SEPARATION OF POWERS AND INDEPENDENCE OF CONSTITUTIONAL COURTS IN CONDITIONS OF SOCIETAL TRANSFORMATION

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Dear participants of the World Congress, ladies and gentlemen!

Allow me, on behalf of the International Conference of Constitutional Review Bodies of the States of New Democracy and on behalf of the Constitutional Court of the Republic of Armenia, to welcome the Second World Conference and wish it productive work.

I. Background

I am representing the International Conference of Constitutional Review Bodies of the States of New Democracy. In October of 2006 in Yerevan our Conference, having reviewed the draft Charter of the World Conference of Constitutional Justice Bodies, came up with a positive assessment of the institutionalization process of the global cooperation between constitutional review bodies and endorsed the draft Charter. The subsequent work over the draft was essentially of editorial nature. We welcome all efforts towards subsequent strengthening of international cooperation in the area of judicial constitutional review.

We are also grateful to the Supreme Court of Brazil and the Venice Commission of the Council of Europe for the great effort invested in the brilliant organization of the Second World Conference on Constitutional Justice.

II. Scope of the issue

The theme of this Congress has been discussed at great length at the Bureau of our World Organization and was eventually acknowledged to bequite topical on many counts. In this communication I shall only dwell upon the problems of assuring the separation and balance of powers in conditions of social transformation, from the perspective of guaranteeing the independence of constitutional justice.

I would like to state first that among the dozens of various doctrinal approaches to specific constitutional models of the separation of powers the only incontestable and unanimously accepted premise is the theoretical acceptance of the need to separate and balance powers. As for particular approaches, forms and methods, not to mention more practical solutions, there exist significant discrepancies in every constitutional system around these.[1]

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[1] The idea of «the separation of powers» was set forth already by the philosophers of antiquity, in particular by Aristotle. The member of the Constitutional Court of the Republic of Armenia Raphael A. Papian maintains that the roots od the system of the separation of powers may be traced to the Bible. He concludes that «the trinity of the Father, the Son and the Holy Spirit design`tes three branches of the heavenly power, the equivalents of the legislative, executive and judicial powers of today.» (See Raphael A. Papian, *The Christian Roots of Contemporary Law*. Moscow, Norma Publishers, 2002, p. 218.

But the genesis of the theory of the separation of powers relates to the emergence in 17th century England of the political and legal theories of John Locke, whose premises on the necessity and importance of the separation of powers were laid down in his principal work *Two Treatises of Government*, 1690. At the same time it is universally acknowledged that the doctrine acquired its classicalformat in the theory of Charles Montesquieu. By developing the ideas of John Locke,

We should admit that one of the ultimate achievements of American constitutionalism is exactly that the doctrine of the separation of powers in the Basic Law of the USA has acquired systemic integrity, and the introduction of the system of checks and balances has afforded the US Constitution a feature of **dynamic regulation of social relations, transferred the constitutional system onto the tracks of dynamically developing balance.**

III. Contemporary diagnosis of the state of implementation of separation of powers

How does the contemporary world address issues of the separation and balance of powers, considering that there emerged specialized public institutions that are called upon to independently guarantee the supremacy and the direct effect of the Constitution?

We believe that by the end of the day not much has changed and the American doctrine of constitutional separation and balance of powers is still very much viable these days. In the framework of modern constitutionalism this model may be schematically presented as follows (see Diagram 1):

Thirdly, the question of principle is that of the separation of functional, checking and balancing powers of constitutional institutions of power, and ensuring an optimal poise between these powers.

Fourthly, an urgent goal of contemporary constitutionalism is the introduction of a viable and effective mechanism of intra-constitutional self-defense in order to guarantee timely identification, assessment and remedying of a functional constitutional balance in its dynamics. This is **essentially the main objective of constitutional diagnostics** and the principal goal of constitutional review in general.

IV. The criteria in the basis of the separation of powers

The criteria in the basis of ensuring the prerequisites listed above may also be presented through a schematic (see image 2).

What are the principal requirements here towards the effective functioning of the system? In our opinion they are embodied in the prerequisites listed below.

Firstly, the separation of powers is a functional, rather than institutional process, something that is often confused even on the level of constitutional solutions. Various constitutional institutions may implement particular separate constitutional-legal functions.

Secondly, the main objective of constitutional architecture is to ensure, first and foremost, **equilibrium in the system function-institution-powers.**

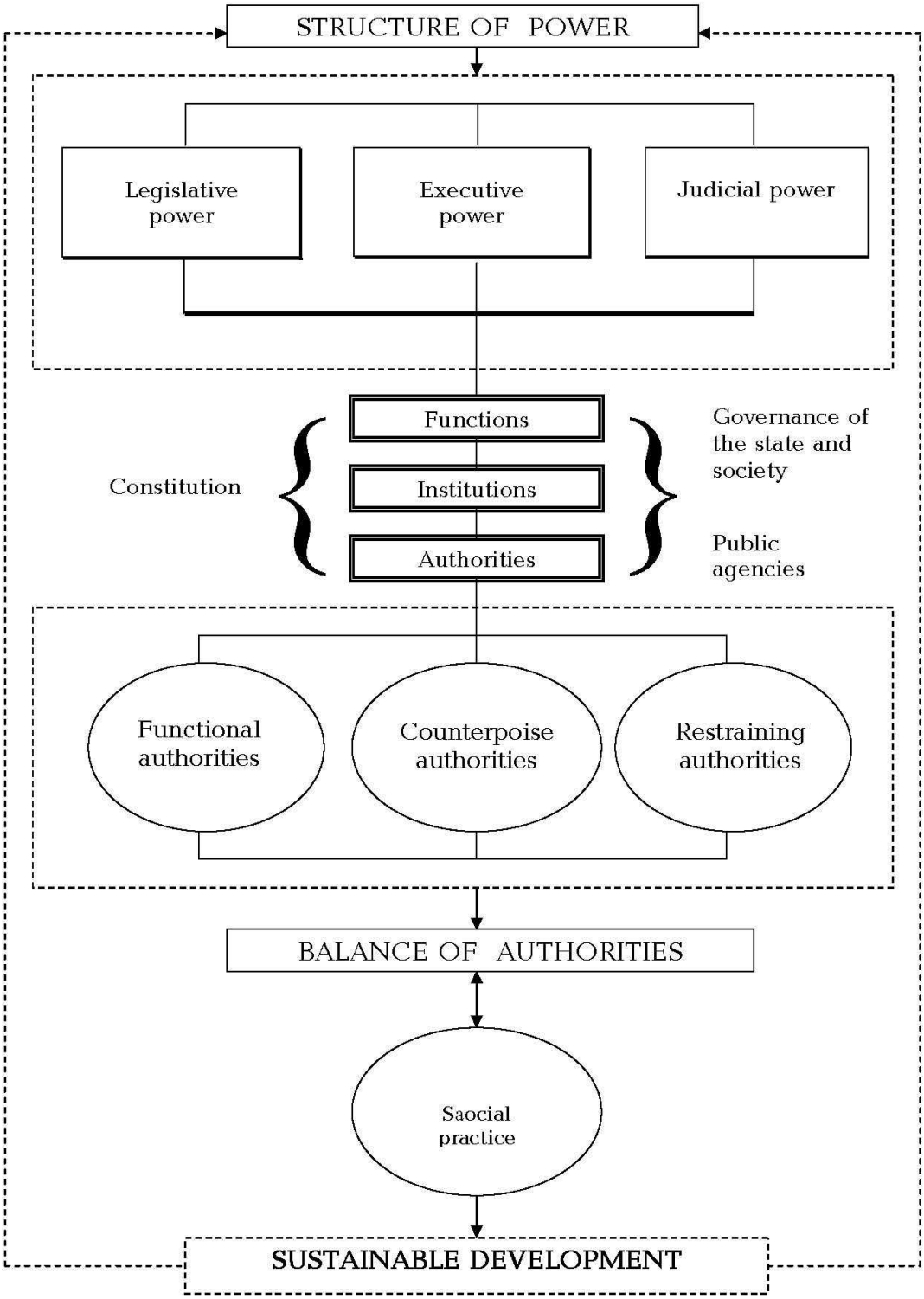
Montesquieu concludes that only the separation of power functions between various bodies of authority may ensure pluralistic accord in the society, human rights and freedoms, and the rule of law in the life of the state.

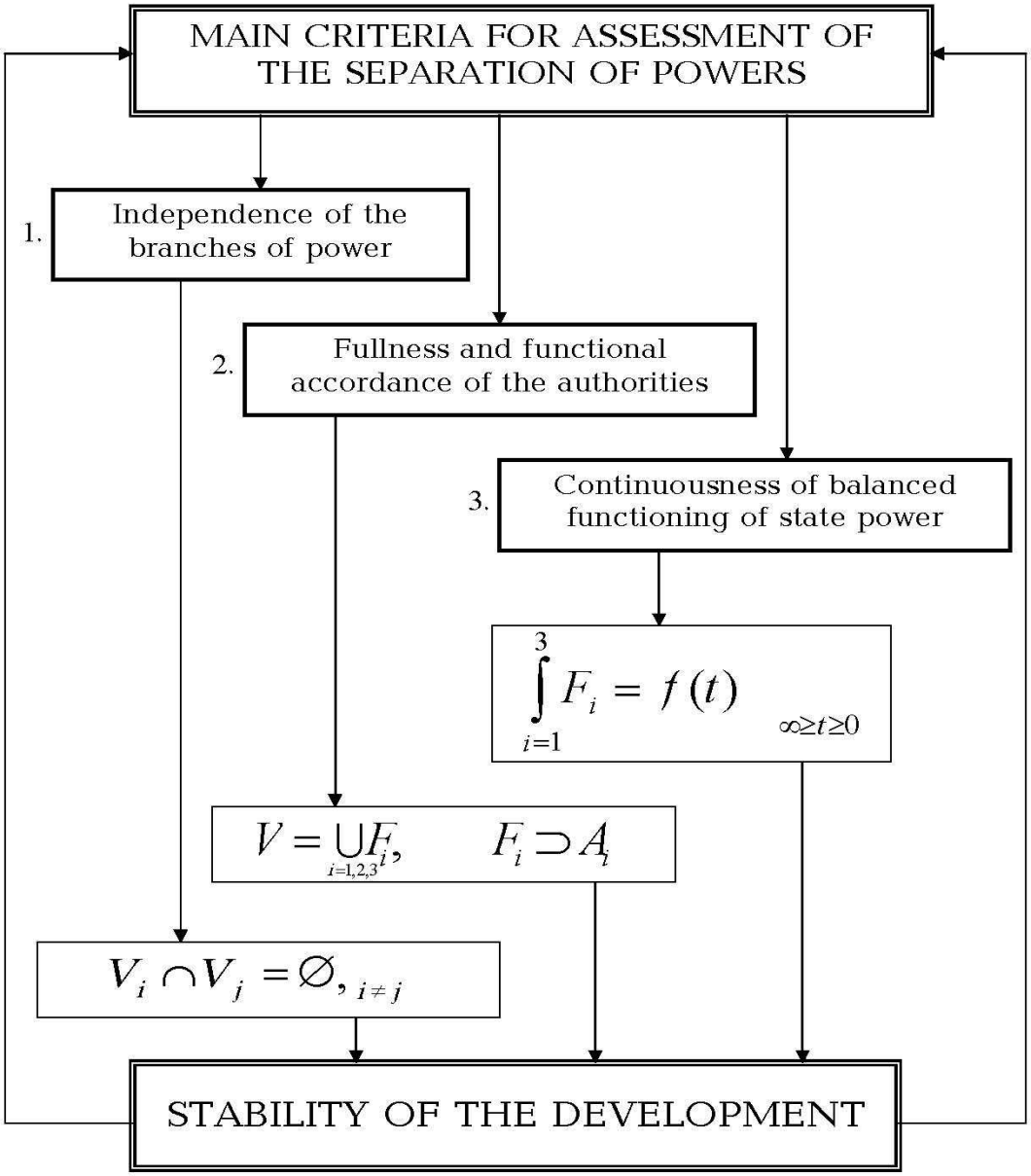
In his turn Immanuel Kant determines the separation of powers as the requirement of pure intellect and the fudamental principle of the state. He claims that the state embodies three powers, i.e. the will, which is joined in a single trinity: the supreme power (sovereignity) as the lawmaker, that is the people; the executive as the Ruler; and the judiciary as afforded to persons appointed by the ruler or elected by the people. Kant maintained that in order for freedom to develop it is necessary for the above powers to be separated. But the separated powers shall not be deprived of mutual linkage. Their interaction spells the benefit of the state.

Subsequent philosophical-legal advances in theory did not, in our opinion, add significant value to this concept.

Diagram 1

SCOPE OF CONSTITUTIONAL REVIEW





V_i - i-th branch of state power,

$f(t)$ - function of state power depending on time t,

F_i - combination of the functions of i-th branch of state power,

A_i - combination of authorities of i-th branch of state power.

We pay attention here to three basic aspects:

1) ensuring the functional independence of the branches of power;
2) guaranteeing full functional adequacy of the powers of constitutional institutions;
3) ensuring continuity and inviolability of the functional constitutional balance in dynamics, in real public turnover, which, in turn, assumes the prevention of the so-called "alienation" of the constitution from real life.

How are these approaches (that are, in our opinion, of principal significance) towards guaranteeing constitutional democracy and legal development assured in various countries? We attempted to find an answer to this question on the basis of a comparative constitutional analysis.

We conventionally broke down countries into several groups:

1) USA, Canada and Western European Countries;
2) Eastern European countries;
3) Latin American countries;
4) African countries;
5) Countries of Central and Eastern Asia;
6) Arab countries;
7) Post-Soviet countries.

The last five groups, from the perspective of the problem examined, and with some exceptions, may be joined into one conventional group, that of countries with young democracies, in view of the similar results of constitutional diagnosis.

What are the features that single out the countries in the first group?

Firstly, in this group the internal structure of the constitution, as well as all concrete constitutional decisions are clearly based upon the functional separation of the powers of constitutional institutions, regardless of the form of governance.

Secondly, this group is set aside by the high level of constitutional traditions and constitutional culture, which in turn forms a respective environment of constitutional perception of social processes among the public at large.

Thirdly, the balance between freedom, power and the law is the general philosophical basis for constitutional decisions.

Fourthly, in this group the continuity, elected nature, accountability and rotation of power is guaranteed both functionally and institutionally, which is the basis for the establishment of constitutional democracy.

Fifthly, there exists no real antagonism between constitutional decisions and public practice. Constitutional values and principles have become a norm of social behavior.

The second group of countries is characterized by trends of approximation towards the criteria basesthat characterize the first group.

The third general group is set aside by the fact that these bases are to a certain extent deformed predominantly along three plains: on the level of the constitution (which includes the systemic deformations at the stage of the choice of the form of public governance, as well as its inconsistencies); deformations in the general legal system; deformed perception and implementation of fundamental constitutional values and principles on the level of the practice of implementation.

V. Viability of the system of separation of powers in conditions of social transformation

From the point of view of the establishment of constitutional democracy he third group of countries is characterized by the process of social transformation.

A study of the constitutions of these countries demonstrates that at this level the rule of law, the power of the people, the supremacy of law, human dignity, freedom, constitutional democracy, the separation of powers, public accord, equality, tolerance, pluralism, solidarity and other universally recognized norms do formally underlie, in their organic unity, the constitutional decisions. Together with this the **reality in these countries differs, it unfolds along another dimension**. In all of these countries the self-sufficiency of the constitution is not fully ensured, and there exists a significant detachment of the fundamental constitutional values and principles from the social realities. The latter is characterized by the low level of constitutional culture, a systemic inadequacy of the mechanisms ensuring the supremacy of law, the existence of deformed legal system prone to internal contradictions,a lack of uniform value-system understanding of social bearings of social development.

I shall begin with the constitution of my own country. The structure of the constitution itself, from the viewpoint of functional balance, in our opinion lacks logic. The chapters on the foundations of constitutional order and n human rights are immediately followed by a presentation of the constitutional institutes of the president, the parliament, the government and, alongside with these, **judicial power** is singled out in a separate chapter. This not only violates the structural logic of the constitution itself, but includes in the functional system of the judiciary institutions that do not administer justice. Such structural inconsistency is also

observed in the constitutions of Bolivia, Greece[2], Bulgaria, Croatia, Georgia, Uzbekistan, the Russian Federation, Japan and a number of other countries. Along with that there are countries in the group under scrutiny that not only have constitutionally enshrined a clear functional structure of separated powers, but devoted a stand-alone article or a chapter of the constitution to revealing the character of the separation of powers. Article 49, Chapter One, Section Three of the Mexican constitution ay serve as an example, which states that the ultimate power of the Federation is divided, for its implementation, into the legislative, executive and judicial branches. Two or all three branches may never converge into the hands of one person or a single corporation, and the legislative power may not be vested in one person, except for the case when the executive branch of the Federation is granted extraordinary powers under the provisions of Article 29. Under no other circumstance, with the exception of that set out in paragraph two of Article 131, may the executive branch receive the extraordinary power of issuing laws.

Under clear constitutional formulation of the essence of the separation of powers the safeguards for the practical implementation thereof increase dramatically. We believe that, regardless of the chosen form of governance and the level of development of constitutionalism, a better choice was made by the countries which used either the institutional approach (Italy, Portugal, Belgium, Poland, etc.) or the functional approach (Austria, Brazil, Slovakia, etc.) as the basis for the constitutional structure.

The main problem for the countries of the third group is in the substantial antagonism between the constitution and the legal reality in general.

We maintain that the following represent the common detrimental features of systemic transformation in these countries:

- instability and indefiniteness in social development and the deepening of the crisis of trust;
- serious omissions and shortfalls in the implementation of value-systemic transformations;
- inadequate formation of civil society;
- lack of correspondence between the social bearings of the public at large and the constitutionally proclaimed democratic-legal values, i.e. the existence of a remarkable deficit of constitutionalism;
- the low level of functional and institutional viability of the institutes of power;
- the antagonism between politics and constitutionally made decisions;
- and, as a consequence of all of the above, the accumulation of certain negative energy, which sometimes leads to multicolored socio-political explosions with inevitable tragic consequences.

Fundamental constitutional vales in public practice may be implemented in life with guaranteed certainty only there and to the extent, where and to which extent the affirmation of constitutional democracy is the axial goal and topical agenda of public policy.**They cannot be determined by considerations of momentary expediency, or cater to bureaucratic, clique or criminal interests.**The assurance of real separation and balance of powers, the establishment of the power of the people, must transform from a mere motto into living reality. Every legal decision must emanate from the principle of the supremacy of law, which is the fundamental guarantee of stability and development. Where the supremacy of law ends, tyranny sets in. This is accomplished through adjusting the constitutional form of governance to current political interests.

What impedes with the establishment of genuine constitutional democracy in conditions of social transformation?

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[2] One needs to note that Article 26 of the Greek Constitution stipulates that the legislative functions shall be implemented by the Parliament and the President of the Republlic, the executive functions shall be implemented by the President and the Government, and judicial functions – by the courts, whose rullings are passed in the name of the Greek people.

In our opinion there exists a multitude of reasons, among which I would like to particularly note the following:

- inertia of the mentality, the mindset and lack of constitutional culture;
- low level of legal awareness and insufficient political will to raise it;
- imperfect constitutional and legal solutions, distorted perception and implementation of the fundamental principles of constitutional democracy in the legislative policy and implementation;
- inadequate guarantees of the viability of democratic public structures and deformity of political institutions;
- intensive mergers of political, economic and administrative powers, which significantly restrict the implementation of fundamental constitutional values in social practice and leads to the emergence of governmental-bureaucratic economic relations;
- the high level of corruption, nepotism and shadow relations;
- insufficient immune response on part of the social organism, determined by the tangle of above factors[3].

The countries in transition from a constitution to genuine constitutionalism must yet overcome many difficulties. Life itself is demonstrating quite persuasively that the development of constitutionalism may not be put to the service of current political expediency. It may not disrupt the balance and separation of powers, contribute to the merger of political, administrative and economic power, which inevitably results in the emergence of a corrupt pyramid of the state.

Constitutionalism as the foundation of civil society cannot develop progressively in conditions of weak viability of democratic state systems and deformations of political institutions themselves. The intensive bonding of political, administrative and economic power, the high level of corruption, nepotism and shadow relations significantly limit the implementation of fundamental constitutional values in public turnover.

The main goal of the successful implementation of social transformation is the consistency in the constitutionalization of public relations, along with overcoming the conflict between the constitution and the legal system in general. Only in these conditions one may ensure the necessary viability of the system of separation and balance of powers. In order to attain this one needs to overcome the principal cause. From the perspective of constitutional conflictology the cause, in our opinion, is exactly in the fact, that, by choosing the method of introducing model constitutions in many countries of young democracy, which, in turn, required to put a significant emphasis on the implementation of predominantly American and Pan European constitutional values, the respective societies faced the reality of transplanted values. The social organism of transition countries was apparently not prepared for such implants. In such a painful situation great opportunities emerge for the expressions of political adventurism, social demagogy and the criminalization of the economic system.

More positive results were attained in countries where the public policy of socio-economic and legal development took profound notice of the realities and, considering the objective features of social turnover, the necessary dynamism and evolutionary nature was ensured in the establishment of constitutional democracy.

VI. The main prerequisites and general philosophy of ensuring the independence of constitutional justice

A study of the international practice of functioning institutes of judicial constitutional review demonstrates that a system of constitutional justice may function fully, effectively and independently only upon the existence of the **necessary and sufficient prerequisites.** The following may rank among them:

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[3] See Gagik H. Harutyunyan - CONSTITUTIONAL CULTURE: THE LESSONS OF HISTORY AND THE CHALLENGES OF TIME. Yerevan, 2009, p. 197-201.

- functional, institutional, organizational, material and social independence of judicial constitutional review;
- consistency in constitutional implementation of the principle of separation of powers;
- adequacy and comparability of the main constitutional principles and the respective constitutional mechanisms of exercising state power;
- a match between the functions and powers of the specialized body of constitutional review, as well as a proper and justified selection of the objects of constitutional review;
- determination of the optimal scope of subjects eligible to bring cases before the constitutional court;
- systemic approach in ensuring the functional completeness of the judiciary;
- ensuring the necessary level of constitutional adjudication;
- setting an optimal balance in ensuring the independence of individual judges and the effective operation of constitutional courts in general;
- attaining the necessary level of perception and implementation of democratic values within the society.

If these criteria are applied to existing constitutions and implementation practice of the young democracy countries, then, unfortunately, one may in particular state, that:

1) there exist certain discrepancies between fundamental constitutional principles and specific mechanisms for their realization;
2) there exists a certain misbalance between constitutional functions and concrete powers of constitutional courts;
3) the constitutional of destination of constitutional courts on the level of state power is sometimes perceived through the prism of political expediency, which impedes with the full implementation of functional, institutional, material and social independence of the institutions of judicial constitutional review;
4) no optimal solutions have been found in ensuring a systemic nature of constitutional powers, determining the objects and subjects of constitutional justice;
5) in conditions of merger of political, administrative and economic power attempts are made to use the entire judiciary to cater to clan, criminal and mercantile-political interests.

The main goal of the improvement of the general system of constitutional review in conditions of social transformation is, in our opinion, exactly in ensuring the **completeness, the systemic nature, independence and viability** of constitutional justice.

An analysis of the practice of establishment of constitutional justice in conditions of social transformation demonstrates that the basic principles, which must become the criterial basis for the formation of viable and independent system of constitutional justice, are as follows: a systemic nature of constitutional review; rational nature of the system and uninterruptibility of its operation; preventive nature of review; self-restrictive nature of the functioning of the system; effectiveness of the institutional system and functional completeness of constitutional courts; organic combination of functional, institutional, organizational and procedural elements in exercising constitutional review; ensuring multi-faceted feedback with social practice and preventing new disruptions of constitutional balance while rectifying the violated equilibrium.

In order for all this to happen one needs to first and foremost ensure the functional independence of constitutional justice.[4]The more than 110 specialized bodies of constitutional review that exist in the world today, exercise the total of 37 various powers. No single constitutional court is vested with all of those powers at the same time. Neither it is possible

[4] We maintain that in the absence of clear separation and interconnection of the functional and institutional independence of the entire judicary it would be equally impossible to realistically guarantee in practice the independence and viability of constitutional justice.

to distinguish at least two constitutional courts that would possess completely identical powers. This is only natural, since they reflect specific social relations along with the concrete features thereof. At the same time all existing constitutional courts may conventionally e divided into three groups:

those that possess more than 15-16 powers in implementing normative constitutional review, interpreting the constitution and the laws, resolving competence disputes, directly protecting constitutional human rights, as well as having a broad scope of subjects eligible to apply to the constitutional court;

the second group may include constitutional courts that possess from 10 to 15 basic constitutional powers in exercising constitutional justice, and a relatively narrow scope of eligible applicants;

the third group includes constitutional courts that face serious problems of maturing, that not only have limited powers, but also a scope of applicants that makes the exercise of those powers virtually impracticable.

It is not incidental that some constitutional courts annually pass hundreds, if not thousands of rulings, whereas there are constitutional courts that pass not more than a dozen final rulings a year.

We are convinced that constitutional justice may not enjoy sufficient functional independence and viability, unless the acts, actions and inaction of all constitutional institutions become the object of judicial constitutional review, and all constitutional institutions become subjects eligible to apply to the constitutional court.[5]

A study of the mechanisms of formation of the institutes of constitutional review, with a notice given to the specifics of social transformation, demonstrates that, unfortunately, many problems of constitutional review are sometimes viewed and addressed from the perspective of political expediency, through half-measures, in detachment, something that by the end of the day fails to lead to the establishment of an effective system of guaranteeing the supremacy of constitutional values.

The entire course of the 20th century has proven that faith, tradition, ethical norms, the entire value system of social behavior, as well as other mechanisms of systemic self-defense have failed to fully ensure a dynamic balance and sustainable development of the society in conditions of the new realities. The main challenges of the contemporary period are exactly in forming a viable system of internal self-defense of the social organism. This becomes possible through guaranteed assurance of the supremacy of the constitution. It follows from this that the main function of judicial constitutional review is the same for any legal system: to ensure, alongside other bodies of state power, the supremacy and direct effect of the constitution.

Therefore functionally viable and complete constitutional courts, that stand among the recent accomplishments of human mind, are called upon, through their legal positions, to impart real substance to constitutional values, ensure constitutional dynamism and development for the society. Only the successful implementation of this fundamental functional role shall make it possible to guarantee the supremacy and direct effect of the constitution of a democratic country, which is also one of the characteristic features of the constitutional culture in the 21st century.

VII. What is the recommendation of practical experience?

In Armenia the evolution of constitutional justice breaks down into qualitatively different phases. The first phase includes the establishment and development of the system prior to the constitutional reforms in the year 2005. The second phase commences with the constitutional amendments and the enacting in 2006 of the new Law on the Constitutional Court.

From the perspective of the issue discussed here the main characteristic feature of the second phase is that the constitutional-legal bases of the independence and viability of constitutional justice in Armenia have become stronger.

[5] We intend this language to also refer to other institutions of judicial constitutional review.

The principle of the rule of law got more clearly enshrined on the level of the Constitution. Article 93 thereof stipulates that constitutional justice in the Republic of Armenia is exercised by the Constitutional Court. The amendment to Article 94 is of even higher relevance, according to which while the powers, the procedure for the formation and operation of the courts is defined by the constitution and the laws, the powers and the procedure for the formation of the constitutional court is determined by the constitution, and the procedure for its operation is determined by the constitution and the Law on the Constitutional Court. This is especially important, since in Armenia there exists no institute of organic vs. constitutional laws, and the Law on the Constitutional Court is a plain law. This means that it may practically be amended by a simple majority of the members of the Parliament present and voting.

Another important step was the significant expansion of the scope of subjects eligible to apply to the Constitutional Court. Article 101 of the constitution also provided for the introduction of individual complaint. Our practice has convincingly affirmed that citizens' applications to the Constitutional Court represents not only a mechanism of guaranteeing and protecting their constitutional rights, but much more. This institute ensures real participation of citizens in the constitutional process, and thus becomes a new and effective mechanism for the exercise of direct power of the people. Nowadays more than 90 percent of the cases on the constitutionality of normative acts is heard by the Constitutional Court on the basis of individual complaints. Within the last 2.5 years the Constitutional Court has ruled the norms of particular laws unconstitutional in 32 such cases. Practice has demonstrated that the independence and viability of the Constitutional Court are significantly strengthened when the Court has a real impact on the constitutional processes in the country. This is more difficult than we may think, even impossible without ensuring the right of citizens to constitutional justice and guaranteed direct effect of constitutional rights.

The new Law of the Constitutional Court was adopted on the basis of a positive opinion of the Venice Commission and it provides for the necessary procedural mechanisms for increasing the effectiveness and strengthening the independence of the Constitutional Court. I shall dwell only on several aspects. A systemic implementation was accomplished of examining cases ex officio, without limiting the court to applications or petitions by parties to litigation, or evidence submitted by the latter and other materials within the case. Institutions were introduced for documentary examination of cases, dissenting opinion of a judge, deferral of lapse of an unconstitutional norm, retroactive effect of the court's ruling, etc., which significantly strengthened the legal bases of constitutional jurisprudence. The legal positions of the constitutional court became an important source of law. On their basis the Parliament of Armenia introduced amendments to more than thirty legislative acts within the last two years. These rulings provide an effective mechanism for identifying and overcoming legislative lacunas. The results of the international conference, held in Yerevan in October of 2009, on the international experience of interaction of constitutional courts and the parliaments in guaranteeing the supremacy of the constitution demonstrated that the independence of constitutional courts provides an irreplaceable safeguard for the strengthening of constitutional lawfulness and establishing balanced relations between institutions of power in the country.

VIII. Principal conclusions

The theory of separation of powers that Charles Montesquieu developed as an independent teaching, and which later became the basis for the American constitutional doctrine to ensure the separation and balance of the legislative, executive and judicial powers, has no constitutional-legal alternative for the rule of law state.

All attempts to "devise" new branches of power are flawed and result from a lack of a clear understanding of the specifics of functional and institutional axes for the interaction of institutes of state power.

From the perspective of assuring the viability of power the main goal of constitutional architecture is, first and foremost, in guaranteeing equilibrium in the system function-

institution-power. Whereupon all three branches of power shall be functionally independent and may implement their functions through concrete constitutional institutions of state power.

In conditions of social transformation there exists a significant detachment of fundamental constitutional values and principles from the social reality. The latter is characterized by the low level of constitutional culture, systemic inadequacy of the mechanisms that ensure the rule of law, a formal and politicized nature of the system of separation of powers, the existence of a distorted, internally contradictive legal system, the absence of a uniform value-based systemic understanding of societal bearings in social development.

The system of separation and balance of powers is in organic unity both with other constitutional principles and provisions, and the socials practice. It is the predominant indicator of the maturity of constitutionalism in any country. This system requires that: firstly, both the internal structure of the constitution and all concrete constitutional decisions be based on clear functional separation of the powers of constitutional institutions of power, irrespective of the form of governance; secondly, that an equilibrium between freedom, power and the law be established, demanded by the society. It is also necessary to functionally and institutionally guarantee the uninterruptibility, elected nature, accountability and rotation of power, which are the bases for the establishment of constitutional democracy, at the same time ruling out the antagonism between constitutional rulings and social practice, preventing the emergence of shadow power.

Judicial constitutional control, as a relatively new and successfully developing system for strengthening the immune sufficiency of the social organism, is capable to fully assure the supremacy, direct effect and self-sufficiency of the Constitution only in conditions of functional, institutional, material and social independence.

In conditions of social transformation the main principles that must become the criterial basis for the formation of a viable and independent system of constitutional justice are: the systemic nature of constitutional control; the rational nature of the system and the uninterruptibility of its operation; the preventive nature of control; self-restriction of the functioning of the system; efficiency of the institutional system and functional completeness of constitutional courts; the organic combination of the functional, institutional, organizational and procedural axes in the administration of constitutional justice; ensuring multi-faceted feedback with social practice and preventing new disruptions of constitutional balance while rectifying the violated equilibrium.

Constitutional justice shall attain the necessary functional independence and viability when the action or inaction of all constitutional institutions will become the object of judicial constitutional control, and all constitutional institutions will become subjects entitled to appeal to the constitutional court.

Thank you for your attention.