

Constitutional Jurisdiction and Developing Society

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Dr. Gagik Harutyunyan, President of the Constitutional Court of the Republic of Armenia, Chair of CCCOCYD, Professor)

Dear participants of the international congress,

First of all, I would like to greet the realization of the first international congress of judicial constitutional control and thank the Venice Commission of the Council of Europe, as well as the Constitutional Court of the South African Republic for this initiative, which is of huge importance for summarizing the vast experience of constitutional jurisdiction and the definition of priorities of its development in the new millennium.

I represent the International Conference of Bodies of the Constitutional Control of the Countries of Young Democracy. These are mainly the states of the post Soviet space. We also actively cooperate with the states of Eastern and Central Europe. Our Conference was founded in 1997 and each year, together with the Venice Commission of the Council of Europe, we convene an international conference on topical issues of constitutional justice in Yerevan. The materials of these conferences, compiled in an almanac, are distributed to 107 countries of the world and numerous international organizations. We also publish a quarterly international bulletin entitled “Constitutional Jurisdiction.” Forty issues of the bulletin have been published within the last decade, containing articles, comments and remarks by nearly 200 renowned specialists from thirty countries on most topical problems of constitutional justice. The presidents and judges of constitutional courts from 25 countries have shared their ideas with the readers in the pages of the bulletin. These include presidents and many members of the European Court on Human Rights, experts of the Venice Commission of the Council of Europe and other European institutions, members of the International Association on the Constitutional Law. Our readers have the possibility to browse such topics as current problems of judicial constitutional control, the practice of constitutional jurisdiction, the case law of the ECHR, overview of decisions by constitutional courts of various countries, constitutionalism and developing democracy, discussion issues, current information, etc.

An analysis of the practice of constitutional justice in the countries of the new democracy attests to the fact that several essential peculiarities are to be noted:

First, all of them function in conditions of systemic insufficiency. Political institutionalization of the society is in the process of establishment. The viability of constitutional institutions of power is low. Legislative gaps essentially stimulate shadow processes. The level of legal consciousness is not sufficient.

Second, the constitutional gaps and systemic insufficiency of mechanisms of constitutional control do not create a necessary and sufficient basis for full-fledged guaranties of the self-sufficiency of the Constitution.

Third, there emerges a certain antagonism between the constitutional court and other institutions of power, and it sometimes becomes difficult for the latter to come to terms with the independent functional role of constitutional courts. This leads to a deficit in adequate comprehension within the society of the legitimacy of the position and the role of constitutional courts as a public office endowed with the functions of control over the constitutionality of operation of all branches of power, endowed with a primary mandate.

Fourth, in the post Soviet area new constitutions with their value-methodological peculiarities emerged practically in a vacuum. This refers to their cognitive apparatus as well as to the public perception of constitutional values and the principles of a rule of law, democratic state. The constitutional courts were entrusted the weighty responsibility for the implementation of constitutional provisions and demonstrating the living essence of the Constitution.

Fifth, in many countries the constitutional courts themselves are in the process of functional and institutional establishment. There is insufficient balance between the constitutional functions and concrete powers of these courts, between the objects and subjects of judicial constitutional control. The systemic character of constitutional control, interaction of all constitutional institutes for assuring the supremacy of the Constitution is in need of further improvement.

Sixth, the general level of democracy in a given society determines the role and the influence of constitutional courts. Along with it, in the countries of developing democracy the constitutional courts have played and continue to play a particularly important role in the establishment of constitutional democracy and ensuring stable development of the society. The mere fact of their presence has become an essential safeguard against anti-constitutional developments. The principal decisions of the constitutional courts for the last 10-15 years have played the even more essential role of protecting human rights and establishing constitutional democracy in our countries.

In a questionnaire circulated before the congress its organizers ask whether there were cases in our court the decision over which had a substantial impact on the society? Doubtless, dozens of such decisions in the countries of young democracy can be listed, where the daily struggle between the sluggishness of the old system and sprouting of the new legal mentality continues. Principal positions of our constitutional courts not only have rendered stable support to guaranteeing the rule of law and protecting human rights and freedoms, but also play a role in the constitutional development of the society. Armenia can serve as a salient example: the doctrinal approaches of our constitutional court were of principal importance in the implementation of the constitutional reforms of 2005, and in particular for strengthening the constitutional basis of the rule of law.

Dear friends,

The process of globalization, new threats looming over mankind, the systemic crisis in the economy come to prove that not only the countries of young democracy, but the entire humanity faces an urgent task of strengthening the creative potential of social development. The 21st century sets forth new challenges for the democratic development of society, ensuring the rule of fundamental constitutional values and principles. In a state of the systemic social instability constitutional justice becomes one of the key links in the immune system of the social organism. The constitutional courts face immense tasks: constitutionalisation of the society, guaranteeing access to constitutional

justice, addressing the many problems of transformation, shaping a constitutional culture of the new millennium.

For the successful implementation of its functions the system of constitutional review needs further functional and institutional improvement. An analysis of the practice of the 110 constitutional courts existing worldwide, as well as of other institutions in this domain demonstrates that constitutional justice transfers into another qualitatively new level of systemic development. Today the problem of successive and systemic implementation of the fundamental constitutional values in social practice comes to the foreground. This demands new approaches in ensuring the integration of functional competences of constitutional courts, strengthening functional, institutional, material and social guarantees of their independence, perfecting the procedural basis for constitutional jurisdiction, deploying reliable mechanisms of enforcing the legal positions of constitutional courts as a source of law.

An examination of constitutional developments in the world leads us to a conclusion that mankind is gradually approaching the problem of the formation of a **qualitatively new immune system of the social organism**. The 21st century confirmed that **faith, traditions, ethical norms, and the whole system of values of social behavior and other mechanisms of systemic self-defense have failed to fully ensure a dynamic balance and stability in the development of the society under the circumstances of the new realities**.

Any dynamically developing system must have an underlying subsystem for ensuring internal functional balance and self-defense. The perennial logic of the immune system of a living organism is to ensure timely discovery of disrupted balance, define the character of transgression and choose the only right strategy, as well as the necessary means for fixing the misbalance. A guaranteed inadmissibility of a new violation in the course of re-establishing the functional balance becomes of principal importance.

Constitutional review in the new millennium is becoming one of the main components in the self-defense of the civil society and the rule of law state. Its main task is the permanent, continual and systemic discovery, assessment and rehabilitation of disrupted constitutional balance in the society. Constitutional review prevents irrational reproduction of functional violations or the accumulation of negative social energy, which may reach the critical mass and result in explosive developments. In practice this represents a choice between dynamic, evolutionary or revolutionary development, with all the consequences of systemic cataclysms.

The operation of a holistic system of constitutional review is called upon to guarantee the constitutional stability and exclude social cataclysms on the basis of commonly accepted constitutional principles and values, such as the *Rechtstadt*, popular power, rule of law, separation and balance of powers, dignity of a person, freedom, public accord, equality, fairness, tolerance, pluralism, exclusion of discrimination, etc.

Consequently, through their legal positions constitutional courts are called upon to render real substance to constitutional values. Only in this way the rule and direct effect of the Constitution of a democratic state may be guaranteed, and this appears to be one of the characteristic features of constitutional culture of the 21st century.

Another issue acquires principal significance in the context of constitutional diagnostics. Most countries have constitutionally enshrined their adherence to democratic, universal human values; have set the institutional foundations for a rule of law state. But to what extent have these values, principles and mechanisms acquired a real substance in social life? This is a matter of principle not only from the perspective of legal practice; it has also acquired a broader thorough academic significance. One of the main tasks of the discipline of transitology is to reveal the common trends and the logic of these processes.

The results of our analysis demonstrate that the state of affairs more often than not is alarming. They indicate that in transition countries commonly accepted legal principles are to a certain extent perceived as alien; they are deformed in the real life and do not dominate in social turnover.

Irrational processes in the constitutional practice of transition societies are mostly expressed as follows:

- distorted perception of democracy and the value system of a rule of law state¹;
- adherence to these values as a “smokescreen” for enforcing the subjective will of the authorities;
- efforts to turn various institutions of power, the press and media into instruments of the authorities;
- convergence of the authorities with the shadow economy, which makes corruption the main asset of the authorities, thus politicizing the shadow economy;
- emergence of a new and most perilous environment of restricting human and civil rights and freedoms through promoting an atmosphere of fear, mistrust, hopelessness, impunity, enhancing political and bureaucratic cynicism, sometimes presented in a democratic packaging.

A qualitative and quantitative analysis of realities in the countries of transition indicates that through the merger of political, economic and administrative levers some sort of a distorted “corporate democratic system” emerges, which ignores the principle of the rule of law and is based on the shadow economy and the absolutism of power.

The biggest threat of the “corporate democracy” is in that the public system slides into the web of chronic immune insufficiency. At first approximation social stability in this case simply camouflages the reproduction of values that have undergone mutations, something that is much more hazardous than any other social disease. Such a situation invariably intensifies contradictions between the interests of the authorities, society and the state. The main task of constitutional-legal systems is to prevent the emergence and intensification of antagonism between these interests of the authorities and the state. Whereas for the establishment of a “corporate democracy” such an antagonism becomes inescapable. The essential feature of a constitution is ensuring a judicially authorized balance between the authorities and freedom.

¹ Such a concept as “transactional democracy”, “national democracy”, “particular democracy”, “directed democracy”, “sovereign democracy”, etc is used by the political officials and some investigators.

For countries in transition the greatest danger is not in the fact that achievements in constitutional democracy are modest and not commensurate with real challenges. The opposite tendency is far more dangerous: that of recoil, when fundamental constitutional values begin to warp in social practice and gradually succumb to mutations, reproducing as such. The main task of constitutional diagnostics in countries of transition is the timely discovery, exposure and prevention of such eventualities. As a necessary prerequisite for this a potent system of constitutional review must be put in place, with an understanding that the main task of all bodies of power within their respective competence is to make a real investment in guaranteeing the supremacy of Constitution. Only thus it will be possible to make the Constitution a living reality and guarantee serious positive strides in establishing constitutional democracy in a country.

Thank you.