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THE CONCEPTUAL APPROACHES OF INTERPRETATION OF CONSTITUTIONAL PROVISIONS IN PRACTICE OF THE CONSTITUTIONAL JUSTICE OF THE REPUBLIC OF ARMENIA

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Dear Participants of the International Colloquium,

First of all, I would like to express my gratitude to the Constitutional Council of Algeria and the Venice Commission of the Council of Europe for the kind invitation to participate in this important Conference as well as for organization of the event at a high level.

The topic chosen for the discussion is a very lively issue, especially for the young democracies which face serious problems from the perspective the constitutional culture; increase in the constitutional legal conscience of the society; overcoming gaps in the law of the country; strengthening efficiency and legal capacity of public authorities; making the fundamental constitutional values and principles a vivid reality.

Today several approaches on interpretation of the constitutional provisions were contemplated in different presentations. Both the institute of abstract official interpretation and different speculations over concrete interpretation were considered important. The

study of international experience witnesses that 42 of the existing 110 constitutional courts and councils around the world have the authority to give the official normative (abstract) interpretation of Constitution, laws and other normative acts. In 43 countries the official interpretation of the Constitution is linked to the solution of disputes among central bodies of state authority. As known this practice originated owing to Article 93, paragraph 1 of the 1949 Basic Law of the Federal Republic of Germany (Verfassung). This institute is very important for providing guaranty of the supremacy of the Constitution in full. We believe it will be further spread widely in other states.

I would attempt to touch upon the issue of direct, abstract, official interpretation of Constitution, as well as the issues of, so called, principles of evolutionary concrete interpretation.

I would like to emphasize that the necessity of official interpretation of constitutional norms is much more for the countries, which have had very complicated procedure of constitutional amendments, for countries where constitutions less detailed to regulate legal relations and/or there is no institute of organic or constitutional laws in the legislative practice. Under these circumstances official interpretation of constitution in judicial practice becomes the most efficient way for constitutional development in the country. The refusal of full-fledged use of its power may become the reason for constitutional crisis.

The Constitution should guarantee and secure the realization of stipulated aims and principles. The key questions are the following: how to reach these aims, how to ensure that Constitution becomes the vivid reality reflecting also main tendencies of social developments. The answers to these questions are heavily dependant upon the official interpretation of basic constitutional principles and concrete norms as well as the existence of reliable mechanisms protecting the supremacy of the Constitution.

One of the basic features of the American Constitutional culture is that huge role in the field of interpretation of the Constitution given to the judicial power. It is solely for the court to state what the Constitution means on practice, and also how it should be interpreted. Such key position on the essence of the Constitution is formed based on how the Constitution is construed in the course of dynamic development of social relations. This is the historically proved way to ensure self-sufficient nature of the Constitution.

The Constitution should include the whole system of profound and enduring values of civil society and ensure their stable and reliable protection. Amendments to the

Constitution should be arduous and very well grounded. Constitutional stability is the main guarantee of stability of the Country. On other hand, the Constitution cannot be rigid; it cannot be reluctant to social progress, turning from a catalyst into its own obstacle. International practice has offered a wide range of tools for the efficient solution of the problem. Among them is due mentioning the importance given during the last century to the institute of constitutional evolutionary concrete interpretation. The latter gives much flexibility and dynamism to the Basic Law and substantially reduces the temptation to amend it. According to the US experts in Constitutional Law the constitutional viability of the State is much conditioned by the fact that during more than 215 years the Supreme Court in rendering legal interpretations and positions, stipulated in its decisions packed in over 540 volumes, has continuously transmitted fresh breath to the Basic Law. I would like to specially quote from Professor Dick Howard "[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"¹ (emphasized by G.H.).

The American constitutional thought stated clearly that the possibility of judicial interpretation of Constitution gives dynamic stability and unabated legal capacity to the Basic Law.

The last decades of European developments also prove the exclusive role of constitutional courts in the field of Interpretation of Constitution, the legal positions of which become the core source of the constitutional law for continental legal system. In several international fora dedicated to this issue the exclusive role of the abstract and concrete-indirect interpretation of constitutions in the name of establishment and development of the Rule of Law State, was specially emphasized intending to make clear the role of constitutional courts in the stability and development of the constitution. I strongly believe that amongst constitutional courts acting universally only those institutions execute the most efficient constitutional supervision, which are vested with greater authority to guarantee constitutional stability through the official interpretation of the Constitution.

¹ A.E. Dick Howard, *Toward Constitutional Democracy around the World: An American Perspective in Issues of Democracy*. An Electronic Journal of the U.S. Department of State Volume 9 Number 1, March 2004. Available at <http://usinfo.state.gov/journals/itdhr/0304/ijde/howard.htm> 23.10.2008

The issue of the official interpretation of constitutions is of such great importance for a number of newly independent states that every single parliamentarian is entitled to appeal to the constitutional court on that matter. The Moldovan experience is typical. For instance, the very analysis of the Decision of the Constitutional Court of April 2, 2004, witnesses how the issue of Interpretation of Article 116, paragraph 3 of the Constitution was considered and how the issue which could become subject for different speculations was solved on the basis of the appeal filed by one parliamentarian. Here I would like to emphasize rather the possibility of legal solution of such issues than to emphasize concrete issue as such. In these circumstances the authority and supervisory role of the Parliament, the exclusion of accumulation of negative social energy, the legal capacity of the constitutional justice and so on is very essential.

The introduction of the system of official interpretation of the constitutional provisions in the practice of constitutional justice requires appropriate selection of subjects entitled to apply to the Court and clarification of procedural peculiarities, as well as provision of reliable legislative guarantees of enforcement of Decisions held on that issue.

The Constitutional Court of the Republic of Armenia has no authority to give abstract interpretation of the Constitution. Unfortunately we also still don't have an institute for solution of disputes on matters of constitutional powers. The issue of interpretation of constitutional provisions rises in concrete cases, when it is necessary to evaluate the constitutionality of a legal provision through its constitutional legal content and through its comparison with relevant constitutional provision. The guarantee of realization of fundamental principles of the Constitution has priority significance in legislative policy. Article 68, paragraph 7 of the Law of the Republic of Armenia on the Constitutional Court contains direct requirement according to which in the course of the abstract control of the constitutionality over legal norms 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 date when the act was adopted, as well as whether it has got into force in compliance with established procedures;
- 3) 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) necessity of ensuring direct application of the Constitution.

The Constitutional Court not only takes these requirements into account to decide whether the provision in question is in accordance with the Constitution or not, but also very often holds that the legal provision is consistent with the Constitution only in the framework of the legal positions stipulated in the Decision. And these legal positions, doctrinal approaches of the Court are nothing else but systematic interpretation of constitutional provisions.

One of the typical examples of the mentioned is the recent case concerning the constitutionality of Article 301 of the Penal Code of the Republic of Armenia, titled *"Public calls for changing the constitutional order of the Republic of Armenia by force"*. It is set forth that: *"Public calls for seizing state power by force, changing the constitutional order of the Republic of Armenia by force are punished with a fine in the amount of three hundred to five hundred minimal salaries or with arrest for the term of 2-3 months, or with imprisonment for the term of up to three years"*. This issue was considered also by Venice Commission of the Council of Europe as to the consistency of the said provision with the European standards.

As a result of consideration of the case the Court has found it necessary to express precise legal positions on such constitutional definitions as *'constitutional order'*, *'sovereignty of the people'*, *'state power'*, *'public calls'*, *'seizing state power by force'* and so on concerning which the Applicant and Respondent had polar positions. It was impossible to discover the constitutional legal meaning of the legislative provision without these interpretations. As a result the Constitutional Court held that the mentioned article is consistent with the constitution only in the framework of the legal positions set forth in the Decision.

The interpretation of the legal meaning of a constitutional provision as well as the clarification of constitutional legal meaning of the legislative norm often allows us to conclude that the law enforcement practice interprets them in such a way as to contradict with the provision of the Constitution. In these situations, our decisions are formulated as follows: recognize the legislative norm together with its interpretation by the law enforcement practice as inconsistent with the Constitution, null and void.

I would also like to mention another peculiarity. The countries in transition usually attached high importance to the circumstance that the legal position of the Constitutional Court helps legislative and other law-making bodies to be governed by the fundamental constitutional principles and solutions in their legal regulatory activities. This concerns not only fundamental principles stipulated in the Foundations of Constitutional Order, but also constitutional standards of human rights limitations as well as ensuring of these rights as a directly applicable right.

One of the typical examples is the case on the issue of protection of the right of property considered by the Armenian Constitutional Court concerning the alienation of private property for the needs of society and the state. The Constitutional Court thoroughly analyzing and interpreting several Articles of the Constitution as well as comparing them with legal regulation concluded that several provisions of the Civil and Land Codes of the Republic of Armenia as well as some particular Decisions of the Government are inconsistent with the Constitution of the Republic of Armenia. The main argument was the following: such a limitation of rights took place which obstructed and distorted the essence of the right. Passing such judgments the guarantees of the supremacy of law are used by the Constitutional Court as a bench mark. The Constitutional Court also held that the legislative and executive authorities have not created necessary legal preconditions in the legal system of the Republic of Armenia in order to implement the requirements of Article 31, paragraph 3 of the Constitution of the Republic of Armenia. This should be done in order to form the legal content and significance, which is in the basis of the constitutional norm.

The peculiarity of the Decision is also that Constitutional Court has found it necessary to clarify fundamental approaches of legislative regulation of the given issue through its legal positions in accordance with the Constitution. On my opinion, this approach is quite fruitful for the successful process of constitutionalization of public relationships.

The issues of the date and the order of coming into the force are also of enormous necessity to pass such judgments. Whether they have only prospective effect or can also apply retroactively. Whether it is possible to postpone the entry into force of the Decision or is not. Taking into consideration the lack of time I would suggest those who is interested in this issue to acquaint with the provisions of Article 68, paragraphs 10-13 and 15-17 of the Law of the Republic of Armenia on the Constitutional Court where these issues are clearly regulated.

Concluding the speech I would like to emphasize that after all the Constitution is the public agreement on the fundamental rules of its existence. The legitimacy of the Constitution is of great importance for establishment of constitutional democracy and for social progress in the country. Interpretation of the constitutional provisions by the Courts requires utmost care, delicacy, high level of constitutional culture in order not to endanger the legitimacy of the Constitution. In this case the principle of self-restraint becomes more important for constitutional courts allowing also to refrain from involvement in political issues. However, neither should it run to extremes. The formalistic approach shouldn't apply to evaluate the constitutionality of legal provisions. Hence, it is necessary to find the most efficient and effective system of interpretation of constitutional provisions for the constitutional practice of the Country by precise constitutional and legislative regulation.

Thank you for attention