaty Suppiluliumas addresses the "people of Hayasa," which, in the opinion of scholars, must refer to the "popular assembly." There is also a reference in Hayasa-Azzi to a "Council of elders." These two bodies resemble the *tulia* (a council comprising the king's inner circle and princes of the court)<sup>120</sup> and *pankus* (the popular assembly, which gradually transformed into a military council) of the neighbouring Hittites.

Unfortunately, little is known about the state and legal order of the kingdoms of Ararat and Van (Urartu). In the opinion of the Urartian scholar H. Karagyojian, the inscribed monuments with "malediction formulas," erected beside irrigation and other structures, as well as vineyards, represent fragments of the state's royal-priestly code of law. A full text of a Code *per se* has not been unearthed yet. There also exists an opinion that in the pantheon of the Araratian kingdom the deity responsible for law and order was Ardi, and goddess Bardzia determined the position and rank of mortals.

The absence, in the course of the subsequent centuries of our history, of a collection of legal norms in effect is not a sufficient reason to believe that Armenia had lacked the prerequisites for wide-ranging legal activities. Armenia did regulate its social relations through certain legal norms. Armenian bibliography indicates that Armenian kings did pass laws through this period. Khorenatsi, for example, ascribes to king Vagharshak (2nd century B.C.) the "approval and appointment" of Armenian nakharars (it would be more appropriate to write "re-approval" and "re-appointment," since many of the Houses of Armenian nakharars were known as early as in the Araratian kingdom). He also "endorsed laws in his royal house," "determined military ranks," "appointed umpires in the royal house, and umpires in the cities and towns."<sup>121</sup>

Nevertheless the norms of customary law played a far more compelling role in Armenia. As Kh. Samuelian writes: "...the traditional

<sup>120</sup> Войцех Замаровский "Тайны Хеттов", М. 1968. с. 254.

<sup>121</sup> Մովսես Խորենացի, «Հայոց պատմություն», գիրք 2, գլ. Է, Ը.

role of customary law in social relations was so strongly rooted, that no need was felt to reduce it to writing. The dearth of lawmaking activity by Armenian kings may perhaps be ascribed to such a proliferation of customary law."<sup>122</sup>

Notions encountered in our bibliography, such as "ancestral law," "ancestral order," "established boundaries" did not denote an ossified corpus of laws; they rather fed off and crystallized in the thick concentrate of ethical and aesthetic criteria of the nation, bearing the seal of its wisdom, coming from the depth of time. And if today we admire the "humane" provisions, unusual for their time, in the criminal codes of Mkhitar Gosh or Smbat Gundstable, the reason is that they contain numerous norms of Armenian customary law. The statement by Mkhitar Gosh "... We took from oral sources whatever seems not [to be taken] from canons." (Lawbook, Chapter 109) confirms the great role reserved to customary law in the Armenian reality.

Armenian ethnography contains vast riches of customary law material, which, unfortunately, is still waiting to be adequately explored from this point of view. **An analysis of our national epic would suffice to open a hidden treasury of customary law norms and perhaps even to answer the question why the "Daredevils of Sassoun," as opposed to heroic epics of other nations, are to such an extent free of bloodcurdling scenes of murders and wars, human cruelty and treachery, or rivers of blood.**

Within medieval Armenian context a special place was reserved in the system of customary law to **canonical (constitutional) custom**, on which S. Tigranean has made an interesting comment.<sup>123</sup> Whereas, as M. Aghaneants mentions: "...whether in prehistoric times or later every nation and society had their if not written, then at least oral laws, which defined relations between people."<sup>124</sup>

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<sup>122</sup> Սամուելյան Խ., «Հին հայ իրավունքի պատմություն», հ. 1, Երևան, 1939, էջեր 34-35.

<sup>123</sup> See: Սիրական Տիգրանեան, Կանոնական իրաւունքը եւ նրա աղբյուրները // Արարատ [Ararat] 35 (1902), թիվ 1, էջեր 18-24.

<sup>124</sup> Մ. Աղանեանց, Հայաստանեայց եկեղեցու կանոնագիրք // Լումայ, 2 (1897), էջ 282.

Nevertheless a particular legal system and constitutional elements therein have come into existence over a lengthy historical period and, as we have witnessed, have expressed themselves with particular consistency in the Armenian reality, and especially so following the adoption of Christianity as a state religion, in conditions of the need for defining uniform rules for ecclesiastical and secular life.<sup>125</sup> There are remarkable reflections on law, justice, inescapability of punishment, proportionality of sanction to the guilt, linkage between the notions of "reason" and "law" and their role in governing a state, assuring the stability of the society, in the writings of Mesrop Mashtots (362-440), Yeznik Koghbatsi (circa 380-450), Yeghishe (410-475), Movses Khorenatsi (circa 410-495), and other celebrated medieval Armenian thinkers. Moreover, by making a distinction between divine and human justice, it was stressed: "the law of kings punishes the culprit, whereas the Lord punishes both the culprit and the nation; he punishes the culprit as a lawmaker, and the nation as the possessor of original knowledge."<sup>126</sup> One of the characteristic features of this period is that **great importance was attached to the role of law and justice in establishing social solidarity, assuring sustainable development of the state.**<sup>127</sup>

For example, the proper purpose of the Aghven Council, as we have mentioned, was to overcome the "many conflicts" in the society through constitutional canons. To attain that general canons were defined that would determine the actions of the clergy and lay people, who would thereafter be **restricted** by those canons. The latter make no distinction of master and servant before the Lord ("On Sunday both master and servant shall go to the cathedral, pray and perform remembrance in the church"), stipulate clearly-defined approaches to

<sup>125</sup> "Canonical activity and canonical rulings, as sources of canonical law, played a salient role in the Armenian history in general and particularly in the history of Armenian law." Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երևան, 1939, էջ 43.

<sup>126</sup> Եղիշե, Սրբոյ հօրն մերոյ Եղիշէի Վարդապետի մատենագրութիւնք, Վենետիկ, 1859, էջ 336.

<sup>127</sup> See, in particular: Սիրումյան Կ., Հայ քաղաքական մտքի պատմությունից, Երևան, 2002, էջ 108.

moral co-existence ("No man shall marry a female relation who is thrice removed, neither shall he marry his sister in law"), clarify the scope of powers ("The nobles shall not, without the bishop, remove or appoint a priest, albeit in their own estate, and neither shall the bishop remove or appoint without them"). More than a dozen norms were established to regulate ecclesiastical and secular relations.

**To define canons and set limits to actions**, do it through a representative assembly,<sup>128</sup> to have the compromise thus attained ratified by all the nobles of Aghvank, to seal the "writing, for it to be more authentic," with the ring of the king, these are no mere attestations to the birth of the phenomenon of Constitution and the basic elements of constitutional culture in the history of Armenian and world law. We deal here with a legal and philosophical reality that suggests remarkable parallels, for example, between the arguments in favor and the procedure of adopting a Constitution in Aghvank in 488 and the adoption of the U.S. Constitution in 1787, the Polish and French Constitutions in 1791, and constitutions of other countries later on. The overall philosophy is the same; to establish basic rules of social existence that override other laws and canons, as well as to set a limit on the acts of the authorities, keeping them within the scope of constitutional canons, accomplishing it all in conditions of transparency and broad public consensus through a Constitutional Convention summoned by a head of state.

One may draw historical parallels between this Constitution and Aristotle's "Athenaion Politeia" (Constitution of the Athenians).<sup>129</sup> It is also known that Aristotle had at least 158 other "politeias" under his disposal, which described the social order of city-states in the ancient Greek world, as well as of other countries, from the state arrangements in Carthage to the "Constitution" of India. Of these the text of only the Athenian constitution has survived to our days. It was discovered in 1890 among the papyri brought to the British Museum

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<sup>128</sup> As stated by Kh. Samuelian, in the medieval Armenian reality in general "National Church Councils reserved themselves lawmaking functions." Op. cit., p 45.

<sup>129</sup> See: Արիստոտել, Աթենական հասարակարգը, Երեւան, 2000.

from Egypt, and published in 1891 by the British scholar F. Kenyon, to be fully interpreted only by the end of the last century. Most probably Aristotle could not have done himself the vast amount of the work involved. Perhaps the 158 constitutions were studied upon his instructions and under his immediate supervision, whereas the Athenian constitution may have been written or at least edited by him. In any case ancient authors have invariably ascribed this work to Aristotle.

Aristotle had undertaken this awesome work with a special purpose: to write, after analyzing the entire material, his fundamental opus entitled "Politica." Anyway, the significance of even the Athenian Constitution that has reached us is invaluable for us whether in terms of history, the legal science, history of law, philology or other disciplines.

The Athenian Constitution breaks down into two sections, the first forty chapters are devoted to the history of the constitution of Athens, a summary of which is made in chapter 41 (unfortunately, the opening parts of the work have not survived). In the second section Aristotle describes at great length the *politeia* or the constitution of Athens of his days. Aristotle mentions eleven iterations of the Athenian constitution, not counting the legendary Ionic social order, considering it to be the baseline. According to Aristotle that order was slightly amended by the no less legendary Theseus. This is followed by Draco's constitution, when the first compilation of law was made. The third is Solon's *politeia*, from which "democracy" originated. The fourth was the tyranny of Pisistratus, the fifth the constitution of Clisthenes, which was more democratic than that of Solon. The sixth, established in the wake of the Persian wars, was the rule of the Areopagus council. The seventh constitution was outlined by Aristides, which Epilates improved, overthrowing the tyranny of the Areopagus. The eighth was the rule of the four hundred, followed by the ninth, the restored democracy. The tenth was the tyranny of the Thirty and the two dozen. The eleventh was the democracy, finally established for good, under which everything was governed through a vote, whether in the Assembly or the

courts. This time the supreme authority was dissected and transferred to various courts, that is there was no monopoly over ultimate centralized power. Nevertheless supreme authority was vested in the **Popular Assembly**, which, in fact, was a continually open referendum. As Aristotle mentions, "...when democracy has the power to vote, it becomes the ruler of the order."<sup>130</sup>

In the Armenian reality the ancient Greek democratic-legal culture was developed, to a certain extent, in canonical constitutions, where it was **augmented by a specially assembled Constitutional Convention that embodied public consensus and had the "power to vote."**

By the end of the 18th century civilization linked the emergence of the fundamental law of the state, the Constitution, with the need to assure a country's sustainable and dynamic development on the basis of public accord. Essentially the same purpose was pursued in the Armenian reality of the early middle ages. **History bears witness to the fact that on sound legal grounds and in the existence of public accord the country has flourished and accomplished great successes, whereas in conditions of tyranny, "misunderstandings," and various conflicts loss and destruction has always been inexorable.**

Movses Khorenatsi starts the Armenian history with words of scorn addressed to "the senseless ways of our first kings and rulers" and goes on to pay tribute to those, "by reading the writings of which **we acquire knowledge of the world order and learn political order**"<sup>131</sup> (our underline, G. H.). There is no doubt that King Vachagan was one of these, and the lessons to be learnt from his wisdom have contemporary resonance.

The testimony of Mateos Urhayetsi is also of exceptional value; speaking about the circumstances of the period when the Aghven Canonic Constitution was adopted, he mentions: "it was in the times when the Seat of Saint Grigor was divided into four parts... it was in the times when sensible sheep succumbed to canine morals, the beasts acquired the nerve, became impetuous and started to bark in the face

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<sup>130</sup> Ibid, p 26.

<sup>131</sup> Սովետն Խորենացի, Հայոց պատմություն, Երևան, 1997, էջ 70.

of the patriarchs. ...but such tribulations and distress failed to come into the land of Aghvans, which is called the Inner Armenian Land."<sup>132</sup>

Casting a renewed glance at constitutional assemblies and canonical constitutions, one may generalize that in medieval Armenian reality we deal with concrete expressions of constitutional culture, the existence of **important elements of a constitution**, irrespective of the existence or loss of statehood.

The opinion of foreign scholars on social relations in mediaeval Armenia is noteworthy. As stated by I. Kohler: "Armenia's political failure is closely linked to its social and legal composition. Already in the ancient times, during the existence of kingdoms, as early as the Haikazian dynasty, which dates back to mythical times, there already existed a cluster of sovereign hereditary princes, the nakharars, who enjoyed complete independence within their domains. They had to pay taxes to the king and go to war together with him, but the latter lacked the *fief ultima ratio*, he had no lien on their fiefdoms against unpaid taxes."<sup>133</sup> It is obvious that extreme decentralization of the social order posed serious threats and the value of centripetal vectors under the circumstances increased exponentially. Together with the Armenian Apostolic Church, the independent role of national ecclesiastical councils and the consolidating impact of canonical constitutions were of great significance in this.

It is also conclusive that whenever in Armenian history the emphasis was put on regulating all social turnover by the rules acquired through compromise, there was apparent progress attained in all walks of life. However embryonic, constitutional culture had played a pivotal role in our existence and development since the dawn of human history. Conversely, discord or attempts to overpower have invariably led to failure. In his lament over the collapse of the Arshakunyats kingdom the Father of Armenian Scripture quotes the following reasons: "peace was disrupted, disorderliness reigned, orthodoxy was undermined, ignorant praise for vice became dominant."<sup>134</sup> Khorenatsi's generalizations are of

<sup>132</sup> Սատրեոս Ուռհայեցի, Ժամանակագրություն, Երեւան, 1991, էջ 247.

<sup>133</sup> Պոլեր [Ի. Կոիլեր], Իրաւունք Հայոց, Վիեննա, 1890, էջ 3.

exceptional importance and hold serious lessons, since, as R. Miroumian rightfully mentions: "As opposed to Metrodorus of Scepsis, who modeled the future of Armenians on the reading of their present, Khorenatsi foresaw the future of the Armenian nation through the validation of its past, since he believed the past to contain the rationale for the project of restoring the nation's statehood."<sup>135</sup>

Reflecting once again on the adoption of canonical constitutions by national ecclesiastical councils, we consider it necessary to mention that, after embracing Christianity as a state religion, when ecclesiastical and secular rules were mostly enacted together, one of the most characteristic and remarkable circumstances was that the **factor of public consensus was put in the foundation of legal regulation**, this being one of the axial expressions of constitutional culture. Relations within society were regulated through accord acquired on a popular level, rather than through coercion and unilateral dictate. The key for understanding this is handed to us by Movses Khorenatsi, in his reference to the Ashtishat council ("Summoning a Council of bishops in concert with the laity, by canonical constitution [Great Nerses,] established mercy, extirpating the root of inhumanity").<sup>136</sup> We have already mentioned that the council prohibited wedlock between close relatives, it condemned treachery, intrigues, greed, gluttony, usurpation, homosexuality, gossip, fervent alcoholism, lying, prostitution, bloody murder, as well as bound the nakharars to treat their workers with mercy, and the servants to obey their masters. It was decided to build hospitals for the feeble, orphanages and asylums for orphans and widows, hotels for aliens and guests, and levies and taxes were imposed to support all these. To spread enlightenment in the county it was decided to establish schools in Armenia with instruction in Greek and Assyrian languages (the purpose was to offer quality education domestically, to prevent the drain of young people). All of

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<sup>134</sup> Սովսեն Խորենացի, Հայոց պատմություն, Ե դար, Երեւան, 1997, էջ 275.

<sup>135</sup> Սիրումյան Ռ.Ա., Պատմափիլիսոփայական հայեցակարգերը XIX դարի հայ փիլիսոփայության մեջ. Սեթողաբանական վերլուծություն, Երեւան, 2003, էջ 42.

<sup>136</sup> Սովսեն Խորենացի, Հայոց պատմություն, Ե դար, Երեւան, 1997, էջեր 224-225.



these measures in combination created a completely new environment and incentives for the subsequent development of constitutional culture.

There are other substantial testimonies in medieval Armenian history to preventing ignorant praise for vice, with an emphasis on following the rules defined through public accord. The "Book of Canons" by Armenian Catholicos Hovhannes Odznetsi (Hohvan Imastaser (Philosopher) Odznetsi), which was endorsed at the 6th Council of Dvin in 719, is especially remarkable in this sense. As rightfully stated by R. Avagian, one may safely claim that "Hohvan Philosopher Odznetsi was among the first in the world after Byzantine emperor Flavius Justinian (482-565) and the first in Armenia to systematize the Armenian *Corpus Juris Canonici*, a compilation of laws which was promulgated by the head of hierocracy, the Catholicos, and contained the canons adopted and ratified by Armenian ecclesiastical councils."<sup>137</sup> The Armenian Book of Canons is an exceptional phenomenon first and foremost because it consolidated canons of constitutional nature and significance and became a distinctive crystallization of Armenian constitutional mind of the 4th-8th centuries. The book of canons also affirmed that canonical constitutions contained viable norms anchored to distinct value bases, which, in their implementation as basic rules of social behaviour, had played a great role in ensuring an organized course of the nation's collective existence. Through collecting and harmonizing already existing rules, thus emphasizing their importance for the time and the circumstances in question, the book of canons, the first comprehensive legal document in our history, elevated Armenian constitutional culture and the role of overriding legal rules in social life, in ecclesiastical and secular milieus to a qualitatively new level.<sup>138</sup>

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<sup>137</sup> Ավագյան Ռ. Հ., Հայ իրավական մտքի գաղտնարան, հ. 1, Երևան, 2001, էջ 144.

<sup>138</sup> Catholicos Hovhan Imastaser Odznetsi not only developed the 32 canons of great legal value, but also consolidated 24 groups of canons into a compilation, the "Armenian Book of Canons," which was approved by the Fifth Council of Dvin in 719. In the 10th century it was augmented by 226 new groups of canons, and in the middle of the 17th century the "Armenian Book of Canons" already contained 98 groups of canons.

One of the principal legal-philosophical features of the book of canons is that it emphasizes qualities of human essence. An individual with his dignity and his social role is viewed as a high value, and the main purpose of legal regulation becomes, as stated by V. Hakobian, "to prevent possible breaches of the rules of human cohabitation through guidance, moral censure or penance."<sup>139</sup> There is no doubt that this legal mindset constitutes proof of high civilizational qualities and considerable values underlying the legal culture. V. Vardanian is quite right in stressing: "The powerful intellect and wisdom of Odznetsi have tempered Armenian legislation, systematized procedural law, the legal norms and canonical definitions that regulate the inner life of the people."<sup>140</sup>

The history of the Armenian nation, however full of violence and destruction brought upon it, stayed immune to distortions of principal qualities of the nation's identity. It has always predominantly been shaped by humaneness, profound philosophical perception of phenomena, faithfulness to spiritual values and lawfulness. The understanding of the fact that "the door through which souls are lost is much wider than the one for bodies: when one deviates from the spotless and straight faith of the Father, the Son and the Holy Spirit, professed by the apostles"<sup>141</sup>, has always represented an unwavering value in the Armenian reality. A millennium ago Grigor Narekatsi in his Book of Lamentations crystallized best of all the spiritual dimensions of Armenian identity, when "disparaging everybody's most varied passions," he emphasized that sins committed by humans, however diverse and many, constitute their misfortune, not their crime. Putting in the lips of the Armenian nation

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<sup>139</sup> Տե՛ն Կանոնագիրք Հայոց / աշխատասիրությանը՝ Վազգեն Հակոբյանի, Երեւան, 1964թ., հատոր Ա, էջ XII.

<sup>140</sup> Վարդանյան Վ., Հայոց եկեղեցու պետաիրավական և զաղափարական շահերի պաշտպանությունը Հովհաննես Օձնեցու կողմից // Սուրբ Հովհաննես Օձնեցի Հայրապետը և իր ժամանակը (2003 թ. հունիսի 3-5-ի գիտաժողովի կյուբերը): Ս. Էջմիածին, 2004, էջեր 25-26

<sup>141</sup> Թովմա Արծրունի և Անանուն, Պատմություն Արծրունյաց տան, Երեւան, 1999, էջ 123.

"the loudest prayer to the Lord," Narekatsi was begging God for the way to turn man around and make him live like a man. He considered it possible only in conditions of solidarity, justice, adherence to laws and a society "doctored by the spirit," where justice can not "wear out and disappear" and "the pan of the scale with the rights can not get substantially lighter," causing the "pan with the wrongdoings" to get heavier.

According to historiography "The canonical statutes"<sup>142</sup> by David Alavkavordi was written in 1130, it contains a preface and 97 articles. It is considered to be the first attempt at the creation of an independent Armenian Code<sup>143</sup> based on customary law. It created serious prerequisites for legal struggle against aberrant phenomena that grew unprecedentedly deep in the society. For Armenia it was a period, when, in the words of Movses Kaghankatvatsi, "three vicious warriors: famine, the sword and death, were at a ruthless rampage." Strict laws and clear order was required to assure sane morals and to establish lawful behaviour.

In the Armenian reality it was also deeply understood that good laws and procedures were not enough, the people have acknowledged the need to abide by those laws, and this realization was not imposed upon, but rather embraced by them. It should have been anchored to stable values, pleasing to the Lord and dictated by human reason. As beautifully formulated by Patriarch Poghos Adrianapolsetsi, "Man's behaviour is guided internally by conscience and externally by the law. Because, if conscience, succumbing to aberrant will, rises against straight reason, the law scorns and restrains it, bringing obeisance. Conscience is the internal judge appointed by nature, and the law is the external adjudicator established by

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<sup>142</sup> See: Ավագյան Ռ. Հ., Հայ իրավական մտքի գանձարան (մ.թ.ա. IX դ.-մ.թ. XIX դ.), Երեւան, 2001, էջ 182.

<sup>143</sup> See: Ղազինյան Գ.Ս., Թրեական դատավարության պատմական եւ արդի հիմնախնդիրները Հայաստանում, Երեւան, 2001, էջ 21.

God,<sup>144</sup> and they both keep the plates of the scale in balance."<sup>145</sup>

It is through ascribing special importance to this circumstance, that Nerses Shnorhali (Nerses the Fourth Klayetsi) in the 12th century addressed his words not only to God, but also, through his "Encyclical" (1166), addressed his commandments to the ministry, the "princes of the world" and the people. This Encyclical was his first, an epitome of his prose writing, and it has exceptional significance in terms of conceptualization of legal and constitutional culture. This document is unique in its conceptual-programmatic scope, value system generalization, and harmony between norm-objectives, norm-principles and "behavioral" norms. Establishing canons and guidance addressed to all strata of the society ("To the clergy," "To the leaders of holy orders of monks," "To the leaders of the Church," "To the rank of the military," "To farmers," "To women," etc) that were based on high spiritual and moral grounds, Shnorhali was certain that one might expect to succeed only through abiding by those requirements, overcoming the perils of "evil and polyarchy" and proceeding through the "orbit of justice." He advised the lay people "not to perform evil deeds, not to deprive, not to use wicked agents, not to judge unfairly, to protect the widows and the poor, not to cut the pay of the worker, to treat everyone with an even eye, not to abandon the spiritual for the sake of the bodily."<sup>146</sup> One may, without exaggeration, acknowledge that the Encyclical contains numerous norms on human rights and the obligations of the authorities. "To the princes of the world" he, in par-

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<sup>144</sup> Of special interest is also the phrase: "and the law, as an external adjudicator approved by the Lord." In fact at the end of the 18th, beginning of the 19th centuries Patriarch Poghos of Adrianople refers to the "natural law," stressing that only through abiding by the law can man "be in the likeness of God, a man of God." The basis of law are lasting divine values, "whoever strays from the direct mind and the instruction of the law, goes against God and his own nature." Պողոս Պատրիարք Ադրիանուպոլսեցի. Խրատի թաւգարան, Ա. Էջմիածին, 2002, էջ 163-164.

<sup>145</sup> Ibid, p 163.

<sup>146</sup> Սաղաքիա Արքեպիսկոպոս Օրմանյան, «Ազգապատում», հատոր Ա, Ա. Էջմիածին, 2001, էջեր 1647-1649.

ticular, advised: "not to treat your subjects unlawfully by levying heavy and cumbersome taxes, but **judge everyone by law, commensurate to his capacity**" (our underscore, G. H.), "Do not deprive any body and do not further divest the poor and the disenfranchised," "Do not appoint wicked and lawless administrators and governors over your domains," "Do not judge anyone lawlessly, but adjudicate rightly," "Do not ignore the rights of widows and the poor," etc.<sup>147</sup> Shnorhali's approaches to judging only by the law, the retroactive effect of law, the degree of responsibility, proportionality of sentence and other fundamental legal issues are remarkable ("never rule prompted by anger or unfair law, or punish someone or sentence to death, since the New law does not allow for this, whereas the Old law, although it allowed to rule for punishment or death sentence, but not unduly, only in accordance with the gravity of the crime").<sup>148</sup> Moreover, the substrate of all commandments is the human being, with the acknowledgment of the need to meaningfully organize his rational existence and spiritual pureness.

It invariably follows from the testimony quoted here, that public accord in Armenia's medieval reality resulted not only in the adoption of laws and canons, but that the need for the latter, determined by a variety of factors, was ascribed particular importance, and that such public demand and the necessary understanding were put in the basis of defining these canons.<sup>149</sup> One of the basic reasons for the creation of Mkhitar Gosh's "Lawbook" (1184) was that "evil has generally grown stronger" and it has extinguished "the natural law inside us" or "the knowledge that we had from nature." The same evil, which contributed

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<sup>147</sup> Ա. Ներսես Շնորհալի, Թուղթ ընդհանրական, «Գանձասար» հանդես, 1991, էջեր 103-123.

<sup>148</sup> See, in particular, *ibid*, p 112.

<sup>149</sup> Speaking about the role of canonical law and its significance as a source of law, S. Hovhannisian rightfully stresses: "Foreign and national groups of canons provide a possibility to outline important institutions of Armenian matrimonial, criminal, civil law, acquire an understanding of how the Armenian Church was implementing the "great function of adjudication" during the existence of the kingdom, as well as throughout the period of deprivation of statehood." See: Հայ ժողովրդի պատմություն, 8 հատորով: Երևան, 1967-1984, հ. 2, էջ 482.

to deficiencies of the soul, eradicated perfection and compassion, placed hatred in love's stead. The Lawbook should help restore the feeling for natural law, perfection, and replace mutual hatred with love and compassion."<sup>150</sup> Together with that it requires a judge to "be of age, skilled, well taught, have a touch of genius, be knowledgeable, well versed in laws, be kind, virtuous, free of jealousy, attentive, alert, impartial, strict, incorruptible, and patient."<sup>151</sup>

Here is how Mkhitar Gosh explains the need to write the Lawbook in its preface, chapter 2:

**Firstly** we, Armenians, have been reproached many times both by infidels and Christians for not having a penal code in writing;

**Secondly**, evil among people, evil in general has developed and "evil has extinguished the knowledge that we had from nature, and sin has made the perfect creation imperfect, and hatred has prevented love and compassion." (Lawbook, p. 10).

**Thirdly**, because of lenience people do not train in law, are not aware of the laws, therefore their decisions are not right or deviate from the law, "for that reason, we wished as if to wake them up from sleep by this lawbook" (ibidem).

**Fourthly**, Mosaic Law, the word of the prophets and the Gospel, having been once proclaimed, have remained static and ossified thereafter, whereas human circumstances and behaviour have changed with time, depending on the nation and country in question. Therefore a code is needed that will capture these changes.

**Fifthly**, the Holy Spirit affected men in the past and helped them to judge properly, the Spirit was the law written in people's hearts, therefore there was no need for written laws. The Spirit no longer has this influence; people have "strayed" away from brotherly Christian love and righteousness, "which is the reason why we had to write" the Lawbook.

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<sup>150</sup> Մխիթար Գոշ, Գիրք Դատաստանի / աշխատասիրության Խոսքով Թորոսյանի, Երևան, 1975, էջ ԺԴ.

<sup>151</sup> Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւաբանական հետազոտութիւնը հանդերձ ծանօթութեամբք Վահան Ծ. Վարդապետի Բատամբանց, Վաղարշապատ, 1880, էջ 130.

**Sixthly**, judicial cases are made decisive also through the oath, but evil among men has grown and, although God has prohibited taking oaths, people take oaths whether necessary or not, often in perjury. The Lawbook was written to restore disrupted legal order.

**Seventhly**, The Lawbook is written for Armenians not to go to foreign courts.

**Eighthly**, one of the most important reasons, "we see that some bishops, vardapets, priests, distinguished laics and princes pervert justice by partiality, bribes and ignorance. This is why we decided to write down briefly this lawbook, so that it reproaches and corrects them" (Lawbook, p. 12). That is the Lawbook was called upon to restore lawfulness and order, for justice to be impartial, incorruptible and fair.

The remaining reasons are also noteworthy, but the above do inconspicuously indicate how profound was the need for the Lawbook in that period, the 12th century, in order to restore the Armenian statehood and re-establish law and order in social life.

It is remarkable that the legal-political conceptual outlook of Mkhitar Gosh was anchored to the theory of natural (divine) law, the main principles of which are equality of men (before God), freedom, the right to life, inviolability of property, etc. Therefore, **positive law should emanate from the principles of natural law, which are constant and unchangeable.**<sup>152</sup> Positive law is created by men, and it bears the imprint of time and particular social conditions.<sup>153</sup> Such a profound understanding of the conceptual differences between the notions of the Right and the Law is lacking even in our times. Another exceptionally important generalization is that, according to Mkhitar Gosh, every nation and country should have its own legislation and legal norms, to choose adjudication according to "the time, the nation and the land."<sup>154</sup>

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<sup>152</sup> According to Mkhitar Gosh the law "...is known to every man by instinct and does not require written constitution." Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւաբանական հետազոտութիւնք հանդերձ ծանօթութեամբ ք Վահան Տ. Վարդապետի Բաստամեանց, Վաղարշապատ, 1880, էջ 94.

<sup>153</sup> See: Սիրումյան Կ., Հայ քաղաքական մտքի պատմությունից, Երևան, 2002, էջեր 174-176.

<sup>154</sup> Մխիթար Գոշ, (last reference), նախադրություն գրոց դատաստանի, էջ 3.

According to V. Bastamyants, Mkhitar Gosh "knows well that the Lawbook is created for the people, that it should contain the nation's ideology and approaches to legal relations, that it should develop and improve along with the nation's legal and intellectual progression."<sup>155</sup>

Mkhitar Gosh's Lawbook became the basis for the creation of the law book of Polish Armenians in 1518, when the Polish government granted legal autonomy to Armenians living in Poland.<sup>156</sup>

Important qualities of the Armenian legal mind of the 12th century also expressed themselves in the writings of Nerses Lambronatsi (1153-1198). **Considering everything to be relative** in the natural world, likewise in socio-political and ethical domains, Lambronatsi at the same time maintained that men are vested from above with freedom of choice (will), and are therefore fully responsible for all their actions, deeds and the consequences thereof. He ascribed great importance to the role of upbringing in overcoming and eradicating unlawfulness and injustice in the society. He also believed that ignoring and camouflaging deficiencies in the society lead to deepening the existing faults and vices.

The Lawbook (1265) of Smbat Gundstable was also called upon to fight against arbitrariness and violations of law. It was of great practical significance in the 13-14th centuries for the strengthening of and empowering the Cilician Armenian statehood.<sup>157</sup> Moreover, scholars of the period rightfully state that while Mkhitar Gosh's legal mind and the system he had created not only lean on the theory of natural law, but are also permeated by it, Smbat Gundstable's

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<sup>155</sup> Մխիթար Գոշ, Դատաստանագիրք Հայոց /Իրաւաբանական հետազոտութիւնը հանդերձ ծանօթութեամբք Վահան ծ. Վարդապետի Բատումեանց, Վաղարշապատ, 1880, էջ 93.

<sup>156</sup> The Latin translation of this Code was presented to the Polish King Sigismund the First and, with some amendments, was approved by him in 1519. See the records of the Armenian court in Kamenets-Podolsk, Կամենեց-Պոդոլսկ քաղաքի հայկական դատարանի արձանագրությունները (XVI դ.). աշխատասիրությամբ Վ. Գրիգորյանի, Երեւան, 1963, էջեր 54-55.

<sup>157</sup> See: Смбат Спарпет: Судебник /աշխատասիրությամբ Ա.Գ. Պալստյանի, Երեւան, 1958, էջ 195.



system, though departing from the principles of natural law, falls fully within the domain of positive law.<sup>158</sup>

The Armenian legal mind of the 14th century, embodied by Grigor Tatevatsi (1346-1409), ascribed particular importance to relations between the individual and the society, proposing a conceptual approach, by which the most important questions of national significance (reforming the country, war and peace etc.) should be addressed by **collective reason and resolved by collective will**. Moreover, the subject of law is not the autocratic monarch, but the people, their collective will. According to this concept the monarch is deprived of unilateral authority or the power to resolve issues of national dimension on his own. Some authors rightfully claim that we deal here with qualities of constitutional monarchy.<sup>159</sup> Tatevatsi too makes a distinction between "divine law" and positive law enshrined in various legislative instruments. Divine laws are unchanging and absolute, and all people are equal before them. **The norms of positive law should be anchored to and emanate from divine laws**, truthfully reflecting socio-political realities.<sup>160</sup> Tatevatsi's legal and philosophical views contain stipulations, which, under modern criteria, clearly qualify as possessing the significance of constitutional principles.

For centuries on end one of the important qualities of our identity and one of the essential features of the Armenian legal mind was that the main vehicles for fighting "unlawfulness" and for "living in love" were the "laws pleasing for God and useful in calling the church to life," rules that conform to "the rational nature of man,"<sup>161</sup> and the firm social determination and willingness to hold on to them was deemed

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<sup>158</sup> See, in particular: Միրումյան Կ., նշվ. աշխ., էջ 240.

<sup>159</sup> Ibid, p 215.

<sup>160</sup> See: Գրիգոր Տաթևացի, Գիրք հարցման, Կ. Պոլիս, 1729, էջ 12.

<sup>161</sup> Scholars have paid attention to the fact that the impact of spiritual values on medieval Armenian perception of law was very significant. For example, Kh. Samuelian states "In the opinion of Mkhitar Gosh law is an ethical category: the notions of law and morality are a uniform inseparable whole." Սամուելյան Խ., Հին հայ իրավունքի պատմություն, հ. 1, Երեւան, 1939, էջ 87.

important.<sup>162</sup> This legal philosophy underlies the decisions of the Councils of Dvin (6th, 7th c.c.), Partav (8th century), Sis (1243), Dzagavan (1268), and Jerusalem (1651).

In the absence of a nation-state for many centuries, the continual impact of exogenous factors has prevented this rich legacy of legal thinking to epitomize, through a Constitutional Convention, into the country's unified holistic Constitution. The entire historical period that had passed since was characterized by incomplete, from the perspective of current constitutional culture, and partial solutions. It was nevertheless impossible to curtail the insights of the legal mind's eye. In the Indian city of Madras in 1773 father and son Shahamirians embarked upon, and in 1788 completed an exceptional monument, a Constitution of a sovereign Armenia they had dreamt of, comprising 521 articles, which they called the "The Entrapment of Vanity." This work is a unique achievement in the history of the social-legal mind; it proposes ideas, arranged into a neat system, which, apart from being the result of profound theoretical conceptualizations, also represents a pivotal value in international constitutional developments. The title itself, in the assessment of the renowned expert in constitutional law professor Dominique Rousseau, represents a whole legal theory. This constitution was called upon to guarantee "the possibility to preserve freedom" and to create an "inescapable entrapment for all evil people, so that they are forced to succumb to the yoke of beneficial activity."<sup>163</sup> It was called upon to play an axial role in governing through fair acts, natural law and justice.<sup>164</sup>

We consider it necessary to particularly stress the important fact that Armenian constitutional culture in the 18th century adhered to the principle of the rule of law, the understanding of the supremacy of natural laws, the separation of powers, assuring proper equilibrium of

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<sup>162</sup> Incidentally, for Mkhitar Gosh's Law Book, likewise for many subsequent legal monuments (including the Astrakhan Armenian Code, created in the 1760s and containing 1135 articles) the principal source of law was the customary law of the Armenian people. See: Դատաստանագիրք Ասորիսանի Հայոց / աշխատասիրությանը Ֆ.Գ. Պողոսյանի, Երևան, 1967, էջ ԾԳ.

<sup>163</sup> Ռրոզայթ փառաց, Երևան, 2002, էջ 15.

<sup>164</sup> Ibid, p16.

checks and balances. "The Entrapment of Vanity" is not a reverberation of the impact of European legal mind; it generalized, in its own way and utilizing cognitive scholarly methodology, the productive outputs by the councils of Aghven, Ashtishat, Shahapivan, Dvin, Partav and others, by Hovhannes Odznetzi, Hovhannes Sarkavag, Davit Alavkavordi,<sup>165</sup> Mkhitar Gosh, Nerses Shnorali, Nerses Lambronatsi, Smbat Gundstable and many other devotees of Armenian social-legal mind. Article 389 of the Shahamirian's Constitution contains a great generalization, stating; "Every provision of law contains numerous details that may be explained by wise men. All explanations of law, provided they pursue a useful objective and are pleasing to the will of the House of Armenians,<sup>166</sup> shall deserve honor, but not those explanations, which go against man's nature."<sup>167</sup> This not only defines a classical rule for the interpretation of law, but also stresses that the latter shall be based on human nature. Let us emphasize that natural human rights and freedoms constitute the baseline for current constitutional law as well.

Reflecting on the power of the people, the rule of law, representative democracy, separation and functional independence of powers, social protection, even on constitutional justice and many other fundamental constitutional principles, a holistic and orderly system of norms of constitutional law was thus presented for the first time in Armenian reality, which not only generalized the advancements in the mainstream legal mind, but also laid the foundations for the new mentality of statecraft. Only "the fruits of the tree of law and justice" may become the basis for upright actions by "fair governments," seeking individual and collective happiness in justice and lawfulness, subscribing to the imperative of "living our lives in law and justice," this is

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<sup>165</sup> Here is what Manouk Abeghian states about the Canonical Regulations of Manouk, son of Alavk: "...this work was a novelty in the history of old Armenian literature, which gave birth to a new stream of thinking." See: Հայոց ինն գրականության պատմություն // Արեւիկա Մ., Երկեր, հ. Գ, Երևան, 1970, էջ 85.

<sup>166</sup> The House of Armenians was a representative lawmaking body, therefore the interpretation of the law could not have contradicted the legal content set in its foundation by the legislature.

<sup>167</sup> *Ibid*, p 192.

the biggest message of "The Entrapment of Vanity." "In order to live our lives as rational and dignified men [...] we have to choose behaviour, order and law ourselves,"<sup>168</sup> "not be lead by disorderliness and unlawfulness," be able "to come together to listen about the law, to compose laws."<sup>169</sup> How to the point, how in harmony with the progressive legal mind of even the 21st century! The only way for the establishment of a rule of law state is, before "composing laws," to hearken to the advice "listen about the law," and follow it profoundly. The conclusion is that "let there be or appear no one among us or in our land, who, being a wayward and arbitrary man in his deeds, would remain unpunished under law, and let our laws be our king and our Lord, and we shall not accept anyone above our laws, but for our Lord the Maker."<sup>170</sup>

More than topical is another generalization from the preamble to the "The Entrapment of Vanity:" "how much more **kindness** do we need to **control our lives with laws and freedom**, to become worthy of the Lord's praise"<sup>171</sup> (our underscore, G. H.). And these laws have to be expounded "in harmony with man's nature, to the liking of our natural spirit."<sup>172</sup>

Extremely noteworthy is the reflection by the Shahamirians on the Roman experience: "So long as, emboldened and strengthened with love and faithfulness, they did not depart an inch from their laws, they developed from a negligible baseline, multiplied and became happy thanks to their laws," but when the Roman senators allowed for the Cesar's throne to "become hereditary," "a great darkness penetrated their light, evil - their kindness, schism - their unity, ostracism - their equity, there came ups and downs, superiors and inferiors. [...]" This paved the way for impiousness to enter them."<sup>173</sup>

Being a Constitution of a state with a parliamentary system of governance, "The Entrapment of Vanity" provides a clear procedure for election to the House of Armenians<sup>174</sup> (legislature), with a three-year

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<sup>168</sup> Ibid, p 20.

<sup>169</sup> Ibid, p 35.

<sup>170</sup> Ibid, p 48.

<sup>171</sup> Ibid, p 38.

<sup>172</sup> Ibid, p 71.

<sup>173</sup> Ibid, p 47.

<sup>174</sup> Ibid, p 180.

term, explicit powers, procedures for enacting laws and making appointments, etc. The legislature shall form the executive and judiciary branches of government, in a procedure stipulated by law. Every public body operates within the scope of competence clearly prescribed by law: "a Patriarch, a nakharar, a bishop, landowners, priests, princes, no one shall issue orders irrelevant to their office, or exceeding the powers granted to them according to their class by the Church or the House of Armenians" (article 364). A particular principle setting the hierarchy of legal acts is defined: "Every instrument, whether on trade, forging alliance, or any other act, shall not be valid, whoever it may be signed by, if it contradicts the law of the House of Armenians or **goes against man's rational nature**"<sup>175</sup> (our underscore, G. H.). By ascribing priority to "man's rational nature" a clear and full formulation is offered for the constitutional principle of **equality in rights** (article 3): "every human being, whether Armenian or alien, born in Armenia, or emigrated to Armenia from foreign countries, whether male or female, shall live equal and free in all their endeavors, no one shall have the right to rule over anyone else, and the work of their hands shall be paid for according to every labor, under Armenian law."<sup>176</sup> Even the rights of convicts did not escape the Shahamirians' focus: "the prison for offenders shall be a clean structure, so as not to harm the health of the inmates"<sup>177</sup> (article 148). There are certain constitutional regulation norms to secure property rights, afford social protection, at the same time the issue of national-state priorities is ascribed particular importance. Article 127, in particular, stipulates: "The House of Armenians shall render assistance to all specialists, especially in philosophy, astronomy, medicine, music, and rhetoric."<sup>178</sup>

Putting above anything else the "equalizing" and restraining role of statute, basing it on the law and values "in harmony with man's nature," concepts of **natural law (divine law) and public alliance**, the Shahamirians laid out their constitutional rules for "governing the Armenian land," which, apart from representing an exceptional value of

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<sup>175</sup> Ibid, p 133.

<sup>176</sup> Ibid, p 75.

<sup>177</sup> Ibid, p 138.

<sup>178</sup> Ibid, p 134.

constitutional culture, are of lasting encyclopedic significance in bridging the legal mind of the past with the present, taking instructive lessons from the past in securely traversing the road toward the establishment of an independent nation-state.

In the second half of the 18th century the "Astrakhan Armenian Code," containing 1135 articles, was of exceptional importance in the social life of the Russian Armenians. It was created by Yeghiazar Grigorian, Grigor Kanpanian and Sargis, son of Hovhannes between 1747 and 1765.<sup>179</sup> In view of the particular historical situation, the autonomy granted to the Armenians by Empress Catherine the Second, the founding of the "Common Armenian-Asian Court" in 1765 and, in 1800, of the Armenian Magistrate, as well as the practical role played in that period by the "Code," one may conclude that:

1. this Code was of great legal and political significance;
2. it was the expression of continual development of Armenian legal mind;
3. rules of permissible behaviour were established by respecting and accounting for the national values, tradition and customs, and sanctions were prescribed against violation thereof;
4. the legal regulation pertained to an ethnic community that had lost its statehood;
5. it was constructed over lasting principles of Christian ideology and perception of law, and was humanistic and progressive in its legal-regulatory role and significance.

For Armenians living in the Russian and Ottoman empires the development of national "Statutes" acquired vital importance. In this respect in the 1850-60s there was a remarkable constitutional movement of the Armenians in the Ottoman empire to develop versions of a "National Constitution." The National Constitution was viewed by Armenians as a safeguard for the preservation of their collective existence, their identity. In legal terms the National Constitution of 1863 (**Nizâmname-i Millet-i Ermeniyân**), approved and enacted by the sultan, satisfied the definition of the notion of "Constitution," which, as characterized by

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<sup>179</sup> See: Դատաստանագիրք Աստրախանի Հայոց, Երևան, 1967, 359 էջ: Ավագյան Ռ. Հ., Դատաստանագիրք Աստրախանի Հայոց // Իրավական գիտահանդես «Վասն արդարութեան», 2003, N38, էջեր 8-11.

Grigor Otian, was called upon to offer the possibility "for a nation or any individual in a state to enjoy and exercise their natural rights."<sup>180</sup> In a conclusive assessment by Nerses Melik-Tangian the National Constitution had the advantage of having developed common principles, and the operation of political and religious councils was subjected, under the supervision of the Patriarch, to the oversight of the "Assembly of Delegates." But the Constitution offered the skeleton, rather than the spirit, for the governance of ecclesiastical-social relations, deprived of all flesh and blood: "under this bombastic word you will not find procedures and laws for the formation of courts or for litigation, no sanctioning and sentencing guidelines, no rules to address the administrative, economic, ministerial, parochial, landowning issues of the church, everything remained as it was, with a guise of constitutionalism pulled over it. That's your Constitution."<sup>181</sup>

There were varying opinions about the National Constitution, it was compared to a cart with square wheels, its provisions were qualified as vague, extremely abstract, even the title became a matter of controversy: "Constitution" or "Statute?" Nevertheless the National Constitution, as mentioned by Nikol Aghbalian, "was recognized as the principal law of the Armenian community" (Collected Works, Vol. 4, page 400). It was the product and an expression of progressive, democratic development. The definition of the principles for the interaction of the state and an individual (a nation), clarification of the constitutional status and competences of the Church, the establishment and clarification of the powers of a National Ecclesiastical Assembly, Political Assembly, Educational Council, Economic Council, Judicial Council, Monastic Council, Financial Trustees, Inheritance Trustees, Hospital Trustees, District Councils, General National Assembly, as well as the norms pertaining to the procedure for amending the Constitution indicate that we deal here with comprehensive, serious and progressive expressions of constitutional culture. In this respect, as opposed to the "Entrapment of Vanity," the

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<sup>180</sup> Отян Г. На смертном пути. Зограб и Вадкес // Газета "Наше время".-Баку, 1919, 27 апреля.

<sup>181</sup> See: Հայոց եկեղեցական իրավունքը, Ներսես Մելիք-Ռանգյան, գիրք Ա, Հուլի, 1903, էջ 735.

constitutional norms did not remain as expressions of personal wishful thinking, they acquired real implementation significance.

Throughout the periods presented above the history of our nation, as we have mentioned, represented a succession of losses, persecution by aliens, survival, through miracle, of a collective entity deprived of a nation-state. The more than a seven-hundred-year-long loss of statehood has had a deep impact on the social consciousness of the people. Many civic properties have been distorted involuntarily. Developing and implementing canonical constitutional norms on a national level, the law of the state was nevertheless perceived as an alien imposition and an impediment for full-fledged expression of identity.

In historical retrospect we have to acknowledge that our national values were either being reduced to a bibliography on parchment, or were predominantly generated and reproduced in alien harbors, naturally without facilitation or nurturing by the state.

The reality is that although we, as the Armenian ethnos, as a nation, re-established our independence on the threshold of the third millennium, we still are not the bearers of civic properties that are necessary for a full-blown citizen of an independent state. These properties are not easy to acquire. Apart from the daunting task of shaking off the centuries-old dust of lost statehood, re-thinking the mentality and the weltanschauung, there is serious programmatic effort required to forge a true citizen of the state.

Without dwelling on the analysis of what makes up such a citizen, we would nevertheless like to emphasize, within the scope of the material discussed, the special importance of the legal culture of a state. As we saw, constitutionalism is in itself a cultural phenomenon.<sup>182</sup> It is also undeniable that legal culture constitutes an inseparable component of the national-public cultural landscape of a state. Historically Armenian legal culture has generated remarkable monuments of universal human appeal. Nevertheless legal culture, as an organic component of national culture, has been **detached from the cultural environment of a nation-state**, for lack of one during a quite lengthy period of our history.

<sup>182</sup> See: Дик Ховард. К конституционной демократии во всем мире: американский взгляд. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г., <http://usinfo.state.gov/journals/journalr.htm>.



Current priorities of the establishment of statehood include the formation of constitutional legal culture, which, feeding off lasting values accumulated over the centuries, the canonical principles of living under divine commandments, enjoying public consensus and solidarity, shall become the basis for the formation and strengthening of an individual's civic qualities, become a prerequisite for the establishment of legal democracy. The establishment of democracy is not sufficient and is not an end in itself. It should be a **legal, constitutional democracy, adding completeness and the necessary liberal qualities to the system.**

In order for constitutionalism to get rooted in a country it is also necessary to have in place an equivalent political culture, a political system that goes with it, as well as a clear social demand for both. Constitutionalism assumes a social environment described by **absence of discrimination, by pluralism, tolerance, justice and solidarity.** Their assurance must be of a systemic nature, permeate every aspect of social relations, and become the main safeguard for faith and optimism. These qualities constitute the main criteria for characterizing a political system, and their establishment and rooting is the ultimate goal of a state. Their absence in a country indicates the lack of constitutionalism; their distortion signifies the low level of constitutional culture and incompleteness of constitutional democracy.<sup>183</sup>

Having in mind these considerations, as well as the lessons of history, we think it necessary to dwell in detail on the fundamental issues pertaining to the place and role of constitutional culture in contemporary Armenian context. This mainly refers to constitutional and legal developments in the Armenian reality of the 20th century, as well as the current trends thereof. The analysis of fundamental issues of the development of constitutional culture in the Armenian reality at this stage may only become complete and well reasoned if it is performed, reflecting in the background on the developments in European value systems, since current European processes have become a decisive factor in our geopolitical orientation.

<sup>183</sup> As rightfully mentioned by Dick Howard: "To make constitutional liberal democracy work, the people must have a level of mutual trust, and ability to cooperate, rather than fragmenting into camps of hate and hostility." Дик Ховард, К конституционной демократии во всем мире: американский взгляд. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г., <http://usinfo.state.gov/journals/journalr.htm>.

### 3. CONSTITUTIONAL CULTURE ON THE BACKGROUND OF BUILDING A DEMOCRATIC, RULE OF LAW STATE, ESTABLISHMENT OF CONSTITUTIONALISM

#### 3.1. CONSTITUTIONAL CULTURE IN CURRENT EUROPEAN LEGAL MIND

European constitutional culture, having deep roots, has nonetheless undergone unique developments in conjunction with the deepening of European integration and legal globalization. A study of current expressions and development trends thereof is of exceptional importance not only from the perspective of our country's value system orientation, but also because European constitutional culture represents a superior civilizational value, offering a bearing for the future of human community.

Current international developments in the legal mind continue, in their general outline, to maintain two basic systemic vectors, determined by the nature and specifics of classification of the sources of law. In general terms, the main properties of Anglo-Saxon and Continental (European) legal systems have emerged over the course of centuries. And these have also left an imprint on constitutional solutions. Nevertheless the main trend of current legal globalization is that these differences are gradually acquiring a relative nature, and general constitutional principles and values come to the forefront, getting rooted in social practice.

The most general feature of international constitutional and legal mind is the fact that now, more than ever before, it is considered

important to have sound guarantees of constitutional principles and norms in social practice. Their so-called constitutionalization is considered to be the prerequisite for the establishment of the rule of law, of democratic state systems. If, prior to the 18th century, the development of the legal and political mind had led to the idea of adoption of constitutions, acquiring social cohesion through the Fundamental Law of social community, the main challenge of the post-constitutional period was **guaranteeing constitutionalism in the country through the Constitution**, which elevated constitutional culture to a qualitatively new level. It acquired real content, became an important component of cognition, a living reality for the members of the public.

In the course of the last centuries consistent solutions to this challenge have become the axial direction of legal developments in Europe. Unfortunately, in their current qualitative expressions these solutions are only now beginning to acquire a topical nature for us here, since they may essentially apply only to independent states under particular value system orientation.

In its turn constitutionalism, which is the ultimate expression of constitutional culture in a democratic society, is a complex socio-political and legal phenomenon. It first and foremost assumes the **establishment of constitutional democracy** in the entire state system, in all aspects of social relations. This objective is pursued by countries that have chosen the path of social progress. Reaching this objective, among others, requires certain mandatory guarantees to be in place, such as the recognition of and adherence to constitutional objectives and fundamental principles both by the state and the entire society, the existence of state authorities in compliance with constitutional principles, the construction of a legal system following the principle of the rule of law, reliable protection of constitutional order and the supremacy of the Constitution.

The issue is not only what exactly is the constitutional order enshrined by the Constitution or what principles underlie the relations of the authorities with the law. What is essential is how does the constitutional order in question translate into social reality, to what

extent do fundamental constitutional provisions acquire flesh and blood, who is the real source and bearer of power, to what extent is human dignity protected or guaranteed, how separate, independent and balanced are the branches of state government? **Safeguards for the above constitute the basic yardstick that makes it possible to assess the real standing of constitutionalism and the meaningful perception of constitutional culture by the public at large.**

The harmonious co-existence of a Constitution, which is the safeguard for the establishment of civil society and is anchored to the principle of the rule of law, and of constitutional democracy equivalent to it, implies the presence of certain necessary and sufficient preconditions. **The baseline among these is the establishment of liberal legal thinking and the degree of its public perception and acknowledgment.** Such legal thinking underlies current European constitutional developments and expressions of constitutional culture.

An important phase commenced throughout Europe in the theoretical philosophical perception of law and legal interpretation as early as in the middle of the 17th century. One of the characteristic features of this period was that a most complete outlook took shape about natural law and that, in fact, the feudal approach to law was rejected. The following stood out among the bearers of the new approach: Niccolò Machiavelli (1469-1527), Hugo Grotius (1583-1645), Baruch Spinoza (1632-1677), Thomas Hobbs (1588-1679), John Locke (1632-1704), Charles-Louis Montesquieu (1689-1755), Jean Jacques Rousseau (1712-1778), Thomas Jefferson (1743-1826), Thomas Paine (1737-1809), Immanuel Kant (1724-1804), Georg Hegel (1770-1831) and others. Hugo Grotius, in particular, believed that natural law emanated from the essence of man, which pushes the latter toward mutual relations. The recognition of natural law **conferred legal studies the status of science.** Whereas the legist approach to law failed to reach out to its academic roots.<sup>184</sup>

In the course of more than 300 years the development of econom-

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<sup>184</sup> Гроций Гуго Де Гроот. О праве войны и мира // Антология мировой правовой мысли. Т. III. М., 1999, с. 21-26.

ic relations, the creation of free and competitive milieu, the acknowledgment of human rights as a **criterion for restricting authorities**, as well as the gradual emergence of other elements of liberal values in the European system of values, crystallized in constitutional norms and principles, which, beginning with the second half of the 20th century, no longer remained merely mottoes, turning rather into living values. As Y. Tikhomirov has rightfully stated, the 17th century brought forth the ideas of natural law; the 18th century set the need for the liberal state, embodied in Rousseau's concept of popular representation and Montesquieu's concept of the separation of powers; the first third of the 19th century gave birth in Germany to the theory of the *reschtsstaat*; but these centuries were themselves riddled with wars, coup d'états, tyrannical rulers, and the concepts remained confined to books.<sup>185</sup> **Values characteristic to civil society, the qualities of the rule of law, democratic state, have come into being over the course of centuries, but they only became systemic regulators of social life especially through the several last decades of the previous millennium.** In fact, beginning with the 1950s, universal democratic values and principles of the rule of law state have found their most systemic and concrete incarnations in the constitutional solutions of European countries, with due notice given to the many specificities characteristic for the system in question. And as Professor Dick Howard mentions, democracy and the rule of law in Europe have become more or less dominant following the Second World War.<sup>186</sup>

European constitutional culture is rooted in the rich legacy of Hellenic, Roman, English, German, French and some other countries' constitutional cultures. It also made a weighty contribution to international constitutional studies, has left a deep impact on the development of global constitutional culture. Serious contributions to the formation of contemporary European constitutional culture were made by the adoption of the 1791 Polish and French, 1814

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<sup>185</sup> Тихомиров Ю.А. Теория компетенции. М., 2004, с. 10.

<sup>186</sup> Ховард Д. Конституционализм и развивающаяся демократия // Конституционное правосудие, 2004, N 3, с. 20.

Norwegian, 1831 Belgian, 1866 Swedish, 1868 Luxemburg, 1874 Swiss, 1901 Australian and, later on, some other countries' constitutions. Many of these are still in effect and have shaped sustainable constitutional values.

Nevertheless, for Europe, which has witnessed two world wars within the 20th century, has learned certain lessons from it, has made democracy and the rule of law its pivotal values, **the main motto of constitutional culture became the statement that the law and the state must be lawful, guarantee equality, freedom and justice, and the value system underlying these shall be based on the supremacy of inalienable human rights.**<sup>187</sup> Moreover, a legal system becomes complete and viable when these values become constitutional values, receive constitutional guarantees of recognition and protection.

For 20th century Europe the establishment of civil society and a rule of law, democratic state, became common ideals, a precondition for the welfare of the human community and the best possible discharge of man's creative potential. It is not incidental that, following the Second World War, constitutions that were adopted or substantially reviewed everywhere in the world, but especially in Europe, enshrined as a norm-objective and norm-principle the need for the rule-of-law state, and acknowledged the supremacy of the norms of international law over provisions of domestic legislation.

**European constitutional culture became characterized by the recognition of human dignity, man's constitutional rights and freedoms as having direct effect, and they were granted serious domestic and pan-European legal and structural guarantees. Specialized institutions of judicial constitutional review became an important component of European constitutional culture: these were the constitutional courts, which made it possible to perform abstract, ex ante, obligatory and elective constitutional review, assumed the responsibility for guaranteeing the supremacy and stability of the constitution.**

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<sup>187</sup> On this also see: Политико-правовые ценности: история и современность / под. ред. В.С. Нерсесянца. М., 2000, с. 5-29.

As it was succinctly acknowledged during an international round table held in India in December of 2001, **the main characteristic feature of European constitutional culture is that the ultimate among constitutional values is the human being, with his dignity and rights.**<sup>188</sup>

**The Constitution of the European Union**<sup>189</sup> became the epitome of European constitutional culture, it not only represents a new advance in the constitutional mind, but also a qualitatively new stage in the development of constitutional culture. The integration of value systems; economic, political, humanitarian and of general systemic cooperation, anchored to common interests, has led to such a quality of supra-national interaction, that the resulting common economic, political, structural groundwork also dictated the need for the creation of a supra-national Constitution (Constitutional Agreement). A purpose was set to promote peace, the values of the Union: welfare, freedom, an environment of security and justice, a common free market without internal borders and distortion in competition, assure even economic growth, sustainable development, social market economy, social progress and prosperity, high level of internal and external security, the best possible representation of the common interest on the international scene. As stated by Francis Snyder, European constitutional culture currently comprises three tiers: the first is the general contemporary legal culture; the second is the Western legal culture; and the third is the legal culture shaped through the regional integration within the European Union.

The expanded European Union appears, with its development trends, as a qualitatively new type of constitutional order, which brings the peoples of its member states together, without disrupting the existing specificities of their political institutions, cultural and linguistic customs that are the product of the development of European civilization. What is especially distinguishing is that, as a result of European integration, **the Constitution became a supra-national**

<sup>188</sup> <http://www.nls.ac.in/ncrwc/justice-iyer-paper.htm>.

<sup>189</sup> <http://www.eurozine.com/article/2004-02-19-snyder-en.html>.

**phenomenon**, which emphasizes the fact that it is **the Fundamental Law of not the state, but of civil society**, an entirety of behaviour principles and rules that are the product of a common agreement of the civil society consolidated within the European Union. This is a reality, the proof of a new stage of social development, a new quality of constitutional and legal relations, new principles of interaction between the universal and the national.

This reality, expressed on a qualitatively new civilizational level, has yet to be studied at length and validated, and also taken notice of in every country's practice of legal developments. At the same time the expansion of the European Union continues to remain the subject of discussions and academic debate. One of the important arguments pertains to the formation of legal and particularly constitutional culture. The main concern of various authors in this respect is that it should take much more time to be able to bring together the particulars of constitutional cultures of England, other countries of Western Europe and also the countries of Eastern Europe, that have been forged in the course of many centuries.<sup>190</sup> There is no doubt that that this issue will be resolved the easiest after all EU countries will have ratified the Constitution, forming one unified and whole system of European constitutional culture and the constitutional "subcultures" of individual countries.

We may state, by way of generalization, that already in the beginning of the 20th century European democratic processes created the conditions, along with the expansion of liberal economic relations, for adopting the **liberal-legal type of the understanding of law**.<sup>191</sup> The latter's essence boils down to the recognition of natural human

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<sup>190</sup> See, in particular: [http://www.iue.it/LAW/Events/WSWorkshopNov2003/Dupre paper.pdf](http://www.iue.it/LAW/Events/WSWorkshopNov2003/Dupre%20paper.pdf), <http://www.eurozine.com/article/2004-02-19-snyder-en.html>, German Law Journal - ESSAY Postnationalism, (Dis)organised civil society and Democracy in the European Union Is Constitutionalism Part of the Solution or Part of the Problem?, [http://www.germanlawjournal.com/past\\_issues.php?id=192](http://www.germanlawjournal.com/past_issues.php?id=192).

<sup>191</sup> Incidentally, V. Goloskokov proposes an interesting classification of legal and political concepts that have come into being in the 20th century, putting the main emphasis on the theory of natural law and various incarnations of legal positivism. See: Голоскоков А.В. Правовые доктрины: от Древнего мира до информационной эпохи. М., 2003, с. 79-82.



rights as ultimate values, as having direct effect, as the basis for positive law.<sup>192</sup> The invariable logic of democratic developments made **guaranteeing the rule of law an axial value in the European legal system**. Article 3 of the Statute of the Council of Europe, signed in London on May 5, 1949, clearly stated, as we have mentioned, that every member of the Council of Europe must acknowledge the principle of the **rule of law**. This approach added a new quality to the subsequent course of international relations, setting a clear value bearing at their basis. **Human dignity, freedom, democracy, equality, the rule of law, respect towards human rights**, in their turn, became value bases for constitutional culture; values that are characteristic of a society built upon principles of **non-discrimination, pluralism, tolerance, justice and solidarity**, values which were in the foundation of what is considered to be one of the most important accomplishments of the 21st century, the Constitution of the European Union.

Europe arrived at these principles and made the current qualities of legal perception the basis for social existence through a gradual, evolutionary process of development, which, in Hegel's terms, resulted in a great leap to new quality.

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<sup>192</sup> On this see: Ներսեսյանց Վ. Ս., Իրավունքի եւ պետության տեսություն, Երեւան, 2001, էջեր 30-47.

### 3.2. THE CHARACTER AND SPECIFICS OF EXPRESSION OF CONSTITUTIONAL CULTURE IN CURRENT ARMENIAN REALITY

With a view of completing the picture of historical development of constitutional culture in the Armenian reality and analyzing it in the context of European legal thinking, we consider it necessary to make a brief reflection on the nature and specifics of expression of these phenomena within the last century through the succession of the First Armenian Republic, Soviet Armenia and the newly independent Republic of Armenia. This was the period of history when, following the centuries-long loss of statehood, new opportunities had emerged to restore it and to develop the qualities of our identity within a system of a nation-state. A. Vagharshian has made an interesting observation on this, having particularly studied the history of Armenia's constitutional developments through the first, second and third republics.<sup>193</sup> The author acknowledges: "these were the phases that Armenia's constitutional development has gone through" and arrives at the conclusion that "this development lacks historical succession, since subsequent constitutional-legal phenomena and institutions did not derive from the preceding ones. The disconnect between them prevents us from viewing Armenia's constitutional developments in the framework of a single historical process since, by virtue of historical, political and ideological circumstances, every new stage in this development represented an utter rejection of the previous one."<sup>194</sup>

Without reflecting on the issue of "utter rejection," we think it necessary to underline that in statements like this one completely overlooks the internationally acknowledged factor of "unwritten constitutions," the fact that a constitution is not merely a document or a collection of norms; it is also a system of values, a mindset, a form of existence, a component in the nation's cultural system. And as we saw, expressions of all these date back millennia in the Armenian reality.

<sup>193</sup> Վաղարշյան Ա.Գ., Հայաստանի սահմանադրական զարգացման որոշ հիմնահարցեր, Երևան, 2003.

<sup>194</sup> Ibid, p 13.

As for the 20th century, it is beyond doubt that we deal with new realities there.

Although the First Armenian Republic did not enact its own Fundamental Law in time,<sup>195</sup> its legislature (the Armenian Council and, since August 1, 1919, the Parliament) of the newly independent Republic of Armenia, struggling for survival in grave historical circumstances of 1918-1920, enacted a number of laws that contained constitutional norms and were remarkable expressions of constitutional culture. Of particular interest among these is the Law on approving the Act of Independence of United Armenia,” of May 26, 1918. It not only spells out the system of governance and the nature of state power, but also enshrines the legal statuses of the parliament and the cabinet as “the ultimate legislative and executive authorities uniting the Armenian nation.”<sup>196</sup> For the first time in the Armenian reality the separation of powers was regulated by law.

A number of subsequently enacted laws were also of constitutional nature, such as: “On the introduction of trial by jury in the territory of the Republic of Armenia” of July 12, 1918; “On state language” and “On elections to the Parliament of the Republic of Armenia” of January 26, 1918; “On extraordinary courts and their jurisdiction” of May 20, 1919; “On the four provinces of the current territory” of May 25, 1920; “On temporary suspension of independence of judicial office” of May 30, 1920; “On transferring certain ministerial functions to provincial autonomies” of June 5, 1920; “On Citizenship” of June 7, 1920; “On crimes by officials” of October 21, 1920; “On transferring the functions of the High Military Tribunal to the Senate of Armenia” of October 26, 1920, and a number of other laws. Acknowledging a certain departure from democratic principles in some of those laws, there were also provisions therein which still retain our attention today. An exam-

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<sup>195</sup> A similar attempt was made in the early 1920s, when the minister of justice A. Chilingarian initiated the process of drafting a Constitution, which was left unfinished.

<sup>196</sup> See: Հայաստանի Հանրապետության պառլամենտի օրենքները (1918-1920 թթ.), Երևան, 1998, էջ 212.

ple may be the law on the holidays, enacted on February 7, 1919, which, alongside general holidays, also recognized the specific holidays of ethnic minorities.<sup>197</sup>

The challenges of the time were reflected in the program of the cabinet of H. Kajaznoui, the first Prime Minister. They required to overcome the danger of famine and epidemics in the shortest time possible; to create minimal living conditions for 3000,000 refugees; sort out explosive issues with the minorities; create conditions for the country's sustainable development, using all available internal and external possibilities. The analysis of more than 1,200 laws enacted in the years of the First Republic indicates that their predominant majority pertains to either the powers of the government or the resolution of pressing challenges. This was firstly determined by the critical situation in the country (as an example, here is the agenda of the morning session of the Armenian Council on September 10, 1918: 1. Weekly report of the medical-sanitary commission; 2. Weekly report of the provisions commission; 3. Weekly report of the refugee commission; 4. Bill by the education commission on the organization of school administrations; 5. Current issues). Secondly, under the imperative of the time, the legislature had in theory delegated its powers to the executive for lengthy periods of time (The Armenian Council for one month, starting from April 27, 1919, and once again from June 5 to August 1, 1919; and the Parliament, elected by a proportional system and operating since August 1, 1919 - from May 5, 1920 until the fall of the First Republic). Thirdly, attempts were also made to fill the legislative gaps through replication. For example, the session of the legislature on December 6, 1918, upon the motion of its legislative commission, enacted a law, which stipulated: "Russian laws shall be effective in the Republic of Armenia, with the amendments adopted by the Russian Provisional Government, the Transcaucasian Seim and Commissariat, and the Armenian Parliament."<sup>198</sup>

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<sup>197</sup> See: Հայաստանի Խորհրդի հաստատած օրենքները, 1918-1919 թթ., մաս 1, Երեւան, 1919, էջ 48.

<sup>198</sup> Հայաստանի Խորհրդարանի արձանագրությունները, 1918 թ. (ՀՀ ՍԳ գրադարան), էջ 169.

Alongside assigning priority importance to situational issues, in terms of the country's legal and political orientation the Armenian Parliament acknowledged, in particular, in its grand session on January 25, 1920: "The Armenian democracy is an equal member of the global family of free democracies. Armenia shall be truly free and democratic, and all nations living within its borders shall enjoy equal rights."<sup>199</sup> Nevertheless several of its laws, as we have already mentioned, contained deviations from this principle.

In the context of the subject material of our study the most characteristic feature of the period is that constitutional culture was rather expressed not so much through legal acts, as in the supervisory role of the parliament, its practical daily work and the legal principles it was based on. At the same time A. Vagharshian is quite right, stating that Armenia, being a parliamentary republic, nevertheless adhered to the principle of the "responsible government."<sup>200</sup>

It would also be appropriate to recall S. Vratsian's reading of the time: "Of course, had we had today's mentality and experience, we probably would not have done many things the way we did back then. But every historical phenomenon must be regarded and judged in the substantive and subjective context of its time. The worst history is that which is made in hindsight by belated prophets."<sup>201</sup>

We deal with a completely different reality after the establishment of Soviet rule in Armenia, departing diametrically from the logic of development of the constitutional mind through the preceding millennia. Without aspiring to offer a systemic analysis of constitutional developments in Soviet Armenia,<sup>202</sup> we consider it necessary to stress that:

1. its ideological contradictions and twists notwithstanding, the Soviet period created a new opportunity for the revival of the

<sup>199</sup> Հայաստանի Խորհրդարանի արձանագրությունները, 1920 թ. (ՀՀ ՄԳ գրադարան), էջ 48.

<sup>200</sup> Վաղարշյան Ա.Գ., Հայաստանի սահմանադրական զարգացման որոշ հիմնահարցեր, Երևան, 2003, էջ 30:.

<sup>201</sup> Վրացյան Ա. , «Ին թղթեր տր պատմության համար», Բեյրութ, 1962, էջ 15.

<sup>202</sup> This pertains to the Constitutions of Soviet Armenia of 1922, 1937 and 1978, as well as the processes that unfolded on their bases, which, in their essence, were identical throughout the Soviet Union in their legal, philosophical and ideological content.

Armenian nation, something not determined by having or not having a Constitution, but rather by relative systemic stability, a certain slackening of exogenous threats to survival, the possibility to enjoy conditions for peaceful work;

2. in the absence, for centuries on end, of a nation-state constitutional rules, enacted by national ecclesiastical councils through canonical constitutions, were the reality. And, although there was no state to speak of, the national Constitution, in a certain sense, existed and remained in effect. Whereas in the Soviet period another reality took shape: there existed a written Constitution, which nonetheless had little to do with real life, while customary law and tradition prevailed in interpersonal relations;

3. constitutional norms and principles, apart from being merely declaratory in nature, were politicized to such an extent, that their regulatory role was substantially eroded;

4. constitutional developments of the preceding centuries were anchored to the principles of the rule of law, recognition and constitutional safeguards of man's natural (divine) rights, whereas the Soviet constitutional order was based on absolutisation of the role of state authority and the mono-party political arrangement, while human rights appeared merely as an indulgence granted by the state;

5. detached from social practice, the Constitution lost its mission of holding the authorities in reign, and it could no longer appear as a vehicle for and expression of social accord.

As for the condition and nature of general legal relations in the Soviet context, we may arrive at several generalizations about it:

1. many countries within that territory had not gone through the process of development of market economic relations, something that took more than two hundred years in Europe. Most of them moved from the feudal system on to "socialism;"

2. property relations that came forth were of a completely different nature. In conditions of predominant state ownership

of instruments of production, people became alienated from the state and turned, from its subjects, to being objects of the exercise of power.<sup>203</sup> The true owners of all property were not the people or even the state, but the authorities. The law therefore was called upon to protect not the people and their property, but the authorities;<sup>204</sup>

3. the cumulative legal thinking of many centuries was replaced by distorted dogmatic legal-positivist legal mindset, based on atheistic perception of the world;

4. under the one-party system the absolute will of political power became the only source of law. The party's supreme organ, possessing unlimited and unhinged power, became the true norm-setting body.<sup>205</sup>

Quite naturally, over the course of decades the mindset of legism, in its politicized and garbled forms, became deeply ingrained not only throughout the former USSR, but also in Eastern Europe.<sup>206</sup> And this became a serious cause of systemic legal distortions also in the post-Soviet period.

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<sup>203</sup> The legal and philosophical mind has proven long ago that the development of democracy in Europe and North America is organically linked to private property and the establishment of market relations. See, in particular: Страшун Б. Перспективы демократии и конституционное правосудие // Альманах - Конституционное правосудие в новом тысячелетии. Ереван, 2002, с. 217.

<sup>204</sup> Many scholars are quite right to maintain that in these circumstances the law and the power converge and become identical, the law is interpreted as an expression of legalized power. See: Четвернин В. Российская Конституция: концепция правопонимания // Конституционное право: Восточноевропейское обозрение, вып. 4, 2003, с. 28.

<sup>205</sup> In practice a single body has centralized the functions of both political and economic governance, and the resulting uber-centralized corporate system reproduced itself under the dictate of the authorities' interest, making ever deeper the contradiction between the interests of the society and those of the authorities. It is not incidental that this kind of a system is described as totalitarian socialism in literature. See, in particular, Чиркин В.Е. Общечеловеческие ценности и современное государство // Государство и право, 2002, N2, с. 5-13.

<sup>206</sup> V. S. Nercissian is quite right instating that, their external differences notwithstanding, soviet legal concepts possess profound internal unity "in the sense of rejecting the law, its objective nature and meaning." Ներսիսյան Վ.Ս., Իրավագիտություն, Երևան, 2002, էջ 220.

Following the collapse of the Soviet Union, certain features determined by the realities of the transformation period also became a serious factor. Throughout the history of mankind systemic changes in the society were usually compared to earthquakes, referring to a mainly sudden emergence of a qualitatively new situation characterized by inconclusiveness, unruliness, disintegration or absence of institutional systems, confusion of values and approaches, unpredictable twists in the situation, neediness and extreme social tension, etc. This amounts to social stress across the board, the first stage typically being that of shock, followed by anxiety and indecisiveness, which, once overcome, yield to stability and development.

Almost all of the post-communist countries surrendered to this situation, but it was most pronounced in the former USSR constituents. The latter experienced a double collapse: first, of the system of social relations and, second, of the structures of state. If the first implied a transition to market economic relations and the advance of social relations characteristic of a democratic, rule of law (also social, in some countries) state based on the principle of the separation of powers; the second compelled urgent measures to be taken in order to graduate from a part to a whole, build one's own state machinery, overcome a broad range of hazards.

Solutions to these problems asked for the entire arsenal of crisis management tools to make the transition manageable, mitigate the inescapable detrimental effects of systemic change, overcome the political, economic, psychological and general value system indeterminations, clarify the new rules of cohabitation, establish new structures to replace those in ruin, and address a multitude of other important issues. An extreme concentration of effort was required to maintain the momentum of being, and find new bearings in time and space. That which was common to all newly independent countries was multiplied in Armenia by the earthquake, the war, the blockade, nonviable economy, and the new geopolitical realities.

In a situation like this crisis management approaches come to the forefront (something that also characterized the First Armenian



Republic), proposing a twofold solution to the problem. First, one needs to prevent chaos and, minimizing the losses, come out of the situation in an organized and managed manner. Second, it is necessary to clarify the priorities in the shortest possible time, prepare the state machinery for operation in the regime of functional management, and put in place the legislative and institutional framework that is appropriate for the new relations.

The solution to these problems in the former communist states of Europe was peculiar because, on the one hand, they had clearer understanding of what was needed to be done and of their own future, since their collective memory was not yet purged of the values that had to be restored, and there still existed many bearers thereof. On the other hand, there existed holistic systems of nation-states, economies based on relatively independent structures, larger opportunities for integration into progressive European systems of values, and a more favorable geopolitical environment.

Whereas for the republics of the USSR not only the factor of previous momentum played a grater role, along with the impact of fundamental problems that had been covered up for decades and surfaced anew, but also the room for independent maneuver was much narrower. This was determined, on the one hand, by the fact that economic links and their impact are relatively independent from political processes and there is a certain time lag between them. And, on the other, a mismatch of interests had emerged in view of the fact that the new solutions and the way to get there were not altogether clear yet.

The newly independent Republic of Armenia took the first steps by attempting to lay solid and stable foundations for the legal system of a nation-state. The first document in this spirit was the Declaration of Armenia's Independence, adopted on August 23, 1990 by the Supreme Soviet of the Republic of Armenia. To draft the Declaration and consolidate various proposals an ad-hoc parliamentary commission was created. The nature of the latter's work, as well as the procedure for discussing various drafts, was largely similar to the practice of Armenian constitutional conventions, first and foremost in assuring the atmosphere of public

accord.<sup>207</sup> It is therefore quite justified that the Declaration was adopted with great enthusiasm.

In its substance the Declaration of Independence turned a qualitatively new page in the history of Armenian constitutional culture. It represented **the systemic sum total of fundamental, consistently systematized norms and principles, which contained profound generalizations of the logic of history, took into account the priorities of national identity, and was rooted in the logic of international constitutional and legal developments.** It will never lose its historic and practical legal significance.

We consider it necessary to dwell at greater length on several individual provisions of the Declaration. It is as “the expression of the unified will of the Armenian people.” Putting acclaimed norms and principles of international law in the foundation of independent statehood, pursuing the objective of “creating a democratic, lawful social order,” it was proclaimed: “The bearer of Armenian statehood is the people of the Republic of Armenia, which exercises its power directly and through representative bodies, on the basis of the Constitution and laws of the Republic of Armenia.”

In constitutional and legal terms exceptional importance is attached to the Declaration’s approaches to the status of citizenship, the principle of non-discrimination, freedom of speech, press and conscience, political freedoms, the country’s sovereignty, it being the subject of international law, constitutional bases of economic, social, cultural relations, and a number of other fundamental issues. They set the principal bearing for new constitutional developments. The Declaration committed to assure, in the Republic of Armenia, “the separation of the legislative, executive and judicial branches of government,” thus laying the foundation for a qualitatively new legal system, which was to become the safeguard for the implementation of the Declaration’s goals.

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<sup>207</sup> As a member of the Parliament who had submitted an individual draft, as a member of the drafting commission of the Declaration, I can state without hesitation that the Declaration of Armenia's Independence is an unprecedented attestation to national consensus..

The Declaration of Independence is not only characterized by adherence to national origins, but also by its strong intrinsic completeness and complementary nature of its norms and principles, alignment with progressive legal solutions and international trends of constitutional development.

Prior to the adoption of the Constitution of the Republic of Armenia, the norms of the Declaration were further expanded upon in the Constitutional Law of the Republic of Armenia on fundamental provisions of independent statehood, enacted by the Supreme Soviet on September 25, 1991 (nullified by Article 116 of the Constitution of the Republic of Armenia). This Constitutional Law enshrined the constitutional order of the Republic of Armenia as an independent democratic state: the power of the people, separation of powers among the branches of government, equality of people before the law, non-discrimination, recognition and protection of rights and freedoms were acknowledged as the basis of social relations. Another important constitutional principle was enshrined: the bodies of public administration could only exercise the powers reserved to them by law. Article 5 of this law stated: "The President of the Republic of Armenia is the highest public official of the Republic of Armenia and the head of the executive power; he shall represent the Republic of Armenia in the country and in international relations." In practice this constitutional law laid the foundations for the formation of a new system of public administration and became the safeguard for dismantling the uniform pyramid of power built by Soviet laws, with the Supreme Soviet at the tip, allowing separation of the legislative, executive and judicial branches of government.

The years that followed, until the adoption of new constitutions, were spent, whether in Armenia or in many other newly independent states, on sporadic reforms and relative stabilization of the situation. The legislative framework for transforming social relations was significantly strengthened, the institutions of state governance were mostly put in place, economic independence acquired a new quality, particularly thanks to the introduction of national currency and the rooting

of independent financial and banking transactions, active international relations took shape, which also set the vector for economic reforms.

This stage possessed its own internal reefs and hazards. For Armenia this was determined not only by the ancillary consequences of the war in Karabagh. Legislative lacunas, imperfection of institutions, particular errors in governance and obtuse solutions to some issues created fertile ground in the society for the emergence and deepening of numerous negative deviations and value system distortions, which became deeply rooted in a very short span of time.

On July 5, 1995, the Constitution of the Republic of Armenia was adopted through a national referendum. This was preceded by four years of heated discussions on a number of issues of principal importance, such as the form of governance, the separation of powers and their respective competences, the foundations of constitutional order, and human rights. Although the new Constitution was not accompanied by the same atmosphere of public accord that surrounded the Declaration of Independence, and it failed to overcome the Soviet inertia of legism in lawmaking, life has nevertheless demonstrated that the Constitution of the Republic of Armenia played a decisive role in assuring the country's subsequent sustainable development, as well as finding constitutional solutions in a number critical situations.

The preamble to the Constitution stated: "The Armenian people, recognizing as a basis the fundamental principles of Armenian statehood and the national aspirations enshrined in the Declaration of Independence of Armenia, having fulfilled the sacred message of its freedom-loving ancestors for the restoration of the sovereign state, committed to the strengthening and prosperity of the fatherland, in order to ensure the freedom, general well being and civil solidarity of future generations, affirming their faithfulness to universal values, hereby adopts the Constitution of the Republic of Armenia."

International constitutional practice has varying approaches to the legal effect of constitutional preambles. We strongly believe that the norm-objectives engrained in the preamble to the Constitution repre-

sent the baseline for regulatory legal norms and possess the ultimate legal effect characteristic of the Fundamental Law.

Several provisions of the Constitution, which are included in the foundations of constitutional order, merit particular attention. These stipulate that:

- The Republic of Armenia is a sovereign, democratic, social, rule of law state (Article 1).
- In the Republic of Armenia power belongs to the people (Article 2).
- A human being, his dignity, fundamental rights and freedoms are ultimate values.

The state guarantees the protection of fundamental human and civil rights and freedoms based on the Constitution and the laws, in accordance with the principles and norms of international law.

The state is restricted by fundamental human and civil rights and freedoms, which gave direct effect (Article 3).

- The elections of the President, the National Assembly and local self-governing bodies of the Republic of Armenia, as well as referenda, are held based on the right to universal, equal and direct suffrage by secret ballot (Article 4).

- State power shall be exercised in accordance with the Constitution and the laws based on the principle of the separation and balance of the legislative, executive and judicial powers (Article 5).
- The Constitution has supreme juridical force, and its norms are direct effect (Article 6).
- Ideological pluralism and the multiparty system are recognized in the Republic of Armenia (Article 7).
- The right to property is recognized and protected in the Republic of Armenia.

The freedom of economic activity and free economic competition are guaranteed in the Republic of Armenia (Article 8).

- The foreign policy of the Republic of Armenia shall be conducted in accordance with the principles and norms of international law, with the aim of establishing good neighborly and mutually beneficial relations with all states (Article 9).

We shall reflect on these and a number of other provisions of the Constitution later in this text. At this point we would like to draw attention to the following circumstances:

1. Based on the criteria of constitutional studies, as well as the problems and priorities in our country's development, one should consider the provisions quoted above a great accomplishment, with a particular importance attached to the unalterable first and second articles, as well as the legal philosophy of articles 3 through 5.

2. After the Second World War the pivotal value of European constitutional developments is that most of Western and Eastern European countries, during the new waves of reforms in the 50s and the 90s, based their constitutional solutions on several important principles, such as:

- human dignity and rights are ultimate and inalienable;
- these rights have direct effect;
- the main criterion for restricting these rights is guaranteeing the rights of others;
- the separation and balance of powers shall be ensured through a dynamic equilibrium in the function-institution-competence axis;
- guaranteeing the supremacy of the Constitution is the main requirement for ensuring constitutionalism and establishing constitutional democracy in a country.

These principles were enshrined in the Constitution of the Republic of Armenia with the necessary clarity, depth and conceptual consistency in the result of the constitutional amendments of 2005.

3. Subsequent developments proved, in particular, that the initial slant towards positivist legal approaches did not create the necessary constitutional safeguards to assure the rule of law and consistently apply the principle of the separation of powers.

L. Reznichenko has a remarkable observation, according to which many newly independent states were also characterized by the expressions of the so-called "negative constitutionalism," which implied that the primary purpose of adopting a constitution was to overcome the neg-

ative charge, to prevent the resurgence of tyranny, which is why the constitutions of those countries emphasized the proclamation of human rights and the judicial oversight thereof, ascribing secondary importance to guaranteeing true separation of powers. Another essential characteristic is that in newly independent states fundamental constitutional issues were excessively politicized. This has resulted, in particular, in distorted perception of many constitutional values in such countries. The party (communist) dictatorship was replaced by the dictate of the majority, while common people remained as disenfranchised as before.<sup>208</sup> All of the above was characteristic for the countries in transition that were taking their first steps in clarifying the system of constitutional values, determining their concepts on political organization of a state, crystallizing new constitutional doctrines. One may still encounter resurgent expressions of the momentum of those phenomena.

From the viewpoint of systemic completeness of constitutional culture the system of governance that a country has selected is not so important: whether it is presidential, semi-presidential or parliamentary. But it is very important, whatever the form, for fundamental constitutional principles to be consistently applied, intra-constitutional contradictions and gridlocks to be excluded, and for the Constitution to become a dynamic organic whole.

Constitutional developments in newly independent Armenia shall, perhaps, become a subject of a separate, more in-depth study. Nevertheless one should derive serious lessons from the fact that transitional social systems of our, as well as a number of other countries, were impaired by certain constitutional legal distortions, which were determined by the following three groups of factors:

1. the inertia of legal thinking and implementation practice;
2. distorted or incomplete constitutional and legal solutions;
3. mechanical borrowing or replication of progressive legal values, without the creation of the value systems and prerequisites necessary

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<sup>208</sup> Резниченко Л. ПРАВА ЧЕЛОВЕКА И КОНСТИТУЦИОННОЕ ПРАВО (Обзор материалов журнала "Конституционное право: восточноевропейское обозрение"), <http://www.hrights.ru/text/b9/Chapter4.htm>.

for their implementation; taking no account of national constitutional culture; which, in real life, resulted in a whole range of distortions in basic constitutional principles and such solutions being detached from real life and deprived of viability. In such circumstances we encounter not the rooting of democracy, but an “experiment in democracy,” which is doomed to fail from the beginning.

Unfortunately, in a number of countries with transitional societies the systemic collapse has not yet lead to a change in the mentality. The inertia of the mindset and *weltanschauung* is tremendous, distorted positivism continues to rule the legal scene, which often is incarnate in salient expressions of legism. Turning the notion of the rule of law state into a motto on a conceptual level, no serious perception emerges of the need for guaranteeing the supremacy of law, restricting government by the rights, constitutionalization of social relations. Ideas on government remain on the plain of the use of force and exercising pressure. Democracy is viewed as a favor by those in power, a possibility for the people to express themselves within the limits granted to them by the authorities. This is not the way to proceed towards transforming Europe, this rolls back to regressive medieval values.<sup>209</sup> At the 59th plenary session (July 17-19, 2004) of the European Commission for Democracy through Law (Venice Commission) the representative of the Parliamentary Assembly stated, quite to the point, that: “the biggest issue in the countries of transition is that they fail to discern the difference between “the rule of statute” and the “supremacy of the law.” Without guaranteeing the “supremacy of the law” authorities in any country, even formed by most democratic principles, shall proceed towards the establishment of dictatorship.”

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<sup>209</sup> For a transition state the creation of democratic infrastructure is not yet sufficient, since they are often put in place deformed. It is more important to have the necessary civil qualities rooted and to transform the mentality. Failing that democracy may turn from being an important value, a prerequisite for the full enjoyment of human rights and freedoms into an instrument in the hands of the authorities for suppressing those rights and freedoms. On this see, in particular, Ежи Мачкув. Демократия и авторитаризм в посткоммунистических трансформационных системах // Конституционное право: Восточноевропейское обозрение. 2003, N2, с. 2-7.



It would be difficult to disagree with this statement. Let us add, though, that international practice knows three different ways for the establishment of democracy: 1) evolutionary development (typical for most European countries); 2) transition through chaos and anarchy (a number of countries in the post-communist zone); and 3) transition through establishment of dictatorship (Portugal, Spain and Chile are classical examples). The problem is that each has a price and takes its time. In countries that choose the 2nd and 3rd options the people always pay the highest price, often without reaching the desired outcome. Today's Europe adamantly rejects those ways. The main approach is that democracy may be attained only upon lawful bases. Wherever the law is violated, democratic slogans are merely instruments for the establishment of dictatorship.

Transitional systems are characterized by the fact that soviet mentality often finds fertile soil for reproduction. This is largely determined by what it is exactly that the authorities strive to achieve. If the goal is assuring the rule of law, then inertia may easily be overcome. If the goal is to impose the will of the authorities, well, soviet legal institutes have no match in achieving this.

The specifics and complexity of the situation is in that we deal here not only with inertia that is deeply rooted, but also in the fact that the systemic collapse had led to the need for re-distribution of wealth, which in turn led to additional new phenomena. On the one hand, the establishment of private property objectively leads to the need for democracy, on the other the soviet system, which was mainly geared to protect the state and its property, had lost its object and, having preserved its main features and institutional system, became an instrument in the hands of the authorities that re-distribute property.<sup>210</sup> This situation was the greatest brake on democratic developments.<sup>211</sup> The primary prerequisite for overcoming it was access to

<sup>210</sup> It would be appropriate here to recall the statement by Aristotle: "The law cannot turn violence into law present power as the source of law."

<sup>211</sup> As rightfully mentioned by A. Salmin, the fundamental issue of the real existence of modern democracy is in the relations between state authority, the bureaucracy, civil society and politics. See: Салмин А. Современная демократия. М., 1997. с. 270.

European legal standards, an understanding of the fact that the law is not a monopoly of the authorities; it belongs to everyone regardless of his or her association with the authorities or the lack thereof. Academician V. Nercsessiants, writes: “As the entire history of civilization has proven, the freedom of men may only be recognized and expressed in a lawful way: through formally acknowledging both individuals and the state, which are de facto disparate, as equal subjects of the law. The law, as an expression of formal equality, represents the universal equal measure of freedom and justice in social relations. In the social life of men, except for the legal way, there is no and there can possibly not be another way for the expression or the existence of equality, freedom and justice. **In the history of mankind the law is the mathematics of freedom...**”<sup>212</sup> So long as citizens of a state fail to appear in social interaction as individuals endowed with full legal capacity, they will be practically disenfranchised, and there can not be any meaningful discourse on liberalism, rule-of-law state, or supremacy of the law, while all statements about civil society shall remain empty shells.<sup>213</sup> Neither is there any future in shifting the emphasis to a legal revolution through “importing” democracy, without putting in place the respective system of values and prerequisites for the latter. The only possible outcome in this case would be botched replication.

The problem should be addressed not on the level of mentality or political awareness, but through overcoming semantic distortions. Therefore the shortest way for the establishment of a lawful, democratic state is not the futile attempt to leapfrog over the centuries, neither it is turning certain values and principles, based on their purely conceptual perception, into paper mottoes or a means to cover up reality, but **rather the recognition of European civil society values within the framework of one’s own system of values and national constitutional**

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<sup>212</sup> See: ՆԵՐՇԵՍՅԱՆԸ Վ. Ս., Ցիվիլիզացիոն մատիֆեստը, Երևան, 2001, էջ 21.

<sup>213</sup> The materials of a round table on these issues, organized by two authoritative Russian magazines, deserve attention. See: Гражданское общество, правовое государство и право ('Круглый стол' журналов 'Государство и право' и 'Вопросы философии') // Государство и право, 2002, N1, с. 12-50.

**culture; consistently and with full determination making them the meaningful assets of the members of the public.** This should be the priority programmatic objective of the policies and undertakings of a newly independent state. Constitutional solutions, in turn, may only be constructed upon such values, containing an internal impetus to push the systemic development of the society in a particular direction, and to be perceived by it.

International practice indicates that any country attempting to emphasize mechanical replication of constitutional solutions is bound to encounter serious problems. We would like to once again stress that a Constitution represents a particular system of values characteristic of the social community in question, with its concrete specifics, problems, and approaches for their solution. It does not spell absolutization or ossification. Ignoring general principles, international best practices, requirements of international law, international case law and international constitutional culture would be impossible. What matters is to try and, instead of mechanical replication, harmonize all of the above with one's own system of values, assuring systemic progress. As professor V. Osyatkin rightfully mentions, borrowing is inevitable, since there exist universal constitutional principles and mechanisms, which have been known way back in time, they are universally acknowledged and appear as the so-called standards or norms and principles of international law.<sup>214</sup> Professor Cheryl Saunders, President of the International Association of Constitutional Law, underscoring the linguistic and substantive similarities in the constitutions of various countries, stresses that an examination of the history of their creation proves that they all are ancillary to each other, with the exception, perhaps, of the archetypal constitutional systems of the United Kingdom, the USA and France.<sup>215</sup> The first to be borrowed, of course, are the constitutional notions and general principles. Nevertheless the ultimate goal is for these to be in harmony with

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<sup>214</sup> See: Осятыньский В., Парадоксы конституционного заимствования // Сравнительное конституционное обозрение. 2004, N 3, с. 53.

<sup>215</sup> Ch. A. Saunders Constitutional Culture in Transition // Constitutional Cultures / Ed. by M. Wyrzykowski. Warsaw: ISP, 2000. P. 37.

the system of values of the society where they become constitutional norms and principles. Failing that they will remain on paper and will not enter life, become a living reality. Moreover, by contravening with the value system of the reality, they may morph from stimuli for progressive transformation into catalysts for profound social contradictions or instruments of compulsion in the hands of the authorities.

More often than not fundamental constitutional principles and provisions are borrowed in a distorted way, to fit particular local conditions and perceptions. Therefore, the understanding and perception of fundamental constitutional principles should come in the context of international legal criteria, only then followed by a profound study of approaches that various countries have used to solve concrete constitutional problems looming before them, assuring their countries' sustainable development. In this respect the study of international practice of constitutional amendments in various countries is of utmost importance. For example, it follows from the constitutional amendments and constitutional laws of several last decades in Austria, the USA, Belgium, Germany, Denmark, Spain, Italy, Greece, Portugal, France, Finland, Slovakia and a number of other countries, as well as from the study of the Constitutions of a number of other countries of Eastern Europe and the former USSR (Poland, Slovenia, the Czech Republic, Bulgaria, the Russian Federation, Lithuania, Estonia, Georgia, Kirgizstan, etc), that there exist a number of stable and universal trends for the formation of constitutional culture:

1. The human being becomes the axis of social-administrative relations, with his inalienable dignity and rights. The latter are constitutionally enshrined and recognized as having direct effect, restricting the exercise of power by the people and the authorities, acquire reliable guarantees for domestic and international protection, appear as principal criteria for the evaluation of the social system. The principle of the supremacy of the law becomes dominant in the system of values of human community. The main criterion for the establishment of civil society in this case is not the restriction of the law by power, but of power by the law.

2. Democratic values become the foundation for the constitutional order and the safeguard for human rights, a general trend is observed of gradually restricting central authorities, of decentralization of power (political, administrative, economic), expanding room for possibilities of self-governance and strengthening guarantees.

3. Consistent implementation of the principle of the separation of powers, ensuring their functional balance, reasonable checks and balances on power become a universal requirement. The developments in representative democracy ascribe special importance to the improvement of political structures in the society and the protection of political rights of individuals. The issue of ensuring the independence of the judiciary, its systemic integrity and completeness, as well as its viability comes to the forefront. Local self-governance, as a particular form of democratic autonomy, becomes especially important.

Guarantees of intra-constitutional stability get stronger; a potent legal system for identification, evaluation and restoration of disruptions in the constitutional guarantees of human rights and in the constitutional balance of powers; the constitutional order acquires a most viable “**immune system**,” access to constitutional justice becomes especially important among human rights.

Solutions to the problems of assuring the “immune sufficiency” of the social organism are sought within the constitutional framework, and every modification of national constitutions receives broad international resonance.

International law acquires an increasingly greater place and role within national legal systems. A noticeable trend appears of using identical basic constitutional notions. Harmonization takes place in the selection of approaches to the criteria for the separation of powers and restriction of human rights. At the same time attempts are made to seek “conciliation” between national specifics and supra-national approaches.

Alongside the general trends mentioned above, issues of developing institutions that perform the functions of the branches of government, clarifying their functional roles and assigning them sufficient competences also acquire great importance. On the other hand, the

interaction of authorities gets increasingly anchored to the principle of partnership and solutions that assure a dynamic equilibrium.

Considering the exceptional role of the stability of government in transitional societies, one may unfailingly acknowledge that the general trends listed above are extremely pertinent in the context of the creation of conceptual approaches to constitutional reforms and the prerequisites for ensuring the supremacy of the Constitution in the countries of transition. The problem, though, is in the need for these solutions to be in harmony with the system of values of the society in question, becoming the product of social consensus, rather than that of social coercion.

This problem may only be resolved **when the country's development priorities and the underlying system of values are clarified through public agreement; when conceptual approaches towards projects to advance social progress on the basis of above priorities become definite.** This is especially necessary for the social systems in transition, where indefiniteness and confusion in the system of values prevail. This circumstance is asking for an extremely serious approach to the Constitution's norm-objectives and norm-principles. These, apart from being in tune with international constitutional achievements, **have to add programmatic nature to the formation and development of the entire legal system, be consistently implemented in the norms of material law, become clear road signs for the establishment of the rule of law state and civil society.** It is not at all incidental that in many countries the first section or chapter of the Constitution is entitled "Foundations of Constitutional Order." This is where all fundamental principles are laid out, which constitute the fundamentals of the constitutional order of a country and are the baseline for all other sections and the regulation of legal relations of any other nature. Even in cases when intra-constitutional inconsistencies or contradictions emerge, there is no doubt that constitutional norm-principles prevail. This principle is clearly enshrined in the constitutions of many countries. For example, Article 16 of the Constitution of the Russian Federation unambiguously states that no

other provision of the Constitution may contradict the Foundations of Constitutional order of the Russian Federation. There is particular attention paid to this circumstance in Article 68 of the Law of the Republic of Armenia “On the Constitutional Court,” which provides that, in assessing the constitutionality of normative acts the constitutional court shall, among other factors, consider the protection of human and civil rights enshrined by the Constitution; the grounds for and the framework of their permissible restriction; as well as the constitutional principle of the separation of powers, the acceptable limits on the powers of state bodies and officials; the need to ensure the direct effect of the Constitution.

### 3.3. CURRENT-DAY PERCEPTIONS OF BASELINE VALUES OF THE CONSTITUTION OF A RULE OF LAW, DEMOCRATIC STATE

One of the axial issues of constitutional developments and establishment of constitutionalism is the appropriate value system perception, interpretation and consistent implementation in social practice of the fundamental principles laid out in the Fundamental Law. This first and foremost pertains to the democratic, lawful, social character of the state, the principles of democracy, the rule of law, and the separation of powers, which are currently of baseline significance for constitutional regulation of social relations. Constitutional and legal perception and interpretation of the above notions acquire principal importance, they have to emanate from the current logic of international constitutional developments and acquire equivalent materialization in concrete legislative and Constitutional norms.

Attaching particular importance to the conceptual apparatus of constitutions, we would like to firstly underline that the philosophical essence of any concept is to reflect the properties of a phenomenon (the object of examination), each one of which is necessary, and all together - sufficient, for the phenomenon in question (the object) to be discerned, identified as a particular qualitative whole. A conceptual generalization of the highest degree becomes a category, the broadest and most comprehensive abstraction in characterizing the phenomenon in question. With respect to the object of our study it expresses the collective essence, quality, and nature of objectively existing relations.

Regardless of the degree of our cognizance, these relations, given the presence of necessary preconditions, do exist, emerge or operate. The extent to which we recognize, model and meaningfully formulate these, contains an answer to the question of what our cognizance, freedom of action and the possibility to affect objec-



tive processes are like. Departing from the given level of cognizance and regulation of relations, it may be accepted by the public as a binding rule of behaviour.<sup>216</sup> In other words a legal norm is the characteristic of regulated, particularly defined state of social relations. Moreover, since these relations exist in dynamics, a legal norm can not simply appear as a registration of fact, it expresses cognizance, a format or principle of approach, indicates a vector of motion or a destination, records the nature of behaviour in a shifting situation, according to which the qualities of constitutional culture are expressed.

In performing a systemic analysis of current constitutional culture the views, first and foremost, about axial constitutional concepts are of preponderant importance. Let us reflect on some of these.

The constitutional concept of "democracy," as a descriptor of social relations and a modus of governance, is perceived and interpreted in a variety of completely differing ways, often even transforming into vulgar demagogy and judgmental attitudes (the issue at stake is not only understanding the essence, but also maintaining the right measure).

Democracy is one of the greatest accomplishments of civilization, it signifies the emergence of civil society, where every individual acquires value as a rational being, as a social subject, as an equal member of the public,<sup>217</sup> where relations are clarified and regulated, where order is well defined, as are the rules to maintain it, along with the framework of civil liberties and individual autonomy.

Only that state shall become like this, in which the format, structure and operation of government answer the will of the people, cor-

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<sup>216</sup> We do not refer here to traditions or the rules of ethical behaviour. The reference is to the plain of legal relations.

<sup>217</sup> It would be appropriate here to remember that currently in the countries with progressive democratic social relations, which have attained great achievements of civilization, particularly in Japan, only a select few could enjoy human rights or represented a social value until the 16th-17th centuries. The majority of the people had no right even to have names, they were known by their occupation. Notwithstanding this, already Plato had stipulated that a state should not be constructed for only a few to be happy, it should ensure the happiness of everybody. 'Платон. Государство' / Собр. соч., т. 3, М. 1994, с. 189) It is of exceptional importance that neither Plato, nor later Aristotle, divided the state from the society, viewing them in inalienable unity.

respond to the universally recognized human and civil rights and freedoms, where the people bear authority, exercising and controlling it at the same time, through their collective will and the right to self-governance, which is implemented on the basis of legal equality of all members of society. This should be enshrined in the Constitution and be guaranteed by laws and the necessary structural systems.

What is of axial importance is for the power to be exercised by the people based on the principle of continuity, direct democracy, and control over the operation of representative bodies in conditions of feedback.

The principal characteristics of such a state are: guaranteeing immediate democracy; genuine representative democracy (a situation when the people render legitimacy to the exercise of power through elected institutions, control the latter and assure feedback channels); guaranteeing continuity of the exercise of power by the people; as well as guaranteed protection of the rights of human beings (as a social value) and citizens (as subjects of law in the social arrangement in question). It follows from the above that only that state may be considered democratic, where the society is constructed or is being constructed over relations regulated by legal laws, where there is guaranteed room for individual's natural expression and autonomy; and where every person, without alternative, represents social value as a public subject; where social progress is based on harmonization by the state of the interests of individuals, groups and the entire society. In a society like this human rights and freedoms are subject to restrictions only there and then where and when it is necessary for assuring others' rights and freedoms.

This social system shall invariably be lawful, and democratic values will enjoy safeguards for legal protection. The rule of law state is that where all activity is anchored to the law, the main goal of which is respect towards and guaranteed protection of human and civil rights.

The notion of *rechtsstaat* (**rule of law state**) is a product of the end of the 18th, beginning of the 19th centuries. But the idea itself had preceded it by far.<sup>218</sup> The theory of law assumes a certain legal reg-

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<sup>218</sup> Almost all countries that have constitutionally enshrined the principle of the separation of powers the Fundamental Law directly or indirectly defines the legal nature of the state.

ulation of social relations, as well as a reliable and flawless operation of their implementation systems. Only in this case the subjects of law may be free. Only the recognition of objective social relations, legal regulation and knowledge thereof grants people the possibility and the prerequisites to act freely. **The basic principle of a rule of law state is the harmonization of individual subjective rights with assuring objective prerequisites by the state for their implementation, the clarification of the limits on people's freedom and on state power.**

Another characteristic feature of a rule of law state is that the state should be responsible for the activities of its officials; a guaranteed system of liabilities and control over the exercise of rights should be put in place.

The description of democratic, legal and social functions of the state may not be confined to a single norm or be viewed individually, as a separately expressed quality. These principal fundamental qualities shall permeate every molecule of regulation of social relations, be reflected in every step taken by the state, become an inalienable presence in the life of every member of the society. They should become the national mentality and axis of action. In other words, they shall be reflected in every norm of the Constitution and its implementation mechanisms.

The mandatory characteristics of a rule of law state are: the separation of powers; the lawfulness of government and the supremacy of law; independence of the judiciary; safeguards for the protection of human rights; the existence of a comprehensive and potent system of constitutional review, etc.

The proclamation of a constitutional rule-of-law state first and foremost testifies to the nature of the state and the specifics of social

relations, it is the expression of the particular features of state organization, the affirmation that the statute and the law are in the basis of relations within the society in question. For a state like this the objective is to submit to this principle the social behaviour of the state and the society, to clarify for the individual the rules of behaviour in civil society and the framework of his/her freedoms, and to guarantee those freedoms.

It is incontestable that any country's Constitution is first and foremost viewed as the embodiment of public consensus over the rules of cohabitation. It is a representation of the entirety of the desires, approaches and methods, objectives, principles, and certain generalizations. For every country the Constitution becomes a source of law-making, the principles enshrined therein are not merely recordings of facts, they are fundamental rules of behaviour. These rules pertain not only to the authorities, but also to every subject of law representing the state, whether an individual, a citizen, or various combinations of the latter, becoming their social profile, the form and content of their self-expression.

In a rule of law state the social community acquires a particular regulated representation, which is characterized as the social order, and an individual becomes the subject of law, his/her relations with other members of the society acquire the nature of legal relations regulated in a particular manner. Such a society must invariably have an institutional system that assures the continuity of oversight over constitutionally regulated legal relations, which plays the role of an original immune system of the social organism.

The notion of "**social state**" is a product of the end of the 19th, beginning of the 20th centuries. It testifies to the emergence of a new quality of the state, according to which the state commits to care for the social protection of its citizenry. This quality is not typical for an extremely liberal rule-of-law state, where priority is assigned to production and market liberties. Although it does not follow from the above that no social issues are considered or resolved on state level in a liberal rule-of-law state. Proposing such an antithesis would be incor-

rect. The issue is that the constitutional endorsement of the social nature of the state renders the entire social system a completely distinctive substance.<sup>219</sup>

A clear substantive interpretation of the term **social** becomes very important here. It is often used in combination with completely different notions (social environment, social structure, social psychology, social issue, etc). In practical relations it is sometimes perceived as a particular sector related to services intended for people (education, health, science, sport, culture, etc), sometimes it refers to a social group or stratum, yet other times the implication is that of a human community brought together over a common interest, system of values, rules of existence, common objectives, etc.

What is common to all these is that the emphasis is on various incarnations of relations between an individual, a group and the society; as well as the various plains of intersections of interests, stressing in every case that we deal with relations between the society made up of rational subjects and its constituent members.<sup>220</sup>

Departing from various interpretations of the term **social**, the phrase **social state** is often understood to denote a state that assumes responsibility for the existence of the society (in this case *social* is perceived *as public*).<sup>221</sup> Still the basic approach is that by referring to a social state one should understand a system of human cohabitation, where relations are mutually agreed upon, where there exists a recip-

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<sup>219</sup> One should not forget the fact that after the Second World War the entire mankind lived through a period of profound social transformation, caused not only by the overthrow of fascism, but also the collapse of colonialism and the emergence of new value systems of human cohabitation. The term "social state" under these circumstances should be considered not only as a pledge to assume simple duties to address certain social issues, but as an essentially new quality of social relations, the axis of which is the recognition of human dignity and constitutional assurance that the state will treat it in a new manner respectively.

<sup>220</sup> Incidentally, there also exists an opinion that termite families or beehives may also be considered to be social communities, where the biological unit, the insect, ceases to reproduce or exist outside of the community. That is the irrefutable law of nature on the preservation and harmonious improvement of the species through reproduction also applies to the society.

<sup>221</sup> Publishers Й. Изензее, П. Кирххоф, Государственное право Германии., С.1, М., 1994, с. 64:

rocal commitment to help the needy, to affect the re-distribution of public economic benefits based on principles of fairness, which create guarantees of a dignified life for everyone. In our opinion, when a state constitutionally proclaims itself to be social, it not only pledges to harmonize the interests of individuals, their groups and the general public, excluding their opposition and subjection to each other, but also undertakes measures to consistently implement all these.

The recognition of the social function of a state and its constitutional formulation is more characteristic of nation-centric state systems and is, perhaps, the main guarantee for its harmonious development,<sup>222</sup> assuring organic unity between the past, the present and the future. This is determined by the natural patterns of preserving the human kind and identity, of harmonious development.

The ultimate expression of public humanism and the highest achievement in the progress of civilization is the formation of a social state, where the members of the society, on the basis of constitutional agreement, determine the objective of their advancement, clarify the relation between the **purposes, preconditions and means**. This represents a higher quality of social cohabitation. Only that state may be social, which has put in place a complete and potent system for guaranteeing the protection of human rights, where the entire system of state governance is anchored to the principle of harmonization of public interests.

The social state implies a higher degree of harmonization between the interests of an individual and the society, an individual and the state. It must be recognized, perceived and protected by every constituent of the society, it must become the binding rule of behaviour: everything that is unlawful is not fair and has no place in the social state.

During various international discussions an opinion is voiced that the principle of the social state is in intrinsic contradiction with the constitutional principles of the rule-of-law, democratic state. We

<sup>222</sup> One should state that even in the Middle Ages the Armenian social mind ascribed essential importance to the need to be guided by "Traditional National Law and Order" in implementing the goals pertaining to the society. See, in particular: «ԿԱՆՈՆԱԳԻՐՔ ՀԱՅՈՑ», Ի. Ա., Երևան, 1964, էջ XV.

refute these statements and believe that the problem here is in the perception of the notion "social state" and its interpretation. What this constitutional principle assumes is not the assurance of socialist equality, but a social orientation of the means of production in the society; the rooting, instead of the principle "production for the sake of production," of the principle "production for the sake of social welfare." This also implies that market economic relations are not the goal, but the means for attaining efficient economic activity along with desirable social outcomes. Therefore we do not think it incidental that Article 3 of the Constitution of the European Union, laying out the goals of the Union, also stresses that "The Union shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive **social market economy**, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment." (our underscore - G. H.). **Social market economy is the basis of the social state. This is the current general denominator of European developments.**

Only that society is deemed to be truly civil, where the individual, rather than opposing the society with his interests, acquires the highest possibility for self-expression, in conditions of harmonization of the interests of the individual and the society.<sup>223</sup>

The social function of the state is often presented in opposition to the function of assuring the freedom of the members of the society, which, in or opinion, is not justified. Democratic freedom also assumes guaranteed social protection of a member of the society, which is one of the basic characteristics of the human community. What makes civil liberty different from natural freedom is exactly the fact that within society the activities of an individual should not lock into antagonism with the right to freedom for other members of civil society. Civil society must have a harmonious system for the free self-expression of its members, which is impossible without guaranteed

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<sup>223</sup> Семигин Г. Ю. Социальное партнерство в современном мире. М., Мысль, 1996, с. 35:

provision by the state of social protection to the members of the society. This in turn means that an individual within the society cannot possibly view himself in isolation; the natural state of his existence is in interaction, interrelation with others, and also in being responsible for the present and the future of the society. Along with that, E. A. Lukashova, a Doctor of law, is quite right when she stresses that today there exists a vacuum on the theoretical level as well: there exist no fundamental provisions on the relations between the citizen and the state in the post-soviet society.<sup>224</sup> In a situation like this the state usually fails to clearly discern not only its future, but even its current obligations before a member of the society; whereas the citizen, in his turn, is in the dark about the opportunities for the state to meet his requirements, or the degree to which his needs and expectations may be justified or fair. Such a situation is a major and dangerous trigger for social discontent. Therefore public policy priorities in a transition period should ascribe an exceptionally important place to the development and deployment of a system of relations between a citizen and the state that is clear and accessible for everyone. The axis is that in a social state every solution should focus on the human being, with his rights and freedoms recognized by the state, constitutionally enshrined, and enjoying the necessary guarantees of protection; accompanied by the obligations he has towards the society.

In our opinion, from among various basic characteristics of a social state it is necessary to single out the following:

- a) ensuring legislative guarantees for increasing social protection and well being of people;
- b) creation of necessary public and non-public institutional systems for social protection, assuring their orderly operation (this, in particular, refers to the system of social protection dealing with upset destinies: disability, sickness, loss of breadwinner, unemployment, insecure old age, etc., as well the existence of a viable system of social insurance, which addresses the social risk);

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<sup>224</sup> See: Социальное государство и защита прав человека. М., 1994, с. 9:



- c) securing the minimum sustenance level;
- d) guaranteeing conditions for the free development of an individual, unimpeded enjoyment of one's inclinations and religious confession, as well as for intellectual self-expression;
- e) assuring the irreversibility of application of the above principle;
- f) judicial safeguards for human rights and freedoms;
- g) assuring the social nature of market economic relations, etc.

It is noteworthy that during the transition period the issue of protecting people's economic rights, as an important function of a social state, acquires exceptional significance. The transition to market relations, in conditions when market infrastructure is not yet fully established, when there exists no clear system of social protection, when monopolistic pressures continue to prevail in many sectors, when serious profound structural transformations are underway, the psychological inertia and the momentum of customs become quite salient, and the possibilities for violating social and economic rights multiply on the background of incomplete market relations. Therefore the state must actively intervene in the resolution of the problems of transition and must create the necessary system of guarantees to assure the protection of people's rights, to arrive at a situation when people, possessing equal rights, become the bearers of new economic relations.

During the transition period a particular socio-psychological situation emerges, when the operation of any subject authorized by the government is identified with the state, and they are treated the same as the state, with all of the associated eventualities. This also indicates that states do not pay enough attention to the manageability of transition relations, neither is a system of protecting human rights or overseeing the activities of legal persons put in place. What is unfortunate is that the failure to prevent such phenomena in a timely manner invariably leads to social metastases. The state is threatened not as much by the fissures inherited from the past, which are inertial in nature and phase out, as by the unlawfulness that has emerged and feeds off the fertile environment within the new reality. This disease

rapidly graduates to a cycle of irrational reproduction and, if at all curable, can be treated only through surgical intervention. Unfortunately many newly independent countries underestimated this circumstance at the time, and Armenia was no exception. The solution for the state, under any circumstances, is to first and foremost care for preventing the immune deficiency of the society, and the main prerequisite for this would be to adopt a systemic approach to the establishment of the mechanisms of governance.

In reflecting on the main characteristic of a social state one should perhaps single out the particular descriptor of social equality, which had become the axis of revolutionary struggle in the course of the last two centuries. This quality has been perceived and interpreted from diametrically opposing positions. Often the simplistic perception of the principle of social equality and its presentation as the ultimate value of social fairness results in a variety of vulgar and twisted interpretations of the nature and development patterns of social relations. There is undeniable truth in the statement that, to assure social equality, the socialist state put up a fight against wealth (proven by 70 years of experience), whereas the social state fights poverty. A social state can not rule out the principle of equality of its members, although it should not be raised to the absolute, but rather be viewed as the right of every member of society, and the creation of the necessary conditions for its exercise must become the duty of the state. This principle also assumes that the duty of the state is to guarantee that individual members of the society, social or other groups are not treated with a bias. In fact the social state, on the one hand, assuring a certain environment of social protection, setting, so to say, the internal threshold, on the other hand shall create the necessary environment for every individual, possessing equal rights, to enjoy room for self-expression commensurate to his/her intellectual ability and legal capacity. This is what assures harmony between freedom and equality.

The democratic, rule of law, social state triad offers full harmonization of the principles of individual's existence: freedom and equality. The isolation and unilateral absolutization or juxtaposition

of any one of these qualities represents a grave error in methodology and may lead to (as attested to by bitter historical experience) extreme, distorted and, as a rule, inaccurate conclusions.

The social state, assuming responsibility for the social protection of an individual, must first and foremost be concerned with securing conditions for the self-cognizance and self-expression of a rational being. But the most daunting issue is: where shall be the line drawn on state's intervention in socioeconomic affairs, in order, on the one hand, to assure guaranteed delivery of its social function and, on the other, for it not to impede the natural development of market relations. It would be futile to look for solutions to this matter that are valid once and for all. Such a balance should be attained through a comprehensive analysis of every country's particular situation. This is exactly why governance is an art in its own right. What is universal, though, is that the social state must come up with active programmatic participation in the system of social reproduction. This pertains to production, circulation, as well as distribution. This acquired particular importance in the German context, when the country proclaimed itself a social, rule of law state. The social state, as Hesse Conrad mentions, not only implements specially designed policies in addressing social problems, but is generally a state that governs, produces and distributes.<sup>225</sup>

Acknowledging the social nature of the state is at the same time a principle, an objective, and a universal rule of behaviour addressing concrete relations. It becomes a characteristic of the essence of continually altering social relations, a bearing for the behaviour of social subjects.

The establishment of a social state is a continual and permanent process, and it requires adequate approaches to every new and changing situation. It would be erroneous to maintain that a state may be considered social only when it has already created a powerful economic base and is now at leisure to reflect on people's social needs. The problem of human needs and the search for a balance between them and a fair possibility to satisfy them is a continuing dilemma,

<sup>225</sup> Хессе Конрад. Основы конституционного права ФРГ. М., 1981. с. 111-112:

and is of a dynamic nature. It is another thing that, depending on existing capacity, differing issues of social satisfaction may be resolved. Although that does not at all mean that over time and space the means may drift away from the goals, not to mention - oppose them.

As for the transition period, and especially situations of crisis management, the challenge of social protection by the state acquires particular priority. Moreover, the Experience of European countries indicates that the social function of the state was particularly emphasized and constitutionally enshrined during systemic transformations, since the ultimate goal of those transformations was the human individual, the satisfaction of his needs and, as it was figuratively stated: "the humanization of society..." Therefore, in the transition period the main issue for the state is to balance the thrust towards the market with a reliable system of social protection. Failing that every reform in the economy will be distorted or downright jeopardized, especially if it pursues the objective of creating a market economy operating in a healthy competitive environment.

In this respect looking at the German experience is once again of interest. Being the first to constitutionally enshrine that Germany is a democratic and social federative state (Article 20), it considered assuring the minimum sustenance level for every citizen to be the issue in the first stage of development of its statehood. Moreover, it is implied that every adult must work and take care of his or her needs. In case that is not possible in view of incapacity, then the state has to assume its share of care. At the same time the state shall assure conditions for individual self-expression, mutual assistance, assembly and joint action.

No state in this world possesses the scale to weigh the extent to which it may be social. One is either headed that way or not, the state either assumes that function or not. If it does, then the objective of the state becomes to assure, on the one hand, the creation of a guaranteed system of social protection and, on the other, the creation of an environment conducive for the self-expression of the rational being in its capacity of a social subject. Naturally this is asking for a particular approach both to production and distribution relations.

If a state does not consider itself to be social, then the society attempts to resolve the above issues through other means and ways, which mostly become the consequence of self-regulation. In other words what matters most is the determination of the nature of social relations in a constitutional norm, which shall characterize its qualitative features and the internal logic of development. And, what is most important, a state which considers itself social can not fail to produce a programmatic approach to social development, can not assume the passive role of registering the outcome of self-regulated relations, relegating everything to the control of the omnipotent market.<sup>226</sup>

The establishment of a social state also assumes bringing forth the issue of rational expectations and demands. Knowing the expectations of the members of the society, forging rational expectations, and the need for respective new value systems of cohabitation, are asking for coordinated programmatic approaches not only in the economy, politics, but also and especially in ethics. The reason is that situations particular to the transition period, such as a disrupted system of reproduction; an economy in need of radical reorganization, which lacks structural basis; the factor of indefiniteness; distorted public mentality; collapsed systems of values, etc., dictate the need for active and systemic formation of new principles of interaction between the state and an individual. Without this it would be impossible to overcome the extreme polarization of approaches and intolerant opposition, to mitigate social tension, assure harmonious development. Moreover, political and other types of motivations increase to tumble the entire society into a stressful situation and keep it there indefinitely, and the failure to find a recipe for an ingenious solution makes disastrous consequences inevitable, leading, in particular, to the emergence of immune deficiency of the society.

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<sup>226</sup> One should mention that almost no country with a liberal economy has elevated this issue to such an absolute as some newly independent countries did. In the USA, as early as from the times of President Jefferson, and throughout the post-war period, the economic mind did not reject the idea of state interference in economic relation, it allowed for a measure of regulation.

Medical science has long ago proven that for normal operation of the human brain 60% of all emotions must be neutral, 35% positive, and only 5% might be negative. Whenever this proportion is skewed towards increasing the share of negative emotions, various diseases inevitably appear. A state considering itself social can not afford to ignore this issue. Especially in civil society one of the fundamental functions of the state becomes to manage the emotions and expectations of the members of the society. It is not incidental that this issue is considered one of the axial questions of social science, and in 1995 renowned US economist Robert Lucas was awarded the Nobel Prize exactly for his contribution to the theory of rational expectations.

The integrity of the social characteristic of a state is also determined by the values and action approaches adopted by its every member, each link, the entire society. Especially in the transition period one of the most important functions of the state becomes the managed shift towards market economic relations. It cannot work any other way, whether we accept it, or not, whether we realize the need for it, or not; that is the way real life goes ahead, and if we needlessly oppose it, we then have to overcome the redundant hurdles set by our own selves. The object of the state's concern must become the issue of lessening and overcoming stress in the society, and the artificial agitation thereof, regardless of its format and the forces responsible for it, should result in up to particular legal consequences.

Apart from expressing particular qualities of the nature of social relations in a state on their own, the "rule of law," "social," "democratic" modifiers of the state, in combination acquire a new quality. It assumes that for such a state the following is typical:

1. The system of reproduction operates by market rules, free entrepreneurship and competition is assured, monopolistic pressure is overcome, and the guarantor of all of the above is the state;
2. Lawful regulated intervention of the state is required in relations of distribution;
3. There is an assumption that, on a national scale, the efficiency of economic solutions shall be paralleled by their social conse-

quences (guided by the criteria of socio-economic efficiency of public production);

4. The issue of optimal decentralization of economic, administrative and political power comes to the forefront;

5. A need arises to clarify, on a state level, the priorities of development;

6. Mechanisms are developed and deployed to assure the supremacy and stability of the Constitution.

A look at the experience of various countries comes to suggest that the main priorities of the economic system of a democratic, social, rule of law state are: the standard of living (prosperity), freedom, security, equality and assistance to the needy. Naturally, these priorities and their successive order have their own specific expressions in every country, determined by its past, present and future.

If we attempt to approach this issue from a broader perspective, covering the entire social-state system, the following may be ranked as development priorities for the Republic of Armenia in strengthening its statehood and national re-assertion: unity,<sup>227</sup> national security, freedom, equality, prosperity, assistance to the needy. Their entirety becomes the purpose of national-social-state activity, and concrete programs and steps towards their implementation embody the policies and constitutional solutions corresponding to the period in question.

In case of Armenia it is of exceptional importance to view in harmonious trinity or, rather, full unity the national, social and state goals and interests. Their separation from, or, moreover, opposition to each other may eventually become fatal. In summarizing all that was mentioned above, we arrive at the conclusion that in enshrining in the Constitution of the Republic of Armenia that "the Republic of Armenia is a sovereign,

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<sup>227</sup> There may be opponents to the idea of considering unity the main priority, naively thinking that it is merely an ethical motto. Not in the least. The approach to this issue is far more serious and profound. We strongly believe that our national destiny, the future of our identity, the issue of natural reproduction of our self, the need to accumulate the critical mass for development, are all a factor of our national unity, and especially of the organic link Armenia-Artsakh-Diaspora. In conditions of new geopolitical realities this is dictated by numerous endogenous and exogenous factors.

democratic, social, rule of law state," the first decisive and, thankfully, accurate characteristic was given to the social relations that we wish to establish conditions for, and which shall be the guarantee of our national and state progress. This approach represents one of the best incarnations of our constitutional culture. The problem is for every practical step to be headed in this direction, emanate from the essence of these notions, and contribute to the development of the society in this direction. Lawmaking efforts, systemic structural and organizational transformations, practical mechanisms and methods for their implementation, the behaviour of the society as a whole and of every individual legal subject should converge on this purpose. The philosophy of constitutional developments has to be outlined on this basis.

Another important condition for assuring constitutionalism is the clear constitutional definition of the notions, enshrined in the foundations of constitutional order, of the "power of the people" and the "power of the state," excluding their identical interpretation. Each of these notions has specific legal content and legal characteristics, and the level of their perception, their constitutional guarantees and practical implementation shall mostly describe the state of constitutional culture in a particular state.

Democracy implies that we deal with only one holder of power, the source and sole bearer of thereof. The classical constitutional formulation is not limited by merely stressing that "the power belongs to the people and its usurpation by an organization or an individual constitutes a crime." The constitutions of many democratic states particularly emphasize: "the people are the only source of power;" "the people shall exercise their power through referenda, other forms of direct democracy and through representation." A comparative constitutional analysis indicates that on the level of norm-principles democracy first and foremost assumes that:

- all power belongs to the people;
- the people are the **only** source of power;
- the people may exercise power either **directly**, or through **representation**;
- no one may **take** the power from the people or **restrict** it, which shall be deemed a grave crime;



- state power is one of the **forms of expression** of the power of the people, which too may be exercised by the people directly, or through representation;

By clearly delineating the "power of the people" and the "power of the state" in constitutions, the emphasis is made on the fact that state power is ancillary to the power of the people, and that it shall be exercised under the principle of the separation of powers.<sup>228</sup> The power of the people may not be restricted by state power.<sup>229</sup> State power is also delegated by the people and is exercised on the basis of constitutional principles and norms that are the product of social agreement. In their turn elections and referenda are viewed as the principal forms of direct democracy. At the same time the international practice of constitutional justice indicates that referenda and elections are two quite different forms of direct democracy that cannot be viewed in contrast to each other. One of these cannot possibly impede with the other. **It is the people who make the choice between them.** Nevertheless, if, as a result of this choice, deepening distrust begins to prevail, these forms allow for complementing and substantiating one another, especially through public surveys and elective referenda. Moreover, a referendum may transform from an effective expression of the power of the people to an instrument, a "truncheon," when it is used only by the authorities for their own purposes, when the people are deprived of their entitlement of being its implementing subject and become merely the object of a referendum, when the scope of the questions posed at a referendum is defined exclusively by the state. The existence and the level of constitutionalism and therefore of constitutional culture in a country are greatly determined by the degree to which the people act as the true bearers of the power that belongs to them. The importance attached to the role of direct

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<sup>228</sup> We ascribe great importance to an observation by Leonid Mamut, Doctor of law, who claims that there often appears an erroneous perception that there exist two powers, the power of the state and the power of the people. In reality there is only one power, the public power of the people embodied by the state, which it exercises through state bodies, not state power. See: А. Мамут. Публичная власть, государство и разделение властей // Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, с. 262:

<sup>229</sup> Чиркин В.Е. Конституционные проблемы власти народа // Государство и право, 2004, N 9, с. 10.

democracy is particularly characteristic of Swiss constitutional culture, and it is attracting increasingly more attention.<sup>230</sup>

For a rule of law state the consistent implementation and protection of all norm-principles enshrined in the "foundations of constitutional order" segment of the Constitution is of preponderant significance. This is necessary for ensuring constitutionalism in the country, and for this reason even constitutional amendments become, in a number of countries, the subject of mandatory preliminary constitutional review.<sup>231</sup> We shall reflect on these fundamental issues in the context of the new challenges that constitutional developments are facing nowadays.

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<sup>230</sup> See, in particular: Saunders Ch. A. *Constitutional Culture in Tradition // Constitutional Cultures*. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000. pp. 41-42:

<sup>231</sup> See, in particular: Бутусова Н.В. Основы конституционного строя Российской Федерации как правовой институт и предмет конституционно-правового регулирования // *Вестник Московского университета. Серия право*, 2003, N 6, с.17-29. For example, Article 61 of the law of the Republic of Azerbaijan "On the constitutional court" states that if the President or the Parliament have proposed constitutional amendments on the basis of Article 153 of the Constitution, the opinion of the constitutional court must be sought in advance. Moreover, in conducting a referendum on this issue the ballot should also include a summary of the opinion of the constitutional court.

### 3.4. CHALLENGES OF CONSTITUTIONAL DEVELOPMENTS

Guaranteeing constitutionalism in a country through consistent implementation of constitutional norm-principles is of particular importance especially for newly independent countries. As we have mentioned, it is of utmost axial importance to clarify and guarantee the norm-principles of the “**rule of law state.**” It follows from the above that in most general terms the requirement of the main principle of the rule of law state is for the state power to be restricted, **clearly drawing the line that the authorities cannot cross.**<sup>232</sup> This line, which the entire system of constitutional review is called upon to protect, is drawn by inalienable human rights. **Restricting power by the law is the main feature of the rule of law state.** A Constitution may turn into a compilation of wishful words, if the chain constitutional principle-law-power lacks harmonious interrelation and complementarity, which makes guaranteeing the law the essence of the exercise of power. Ultimately constitutions have come into being to accomplish the following three important missions:

- to guarantee human rights and freedoms;
- to set a boundary for power and the activities of those who exercise it;
- to define the foundations of state order and regulate the exercise of the functions of power.

Based on the realities and generalizations referred to above, the following may be viewed as the mandatory and basic conditions for the establishment of the rule of law state in every post-communist country:

- recognition of and respect towards human dignity, guarantees of fundamental human rights and freedoms, assuring the supremacy of law;

<sup>232</sup> See: Сушинская С.И. Понятие и сущность правового государства и соответствие ФРГ критериям правового государства с точки зрения ее конституционных характеристик // Конституционное право зарубежных стран. 2001, N 1, с. 42-48.

- separation and balance of powers, optimal decentralization of political, economic and administrative might;
- elected nature and accountability of the authorities;
- existence of independent judiciary power;<sup>233</sup>
- Guaranteeing the supremacy and stability of the Constitution.

These conditions are interrelated, and the absence, ignoring or assorted distortions of any one of these may invalidate the existence of others and indicate the presence of a non-democratic political regime. These are perhaps the most elementary truths crystallized by progressive international legal mind and social practice. Still, foremost among these would be the profound doctrinal interpretation of especially those axial features of the rule-of-law state, which constitute the constitutional principles of “the rule of law” and “the separation of powers.”

Having in mind that we have already, to some extent, covered the issue of the rule of law,<sup>234</sup> we shall hereafter focus our attention only on the baseline circumstances, and shall examine the fundamental issue of the separation of powers and **ensuring their functional balance**, which is of preponderant importance in view of current constitutional developments.

Let us look first at the lessons of history. As it is impeccably stated in Article 2 of the French Declaration of the Rights of Man and of the Citizen: “**The purpose of any political association is the conservation of the natural and imprescriptible rights of man.**” The latter constitute the principal content of any Constitution and the ultimate objective of the state system. In order to secure this in practical life it is necessary, first and foremost, to adopt a clear methodological approach towards the notion of “the law,” (*Recht*) as well as a perception of the primacy of natural human rights.

The theoretical debate around the notions of “supremacy of the law” or “supremacy of statute,” which represent the axis of our dis-

<sup>233</sup> As stated by Thomas Jefferson judges must be independent of the executive, not the will of the people. In genuine democratic states the will of the people is embodied in the Constitution and in laws.

<sup>234</sup> See, in particular, also: Հարությունյան Գ., Իրավունքի գերակայության սահմանադրական երաշխիքները, Երեւան, 2003.

course, has deep historical roots, and it is naturally of principal importance in finding an exhaustive answer to the question we have raised.

For the first time the social mind of the pre-Christian period has come up with a major generalization in Democritus' (470–366 BC) formulation about **correspondence to nature being the criterion of fairness in politics, ethics and legislation.**<sup>235</sup> He saw justice and truth in what was natural, he deemed law to be artificial and he made a distinction between “truth” and “public opinion,” the **natural truth and law.**<sup>236</sup>

If Socrates subsequently associated the reflection of truth in the law with knowledge, Plato, through delineating the “world of ideas” from the “world of forms,” and characterizing truth as the mission of everyone doing his work, presented **law as the product of reason.**<sup>237</sup> According to Plato wherever law is devoid of power and is subjected to authority, the **state in question is doomed to collapse.**

The philosophical mind of the Aristotelian period stipulated that political justice was only possible between free and equal people of the same community. Characterizing political justice as a political right, Aristotle divided political law into natural and conventional laws, formulating the exceptionally important generalizations that, firstly, the **law may not make violence a right or present power as a source of law** and, secondly, that **conventional law must be in harmony with natural law.** Law must be based on political justice. We should not forget that political justice or political law appear in Aristotle's work as justice and law in general. Aristotle has stated quite clearly and unambiguously that **the law must be the basis of every statute, and that such law must be protected through statute.** In today's terms Aristotle would only acknowledge a What is considered to be the quintessential foundation of democracy is not only for men to be equal (slaves are equal in disenfranchisement), but, and especially, to be equal in **possessing legal capacity.**<sup>238</sup>

<sup>235</sup> Материалисты Древней Греции. М., 1955, с. 53-178.

<sup>236</sup> Нерсесянц В.С. Философия права. М., 1997, с. 404.

<sup>237</sup> Платон. Государство, Законы, Политик. М., 1998, с. 171.

<sup>238</sup> Аристотель. Этика, Политика, Риторика, Поэтика, Категории. М., 1998, с. 616, 623, 624.

Aristotle saw the democratic essence of law exactly in the extent to which it corresponded to its legal content, becoming a binding rule of behaviour for everybody.<sup>239</sup> It is commonly believed that ancient Roman law not only came forth as an independent academic discipline, clarifying the boundaries of public and private law, but also presented **natural law** through the entirety of its natural proto-origins.<sup>240</sup>

Without dwelling on the details of awesome generalizations by the giants of ancient Greco-Roman philosophical and legal mind, let us add that the theoreticians of the 17th-18th centuries, such as John Locke, Montesquieu, Jean-Jacques Rousseau and, later on, Kant and others, not only crystallized the idea of the separation of powers, but also that of the rule of law; their understanding of the substance of natural law acquired a new quality, preserving the axial idea of **statute being the embodiment of the law**.

In the history of Armenian legal mind, as we have mentioned, certain positions by Mkhitar Gosh, as well as Hakob and Shahamir Shahamirians on the supremacy of natural (Divine) rights and the constitutional formulation of this approach in the “Entrapment of Vanity” deserve special notice.

**Whichever philosophical characteristic were to be given to the notion of the law, as a social phenomenon<sup>241</sup> it has a natural foundation and is the prerequisite and means for the expression of the social essence of a rational being.**

Incidentally, in the Christian thinking (the Gospel, the Old Testament, part 1 of the Book of Genesis) man is created in God’s image and as such deserves respect. The proem to the Leviticus states: “The Lord of holiness, the Lord of love and life wants to make his people party to His holiness, for them also to become the bearers of life, love and holiness.”<sup>242</sup> It is for this reason that the Bible urges towards and teaches the rules of proper, humane and dignified living. And one of the best lessons to be learnt from this is that the state shall

<sup>239</sup> Արիստոտել, Աթենական հասարակարգը, Երևան, 2003, էջեր 26-27.

<sup>240</sup> Гарольд Дж. Берман. Западная традиция права: эпоха формирования. М., 1998, с. 28-34.

<sup>241</sup> Алексеев С.С. Философия права. М., 1999, с. 2.

<sup>242</sup> Աստվածաշունչ, Սայր Աթոռ Ս. Էջմիածին, 1994, էջ 117.

exist for the man, rather than the man for the state.

In legal and philosophical discourse the fundamental issue of relations between statute and the law has also become the subject of ethical science. The reason is that a lawful statute "...elevates to a solemn level the ethical significance of power,"<sup>243</sup> harmonizes and brings to a common denominator the individual, mutually acknowledged and publicly acceptable interests, becomes a criterion of fairness and a basis for the administration of justice.

As formulated by B. Chicherin, the entire ethical significance of power is based in it holding the sword of justice, whereas justice is in each one receiving that which he or she is entitled to. What if this sword, which is called upon to protect the law, becomes an instrument of its infringement, something that destroys the moral high ground in the eyes of the people, and that is destructive both for the disenfranchised and the authorities themselves.<sup>244</sup>

This brief historical foray pursued the objective of, acknowledging the principal lessons learnt, to clearly frame the following indisputable truths, generalized by legal and philosophical mind:

- man, as a social being, enters social relations with his natural and inalienable rights;
- the state must recognize human rights as an ultimate and inalienable value, as a constitutionally enshrined direct right;
- every law shall emanate from these rights, shall protect these rights, shall restrict these rights only and exclusively inasmuch as it is necessary for recognizing and guaranteeing others' rights, for harmonious social cohabitation;
- natural human rights underlie the exercise of power by the people and the state. Power is restricted by the law, rather than the law by power;<sup>245</sup>

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<sup>243</sup> Чичерин Б. Н. Курс государственной науки. Ч. 3. М., 1898, с. 401.

<sup>244</sup> Ibid, p.p. 133-134.

<sup>245</sup> As mentioned by academician V. Nercissians: "...the law (that which is defined as positive law) may either conform to, or contradict the right. [...] The law (positive law) becomes lawful only as a form of expression of the right. [...] It is not the law that is the consequence of official-authoritative bondage, but the opposite." See: ՆԵՐՍԵՍՅԱՆԵՆ Վ. Ս., Իրավունքի և պետության տեսություն, Երևան, «Նաիրի», 2001, էջեր 41-43.

- the direct effect of constitutional human rights is guaranteed by the Constitution, laws and by enforcement practice;
- these rights are universal and enjoy the protection of not only domestic, but also international guarantees.

The Constitution, enshrining a particular methodological approach towards the recognition and protection of human rights, predetermines the nature of their legislative materialization, institutional support and systemic guarantees. The Constitution itself must not become an impediment for the comprehensive and full implementation of the principle of the rule of law. Therefore we consider it necessary to discuss the constitutional approach to human rights and freedoms.

As we have mentioned, the principle of the equality of rights acquires flesh and blood when it is combined with legal capacity (since slaves are also equal). In democratic lawful systems it means the equality of subjects whose rights are recognized, respected and protected through guarantees. And the law is not only in the recognition of the right, but also in its rational restriction, to avoid violating the rights of others. The quintessential issue here is the recognition of human rights, their legal formulation, and practical safeguards and guaranteed protection.

In our opinion the best, well-founded and comprehensive constitutional formulation could be: "...the state shall recognize and guarantee the principle of the supremacy of the law and the rule of law." Such language assures a proper methodological approach, acknowledgment of the priority of natural rights, recognition of the substance of statute in the law, underlining the public accord around its restriction, a clear articulation of the conceptual framework for the freedom of rights and restriction of power. The law becomes the safeguard for an individual's freedom, security, the protection of his/her property and the exercise of his/her rights.<sup>246</sup>

The principal constitutional requirement is the recognition and stipulation of the supremacy and priority of those rights, their baseline nature, and their inalienability. Lacking such recognition, the dictate of

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<sup>246</sup> Четвернин В.А. Понятия права и государства. Введение в курс теории права и государства. М., 1997, с. 26.



the right to rule shall invariably come to the foreground, and the Constitution in this case, rather than “setting the boundary” for the right to rule, shall do it with respect to individual freedoms, thus perpetuating the principles of tyranny.

In these circumstances the state, willingly or unwillingly, shall appear not as the regulator catering to the common demand of the society, but as a natural self-reproducing necessity, which starts to operate under the logic of self-protection and unimpeded strengthening of its influence.<sup>247</sup> This shall lead to a situation where the law shall become an instrument for violating the law. The above historical and logical analysis comes to prove that the law must be the safeguard of freedom, rather than of its restriction and abuse.

This issue is more topical and urgent in the continental systems of law. In the Anglo-Saxon common law system the materialization of the law is based on case law, whereas in the continental system it is the positive law resulting from political compromise. Under the circumstances the clarity of constitutional norms and principles, their integrity and internal coordination acquire an exceptionally important significance.

What does the international practice of law indicate? A comparative analysis of the constitutions of more than a hundred countries comes to prove that the constitutions or human rights declarations (which are of constitutional norm-setting nature) of almost all countries enshrine a conceptual approach to human rights, and constitutions of more than 65 countries contain a clear approach towards the constitutional norm of human dignity. The latter has one or more articles devoted to it, underscoring the inviolability of human dignity as an inalienable right, the obligation of the state to respect and protect it, as well as its standing vis-à-vis human rights and freedoms.

We would like first to dwell on the example of those countries, which have clearly defined constitutional positions on the priority and supremacy of the law, the harmonious linkage between the law and statute.

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<sup>247</sup> The state cannot be established to make a few individuals happy. Its purpose is to make the society happy. Платон. Государство. Собр. соч. Т. 3. М., 1994. с. 189.

Article 1, paragraph 1 of the Constitution of Germany enshrines that human dignity is inviolable. Respect towards it and its protection is the obligation of any state power. Paragraph 2 of the same article stipulates that the German people accept inviolable and inalienable human rights as the basis for any human community, for peace and justice in the world. Paragraph 3 completes this conceptual approach, enshrining that the mentioned fundamental rights are binding for the legislative, executive and judiciary branches of power, as rights possessing direct effect.

In our opinion this attitude represents a classical, complete, consistent and exemplary approach. A similar approach is reflected in Articles 18 and 21 of the Russian, 3 of the Armenian, 10 of the Spanish, 1 to 3 of the Czech, 7 of the Georgian, 8 of the Ukrainian, 30 of the Polish, 1 of the Romanian, 15 of the Slovenian, and 1 of the Portuguese Constitutions. We would like to submit Article 7 of the Georgian Constitution as an example of a clear and complete formulation, which states: “Georgia recognizes and defends generally recognized rights and freedoms of the individual as everlasting and **most high values. The people and the state are bound by these rights and freedoms, having direct effect.**”

Article 3 of the Armenian Constitution states: “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 international law.

The state shall be limited by fundamental human and civil rights as a directly applicable right.”

Apparently everything is clearly and unambiguously stated. Let us single out the following factors:

1. the country recognizes universally acknowledged human rights and freedoms;
2. it takes care of their protection;

3. it acknowledges them as ultimate values;
4. these rights and freedoms restrict the exercise of power not only by the state, but also by the people.

As one may see, the principal philosophy of this constitutional approach is, as we have already mentioned, that the power is restricted by the law, rather than the law by power. We are certain that the constitutions where these methodological approaches are not adopted with the same degree of determinateness are incomplete and essentially imperfect.

The main conclusion is also that the legal basis for the Constitution is exactly in the recognition and articulation of the supremacy of the law. It is in this respect that ensuring the supremacy of such a Constitution shall also guarantee the supremacy of the law. In its turn it is of utmost importance for enforcement and legislative practice that the criteria for the supremacy of the Constitution be clarified. Professor Yuri Tikhomirov, for example, singles out seven such principles: 1. reflection of constitutional principles and ideas in a legal act; 2. correct usage of constitutional notions and terms; 3. adoption of acts by the competent authority; 4. taking account of the place of the act and the requirements presented to it in the legal system; 5. adherence to the procedures for drafting, adopting and enacting an act; 6. substantive conformity between the norm of the legal act and the corresponding constitutional norm; 7. stability of the implementing interpretation and elucidation of the content of legal norms.<sup>248</sup> Ultimately these criteria, in their substantive integrity, offer an answer to the following fundamental question: to what extent is the normative act legal in its form and substance, expressing, formalizing the essence of the law? If this is assured, then it undoubtedly emanates from the principle of guaranteeing the supremacy of the law and may be considered to be in conformity with the Constitution. In fact it is through the Constitution, through assuring its supremacy, that the

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<sup>248</sup> See: Тихомиров Ю.А. Коллизионное право. М., 2001, с. 257.

principle of the supremacy of the law acquires flesh and blood in legal acts.<sup>249</sup>

Let us attempt to revert to international legal instruments. The preamble to the Universal Declaration of Human Rights states: “the inherent dignity and equal and inalienable rights of all members of the human family are the foundation of freedom, justice and peace in the world.” It goes on to add: “human rights should be protected by the rule of law.” Articles 1, 6, 8, 29 of the Declaration not only clearly enshrine the principles of inalienability of natural human rights, the freedom and equality of individuals, but also their duties toward the society and their status of the subject of law. Article 8 unequivocally stipulates the right to fair trial, seeking remedies in authorized courts for the violations of the rights established by the Constitution or by laws.

The same methodological approach is reflected in the UN Charter, the preamble to which asserts the dedication to fundamental human rights, the dignity of man. The International Covenant of Civil and Political Rights (December 16, 1966) also stipulates that the recognition of human dignity and equal and inalienable rights is the basis for universal freedom, justice and peace, and that these rights emanate from the dignity characteristic of a human being. Article 16 of the Covenant defines the principle of a human individual being the subject of law. The Covenant, departing from the fundamental principle that “in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political free-

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<sup>249</sup> Incidentally, clause 7, Article 68 of the law of the Republic of Armenia on the Constitutional Court stipulates: “In cases mentioned in Paragraph 1 of this Article the Constitutional Court shall determine whether the legal acts referred to in the appeal are in conformity with the Constitution or not, proceeding from the following factors: 1) the type and the form of the legal act; 2) the time when the act was adopted, as well as whether it got into force in compliance with established procedures; 3) the necessity of protection and free exercise of human rights and freedoms enshrined in the Constitution, the grounds and frames of their permissible restriction; 4) the principle of separation of powers as enshrined in the Constitution; 5) the permissible limits of powers of state and local self-government bodies and their officials, 6) the necessity of ensuring direct application of the Constitution.”

Сборник документов Совета Европы в области защиты прав человека и борьбы с преступностью. М., 1998, с. 34.

dom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights,” also provides for the permissible limits in restricting these rights by law.

Having acceded to the Council of Europe, Armenia adhered to the Statute of the organization, signed on May 5, 1949 in London, Article 3 of which unequivocally states: “Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.”

We would like to particularly single out the “Convention on the protection of fundamental human rights and freedoms” (November 4, 1950), the preamble to which not only enshrines the principles mentioned above, but also emphasizes such notions and formulations, as: “universal and **effective** recognition and observance of human rights,” “Human rights [...] are best maintained [...] by an **effective political democracy**,” “freedom and **the rule of law**,”<sup>250</sup> etc. The last phrase is especially noteworthy; it is used in the preamble to the Convention as an expression of political ideals and traditions of European countries, their common perception of values. This Convention is also special in that its norms possess direct effect and are protected by the European Court of Human Rights. Enshrining fundamental human rights and freedoms, the Convention defines the permissible limits for their restrictions and derogation from the obligations in emergency situations. Moreover the restrictions have to be prescribed by law, be proportionate, and they should not distort the essence of the right involved. The Convention also requires delineating fundamental rights from the socio-economic and cultural rights, the respective approaches to which shall be defined under the norms and principles of international law. The Convention and its Protocols contain norms on fundamental human rights and principles, the direct effect of which must be guaranteed in every country that is a member of the Council of Europe.

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<sup>250</sup> Сборник документов Совета Европы в области защиты прав человека и борьбы с преступностью. М., 1998, с. 34:

The Charter of Paris for a New Europe (November 21, 1990) is also particularly noteworthy. The new democratic processes underway in the world made it necessary to enshrine in the Paris Charter, on the level of international legal norms, that “Human rights and fundamental freedoms are the birthright of all human beings, are inalienable and are **guaranteed by law**,” “Their protection and promotion is **the first responsibility of government**,” “**Respect for them is an essential safeguard against an over-mighty State**,” “Their observance and **full exercise are the foundation of freedom, justice and peace**.”

Let us also add that the 1789 French “Declaration of the rights of man and citizen” states, quite up to the point, that “ignorance, forgetting or contempt of the rights of man are the sole causes of public misfortunes and of the corruption of governments.”

The principle of the rule of law, while being one of the axial subjects of European constitutional science, received a new impetus in the draft of the European Constitution. Article 2 of the draft is simply entitled “The Union’s Values.” It enshrines on a constitutional level: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights [...]. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity [...] prevail.” These are not merely words, but values that constitute the basis of an entire civilizational system, and in any country aspiring to become a full member of the European family these values must become viable bearings of fundamental significance.

All of the examples above come to unambiguously attest to the fact that, by the end of the day, the fundamental issue of assuring the supremacy of the Constitution boils down to guaranteed protection of human rights and freedoms, through ensuring harmonious interaction of the separated branches of power. And since these rights are of direct effect, the main safeguards for their protection are their constitutional articulation and the existence of a viable system of the judiciary.

The experience of the European countries within several last decades invariably demonstrates that the protection of human rights is

guaranteed best when people have a constitutional right to seek remedies for infringed rights in a court of law. Access to judicial redress becomes an important guarantee for the protection of human rights.<sup>251</sup> Such a statement is nevertheless imperfect and incomplete, if it is anchored to the conceptual perception of human rights. The issue is that the rights of man and citizen, even if they are not fully reflected in the Constitution (the Constitution of the Republic of Armenia, Article 42), cannot become a function of state governance disengaged from man. If these rights are recognized and enshrined in a Constitution, if their restrictions are determined constitutionally, and if these rights may also be violated not only through various actions or inaction, but also through laws or normative acts that are a “result of political accord,” then the protection of these rights shall only be guaranteed when individuals are endowed with the right to constitutional justice.

The fundamental issues of guaranteeing the rule of law and possible restrictions of human rights are currently in the focus of international constitutional developments. The specialists convened from more than two dozen countries and a number of international organizations to an international conference held in Yerevan on October 3 and 4, 2003, discussed the fundamental issue of restrictions of human rights.<sup>252</sup> This also became the subject of the 2005 Congress of European Constitutional Courts in Nicosia, as a most topical theme about which all countries submitted national communications. The international conference organized in Yerevan in October, 2004, by the Venice Commission of the Council of Europe and the Constitutional Court of the Republic of Armenia reflected on the fundamental issue of guaranteeing the rule of law, discussing more than 20 communications submitted from various countries.<sup>253</sup> During the initial two year (2000-2001)

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<sup>251</sup> Արդարադատությունը՝ իրավունքն է գործողության մեջ, իրականացման գործընթացում: See Алексеев С.С. Право: азбука-теория-философия: Опыт комплексного исследования. М., 1999. с. 50.

<sup>252</sup> See Конституционное правосудие в новом тысячелетии. Международный Альманах-2003, Ереван, 2003.

<sup>253</sup> See Конституционное правосудие в новом тысячелетии. Международный Альманах-2004, Ереван, 2004.

discussions of constitutional reforms in the Republic of Armenia with the group of experts of the Venice Commission from 7 countries the same axial baseline issues were raised, aiming at guaranteeing the implementation of the norm-principles enshrined in the first article of the Constitution of the Republic of Armenia.

The discussions referred to above, as well as the trends of international constitutional developments irrefutably prove that the axial issue for the establishment of a rule-of-law democratic state is assuring the supremacy of the law. And the latter is possible if there also exist clear concepts about the possible restrictions of rights. The basic approach is that the natural, divine human rights pertain to every individual who is an organic particle of social community, and these may only be restricted to the extent to which they make the exercise of others' rights or natural cohabitation impossible. In other words, the main and only criterion for restricting human rights is the assurance of others' rights and natural cohabitation. This approach also underlies the Universal Declaration of Human Rights, Article 29 of which defines: "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society."

We maintain that the search for criteria different from these shall only lead to conceptual confusion. Nevertheless there is a need to delineate the notions of the "criterion," "principle," "condition" and "basis" for the restriction of rights. Considering the criterion mentioned above to be central, various "principles," "conditions," "bases" are called upon to assure and guarantee that there be no deviation from those criteria. The answer to this question is offered by international constitutional practice, departing from the following principles (the so-called golden rules) for restricting rights on the basis of the above principle. The restriction of a right must:

- be implemented on the basis of law;
- preserve the principle of proportionality;



- not distort or disrupt the essence of the right.

This means that the restrictions may only be set by law, in the name of a lawful objective provided by the Constitution and necessary in a democratic society, and such a restriction must not result in the right being stripped of its substance, must not jeopardize the existence of the right or distort its essence.

It is also of extreme importance to see how these criteria and the principles of their implementation are perceived, interpreted and applied in the practice of constitutional adjudication.

According to international practice of constitutional justice **the state may restrict a right if the restriction is justified by the protection of other rights or the protection of another constitutional value, or by a constitutional objective, provided such protection or objective cannot be accomplished by other means, based on the principle of the rule of law.**

On the level of constitutional solutions the system of rights subject to restriction has the following structure:

- a) rights that may be restricted by law unconditionally. The lawmaker in this case has a wide margin of discretion;
- b) rights that may be restricted by law only under certain conditions, for particular purposes and through specific means;
- c) rights that may not be restricted by law. In view of the possibility of a conflict between the exercise of these rights and the rights of third persons, these rights are still not absolute and could be restricted. Since these rights may not be restricted by law, the restrictions on their exercise are enshrined on a constitutional level;
- d) the protection of human dignity and a number of rights are beyond the scope of the system of distinctive restrictions, since these fundamental rights shall not be the subject of any restriction.

Although the conditions for restricting every concrete right are set as applied to the particular right in question, the Constitution outlines the outer perimeter for restricting all rights. That is, the law restricting a right must apply to the general, rather than a particular case. The essence of the right may not be distorted under any conditions.

In various countries the scope of the so-called absolute rights, not subject to any restriction, may vary. The Constitution of the Republic of Armenia, in particular, first stipulates the scope of the rights subject to restriction by law (Article 43. The fundamental human and civil rights and freedoms set forth in Articles 23-25, 27, 28-30, 30.1, Part 3 of Article 32 may be temporarily restricted only by the law if it is necessary in a democratic society in the interests of national security, public order, crime prevention, protection of public health and morality, constitutional rights and freedoms, as well as honor and reputation of others.

Limitations on fundamental human and civil rights and freedoms may not exceed the scope defined by the international commitments assumed by the Republic of Armenia.)

The scope of rights not subject to any restriction is also set (Article 44. Special categories of fundamental human and civil rights, except for those stipulated in Articles 15, 17-22 and 42 of the Constitution may be temporarily restricted as prescribed by the law in case of martial law or state of emergency within the scope of the assumed international commitments on deviating from commitments in cases of emergency). This means that even in conditions of martial law or a state of emergency the right to life, prohibition of torture, right to privacy, fair trial, presumption of innocence, proportionality of punishment, etc, may not be restricted even provisionally.

The issue of proper application of the principle of proportionality in restricting the rights is extremely topical on the level of constitutional solutions and in implementation practice. An examination of the practice of constitutional adjudication in Western European countries indicates that in applying the principle of proportionality the constitutional courts must first and foremost determine whether the lawful end is commensurate to lawful means. The means selected must be sufficient for obtaining the end in question, that is, the objective must be attained through the selected restrictive measure. The necessity is deemed to exist when, from all available means the one is selected, which restricts the right in question least of all. Then the

court must determine whether the restriction of an individual's right is commensurate to the public interest pursued.

It is also of exceptional importance for the lawmaker, when restricting rights and freedoms, not to establish regulation that may encroach upon the essence of the rights or result in the loss of its essence. Public interest may justify the restriction of a right, if those restrictions correspond to the requirements of fairness, are proportionate to and commensurate with constitutionally significant values and have no retroactive effect.

The principle of proportionality has three components:

- the restriction must pursue a lawful objective;
- the restriction must be necessary to attain the objective, since other restrictive means to attain the lawful objective in question are lacking;
- the selected restriction must be fair.

In assessing adherence to the principle of proportionality, the constitutional court must answer the following questions:

- did real reasons exist for restricting the right?
- is there another restriction that may have the same effect?
- is the selected restriction lawful for attaining the lawful objective in question?
- is the volume of restrictions acceptable in view of the lawful objective in question?

In order to avoid disproportionate restrictions, the restrictive norm must be formulated in conformity with the requirements of legal technique, be clear and concrete, prohibiting broad interpretation and arbitrary implementation.

Restricting rights is associated with a number of perils, first among them being the interpretation of the provision "necessary in the interests of state or public security, public order, protection of public health and morality, rights and freedoms, as well as honor and reputation of others," as well as "restrictions may be imposed for a lawful purpose provided for by the Constitution and necessary in a democratic society."

In both cases the main way to avoid the peril is in consistent application of the principle of proportionality, whether by the lawmaker or the tribunal administering justice. The issue of restricting rights in emergency situations is a special case. The Committee of Ministers of the Council of Europe, which adopted the Guidelines on human rights and the fight against terrorism<sup>254</sup> on July 11, 2002, introduced certain clarity in this matter. Paragraph 2 of Clause XV of this document clearly defines that states may never, however, and whatever the acts of the person suspected of terrorist activities, or convicted of such activities, derogate from the right to life, from the prohibition against torture or inhuman or degrading treatment or punishment, from the principle of legality of sentences and of measures, nor from the ban on the retrospective effect of criminal law.

It is of extreme importance for the entire legal system of a country for the Constitution to clearly enshrine:

- the rights that are not subject to restriction;
- the rights that may be restricted in the scope and procedure defined by the Constitution;
- the rights that are restricted by laws, and the conditions for such restrictions;
- the limits on and the procedure for restricting rights in emergency situations.

Especially in the last case special attention should be paid in the Constitution to assuring functional checks and balances on the restriction of rights. The lack thereof, in conditions of constitutional imprecision, may lead the system of constitutional adjudication into a very grave situation, when there is a deep clash between legal principles and political realities.

**What should be the approach to the fundamental issue of the separation of powers?** There is no doubt that the separation of powers is of pivotal significance for any country's constitutional solu-

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<sup>254</sup> Руководящие принципы Комитета Министров Совета Европы в области прав человека и борьбы с терроризмом (утверждены на 804-м заседании Комитета Министров 11 июля 2002 г)

tions.<sup>255</sup> More than 200 years have passed since this principle was enshrined for the first time, but life nonetheless demonstrates that, various interpretations notwithstanding, for a rule-of-law state the separation of powers was and remains a cornerstone value, acquiring new meaning and significance. Twenty or so years ago soviet jurisprudence considered the separation of powers a “bourgeois principle” characteristic of foreign constitutional models. And this is the legacy of old legal thinking, which is not easy to overcome. As rightfully mentioned by A. Blankenagel, a professor of the Berlin University, the separation of powers in modern times is one of the principal achievements in the development of a constitutional state.<sup>256</sup> The essence of this principle, by the end of the day, is in setting forth the idea of restricting state authority, through establishing mutual checks and balances on its separated branches.<sup>257</sup> **This allows overcoming the hazard of concentration of power and creates the necessary preconditions for the exercise and protection of human rights and fundamental freedoms.**

One of the greatest contributions of the fathers of the American Constitution is adding to the theory of the separation of powers the doctrine of checks and balances, which became an axial value of the Constitution of 1787.<sup>258</sup> It is of principal importance that through the system of checks and balances the “static” separation of powers acquires a “dynamic” dimension. Hegel has once expressed his concern that if the “living unity” of powers were to be ignored, their static balance would always be jeopardized. In his turn professor O. V. Martishin rightfully maintains that an inefficient application of the system of checks and balances, and the establishment of only a static

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<sup>255</sup> On this see, in particular: Алебастрова И.А. Основы американского конституционализма. М., 2001, с. 83-85

<sup>256</sup> Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, с. 5.

<sup>257</sup> See: Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, с. 256.

<sup>258</sup> See: Алебастрова И.А. Основы американского конституционализма, М., 2001, с. 9.

balance of powers shall invariably lead to a paralysis and crisis of power.<sup>259</sup>

The separation of powers is in organic linkage with the optimal decentralization of political, administrative, and economic power, representing different expressions of the same phenomenon. Moreover, in case of a formalistic approach to the issue, that is a centralized fusion of political, administrative, and economic power, on the one hand intolerance, corruption, mafia, clans, and criminal autocracy become inevitable and, on the other, there is an apparent danger of violating human rights and dignity, excessive accumulation of negative social energy and explosion.

The President of the Constitutional Court of the Russian Federation V. Zorkin maintains that, irrespective of its multi-faceted expressions, the separation of powers is only present where:

- the law is endowed with ultimate juridical power and is enacted by the legislature (representative body);
- the executive is mostly implementing the laws, is limited to passing regulatory acts, and is subjected to the parliament or the President;
- a balance of competences is assured between the lawmaking and executive branches of power;
- the judiciary are independent and, within the scope of their competence, autonomous;
- legal measures are put in place to assure mutual balance between the branches of power.<sup>260</sup>

The issue of the separation and balance of powers qualifies the degree of constitutional democracy and the development of parliamentarianism in any country. This principle acquires a specific expression in intra-parliamentarian relations. The issue is that, in order to assure the balance of powers in a broader sense, a certain

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<sup>259</sup> See: Мартышин О.В. Конституция Российской Федерации 1993 г. как памятник эпохи // Государство и право, 2004, N 4, с. 13-16.

<sup>260</sup> Зорькин В. Реализация конституционного принципа разделения властей в практике Конституционного Суда России. Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, т9 17.

functional role is also reserved to the parliamentary minority. The latter should be capable of and enjoy a possibility to keep the political majority within the framework of constitutionalism, by balancing its lawmaking activity, acting with full legal capacity to motion for the judicial review of the constitutionality of legal acts. Failing that we may deal with a de facto one-party parliament, with all the detrimental consequences that follow.

International practice proves that the issue of the separation of powers encounters most difficulty in the so-called semi-presidential systems of governance, where disputes over constitutional competences are most frequent and acute. In practice the semi-presidential system is of dual nature; it is a parliamentary system with two executive branches, the President and the Cabinet (France, Ireland, Poland, Lithuania, Russia, Ukraine, Armenia, etc).<sup>261</sup> The principal characteristic of this system is that in the event of a major dispute between the government and the parliament it is not only the parliament that may withdraw confidence in the cabinet, but also the President may dissolve the Parliament. As a rule the president in semi-presidential systems is elected by popular vote, possesses mostly balancing powers, as well as some functional powers in the realm of the executive.

The experience of international constitutional developments also indicates that in such systems, regardless of their complexity, efficient solutions have been found that stood the test of social practice. In order for this to happen it is instrumental that, firstly, **the issue of harmonizing the system “function-institution-competence” be addressed.** And, secondly, **the framework of the functional, balancing, and checking competences of each branch of power should be clarified and harmonized.** This is necessary, on the one hand, to assure relatively independent and full operation of each branch of power without disrupting the equilibrium in the “function-institu-

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<sup>261</sup> Armenia, having a semi-presidential system by many indicators, also has essential differences from other countries belonging to the same system. This first and foremost pertains to the indefinite and unbalanced place and role of the President in the constitutional system, something that is an independent subject of a serious discussion.

tion-competence” system and, on the other, this equilibrium should be dynamically maintained through necessary and sufficient checks and balances.

Regardless of the type of governance system and the level of perception of the principle of the separation of powers, the issue not only of separating, but also of balancing powers is an inescapable necessity for the rule-of-law state. As rightfully mentioned by Edigius Kuris, the President of the Constitutional Court of Lithuania, “the separation of powers implies their balance, and it is understandable that a balance may not be established between powers that have different weights.”<sup>262</sup> In the opinion of the President of the Constitutional Court of Slovakia Jan Mazarek there is a need for such a balance between the branches of power, which will assure their equipollence.<sup>263</sup>

One should keep in mind that the following main criteria<sup>264</sup> for the separation of powers, formulated by us, are currently considered most acceptable in the theory of constitutional law: **a) relative independence of the branches of power; b) the existence of the necessary constitutional institutions, completeness of their competences and their equivalence with respective functions; c) guarantee of uninterrupted balanced operation of state power** which, in turn, assumes stipulation of safeguards that will allow to identify, evaluate and restore disrupted functional balance. Only in this case will it be possible to assure dynamic and harmonious development, avoid “explosive” political and social solutions.

From the perspective of addressing this fundamental issue, the 1995 Constitution of the Republic of Armenia had **three major weak links**, so to say. Firstly, there was insufficient clarity about the place of

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<sup>262</sup> Эдигиус Курис. Доктрина разделения властей в практике Конституционного Суда Литвы. Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, с. 106.

<sup>263</sup> Ян Мазак. Разделение властей в решениях Конституционного Суда Словакии. Конституционный Суд как гарант разделения властей: Сборник докладов. М., 2004, с. 167.

<sup>264</sup> See: G. Harutyunyan, A.Mavcic THE CONSTITUTIONAL REVIEW AND ITS DEVELOPMENT IN THE MODERN WORLD (A COMPARATIVE CONSTITUTIONAL ANALYSIS), Yerevan Ljubljana, 1999, p. 382.



the institute of the president within the system of state governance; secondly, from the point of view of all criteria mentioned above, the legislature, the executive and the judiciary lacked the necessary functional independence and the state of dynamic equilibrium; thirdly, the mechanisms for identifying, evaluating and restoring disrupted balance were imperfect.

In semi-presidential systems of governance there often emerge contradictions between the President and the government in cases when they do not represent the same political party (the examples of Armenia, and also of France, are typical). In systems like this it is often difficult to get a definite answer to the question: which dimensions of executive power are the responsibility of the President, and which are the prerogative of the prime minister and the government?

In the event when the President has a clear majority in the parliament, such an issue naturally never occurs, since political responsibility is shared. At the same time the system implies that the President may have to appoint a prime minister who is acceptable to the parliament or altogether cede the real initiative to the parliament, adjusting to the latter. Such a situation implies the existence of a strong and viable parliament, which is capable of assuming political responsibility for the operation of the government, as well as the existence of balances, which, in the event when the National Assembly and the government fail to display adequate competence, shall help to restore the upset balance. In this case what matters is that in a semi-presidential system of governance the first function of the President of the country is to assure the natural, orderly and balanced operation of the branches of power, which characterizes his place and role as the head of state. But this function can not be transformed into the role of a coordinator, something that will annihilate any attempt at the separation of powers. The President of a country appears as the head of state in the constitutions of many countries (Italy - Article 87, Russia - Article 80, Estonia - Article 77, Georgia - Article 69, Azerbaijan - Article 8, Bulgaria - Article 92, Kirgizstan - Article 40, Belarus - Article 92, Ukraine - Article 102, Nicaragua - Article 184, the - Czech

Republic - Article 54, Slovakia - Article 101, etc). In all of these countries the ultimate issue is to prevent the head of state from acquiring the role of the general secretary of the Politburo, which is characteristic of some post-communist countries and represents a great danger for the country's future democratic development.

The principle of the separation of powers is considered to be one of the fundamental principles of constitutional order, enshrined in the foundations of constitutional order of the Constitution of the Republic of Armenia. This is expressed in Article 5 of the Constitution of the Republic of Armenia, according to which state power is exercised on the basis of the separation and balancing of powers of the legislative, executive and judiciary branches of government. But the perception of the separation of powers as a principle of the Constitution of the Republic of Armenia makes one let go of the conceptual disposition, according to which the separation of powers is viewed as the separation of unified state power between different institutions. This principle must be interpreted as the restriction, balancing of real factors of state governance, their cooperation and interrelation. It is not incidental that through their Constitutions most of the countries emphasize not the principle, but the assurance of the real separation of and cooperation between the branches of power and enshrining this conceptual approach in the Constitution. For example, Article 10 of the Constitution of the Russian Federation states: "State power in the Russian Federation shall be exercised on the basis of the separation of the legislative, executive and judiciary branches. The bodies of legislative, executive and judiciary powers shall be independent." Moreover, constitutions of many countries also stress the interrelated nature (Portugal – Article 111), interaction (Moldova – Article 6), cooperation (Kirgizstan – Article 3), equilibrium (Poland – Article 10), balancing (Estonia – Article 4), etc., of the branches of power. Such varied approaches are also determined by differences in theoretical interpretation and practical implementation of the criteria for the separation of powers. Special importance is attached to clear definition of constitutional checks and balances and

assuring a dynamic equilibrium between functional, balancing and checking constitutional powers. Unfortunately these issues are extremely under-examined in theoretical literature. In our opinion a **constitutional balance is a constitutional, non-functional power of a state institution, called upon to dynamically assure the constitutional balance of the separation of powers. In its turn a constitutional check is a constitutional, non-functional and non-balancing power of a state institution, called upon to prevent a possible disruption of the constitutional balance of the separation of powers in the event of failure of the system of constitutional balances.** The axial issue of constitutional architecture is to assure a dynamic equilibrium of the branches of power. To this end every constitutional functional power must be balanced and checked with respective powers of the remaining branches of government.

Many theoreticians of contemporary constitutional law (particularly the German scholar of state C. Hesse) consider the main characteristics of the principle of the separation of powers to be the regulation of joint activities and the discipline of individuals, determination of the separate branches of power, determination of their legal capacity and restriction thereof, regulation of common work, balancing the legal capacity of state bodies and, as a result, the uniformity of limited state power.<sup>265</sup> The reality is that the factor of the separation of powers is not made absolute. This principle implies functionally clear and independently exercised interaction and equilibrium between various branches of unified government. In this respect attempts are made in international practice to constitutionally define the restrictions on power, to produce interrelation between its branches, a system of “imposed” coordination of actions (approving the cabinet’s program by the parliament, veto power by the President, the parliament’s right to override presidential veto, the parliament’s right to a no-confidence vote to the cabinet, etc.). In its turn a most important condition for assuring the equilibrium of power is the existence of a

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<sup>265</sup> See: Хессе К. Основы Конституционного права ФРГ. М., 1981, с. 237.

potent system for identifying, evaluating and restoring, through constitutional jurisdiction, disruptions in the balance of constitutional competences of the branches of government. And that is only possible when each of the three branches of government has at least enough power to assure the expression of its essence.<sup>266</sup>

The most dangerous deviation is the quest for a new branch of government outside of these three, which is nothing more but an exclusion of such equilibrium, nostalgia for various kinds of domination, and a green path for a system of corporate governance through centralization of political, administrative and economic power. These approaches are extremely dangerous and have nothing in common with the principles of establishing lawful democracy and value approaches of the civil society. The theoretical and philosophical generalizations of the principle of the separation of powers are anchored not to subjective perceptions of individual thinkers (including John Locke, Charles Montesquieu et al), but to objective laws underlying social relations. If Ohm's proposition that there exists a certain correlation between an object's diameter and electrical resistance is beyond doubt, then no less accurate is the pattern, discovered by social science, continually and necessarily applicable, under which the establishment of a rule-of-law state and civil society is impossible without true separation and balancing of powers.

According to another approach (that, for example, of the British political scientist M. Weil) the issue is not limited to a formal legal study of relations between the legislature, the executive and the judiciary, it rather is viewed from the perspective of the interaction of the legal, social and political systems, establishment of an "equilibrium" between the state and the society.<sup>267</sup>

In most general terms one may assert that in international constitutional practice nowadays there have emerged two models of enacting the principle under our scrutiny: that of "flexible" and "rigid" sep-

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<sup>266</sup> See, in particular, the ruling of the Constitutional Tribunal of Poland on the case 6/94 of November 21, 1994.

<sup>267</sup> See: Vile M. G. *Constitutionalism and Separation of Powers*. Oxford, 1967, pp. 1-10.

aration of powers. The first is based on the ideas of John Locke on the interaction of powers under the lead of the lawmakers, and the second originates in the interpretations of Charles Louis Montesquieu of the balance and most clearly drawn separation of powers. European constitutional and political practice derives from both models, and the most classical example of the second model may be seen in the USA.

Each of the said models operates in particular conditions, such as: the political culture of the society, the maturity of political institutions, legal traditions and mentality, the psychology, level of legal awareness, development trends of various branches of power, the dialectics of their functional and structural developments, etc.

One of the most salient trends observable within the recent decades in some countries is the relative strengthening of the executive branch. This process is characterized in Britain as a transition from a “system of governance by the cabinet” to a “system of governance by the Prime Minister,” something that is particularly attributable to modern-day Great Britain.<sup>268</sup>

A disruption of the balance between the legislative and executive branches of government in Great Britain has been noted in many studies.<sup>269</sup> At the same time the prevailing role of the cabinet vis-à-vis the parliament does not indicate a reversal of parliamentarianism. The parliament retains the function of overseeing, adjusting and ratifying the policies of the government. The political responsibility of the government before the parliament is also preserved.

Similar processes of strengthening the vertical executive axis are also noticeable in the constitutional practice of non-parliamentary states or monarchies. The gradual expansion of the nature and scope of presidential powers is viewed by American constitutional law and political science as one of the main characteristics of American constitutional practice and the Constitution itself, when the process of

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<sup>268</sup> See: Rush M. *Parliamentary government in Britain*. N. Y., 1981. Политическая система Великобритании, с. 111, 147-153.

<sup>269</sup> See: Beloff M., Peel G. *The Government of the United Kingdom. Political authority in a changing society*. L., 1980, 1981; Сэмпсон А. *Новая анатомия Британии*. М., 1975.

increasing presidential powers takes place without constitutional amendments. Several American scholars affirm that such an expansion of powers may jeopardize liberty and democracy in the country.<sup>270</sup> Many among American theoreticians of law discuss the issue of interrelations between legal and political approaches in addressing the separation of powers, often to the extent of considering the Supreme Court a political institution.<sup>271</sup> The issue here is to what extent, in discussing the questions pertaining to functional roles of the branches of government, are political expediency and constitutional principle reconciled? In any circumstance, it is impossible to assure the supremacy of the Constitution without subjecting expediency to principle. Even when expediency is a result of a compromise, it should nonetheless emanate from principle.

Some other trends present in Western European countries also merit attention. For example, as a result of constitutional reforms of 1992-1995, Finland moved from a semi-presidential system to a parliamentary format of republican governance. At the same time serious arguments have emerged in Italy in favour of moving from a parliamentary to a semi-presidential system. A similar transition took place in Slovakia in the year 2000. And Georgia in 2004 voiced its preference for a semi-presidential system in contrast to the presidential one.

It is obvious that these trends are determined not only by varying interpretations of the principle of the separation of powers, but also and especially by the issues that each country's state system faces. Regardless of which model of state organization is chosen: presidential, semi-presidential or parliamentary, the common premise is that the separation and balanced co-operation of powers is an unavoidable necessity, and it must be realized through assuring systemic harmony within the trinity "**function-institution-competence**," enshrining an optimal equilibrium of **functional, checking and balancing powers**

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<sup>270</sup> See: Cass Sunstein. *Changing Constitutional Powers of the American President*. EECR, Vd 2, N4. Fall 1993, Vol 3. N1 Winter, 1994, c. 99.

<sup>271</sup> See, in particular: Zoller E. *Splendeurs et mise`res du constitutionnalisme. Les enseignements de l'experience americain* // *Revue du droit public*. 1994. p. 177; Peretti T.J. *In Defense of a Political Court*. Princeton, N.J.: Princeton University Press, 1997. p. 73.

for each constitutional institution and, with the help of these, guaranteeing dynamic maintenance of constitutional symmetry within the framework of unconditional protection of and constitutional guarantees for fundamental principles of democracy and the rule of law. In their turn the clear separation of powers, their dynamic balance and guaranteed protection thereof are the most important prerequisites for the development and deepening of democracy. These solutions are of cornerstone importance for every country in establishing constitutional lawfulness and resolving disputes over constitutional competences.

Naturally, in order to clarify the conceptual approaches to this issue it is extremely important to examine the international experience of constitutional amendments in various countries. The latter comes to prove that there exist several stable trends with respect to the subject of our study:

- the functional competences of the branches of power get increasingly clarified, they are harmonized with the function of the branch of power in question and guarantees for autonomous exercise of such competences are strengthened;
- checking and balancing competences get clarified and strengthened;
- guarantees of intra-constitutional stability are strengthened;
- the interaction of the branches of power increasingly leans towards principles of cooperation and solutions that assure dynamic equilibrium;
- the system for identifying, evaluating and rectifying disruptions in constitutional guarantees of human rights and in the constitutional balance of competencies of the branches of power, gets increasingly strengthened;
- there is a noticeable increase in cooperation, based on the principle of the rule of law, between branches of power in the area of normative-lawmaking activity.

Along with these general trends, as we have mentioned, importance is attached to the development of institutions that implement

the functions of the branches of power, clarifying their functional roles, and affording them the necessary and sufficient competences.

In any country that has embarked on the road to democratic development the most refutable and dangerous eventuality is when the separated branches of power are viewed not as institutions that bear the authority and independently implement their functional competences, but as “instruments” in the hands of the “real” bearer of power who, as a rule, happens to be the head of state. Another perception is also quite widespread, according to which the executive pyramid exercises the real power, and the rest of the state institutions are simply necessary as its means. It is obvious that such models have also existed throughout the history of human society and they still persist. But the theory of law has qualified such regimes as unlawful already a long time ago. No matter how great may be the desire for democratization, in countries where there exist no guarantees of real separation of powers, independence in exercise of their competences, an equilibrium thereof attained through a system of checks and balances, various expressions of autocracy become inevitable, which lead to serious grave consequences.

An important condition for guaranteeing constitutionalism is for its norms, following the enacting of the Constitution to:

- a) be called to life effectively and without hindrance;
- b) enjoy reliable protection.

The Constitution should not stay on the level of registering wishful thinking; it shall guarantee and assure the implementation of the objectives and principles enshrined therein. The main question is how to get there, how to guarantee that the Constitution becomes a living reality, reflecting also the principal trends of development in the society? The answer to these questions is largely determined by the availability of official interpretation of fundamental constitutional principles and its specific norms, as well as by the existence of mechanisms for reliable protection of the supremacy of the Constitution. In current international practice special importance is ascribed to the principles of **immediate abstract direct official interpretation of the**



### **Constitution and its evolutionary concrete interpretation.**

Acknowledging the importance of doctrinal or discretionary interpretation, under the circumstances we do not wish to make it the subject of discussion, since there exist almost no profound controversies in this area. As for official interpretation, its principles and formats, there still exist divergent approaches and several fundamental issues about them that ask for clarification.

One of the characteristic features of American constitutional culture is that the judiciary are reserved a great role in interpreting the Constitution. For example, in the opinion of Robert E. Nagel: "The legal profession monopolizes the opportunity both to present arguments to courts and to render authoritative interpretations. Lawyers therefore affect not only what the Constitution is, as a practical matter, but also how it is thought about and understood."<sup>272</sup> The same author, making a distinction between constitutions that submit to interpretation and those that do not, emphasizes: "Effective legal argument can be penetrating; it finds ambiguities because a careful reading [of the Constitution] demonstrates that the text is less clear than first appeared, and it locates uncertainties in historical intent because history is rich and complex. Indeed intellectual sophistication is the main ally of those who see the Constitution as a "living document," flexible enough to be useful in modern conditions. [...] Because our conception of the Constitution is so shaped by argument about its meaning, interpretation seems indispensable. The most familiar content of the Constitution is simply a series of judicial interpretations."<sup>273</sup>

Constitutional principles may also emerge in the segment of implementation, when judicial interpretation, failing to attain particular significance, simply ratifies the lawfulness of preceding implementation practice. At the same time many constitutions acquire their meaning as a result of implementation, rather than interpretation. The most

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<sup>272</sup> Robert F. Nagel, *Constitutional Cultures The Mentality and Consequences of Judicial Review*, University of California Press, Berkeley 1993, p. 7.

<sup>273</sup> *Ibid*, p.p. 7-8.

important constitutional principles in the constitutional system mostly acquire substance through extensive implementation, turning into established characteristics of constitutional culture.

We would like to particularly emphasize that constitutional culture, while undergoing its logical development whether in the Armenian reality or in international practice, is based on a number of stable characteristics, such as public accord and solidarity, the existence of laws “harmonious with the nature of man, and to the liking of our rational soul,” “infallible faithfulness” to them, the existence of the balance and separation of powers, the ability to “restrain our lives with the law and freedom.” These are the values that lead us onto the thoroughfare to progress and development. Misunderstandings, “contradictions,” “cynical” behaviour, “depravity,” “placing the will of the ruler above law,” “praise to vice through ignorance,” “schism in unity,” and many other expressions of evil incompatible with the “nature of man,” pave a direct road to inevitable loss and regress. Unfortunately our history contains abundant testimony to all these.

We also consider it necessary to mention that constitutions are often written and amended in situations when the society faces complex challenges requiring urgent solutions. Such situations entail especially careful and responsible approaches to the principal qualities of constitutional culture. Granting preference to current issues, political compromises around them often seriously imperil the future and stability of the country’s constitutional order in general. Famous constitutional scholar Herman Schwartz is rightfully concerned that the desire to find quick fixes to current problems through constitutional amendments may prove to be inadequate in the long run.<sup>274</sup> Political realities leave their imprint on the perception of the content and the forms of expression of legal principles. It is mostly political realities that determine the selection of the system of governance in a given country, the constitutional balance of powers in it, the practice of

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<sup>274</sup> Герман Шварц - Основные элементы конституции. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г. <http://usinfo.state.gov/journals/journalr.htm>

checks and balances, intra-constitutional safeguards for overcoming conflicts in the legal plain, the possibility for dynamic harmonization of political and legal realities, etc. It was characteristic of post-communist countries that, at the time of adopting their respective new constitutions, revolutionary liberalism and leftist revanchist opposition coexisted there. Their interaction had led to an environment of a certain political compromise around legal solutions. Almost in all of these countries not only left extremism gradually phased out, but also liberal romanticism yielded to moderate realism. The balance of political influences was significantly disrupted. The administrative-political leverage of the incumbent authorities gradually gained prevalence in the process of change, and this was dangerous to the extent to which constitutional solutions were subjected to addressing current political problems, rather being the result of a public consensus around general approaches.

Constitutional reforms must become the conduit for the establishment of public accord, overcoming political crises, rather than the victim of “contradictions.” The examination of the experience of many countries indicates that the principal features of such crises are: a decline in the popular confidence towards political authorities, rampant corruption elevated to a systemic level (this includes political corruption), centralization and merger of political, administrative and economic power, the rooting of clan-based corporate governance in the system of state power, the high degree of shadow in the area of social relations, etc. The deepening of the negative vector of these phenomena annihilates the safeguards assuring the continuity of the process of the establishment of constitutional democracy, which poses the highest danger for the countries in transition.

The discussions organized by the International Association of Constitutional Law in recent years indicate that the procedure for enacting and amending constitutions is becoming increasingly more important. The principal trend is that these processes should be detached from current political influences and speculation. And for this purpose the preferred option is the establishment of the institu-

tion of Constitutional Council, a major safeguard in assuring the country's stability. This is proven by the experience of numerous countries, as well as the modern history of the formation of constitutional culture. The need for such an institution becomes ever more apparent in conditions of imperfections in the political system of a country, low level of legal awareness and legal culture, the need for clarifying and ensuring national and state priorities through political and social consensus. We believe that the establishment of a Constitutional Convention in the Republic of Armenia shall also guarantee the efficient resolution of many issues and shall greatly contribute to the sustainable development of the country.

Constitutional architecture possesses its own logic, principles and boundaries. The principal issue in adopting or amending constitutions is assuring the rule of law. In its turn, the existence of clear guarantees for the protection of human rights and fundamental freedoms is the foremost criterion for evaluating the viability of a Constitution. This is the baseline, the interminable criterion. Every step aiming at addressing whatever political ends through constitutional amendments, which is not rooted in the principle of the rule of law, can not be deemed constitutional and shall be in contradiction to true democratic values. **One of the most important principles of international public law is that a constitutional amendment is impermissible, if it weakens the protection of human rights or the safeguards for the exercise of those rights and freedoms.** As figuratively stated by the President of the Venice Commission at its 61st plenary session in December 2004, “the **rule of law and democracy** must be written on the flag of those who have chosen the road to progress.”

The **second task** of constitutional amendments is guaranteeing functional capacity and effective performance of the authorities. This is exclusively possible through consistent implementation of the principle of the separation of powers, balancing their competences, the rooting of a forceful system of checks and balances. Every amendment in this direction shall provide a clear answer to the following questions:

1. How does it affect the functional competences of the branches of power, and to what extent may it disrupt the dynamic equilibrium and impair the functional independence of a branch of power?
2. How to assure systemic harmony in the chain **function-institution-competence**?
3. To what extent are changes in functional competences offset by balancing competences?
4. To what extent are the checking powers reliable and complete in conditions of the new equilibrium of functional and balancing competences?

The answers to these questions shall determine the necessity and effectiveness of every amendment aiming at reforming the system of governance. The true essence of the constitutional principle of the separation of powers is that they be checked and restricted to the benefit of the law. Therefore the answers to these questions also determine the extent to which the rule of law is assured. In its turn, without dependable protection of constitutional norms and principles the constitutional order shall be deprived of a reliable system of self-defense.

The **third important task** of constitutional amendments is to assure as broad as possible public consensus around constitutional solutions, at the same time minimizing and excluding constitutional lacunas and inconsistencies, overcoming impasses, strengthening constitutional stability, setting fundamental conditions for constitutionally assuring the supremacy of the Constitution and the establishment of democracy. Specialists often recall the principal feature of American constitutionalism: its stability when it comes to fundamental principles and the flexibility in their practical expression according to the requirements of the time and the place.<sup>275</sup> This is not only characteristic of American constitutional practice, it is internationally considered to be an important quality of constitutional culture. Therefore constitutional amendments must create guarantees of intra-constitutional stability whereby **stable and flawless protection**

<sup>275</sup> See, in particular: Алебастрова И.А. Основы американского конституционализма. М., 2001, с. 4.

**of fundamental constitutional principles is accompanied by continually assuring the dynamic development of constitutional democracy and the supremacy of the Constitution.** These qualities represent the main characteristic of contemporary constitutional culture and are of pivotal significance for the rule of law state.

The approaches to assure these qualities are used to assess the nature and degree of the meaningful perception of constitutional culture in a country, its determination in establishing constitutionalism, the importance assigned to the environment of public accord, the responsibility towards the future of the state and the people.

Every constitutional amendment must be supported by a clear conceptual basis. The amendment must have a rationale: why, what issue is it addressing? An answer shall be provided to the question: what are its underlying value system approaches, to what extent does the amendment in question assure most complete and consistent implementation of fundamental constitutional principles? Before considering amendments one should consider solutions of the same issue in international constitutional practice, the existing legal approaches, skim international case law, especially the legal positions of the European Court of Human Rights. Every amendment pertaining to the powers of governmental bodies and their dynamic functional balance must be assessed from the perspective of its possible consequences, and a determination of its potential shall be made to assure the consistent implementation of three important constitutional principles: the rule of law, the rule of the people and the separation of powers.

The Constitution must include the entire system of profound, lasting values of civil society and assure their stable and reliable protection.<sup>276</sup> Constitutional amendments must not be easy and they shall be strictly justified. The stability of the Constitution is the main safeguard for the stability of the country. On the other hand, the

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<sup>276</sup> It would be appropriate to mention the emphasis by V. A. Chetvernin: "...the system of relations characterized as "civil society" assumes a historically developed situation in the [organization of] state and law, where the supremacy of human rights is accepted." See: *Феноменология государства. Сборник статей. Вып. 2. М., 2003, т. 20.*

Constitution can not be ossified, fail to respond to social progress, turning from the latter's incentive into its holdup. International practice has come up with a whole arsenal of means to address this issue. Among these, especially in the course of the preceding century, the institute of constitutional interpretation was deemed especially important. Alongside conceptual and doctrinal interpretations the institute of the official interpretation of the Constitution is of particular importance. The latter allows for the possibility to afford the Fundamental Law great flexibility, social dynamism, to significantly reduce the temptation of amending it. In the opinion of the US constitutional scholars the viability of their Constitution is greatly determined by the fact that over 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**"<sup>277</sup> (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. Underestimating this factor means ignoring the principles of constitutional democracy and testifies to one's insufficient constitutional literacy. It would be appropriate to emphasize the common

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<sup>277</sup> Дик Ховард - К конституционной демократии во всем мире: американский взгляд. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, N1, 2004 г.,

thread in the communications of the Japanese and Mexican representatives at the 61st plenary session of the Venice Commission of the Council of Europe on December 3 to 4, 2004, where both countries, having embarked on serious processes of constitutional reforms, consider the establishment of Constitutional Courts to be one of their main objectives (incidentally, similar steps are also being initiated in Estonia). The principal rationale for it is the importance of resolving constitutional disputes over competences and of constitutional interpretation, and the creation of the necessary conditions for that.

European developments of recent decades also indicate that the role of constitutional courts is of exceptional importance in the area of constitutional interpretation, their legal position becomes a preponderant source of constitutional law in the continental legal system. Among numerous international discussions on this subject we would like to single out the international conference held in Moscow in February of 2004.<sup>278</sup> With a view of revealing the role of constitutional courts in assuring the stability and development of constitutions, the participants of the conference ascribed particular importance to the exceptional role of abstract and concrete-indirect interpretations of constitutions in the establishment and development of a rule of law state. It was also emphasized that, from among the 110 constitutional courts in the world, the most effective constitutional review is implemented by those institutions that have broad powers to assure the stability of the Constitution through its official interpretation. Incidentally, if all constitutional courts without exception have the power of indirect interpretation of the Constitution, the right of abstract interpretation is reserved to the constitutional courts of about 30 countries.

The question of the official interpretation of the Constitution is considered so important in a number of newly independent countries that even an individual member of parliament is reserved the right to apply to the constitutional court with that request. The Moldovan

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<sup>278</sup> The materials of the conference were published in the international journal "Конституционное правосудие" (2004, N 2).



experience here is most typical. The study of just one decision of the Constitutional Court of this country of April 2, 2004, illustrates how, on the basis of an application by just one member of the parliament, the court considered the issue of interpreting part 3 of article 116 of the Constitution and resolved an issue that may have become the subject of numerous speculations. We ascribe importance here not as much to the concrete issue, but the possibility to address and legally resolve similar issues. In these circumstances also relevant are the authority and the supervisory role of the parliament, the prevention of accumulation of negative social energy in the society, the operation of a system of constitutional justice, etc. B. A. Osipyan is quite right in stating “[...] even the most “rigid” constitution must allow for the functional possibility to implement legislative reforms in order to avoid social cataclysms.”<sup>279</sup>

One of the most important criteria for evaluating the rule-of-law state is the degree of shadow governance in it. The problem is in the extent to which real power is in the hands of constitutional institutions and the degree of formality thereof, while true power may end up in the hands of institutions and individuals in the shadow. Such an eventuality may be in direct correlation to the degree of judicial independence and capacity to act, and may be prevented only by guaranteeing the latter.

In summarizing the above, we may conclude that the need for constitutional reforms in Armenia in 2005 was determined by the existence of the following fundamental problems:

1. An important condition for the establishment of independent statehood and overcoming the transition is the introduction of systemic clarity into the foundations of state order, on the basis of an assessment of the profound patterns of social practice, examination of the international experience, and a multi-factor analysis of the fundamental priorities of a nation-state for each development phase. The third Armenian Republic, making its first independent steps in con-

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<sup>279</sup> Осипян Б. А. Идея саморазвивающейся правовой системы // Журнал российского права. 2004, N 4, с. 73.

ditions of a systemic collapse, in extremely difficult conditions of war, socio-economic hardship, found the capacity to solve most complex nation-building issues, accruing along the way numerous fundamental problems impeding with the establishment of statehood, and these can only be addressed in conditions of targeted systemic reforms.

2. The current processes of Armenia's international integration indicate that one should more deeply consider historical realities and the fundamental values which, especially in the area of democratic development and the protection of human rights, are currently in the basis of domestic, international and supra-national legal relations of European countries. In view of this many traditional democracies, as well as Eastern European countries, have also amended their respective constitutions.

3. The 1995 Constitution of the Republic of Armenia lacked a clear attitude of methodological significance toward human rights as ultimate inalienable values, as directly effective rights that had to be recognized and guaranteed. One of the main directions of constitutional reforms was to strengthen constitutional guarantees for ensuring and protecting human rights, clarification of the framework of possible restrictions of these rights, rooted in the international law and, in particular, the provisions of the European Convention on the Protection of Human Rights and Fundamental Freedoms, as well as the trends of international constitutional developments.

4. The 1995 Constitution of the Republic of Armenia failed to consistently implement the principle of the separation of powers, there were deficiencies in ensuring the separated equilibrium of legislative, executive and judiciary branches of power that would properly balance each other. In view of the principles mentioned above it was necessary to clarify the functional competences of various institutions of power, and strengthen the checks and balances therein.

5. Constitutional guarantees for assuring the efficiency of law-making in the National Assembly of the Republic of Armenia

and its potent oversight role were deficient. It was necessary to reserve the National Assembly a higher degree of independence in implementing the political responsibility it had assumed, through strengthening its lawmaking role and creating real prerequisites for the establishment of true parliamentarianism in the country.

6. New approaches of principle were required to the issues of assuring constitutional guarantees for the independence of the judiciary and its systemic integrity. True independence of the judiciary had to be enshrined constitutionally, the fundamental question of establishing a system of administrative adjudication had to be addressed, clear functional relations had to be designed between various institutions administering judicial power.

The system of constitutional justice had to be made more effectual and efficient.

7. The methodological approaches in the section of the Constitution on “Territorial governance and local self-governance” had to be revised in principle in order to overcome the existing confusion. Local self-governance had to be viewed as an independent institutional system of a democratic society, stipulating the necessary and sufficient constitutional guarantees for the independence of local administrations.

8. There also had emerged the need for overcoming some inherent contradictions, assuring the guarantees for intra-constitutional stability.

9. In order to make the Constitution a living reality, for establishing constitutionalism, constitutional democracy, there was a need for persistent constitutionalization of social relations, removal of all impediments dissecting the chain “citizen-Constitution,” creation of real prerequisites for the power of the people.

10. There was a need for constitutionally guaranteeing full-fledged implementation of direct democracy, directed by the will of the people without any hindrance.

The fundamental problems listed above have found their particular solutions as a result of constitutional amendments, at the same time bringing forth new issues requiring further systemic improvements.

### 3.5. SOME LEGAL AND POLITICAL DEFORMATIONS OF CONSTITUTIONALISM IN TRANSITION SOCIAL SYSTEMS

It is common knowledge that constitutional developments involve a natural, dynamic, continual process for every country. Various countries have found ways and methods of establishing constitutionalism and promoting dynamic systemic transformations that are democratic in nature, lawful in substance and guarantee social progress and development for the society in question.

For countries with transition systems the ultimate goal of the transformation is the establishment of constitutionalism and ensuring stable constitutional development. The latter implies guaranteeing the rule of law through democratic institutions, public accord, formation of an atmosphere of mutual understanding and tolerance, continual maintenance of an agreement over basic rules of cohabitation and, thanks to all of the above, steering the positive potential of the society towards progress and development.

It is also not questioned what is counter-indicated to this process in view of the principles for the establishment of civil society. Constitutional developments can not be put in the service of current political expediency. They may not disrupt the poise of the separation of powers, lead to misbalance, contribute to the convergence and centralization of political, administrative and economic powers. Constitutional processes should not undermine the guarantees for the protection of human rights, restrict freedoms, impede with the development of local self-governance. The notions of "human rights," "democracy" and "the rule-of-law state" appear in organic trinity, and the purpose of the establishment of constitutionalism is to guarantee their full enjoyment. A most important issue of late is how these are expressed in the common European legal system and what are the specific trends of the same in the social systems in transition.

Let us firstly mention that in recent years there were many discussions around the problem of "common European legal space." What is the essence of this commonality? What common system of values does underlie the common European legal space? To what extent is the perception of this commonality similar in societies with pretty divergent levels of common legal and particularly constitutional culture? One more question: how is the essence of this common legal space expressed in the lawmaking and implementation practice of various countries? All of these questions possess a special significance not only for constitutional practice, but also for the purposes of transitology.

Quite naturally, when speaking about the common European legal space many first and foremost refer to integration processes within Europe: the Council of Europe and the European Union. These processes have resulted in the emergence of the necessary institutional foundations and the legal premises for close cooperation on the basis of common, mutually accepted principles and values. In our view it is exactly the system of values that has become the basis and the guarantee for the strength of this cooperation and the foundation for the emergence of the common European legal space.

The Constitutional Treaty of Europe for the first time clearly and unambiguously enshrined, on the level of constitutional solutions, the system of values that is in the foundation of the Union. According to Article 2 of the Constitution these are, above all, human dignity, freedom, democracy, equality, the rule of law and respect for human rights. But enshrining these values is not yet sufficient. They may acquire a real incarnation only in a society where pluralism, tolerance, justice, solidarity and non-discrimination prevail.

Many countries of the European Union may state that these values and qualities of the social system are an inalienable characteristic of their daily social existence. The extent to which this statement is true determines the extent to which the societies in question are part of the common European legal space. Simply ratifying most European legal instruments and transposing them into domestic legislation does not yet spell integration into the common European legal space. In

our view what is essential here is the degree to which the said principles and provisions translate into practical reality.

What are, from this perspective, the true situation and the existing trends in Eastern Europe and the countries of the Former USSR?

All of these countries have constitutionally pledged their allegiance to democratic, lawful common European values, they have recognized the fundamental principles of the power of the people, the rule of law, the separation of powers, and have laid the institutional foundations for the rule-of-law state. But to what extent have these values, principles and mechanisms acquired real content in social life? This is a question of principle not only from the perspective of legal practice, it also possesses a much broader profound academic significance. We have conducted a comparative analysis of the main indicators describing democratic processes in the EU countries, the non-EU Balkan countries and in the CIS. We have determined the integral indicator of democratic development based on the assessment of electoral processes, the independence of the judiciary and the media, the development level of civil society, effectiveness of governance, the level of corruption and a number of other parameters of social existence.

What general conclusions follow from this analysis? There emerged three basic qualitatively different groups within the EU and the CE member countries, scoring varying levels of principal indicators that reflect the value basis of legal space in respective countries:

- While in the countries of the first two groups the general dynamic of democratic and legal processes is predominantly positive, the average CIS level is not only low, but its dynamics is also negative;

- the real situation in the CIS indicates that common European legal principles are definitely deformed in practice and do not appear as domineering features of social reality, while the process of constitutionalization of social relations is noticeably stalled: a certain constitutional deficit emerges in conditions of transformation.

Naturally this situation requires serious evaluation and assessment. This is when one may acknowledge the existence of a Constitution without the necessary level of constitutional democracy. This is

attested to by not only the accumulation of certain negative social energy and, as a consequence, by various "tinted" revolutions and political crises, but also by the fact that, while turning constitutional principles of the rule-of-law state and democracy into mottoes, in real life completely different rules and relations are set.

The first goal would naturally be to determine the causes of all these. In our opinion one may isolate here several principal reasons:

- Inertia in the minds and mentality. And the reason is not only that leapfrogging over centuries of development is virtually impossible, but also that "imported democracy" often deforms when it encounters expressions of inertial value systems;
- the lack of legal, constitutional culture, low level of legal awareness;
- inadequate capabilities of democratic state institutions and deficiency of political institutions;
- insufficient political will of the government in promoting democratic change, unsatisfactory constitutional and legislative solutions, distorted perception and implementation of fundamental principles of constitutional democracy in legislative policies and implementation practice;
- the immune insufficiency of the social system, exacerbation of negative social trends and irrational processes in view of unsatisfactory resolution of social problems;
- the objective difficulties accompanying systemic collapse, transformation to a part from a whole, with the concurrent need to resolve issues of systemic transformation, which had a different character in countries of Eastern Europe, etc.

We would like to draw attention to certain circumstances that also determine, within the framework of the causes quoted above, the viability of constitutional jurisprudence in transformational systems.

The analysis of the experience of constitutional developments in post-communist countries indicates that they were characterized by the existence of revanchist leftist opposition and revolutionary liberalism at the time of enacting new constitutions. The interaction of these had



brought about a particular environment of political consensus over legal decisions. Almost in all of those countries leftist extremism gradually dwindled, whereas liberal romanticism has yielded to moderate realism. The equilibrium of political influences was significantly disrupted. The administrative and political leverage of the authorities gradually gained the upper hand in the process of change, and this was dangerous to the extent to which constitutional solutions were subjected to the solution of current political issues, rather than resulting from public accord around general approaches.

It is also typical that in these countries, as a rule, political institutionalization is on a low level. Most of the political parties are, in the definition of one German political scientist, "either political sects, or the means for self-assertion of select ambitious individuals." Political culture that would be in harmony with democratic values is lacking. In a certain sense democracy is falsified and turned into political dictatorship, when the political majority enjoys unlimited power, while the minority has no possibility to affect political and legal processes.

In transition societies the main expressions of irrational processes in constitutional practice are as follows:

- distorted perceptions of democracy and the system of values of a rule-of-law-state;
- the use of these values as a smokescreen for enforcing the will of the authorities;
- efforts to convert various institutions of government, the press and the media into instruments of exercising power;
- the merger of incumbent authorities with the shadow economy through, on the one hand, corruption becoming the main capital of the authorities and, on the other, the politicization of the shadow economy;
- the formation of a new and particularly dangerous environment of restricting human and citizen's rights and freedoms through the emergence of an atmosphere of fear, distrust, hopelessness, impunity, acceleration of political and bureaucratic cynicism, which are often wrapped in democratic packaging.

In conditions like these the role of exogenous factors increases exponentially, this includes the active impact of the European structures on democratic developments in the post-communist countries, exercised, to a certain degree, through implanting European norms into the social life of various countries, something that often results in negative domestic response.

Both quantitative and qualitative analyses of the existing realities in the CIS countries indicate that the convergence of political, administrative and economic powers contributes to the emergence of the features of a "corporate democratic system," which is distorted in its nature, ignores the principle of the rule of law, is rooted in the shadow economy and the realities of elevating the power to the absolute, and attests to a significant constitutional deficit in these countries.

The biggest danger of corporate democracy is exactly in that the social system succumbs to the cobweb of chronic immune insufficiency. Superficial social stability in this case disguises the reproduction of mutated social values, which is more dangerous than any other social disease. Such a situation invariably leads to the deepening of contradictions between the interests of the authorities, the society and the state. The main objective of the constitutional-legal system of the society is to prevent the emergence and deepening of antagonism between these interests, between power and freedom. Whereas upon the establishment of corporate democracy such an antagonism becomes inevitable. An essential feature of the Constitution is exactly in ensuring a legally enshrined balance between power and freedom.

An obstacle to this is the fact that the formation of value foundations of the new legal environment is not implemented as an intrinsic necessity, as a means to accomplish public accord, overcome political crises.

The level and character of social development have always been determined by relations between man and society, which, first and foremost, are a factor of the place and role of the social entity in production relations. Slaves were fully owned by their masters. In feudal society individuals did possess certain rights, since the masters only

owned their work. Subsequent social developments have led to the acceptance of the right of man to contractual labor relations, whereas in civil society the recognition of natural human rights and the principle of the rule of law prevail. Notwithstanding the constitutional and legal acknowledgement of the principles of the rule of law, democratic society, the real character of social relations is determined by the true exercise of these principles, when power is restricted by law, rather than vice versa, when these rights have direct effect, determine the meaning, content and enforcement of laws, the operation of the legislative and executive branches, local administration, and when they are backed by the administration of justice.

A March, 2006 editorial in the French *Le Monde Diplomatique* (#624) was devoted to an important question: what are the principal criteria of democracy? A question like this in transition societies shall result in an infinite multitude of answers. But in our opinion the French periodical offered a full and exhaustive answer. There exist five criteria:

Free and fair elections;

Organized and free opposition;

The possibility of real alternative replacement of the authorities;

Independent judiciary system;

Independent press.

Many indicators may accurately characterize each one of these criteria, painting a general, integral landscape of democracy. Though one important factor, in our opinion, merits special notice. These criteria are interdependent; they do not exist in detachment from each other, and all other democratic qualities are their derivatives. The absence or distortion of any one of them indicates a deformation of democracy. These criteria underlie the two axial objectives of European civilization: free competitive market economy and representative democracy. All of the European conceptual initiatives converge at these objectives.

In assessing the real situation of just the labor relations in certain countries under current conditions of transformation, it would be impossible not to notice that they are to some extent of a "feudal

nature." This oligarchic-feudal phenomenon is gradually dissipating from the economy onto politics and the state system. This represents a degradation of the social fabric, and it will take generations to overcome its consequences. Corporate democracy is the principal host to this hazard, and overcoming it is the priority objective, to be attained through genuine constitutionalization of the social system, calling to life the principle of the formation of a rule-of-law, democratic state and civil society.

All of these deformations are incompatible with the fundamental principles of the European rule-of-law state. The role of constitutional courts in transition countries is exactly to guarantee the supremacy of the Constitution on the basis of genuine rule of law and the formation of a fundamental system of values that underlies the common legal system of Europe.

What is the most preponderant task in this quest? Having examined the character of doctrinal approaches and legal dispositions of many European constitutional courts, including those of the CIS, we conclude that there is no great divergence here in the assessment and understanding of common European legal principles, especially when it comes to protecting human rights. From among all structures of the state the constitutional courts stand out with their advanced potential of adequate understanding of the essence of and, respectively, applying in practice, the fundamental principles and standards of European law. The principal task would be to effectively claim this potential, actively galvanize the constitutional-legal resources for overcoming the problems of transformation. This is only possible through ensuring real independence of constitutional courts. The experience of many constitutional courts and the attitude of the other branches of power to them convincingly indicate that their real independence and functional capacity would be impossible to ensure in transition societies without the appropriate use of both endogenous and exogenous factors within the framework of international commitments of each country.

### 3.6. THE IMPERATIVE OF GUARANTEEING THE SUPREMACY OF THE CONSTITUTION

The ultimate principle of the existence and functioning of democratic society and the rule-of-law state is, as mentioned already, the supremacy of the Constitution. All judgments about constitutional culture will lose their value if the supremacy of the Constitution is not guaranteed in real life.

**Supremacy is the universally binding nature of the Constitution, enshrined therein, which stipulates the hierarchy of legal acts, reserves the Constitution the role of the most important source of law and binds the norm-maker and the enforcer to accept the Fundamental Law as the ultimate criterion.** The basis for this is the essence of the Constitution as a legal act of a constituting power, the universally binding nature of which supersedes the legal effect of any decision by any public authority. The Supreme Law of the rule-of-law state is the basis for the formation and implementation of the state will of public authority and it assumes a special protection function, as the ultimate supervisory function in a rule-of-law state. One of the main achievements of the 20th century was the emergence of specialized judicial structures to accomplish this mission. This role of the bodies of judicial constitutional review is first and foremost in **ensuring the supremacy of the Constitution, guaranteeing the conformity of legal acts to the Constitution, resolving disputes on constitutional competences between state bodies, putting in place legal guarantees for legal regulation of political disagreements that emerge within the society, constitutionally ensuring human rights and freedoms.** In other words, judicial constitutional review is a means and a possibility for guaranteeing stability within the society. This role is first and foremost implemented through review of normative acts that fail to conform to the Constitution, through identifying, evaluating and rectifying such unconformities.

The calling of the specialized bodies of judicial constitutional review is for constitutional courts to be created and function with the purpose of ensuring and protecting the foundations of constitutional order, human and citizen's rights and freedoms, guaranteeing the supremacy and the direct effect of the Constitution, protecting the fundamental political and legal values proclaimed and guaranteed by the Constitution.

Currently there are 110 constitutional courts in the world. They vary substantially in their powers, mechanisms of formation and operation. Whatever the case, their functional role is still the same: **to ensure the supremacy of the Constitution through judicial constitutional review.**

Certain elements of constitutional justice date back to 1180, to the old German state. In those days too the respective legal institutions regulated the disputes that emerged between bodies endowed with state power. Portugal introduced constitutional review in the 12th century in Philip's Code. Early forms of constitutional review had existed in France in the middle of the 13th century. More serious projects of judicial constitutional review had been undertaken in Norway, Denmark and Greece in the 19th century.

In the history of constitutionalism, especially from the perspective of historical development of constitutional justice, the approaches of Hakob and Shahamir Shahamirians in the "Entrapment of Vanity" are truly exceptional. As we have already mentioned, this work, written in compliance with the principles of the theory of natural law, is essentially the first Constitution that includes the idea of a unique specialized tribunal, the "High Court," whose mission, in current terms, was to exercise judicial constitutional review. Just the title of this work implies an entire theory of constitutional review. Its essence is in the authors constructing a "trap" for the bearers of power, so that the latter remain and act within the framework of their respective constitutional competences. In this unique document the checks, balances and functional competences are laid out in amazing harmony.

In 1867 the Federal Court of Austria received the right to resolve disputes on competences, in protection of individual political rights

against the administration. Although some rudiments of constitutional review were present in the Swiss Federal Constitution of 1848, the Swiss Federal Court received broad powers only in the amended Constitution of 1874. In Norway judicial constitutional review was born in 1890. Romania introduced constitutional justice, fashioned after the American model, on the eve of the First World War.

In modern American legal system there are no specialized institutions for judicial constitutional review, but the British legal history has several components, in particular, the principle of the supremacy of the Constitution, which dates back to 1610 and played an important role in the history of development of constitutional law in Britain. The ideas of the supremacy of the Constitution and judicial review have spread from England to the USA. As early as in the 18th century the court there had recognized certain British laws null and void (in the Northern States). Nevertheless in the Constitution of 1787 the Supreme Court, as the highest federal tribunal, has no express competence of constitutional review.

The case of *Marbury V. Madison* (1803) had a decisive impact on the development of constitutional justice: in it the Supreme Court reserved itself the right of constitutional review in addressing issues of conformity with the Constitution. This paved the way for using the power of the American Supreme Court for judicial review of laws. In its ruling the Supreme Court de facto recognized as unconstitutional the section of a procedural law enacted by Congress in 1789, which pertained to the competences of the Supreme Court (Paragraph 13). The statement by Chief Justice John Marshall on the ruling of February 24, 1803, has since become a classical formulation: "It is emphatically the province and duty of the judicial department to say what the law is. [...] Any law incompatible with the Constitution shall be null and void."

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 preliminary). 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 con-



stitutional 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 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, Belgium). As a result 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 jus-

tice, 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 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. But 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;<sup>280</sup>
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;

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<sup>280</sup> It is also important that in the continental legal system the law is the exclusive product of political consensus and case law has no decisive role as a source of law.

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 to be 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.

The specifics of the European system are not only in carrying out review by specialized institutions and breaking it down into abstract, concrete, elective, mandatory, *ex ante*, *ex post*, procedure or merit based types. Of special importance is also the fact that the role of constitutional justice in the system of state power has also essentially changed.

The international experience of the system of specialized judicial constitutional review demonstrates that the principal task of constitutional justice is assisting the formation of a system of state governance where there will be guarantees for the supremacy of the Constitution; for the protection of inalienable human rights and freedoms; where there will be the necessary conditions created for the stable and dynamic development of the society based on the rule of law, the separation, elected nature and accountability of powers; **where the process of progressive accumulation of negative social energy will have been overcome.**

This issue is currently acquiring tremendous expediency in view of the fact that mankind has embarked on a new stage of development

where, on the one hand, the need for rethinking the system of values becomes apparent and, on the other, mutual connections and influences acquire a new quality. In conditions of legal globalization the constitutional review system of each country must become a strong guarantee for constitutional stability and answer certain universal criteria and requirements. A clear definition of the latter, their academic analysis and the **formation of a continually functioning comprehensive system of constitutional review** have become an imperative necessity.

In order to reveal the role and significance of the constitutional court in establishing constitutional democracy and stability it is of principal importance, in our opinion, to adopt a proper methodological approach to identifying the systemic nature of the function of constitutional review. We believe that scientific literature does not pay adequate attention to this question. One should single out two matters of principle here.

Firstly, as a comprehensive system, constitutional review may only possess capacity upon the existence of the necessary and sufficient functional equilibrium. We refer here not only to the place and the role of specialized institutions of judicial constitutional review, but also the functional role of the legislative and executive branches of power, as well as of other constitutional subjects in constitutional review, the process and the traditions for the preservation of ethical, national and spiritual values. Over the span of many centuries the latter have enjoyed an exceptionally important significance in ensuring the systemic stability of social development based on rational values. Unfortunately their former influence and sway is substantially eroding within the new reality.

The second expression is that constitutional review as a system, an entirety of bodies of differing competences requiring harmonious operation,<sup>281</sup> may exist and effectively operate only in the presence of

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<sup>281</sup> We consider it necessary to stress that bodies of constitutional review shall include, on the one hand, the country's President, its parliament, the cabinet, other constitutional institutions (as non-specialized bodies) and, on the other, the judiciary and especially the constitutional court (as specialized bodies).

particular prerequisites. Among these one should single out the following: the depth and systemic nature of constitutional regulation of social relations; faithfulness to democratic principles of social development; the existence of a specific environment of constitutional democracy; the independence of constitutional review, its comprehensive nature, its accessibility for the members of the public, etc.

Ensuring the integrity of the system, clear functional interrelation between its main links, rational interaction in maintaining the system's dynamic equilibrium, as well as the structural harmony of the system of constitutional review are all of cornerstone significance.

A study of the international experience of formation and functioning of systems of constitutional review through the 20th century, as well as of the situation that has emerged in the countries of young democracy, clearly demonstrates that, unfortunately, many issues of constitutional review are viewed and resolved only superficially, no consistency is assured in implementing the principle of the separation of powers, which fails to produce the desired effect: **the establishment of a potent system of self-defense of the social organism**. This becomes especially controversial when the place and the role of judicial constitutional review in the framework of constitutional review get underestimated.

One often finds it necessary to underscore the words of the former President of the Austrian Constitutional Court, Professor Ludwig Adamovich: "constitutional democracy provides the main necessary environment for the normal operation of constitutional courts." One may also add that without the introduction of an able system of constitutional justice it would be impossible to guarantee constitutional democracy and the stability of the social system. Let us try to develop this approach with the help of the following, albeit unusual, but thought provoking comparison.

Within recent decades the academic mind in microbiology and medical science has come up with several serious generalizations that are of exceptional importance in the systemic study of the main self-defense principles and mechanisms of also the social organism, from the perspective of ensuring the stability of the constitutionally

enshrined functional equilibrium. These almost axiomatic principles include:

- the human being has the most perfect internal defense structure, the immune system that has developed in the course of almost two hundred million years;
- the functions of the human immune system, as well as of other complex biological systems, extend over the entire organism, they possess a hierarchic and self-regulatory nature;
- every cell in the body disposes of certain self-defense resources, and only the exhaustion thereof may trigger the defense systems of other related structural units of the organism;
- the main mission of the immune system is the preservation of the natural balance and stability in the whole body, since failure to rectify disrupted balance may cause accumulation of negative potential and irrational reproduction;
- the physiological balance, the immune and nervous systems of the body exist in the state of stable equilibrium;
- any pathology triggers and activates the entire system of self-defense;
- the otherwise constant level of immune hormones, in the event of defensive reaction, increases to a higher level necessary for the adequate performance of the defensive function. But if the total defensive capacity is insufficient for restoring functional balance, a diagnostic situation emerges requiring exogenous intervention;
- an advanced immune system is characterized by rationality and clear differentiation of self-defense, a clear succession of targeted actions aiming at restoring the integrity of the equilibrium within the cell system and the organism as a whole;
- any dynamically developing system must possess an adequate subsystem for restoring the internal functional balance and ensuring its self-defense;
- the functional logic of the immune system is in the following:
  - a) identification of disrupted balance;
  - b) determination of the character of incursion and selection of tactics and toolkit for repairing misbalance;

c) guarantees against new incursions during restoration of balance.

We have studied these principles for many months with medical doctors, biologists, specialists of systems management, and they had emerged, as we have mentioned, over the course of millions of years, parallel to the development of living organisms. The human society has been in existence for hardly several thousand years, and it has not yet reached the level of systemic perfection and harmony as a consolidated organism, as a complex system.

The example of the 20th century, that has taken the lives of more than 130 million people through social calamities, the current wave of international terrorism are salient proof that the human society is suffering from immune deficiency. It is not incidental that the emergence of the idea of establishing specialized institutions of judicial constitutional review coincides with the period of the First World War, and its systemic development became a reality in the aftermath of the Second World War.

We maintain that mankind, perhaps to some extent "subconsciously," is approaching the formation of a **qualitatively new immune system of the social organism**. The entire 20th century has proven convincingly that **religion, traditions, ethical norms, the entire system of values of social behaviour, other mechanisms of systemic self-defense have failed to fully ensure the dynamic equilibrium and stability of the society in conditions of new realities**.

In fact constitutional review is becoming one of the axial components of civil society and the rule-of-law state. Constitutional review appears in the area of "checks and balances," the main purpose of which is the continual, uninterrupted and systemic identification, evaluation and rectification of disruptions of constitutional equilibrium. **Constitutional review prevents irrational reproduction of functional disruptions or the accumulation of negative social energy**, which, upon attaining the critical mass, may acquire a new quality through an explosion. In practice this represents a choice between dynamic and evolutionary or revolutionary development.

The operation of an integral system of constitutional review is

called upon to guarantee constitutional stability and exclude social catastrophes, leaning predominantly on constitutional principles such as the power of the people, the rule of law, the separation of powers, state sovereignty, the supremacy of the Constitution, etc.

The constitutional system of a democratic state must invariably be open and possess the intrinsic capacity for self-development. An important prerequisite for this is for every violation of constitutional lawfulness and disruption of constitutional balance to receive immediate response, be professionally assessed and overcome.

**By ensuring the supremacy of the Constitution constitutional review becomes a means to guarantee the stability of pluralistic society, which, on the basis of fundamental constitutional values, ensures its dynamic functional consistency and uninterrupted development.** This is the principal criterion for the functioning of constitutional review in general, and of judicial constitutional review in particular, which is of exceptionally important significance both for developing and traditional democratic systems.

Distortions in legal awareness in the newly independent countries often acquire outrageous incarnations, whereupon various encumbrances of the implementation of the functional role of the constitutional court or simply "keeping it away" from constitutional processes are viewed as a way of flexing muscles by the authorities. The existence of such a mindset and psychology among the legislative and executive branches is not only lamentable and incompatible with democracy, but also extremely dangerous, since it is just half a step away from the establishment of autocracy. One of the principal causes for such situations is that only constitutional courts are the product of the new reality within the system of the judiciary, and they do not bear the mark of the totalitarian system and are saved the impact of inertial processes. The birth of constitutional courts is inalienably linked to choosing the road towards lawful democracy. Their self-assertion progresses through struggle between the new and the old beginnings. The more the society subscribes to old values and mentality, the harder it is to attain the establishment of viable constitutional justice and its appropriate public



perception. This is even more difficult in systems where democracy transforms from a public need to a means to submit law to the will of the authorities.

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 country.

One may state that the constitutional court is the principal body of state governance, which, on the basis of fundamental constitutional values and principles, ensures the restriction of state authority proper to the benefit of the principles of law, and through this it guarantees adequate succession and stability in implementing constitutional norms and principles. **Understanding this role and its rational implementation, with due consideration given to the trends of international constitutional developments, is one of the main directions of legal developments in the new millennium.**

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;<sup>282</sup>
- 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 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;

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<sup>282</sup> Speaking of the pre-conditions for ensuring the independence of the judiciary, justice of the U.S. Supreme Court Sandra O'Connor ascribes special importance to the fact that such independence comprises individual as well as structural and procedural components. The individual ones, aside from life tenure, include protection from any repression, exclusion of any moral or other pressure or threat thereof, so that the judge in passing her ruling does not feel intimidated or terrorized. Сандра О' Коннор - Важное значение принципа независимости судебной власти. ВОПРОСЫ ДЕМОКРАТИИ. Электронный журнал Государственного департамента США. Том 9, номер 1, март 2004 г.

- 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.

It is not only in European countries that constitutional courts have these powers, it is also a prevailing trend that the consolidation of their powers be consistent and in unison with the vector and degree of the country's democratization. Constitutional justice will be formal and incomplete within legal systems where attitudes towards democracy in general are formalistic and inconsistent.

A structural analysis of the cases heard and applications admitted indicates that in the predominant majority of countries there exist no constitutional or legislative impediments for the implementation of the functions of constitutional courts. This is attested to by the fact that the continuity of constitutional assessment of laws and other normative acts, the possibility of resolving competence disputes, the guaranteed protection of human rights are mostly ensured. The situation that emerged in our country had no precedents when, prior to enacting constitutional amendments, the even limited powers of the constitutional court were not being implemented because of inadequate constitutional and legislative solutions. This is also in clear evidence of the fact that the existence of a Constitution *per se* does not yet indicate the presence of constitutionalism in a country.

In the context of international trends it is also important that the list of eligible applicants present no hindrance for the implementa-

tion of the functions. Whereas in Armenia exactly the opposite is the case.

One should underscore once again the principal importance of the fact that the viability of the system of constitutional review is in direct correlation with constitutional solutions themselves. Let us illustrate it with an example. For any constitutional court the matter of principal importance is the consistent implementation of the principle of the rule of law in the practice of constitutional justice. In the 1949 Basic Law of Germany (Article 1, clause 3) it was for the first time clearly stated that: "The following basic rights bind the legislature, the executive and the judiciary as having direct effect." This principal issue found its subsequent development and systemic application in numerous instruments of international law. In our opinion one should pay particular attention to the language of Articles 2 and 18 of the Constitution of the Russian Federation. Article 2 stipulates: "Man, his rights and freedoms shall be the supreme value. It shall be a duty of the state to recognize, respect and protect the rights and liberties of man and citizen." And Article 18 develops this principal approach further: "The rights and liberties of man and citizen shall have direct effect. They shall determine the meaning, content and application of the laws, and the activities of the legislative and executive branches and local self-government, and shall be secured by the judiciary." We think that this particular way of stating the issue is an important result of the development of constitutionalism, where not only there is a clear determination of the legal content of ensuring of the rule of law, but also the functional role of constitutional institutions in implementing this principle is clearly delineated. This is of great importance for the practice of constitutional justice. On the other hand the distortion of constitutional principles and methodological bases, internal contradictions, bottlenecks and gaps in constitutions also have an impact on the administration of constitutional justice.

We second the opinion of Professor Georgi Boychev when he states that the capacity of the constitutional court and the quality of its work are greatly determined by the by the quality of the

Constitution.<sup>283</sup> The main problem is that the Constitution is often presented as the Fundamental Law of the political system of the state, rather than that of the civil society.<sup>284</sup> This is a question of preponderant importance and it characterizes the main vector of the development of constitutionalism in the new millennium.

One of the axial questions of the current developments of constitutionalism is the strengthening of the social nature of the Constitution, **shifting the emphasis from it being the Fundamental Law of the state to being the Fundamental Law of civil society.** Current international developments, the tendency of legal globalization, the attempts at rethinking the place and role of the state lead to the conclusion that the human being is gradually becoming the axial subject of international law. The state as such is pushed to the background, with all the consequences that come with it. The main consequence among these is that the role of the state within civil society is inevitably re-valued.<sup>285</sup> Therefore, in any country, the **Constitution must first and foremost guarantee possibilities for the establishment of sustainable public accord and contain solutions for overcoming any kind of social confrontation.** The Constitution may not lead to constitutional impasses; it must provide the most potent stimulus for the development of the society. The existence of disfigured civil society is also determined by the fact that incomplete constitutional solutions may have provided fertile soil for it.

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.** Unfortunately the constitutions of many post-communist countries lack the required potential for this.

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<sup>283</sup> We maintain that the Constitution is self-sufficient in its essence. Imperfections and internal contradictions pertain to textual formulations, which have to be overcome through the practice of constitutional jurisprudence.

<sup>284</sup> Дайджест - Конституционное правосудие в странах СНГ и Балтии. 2004, N 12, с. 103.

<sup>285</sup> See, in particular: Гаврилов В.В. Развитие концепции правовой системы в зарубежной правовой доктрине второй половины XX - начала XXI века // Московский журнал международного права, 2004, N4, с. 19-35.

In order to reveal the substance of this issue one should also answer the question: what are the criteria for the evaluation of the implementation of this principle? They should be seen in **guaranteeing the rule of law, complete and independent exercise of separated powers, ensuring harmonious systematization of competences and functions, as well as in the continual and balanced nature of state power.**

Had the criteria listed above been applied to the 1995 Constitution of the Republic of Armenia, prior to the amendments of 2005, then, from the perspective of the fundamental issues under consideration, one could state that:

1. Constitutional guarantees for the rule of law were insufficient. The human being, his dignity, his rights and freedoms were not constitutionally recognized as ultimate and inalienable values. An axial constitutional provision was lacking on human and citizen's rights having direct effect and determining the meaning, content and implementation of laws, as well as on the operation of the legislative and executive branches of power being ensured through the administration of justice. This methodological approach failed to have a systemic implementation elsewhere in constitutional provisions.
2. There existed certain inconsistencies between fundamental constitutional principles and concrete constitutional mechanisms for their implementation.
3. The principle of the separation of powers was implemented inconsistently, the necessary and sufficient functional balance between state institutions of power was not ensured. In particular the necessary prerequisites for the functional independence of the legislative and judicial powers were not ensured, the system of checks and balances was deficient.

There existed a certain misbalance in the system "institution-competence-function" as it applied to almost all constitutional institutions of state power. The same pertained to the system of "functional-balancing-checking" powers. One may state without exaggeration

that the fundamental issue of a systemic balance within state power was not resolved effectively in the Constitution of the Republic of Armenia.

4. The Constitution had failed to put in place a complete and capable system of constitutional review. In this respect constitutional solutions were deficient, they failed to reflect the progressive trends of the rooting of intra-constitutional system of self-defense in the world. Neither was the right of individual access to constitutional justice recognized or guaranteed.

5. There were no functional relations between the Constitutional Court and courts of general jurisdiction to speak of. Local administrations were exempt from the system of constitutional review, there were certain omissions in the procedure and principles of constitutional litigation, etc.

Considering all of these in combination with constitutional practice, as well as the fact that, since the inception of the constitutional court and prior to the constitutional amendments of 2005, there was not a single complaint submitted to it on the constitutionality of a presidential decree or a resolution of the government, and within 8 years a mere 6 applications were heard on the constitutionality of laws, it becomes apparent that the constitutional court was practically removed from guaranteeing human and citizen's rights, and this **attests to essential immune deficiency of the constitutional system in the Republic of Armenia in that period.**

Having replicated the French constitutional and legal system, at the same time, whether knowingly or unknowingly, important mechanisms characterizing it were omitted, such as the State Council, The Supreme Palace of Justice, the mandatory ex ante constitutional review of laws, the national committee on human rights, The Court of the Republic, the mechanisms of judicial oversight provided for in Chapter 10 of the Constitution, etc. All of these were of principal importance in guaranteeing the stability and viability of the system. France itself, in view of the experience and current trends in international developments, as well as the challenges of the new millennium,

is undertaking serious steps in the direction of systemic reformation of the system of public administration.

From the perspective of the fundamental issues under discussion, the logic of subsequent constitutional development should have ensured the **integrity, the systemic nature, independence, legal capacity of the Constitution.**

The situation in place prior to the constitutional amendments forced the constitutional court, with the purpose of protecting constitutional values and ensuring the stability of the Constitution, to revert to **the practice of broader interpretation of constitutional provisions** on the basis of fundamental constitutional principles and the provisions of Article 4 of the 1995 Constitution of the Republic of Armenia (which stipulated, in particular, that the state guarantees the protection of human rights and freedoms based on the Constitution and the laws, **in accordance with the principles and norms of international law**). A characteristic example of this was the hearing in the Constitutional Court of the Republic of Armenia of the case on the constitutionality of the European Convention on the Protection of Human Rights and Fundamental Freedoms prior to its ratification. The legal disposition of our court on it reveals the principal directions of subsequent developments in our country of constitutional guarantees for the protection of human rights. In particular the constitutional court emphasized that, although states have obligations towards each other under the norms of international public law, the current-day approaches to the protection of human rights within the system of international public law allow us to conclude that human rights and fundamental freedoms, based on the system of multilateral conventions, present objective criteria of the behaviour of states, rather than their mutual rights and obligations. The obligations of states under those conventions pertain more to individuals under their jurisdiction, than that of other contracting states. From this point of view the Convention of December 4, 1950, is called upon to protect individuals and non-governmental organizations from institutions of the state, which is one of the important features



of the rule-of-law state enshrined in Article One of the Constitution of the Republic of Armenia. Therefore the Convention and its Protocols are based on rights and criteria that are in unison with the spirit and the letter of human rights and fundamental freedoms enshrined in the Constitution and the international agreements of the Republic of Armenia.

In conclusion of the above we would also like to emphasize that the following present the basis for the formation of an independent and capable system of constitutional justice: the systemic nature of constitutional review; the rational nature of the system and the continuity of its operation; the preventive nature of review; self-restriction of the operation of the system; the comprehensiveness of the operation of constitutional courts; organic combination of the functional, structural, organizational and procedural principles in administering constitutional justice; ensuring full-fledged feedback from public practice; and excluding new violations during the rectification of disrupted constitutional equilibrium.

The problems referred to above were partially resolved in the result of constitutional amendments of 2005, as well as of the new law of the Republic of Armenia "On the Constitutional Court," which entered into force since July 1, 2006. It not only addressed the powers of the constitutional court, the objects of litigation, the scope of subjects eligible to apply, the fundamental principles of hearing constitutional cases, but also concrete procedural particulars applying to various cases.

We would like to single out several approaches of systemic nature:

1. 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).<sup>286</sup> This provision

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<sup>286</sup> In some countries, like in the USA, the appointment is for life.

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 other 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, Kirgizstan, 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 on the basis of 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.

2. When it comes to the subjects eligible to lodge complaints before the constitutional court international practice adheres to a principal approach: these having to ensure the full and complete exercise of the court's power of constitutional review. From among more than one hundred existing constitutional courts in the world, Armenia used to be a unique exception, since its constitutional court had the tightest circle of eligible applicants, and ranked last in the number and scope of thereof. This problem was radically resolved through constitutional amendments.

Currently, according to Article 101 of the Constitution of the Republic of Armenia, the following entities may appeal to the constitutional court in a procedure stipulated by the Constitution and the law on the constitutional court:

- 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.

3. The 1995 Constitution of the Republic of Armenia had defined rules of constitutional litigation that were absent in all of the remaining constitutional courts of the world. In particular it stipulated that the constitutional court should adopt decisions and opinions no later than within thirty days from receiving the application. A similar norm existed only as applied to the French Constitutional Council, which implemented preliminary normative review. No constitutional court exercising ex post abstract review of normative acts was encumbered with such a constitutional restriction.

As a result of the constitutional amendments of 2005 Article 102 of the Constitution stipulates:

"The Constitutional Court shall adopt decisions and opinions in conformity with the procedure and terms stipulated in the Constitution and the Law on the Constitutional Court.

The decisions and opinions 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 opinions. The opinions 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 opinion of the Constitutional Court is negative, the issue shall be removed from the scope of competence of the relevant body."

4. There are serious discussions nowadays in various international instances about the nature of the rulings of constitutional courts, the fundamental issues of their enforcement, the constitutional consequences thereof. Having in mind that serious experience of judicial constitutional review has been accumulated in Poland, where the debates on reforming the system had started as early as in 1972, as well as considering the fact that among Eastern European countries Poland adopted its new Constitution relatively later, the solutions found in this country deserve particular attention, especially when it comes to the power of the constitutional court to determine the time-frame for its ruling to take effect.

The Constitutional Court of the Russia also followed the practice of determining the date of entry into force of its rulings, 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. This, in particular, refers to the ruling of the Constitutional Court of the Russian Federation of February 18, 1997.

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. The new law of the Republic of Armenia "On the constitutional court," in clauses 12 and 13 of its Article 68, states: "12. The Constitutional Court can decide to validate the influence of the

decisions mentioned in Subparagraph 2 of Paragraph 8 of this Article on the relations that started before those decisions got into force if the absence of such decision of the Court can cause irretrievable consequences for the state or the public.

The administrative and judicial acts that were adopted and implemented on the basis of the general acts that were annulled and found unconstitutional (together with those acts that were providing the implementation of the former) by the decision defined in Paragraph 1 of this Article within three years before the Constitutional Court decision got into force shall be revisited by the administrative and judicial bodies that adopted those in the procedure stipulated by Law.

13. In case of ruling a decision on finding unconstitutional or invalid the challenged provisions of Law related to the criminal code or the administrative liability, those provisions are annulled from the moment of the announcement of the Court's decision.

The administrative and judicial acts that were adopted and implemented for the implementation of those provisions within the period before the Constitutional Court decision got into force shall be revisited in the procedure stipulated by Law."

At the same time clause 15, Article 68 of the same law states: "15. If in accordance with Paragraph 3 of Article 102 of the Constitution the Constitutional Court finds that declaring invalid the challenged general act or any provision of it from the time of the announcement of the Court decision are unconstitutional and will inevitably cause such hard consequences for the public and for the state that it would harm the legal security expected from the annulment of the given general act, then the Constitutional Court has the right to declare the act as unconstitutional and at the same time to postpone the period of invalidation of the act.

In this case the act is considered constitutional before being invalidated."

5. Nevertheless, 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 prac-

tice of constitutional justice and by constitutional studies that the rulings of the constitutional court **have precedential value and constitute an important source of law.**<sup>287</sup> International practice has also demonstrated that the rulings of the constitutional court can not 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.

The question of the legal nature of the rulings of the constitutional court is also of exceptional importance. This is an issue to be addressed not on the level of a law, whether constitutional or organic, but on the level of the Constitution. If the rulings of the constitutional court, adopted by half of its members, are final and not subject to review, then its opinions, adopted by two thirds, can not but have binding legal consequences. Failing this the legal process, rather than contributing to solving political disputes on the legal plain, shall shift the legal issue to the political plain, something that is irreconcilable with the notion of the rule-of-law state and the principles of the rule of law. A proper practice has emerged in the legal experience of the Republic of Armenia, according to which, on the basis of Article 81 of the Rules of Procedure of the National Assembly, if the bases for the impeachment of the president of the Republic of Armenia are absent in the opinion of the constitutional court, the issue shall be removed from the discussion agenda. The same approach is enshrined in Article 83. Nevertheless resolving this matter of principle through ordinary legislation may not only undermine the consistent implementation of the principle of legal resolution of political disputes, but also become the cause of political speculation, sucking the judicial system into them. It is, among others, through these considerations that the question was resolved on the constitutional level. The international experience also indicates that the legal nature of acts passed by the constitutional court shall be clearly spelled out in the Constitution.

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<sup>287</sup> See: Зорькин В. Д. Прецедентный характер решений Конституционного Суда Российской Федерации // Журнал российского права, 2004, N 12, сс 3-9.

6. In most general terms, as it was already mentioned, ensuring the supremacy of the Constitution implies guarantees of the constitutionality of legal acts, safeguards for human rights and constitutional freedoms, resolution of disputes emerging over constitutional competences between bodies of state power. Without comprehensive implementation of these functions it would be impossible to ensure fully-fledged constitutional justice in a country. Incidentally, if in the early 20th century and especially after the 1950s in Western Europe the issue of constitutionality of normative acts was particularly significant, in the new millennium issues of immediate guarantees by constitutional courts of constitutional rights and the resolution of competence disputes have come to the foreground. Many Eastern European countries have adopted the experience of Germany, Austria, Italy and several other countries in this area and introduced the necessary amendments into their legal systems with the purpose of, in view of the above trends, putting in place reliable prerequisites for ensuring the supremacy of the Constitution. In the most recent period this example was followed by Latvia, Azerbaijan, and Moldova: they introduced the full institute of individual complaint to the practice of constitutional justice, created clear mechanisms for the official interpretation of the Constitution and the resolution of competence disputes. In our country the deliberations of political parties, the constitutional and legal reform initiatives are not in tune with the generalizations of the legal mind. The constitutional amendments resulted in the introduction of the most cautious, so to say, and most limited version of admitting and hearing individual complaints, whereas the issues of disputes over constitutional competences and, within their limits, of abstract interpretation of the constitution, remained unsolved, failing to create full guarantees for ensuring the supremacy and the direct effect of the Constitution.

In conclusion we may state that constitutional justice is not only the most important and inalienable component of the immune system of the civil society, but also that the real state of constitutional



justice is one of the main criteria for measuring constitutionalism, the level of constitutional culture in the country.

Merely setting value bearings and overcoming the old mentality are not sufficient to sensibly traverse the road from the Constitution to the establishment of true constitutionalism. The following essential preconditions are required for it:

1. guaranteed rule of law;
2. clear separation and balance of powers;
3. democracy needs to shift from constitutional principle to a living reality, ensuring the legitimacy of the authorities;<sup>288</sup>
4. the system for guaranteeing the supremacy of the constitution shall enjoy integrity and viability;
5. the independence and capability of the judiciary shall be guaranteed.

In the absence of any one of these prerequisites the remaining become flawed, the Constitution turns from a living reality into a formality and its presence no longer indicates the existence of constitutional culture in tune with the principles of constitutionalism and the rule-of-law state.

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<sup>288</sup> In literature the notion of the legitimacy of the authorities is often interpreted incompletely and partially. It not only assumes the lawful nature of the formation of a body of power, but also the existence of necessary and sufficient trust by the public at large towards the process and the body in question. (Конституционное право: Словарь / Отв. ред. В.В. Маклаков. М., 2001, с. 248)



## APPENDIX

### THE NOTION OF "CONSTITUTION" THROUGH THE ARMENIAN SOCIAL, POLITICAL, LEGAL AND PHILOSOPHICAL DISCOURSE

This appendix was compiled from the materials of "Armenian Classical Bibliography" at [www.digilib.am](http://www.digilib.am), version 1.0. The appendix does not present a comprehensive and complete bibliography, our purpose was to provide, apart from the analysis contained in the body of this work, a sampling of select references to underscore that this notion has been used in its time not as a borrowed value, but, while encompassing a whole range of meanings, it was used in the Armenian context of "constituting," setting a terminal "border," "imposing limits." Naturally the references pertaining to legal regulation and "delineating" relations are the most interesting. In this respect we would like to single out the passage from Movses Khorenatsi, where he describes how Nerses the Great (St. Nerses, the Catholicos of Armenians between 353-373), who "in the third year of the reign of Arshak [...] became archbishop of Armenia," "established mercy, extirpating the root of inhumanity" through "canonical regulation." This is with reference to the Council of Ashtishat held in 365. Pawstos Buzand has best characterized the outcome of the Council: "**put in order, compiled, canonized and set down**" (They all came willingly to the council and deliberated profitably together so as to perfect there the secular regulations of the church and the uniformity of beliefs. At that time they **put in order, compiled, canonized and set down regulations** and turned the entire population of the land of Armenia into the

likeness of an universal order of solitary-communities... *Pawstos Buzand, Armenian History, Ch. 4*). All of these notions, as used in medieval Armenian written monuments, have described types of lawmaking activity, regulation of relations, definition of rules of behaviour. National Ecclesiastical councils played a special role in this, since the rules they enacted were of universal nature and possessed superior legal effect. Therefore it is not incidental that in defining the word "Constitution" The New Haikazian Dictionary of the Armenian Language (Venice, 1837) makes references to canonical regulations.

**MOVSES KHORENATSI, *HISTORY OF ARMENIA (5th century)***

Concerning Saint Nerses and the Good Order Established by Him

III. 20. In the third year of the reign of Arshak, Nerses the Great, son of Atanagines, son of Husik, son of Vrtanes, son of Saint Gregory, became archbishop of Armenia. Having returned from Byzantium to Caesarea, he came to Armenia and restored all the just administration of his fathers, and he went even further. For the good order that he had seen in the land of the Greeks, especially in the royal city, he imitated here. Summoning a Council of bishops in concert with the laity, by canonical **constitution (regulation)** he established mercy, extirpating the root of inhumanity, which was the natural custom in our land. (Thomson 2006, 270)

**AGATHANGELOS,**  
*THE LIFE AND HISTORY OF SAINT GREGORY (5th century)*

*THE TEACHING OF SAINT GREGORY*

694. "After this the Christian band of the Apostles, who by the grace of the Holy Spirit had advanced through all regions under heaven, with all signs and miracles and power of grace, made warning to each part, and

announced the word of life, and encouraged the Christians with the hope of the resurrection. By their graceful words and deeds each **constitution (decision)** fixed by the command of the Holy Spirit was revealed." (Thomson 2001, 224)

322. "He created from one blood all the races of mankind to dwell on the face of the earth; and He established and ordered the times and **constitution (bounds)** of their dwelling for them to seek God, that perhaps they might search for Him and find Him" (Acts 17:26-27), "for his invisible [creatures] from the beginning of the world are understood and seen by the created things" (Rom. 1:20). (Thomson 2006, 89)

**ANANIA OF SHIRAK,**  
*HISTORY OF LEO THE GREAT (7th century)*

Ventidius, Pope of Rome, learning about his unsuccessful admonition, orders him to summon a council to confirm the blasphemy of the Council of Chalcedon and the apostasy of the Tome of Leo. So he, ordering the council to take place in Constantinople (which is called Fifth [Ecumenical] Council), gave an order that any bishop or patriarch not advocating the Council of Chalcedon among the Holy Councils was to be deposed from his rank. Then Anthimus, bishop of Constantinople, together with many [other] bishops preferred to be persecuted for the sake of truth. Among them was Julian, bishop of Halicarnassus (a city in Cyprus), who did not accept the impious constitution (canons) of the Council of Chalcedon. [...] And he sent armed forces [against] those who did not obey the Emperor's command to acknowledge the much-talked-of constitution (canons) of the Council and to agree with the innovations in the feasts and ecclesiastical regulations established by the lawless Justinian together with those assembled in Constantinople for the Fifth Council; he shed blood in many places.

**HOVHANNES ODZNETSI,**  
*DISCOURSE OF THE BLESSED FATHER AND PHILOSOPHER  
JOHN, CATHOLICOS OF THE ARMENIANS, ON HIS EARLY  
LIFE, HIS ASCENTION TO THE PATRIARCHAL THRONE  
AND ON THE ESTABLISHMENT OF NUMEROUS AND  
VARIOUS ORDERS AND RITES OF THE CHURCH (8th century)*

For we will not follow the strange custom established by controversy but, with **canonical constitution (regulations)** and chapter by chapter, we will abolish and remove the rooted disorder from the church of God, strengthening, instead, the decent and most useful things at their proper place.

**MOVSES DASKHURANTSI,**  
*HISTORY OF THE CAUCASIAN ALBANIANS (9th century)*

3.8. Whoever in fear of God complies with this **constitution (canon)** shall be blessed by the Holy Trinity and by all the orthodox servants of God; and should any oppose this and err from the truth, he shall answer for it, whoever might he be, before God. (Dowsett 1961, 196)

2.33. When the saint saw this and realized that the vision was inspired from above, he revealed its meaning to him and showed him the same life-giving cross, but commanded him through **constitution (swearing an oath)** to tell no one. (Ibid, 141)

**TOVMA ARTSRUNI,**  
*HISTORY OF THE HOUSE OF ARTSRUNI (10th century)*

3.18. But Ashot went to fight against the seashore people called Utmanik, who fortified their positions in the impregnable cave of Amiuk (for according to the **constitution (borders drawn)** by Ptolemy and Alexander or by our Artashes, son of Sanatruk, that province is listed

among the provinces of Vaspurakan; 100 years ago, it was separated by Arab rulers from the principedom of Vaspurakan).

(...) But now what can I say? Although they openly returned to the worship of Christ our God, they did not closely adhere to the **constitution (canonical rules)**; not only Ashot but also all the Armenian princes who came home from captivity. They rejected the malignancy of apostasy but remained outside the **constitution (canonical rules)**; their conduct was not truly Christian, for they indulged themselves with debauches and hard drinking, with defiled beds and pollution, with impure, awful, and repulsive copulation, with pederasty, with bestiality surpassing the vices of Jericho and Sodom. Men were shamelessly inspired with passion for men, bringing upon themselves endless fire-dispersing burning from heaven and perdition more devastating than the Flood.

#### **ARISTAKES LASTIVERTSI,**

*HISTORY OF THE EVENTS CAUSED BY FOREIGN NATIONS SURROUNDING US (11th century)*

(...) For he was a devotee of the Chalcedonian **constitution (creed)**, strongly hating the true faith.

#### **UKHTANES, HISTORY OF ARMENIA (BISHOP UKHTANES, PART I: HISTORY OF THE ARMENIAN PATRIARCHS AND KINGS) (11th century)**

Probus reigned after Tacitus, and Probus and Artashir divided our country between themselves by **constitution (fixing the borders)** and making peace with each other.

(...) For people say this based on stories told by elders: in the days of Abraham, Catholicos of the Armenians, when he ascended the patriarchal throne, the Georgian and Albanian catholicoi came to him. For at that time they were subordinate to the archbishop's throne of Saint Gregory; and according to the **constitution (canons)** and custom of the

first fathers, they came to Abraham in the first year of his patriarchate to show him their love and obedience.

**GRIGOR NAREKATSI,**  
*THE BOOK OF LAMENTATION (11th century)*

A Word to God from the Depth of My Heart

Here is my profession of faith, here,  
the yearnings of my wretched breath to you  
who constitute all things with your Word, God.  
What I have discoursed upon before, I set forth again,  
these written instructions and interpretations  
for the masses of different nations.  
I offer these prayers of intercession  
in [**constituting**] the thanksgiving prayer below.  
*(translated by Thomas J. Samuelian)*

**MKHITAR GOSH,**  
*ARMENIAN LAWBOOK (12th century)*

If there is a village left by a deceased priest (which had been given to him for his office), it belongs as heritage to the Holy See, and the *vardapet* (archimandrite) has the right to give it to whomever he wishes. This **constitution (law)** also existed in the time of Khosrov and Heraclius. However, irrespective of what it was before their time, let it not be changed (for nobody knows it exactly); let people own whatever they had owned, but from their time on and forever, let this law be firm and let no one violate it.

If the divine lips curse people who trespass the boundary path fixed by their neighbor, trampling on and ignoring the **constitution (laws)** and commandments of the Creator of all, they should be recognized as [worthy of] great anger (and others, too, because of them).



**VARDAN AREVELTSI,**

*HISTORICAL COMPILATION (13th century)*

You should know beforehand that I have come to bless the church according to my law: the **constitution (canons)** of the Council of Chalcedon.

**VARDAN AREVELTSI,**

*SERMONS AND PANEGYRICS (13th century)*

He also established the awesome mystery of the liturgy with bread (unleavened and without water), according to the Apostolic **constitution (canons)** and the venerable St. Gregory and his sons, until Ezer corrupted it in his insanity.

**HISTORIOGRAPHER HETUM,**

*CHRONICLE (13th century)*

*CHRONOLOGICAL HISTORY WHICH I, THE HUMBLE*

*SERVANT OF CHRIST HETUM, LORD OF KORIKOS,*

*TRANSLATED FROM FRENCH IN THE YEAR 745 OF THE*

*ARMENIAN ERA (circa 1296)*

"In 1129 Innocent II became the Pope of Rome. He summoned a universal council in the Holy Savior Church and punished Peter Leo and his **constitution (law)**, holding his office for thirteen years, eight months and eight days."

**SMBAT SPARAPET,**

*LAWBOOK (13th century)*

24. Now, see how many punishments there are for the priors and other judges of the church, in order that they should not distort the divine law for a bribe. One shall by no means dare change anything in the **constitution**

(**canons**) of the church and in the decrees of dioceses without [the permission of] the Catholicos, who may do this by summoning the great synod.

**NERSES PALIANENTS,**

*GENEALOGY: ARMENIAN PRINCEDOMS AND KINGS*

*(14th century)*

This Vagharshak was a valiant and prudent man; he established secular orders and hierarchies, also [appointing] ministers and administration in the royal palace. Furthermore, in the Armenian land he put many things in order, duly organizing the houses, families, cities, buildings, estates, armies, and prefectures, also making other similar and necessary arrangements and **constitution (regulations)**, about which we shall briefly speak, explaining them.

**YAKOB GHRIMETSI,**

*COMMENTARY ON THE CALENDAR (15th century)*

(...) First, one should know that the sun was created on the fourth day at dawn and was put on the same path and at the same point, where it until now rises at the same minute by the **constitution (decree)** of the Creator.”

(...) One should know that “point” is a polysemantic word, for it means many things. In the first place, “point” is “God of all creatures” (i.e., of those originated from Him, because there was no one before Him); accordingly, “I am the first and the last” (Rev. 1:17). Second, “point” refers to eternity, for every eternity has as points its beginning and its end. Third, a man’s death too is called “point,” because it is said: “He reached the point of his destiny.” Fourth, “point” means” a moment and a short space of time, for Job says about lustful people: “They spend their days in prosperity and at the same point they go down to hell” (cf. Job 21:13). Fifth, “point” is also legislation, for [God] ordered Adam not to eat of the fruit till the point **constituted (determined)** by Him, [that is,] as long as He wished.

**ARAKEL OF TABRIZ,**  
*BOOK OF HISTORY (17th century)*

Chapter 23

(...) But the vardapet (archimandrite) paid no attention to this, for he had high hope in the Lord; and every day he wandered and preached and built churches, and put everything in a correct order and **constitution (arrangement)**.

Chapter 24

(...) And the Christians of the upper part of our land, listening to their true preaching (for their deeds confirmed the truth of their words and preaching), all turned from their wrong ways and obeyed their **constitution (orders)** and rules ? princes, bishops and priests, noblemen and all the common people.

Chapter 25

(...) And the monasteries abandoned long ago were filled with monks, and the towns and villages with priests, and day after day they still prosper thanks to the **constitution (order established)** by him [Catholicos Philip].

(...) And then truly loving one another, they have become compassionate brothers, respecting the **constitution (order established)** by the patriarch Philip; their love and unity is wonderful, and they have received the grace of the blessed God Christ.

**GRIGOR DARANAGHTSI,**  
*CHRONICLE (THE CHRONICLE BY GRIGOR VARDAPET  
KAMAKHATSI OR DARANAGHTSI) (17th century)*

(...) After some time Movses Vardapet (he who later on became catholicos) went there, and they stayed together for many years and became the illuminators of Upper Armenia. As if they were the embellishment and embellishers of the anchorites, men and women, and the correctors of all their **constitutions (rules)**.

(...) After these efforts the Devil, making the pseudonymous catholi-

cos Melki (and not Sedek) his assistant, roused him against the saints of God, exposing them to many trials as if to torrents. For their conduct and piety and **constitutions (rules)** seemed evil [to the persecutors], because they looked askew at the just men, wishing to kill them. However, the Lord did not put [the saints] in their hands and they could not completely condemn them.

He was from the land of Baghesh (...) and was very humble and submissive in his heart and modest in his cloths; and he wandered on foot like Nerses the Pedestrian, with good deeds and holy conduct and as a gracious, merciful caregiver and consoler of all sufferers. And one day he took a journey to the great Rome in Italy, to see, greet and kiss the holy bodies of the Apostles Peter and Paul, and to meet the great Pope, patriarch of Rome. At first he was accepted by them but then was dishonored and persecuted. Being questioned with evil intentions about his faith and the order of **constitutions (canons)**, he gave true answers regarding the apostolic preaching on the rock of faith and the definition of faith by the holy fathers at the three [Universal] Councils and regarding the **constitutions (canons)** of our Holy Illuminator. And since he did not acknowledge the lawless Council of Chalcedon, they brought a big volume of the Chalcedonian creed and canons, written and sealed by the hand of the Catholicos Azaria, harmonious and in agreement with the pernicious Tome of Leo and the [Emperor] Marcian and the [Empress] Pulcheria and their seven councils; and they gave it to the Vardapet.

**EREMIA KEOMIURTCHEAN,**

*THE DIARY OF EREMLIA KEOMIURTCHEAN (17th century)*

The curse of the Apostles, patriarchs and our Holy Illuminator (who were the vicars of Christ and **constituted** the correct canons of the universal church) was upon them.

YOVHANNES HANNA,

*BOOK OF THE HISTORY OF THE HOLY AND GREAT CITY OF GOD JERUSALEM AND THE HOLY DOMINICAL PLACES OF OUR LORD JESUS CHRIST (18th century)*

And then once again he **constituted (confirmed)** with his signature and seal the regulations ordered by him; they are the following.

MIKAYEL CHAMCHEANTS,

*HISTORY OF ARMENIA FROM THE BEGINNING OF THE WORLD TILL 1784, BASED ON THE WORKS OF VARIOUS AUTHORS (Written by Father Mikayel Vardapet Chamcheants of Constantinople, pupil of the most reverend Father Mkhitar the Great Abbot; in the dominical year 1786, on April 16) (18th century)*

The **constitutions (canons)** of the synod of Sis were read before all of them, and the fathers of the synod, examining once again all the definitions of those canons and the letter of Grigor Anavartzetsi, accepted and reapproved them, and wrote everything more clearly on parchment, which they all signed together with princes, as it is stated in the true history of this synod.

Then, after many days' examination and conversations, and after a long consideration of the testimonies of the Divine Scriptures and of the holy fathers and teachers of the church, we considered it necessary to briefly transmit by this **constitution (canons)** the truth of the orthodox faith unanimously approved the holy Council of Florence and with the agreement of the same messengers, in order that henceforth there should be no doubt among Armenians about the true faith and in order that they should adhere to the same [creed] with the Apostolic See and always maintain this unanimity steadily and without any doubt.

**ABRAHAM KRETATSI,**  
*HISTORY (18th century)*

Chapter 18

*How we appeared before the Khan in Tiflis, how he consoled us and entrusted me and Holy Ejmiatsin to the Khan of Yerevan, giving us the necessary edicts*

When we appeared before the Khan, he rejoiced and said many consoling words to us, giving useful and instructive orders. He also loudly announced the political laws and constitution (statutes) for everybody to hear.

Chapter 46

*On the prayer that bodyguards recite when Valinamat enters the court or mounts a horse, and on the number of the troops*

The **constitution (arrangement)** and order of the troops and the rites performed by servants are as follows.

*Of particular interest is the varying usage of the notion “constitution” in the Book Of Canons by John Odznetsi. A study of volumes 1 and 2 of the “Armenian Ecclesiastical Canons,” edited by Vazgen Hakobian, indicates that there are at least 15 occurrences of the notion “constitution” in various canons. With reference to the original text below one should note that it contains generalizations of this notion spread over several centuries.*

**ARMENIAN ECCLESIASTICAL CANONS**

(edited by Vazgen Hakobian, volume 1, Yerevan, 1964)

Decrees and canons established by the holy universal church at the great Council of Nicaea, where they assembled by order of the great God-recipient Emperor Constantine (for his heart was filled with the grace of the Holy Spirit) together with holy patriarchs; and the heads [of the churches] arrived there to meet and to **constitute (establish canons)**: doctors and prelates, 318 bishops who teach laws to common people. They cleansed with penitence the rotten wounds and alleviated the heavy burdens of those who had committed various sins. (Canons of the Council of Nicaea)

Now, we have achieved unity of the **constitution (canons)** at the church of Gangra; our names are the following: Eusebius, Aelian, Eugenius, Olympius, Bithynicus, St. Gregory, Eulalius, Hypatius, Proaeresius, Basil, Bassus, Eugenius, Philetus, Heraclius, and Pappus. From east and west, south and north, we assembled and came by order of the Holy Spirit for the Council. We assembled and came to Gangra, and confirmed the canons of the great Council of Nicaea and sent them for the prosperity and perfection of the holy church. (Canons of the Council of Gangra)

Now, if a [deposed bishop] asks that his case be heard again and wishes to involve the bishop of Rome in the matter, the latter shall send presbyters on his behalf [to investigate the case]. It shall be in his power to do what he shall resolve; if he decides that someone should be sent to represent the matter to other bishops on behalf of [the bishop of Rome] by whom they had been sent, it shall be so. But if he believes he knows the case properly and can give a **constitution (final decision)**, let him do what he considers right according to his wise judgment. (Canons of the Council of Sardica)

If one unintentionally kills a [pregnant] woman, he shall be condemned to death. However, it is necessary to investigate the case properly, not in passing, and to involve the woman and find out whether the embryo had been formed or unformed according to its age. In the [first] case it shall be considered a second murder; [though] such a person has to stay in penance until the day of his death, it shall be decreed to shorten that time, for [according to] the canon, perfect penance does not depend on the duration time but on the correct behavior of those who repent. (Canons of Basil of Caesarea)

#### *Concerning priests who are in an unfitting marriage*

They shall be subject to such **constitution (rules)**; for example, they shall be permitted to only share an office with others. (Canons of Basil of Caesarea)

44. *Concerning the constitution of canons* (Canons of Sahak Partev)

For it is necessary, according to the canonical **constitution (regulations)**, that every year when synods are convened, rural bishops should inspect the churches entrusted to them and examine the performance and order of religious rituals, i.e., how they are organized. They should demand account from priests and deacons concerning the appropriateness of the hours of preaching and praying and baptism one by one, as well as concerning the fitting service of the awesome mystery of the liturgy, so that they keep them unchangeable with ardent diligence and reverence. For if we are careless, we must answer for that, and if one turns out to be sluggish and backward in the mentioned wonderful rites, he must suffer strict punishment, whoever he be; he must be deprived of his office until the archimandrite accepts him. (Canons of Sahak Partev)

This also concerns the places of assemblage and chapels, which from ancient times have been habitually called churches; although, being in various villages and towns, they are many, those many are not divided into many, but the same mystery is performed in all. And none of them is called big or small according to the mystery, but according to the rank of the office; and this is arranged so and must be eternally maintained with much care. For these **rules** are not announced according to human opinion but are clearly repeated by us from the God-inspired Scriptures, and those who oppose it oppose not a human but a divine command, and those who wish to oppose will suffer their punishment. (Canons of Sahak Partev)

This **constitution (regulation)** of the orders [of the church] was written at the command of the blessed Sahak, the great patriarch of the land of Armenia; he accepted them from Gregory, the fearless martyr of the Lord, and translated them from Greek into Armenian. Now, if anyone disobeys this canon and wishes to make innovations in this **constitution (regulations)**, let him be deprived of his part of heritage in the kingdom of Christ and God. (Canons of Sahak Partev)



## ARMENIAN ECCLESIASTICAL CANONS

*(edited by Vazgen Hakobian, volume 2, Yerevan, 1971)*

This **constitution (canon)** of the church also existed in the time of Heraclius, emperor of the Romans, and Khosrov, king of the Persians. However, irrespective of what it was before their time, let it not be changed (for we do not know how [people] owned [something]); but henceforth they shall own in this way, as we have defined in the name of the Lord, and no one shall violate this canon. (Canons of Dvin)

Now, let the archimandrites and priests of the church announce the above-written canons of our **constitution (legislation)** into the ears of auditors; and those who listen to them and observe the commandments will be blessed by Christ, the holy archimandrites and our unanimous assembly. But if [some people] disobediently and arrogantly ignore them, they will be ignored by the holy martyrs and deprived of all spiritual blessings. (Canons of Dvin)

But if it occurs on Friday or Wednesday, let them celebrate it, according to the supreme commandment, with fasting and not breaking [the fast] with food or drinks. And if any believer violates this canonical **constitution (rule)**, let him be cursed; for so it was commanded to the whole world by the holy Apostles and was handed down to us; and we follow what they have preached and established. (Canons of Karin)

Again, in addition to this tradition of all written commandments and besides what has been said, we hand down this canonical **constitution (rules)** to all the clerics of the holy church and the ministers of the sacramental altar. For we have heard an awful and grievous rumor that at certain places some of the heads the church, being misled by the Nestorians and Caledonians, defile the holy communion by adding leaven and water. (Canons of Karin)

*All of the excerpts above incontestably indicate that in the Armenian bibliography the notion “constitution” refers to the meaning of setting, adopting, approving a particular order, canon, pattern of things and phenomena and, in some cases, in the meaning of establishing a boundary, a perimeter (for example, in the passages from Agathangelos). While the notion “to constitute” was used in a distinctive sense, to underline the special nature of “constituted” canons: “decision fixed by the command of the Holy Spirit,” “order established by the patriarch,” “the canons of the Council of Chalcedon,” “endorsed by St. Gregory’s apostolic constitution,” “constituted by the Council of Sis,” etc. In the New Haikazian Dictionary the notion of “սահմանադրել” (Determino, constituo) is presented through the synonyms “to set a border,” “determine,” “regulate,” “ordain,” “make the law,” “establish.” Every one of these should be perceived in the context of defining a boundary, determining a perimeter, regulating relations of a terminal nature, defining the principal rules.*

*Any translation which presents the Grabar (classical Armenian) “սահմանադրել” in the meaning of “define,” “approve” and others, without ascribing importance to the bordering, terminal nature of the norm, canon or order, essentially narrows the meaning of the notion “սահմանադրել,” since in the Armenian bibliography the latter obviously pertains to defining special canons of ultimate significance characteristic of a constitutional norm: “a determination of borders and supreme oversight.”*

## РЕЗЮМЕ

Понятие "конституционная культура" нуждается в определенном переосмыслении и серьезном научном анализе в свете развития нового тысячелетия. В XXI столетии в ряду вызовов, вставших перед человечеством, особенно важны гарантирование системной устойчивости и исключение социальных катаклизмов, чреватых беспрецедентными последствиями. На протяжении последних столетий эту роль в большей мере выполнял Основной Закон государства. Закрепляя цели и основополагающие принципы общественного бытия, исходящие из целостности цивилизационных ценностей конкретного общества, Конституция устанавливает основные правила общественного поведения, характер взаимоотношений индивидуума и государства, порядок и границы осуществления власти, создавая при общественном согласии среду, необходимую для прогресса и полноценного проявления созидательной сущности человека. Такая возможность возникла на определенном уровне развития цивилизации и общественного сознания.

Понятие "конституция" ("constitutio" - установление, учреждение, организация) характеризуется как Основной Закон государства, обладающий высшей юридической силой, основные характеристики которой обусловлены тем обстоятельством, что им устанавливаются:

- основы государственного строя;
- гарантии по обеспечению и защите прав и основных свобод человека и гражданина;
- система государственной власти, ее функции, принципы и порядок организации;
- правовые границы осуществления политической власти, а также политических, экономических, социальных прав и свобод индивидуума.

Понятие "конституция" в армянском языке также, в первую очередь, подразумевает "установление". Как отмечает профессор Х. Самвелян, в средневековые армянские национально-церковные собрания (соборы), претендуя на "значение законодательного фактора", использовали термин "границы", который "...часто имеет синонимичное "канону", "закону" значение; поэтому в канонических решениях часто встречаются глаголы устанавливать, конституировать - в смысле устанавливать законы, правила". В то же время понятие "конституция" этимологизировалось также в смысле "поставить границу", уточнить границы власти и создать "неминуемую западню" для всех тех, кто попытается перешагнуть за пределы установленных законом полномочий.

Блестяще восприняли аксиологические нюансы данного понятия еще авторы изданного в 1837 году в Венеции Словаря нового армянского языка, которые охарактеризовали "Конституцию". Вначале приводятся разноязычные эквиваленты, как, например, *determinatio, constitutio, statutum, dispositio*. Далее дается исключительно интересная и ценная формулировка: **"Пределозначимые решения и Провидение Божие"**. Очевидно, что мы имеем дело не только с высшим "решением" конституирующего значения, значит с праворегулированием подобного характера, но и в его основе лежит Божественное познание, данная свыше ценностная система, Высшее провидение.

Приводятся первоисточники применения в армянской действительности понятия "конституция", в частности, высказывание Мовсеса Хоренаци (Vв.) в связи с **Аштишатским Соборием (365г.)** о том, что "канонической конституцией установлено милосердие".

Очевидно, что в указанном словаре понятие "конституция" имеет широкий смысловой охват, в основе которого лежит ряд важных составляющих:

- это – решение, порядок, законоположение;
- оно имеет устанавливающее значение, не допускающее "решений", уклонившихся от него, выше его или сверх него;
- выражение "Провидение Божие", взаимодополняя устанавливающий и высший характер подобного "решения", особо подчеркивает наличие лежащих в его основе неизменных, "ниспосланных свыше" ценностей.

Армянская рукописная традиция в ее грабарных (древнеармянских) вариантах была последовательна в вопросе осмысления понятия "конституция", что не сохранилось в переводах на ашхарабар (новоармянский). Типичным примером является приведенная из "Истории Армении" Мовсеса Хоренаци мысль, в которой беспрекословно говорится о явлении "конституция". В переводах понятие "конституция" было заменено словом "по границам", что привело к полной утрате первоначального смысла.

"Новый словарь армянского языка" под понятием "конституция" подразумевает "устанавливать", интерпретируется как ставить границу, решать, регулировать, упорядочивать, законодательствовать, конституировать. Все это, очевидно, в своей основе содержит значение регламентации, праворегулирования. Следовательно, перечисленные характеристики понятия "конституция" обладают также нормативным характером.

"Конституирование" общественных отношений, установление при всеобщем согласии общеобязательных правил поведения, исходя из их характера, формы, круга охвата, состояния применения, ценностно-системных ориентиров, формирует соответствующую конституционную культуру. **Конституционная культура, в первую очередь, представляется как определенная ценностная система созидательной жизни человеческого общества, относительно основополагающих правил, норм и принципов общественного бытия – независимо от наличия или отсутствия писаной конституции в современном понимании.**

Конституционная культура не только предполагает определенный уровень общественного согласия и социальной роли человека, возможность гарантирования упорядоченного развития общественного бытия на основе разумно осмысленных ценностей и принципов, но и способность превратить эту возможность в реальность.

**Основные элементы конституционной культуры – разумное осмысление социального общежития, наличие основополагающих ценностей бытия, общественное согласие относительно них, их воспроизводство в образе жизни и образе действий посредством правил и норм общеобязательного поведения, придание им определено систематизированного правового характера.**

Общеизвестно, что на заре человеческого общества основу социального общения составляли обычаи, традиции, моральные нормы, духовные ценности, разнохарактерные правила и каноны, которые в человеческом общении исполнялись и сохранялись как обязательные условия поведения. Поскольку они относились ко всему обществу и имели системно упорядочивающее значение, они содержали в себе элементы конституционной культуры.

Конституционная культура, вместе с тем, более целостно проявляется на определенном уровне цивилизации, когда появляется осознанная необходимость в установлении при общественном согласии основных правил поведения как общеобязательных правовых норм. В правовой плоскости эта потребность привела к появлению конституций и конституционному упорядочению общественной жизни. На этом этапе конституционная культура получает новое качество в тех общественно-государственных системах, где наряду с Конституцией наличествует также конституционализм, то есть конституционные нормы и принципы становятся действенной реальностью, где Конституция - не орудие в руках государственной власти, а основной закон гражданского общества, средство обеспечения гармоничного и стабильного развития общества, устанавливающее не только основные правила поведения, но и границы власти, ограниченные правом.

В русле современных достижений цивилизации основная характеристика конституционной культуры заключается в том, что Основной Закон страны должен включать всю систему фундаментальных ценностей гражданского общества и гарантировать их устойчивую и надежную защиту и воспроизводство. Эти ценности, в свою очередь, формируются на протяжении веков, каждое поколение переосмысливает их и своими дополнениями гарантирует дальнейшее развитие. Удача сопутствует тем нациям и народам, у которых эта цепь не прерывается или серьезно не искривляется. Следовательно, **понятие "конституционная культура" более развернуто может характеризоваться как исторически сложившаяся, стабильная, обогащенная опытом поколений и всего человечества определенная ценностная система убеждений, представлений, восприятия правоотношений, правосознания, лежащая в основе социального общества, способ-**

**ствующая установлению и реализации основополагающих правил поведения на основе общественного согласия.** Конституционная культура характеризует также качество и уровень взаимоотношений конституционных субъектов и институтов, степень "зрелости" правовых отношений между ними.

Говоря о конституционных культурах, специалисты подчеркивают также системные особенности их формирования. Например, профессор Сандерс различает такие конституционные системы, как системы Соединенного Королевства, США и Франции, Роберт Гудин делает акцент на тождестве конституций разных стран. Однако, независимо от различий в акцентах, историческая действительность такова, что любая страна и любой народ прошли самостоятельный путь формирования конституционной культуры и утверждения конституционной действительности, в той или иной мере перенимая опыт других, делая ее более целостной и дополняя, исходя из своей ценностной системы. Основное, существенное в том, что конституционная культура и сама Конституция не могут стать импортируемым или экспортируемым товаром. Это действительность, которая формируется на ценностной системе данного общества, конкретной социальной общности.

Как подчеркивалось, конституционная культура приобретает новое качество именно в тех общественно-государственных системах, где, **наряду с Конституцией, общественной реальностью является и конституционализм,** где конституционные нормы и принципы являются живущими ценностями, сформировалась необходимая и достаточная среда конституционной демократии, в которой конституционные права человека и гражданина действуют непосредственно. В подобных системах Конституция является Основным Законом гражданского общества, средством гарантирования его гармоничного и стабильного развития.

Современное понятие **"конституционная культура"** нами в итоге определяется как **исторически сложившаяся, устойчивая, обогащенная опытом поколений и всего человечества определенная ценностная система убеждений, представлений, правосознания, являющихся основой социального общества в процессе установления и гарантирования общественным согласием основополагающих правил демократичного и правового поведения.**

Конституционная культура - не абстрактное понятие, она проявляется в аксиологических основах самой Конституции, во всех сферах бытия социального общества, проявляется на прочной основе выработанных, выстраданных, выверенных за века ценностей и идеалов. Конституционная культура находит свое предметное проявление в принятых законах и иных правовых актах, в соблюдении основных принципов международного права, в политической системе государства, деятельности политических институтов и органов власти, их взаимоотношениях, в общественном статусе личности, ее правоспособности.

**Культура каждого народа – это его осознанное бытие, осмысленное присутствие во времени.** Ценностное измерение конституционализма каждого суверенного народа с учетом его социокультурных особенностей придает определенную уникальность конкретным конституционным решениям.

**В армянской исторической действительности имеют место исключительные проявления элементов конституционной культуры,** которые и для наших дней имеют большое значение и нуждаются в глубоком осмыслении.

Автор попытался обратиться к некоторым историческим реалиям христианского периода, исходя из необходимости их анализа в контексте нынешних проблем.

Элементы конституционализма сформировались в течение длительного исторического периода и в армянской действительности проявились с особой последовательностью, особенно после принятия христианства как государственной религии (301г.), в условиях необходимости установления взаимосогласованных, единых правил светской и духовной жизни. Вопросам закона, права, правосудия, неизбежности наказания, соизмеримого с виной возмещения, взаимосвязанности понятий "разумность" и "закон", а также вопросам их роли в управлении государством и обеспечении стабильности общества обращались Месроп Маштоц (362-440), Езник Кохбаци (около 380-450), Егише (410-475), Мовсес Хоренаци (около 410-495) и многие другие выдающиеся армянские мыслители средневековья. Между тем, различая божественное правосудие от человеческого, подчеркива-



лось, что "закон царей наказывает преступников, а Бог - и преступника, и народ: преступника - как Законодатель, а народ - как Провидец". Одной из характерных черт этого периода является то, что огромное значение придается роли закона и правосудия в деле утверждения общественной солидарности, гарантирования устойчивого развития государства.

Мовсес Каланкатвази упоминает: "В годы правления царя Вачагана из Агвена между мирянами и епископами, священниками и архиепископами, дворянами и простолюдинами возникали многочисленные противоречия. Царь пожелал созвать многолюдное Собрание в Агвене, которое состоялось в мае месяце, 13 числа".

Результатом этого Собрания стало принятие **Канонической Конституции**, включающей 21 статью. Историография считает датой принятия этой Конституции 488 год.

В связи с исследуемым материалом следует особо выделить следующие обстоятельства:

1. К середине V века в армянской действительности сформировалась среда, в которой делается попытка разрешить возникшие между различными слоями общества "...противостояния" не силой или "административными" методами (в том числе указом Царя или дубинкой), а правовым путем - принятием конституционного закона. Это обстоятельство свидетельствует как о высоком правосознании автора инициативы, так и о принятии обществом подобного подхода и зрелости соответствующей среды.
2. Фактически, принятие Учредительным собранием Конституции - удивительно прогрессивное для своего времени событие - свидетельствует, что в основу регулирования общественных отношений положены принципы общественного согласия.
3. Каноны характеризуются не иначе, как конституционные, получая особый статус, с признанием верховенства установленных национальным согласием норм над любыми другими нормами и правилами.

Устанавливать правила и ставить границы действий, осуществляя это посредством представительного собрания, и достигнутое соглашение засвидетельствовать всеми дворянами Агванка, "чтобы запись была более достоверной", закрепить ее царским перстнем – это не

просто свидетельства рождения Конституции как явления в истории армянского права. Мы имеем дело с достойным особым вниманием событием, позволяющим провести аналогию между обоснованием необходимости и порядком принятия Конституции в 488 году в Агванке и принятием Конституций США 1787 года, Польши и Франции 1791 года, а в дальнейшем - и конституций других стран. Такова же общая философия: установить основные правила общественного бытия, которые верховенствовали бы над другими законами и правилами, как и ограничить действия носителей власти в рамках конституционных правил, **осуществить это путем созыва Учредительного собрания и общественного согласия.**

Проводится параллель между этой Конституцией и "Афинской пометией" (Конституция Афин) Аристотеля.

В армянской действительности, а именно в Канонической Конституции царя Вачагана, не только получила определенное развитие древнегреческая демократическо-правовая культура, но она была дополнена также имеющим "мощь голосования" и являющимся проявлением общественного согласия новым событием – созывом Учредительного собрания.

В конце XVIII века цивилизация связала появление Основного Закона государства, необходимость Конституции с необходимостью гарантирования устойчивого и динамичного развития страны на основе общественного согласия. По существу, та же цель преследовалась в армянской действительности раннего средневековья. История - свидетель также того, что на подобной правовой основе были достигнуты большие успехи и страна пробуждалась, а господство насилия, "непонимания", разнохарактерных "противостояний" сопровождалось неизбежными потерями и разрухой.

Мовсес Хоренаци начинает свою "Историю Армении" словами осуждения "...немудрых нравов наших первых царей и князей" и достойно воздает тем, чьи "изложения читая, получаем науку мирских порядков и изучаем политические системы". Несомненно, одним из достойных был также Царь Вачаган, уроки мудрости которого имеют современное звучание.

Очень ценны также свидетельства Маттеоса Урхаеци, который,

говоря об относящихся ко времени принятия Канонической Конституции событиях, отмечает: "Это было в те времена, когда на четыре части разделился Престол Святого Григора... В те времена, когда разумные овцы стали развратными, у зверей появилось сердце, и стали дерзкими, и начали лаять в лицо патриархам. ...Однако подобный переполох и негодование не смогли проникнуть в страну Агвуна, которая называется Великая страна Армянская...".

Очевидно, что прогрессивно и устойчиво то общество, в основе которого лежит общественное согласие. Эта культура, отчетливо проявившись в армянской действительности в 488 году, в своей основе имела также серьезную предысторию, которая начинается с принятия христианства в качестве государственной религии, разработки различных духовных и светских правил, особенно Канонов Собраний в Аштишате (365 г.), Канонов Шаапивана (446 г.), установленных собранием при участии армянской знати. Очевиден тот факт, что когда в армянской действительности акцент ставился на регулировании общественной жизни посредством правил, достигнутых взаимосоглашением, во всех сферах наблюдается значительный прогресс. Хотя и в зародышевом состоянии, однако конституционная культура для нашего существования и развития имела стержневое значение еще на заре истории человеческого общества. Напротив, несогласия или попытки их преодоления насилем стали причиной неудач. Во веки веков весомы слова Великого Отца армянской историографии в реквиеме по поводу распада Аршакидского царства, где в качестве основной причины случившегося отмечается то, что "разгневался мир, укоренился беспорядок, нарушилось православие, основалась невежеством ересь".

После принятия христианства как государственной религии, когда правила духовной и мирской жизни в основном устанавливались совместно, одно из наиболее характерных и достойных внимания обстоятельств состоит в том, что в основу правового регулирования был положен фактор общественного согласия. Внутри общества отношения регламентировались соглашением, достигнутым на собрании, а не силой принуждения и единоличным диктатом. Мовсес Хоренаци, например, говоря о Собрании Аштишата, свидетельствует, что на третий

год царствования Аршака сын армянского Верховного Патриарха Атанегинеса Нерсес Великий "созвал собрание епископов и мирян, канонической конституцией установил милосердие, искоренил жестокость". Собрание запретило браки между близкими родственниками, осудило коварство, доносительство, жадность, алчность, хищение, мужеложство, сплетни, заядлое пьянство, лживость, проституцию, убийство. Вместе с тем, оно и обязало нахараров милосердно обращаться с тружениками, а слуг - быть покорными своим хозяевам. Было решено для немощных построить больницы, для сирот и вдов - сиротские и вдовьи приюты, для чужеземцев и гостей - гостиницы; для их содержания были установлены пошлины и налоги.

В первой половине V века созывается **Собрание в Шаапиване**, где, согласно историческим летописям, "собрались 40 епископов и многие священники, дьяконы, ревностные служители и все духовенство святой церкви, все князья, управляющие уездов, руководители уездов, верховные судьи, казначеи, военачальники, тысячники, сходские староста, азаты разных районов". Старшие нахарары Страны Армянской, которые были ревностными защитниками законов и святынь, говорили так: "Восстановите установленный Святыми Григором, Нерсесом, Сааком и Маштоцом порядок и правила, а также по вашей воле установите другие блага, и мы добровольно и с любовью примем, так как ослабили порядок и правила церкви, и люди вернулись к произволу. Вы установите законы, угодные Богу и пригодные в деле призвания к жизни церкви, а мы повинемся и будем держать их крепко".

Собранием Шаапивана было принято 20 канонов, которые касаются таких важных, основополагающих для тех времен вопросов внутренней жизни Армении, как регулирование брачно-семейных отношений, деятельность духовенства и контроль за ней, борьба против сектантства и другие.

Чтобы не обосновывать ересь невежеством, армянская средневековая история имеет также иные свидетельства с акцентами на следование правовым правилам, являющимся результатом общественного согласия. Среди них особо выделяется **"Армянская книга канонов" Католикоса Ованеса Одзнеци (Ован Имастасер Одзнеци),**

**утвержденная Третьим Двинским Собором в 719 г.** Одзнеши был одним из первых в мире, после византийского императора Юстиниана Великого (482-565 гг.), и первым в Армении, кто создал армянский "Corpus juris canonіc" - собрание законов, которое берет начало от возглавляющего иерократию католикоса и содержит ратифицированные и принятые на армянских национально-церковных собраниях каноны.

Одна из основных особенностей "Армянской книги канонов" заключается в том, что акцент ставится на качествах человеческого существа. Человек со своим достоинством и социальной ролью рассматривается как большая ценность и считается основой право-регулирования.

Хотя в истории армянского народа было много насилия и разрушений, все равно, они не смогли исказить основные качества, составляющие национальную самобытность. В ней всегда преобладали гуманизм, глубокое рационально-философское восприятие явлений, верность духовным ценностям и законности. Для армянской действительности незабываемой ценностью было осознание того, что "потеря души, когда уходят от чистой, прямой и проповедуемой апостолами веры в Отца и Сына и Святого Духа, больше, чем потеря тела". Тысячу лет назад Григор Нарекаци в "Книге скорбных песнопений" наилучшим образом представил сгусток духовных восприятий армянской идентичности: "обозначая самые разные страсти каждого", он подчеркивает, что совершенные человеческим естеством грехи, насколько бы они не были многочисленны и разнохарактерны, - не столь его преступление, сколь его несчастье. И устами армянского народа прочитав "высочайшую молитву к Богу", Нарекаци молит Господа о том, чтобы Он наставил человека на путь истинный и чтобы человек жил по-человечески. А это он считал реальным в условиях согласия, справедливости, в обществе, придерживающемся закона и "здоровой душой", где справедливость не может "убывая, совершенно исчезнуть" или "чаша прав на весах стать слишком легкой, делая более тяжелой чашу бесправия".

Глубоко осознавалось также, что одного хорошего закона и порядка недостаточно; нужно, чтобы люди также поняли необходимость жить по этим законам, чтобы осознание этого было бы

продиктовано уверенностью, базирующейся на устойчивых и богоугодных, диктуемых разумной сущностью человека ценностях. Вот почему Нерсес Шнорали (Нерсес Д Клаеци) в "Соборном послании" (1166 г.) обратил свое слово не только к Богу, но и духовному сословию, "князьям мира" и народу. "Соборное послание", будучи первым кондаком Шнорали и венцом его прозаических работ, имеет исключительное значение и в плане обобщений правовой и конституционной культуры. Этот документ уникален своим концептуально-программным масштабом, ценностно-системным обобщением, взаимогармоничностью норм-целей, норм-принципов и норм "обхождения". Составляя правила и наставления, основанные на высоких духовных и моральных ценностях и обращенные ко всем общественным слоям, Шнорали был уверен, что только живя этой обязанностью и руководствуясь ими можно чаять удачи, преодолеть тревогу "зла и многовластия", руководствоваться "ростками справедливости". Мирян он поучал "не беззаконничать, не лишать, не использовать злые наставления, не совершать бессовестные суды, защищать вдов и бедных, не урезывать плату труженика, относиться ко всем равно, не забывать ради телесного о душевном". Без преувеличения можно констатировать, что "Соборное послание" содержит множество норм относительно прав человека и компетенции властей. "Князьям мира", в частности, обязывается: "Бессовестно не обращайтесь с подданными, устанавливая тяжелые и непосильные налоги, а каждого судите по закону и по его состоянию", "никого не лишайте и не притесняйте бедных и нищих", "не назначайте в вашей стране злых и бессовестных делопроизводителей и уездных начальников", "бессовестно не судите кого-либо, а прямо свершайте суд", "не пренебрегайте правами вдов и бедных" и т.д. Достойны внимания подходы Шнорали к вопросам суда только по закону, обратной силы закона, соразмерности степени ответственности и наказания и к другим правовым проблемам ("чтобы не было так, что побуждаемые злостью и несправедливым правом выносили решение: или накажите одного, или выносите смертный приговор, поскольку Новый Завет это не позволяет, а Ветхий Завет хотя и позволяет любого осудить наказанием или смертью, но не без вины"). Более того, **основа всех**

**наставлений – человек с необходимостью осмысленной организации его морального образа, душевной чистоты, разумного бытия.**

Из приведенных свидетельств следует, что в армянской средневековой действительности результатом общественного согласия было не только принятие законов и правил, но также очевидно, что в основу определения этих правил положены подобное общественное требование и необходимое сознание.

Изучив порядок принятия национально-церковными собраниями канонических конституций, а также конституционно-правовой характер принятых норм, можно сделать несколько важных выводов:

1) эти собрания порядком их созыва, представительным характером, процедурами проведения, правомочием могут считаться учредительными собраниями;

2) в основу принятых норм положены всеобщие христианские ценности с национальным восприятием и познанием;

3) канонические конституции считались Основным Законом для всего народа и сыграли главную роль для общества не только в условиях существования государственности, но и в условиях ее потери. А армянский народ потерял свою государственность на протяжении многих веков.

Достойны также внимания приведенные еще в 1184 году в введении к **Судебнику Мхитара Гоша** обоснования. Мхитар Гош объясняет необходимость написания Судебника, суть которых, в частности, заключаются в том, что:

- зло в людях, зло вообще стало могущественным, и для предотвращения ненависти и утверждения любви необходим Судебник;
- из-за лени люди не упражняются в законах, несведущи в законах, вследствие этого их решения тоже неправильны или отклоняются от закона, следовательно, Судебник необходим, чтобы вывести их из этого состояния;
- Моисеевы законы, писания пророков и Евангелие, будучи уже раз сделаны, так и остались неподвижными, между тем поведение и нравы людей различны и меняются со временем, в отношении народов и стран. Следовательно, нужен такой судейник, который отражал бы эти изменения;

- раньше Святой Дух воздействовал на людей и способствовал свершению справедливого суда, и Дух был законом, начертанным в сердцах людей, следовательно не было нужды в письменном законе. Ныне, когда Святой Дух не имеет того воздействия и люди «совратились» от христианского братолюбия, правдивости, поэтому решил написать этот Судебник;
- судебные дела кончаются присягой, но зло в людях умножилось, и они, несмотря на то, что клятва запрещена Богом, все же к месту и не к месту клянутся и часто – лживо. С целью восстановления нарушенного законного порядка был написан Судебник;
- Судебник должен был установить законность и порядок, **чтобы правосудие было беспристрастным, неподкупным и справедливым.**

Эти суждения сделаны еще в конце 12 века. Судебник был призван способствовать восстановлению совершенства „естественного закона" и заменить ненависть друг к другу „состраданием и любовью". Особого внимания достойно то обстоятельство, что политико-правовая концепция Мхитара Гоша базируется на теории естественного (божественного) права, основные принципы которого – равенство людей (перед Богом), свобода, право на жизнь, неприкосновенность собственности и т.д. Следовательно, позитивное право должно исходить из принципов естественного права, которые устойчивы и неизменяемы, а позитивное право создается людьми, и на нем ставят свою печать время и конкретные общественные условия. Еще одно исключительно важное обобщение заключается в том, что, согласно Мхитару Гошу, каждый народ и каждая страна должны иметь свое законодательство и правовые нормы, выбирать суд "согласно времени, и нации, и миру".

Основные качества армянской правовой мысли этого исторического периода проявились также у Нерсеса Ламбронаци (1153-1198). Как в естественном мире, так и в социально-политической и моральной сферах все считая относительным, Ламбронаци в то же время полагает, что люди наделены свыше свободой выбора (воли), поэтому полностью ответственны за все свои действия, поступки и их последствия. Он считает важной роль воспитания в деле преодоления и уничтожения существующих в обществе беззакония и несправед-



ливости. Он считал также, что игнорирование и маскировка имеющихся в обществе недостатков приводят к углублению существующих ошибок и пороков.

К борьбе против произвола и правонарушений был призван также **Судебник Смбата Спарапета**, созданный в 1265 году и имевший в XIII-XIV веках большое практическое значение в деле укрепления и усиления Киликийской армянской государственности. Причем, исследователи справедливо отмечают, что если у Мхитара Гоша правовое сознание и созданная система не только исходят из теории естественного права, но и пронизаны ею, то Смбат Спарапет, хотя и исходит из принципов естественного права, тем не менее, созданная им система полностью относится к сфере позитивного права.

Армянская правовая мысль XIV века в лице Григора Татеваци (1346-1409) особо важное значение придавала задаче взаимоотношений человек - общество и предложила концептуальный подход, согласно которому наиважнейшие общегосударственные задачи (благоустройства страны, мира и войны и т.д.) должны решаться общим разумом и общей волей. Причем, субъектом права выступает не монарх-самодержец, а народ, его единая воля. Монарх, согласно этой концепции, лишается единовластия, права единолично решать общегосударственные вопросы. Правы те авторы, которые считают, что в данном случае мы имеем дело с признаками конституционной монархии. Татеваци также различает "божественное право" и позитивное право, которое закреплено в разных законодательных документах. Божественные законы неизменны и исключительны, перед ними все люди равны. Нормы позитивного права должны базироваться и исходить из божественных законов, одновременно отражая общественно-политическую действительность.

На протяжении веков одним из основных качеств нашей самобытности и существенных свойств армянского правосмысления было то, что основным средством борьбы против "беззакония" и установления "жизни с любовью" являлись "угодные богу и пригодные в деле призвания церкви к жизни законы", правила, соотносимые с "естественной природой человека", а также готовность "усмирять" и крепко удерживать их. Данный подход лежит также в основе ре-

шений Собраний Двина (VI, VII вв.), Партава (VIII в.), Сиса (1243 г.), Дзагавана (1268 г.), Иерусалима (1651 г.).

Вековая потеря государственности, длительное воздействие внешних факторов помешали воплотить посредством учредительного собрания это богатое наследие правовымышления в единую конституцию страны. Однако невозможно было сковать полет мысли. **В 1773-1788 гг. в Индии, в городе Мадрасе, отец и сын Шаамирянны создали исключительный памятник права - Конституцию будущей независимой Армении**, лелеемой в их мечтах, состоящую из 521 статьи и озаглавленную "Западня тшеславия". Эта работа - одно из немногих достижений общечеловеческой общественно-правовой мысли, выдвинутые в ней и приведенные в определенную систему идеи являются не только результатом глубоких теоретических обобщений, но и основополагающей ценностью международных конституционных развитий. Само название работы, по оценке известного профессора конституционного права Доминика Руссо, - целая правовая теория. Эта Конституция была призвана гарантировать "...возможность сохранения свободы" и создания "...неминуемой западни для всех низких людей, чтобы они были вынуждены оказаться под гнетом полезной деятельности". Она должна была иметь краеугольное значение для руководства справедливыми законами, естественным правом и справедливостью.

Необходимо особо подчеркнуть, что в XVIII веке армянская конституционная культура базировалась на принципе верховенства права, сознании приоритета естественных прав, разделении властей, гарантировании гармоничности конституционных функций, сдержек и противовесов. "Западня тшеславия" - не отклик на влияние европейской правовой мысли, а в правопознавательном и научно-методологическом плане своеобразное обобщение результатов национально-церковных собраний Агвена, Аштишата, Шаапивана, Двина, Партава и др., плодотворной деятельности Ованнеса Одзнеци, Ованнеса Саркавага, Давида - сына Алавика, Мхитара Гоша, Нерсеса Шнорали, Нерсеса Ламбронаци, Смбата Спарапета и многих других представителей армянской общественно-правовой мысли. Широкое обобщение содержит 389 статья Конституции Шаамиряннов, в которой зак-

реплено: "Каждая статья закона включает многочисленные подробности, которые могут быть разъяснены мудрыми людьми. Все объяснения о законе, если преследуют полезную цель и соответствуют желанию Армянского дома [Парламента], должны быть удостоены чести, но не те объяснения, которые противоречат человеческой природе". Здесь не только устанавливается классическое правило толкования закона, но и подчеркивается, что его основа - разумная природа человека, верховенство его права.

В аспекте принципов власти народа, верховенства права, представительной демократии, разделения властей и их функциональной независимости, социальной защищенности и других основополагающих конституционных принципов, вплоть до конституционного правосудия, следует отметить, что впервые в армянской действительности представлена целостная и упорядоченная система норм конституционного права, не только обобщающая достижения армянской и мировой правовой мысли, но и формирующая начало нового государственного мышления. Только "плоды древа права и правосудия" могут стать основой благочестивой (праведной) деятельности "справедливых правительств", ищущих в справедливости и законности счастье индивидуума и общества, имея исходным императив "жить по закону и справедливости", - таков наивысший наказ "Западни тшеславия". Чтобы "жить как разумный и достойный человек ...мы должны выбрать для себя поведение, порядок и закон", не руководствоваться "беспорядком и беззаконием", уметь "собираться - слушать о праве, составлять законы". Как метко и точно сказано, насколько гармонирует с прогрессивным правосмыслением даже XXI века! Единственный путь становления правового государства - до "составления" закона глубокое понимание и следование совету "выслушать о праве". Вывод таков, что "...ни у нас и ни в нашем мире пусть не будет и не выступает кто-либо, кто своими поступками будучи своевольным и своенравным человеком, не будет наказан по закону, и пусть наши законы будут нашим хозяином и царем, вне наших законов никого не признаем выше, кроме только Бога Создателя...".

Сегодня более чем актуальным является также другое положение

предисловия "Западни тшеславия": "...как много добра нам нужно, чтобы нашу жизнь сдерживать законом и свободой, чтобы стать достойными почитания Господа...". А эти законы должны диктоваться "...гармонично человеческой природе, согласно желанности нашей разумной души".

Особо привлекает внимание обращение Шаамиряннов к римской действительности: "Пока они были непоколебимы и оставались верными своим законам, мужественные и подбодренные любовью, из незначительного положения возросли, размножились и благодаря своим законам осчастливились", однако когда старейшины (сенаторы) Рима позволили, чтобы должность императора "стала наследственной", то в их свет проникла тьма, в их добро - зло, в их единство - трещина, в их равенство - камнеметание, земля и небо, т.е. высшее и низшее. ...Этим непримиримость вошла в них".

Будучи Конституцией, предусмотренной для государства с парламентской формой правления, "Западня тшеславия" устанавливает строгий порядок выборов в Армянский дом (законодательный орган), трехлетний срок, определенные полномочия, регламенты принятия закона и осуществления назначений и т.д. Законодательный орган формирует исполнительную и судебную власть в установленном законом порядке. Любой орган власти действует в рамках своей компетенции, установленной законодательством: "Патриарх, нахарар, епископ, староста, священники, власть имущие, никто никому не должен давать приказ, не касающийся его положения и (или) не более того, что дано каждому в соответствии с его положением как со стороны церкви, так и Армянского дома" (ст. 364). Устанавливается определенный принцип иерархичности правовых актов: "Каждый документ, касающийся либо продажи, либо заключения союза, либо любых других действий, кем бы он ни был подписан, не будет иметь цены, если противоречит Армянскому закону или разумной природе человека". Отдавая преимущество "разумной природе человека", дается точная и целостная формулировка принципа конституционного правового равенства (ст. 3): "Любое человеческое существо, как армянской, так и другой национальности, рожденное в Армении или странник из чужой страны в Армении, как

мужского, так и женского пола - все равны и будут свободны во всех своих делах, никто не имеет право властвовать ни над кем, а созданное их руками должно оплачиваться соответственно каждой работе, согласно Армянскому закону". Даже вопросы защиты прав осужденных не остались без внимания Шаамирянов: "Тюрьма правонарушителей должна быть чистой, чтобы не был нанесен вред здоровью заключенных" (ст. 148). Предусматривая определенные нормы конституционного регулирования осуществления права собственности, вопросов социальной защиты, в то же время важное значение придается национально-государственным приоритетам. Статьей 127, в частности, устанавливается: "Армянский дом должен содействовать всем специалистам, особенно в области философии, астрологии, медицины, музыки, ораторского искусства и др".

Превыше всего ставя "всеобщеравную" роль и сдерживающую силу закона, ставя в основе этого право и "гармоничные природе человека" ценности, основываясь на концепциях естественного (божественного) права и общественного союза, Шаамиряны изложили свои конституционные правила "Для правления Армянской страной", которые, являясь исключительной ценностью конституционной культуры, вместе с тем имеют важное значение для увязки прошлого и современного правосознания, для использования уроков прошлого в неуклонном движении по пути установления независимой правовой государственности.

Более чем семивековая потеря армянской государственности оставила свою печать на общественном сознании людей. Поневоле деформировались многие гражданские качества. Законы господствующих стран воспринимались как принуждение, препятствие проявлению своей самобытности.

Бесспорно, что правовая культура - неотделимая часть национально-государственной культуры. Армянская правовая культура оставила достойные внимания памятники общечеловеческого масштаба. Однако правовая культура, будучи органической частью национальной культуры, в основном была оторвана от национально-государственной культурной среды, которую мы просто не имели в период потери государственности. К современным приоритетам ста-

новления государственности необходимо, в первую очередь, причислить формирование такой конституционно-правовой культуры, которая послужит основой для формирования и укрепления гражданских качеств индивидуума, станет предпосылкой установления правовой демократии. Утверждение в стране демократии - само по себе недостаточно и не самоцель. Это должна быть правовая, конституционная демократия, придавая системе целостность и необходимые либеральные качества.

В настоящее время международная конституционно-правовая мысль, более чем когда-либо, придает важное значение надежному гарантированию конституционных принципов и норм в общественных отношениях, так называемой конституционализации этих отношений как предпосылке становления правовых, демократических государственных систем. Если до XVIII века развитие политико-правовой мысли привело к принятию конституций, к идее установления общественного согласия посредством Основного Закона социального общества, то основная задача постконституционного периода - гарантирование в стране конституционализма, который поднимает конституционную культуру на качественно новую ступень. К сожалению, у нас эта задача только недавно приобрела актуальность, поскольку она осуществима только в условиях независимой государственности.

Конституционализм, который является воплощением конституционной культуры, в свою очередь, - сложное общественно-политическое и государственно-правовое явление. Он, в первую очередь, подразумевает утверждение конституционной демократии во всей государственной системе. Это цель, к которой стремятся все страны, избравшие путь социального прогресса. Однако осуществление этой цели, в частности, требует таких обязательных гарантий, как признание и гарантирование государством и всем обществом конституционных целей и основополагающих принципов, наличие соответствующей конституционным принципам государственной власти, становление правовой системы, построенной на принципе верховенства права, надежная защита конституционного строя и верховенства Конституции и др.

Вопрос не только в том, каковы закрепленные Конституцией конституционные порядки и какие принципы положены в основу взаимоотношений права и власти. Существенно то, как в общественной жизни проявляется данный конституционный строй, насколько облекаются в плоть и кровь основополагающие принципы Конституции.

Совместное гармоничное существование Конституции, основанной на принципе верховенства права, выступающей гарантом становления правового государства и гражданского общества, и равноценной ей конституционной демократии предполагает наличие определенных необходимых и достаточных предпосылок. Среди них исходной является степень становления либерального правового мышления и его общественного восприятия и охвата. Такое правовое мышление лежит в основе современных европейских конституционных развитий.

Важная стадия теоретико-философского восприятия и правонаучного толкования права началась в Европе еще в середине XVII века. Одна из характерных особенностей этого периода в том, что сформировалось более целостное мировоззрение о естественном праве и отвергалось так называемое феодальное юридическое мировоззрение. Среди носителей новых взглядов особо выделялись Н. Макиавели (1469-1527), Г. Гроций (1583-1645), Б. Спиноза (1632-1677), Т. Гоббс (1588-1679), Дж. Локк (1632-1704), Ш.-Л. Монтескье (1689-1755), Ж.-Ж. Руссо (1712-1778), Т. Джефферсон (1743-1826), Т. Пейн (1737-1809), Э. Кант (1724-1804), Г. Гегель (1770-1831) и др. Г. Гроций, в частности, считал, что естественное право исходит именно из существа человека, которое и побуждает его к общению с себе подобными.

Признание естественного права придало юриспруденции научный характер. Волеустановленное право оказалось не в состоянии добраться до своих научных корней.

Развитие экономических отношений, создание свободного и конкурентного пространства, признание прав человека в качестве критерия ограничения власти, как и постепенное укоренение других элементов либерально-ценностной системы в европейском правовом мышлении на протяжении последних более чем трехсот лет кристал-

лизировались в таких нормах и принципах, которые со второй половины XX века сформировали качественно новый уровень европейского права.

Характерные для гражданского общества ценности, качества правового, демократического государства формировались на протяжении веков, однако стали системными регуляторами общественной жизни, особенно в последние десятилетия предыдущего тысячелетия. Фактически, начиная с 1950-х годов, общие демократические ценности и принципы правового государства нашли свое системное отражение в конституционных решениях европейских стран, с учетом особенностей конкретных стран. Однако общее для всех заключается в том, что закон и государство должны быть правовыми, гарантировать равенство, свободу и справедливость, ценностно-системная основа которых - приоритет неотъемлемых прав человека. Причем, правовая система становится целостной и жизнеспособной, когда эти ценности становятся конституционными, получают конституционные гарантии признания, обеспечения и защиты.

Европейские демократические процессы еще в начале XX века, с углублением рыночных экономических отношений, создали предпосылки для утверждения целостной системы либерально-правового типа правосознания. Сущность последнего сводится к признанию естественных прав человека как высшей ценности, как непосредственно действующего права и основы позитивного права. Неизбежная логика демократических развитий заключалась в том, что в европейской правовой системе гарантия верховенства права стало краеугольной ценностью. В свою очередь, ценностно-системной основой конституционной культуры стали человеческое достоинство, свобода, демократия, равенство, верховенство права и уважение прав человека - ценности, которые характерны для общества, построенного на принципах недискриминации, плюрализма, толерантности, правосудия и согласия. Эти же ценности положены в основу Конституции Европейского союза, считающейся большим достижением международной правовой мысли.

Автор анализирует также постсоветскую действительность. Выделяются некоторые обобщения:



1) многие страны, находящиеся на этой территории, не прошли тот путь развития либеральных рыночных отношений, который в Европе длился более двух столетий. Многие просто перешли от феодализма к "социализму";

2) сформировались отношения собственности совсем иного характера. В условиях господства государственной собственности на средства производства народ был отделен от власти и из субъекта власти превратился в объект. Право же было призвано защищать не человека и его собственность, а власть;

3) сформировавшееся на протяжении веков правомышление уступило место построенному и сформированному на атеистическом мировоззрении догматическому легистско-позитивистскому правомышлению;

4) в условиях однопартийности источником права стала исключительно воля политической силы. Реальным нормотворческим органом стал высший орган партии, который имел неограниченную и несбалансированную власть.

Естественно, на протяжении десятилетий волеустановленное правомышление своими политизированными и деформированными проявлениями пустило глубокие корни во всем бывшем СССР, а также в Восточной Европе. Все это стало серьезной причиной правовых системных деформаций.

Основные конституционно-правовые деформации в переходной общественной системе условно можно разделить на три группы:

- инерция правомышления и правоприменительной практики;
- искаженные конституционно-правовые решения и пробелы;
- механическое заимствование или копирование прогрессивных правовых ценностей без создания необходимой ценностной системы и предпосылок их реализации и без учета национальной конституционной культуры, что в реальной жизни приводит к разнохарактерным деформациям основных конституционных принципов или к оторванности найденных решений от реальной жизни, следствием чего является их недостаточная жизнеспособность.

Не секрет, что современные Конституции переходных стран – это

продукт сложного компромисса, обусловленного глубинными противоречиями общественной трансформации. В странах молодой демократии после девяностых годов прошлого столетия образовалась определенная система посткоммунистического конституционализма, характерными чертами которой являются, с одной стороны:

- наличие в Основном Законе определенного конституционного романтизма;
- максимальный упор на общечеловеческие ценности и европейские конституционные установки, без глубокого учета особенностей системной трансформации;
- оторванность основополагающих конституционных ценностей и принципов от общественных реалий.

С другой стороны:

- низкий уровень конституционализации общественных процессов;
- недостаточный уровень конституционного правосознания в гражданском обществе;
- наличие деформированной, внутренне противоречивой, неполноценной правовой системы;
- отсутствие единого ценностно-системного понимания социальных ориентиров общественного развития.

Это тот период, когда Основной Закон не успел воплотиться в систему гражданских ценностей каждого члена общества, стать основой его поведения и моральных принципов. Процесс трансформации обнажил также множество острых политических, правовых, национальных, экономических и социальных проблем в обществе. Во всех переходных странах по известным причинам конституции первоначально не стали продуктами всеобщего осмысленного согласия.

К сожалению, в ряде стран с переходным обществом системный распад еще не привел к перемене мышления. Огромна инерция мышления и миропонимания. На созерцательном уровне или при трансформации понятия правового государства в лозунг всерьез не воспринимается необходимость гарантирования верховенства права, ограничения власти правом, конституционализации общественных отношений. Представления о власти продолжают оставаться в плоскости возможности применения силы и давления.

Международная практика свидетельствует также о трех путях установления демократии: 1) эволюционное развитие (по которому пошли большинство европейских стран); 2) через революции, хаос и анархию; 3) через авторитарные режимы (классическими примерами являются Португалия, Испания, Чили). Задача заключается в том, что каждый из них требует свою цену и время. Всегда несравнимо дорого платят народы стран, избравших второй и третий пути, при этом зачастую не достигая желаемого результата. Сегодняшняя Европа однозначно отвергает эти пути. Основной подход заключается в том, что к демократии можно прийти только и только на правовой основе. Там, где насилуется право, демократические лозунги становятся просто средством установления тоталитаризма.

Для переходных общественных систем характерно то, что советское правовымышление часто находит благодатную почву для самовоспроизводства.

Сложность и особенность ситуации заключается в том, что имеем дело не только с инерцией, имеющей глубокие корни, а также в том, что системный распад выдвинул необходимость перераспределения собственности, чем и обусловлено появление новых явлений. С одной стороны, установление частной собственности объективно выдвигает необходимость упрочения демократии, с другой - советская правовая система, служившая главным образом защите государства и государственной собственности, в основном потеряла свой предмет и, сохранившись в своих главных чертах и институциональной системе, стала орудием в руках власти, перераспределяющей собственность. Такое положение - самый большой тормоз демократических развитий.

Беспроспективно также акцентирование осуществления правовой революции путем "импорта" демократии без создания необходимой для этого ценностной системы и предпосылок. Это может привести только к неудачному копированию.

Задача должна решаться не только на уровне мышления или на уровне политического сознания, но и должны быть преодолены гносеологические искажения. Следовательно, оптимальный путь становления правового, демократического государства - не бесплод-

ная попытка перепрыгнуть через века или превращение некоторых ценностей и принципов в бумажные лозунги и вуалирование существующей действительности, а признание европейских ценностей гражданского общества в рамках собственной ценностной системы и последовательное, непреклонное превращение их в осмысленную собственность членов общества. Конституционно-правовые решения могут быть построены только на этих ценностях, заключая в себе внутреннюю энергию восприятия обществом и придания обществу определенного вектора системного развития.

Бывший Председатель Международной ассоциации конституционного права, профессор Черил Сандерс, подчеркивая лингвистические и содержательные сходства конституций разных стран, подчеркивает, что исследование истории их создания свидетельствует, что они производны друг от друга, но должны быть сообразны ценностной системе того общества, для которого предназначены установленные конституционные принципы и нормы. В противном случае они останутся на бумаге и не будут реализованы в жизни, не станут живой реальностью. Более того, несоответствие ценностной системе действительности может привести к тому, что они из стимула прогрессивных реформ превратятся в стимулятора глубоких социальных противоречий или в орудие принуждения в руках власти.

Основные конституционные принципы и положения зачастую заимствуются в искаженной форме, приспособляются к разным условиям и представлениям. Предварительным условием является признание и восприятие основных конституционных принципов в контексте правовых критериев, и лишь затем глубокое изучение тех подходов, с помощью которых разные страны смогли решить вставшие перед ними конкретные конституционные задачи и обеспечить стабильное конституционное развитие страны. В этом плане очень важно изучение международной практики конституционных изменений разных стран. Например, из исследования конституционных изменений и конституционных законов последних десятилетий Австрии, США, Бельгии, Германии, Дании, Испании, Италии, Греции, Португалии, Франции, Финляндии, Словакии и ряда других стран, как и из изучения конституций ряда стран Восточной

Европы и бывшего СССР (Польши, Словении, Чехии, Болгарии, Российской Федерации, Литвы, Эстонии, Грузии, Казахстана и др.) следует, что в плане формирования и развития конституционной культуры имеется ряд устойчивых и общих тенденций:

1. Все более доминирующими становятся демократические конституционные ценности. Принципы правового, демократического государства приобретают системный характер. Конституционные изменения и дополнения направлены на ограничение власти, децентрализацию политической, экономической и административных сил и одновременно на укрепление гарантий и расширение возможностей институтов самоуправления.

2. Принцип верховенства права приобретает реальное содержание, приводятся в соответствие основные конституционные принципы и конкретные механизмы конституционных правоотношений, повышаются требования к усилению конституционной ответственности.

3. Углубляется процесс конституционализации общественных систем, основные конституционные права и свободы человека и гражданина приобретают непосредственно действующий характер, определяют смысл и содержание власти, укрепляются конституционные гарантии их защиты. Конституционные определения о достоинстве личности как источнике ее прав и свобод, а также о характере непосредственного действия конституционных прав приобретают общепризнанное системообразующее содержание.

4. Последовательно конкретизируются функциональные полномочия институтов государственной власти, и они приводятся в соответствие с функциями ветвей власти, укрепляются гарантии независимого осуществления этих полномочий. Приобретает системный характер сбалансированность функциональных, противобесных и сдерживающих конституционных полномочий, разделение властей осуществляется на более конкретной критериальной основе, обеспечивая динамичную функциональную сбалансированность различных ветвей власти. Функционирование институтов государственной власти больше базируется на принципах сотрудничества и взаимодействия.

5. Закрепляется целостный конституционный механизм выявления, оценки и восстановления нарушенного функционального конституционного баланса институтов власти с целью последовательного укрепления иммунной системы общественного организма, усиливаются механизмы внутриконституционной самозащиты, укрепляются гарантии конституционной стабильности.

6. Параллельно с углублением правовой глобализации наблюдается устойчивый поиск механизмов сочетания универсальных ценностей с национальными особенностями. Принципы и нормы международного права на основе общих ценностей, стандартов и позиций играют все более возрастающую роль в национальных правовых системах. Меняются также характер и функции государства и права. Происходит интернационализация права. Укрепляются основы единой европейской системы конституционализма, идея надгосударственной европейской конституции приобретает реальный облик. В континентальной правовой системе физическое лицо становится субъектом международного права, а международная судебная практика в определенной мере становится важнейшим прецедентным институтом.

Естественно, приведенные обобщения не исчерпывают все основные тенденции конституционного развития в современной Европе, однако представляют основную суть и логику происходящих процессов, при этом констатируя, что верховенство права утверждается на основе высокой правовой и конституционной культуры. Правовая глобализация на европейском уровне создала все необходимые предпосылки, чтобы без всякого сомнения утверждать, что формируется некая новая система права - права цивилизованных народов.

Наряду с указанными общими тенденциями важное значение имеют вопросы развития институтов, осуществляющих функции ветвей власти, конкретизации их функциональной роли и наделения необходимыми и достаточными полномочиями.

Учитывая исключительную роль устойчивой власти в переходных общественных системах, можно признать, что отмеченные общие тенденции актуальны в плане формирования концептуальных под-

ходов к конституционным реформам переходных стран и создания предпосылок гарантирования верховенства Конституции. Задача, однако, заключается в том, что эти решения должны быть гармоничны ценностной системе данного конкретного общества, базироваться на необходимых предпосылках и быть результатом общественного согласия.

Эта задача может получить продуктивное решение только в том случае, если общественным согласием конкретизированы приоритеты развития страны, положенная в их основу система ценностей, когда определены концептуальные подходы для обеспечения развития общественной жизни на основе реальных программ, исходящих из этих приоритетов. Это необходимо особенно для переходных общественных систем, в которых господствуют неопределенность и ценностно-системный хаос.

**Развитие конституционной культуры как в армянской действительности, так и в международной практике, в своей основе имело стабильные характеристики: общественное согласие и мир, ограничение власти правом, наличие правовых законов, "гармоничных человеческой природе, соответствующих желанности нашей разумной души", "непоколебимая верность" им, способность сдерживать нашу жизнь "законом и свободой".** Эти ценности выводят на путь прогресса и развития. "Противостояния", "распутное" поведение, "несогласие", "признание воли носителя власти выше закона", "утверждение иррационала невежеством", "трещина в единстве и взаимопонимании" и многочисленные другие не соответствующие человеческой природе проявления зла - прямой путь к неизбежным потерям и регрессу. К сожалению, наша история также сохранила многочисленные свидетельства этого.

Конституции часто пишутся и изменяются в таких ситуациях, когда перед обществом стоят требующие неотлагательного решения задачи. Подобные ситуации диктуют сверхосторожный и ответственный подход к основным качествам конституционной культуры. Отдавая предпочтение текущим задачам, формирующиеся вокруг них политические соглашения часто создают серьезные опасности для будущего, устойчивости конституционного строя страны вообще.

Политические события ставят свою печать на восприятии содержания и формах проявления правовых принципов. В основном, политическими событиями обусловлены выбор в стране формы правления, конституционный баланс властей, практика применения сдержек и противовесов, внутриконтитуционные гарантии преодоления конфликтов в правовом поле, возможности динамичной гармонизации политических и правовых событий и т.д. Для посткоммунистических стран характерно, что на стадиях принятия новых конституций были и стремящаяся к реваншу левая оппозиция, и революционный либерализм. Их взаимовлияние сформировало определенную среду политического взаимосогласия правовых решений. Почти во всех этих странах постепенно не только ослабился левый реваншизм, но и либеральный романтизм уступил место умеренному реализму. Существенно нарушился баланс внутренних политических влияний. Над конституционными решениями, новыми изменениями постепенно стало господствовать административно-политическое влияние действующей власти, что опасно в той мере, в какой конституционные решения приспособляются к решению политических задач, не превращая их в результат общественного согласия относительно общих подходов.

Конституционные реформы должны стать средством достижения общественного согласия, преодоления политических кризисов, а не жертвой "противостояний". Изучение опыта многочисленных стран свидетельствует, что основные характеристики таких кризисов – это спад доверия народа к политической власти, расширение и системный характер коррупции (в том числе наличие политической коррупции), слияние политической, административной и экономической сил, укоренение корпоративно-кланового правления в системе государственной власти, высокий теневой уровень в сфере общественных отношений и т.д. Углубление этих явлений уничтожает гарантии непрерывности процесса становления конституционной демократии, что представляет большую опасность для переходных стран.

Конституционная архитектура имеет свою логику, принципы и границы.



**Основная задача** принятия конституций или внесения в них изменений - гарантирование верховенства права. В свою очередь, наличие четких конституционных гарантий обеспечения прав и основных свобод человека - важнейший критерий оценки жизнеспособности Конституции. Любой шаг, направленный на разрешение каких-то политических задач путем конституционных изменений, но не исходящий из принципа гарантирования верховенства права, не может считаться конституционным и будет противоречить ценностям правовой демократии. Один из важнейших принципов международного права заключается именно в том, что недопустимо какое-либо конституционное изменение, которое ослабляет защиту прав человека или гарантии осуществления этих прав и свобод.

**Вторая задача** конституционных изменений - гарантирование дееспособности и плодотворной работы властей. Это возможно исключительно путем последовательной реализации принципа разделения властей, баланса их полномочий, укоренения действенной системы сдержек и противовесов. Любое осуществляемое в этом направлении изменение должно дать четкий ответ на следующие вопросы:

1. Какое изменение происходит в функциональных полномочиях ветвей власти и насколько они могут нарушить динамическое равновесие и нанести вред функциональной независимости той или иной ветви власти?

2. Как обеспечить системную гармонию цепочки функция - институт - полномочие?

3. Насколько изменения функциональных полномочий сбалансированы противовесными полномочиями?

4. Насколько сдерживающие полномочия целостны и надежны в условиях нового баланса функциональных и противовесных полномочий?

**Третья важная задача** конституционных реформ заключается в том, чтобы гарантировалось по возможности широкое общественное согласие относительно конституционных решений. Одновременно должны быть снижены до минимума или исключены внутриконституционные пробелы и несоответствия, преодолены тупиковые ситуации, укреплен внутриконтитуционная устойчивость, созданы

основополагающие предпосылки гарантирования верховенства Конституции и установления конституционной демократии. Специалисты часто призывают в свидетели основную особенность американского конституционализма, согласно которой ему свойственны устойчивость в плане принципиальных оснований и гибкость в их функциональных проявлениях в соответствии с требованиями времени. Это характерно не только для американской конституционной практики, но считается важнейшим качеством конституционной культуры в международном масштабе. Поэтому конституционные реформы должны создать такие гарантии внутриконституционной устойчивости, когда надежная и неукоснительная охрана основополагающих конституционных принципов сочетается с динамичным развитием конституционализма и конституционной демократии, последовательным обеспечением верховенства Конституции. Эти качества - основные критерии современной конституционной культуры и имеют краеугольное значение для правового государства.

Основные аксиологические характеристики Конституции, как правило, прежде отражаются в прединтродукции Основного Закона, в основном, в форме норм-целей. Они находят свое дальнейшее систематизированное отражение в конституционных нормах-принципах, а также в нормах и положениях, регулирующих основополагающие правоотношения.

Сравнительный анализ аксиологических характеристик конституций разных стран показывает, что:

**Первое**, трудно найти Конституцию какой-либо страны, в которой ценностно-системные подходы были бы абсолютно тождественны Конституции другой страны. Каждая страна принимает свою доктрину конституционной аксиологии. Это естественно и свидетельствует, что Конституция – это не экспортируемый или импортируемый товар, а построенное на ценностно-системных обобщениях данного социального общества, данного государства взаимосогласие относительно основополагающих правил общежития.

**Второе**, значительная часть стран (США, Испания, Индия, Аргентина, Российская Федерация, Молдова, Армения и т.д.), в первую очередь, сделали попытку закрепить в прединтродукции Консти-

туции аксиологические основы Основного Закона как конституционную норму-цель. Причем, акцентируются такие ценности, как правосудие, свобода, равенство, братство, толерантность, гражданская солидарность, политический плюрализм, безопасность государства, благополучие поколений, демократия, верховенство права, достоинство человека, уважение и защита его прав, международное сотрудничество и т.д. Действительность такова, что в предисловиях конституций разных стран акцент делается только на часть этих ценностей, принимая за основу их приоритетность для данного общества.

**Третье**, во многих странах конституции в конкретных статьях закрепляют такую группу ценностей, которая лежит в основе регламентирования конституционно-правовых отношений. Например, статья 1 Конституции Южно-Африканской Республики устанавливает, что эта страна - демократическое государство, основанное на таких ценностях, как достоинство человека, правовое равенство, обеспечение прогресса прав и свобод, исключение расизма и дискриминации, верховенство Конституции, власть закона, а также всеобщее избирательное право, единый национальный общий избирательный реестр, система многопартийности. А статья 3 Конституции Хорватии устанавливает, что свобода, равенство, национальное равноправие, миротворчество, социальная справедливость, уважение прав человека, неприкосновенность собственности, охрана природы и окружающей среды, верховенство права и демократическая многопартийная система являются высшими ценностями конституционного строя Республики Хорватия.

Статья 3 Конституции Румынии также устанавливает, что Румыния – правовое, демократическое и социальное государство, в котором достоинство человека, его права и свободы, свободное развитие личности, справедливость и политический плюрализм являются высшими ценностями и гарантируются.

Статья 2 Конституции Франции устанавливает, что девиз Республики – “Свобода, Равенство, Братство”. Эти девизы Французской революции на конституционном уровне были оценены как главные качественные характеристики общежития. Они предполагают

внутренний мир человека, все его социальные связи, оценку его общественного бытия, и в этой среде все проявления самореализации должны, в первую очередь, осмысленно базироваться на этих ценностях. Это также лучшее свидетельство того, что, прежде всего, основополагающие конституционные ценности делают Конституцию живущей реальностью. Указанные понятия на конституционном уровне получают реальное содержание как основополагающие системно-ценностные, социально-культурные ориентиры социального общества.

По пути уточнения и закрепления основополагающих конституционных ценностей в форме конкретной нормы пошли также члены Конвента по разработке Европейской Конституции, которые во второй статье Конституционного соглашения, представленного на ратификацию стран Европейского союза, закрепили ценности Союза: **“Союз основан на таких ценностях, как человеческое достоинство, свобода, демократия, равенство, верховенство права и уважение прав человека. Эти ценности общие для стран-членов, обществу которых характерны недискриминация, плюрализм, толерантность, правосудие и солидарность”**. Несмотря на то, что этот документ не был призван к жизни и Лиссабонское соглашение о Европейском союзе 2007 года не содержит подобной конкретной статьи, вместе с тем, очевидно, что на уровне конституционной аксиологии Европейского союза дана четкая и всеобъемлющая формулировка, которая является ценностно-системной основой цивилизационной ориентировки и, по нашему мнению, значительным шагом в области конституционализма.

**Четвертое**, многие страны, не закрепляя в отдельной статье основные аксиологические характеристики Конституции, вместе с тем, в разных статьях обращаются к этому. Причем, основной подход таков, что проявляется подчеркнутое отношение к правам и основным свободам человека. Например, статья 2 Конституции Российской Федерации устанавливает, что человек, его права и свободы являются высшей ценностью. Признание, соблюдение и защита прав и свобод человека и гражданина - обязанность государства.

Согласно статье 3 Конституции Армении: “Человек, его достоин-

ство, основные права и свободы являются высшей ценностью. Государство обеспечивает защиту основных прав и свобод человека и гражданина в соответствии с принципами и нормами международного права. Государство ограничено основными правами и свободами человека и гражданина, являющимися непосредственно действующим правом". Равноценные формулировки можно встретить также в конституциях многих других стран (например, Германия, статья 1; Грузия, статья 7; Украина, статья 3 и т.д.). Подобные нормы, основываясь на теории естественного права, конкретизируют аксиологические подходы правового, демократического государства относительно основополагающих конституционных решений, ставя в их основу принцип верховенства права. Этот подход характерен также таким международным основополагающим документам, как Всеобщая декларация прав человека, Европейская конвенция о защите прав человека и основных свобод, Международные пакты 1966г. и т.д.

Общий подход таков, что основополагающие конституционные ценности призываются к жизни посредством института прав и свобод и других конституционных институтов, а преодоление возникшей между ними коллизии является одной из важнейших задач гарантирования верховенства Конституции, имея в основе принцип верховенства права.

**Пятое**, в конституционных решениях правовых демократических стран особую важность ценностно-системного обобщения имеют принципы народовластия, разделения и сбалансированности властей, гарантирования общего, равного и прямого избирательного права, верховенства Конституции, обеспечения политического плюрализма, признания и защиты права собственности, исключения лишения правосубъектности человека и ряд других принципов, которые, как правило, составляют основу конституционного порядка данной страны. Эти принципы в конституциях разных стран конкретизируются по-разному, однако в своей сущности имеют одну и ту же аксиологическую основу.

Во всех указанных проявлениях основополагающие конституционные ценности составляют системную целостность и делают Конституцию живой реальностью, когда на этой ценностно-

системной основе базируется также вся правовая система, правоприменительная практика, весь комплекс межличностных отношений и взаимоотношений человек-государство, когда эти ценности для каждого конкретного индивидуума в гарантированной форме становятся движущей силой бытия.

Сегодня можно без сомнений сказать, что заканчивается **этап конституционного идеализма**. Конституционная культура многих стран постсоветского пространства приобретает больше прагматизма, реализма и рационализма. А общество, в свою очередь, стало более подготовленным быть носителем конституционных свобод. Можно также констатировать, что сложилось определенное общественное согласие вокруг базовых конституционных ценностей. Опираясь именно на это, необходимо дать новое дыхание системному развитию конституционализма во всех странах молодой демократии.

**Последовательное конституционное развитие, стабильный динамизм этого процесса, эволюционность преодоления тенденций критического накопления отрицательной общественной энергии и, вследствие этого, недопущение трансформационных социальных катаклизмов должны стать достойным и очень полезным примером для развития конституционализма в странах молодой демократии.** Мудрость творцов Конституции и институтов, обеспечивающих ее развитие и живой характер, заключается именно в том, чтобы в динамике достичь постоянного, рационального согласия ценностно-сбалансированных конституционно-правовых отношений, минимизировать их внутренние противоречия.

Сегодняшний **„трансформационный конституционализм„** постепенно приобретает системно-целостный характер, все больше охватывает правосознание общества, процесс правотворчества, правоприменительную практику, формирует образ жизни миллионов людей. Конституция перестает быть сугубо политической декларацией, все больше проявляется юридическая природа Основного Закона переходных стран. А это свидетельство формирования новой конституционной культуры в обществе, конституционной культуры 21-ого века.

Вызовы времени указывают также, что главная задача переходных

обществ - это последовательная конституционализация общественных отношений с преодолением конфликта между Конституцией и правовой системой в целом. Огромную роль в этом, в осуществлении конституционной диагностики и решении проблем конституционной конфликтологии играют конституционные суды.

Анализ практики конституционного правосудия в странах новой демократии свидетельствует, что им характерны несколько существенных особенностей:

**Первое**, все они функционируют в условиях системной недостаточности. Политическая институционализация общества находится в процессе становления. Низка дееспособность конституционных институтов власти. Законодательные пробелы являются существенными стимуляторами теневых процессов. Недостаточен уровень конституционного правосознания.

**Второе**, конституционные пробелы и системная неполноценность механизмов конституционного контроля не создают необходимых и достаточных предпосылок для полноценного гарантирования самодостаточности Конституции.

**Третье**, проявляется определенный антагонизм между конституционным судом и другими институтами власти, которым порою трудно смириться с независимой функциональной ролью конституционных судов. Из-за этого зачастую возникает в обществе дефицит адекватного восприятия легитимности, места и роли конституционных судов как власти, наделенной функциями контроля над конституционностью функционирования всех институтов власти, в том числе наделенными первичным мандатом.

**Четвертое**, в посткоммунистическом пространстве новые конституции с их ценностно-методологическими особенностями появились практически в условиях вакуума. Это относится как к понятийному аппарату, так и к общественному восприятию конституционных ценностей и принципов правового, демократического государства. В подобных условиях на конституционные суды была возложена тяжелейшая обязанность внедрения в реальную жизнь конституционных положений, раскрытия живого характера Конституции.

**Пятое**, во многих странах сами конституционные суды находятся

в процессе функционального и институционального становления. Нет достаточной сбалансированности между конституционными функциями и конкретными полномочиями этих судов, между объектами и субъектами судебного конституционного контроля. Системный характер конституционного контроля, взаимодействия всех конституционных институтов в обеспечении верховенства Конституции нуждаются в дальнейшем укреплении.

**Шестое,** роль и влияние конституционных судов, безусловно, обусловлены общим уровнем демократии в данном обществе. Вместе с этим в странах развивающейся демократии конституционные суды играли и продолжают играть исключительно важную роль в утверждении конституционной демократии и обеспечении стабильного развития общества. Лишь факт их присутствия стал существенным сдерживающим фактором против антиконституционных проявлений. Но более существенными оказались принципиальные решения конституционных судов за последние 10-15 лет по защите прав человека и установлению конституционной демократии в наших странах.

Процессы глобализации, новые общечеловеческие угрозы, системные кризисы в экономике свидетельствуют, что не только в странах молодой демократии, но и перед всем человечеством встала неотложная задача укрепления созидательного потенциала социального развития. XXI век выдвигает новые вызовы обеспечению верховенства основополагающих конституционных ценностей и принципов. В условиях системной социальной нестабильности конституционная юстиция становится одним из ключевых звеньев иммунной системы общественного организма. Перед конституционными судами стоят огромные задачи конституционализации общества, обеспечения права человека на конституционное правосудие, проведения конституционной диагностики в стране, разрешения многих проблем трансформации, формирования конституционной культуры нового тысячелетия.

Для успешной реализации своих функций сама система судебного конституционного контроля нуждается в дальнейшем функциональном и институциональном совершенствовании. Анализ практики существующих ныне в мире 110 конституционных судов, а также других



институций в этой области показывает, что конституционное правосудие переходит на качественно новый уровень системного развития. Сегодня на первый план выдвигается проблема последовательной и системной реализации основополагающих конституционных ценностей в общественной практике. А это требует новых подходов обеспечения целостности функциональных полномочий конституционных судов, укрепления функциональных, институциональных, материальных и социальных гарантий их независимости, совершенствования процессуальных основ конституционной юстиции, внедрения надежных механизмов реализации правовых позиций конституционных судов как источника права.

Изучение процессов конституционного развития в мире приводит к выводу, что человечество в определенной мере приближается к проблеме формирования **качественно новой иммунной системы общественного организма**. Весь XX век убедительно доказал, что **вера, традиции, нравственные нормы, вся ценностная система общественного поведения, иные механизмы системной самозащиты неполноценно обеспечили динамический баланс и устойчивость развития общества в условиях новых реалий**.

Любая динамически развивающаяся система должна иметь равноценную подсистему обеспечения внутреннего функционального баланса и самозащиты. Многовековая логика функционирования иммунной системы живого организма состоит именно в том, чтобы своевременно обеспечить выявление нарушенного баланса, определить характер нарушения и выбрать единственно правильную стратегию, а также необходимые средства для преодоления дисбаланса. Принципиальным является также гарантирование недопущения нового нарушения при восстановлении функционального равновесия.

Во всем мире высшей задачей конституционного контроля является гарантирование верховенства Конституции. В настоящее время по-новому встают логические вопросы:

- насколько исторически необходимо было создание конституционных судов?
- каковы основные характеристики их системной роли в новом тысячелетии?

В поисках ответов на эти вопросы был проведен сравнительный системно-аналоговый анализ. За последние десятилетия научная мысль в сфере микробиологии и медицины сделала ряд серьезных обобщений, которые исключительно важны также с точки зрения системного изучения основных принципов и механизмов внутренней самозащиты общественного организма, обеспечения устойчивости конституционно закрепленного функционального баланса. Почти к аксиоматичным принципам причисляется то, что:

- более совершенной системой внутренней самозащиты наделен человеческий организм, иммунная система которого формировалась на протяжении почти двухсот миллионов лет;
- функционирование иммунной системы человека, а также иных сложных биологических систем охватывает весь организм, имеет иерархический и самоуправляемый характер;
- каждая клетка организма наделена определенными ресурсами самозащиты, когда они иссякают, подключаются защитные системы других взаимосвязанных структурных элементов организма;
- главная миссия иммунной системы – сохранение естественного баланса и устойчивости во всем организме, поскольку невозстановление нарушенного баланса становится причиной накопления отрицательного потенциала и иррационального воспроизводства мутированных клеток;
- физиологический баланс, иммунная и нервная системы организма находятся в стабильном гармоничном состоянии;
- любая патология активизирует и вводит в действие всю систему самозащиты;
- число иммуноглобулинов, всегда существующих в определенном количестве, при защитной реакции возрастает до количества, необходимого для полноценного осуществления защитной функции. Однако если защитная способность недостаточна для восстановления функционального баланса, создается патологическая ситуация, требующая экзогенного вмешательства;
- развитым иммунным системам характерны четкость и рациональность самозащиты, последовательность целенаправленных, „запро-

граммированных,, действий для обеспечения целостности и гармоничности функционального баланса клеточной системы и всего организма;

- любая динамически развивающаяся система должна иметь равноценную подсистему обеспечения внутреннего функционального баланса и самозащиты;
- логика функционирования иммунной системы состоит в следующем:
  - а) выявление нарушенного баланса;
  - б) определение характера нарушения и выбор стратегии и средств для преодоления дисбаланса;
  - в) гарантирование недопущения нового нарушения при восстановлении баланса.

Эти принципы, которые на протяжении многих лет были изучены вместе с медиками, биологами, специалистами системного управления, формировались, как указывалось, на протяжении миллионов лет - параллельно развитию живого организма. Человеческое общество существует всего несколько тысяч лет, и как единый организм, как сложная система еще не достигла уровня системного совершенства и гармонии. Лишь пример XX века, который вследствие общественных катаклизмов унес более 130 миллионов человеческих жизней, а также сегодняшняя волна международного терроризма, нерешенные региональные конфликты, всемирный глубокий социально-экономический кризис являются ярким свидетельством наличия общественной иммунной недостаточности. Не случайно также, что возникновение необходимости формирования специализированных институтов судебного конституционного контроля совпадает с периодом первой мировой войны, а их системное развитие стало реальностью после второй мировой войны.

Делается вывод, что человечество в определенной мере "подсознательно" приближается к проблеме формирования **качественно новой иммунной системы общественного организма**. Весь 20-ый век убедительно доказал, что **вера, традиции, нравственные нормы, вся ценностная система общественного поведения, иные механизмы системной самозащиты неполноценно обеспечили динамический**

**баланс и устойчивость развития общества в условиях новых реалий. Стала объективной необходимостью научная разработка проблематики общественной иммунологии с учетом новых угроз системной нестабильности.**

В новом тысячелетии конституционный контроль становится одним из стержневых элементов самозащиты гражданского общества и правового государства. Его главная задача - постоянное, непрерывное и системное выявление, оценка и восстановление нарушенного конституционного баланса в обществе. **Конституционный контроль не допускает иррационального воспроизводства функциональных нарушений или накопления отрицательной общественной энергии**, которая, достигнув критической массы, может привести к новому состоянию посредством взрыва. На практике это выбор между динамическим, эволюционным или революционным развитием со всякими последствиями системных катаклизмов.

Действие целостной системы конституционного контроля призвано гарантировать конституционную стабильность и исключить общественные катаклизмы, опираясь, в первую очередь, на такие общепринятые конституционные принципы и ценности, как правовое государство, народовластие, верховенство права, разделение и сбалансированность властей, достоинство человека, свобода, общественное согласие, равенство, справедливость, толерантность, плюрализм, недопущение дискриминации, правосудие и др. Следовательно, конституционные суды своими правовыми позициями призваны придать реальное содержание конституционным ценностям. Только так возможно гарантировать верховенство и непосредственное действие Конституции демократической страны, что является также одной из характерных особенностей конституционной культуры XXI века.

С точки зрения полноценной **конституционной диагностики** принципиальное значение имеет и другой вопрос. Большинство стран конституционно установили приверженность к демократическим, правовым общечеловеческим ценностям, заложили институциональный фундамент правового государства. Насколько эти ценности, принципы и механизмы приобрели реальное содержание в общественной жизни? Это принципиальный вопрос не только с позиции

правовой практики, но имеет также более широкий и глубоко научный характер. Одной из основных задач транзитологии является именно выявление общих тенденций и логики проявления этих процессов.

Результаты анализа показывают, что картина зачастую тревожная. Они свидетельствуют о том, что в переходных странах общепризнанные правовые принципы в определенной мере воспринимаются как инородные, деформируются в реальной жизни и не являются доминирующими характеристиками социальной действительности.

В переходных обществах основными проявлениями иррациональных процессов в конституционной практике являются:

- искаженные представления о демократии и ценностной системе правового государства<sup>1</sup>;
- применение этих ценностей как „завесы„ для призвания к жизни субъективной воли власти;
- усилия превратить различные институты власти, прессу и средства массовой информации в орудие властвования;
- сращивание власти и теневой экономики и этим путем, с одной стороны, перерастание коррупции в основной капитал власти, с другой стороны - политизация теневой экономики;
- формирование новой и наиболее опасной среды ограничения прав и свобод человека и гражданина через появление некоей среды страха, недоверия, безнадежности, безнаказанности, укоренения политического и бюрократического цинизма, которые порою преподносятся в демократической упаковке.

И количественный, и качественный анализ существующих реалий в переходных странах свидетельствует, что **путем слияния политической, экономической и административной сил формируется признак некоей "корпоративной демократической системы"**, которая своим характером искажена, игнорирует принцип верховенства пра-

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<sup>1</sup> Об этом свидетельствуют также используемые политиками и некоторыми исследователями в последнее время такие понятия, как "переходная демократия", "национальная демократия", "частичная демократия", "управляемая демократия", "суверенная демократия" и т.д.

ва, основана на теневой экономике и реалиях абсолютизации власти.

Самая большая угроза корпоративной демократии заключается именно в том, что общественная система оказывается в паутине хронической иммунной недостаточности. С первого взгляда, под общественной стабильностью скрывается воспроизводство подвергшихся мутации ценностей, что более опасно, чем любая другая общественная болезнь. Подобная ситуация неизбежно приводит к углублению противоречий между интересами власти, общества и государства. Главная задача конституционно-правовой системы общества - не допустить появления и углубления антагонизма между этими интересами, между властью и свободой. Однако при установлении корпоративной демократии подобный антагонизм становится неизбежным. А ведь сущностная характеристика Конституции заключается именно в том, чтобы обеспечить юридически узаконенный баланс между властью и свободой.

Для переходных стран наибольшей опасностью является не то, что достижения в сфере конституционной демократии скромны и несозвучны реальным вызовам. Еще опаснее, когда наличествуют противоположные тенденции, когда констатируется отступление, когда основополагающие конституционные ценности в общественной практике, деформируясь, постепенно подвергаются мутации и начинают воспроизводиться как таковые. Главная задача конституционной диагностики переходных стран - своевременное выявление, предупреждение и предотвращение возникновения подобных явлений. А для этого, как обязательное условие, необходимо заложить действенную систему конституционного надзора и контроля, считая главной задачей всех органов государственной власти в рамках своих компетенций внести реальный вклад в гарантирование верховенства Конституции. Только так возможно превратить Конституцию в живую реальность и обеспечить серьезные положительные результаты в деле становления конституционной демократии в стране.