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CONSTITUTIONAL MONITORING AS A GUARANTEE FOR OVERCOMING THE DEFICIT OF CONSTITUTIONALISM

/Conceptual approaches/

Honorable participants of the International Conference,
Distinguished guests,

As you know, my report regarding the concept of constitutional monitoring was presented at the 106th Plenary Session of the Venice Commission of the Council of Europe in March, 2016. In June 2016, within the framework of the 107th Plenary Session the Scientific Council of the Venice Commission examined the given issue from the viewpoint of our conceptual approaches to convene this conference on the mentioned issue. The Scientific Council stressed the importance of the participation of the experts of the Commission in the discussions and presented a statement regarding this at the Plenary Session of the Commission.

It is obvious that the raised issue is more than urgent and it has received overall European appreciation.

Within the framework of my report, I will try to briefly present the essence of the issue and make a number of conclusions of conceptual significance. I would also like to inform you that you can get acquainted with the details of the issue via the trilingual monograph handed out to you, entitled "Constitutional monitoring".

Which are the initial theses on which our conceptual approaches are based?

1. Many disasters, which the manhood faced in the new millennium, such as terrorism, forced migration of thousands of people, uncontrollable migration, corruption, extreme social stratification, social economic instability, concretion of civil, economic and administrative potential, diverse abuses of human rights, mutilated realization of the principle of the rule of law etc are mainly attributed with the deficit of constitutionalism, are

acting as a gap between the axiology of the Constitution, fundamental principles and norms and reality.

2. In the new millennium it becomes more and more evident that the immune system of the human society is not sufficiently viable, and timely revelation, assessment and restoration of constitutional balance is not guaranteed.

3. Functional and institutional resolutions, which guarantee sustainable and dynamic development of the social society, are disharmonic with the new challenges not only in the real life but also at the constitutional level. This is confirmed not only by the results of assessment of the rule of law index in more than hundred countries, but also by the rise and fall of formation of the European Union state.

4. The scientific approaches regarding the solution of the issue are contradicting, and the elaboration of the unified doctrine is too far from being satisfactory. The report on the Rule of Law Checklist adopted at 106th Plenary Session of the Venice Commission may be considered as crucial, which needs to undergo a long way for implementing it into life.

5. The notions "constitutionalism," "constitutional culture," "constitutional diagnosis," "constitutional monitoring" and other notions of pivotal essence, their interrelations and interdependence are rather different and, as a result, the functional and commonly acknowledged solutions for revelation, assessment and overcoming each violation of the constitutional balance in the country have not been found yet.

6. Systemic solution of the legal issues often creates grounds for the intimidations dictated by the political advisability which brings to further complication of the disease that affects the public organism when the operative intervention is needed.

7. The transition from authoritarianism to democracy isn't conditioned just by new constitutional or legal solutions. First and foremost these solutions per se should have new systemic quality and entirety. But the main issue is what changes they entail in real life. The transformation will continue so long as the index of rule of law has obtained a level higher than the critical one. The main criterion for the evaluation of the efficiency of transformations can be characterized exceptionally by an adequate increase of the index of rule of law.

8. From the perspective of guaranteeing self-sufficiency of the Constitution and constitutionalism, no equivalent solutions on realization of the potential of direct democracy and guaranteeing the constitutional role of civil society, establishment of the functional institutions of constitutional liability, ensuring of the dynamic balance of the branches of power, making the rule of law the cornerstone of public behavior and for a number of other issues have not been found yet in the states of new democracy.

We consider the following approaches pivotal for the basic notions for answering the question “What to do?”

A/ Despite the numerous features of the notion “**Constitution**” we do consider pivotal that the Constitution is the public consent on fundamental principles, values and rules of existence. Firstly it is the fundamental law of the civil society and must possess equivalent and functional mechanisms for protection and implementation into life. The Constitution, as the fundamental law of coexistence, serves as a warrantee and remedy for ensuring the sustainable and dynamic development. And this is possible only in the case when, by the power of the Constitution, the rule of law becomes the grounds for social behavior of the person, political behavior of political institutions of the state and the public behavior of authorities.

B/ In the rule of law state the notion “**constitutional culture**” is formulated as historically formed, sustainable, enriched by the experience, believes, imagination, legal perception and legal sense of the generations and entire manhood, which serves as the pivot of the public perception for the social society to define and guarantee the fundamental rules of its democratic and lawful behavior.

The new agenda of the sustainable development initiated by the international society will never come to life if in the international and national relations the necessary and sufficient level of the constitutional culture is ensured based on the principles of constitutionalization of the social life, justice and rule of human rights. On September 2015, the United Nations General Assembly unanimously adopted 17 Sustainable Development Goals and 169 targets (the 2030 Agenda), the implementation of which tends to create such a world where, in particular, democracy, rule of law and good governance shall become the most important prerequisites for such development.

The obligation of State shall be to “Promote the rule of law at the national and international levels and ensure equal access to justice for all.” And this demands relevant level of constitutional culture.

C/ The notion “**Constitutionality**” is defined as an ability to **lead the constitutional life in real life**. By the public consent “Constitutionality” is defined as the presence of the fundamental rules of democratic and lawful behaviour, its existence as a living reality in the social life, in the civil behaviour of each individual in the process of implementation of state power established by the public consent. More precisely, “**constitutionalism**” is a **systemic and knowledgeable value in the public life**. It is a **general legal principle** of characteristics of social behaviour of the society. That is why the task is not the simple implementation of the

Constitution but formation of such a social system, where the Constitution is implemented by each cell of that system as a term of its existence.

In our opinion, existence of constitutionalism first of all is of axiological nature and is linked to realities of the constitutional culture. Constitutionalism is not a mere the evidence of the written constitution but also characteristics of manifestation of constitutional culture, constitutional order and meaningful existence of its essential elements in the real life.

Constitutionalism, as well as the law, is an objective social reality, evidence of the level of civilised coexistence of the social society, which is the guarantee of sustainable and dynamic development of the society¹. Constitutionalism is the characteristic of the essence of mutually agreed existence of the social society, the evidence of its meaningful existence in time, indicator of the level of maturity of social relations and their legal regulation. Constitutionalism is the ultimate goal of the civilised coexistence which the society must constantly be anxious to achieve.

D/ The notion **“constitutional diagnosis”** constitutes the tools and entire procedure of assessment of constitutionalism in the society, **revealing of concordance of the public relations with the constitutionally envisaged values, principles and norms.** Constitutional diagnosis is necessary first of all for **revealing the real condition, tendencies of development and various distortions of constitutionalism in reality.**

The objects of the constitutional diagnosis are: the public life, constitutionally prescribed condition of functional balance, and, in particular, activity of the bodies of state power.²

The subjects of the constitutional diagnosis are: people as the carrier and source of power, organs of the state administration and local executive power, all institutions of civil society, each individual.

Especially during the period of public changes or in the terms of unsustainable constitutional balance, **the main tasks of constitutional diagnosis are, in particular:**

- revealing the violated constitutional balance;
- assessment of the character and the form of revealing the violation on the basis of multi-factual assessment of situation;

¹ See G. Harutyunyan, Constitutionalism as a fundamental principle of right in the rule of law state // Constitutional justice, 2012, N 1. – P. 5-16. N. Bondar, The concept of judicial constitutionalism: methodology of research in light of the practice of constitutional justice. See also page 29.

² Our approaches on the object of constitutional diagnosis have found wide reflection in the professional literature. In particular, professor N.S. Bondar writes, “as Professor G.G. Harutyunyan mentions in one of his speeches, the constitutional diagnosis of the socio-economic and political processes shall start just from the system of constitutionality” /see. Бондар Н.С. Конституционная модернизация российской государственности: в свете практики конституционного правосудия. М., 2014- С.14/.

- revealing of the causes of these violations and raising the means for the restoration of the violated constitutional balance;

Constitutional diagnosis must be based on the following main principles:

- revealing of any violation of the constitutional balance in the regime of non-stop actions;
- assessment of the character of the violations;
- raising the remedies and ways of restoration of the constitutionalism;
- guaranteeing non-admission of the new violations during the restoration of the functional balance.

For conducting successive constitutional diagnosis, it is necessary to choose **such a system of indicators** which would diversely and fully characterize the constitutionality of the examined public relations.

E/ “Constitutional monitoring” is a remedy and possibility to guarantee overcoming the deficit of constitutionalism, ensuring stability and dynamic development on the basis of constitutional diagnosis of the constitutional balance in dynamics. Constitutional monitoring proposes:

- non-stop constitutional diagnosis for revealing the possible distortions of the constitutionalism,
- as a result of contrastive analysis and assessment of the outcome, presence of the functional and instrumental systems of restoring the violated constitutional balance,
- ensuring the feedback between the constitutional decisions and development of constitutional practice,
- presence of efficient systems of constitutional liability.

For conducting constitutional monitoring, it is important to clarify the approaches especially on three issues:

First, what methods and set of tools are required for conducting systemic constitutional diagnosis?

Second, what role and significance may the Rule of Law Checklist (adopted by the Venice Commission) have while conducting constitutional monitoring?

Third, what may the legal system of constitutional monitoring be in the aspect of functional and instrumental solutions?

We consider it a good idea to directly and independently refer the first question; hence, the second and third questions would be accented in this publication.

In our opinion, the answer to the second question shall be looked for both at the methodological and methodical levels.

In the methodological aspect, based on the perception of rule of law **as a common and fundamental principle of democracy**, on its characteristics and revealing of its essence in the international legal documents, comprehensive assessment of the peculiarities of realization, comparative analysis of its specification by a number of authors, for the first time the Rule of Law Checklist in the systemic integrity represents the multi-layer manifestations of the principle of the rule of law in the rule of law state. Initial conclusions are made, according to which, in particular,

- the principle of the rule of law must be applied at all levels of public power /Point 17/,
- despite diverse interpretations, united perceptions of elements of the rule of law are present. There are six of them:
 - legality,
 - legal certainty,
 - prohibition of arbitrariness,
 - access to justice before independent and impartial courts,
 - respect for human rights,
 - non-discrimination and equality before the law /Point 18/,
- 2012 Declaration of the United Nations signifies that the “Rule of law applies to all States equally and to the international organizations” /Point 22/,
- the checklist is mainly directed at assessing legal safeguards /Point 25/,
- full achievement of the rule of law remains an on-going task, even in the well-established democracies /Point 29/,
- the rule of law would just be an empty shell without guaranteeing, ensuring and protecting human rights /Point 31/,
- the rule of law is linked to the entire legal system and all manifestations of restriction of power and protection of human rights by law /Points 33-37/,
- the rule of law can only flourish in a country whose inhabitants feel collectively responsible for the implementation of the concept, making it an integral part of their own legal, political and social culture /Point 43/.

All the mentioned conclusions are of pivotal importance from the perspective of implementation of the raised conceptual approaches.

In the methodological aspect, the provision stated by the Venice Commission is pivotal, according to which the Rule of Law Checklist is an innovative and efficient remedy for

guaranteeing the rule of law in this or that country for assessing **in accordance with the united method**, taking into account the certain peculiarities of legal system of the certain country (Points 20, 25 and 34). Simultaneously, for realization of practical steps for assessment of the rule of law, the approaches stipulated in Points 43-120 of the Checklist, which have methodological significance, are of guideline significance.

In our opinion, the conclusion is unambiguous: the Rule of Law Checklist adopted by the Venice Commission opens qualitatively a new page for a full, systemized and precise vision of realization of the principle of the rule of law in practice, multi-factual analysis as well as for effective and optimal management of the process of legal developments. It provides systemized and fully-fledged tools both for qualitative and quantity assessment of the state of rule of law.

Moreover, we are deeply convinced that such multi-layer disclosure of the status of the rule of law would also create full vision of the real status of constitutionality and the level of constitutional culture in the country. Therefore, for exercising constitutional monitoring, the Rule of Law Checklist becomes exceptionally pivotal both in the aspect of methodological approaches and methodic guidelines.

Constitutional monitoring should not be fragmentary and discrete, but **it should be conducted in accordance with the principles of continuity and clear periodicity**, as well as by the means of assessment of the condition of the rule of law revealing each violation of the constitutional balance, each distortion from the constitutional axiology and constitutional principles, each distortion of the constitutionalism.

What must the legal system of constitutional monitoring be in the aspect of functional and instrumental solutions?

The Rule of Law Checklist approved by the Venice Commission states that such informative sources may serve as grounds for the assessment of the rule of law for the European countries. If a stand-alone and one time study in annual context is made, then a single approach is needed, and if the monitoring is permanent and continuous, then the approach should be completely different.

The essence of the constitutional monitoring is that **continuous and systemized revelation** of the real condition of constitutionalism shall be applied in social life. **A certain function typical for the immune system of each organism should be performed.** The entire social organism should be involved in the process of dynamic maintenance of functional constitutional balance, revealing and assessing each violation of that balance and its restoration by equivalent lawful interference. The Rule of Law Checklist is an exclusive

means and opportunity **for performing** necessary **constitutional monitoring**, which follows from such function, and this is the necessary and initial phase of constitutional monitoring.

How should the constitutional monitoring be organized and performed?

We consider that in functional aspect all constitutional institutions of the state and the civil society should play essential role in the constitutional monitoring.

Today this task is partially resolved by the constitutional control. However, our researches allow concluding that in the constitutional control system the component of judicial constitutional control is mainly efficient. All other elements are not manifested by the logics of systemic integrity, and in their functional role and systemic integrity they do not comply with the requirements of the new challenges of overcoming distortions of constitutionalism and accumulation of negative social energy. Therefore, better approaches and solutions are needed.

The doctrine we propose is first of all focused on the resolution of two issues:

First, guaranteeing and ensuring self-sufficiency and dynamic emotional development of the Constitution,

Second, creating necessary functional and institutional guarantees for the timely revealing, assessing and overcoming the distortions of constitutionalism.

Each of them may become certain topics for serious discussion. In the first issue, we touched upon the concept of the latest reforms of the Constitution of the Republic of Armenia and we do think that the presented approaches may cause great interest for every country.

In the framework of this publication, I would like to make a brief reflection to the second issue.

Our pivotal approach is that in the structural system of constitutional monitoring all constitutional subjects shall play relevant role, i.e. the human being, institutions of civil society, all bodies of public power. They shall act in the systemic integrity, with complementary functions excluding the circumstance of non-reacting on any violation of the constitutional balance. In the aspect of the latter the role of each member of the society and institution of the civil society is exclusive, implementation of which should have necessary constitutional guarantees. For this uninterrupted activity of the nervous system of the social system is ensured and guaranteed.

The head of the state has a special significance in the system of public power. In the international constitutional practice, as a rule, the president acts as political guarantee for ensuring the rule of Constitution. Thus, it is necessary to provide efficient constitutional-legal contents for the constitutional provisions, such as: "The President of the Republic shall ensure due respect for the Constitution" (see the Constitution of France, (Article 5), Poland

(Point 2 of Article 126), Armenia (Article 123), "President shall be the guarantor of Constitution" (see Constitution of the Russian Federation (Part 2 of Article 80); "The President guarantees ... the proper functioning of the democratic institutions..." (Portugal, Article 123), "President shall ensure the regular operation of Constitutional bodies" (Slovakia, Part 1 of Article 101) etc.

Preservation of the Constitution is merely formal in all the cases when no consistent constitutional monitoring is conducted by the institute of President.

It should be emphasized that the establishment of the system of constitutional monitoring demands to assess anew the role of the rule-making and law-enforcement bodies, role and place of the judicial constitutional review, contemporary challenges of constitutionalization of the public relations, imperative of establishment of efficient system of constitutional liability.

These questions must become a subject of certain and independent thorough examination.