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Judicial Activism of the Constitutional Court of the Republic of Armenia in the Context of Constitutional Reforms

Honourable President of the Constitutional Court of Latvia,
Dear Colleagues,
Ladies and Gentlemen,

Please allow me, on behalf of the Constitutional Court of the Republic of Armenia, to congratulate you on the 20th anniversary of the Constitutional Court of Latvia. I wish the whole team of the Latvian Constitutional Court good health and further success in effectively carrying out the mission of constitutional justice. I am also grateful for the invitation to participate in the Conference, and for the high-class welcome I have received.

The theme chosen for discussion is of current interest. In my report, I would like to present some aspects of Armenia's realities as concerns the judicial activism of the Constitutional Court and the relevant constitutional developments.

I will start with some general observations.

Judicial activism of a constitutional court is an important and necessary element, aimed at ensuring that the main functions of constitutional justice are effectively implemented.

It goes without saying that the activism of a constitutional court must have certain limits, to avoid conflict of interests in the court's relations with both the judiciary bodies and other public authorities, as well as to secure a targeted and objective self-expression.

In our opinion, the limits of a constitutional court's activism are, in particular, determined by:

- the nature of the constitutional court's powers and the range of objects of constitutional review;
- the range of entities with the right to address the constitutional court;
- the specific features of the constitutional proceedings;
- the legal consequences of the constitutional court's judgements.

Judicial activism of a constitutional court is, to be sure, directly determined also by the judicial independence of the constitutional court.¹

At the same time, we think that a primary role in the aspect of the judicial activism of a constitutional court is played by the high-level professional experience of judges of constitutional courts, as well as by their determination, their commitment to principles, and their integrity in effectively carrying out the mission of constitutional justice.

In the Republic of Armenia, the powers of the Constitutional Court are specified in the the Constitution (Article 100). As to the range of objects of constitutional review, we will specifically point out that in accordance with the Constitution it does not include acts of all the constitutional bodies, and the settlement of disputes between constitutional bodies relating to their constitutional powers. In this context, we would also like to note that the institution of individual constitutional complaint in the Republic of Armenia exists in a restricted form.

The Constitution also establishes an exhaustive list of entities that have the right to address the Constitutional Court (Article 101). In accordance with the constitutional regulations, the Constitutional Court does not have the right to examine cases on its own motion. It examines cases only when a relevant application has been filed by an entity that has the right to address the Constitutional Court, and adopts a judgement only on the matter specified in the application.

As concerns the constitutional proceedings and the specific features thereof, the Constitutional Court, in accordance with the procedure prescribed by the Law on the Constitutional Court, is in particular authorised:

¹ Problems related to the above are being thoroughly discussed on an international scale from an academic and research perspective, including, *inter alia*, during the Yerevan conferences organised by the Constitutional Court of the Republic of Armenia, the Venice Commission of the Council of Europe, and the Conference of Constitutional Control Organs of the Countries of New Democracy, the materials of which are published in the International Almanac (see www.concourt.am).

- to clarify all the circumstances *ex officio*, without limiting itself to the motions, suggestions and evidence brought forward by the parties to the proceedings, and other materials of the case;
- to demand materials from state and municipal bodies, from officials of those bodies, as well as from individuals and legal entities;
- in determining the constitutionality of a legal act, to evaluate also the existing law enforcement practice;
- in determining the constitutionality of a normative act, to also determine the constitutionality of its other provisions which are systemically interrelated with the contested provision. Having found out that these other provisions of the act are not in conformity with the Constitution, to recognise those provisions as being incompatible with the Constitution and invalid;
- to extend the effect of a ruling by which the contested act is recognized as being in whole or in part incompatible with the Constitution and invalid to the relations that had started before that ruling came into force, if the opposite decision could cause grave consequences for the state or the public;
- if the Court finds that holding the contested legal act or any provision thereof unconstitutional and invalid from the moment of the announcement of the Court's judgement would inevitably cause grave consequences for the public and for the state, which would harm the legal certainty expected from the annulment of that legal act, the Constitutional Court has the right, while recognising the act as being incompatible with the Constitution, to stipulate in its judgement that the invalidation of the act is postponed for a certain period, during which it is possible and necessary to take measures for the prevention of the above-mentioned consequences.

It should be noted that the Constitutional Court is actively exercising its powers, which is reflected in extensive statistics. Moreover, the Constitutional Court has firmly established the practice of obtaining, particularly in cases regarding the constitutionality of legal acts, opinions of the judiciary and the Chamber of Advocates.

As it has been mentioned above, the limits of the judicial activism of the Constitutional Court are also determined by the legal consequences of the Constitutional Court's judgements. We fully share the doctrinal approach, according to which the enforcement of the Constitutional Court's judgement must have threefold legal consequences. First, it must serve as a guarantee of the protection of objective rights for everyone; second, it must protect the subjective right of a particular person; third, it must become a source of law for the legislator and the executive, playing a directing role in the development of law. Without the due perception and implementation of the Constitutional

Court's case-law, it is impossible to establish constitutionalism in a country and to speak of guaranteeing the supremacy of the Constitution.²

Over the 20 years of its activity, the Constitutional Court of the Republic of Armenia has adopted 1272 decisions,³ 224 of which concern the issues of the constitutionality of legal acts. The Constitutional Court has reviewed the constitutionality of 85 legal acts (14 contested acts in their entirety and 528 contested provisions of legal acts), as a result of which:

- 137 provisions of contested acts were found to be compatible with the Constitution;
- 10 contested acts in full and 162 contested provisions of contested legal acts were found to be compatible with the Constitution in the specific constitutional legal meaning provided for in the judgement of the Constitutional Court;
- 2 contested acts in full and 168 contested provisions of contested legal acts were found to be incompatible with the Constitution and invalid.

The Constitutional Court has adjudicated upon 43 disputes related to elections. Decisions of the respective election committees or the results of elections were found to be invalid in eight electoral precincts, and the results of voting were recognised as invalid in 40 voting stations.

As a result of reviewing constitutionality of about 1000 obligations assumed by the Republic of Armenia under international agreements, various provisions of five international agreements were found to be incompatible with the Constitution.

Guided by the Constitution, by the European Convention on the Protection of Human Rights and Fundamental Freedoms, and by the basic provisions enshrined in other international legal documents, referring to the international experience in the development of democracy and to the case-law of the European Court of Human Rights, having emphasised the formation and development of the necessary regulatory and legal prerequisites, having also evaluated the law-enforcement practice, the Constitutional Court in its judgements has put forward doctrinal approaches, has expressed and consistently developed the key legal positions. Based on the legal positions of the Constitutional Court of the Republic of Armenia, numerous amendments of a systemic and institutional nature have been made to legal acts.⁴ We will also note that the previously mentioned legal

² For more details, see *Harutyunyan G. G. Guarantees of Execution of the Decisions of the Constitutional Court* (2012 report) (www.concourt.am).

³ Statistical data as of 25 May 2016.

⁴ At the same time, it is necessary to note that our country still faces many problems with the full-scale implementation of the legal consequences entailed by the judgements of the Constitutional Court, those problems being determined by the legal and constitutional culture and related, in

positions of the Constitutional Court have served as a basis for the constitutional changes in the Republic of Armenia.

We consider it necessary within the present theme to point out that the Constitutional Court within one month following the end of every year actively follows its legal obligation to publish a report on the implementation status of its rulings. The analysis of those annual reports shows that they never, even initially, were just an informative, statistical summary. By means of those reports, the Constitutional Court also carries out analysis, in which it brings into focus the problems of securing constitutional legitimacy that have been encountered in the respective year, as well as puts forward proposals for the solution of those problems, such proposals primarily being addressed to the competent authorities and officials.

Summing up the above, one can conclude that in the framework of the existing constitutional legal possibilities the judicial activism of the Constitutional Court of the Republic of Armenia is a reality. It should simultaneously be pointed out that the high level of the judicial activism of a constitutional court is, as we view it, conditioned by the presence of some necessary prerequisites, such as, in particular:

- a clear and full-scale establishment on the constitutional legislative level of the main functions of the Constitutional Court and of the powers necessary for the implementation of those functions;
- a coherent and substantiated selection of the objects of constitutional review;
- an optimal range of the subjects of constitutional justice;
- a full-scale establishment on the constitutional legislative level of the necessary functional, institutional, material, and social guarantees of the independence of the Constitutional Court.

In terms of securing the above-mentioned prerequisites, our country still has problems, the solution of which was among the targets of the constitutional reforms that resulted in the adoption of amendments⁵ to the Constitution in a referendum on 6 December 2015.

particular, to the implementation of the legal positions of the Constitutional Court as a source of case-law, and to the implementation of the Constitutional Court's judgements on the grounds of new circumstances. The Constitutional Court has repeatedly brought these problems to notice in its judgements and in the annual reports on the implementation thereof.

⁵ It must be mentioned that the legal regulations concerning the Constitutional Court contained in the constitutional amendments of 2015 will come into effect on the day of accession to the office of a new President of the Republic of Armenia. Until that moment, the provisions complying with the 2005 amendments to the Constitution remain in force.

Thus, the main function of the Constitutional Court – to secure the supremacy of the Constitution – has been clearly established on a constitutional level. Before the adoption of the above-mentioned constitutional regulation, this function was enshrined only in the Law on the Constitutional Court.

The procedure of the formation of the Constitutional Court has changed. As a result of the constitutional changes, the Constitutional Court is no longer formed by the President of the Republic and by the National Assembly, and, instead, it is stipulated that the judges of the Constitutional Court shall be appointed by the National Assembly by no less than three fifths of the votes of all members, three of those judges being proposed by the President of the Republic, three – by the Government, and three – by a general meeting of judges. This amendment was introduced to ensure that in a state with a parliamentary system of government a decision by the only representative body vested with a primary mandate would impart high legitimacy to the election of the judges of the Constitutional Court. It is of high importance that the Constitutional Court is composed of experienced and reputable lawyers; therefore, the minimum age and professional experience requirements have been raised. There is no doubt that a balanced composition of the Constitutional Court, a higher level of the professional experience of its judges, as well as pluralism, create effective guarantees for active and efficient functioning of the Court.

The constitutional amendments limit the term of office of a Constitutional Court judge to 12 years, without the right to re-election. This amendment is presented as being a step aimed at strengthening the independence of the judges of the Constitutional Court, which also gives way to a generational change and a change of ideology. This also creates career prospects for the judges of general jurisdiction courts, thus contributing to the development of a healthy competition among judges.

Pursuant to the new constitutional provisions, the President and the Deputy President of the Constitutional Court shall be elected by the judges of the Constitutional Court for the period of six years without the right to re-election. This makes it possible for different judges to hold these offices and prevents the possibility of their superiority over other judges. Limiting the term of office creates the possibility of an additional stimulus for the judges, thus contributing to the activeness and efficiency of their work.

There is another fundamental change. As an important step in securing judicial independence, the procedure for termination of powers of a judge of the Constitutional Court has been revised, and, as a result, according to the Constitution the decision-making on this matter is left to the Constitutional Court. Before this constitutional regulation, this matter was within

the competence of the body that had appointed the respective member of the Constitutional Court.

Some key constitutional changes have taken place also with regard to the powers of the Constitutional Court, resulting in the expansion of the range of objects of constitutional review. In particular, the Constitutional Court has for the first time been given the authority to settle disputes between the constitutional bodies in relation to their constitutional powers. This allows settling, by legal means, the constitutional disputes that emerge between the National Assembly, the Government, the President of the Republic, the municipal bodies, and the Supreme Judicial Council (the latter is a new independent state body that guarantees the independence of courts and judges).

The Constitutional Court has been given the authority to determine, in accordance with the established procedure, whether draft constitutional amendments and draft legal acts to be adopted in a referendum comply with the Constitution – before the adoption of the respective amendments or acts. One more effective guarantee of preliminary constitutional review has been established: the Constitutional Court has been given a possibility to determine, in accordance with the established procedure, constitutionality of a law adopted by the National Assembly before the respective law is signed by the President of the Republic.

As concerns individual complaints, the constitutional amendments have eliminated the unnatural situation of the Constitutional Court being limited solely to the review of constitutionality of laws. In accordance with the new constitutional regulation, the Constitutional Court has been authorised, in accordance with the established procedure, to review the constitutionality of any normative act that infringes upon the fundamental human rights and freedoms. Moreover, the provision according to which the Constitutional Court, when determining constitutionality of such regulatory acts, shall also take into account the interpretations given to the respective provision in law-enforcement practice, has been raised up to the constitutional level. Needless to say that these changes have significantly expanded the framework of the institute of individual constitutional complaint.

We believe that the above-mentioned constitutional amendments create powerful prerequisites for the effective exercise of judicial activism of the Constitutional Court. Those amendments have been a top-priority and necessary step. However, a comprehensive legislative implementation of the new constitutional regulations and a full-scale implementation of the new constitutional legal solutions is not insignificant, either. Everything is still ahead. As a conclusion from all of the above, it is safe to say that the judicial activism of the Constitutional Court really serves its purposes, which are to effectively

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secure the supremacy of the Constitution, to ensure the constitutional balance in the separation of powers, and to guarantee the protection of human rights and freedoms enshrined in the Constitution.

Best of luck in the Conference, and thank you for attention!