AMERICAN UNIVERSITY OF ARMENIA

A STUDY OF CONSTITUTIONAL OVERSIGHT MECHANISMS OF THE REPUBLIC OF ARMENIA

A MASTER'S ESSAY SUBMITTED TO

THE FACULTY OF THE GRADUATE SCHOOL OF

POLITICAL SCIENCE AND INTERNATIONAL AFFAIRS FOR

PARTIAL FULFILLMENT OF THE DEGREE OF

MASTER OF ART

BY

VARDAN MAKARYAN

FACULTY ADVISOR: NICOL SHAHGALDIAN

YEREVAN, ARMENIA

NOVEMBER 2000

SIGNATURE PAGE

Nicol Shahgaldian
Faculty Advisor *Date*

Douglas Shumavon
Dean *Date*

American University of Armenia

November 2000

TABLE OF CONTENT

ACKNOWLEDGMENTS

I am deeply grateful to all contributors of this study for their commitment and enthusiasm that they brought in bearing this work.

First of all, I express my gratitude to the Faculty of Political Science and International Affairs of the American University of Armenia for enabling me to reach the stage of conducting this research in the complicated world of politics. I am particularly thankful to Dr. Nicol Shahgaldian, Professor of the PS Department, who was the first to open up for me the world of Comparative Political Systems being of great importance for conducting this study. I am enormously grateful to Dr. Shahgaldian, who was frequently called upon to sacrifice his valuable time and more than one well – turned phrase inspiring for the conducting the research with incredible interest, and the one who has brought this work through to the finishing post. I am thankful for his being tolerance, for encouragement and support with the research itself. I would like to assure that his contribution would not go in vain: it inevitably will serve for the future research in this field, which actually is essential for Armenia.

The greatest debt of gratitude is owned to the contributor to this study, Associate Dean of the PS Department, Professor of the Political Science, Dr. Lucig Danielian. I could get a valuable knowledge, while Dr. Danielian was exploring the course on National Assembly of the Republic of Armenia. The discussions we were engaged in were helpful in finding many pitfalls that are exist in the current Constitution of the Republic of Armenia.

Finally I would like also to acknowledge with thanks the support of the Constitutional Court of Armenia, involved in the investigation process of this study for providing necessary clarifications on complicated issues and assistance for revealing some essential data. I also express special thanks to those who provided significant insight in the process of studying at AUA, which is utilized in the process of conducting this research in the interest of greatest consistency and for the work as a whole.

Vardan Makaryan
American University of Armenia 2000
Political Science and International Affairs

ABSTRACT

The comprehensive study of international experience is of utmost importance for the effective functioning of the democratic processes in the newly independent states in order, in the first place, to avoid possible mistakes and take into account approaches that have already become a common value, and in the second place, to reveal one's own peculiarities and bring them into conformity with common solutions.

Constitutional oversight, as an important public and government function ensuring the dynamic development and inner stability of the society, is closely linked to the nature of the given public relations and to the basic principles and aims of the Constitution. Peculiarities of the formation of the institutions of constitutional oversight, problems facing them, forms of constitutional oversight, objects and subjects of such oversight, the nature of court resolutions and several other questions have been studied. Special attention has been paid to the problems of providing guarantees for the independence of the institutions of constitutional oversight. Special importance has been attached in this work to the analysis of the mechanisms of constitutional control of human rights protection in terms of the implanting of a reliable system of guarantees for the protection of human rights in the newly independent states.

The study has led to certain general conclusions, to the revealing of the main tendencies in the further development of the systems of constitutional oversight and to the understanding of the main lessons of the past. All these can be summarized in the following: Special or specialized bodies of constitutional oversight become one of the exceptionally important institutions of state power, contributing to balance and stability of the State Power. The trend in already functioning systems is towards the improvement of the forms of organization; a clearer definition of powers; the improvement of principles, forms and methods of constitutional oversight; the enlarging of the list of subjects who can appeal to the court, the definition of the objects of control; and the raising of the role of preliminary control, etc. The system of constitutional oversight is incomplete and defective until the control of human rights protection has become its inseparable part.

The comparative analysis of the internationally accumulated experience of constitutional oversight, apart from the above mentioned reasons, is also conditioned by the fact that the corresponding European systems of constitutional oversight, in particular, that were established in the post-war period, currently undergo active reforms. Hence, the study of new solutions and the creation of reliable guarantees to ensure the Constitutional order acquire greater importance. In this work the concept of constitutional oversight is interpreted and defined as a system.

LIST OF ABBREVIATIONS

CC – Constitutional Court

COM – Constitutional Oversight Mechanisms

LCCA - Law on Constitutional Court of Armenia

NA – National Assembly

RA – Republic of Armenia

SSR – Soviet Socialist Republic

USSR – United Soviet Socialist Republic

US – United States

INTRODUCTION

Constitutional review has been in existence in some form throughout the history of mankind. One of the most impressive features of the 20th century has been the emergence of specialized institutes for judicial/constitutional review in more than one hundred-fifty country. The exclusive and increasing role of constitutional review has resulted in a persistent demand for a scientific generalization of the problems of genesis of the new constitutional review systems, as well as their operation and development.

A major aim among the vital theoretical and practical problems of constitutional review is the definition of the position and role of the CC within the system of state authority, as well as the establishment of the separation of powers between the legislative, executive and judicial branches.

It is common knowledge that polarized opinions exist on these issues not only in theory but also in the practice of constitutional review. Moreover, the lack of clarity and determinacy can impede the deployment of an efficient system of judicial constitutional review aimed at making social development sustainable and dynamic. This is rather characteristic of the newly emerging democracies, with the constitutional regulation of public relations having an incomplete character. In situations of this type, it is of crucial importance to clarify the role and position of constitutional justice within the system of state authority, as well as to provide the necessary and sufficient stipulations for their adequate operation. The constitutional review has acquired a particular importance as one of the pivotal links of the social organism's immune system.

A major objective of this study is to facilitate the formation of a system of state authority in Armenia that would securely provide the resolutions of the issues of supremacy of the

Constitution, protection of the fundamental human rights and freedoms, establishment of the necessary provisions for the sustainable and dynamic development of society, with suppressed revolutionary factors and the processes of advance accumulation of negative social energy.

A new concept of formation and development of a complete system of constitutional review on the turn of the 21st century has been substantiated based upon studying of many years' experience of the judicial constitutional review, many available models, identifying the features of transitional period, as well as a suggested technique of comparative constitutional analysis.

Constitutional review is examined not only from the viewpoint of exercising the judicial function, but also from the position of the public and state administration, as well as of the nation-implemented right to a direct discharge of state authority.

Literature Review

According to Gagik Harutyunian and Arne Mavcic (1999), constitutional review has been in existence in some form throughout the history of mankind. One of the most impressive features of the 20th century has been the emergence of specialized institutes for judicial/constitutional review in more than one hundred-fifty country. The exclusive and increasing role of constitutional review has resulted in a persistent demand for a scientific generalization of the problems of genesis of the new constitutional review systems, as well as their operation and development.

A major aim among the vital theoretical and practical problems of constitutional review is the definition of the position and role of the CC within the system of state authority, as well as the establishment of the separation of powers between the legislative, executive and judicial branches.

According to Mueller (1996), the ideal ground of constitutional review involves the principle that the Constitution is the highest legal act, which in the hierarchy are above all other general legal acts. Therefore, constitutional review is the highest remedy among the legal remedies for the protection of constitutionality and legality. It would be excessive to assert that it is impossible to consider as constitutional such constitutional systems, which do not have an appropriate legal guarantee of constitutionality. However, it is necessary to take into consideration the fact that the protection of constitutionality by different forms of judicial review is one of the most important guarantees for the enforcement of the sociopolitical system determined by the constitution. The principles of constitutionalism also require that emergency powers be exercised in a non-arbitrary fashion and not simply for the good of the holder. An executive's powers must not, in Locke's words, be used for his or her own advantage, but rather 'for the good of Nation'.

According to Herbert Jacob (1996), institutions of the constitutional oversight have been classified into three main groups. The first group comprises those bodies which (a) carry out the constitutional control (oversight) of laws and regulations, (b) settle disputes between different bodies of state power regarding their authority and (c) carry out direct control in the sphere of human rights protection, based on appeals directly received from the citizens themselves. The second group comprises institutions of constitutional oversight of those countries where these institutions are entitled only to function (a) and (b). The third group comprises only those specialized agencies of constitutional oversight, which are entitled only to function listed in point (a). Peculiarities of the functioning of the bodies of constitutional oversight comprising each group have been slightly studied.

Michael J. Perry (1982) is concerned with the legitimacy of constitutional policymaking that goes beyond the value judgments established by the framers of the written Constitution. The distinction between interpretive and non-interpretive review can best be elaborated in terms of a particular conception of the US Constitution. The Constitution consists of a complex of value judgments the framers wrote into the text of the Constitution and thereby constitutionalized. The important such judgments – the ones that will concern us here - fall into two categories. One category of judgments defines the structure of American government by specifying the division of authority, first between the federal government and the governments of the states and, second, among the three branches of the federal government – legislative, executive, and judicial. The other category defines the limits of governmental authority vis–s–vis the individual; this category of value judgments specifies certain aspects of the relationship that shall exist between the individual and government.

According to John Elster and Rune Slagstad (eds.1998), Constitutional review is featured within the framework of deterrents and counterbalances, its main purpose being the disclosure, assessment and rehabilitation of the disrupted balance. The constitutional review is called upon to exclude the revolutionary features or social emergencies. The contents and forms of constitutional review are not identical in different legal systems. The history of constitutional review counts many centuries. Its character, implementation philosophy, forms and methods, organizational systems have undergone serious changes and are currently in the stage of active improvement. The main idea is that the insurance of harmonic activity of the bodies of state authority is not something invariable, but rather requires continuous review of the system stability. Therefore, the role of constitutional review can be compared with the role of the immune system in the human body.

Methodology

The research method employed in this study is the method of unobtrusive research, historical/comparative analysis: a qualitative method, one in which the researcher attempts to master many subtle details. The main resources for observation and analysis are historical records. Although a historical/comparative analysis might include content analysis, it is not limited to communications. The method's name includes the word comparative because social scientists – in contrast to historians who may simply describe a particular set of events – seek to discover common patterns that recur in different times and places.

This methodological approach is substantiated to the evaluation of the position and role of the bodies of constitutional review within the system of the state authority based upon a multifactorial analysis of the legal nature and substance of the institute of constitutional review, its historical stipulations, evolution and dynamics as a universal factor of democratizing the society and state, the said bodies being regarded as the pivotal link of the immune system of a civil society and a state governed by the Rule of Law.

Substantiation is provided of basic principles and criterial elements for the formation of a valid system of constitutional review on the eve of the third millennium. Constitutional review is examined not only from the viewpoint of exercising the judicial function, but also from the position of the public and state administration, as well as of the nation – implemented right to a direct discharge of state authority. Moreover, it is being suggested to the evaluation and analysis of stability in social development and in uncovering the position and role of constitutional review in this regard.

CHAPTER 1: WHAT ARE THE SPECIALIZED BODIES OF THE CONSTITUTIONAL OVERSIGHT INSTITUTIONS OF THE STATE POWER?

In the contemporary world, it is very difficult to imagine any state without a more or less developed system of laws, which aim to regulate a wide range of diverse public relationships and establish rules of behavior for individuals, organizations, and government authorities. In current societies and states, the principal public and governmental institutions are usually fixed in constitutions. Constitutional oversight, as an important public and government function ensuring the dynamic development and inner stability of the society, is closely linked to the nature of the given public relations and to the basic principles and aims of the Constitution.

An Introduction to the Nature of the Origin and Function of Systems of Constitutional Review

According to Beardsley (1975), almost all states have tried to give a constitutional formulation of their social relations, defining the state as secular or dominated by the rule of law and democratic. In this regard special importance has been attached in this work to the issues of bringing to the light the nature of relations among the different branches of the government and its relation to the constitutional oversight.

Institutions of the constitutional oversight have been classified into three main groups. The first group comprises those bodies which (a) carry out the constitutional control (oversight) of laws and regulations, (b) settle disputes between different bodies of state power regarding their authority and (c) carry out direct control in the sphere of human rights protection, based on appeals directly received from the citizens themselves.

One source of constitutional review is the tendency to limit the absolute powers of monarches. Therefore power must be limited by legal regulation. In addition, the ability to appropriately implement such power is fixed in such a way that basic human rights are guaranteed. This issue was first given serious consideration and practical application in the United States when it adopted its Constitution[1]. Then, the separation of powers was strictly regulated, and there arose a need to ensure the balance of the system through certain restraints and practical mechanisms It is significant that this issue was resolved as a result of a conflicting situation leading to a Supreme Court decision on Merberin vs. Madison in 1803[2].

The written constitution is, in principle, the most important legal and political remedy for the implementation of constitutional review. Therefore it is necessary for the functioning of each democratic political system that a constitution is implemented. Only in a definitely democratic political system can the implementation of constitutional review and legality be provided. There is no constitutionality without democracy and vice versa. In 1961, responding to a flurry of constitution making in Western Europe and in many Eastern European countries, Giovanni Sartori remarked that "every state has a constitution, but only some states are constitutional."[3]

The objective of important significance for a harmonic development of society is an operational system of state authority, a prerequisite of mutually agreed activities of the legislative, executive and judiciary authorities. Any arbitrary change in constitutionally defined relations by any branch of government must be ruled out. In a democratic society, the purpose of

[1] The word "constitution", which originated in ancient Rome, has reached us over the centuries and has been constantly placed in the vocabularies of all nations. The term "constitution" comes from the Latin *"constitutio"* and literally means **"to establish" or "to structure"**. Khachatryan H., "The first Constitution of the RoA," p. 7, 1997.
[2] See Hamilton, et al. The Federalist 78
[3] Giovanni Sartori, "Constitutionalism: A Preliminary Discussion," p. 56, 1962

making laws is to guarantee and implement the human rights and freedoms, with reasonable restrictions on the use of authority.

The top principle of existence and functioning of the democratic society and a state governed by the Rule of Law[4] is the supremacy of the Constitution, which is at the same time the principal concept of constitutional review. Harutunian (1999) stated that supremacy is an attribute implanted into the Constitution of the topmost common priority of its validity instituting the legal act hierarchy, which identifies the Constitution as the basis of law making and binding the law-enforcement body. Constitution, he says, is the law of justice, rather than a mechanical linkage of accepted statements.

The Constitution is a fundamental legal substance, intended not only to establish the institutes of authority, to ascertain their competence and order of relationships, but rather also to secure the restrictions on the excessive use of power. The Constitution is intended to outline the boundaries of law and to provide it with an inherent determinacy.

Functional Characteristics of the Constitutional Review

The constitutional review is actually becoming the core of the immune system of the social structure. Any country which wants progress, wishes to have democracy at the basis of its development, wants certain clearly regulated communal relations, and no (or minimal) irrational perpetuating processes, must necessarily after the adoption of the constitution take care that all the principles articulated in the constitution are actually protected in real life and that certain oversight mechanisms exist. Otherwise, progress will not be regulated, and under - ground

[4] See Harutyunyan G., et al. "The Constitutional Review and its Development in the Modern World", 1999.

relations will take over. And under those circumstances, it will be absolutely impossible to predict what life will be like, how things will progress. In this case, the very existence of the constitution actually dictates the need for constitutional oversight, which is both necessary and mandatory. It is not accidental that those countries, which adopt constitutions, also immediately Include certain mechanisms for constitutional oversight.

According to Elster (1998), Constitutional review is featured within the framework of deterrents and counterbalances, its main purpose being the disclosure, assessment and rehabilitation of the disrupted balance. The constitutional review is called upon to exclude the revolutionary features or social emergencies.

The contents and forms of constitutional review are not identical in different legal systems. The history of constitutional review counts many centuries. Its character, implementation philosophy, forms and methods, organizational systems have undergone serious changes and are currently in the stage of active improvement. The main idea is that the insurance of harmonic activity of the bodies of state authority is not something invariable, but rather requires continuous review of the system stability. Therefore, the role of constitutional review can be compared with the role of the immune system in the human body.

The bodies of constitutional review perform this type of role primarily by securing the supremacy of the Constitution, "resolving the litigations arising in the system of state authority in respect of jurisdictional disputes, and, not the least important, by establishing guarantees of legal regulation of political conflicts emerging within the society" (Harutyunyan, et. al. 1999, p. 23). In other words, constitutional review is a means and a contingency to ensure the stability of society by consecutive and continuous character of its development. This role is implemented by

examining, uncovering, stating and removing the discrepancies with the regulatory acts of the Constitution.

Constitutional review is also an incentive to continuous improvement of the system of state authority and harmonizing coordination of the continuously varying public relations. The concept of constitutional review is directly associated with the availability of the Constitution. Thus, the principal mission of the constitutional review is to secure the supremacy and stability of the Constitution, to retain the constitutional separation of powers and to guarantee the protection of the constitutionally established human rights and freedoms.

What is then the constitutional review as a system? More often than not many authors circumvent this issue by silence or by identifying it with the judiciary system of judicial review. We shall return to diverse aspects of this issue further on. Two significant points need to be noted here. First of all, the constitutional review is not restricted only by the framework of judicial review. What also needs to be considered is the functional role of the legislative and executive authorities, and the order and traditions of retaining the moral, national and spiritual values. Secondly, the constitutional review, taken as a system, as a totality of complex and harmonically interacting bodies having differing powers, can exist and efficiently function only with certain preconditions. Those having prominence include the constitutional adjustment of public relations, the establishment of democratic principles of the development of society, independence of review, its universal character, accessibility to the members of the society, openness of the constitutional review, etc. Of fundamental importance, according to Harutyunian (1996), is the condition of the system integrity, explicit functional interconnection between its major components, rational interaction supporting the system dynamic balance, as well as the institutional balance of the system of constitutional review.

The development of different systems of constitutional review can be divided into two major stages. First, prior to the constitutional regulation of public relations, when the retention of the rules of social life was not so much an objective of the legal sphere but rather a problem of ethics, morals, spiritual development and tradition. Second, within the last two centuries, when the developing public relations prompted the need to bring the life of the people and the state to a more orderly condition, when adoption of the Constitution, recognition of its supremacy and its protection became a fundamental exigency. That was the way of building a civil society demanding not only a social accord with regard to the rules of social behavior but an operational system of protection and review as well. **(See Diagram 1)**

Today, there are systems of constitutional review in 164 countries In 74 of them, this is handled through a specialized court system, in another 48 through so-called courts of general jurisdiction, and in 30 other countries through mixed court systems. In fact, in any country where there is separation of powers among the legislative, executive and judicial branches, regardless whether that country's system is presidential, quasi-presidential or purely parliamentary[5] and regardless of its institutional system of governance, the need necessarily arises for constitutional oversight in the form of this or that system. Why? Because, in a given country, any normative act, law, legislative code has its basis in the constitution.

As regarding to the constitutional review within the French Fifth Republic[6], there was introduced two new dimensions: "limits on the omnicompetence of the legislature, and a supervisory body akin to a court that can make binding rulings on the validity of parliament's legislation" (Bell, 1992). From 1789 the very act of making constitutions defining the competence of governmental institutions introduced law as a regulator of public power. But the

[5] See Leslie Holmes, "Post-Communism: An Introduction," p. 172, 1997
[6] See John Bell, "French Constitutional Law", p. 10, 1992

concern was predominantly with the division of institutional competence - who does what, and how each institution should operate.

A new supervisory organ, the Conseil Constitutionnel, was created to review the exercise of legislative power by Parliament and the executive. The creation of the Conseil Constitutionnel was originally intended as an additional mechanism to ensure a strong executive by keeping Parliament within its constitutional role. Later, this original intention has been departed from a significant degree in subsequent years to create what is effectively a constitutional court[7].In presenting the Conseil Constitutionnel in 1958, Bell (1992) writes, it is stated that 'It is neither in the spirit of a parliamentary regime, nor in the French tradition, to give to the courts, that is to say, to each litigant, the right to examine the validity of a *loi*.' Until then, although the rule of law quite quickly involved the subordination of the executive to the law and to bodies that could be called courts. Parliament, as the lawmaker and representative of the nation, was in a different position.

[7] See J. Beardsley, "Constitutional Review in France", *Supreme Court Review* at 191-212, 1975

CHAPTER 2: WHAT IS THE LINE OF DEVELOPMENT OF MECHANISMS OF CONSTITUTIONAL OVERSIGHT IN THE REPUBLIC OF ARMENIA

The sharp increase of credibility of the Constitution as a new phenomenon in our life is an evidence of its tremendous role acknowledged by citizens and entire society. Unfortunately, genuine comprehension of Constitution on required level is not deeply rooted in the consciousness and behavior of public at large.

Sometimes, there is no distinction between the Constitution and other pieces of general legislation. There is no clear understanding, even by some lawyers, of the mechanisms of implementation of basic provisions provided for by the Constitution. Reliance on Constitutional provisions is not considered essential within the entire legislative process. Consequently, there is an urgent need to clarify basic features of a Constitution in general, as a main law, and the major provisions provided for by the Constitution of Armenia in particular.

The History of Constitutional Development in Armenia

The new Constitution of the RA adopted on July 5, 1995, is the forth constitution in the history of Armenia. It was preceded by the Constitutions of 1922, 1937, and 1978. The Armenian experience of constitutional development is unique. The Armenian people, whose statehood, in terms of its origin, dates from the end of the twelfth century BC, after having lost it in the fourteenth century AD had struggled for liberation for hundreds of years and had strived for restoration of its national statehood. Having survived the terrible genocide of 1915, the Armenian people re-created its national state on May 28, 1918, on a small piece of the territory of historical Armenia, but there was no constitution until 1922. Because of the lack of socio-economic and political prerequisites, the progressive ideas of constitutionalism prevailing in those times failed to be fulfilled in Armenia.

On February 3, 1922, two years after the new government came in November, 1920 to rule in Armenia, the first Constitution of the Armenian SSR was adopted. The second Constitution of the Armenian SSR was adopted on March 23, 1937, immediately after the adoption of the 1936 Constitution of the USSR. The third Constitution of Armenia, adopted on April 14, 1978, was designed and developed in conformity with the USSR Constitution of 1977 and appeared to be the embodiment of the concept of "developed socialism and construction of the public socialist state." (Khachatryan, 1997, p.13)

On September 25, 1991, The Supreme Council of the RA passed the Constitutional Law on the Fundamentals of Independent Statehood. This is an important point in the constitutional development of Armenia, since the above mentioned legal act has a multipurpose and comprehensive character and covers not only the main aspects of government, but also all the layers and basic issues of public life. This was because the above stated Constitutional Law was aimed at the creation of the normative micromodel of our regenerated society.

The constitutional reform came to its end with the adoption, by the Supreme Council of the RA, of the Constitutional Law dated March 27, 1995, and the Law on Elections of Delegates to the National Assembly of the RA dated April 4, 1995. These acts created a firm and stable normative-legal basis for the adoption of the basic law of the RA. The issue of adoption of new Constitution was raised immediately after declaration of independence of Armenia. Pursuant to the decision of the Supreme Council of Armenia, dated November 5, 1990, a Constitutional Commission was formed to draft the text of new Constitution. This Constitution reflects quite a new phase of development of our society and statehood, displays the improvement of the entire system of social administration, and underlines the status of Armenia as a full – right subject of international law. The new Constitution of the RA establishes new foundations of the

constitutional order, as well as serves as a guide in law – making and law – application practices of the state.

"The Constitution is not a document; it is an institution. As such, it involves a process in which many other formal and informal, authoritative and functional actors participate.[8] The protection of constitutionality and legality is reflected in the constitutionally assured protection of constitutionality and legality (the constitutional review of constitutionality). This was introduced on the basis of the realization that also state bodies can violate the Constitution, and was more firmly established with written constitutions.

According to Mueller(1996), the ideal ground of constitutional review involves the principle that the Constitution is the highest legal act, which in the hierarchy are above all other general legal acts. Therefore, constitutional review is the highest remedy among the legal remedies for the protection of constitutionality and legality. It would be excessive to assert that it is impossible to consider as constitutional such constitutional systems, which do not have an appropriate legal guarantee of constitutionality. However, it is necessary to take into consideration the fact that the protection of constitutionality by different forms of judicial review is one of the most important guarantees for the enforcement of the sociopolitical system determined by the constitution. The principles of constitutionalism also require that emergency powers be exercised in a non-arbitrary fashion and not simply for the good of the holder. An executive's powers must not, in Locke's words, be used for his or her own advantage, but rather 'for the good of Nation'.[9] In his book, John Finn(1991), states that one of the methods of limiting political power is the constitutional review. It has evolved as the most important among the other methods of limiting political power such as, vertical separation of power (federalism) and

[8] W. Michael Reisman, "International Incidents: Introduction to a new Genre in the study of International Law," p.10, 1984.

promotion of geographic and cultural diversity. The precise manner and character of review varies widely across contemporary constitutional systems. Theory distinguishes wider and narrower senses of constitutional review. Constitutional review in a wider sense of the word means the deciding of constitutional disputes in a judicial form with the aim to protect the Constitution. In a narrower sense of the word, constitutional review is an evaluation of the conformity of statutes with the Constitution, i.e. the review of the constitutionality of statutes.

The Formation of the Constitutional Court of the Republic of Armenia

As already noted, today, in 164 countries the mechanisms of constitutional review are operational. It is essential to identify two fundamental types of oversight, one of which is called the American model or system, and the other is the European model. The first system, as noted, is operational in 48 countries, such as the North American continent, Japan, the Scandinavian countries, India, Switzerland, etc. The European model was fundamentally formed in the 20th century, and the first one implemented in Austria in 1920 and basically started to function after 1950 in the post-war period. After 1945, it was Austria again which first restored its constitutional oversight system through a specialized court[10]. In 1947, the Italian constitution accepted this same institution[11]. **(See Diagram 2)**

Since 1951, this system has been operational in Germany[12]. In 1958, the French Constitutional Council was formed[13]. Today, 74 countries implement constitutional review through such mechanisms. After 1990, when the Soviet Union collapsed, and the former

[9] Locke, Two Treatises, p.18

[10] Лазарев В. В. Конституционный Суд в Австрии. Государство и право. 1993, N 9

[11] Положение об образовании и деятельности Конституционного Суда (Италия). Закон 87 от 11 марта 1953 г. с изменениями, внесенными Конституционным законом 2 от 22 ноября 1967 г.

[12] Изензее Й, Кирххоф. П. Государственное право Германии, 1994 г.

[13] See the French Constitution: Title VII, Articles 56 to 63

communist countries of Eastern Europe began to develop democratically and towards a free market, almost all adopted the European system. Estonia formed the exception[14]. There, a unique system, which differs from the others, was formulated where constitutional review is handled by courts of general jurisdiction, but where they have also introduced the institution of a justice chancellery through which complete constitutional oversight is implemented. The remaining countries formed institutions following the European model of constitutional oversight.

Today, it is the subject of active debate as to why Europe did not adopt the American model, why a new system was formed, why it functions with new characteristics. But before speaking about the series of advantages that the European system has let us note in passing a process of the formation of the system of Constitutional Review in the New Democracies and of the Armenian CC system.

Development in the so-called New Democracy countries has involved the introduction of constitutional review in the so-called New Democracy countries. The introduction of constitutional review has meant a break-up of the former principle of the Unity of Powers, in view of which socialist systems, as a rule, did not have any constitutional review.

The development of constitutional review in the countries of the former socialist regimes, according to Harutyunian and Mavcic (1999), is characterized by the following:

1. Except in the former Yugoslav Federation and some attempts in Romaine and Czechoslovakia, constitutional review has no tradition.
2. Even after World War II constitutional review (contrary to its affirmation in West European countries) was not instituted due to the fundamental incompatibility with the existing national political systems. These systems adopted the principle according to which the legislative branch is held responsible for the constitutionality of regulations and according to which

[7] See the Law on Constitutional Review Court Procedure (Estonia), adopted: 5 may 1993.

constitutional review cannot be practiced by an extra-parliamentary body. Therefore, the power of constitutional review was in principle reserved for the legislative bodies

3. The introduction of constitutional review systems following the European Model is of more recent date, arising in general at the end of the eighties and continuing in the nineties, along with the development of the democratic process in the above mentioned countries. Accordingly, the introduction of constitutional review brought about a significant change in the above countries where previously such a system had been completely unknown.

The generally adopted constitutional review model in these countries has been the so-called European (known also as Austrian/German, Continental, Concentrated) Model. Bodies, then, exercising constitutional review include the following:

a) Constitutional Courts

b) Concentrated or specific constitutional review performed by the highest ordinary court in the country

c) Other forms of the constitutional review based to a large degree on the principle of self-review inside the parliamentary system

It is natural that each country, state, and people, at different periods of its history, have unique systems of oversight for regulated communal relations. Today, as we have our own state, and when we speak about constitutional oversight in the context of constitution and statehood, we often forget that our nation, both with or without a state, has long enjoyed a tradition of regulated communal relations and mechanisms for their oversight. If we refer to the IV-V centuries and subsequently to the period of Seljuk domination of the XI-XII centuries, we will see that at different tunes, our church, church laws, various codes of Cilician Armenia, Mkhitar

Gosh's Codex, etc., have utilized unique institutional systems to regulate and supervise communal relations.

In the present RA the supreme body of the judicial authority responsible for the protection of constitutional legality is the CC of RA. It was formed on February 6, 1996. CC of the RA holds a specific, signified position in the system of governmental bodies of judicial authority. Legal status and peculiarities of CC of RA as judicial body of Constitutional control are mainly characterized by its jurisdiction (December 30, 1997). Article 100 of Constitution of RA and in the manner prescribed by the Article 5 of the Law of the RA on the CC, the Constitutional Court:

1) shall decide on whether the laws, the findings of the National Assembly, the orders and decrees of the President of the Republic and the findings of Government are in conformity with the Constitution;
2) shall decide, prior to the ratification of an international treaty, whether the obligations assumed therein are in conformity with the Constitution;
3) shall rule on disputes concerning referenda and the results of Presidential and parliamentary elections;
4) shall ascertain the existence of insurmountable obstacles facing a Presidential candidate or the fact of the removal of such obstacles;
5) shall determine whether there are grounds for the removal of the President of the Republic;
6) shall determine whether there are grounds for the appeal of Sections 13 and 14 of Article 55 of the Constitution;
7) shall determine whether the President of the Republic is incapable of continuing

to perform his or her functions;

8) shall determine whether there are grounds for the removal of a Member of the Constitutional Court, the arrest or the initiation of administrative or criminal proceedings through the judicial process;
9) shall decide on the suspension or prohibition of a political party in cases prescribed by law.

Having already established above mentioned CC, I want to point to the certain socio – political and legal changes resulted in the adoption, on December 23, 1989, of the Law on Constitutional Control in the USSR, which was followed in early 1990 by particular changes and amendments to the ASSR Constitution of 1978. It was established that Supreme Council would elect a Committee of Constitutional Control for the term 10 years. However the said Committee was not elected, since the given case was speaking to a very vague authority of Constitutional Control rather than a proper Constitutional supervision.

Regarding the series of advantages that the European model has, according to Finn (1991), it works very effectively in extreme situations, in cases when major changes are taking place in communal relations, when there are ongoing systemic changes, when a need arises to totally and fundamentally change the legal framework, to introduce qualitative constitutional changes, and even to adopt new constitutions, and therefore to regulate communal relations. This model makes it possible to take certain preventive measures, in order not to allow this or that wing of the government to take over the reins of government or to expand its own functions. This is especially true at those times when the constitution exists but the legal framework for its implementation is not yet complete, or the mechanisms are not yet such that the constitutional provisions can be practically implemented in real life. The European model acquires these new

characteristics because, as opposed to the American model, here, oversight is realized no simply through specific action, but also through so-called abstract, initial, preliminary requisite and other means.

The European system allows abstract supervision, because constitutional oversight is handled by specified bodies – constitutional courts. Their first and foremost task is the protection of the constitutional rights and freedoms of individuals, and the guarantee of the constitutionality of the legal acts. Various methods of oversight are utilized to prevent the adoption of unconstitutional acts, and in the case of unconstitutionality of an adopted act, to stop its future application. In newly independent states, there is active change in the legal framework and communal relations and naturally, constitutional oversight becomes even more important.

CHAPTER 3: TO WHAT EXTENT DO THE MECHANISMS OF CONSTITUTIONAL REVIEW CONTRIBUTE TO OR WEAKEN THE BALANCE AND STABILITY OF THE STATE POWER.

Constitutional review in the world has reflected and still reflects different social and political interests, depending on particular social and political relations within concrete political systems. Therefore, it is impossible to speak about a certain positive or negative function of this institution. In any case, the function of constitutional review is the protection of social and political regulation. Constitutional review is a legal remedy, by its contents and consequences it can intervene into political circumstances. It may be taken to be one of the most important guarantees for the secure stability of a particular political system, because it potentially limits the self-interest of the highest bodies of authority, in particular the legislative, executive and administrative branches.

All countries striving to provide public development with stability and a positive impulse to recognize the need for establishing the civil society, stress the problem of rational use of the creative potential of the society, in the quest for consolidating the ensuring protection of human rights and freedoms by converting the issue into the subject of constitutional review. The system of constitutional review can function efficiently and completely only if certain prerequisites are available.

Fundamental Principles of the Constitutional Court and their Effectiveness

To understand whether the mechanisms of constitutional oversight contribute to or weaken the balance and stability of the State Power, we should look at, first of all, to the fundamental principles guiding the activities of the CC, then, to the relation of the CC to other branches of State Institutes. According to the Article 6 of the LCCA, the fundamental principles guiding the activities of the CC shall be independence, controversy, collegiability, and

transparency. A Member of the CC shall be independent and only subject to the Law. Any exerting of influence on a Member of the Court in relation to his/her activities is prohibited and shall be persecuted by law. According to Mueller (1996), independence of the judicial constitutional review can be functional, institutional, organizational, material and social.

At a Session of the CC the review of cases is carried out according to the principle of controversy. The parties contribute to the adoption by the CC of a resolution of the case by freely expressing their stance, presenting arguments and counter – arguments. The review of cases and adoption of decisions or findings of cases by the CC shall be done on the basis of collegiability. The decisions and findings of the CC shall be adopted by voting. The Sessions of the CC also shall be held in public. The CC may allow the Sessions to be photographed, taped, video recorded, or broadcast.

These fundamental principles are good in terms of theoretical approach. But, in terms of practical implementation of these principles we face the Article 26 of the same law, on the basis for review of cases by the CC. It states that, the CC shall only hear cases that are duly submitted.

So, we need to examine whether the mechanisms of constitutional oversight, based on the fundamental principles, contribute to or weaken the balance and stability of the State Power, on two levels. First, when a case is not submitted. Second, when a case is submitted.

For the first level, the mechanisms of constitutional oversight are not only impotent for any kind of contribution, but rather weaken the balance and stability of the State Power. In this transition period, unconstitutional matters may arise, not simply as a result of the actions of this or that body, but also as a result of unction or passivity. Confucius said, "We don't know yet about life, how can we know about death?"[15]

[15] See George Seldes 'Great Thoughts', 1985, p. 91

So, we are not sure of the contribution of the mechanisms of constitutional oversight even when any case is submitted, how then we can be sure when the case is not submitted. Could we imagine what would happen if the issue of resignation of the NA Chairman hadn't been submitted to the CC for review?

I would like to mention here that since its foundation the CC of Armenia could hear and make only twelve decisions. This is so because, on the one hand, the CC is not authorized to review cases by its own initiative. On the other hand, the CC of Armenia is not accepted as the guarantor of rights and freedoms of citizens.[16] In contrast to this, the French CC in the three months, from January to March 1994, delivered as many decisions on the constitutional verification of rules as in the 25 years from 1958 to 1974. This enormous increase is chiefly due to the combination of two factors:

- first of all, case law: in 1971, when giving judgment on the law governing associations, the Council incorporated in the rules of reference the text of the preamble to the Constitution and, incidentally, that of the 1946 Constitution and the 1789 Declaration of the Rights of Man and the Citizen. This development in case law establishes the role of the Council as the guarantor of rights and freedoms.
- secondly, constitutional factors: the 1974 revision extended the right of referral, hitherto reserved exclusively to the Presidents of the Assemblies, to a minority of parliamentarians.[17]

For the second level, when a case is submitted, whether the mechanisms of constitutional oversight contribute to or weaken the balance and stability of the State Power, depends on the

[16] Interview with the citizens of Yerevan of ages 25 – 45 from the randomly selected 'Kentron' hamayk. About 80 % of them are not sure that the Constitutional Court of Armenia is the guarantor of rights and freedoms of citizens. The independence and the transparency of the Constitutional Court were negatively mentioned. There can be no word of trust on the Constitutional Court.

[17] The Law on the Constitutional Council of the Fifth Republic on 4 October 1958

‘successful implementation’ of the fundamental principles by the CC. In other words, we are to answer the following questions: What do we mean by saying successful implementation or what are the outcomes that show the implementation of those fundamental principles and consequently the balance and stability of the State Power? To illuminate these questions I would like to refer to the recent decision of the CC of Armenia on the issue of the resignation of the NA Chairman.

National Assembly Chairman Armen Khachatrian announced his resignation on Fall of 2000. At the meeting of the National Assembly he explained his decision by the fact that a new alignment of forces is being formed in the parliament and new political cards are being shaped. He said that he was not one of the new majority and that he valued statesmanship and state interests above personal ones. He thought that a new chairman might be elected to retain the atmosphere of maximally peaceful cooperation. He thought that if his resignation is accepted, the new chairman will work in cooperation with MP's and the parliament-government conjunction will be more effective. Khachatrian asked for the MP's support, declaring his resignation. The September 26 voting in parliament on the matter of the resignation of NA Chairman Armen Khachatrian has aroused a bitter controversy, dividing the NA into two camps. In the coming days the problem is thought to find its legitimate solution with the help of the president and the CC. It was repeatedly observed that the right to comment the parliament's decision belongs to the CC only. However, there arises a question: who is to apply to this instance?

Robert Kocharian has already applied to the CC on the issue of constitutionality of the NA decision made on September 26. On October 17, the CC of Armenia ruled that the Parliament's decision on Speaker Armen Khachatrian's resignation of September 26 does not conform to the Constitution and is invalid. CC considered the issue at the request of the President Robert Kocharian dated October 2. Stating that in making the decision the NA violated the Law

"On the Regulations of the NA of the Republic of Armenia", the CC points out in its verdict that each violation is a testimony to the Parliament's ignoring Article 62 of the Constitution under which the NA is to work in accordance with its Regulations. The verdict of the CC means that Armen Khachatrian, who presented his resignation on September 26, is still a legal Chairman of the NA, as the resignation was not confirmed by a legal voting. It still remains to see if the parliament will initiate a new voting procedure.

The decision of the CC on above mentioned issue, by which we are going to judge the implementation of the fundamental principles, did, in my opinion, contribute to the balance and stability of the State Power. Without going into details of implementation of the fundamental principles, it was evident that the Parliament ignored Article 62 of the Constitution under which the NA is to work in accordance with its Regulations. Thank goodness that there was a misuse of the Regulations. But what if the case is submitted to the CC and there was no misuse of Regulations of any kind. Would the fundamental principles of the CC be successfully implemented in this case, establishing the balance and stability of the State Power? In this case we should look at the relationship of the CC to other branches of the State Institutes, particularly to the legislature.

The Relationships of the Constitutional Court to other Branches of the State Institutes

In order to form correct ideas on this important subject it will be proper to investigate the sense in which the preservation of liberty requires that the three great departments of power should be separate and distinct. The 1789 French Declaration of the Rights of Man and Citizen (Article 16) stated that “every society in which the guarantee of rights is not assured or the

separation of powers not determined has no constitution at all"[18] and this statement has become a generally accepted and often quoted principle of the constitutional state. Despite the general acceptance of the principle of separation or division of powers, when we look closer how this principle works in reality we see a surprising uncertainty in the constitutional texts.

Theoretical approaches to the question of separation or division of powers reveal that there is no single or universally accepted solution in this field, though we know that all state power emanates from the people. It shall be exercised by the people by means of elections and voting and by specific legislative, executive and judicial organs.

Another general characteristic of the complex system of power relations that is emphasized in general is the functional relation of the state powers. The violation of a strict separation of powers, according to Vile (1967), can be observed in several ways: "a function can be exercised by more powers; an organ can be vested by certain competences that belong basically to another branch; an organ may have faculties to control the other one; in some cases different branches interfere with each other in exercising a certain function" (p.158). For instance, this institutional solution of the balance of powers was realized in the American Constitution in an institutional solution known as "checks and balances".

As a significant part of the examined constitutions does not expressly proclaim the principle of separation of powers, no surprise that the CC of those countries do not interpret the principle directly. The direct interpretation does not necessarily follow from the fact that a constitution contains the principle of separation of powers. We can conclude that the general rule is that separation of powers is interpreted by the courts in connection with other principles and constitutional rules. Only exceptionally do constitutional courts directly interpret and analyze the

[18] W. Laqueur – B. Rubin (eds.), The Human Rights Reader, Meridian, London, 1990, 120.

separation of powers. Especially constitutional courts of new democracies emphasize the balanced character of the relation between the power branches, rejecting what they call the "Chinese wall theory."[19] Evidently, the CC function in realizing separation of powers remains the protection of the competence of the branches against the others, and restricting them to their competences.

Now, I would like to refer to the balance of powers among the CC of Armenia and the NA of Armenia, to see if, when a case is submitted to the CC and there is no misuse of Regulations, the balance and stability of the State Power is provided through the implementation of the fundamental principles by the CC.

The nature of the relation between the Parliament and the CC is that the Parliament as a legislature adopts statutes whose conformity with the Constitution is

evaluated by the CC. Beside this, the Parliament regulates by statute the important questions of the status and functioning of the CC and the status of the judges of the CC. The CC has an important influence on the activities of the Parliament, only when it is bound to consider and implement the decisions of the CC.

Though it is stated that the CC is guided in its decisions based on the principle of independence, there are Articles that state the opposite reality. The Article 1 of the LCCA, adopted by the NA on December 9, 1997, refers to the composition of the CC and to its formation. It simply states that the CC shall be made up of nine Members. The NA, the other four by the President of the Republic, shall appoint five Members. The Article 2 of the same Law refers to the designation of the President of the CC. It states that the President of the CC shall be

[19] Scientific explanation requires to bear in mind that there is no 'Chinese wall' between the different powers, that these interact and that in the long run they are exponents of united state power and sovereignty.

designated from among its Members by the NA on the basis of a proposal made by the President of the NA.

According to the Article 83 of the Constitution, the NA "shall appoint the Chairman of the NA's Oversight Office upon the recommendation of the President of the NA and members and the President of the CC from among the members of the Court; may, upon the determination of the CC, terminate the powers of a member of the CC the Assembly has appointed; approve such member's arrest, and authorize the initiation of administrative or criminal proceedings against such member through the judicial process."

Without doubt we can say, based on the above mentioned Articles, that there is not a balance of power between the CC and the NA of Armenia. I will mention only the simple fact that the judges of the CC are appointed and not elected.

On the other hand, when a case is submitted to the CC and there is no misuse of the regulations, the balance and stability of the State Power depends on the right to appeal to the CC. According to the Article 25 of the Law on the CC the right to appeal to the CC is vested on:

1. the President of the Republic;
2. at least one third of the Members of the NA;
3. Presidential and parliamentary candidates on disputes concerning elections results;
4. the Government, in cases prescribed by Article 59 of the Constitution;
5. the NA in cases prescribed by Article 57 of the Constitution.

Constitutional oversight in the field of human rights protection is carried out in Armenia in an indirect way, not in a systematic manner. The CC carries out this authority in relation to its control, supervision of laws and international agreements. This is obviously not sufficient for a

newly independent country, which has chosen the path to democracy. This important function is not carried out and citizens are confused and at a loss.

All in all, it is important that the case has been submitted to the CC for review. Then, there shouldn't be misuse of Regulations of the body who submits the case to the CC. When Regulations are not misused, it is important to have a balance of power among the State Institutes. But, this is not enough, there must be also developed mechanisms for the individual appeal to the CC. Having failed in one of these procedures we are going to fail in the contribution of the CC to the balance and stability of the State Power. ***(See Diagram 3)***

CHAPTER 4: WHAT ARE THE PROPOSALS FOR FURTHER IMPROVEMENT OF THE SYSTEM OF CONSTITUTIONAL OVERSIGHT IN THE REPUBLIC OF ARMENIA?

Armenia has significant resources for a substantial improvement of the system of constitutional review. This is possible to implement both on the basis of the acting Constitution, and within the framework of constitutional reforms. Armenia has to keep in mind that the countries with established democratic traditions, specialized institutes of judicial constitutional review have emerged within the last decades and are in the process of continual improvement. It is expedient to go forward while taking into account their experience to avoid an ongoing correction of one's own mistakes.

With regard to further development of the systems of judicial constitutional review in Armenia, Harutyunyan and Mavcic (1999) proposed the following general trends concerning the guarantees of the independence of Constitutional Justice. These include:

- financing the budget of the Constitutional Court as proof of their independence;
- powers of the Constitutional Court as proof of their independence;
- public control and the public nature of the activities of the Constitutional Court.

Guarantees of the Independence of Constitutional Justice

Most constitutional/judicial review bodies have an independent budget separate from the whole State budget, and they are fully independent concerning its control. In addition, the financing of some newly introduced CC (e.g. in the Russian Federation, Lithuania, Belarus) is regulated in greater detail than other previously established Courts. In Bulgaria, for example, the Constitutional Court shall have an independent budget (Article 3 of the Constitutional Court Act of 30 July 1991). In Germany, under Article 1 of the Constitutional Court Act (of 12 March, 1951, with amendments), the CC has a more independent and autonomous position in

comparison with other constitutional bodies. Therefore, the Constitutional Court as a constitutional body is not financially subordinated to any Ministry, but it is an autonomously managed and budgeted independent body.

In Italy, under Article 14.2.1. of the Organization and Proceedings of the Constitutional Court Act No. 87/1953 of 11 March, 1953, the CC may autonomously manage its expenditures within the scope of funding adopted by statute. In France, the funds required for the activity of the CCl are determined within the scope of the whole general State budget. The President of the CC is empowered to provide budgetary expenses. (Article 16 of the Decree on the Constitutional Council No. 58/1067 of 7 November 1958 with amendments).

In Armenia, under Article 7 of the Constitutional Court Act, the President of the CC shall present to the Government for inclusion in the State budget the projected expenses of the CC. The budget of the CC shall be part of the State budget.

Were the despotic state legislatures merely a consequence of the historical context in which the new state governments were launched, or did the failure of the state constitutions to preserve balanced separation of powers systems reflect a deeper problem for democratic constitution building? In this regard, Litch (1993), wrote that Publius' view was clearly the later. Something about the legislative power in a representative democracy makes the legislature a real threat to undermining the balance of the Constitution. Publius gave at least four distinct reasons for this view. I will refer to the one of them. It is "pecuniary rewards", that is the salaries of those who serve in the other branches. The legislature can bend these others to its will.

What, then, can we say about the contribution of the Supreme Court to this institutional solution to the problem of legislative tyranny? Robert Litch states that at one level, of course, the

Court would enjoy the enhanced independence brought about by a life term and salaries that could not be diminished during the term of a judge.

Next point refers to the powers of CC as proof of their independence. The extent of the powers of constitutional/judicial review bodies in the traditional approach has no positive power in relation to the legislature. They may only be a negative legislature, whereas the role of a positive legislature is reserved for the Parliament. However, the negative powers of CC in relation to the legislature are also subject to certain limits, whereby the function of cessation of constitutional justice is limited by certain rights reserved for the legislative and the executive branch. Today, however, constitutional review decisions are no longer limited to the mere function of cessation, and the so-called positive decisions issued by constitutional Courts are gradually gaining importance.

One of these forms involve appellate decisions (Germany, the USA), in which the CC instructs the legislature (explicitly or implicitly, with or without a time limit) to adopt certain regulations in a particular domain. The Portuguese CC is provided with the express constitutional authorization to identify the existence of unconstitutionality due to an omission. The nature of the Portuguese Constitution, which imposes upon the legislature the obligation of legislative activity, has influenced the fact that the Portuguese CC actually acquired such power.

The Hungarian CC, too, has jurisdiction to eliminate an unconstitutional situation that has developed due to some omission of a government body. The Italian constitutional review system is, above all, characterized by the so-called creative decisions with which the CC may even change or add wording to the regulation in question.

Another factor in the decision-making process is the guidelines issued following a constitutional/judicial review; such guidelines for the future action of the legislature, the

government and the administration may include appellate decisions, and partly also other decisions. The court may issue decisions on unconstitutionality with reservation or with interpretations created by the CC itself (interpretative decisions). In these decisions the CC insures with its own interpretation that in the future the implementation of the statute complies with the Constitution.

Constitutional review may not contradict itself. Therefore, the bodies that carry out judicial review of constitutionality must consider some unwritten rules. Among others, these include that the constitutional review of the constitutionality of statutes must interpret the Constitution in accordance with valid social and political principles. In addition, the CC must equally evaluate the unconstitutionality of statutes from the point of view of the contents as well as from the point of view of formal constitutionality. The basic principles and the basic rights are the framework, which determines the competence of the legislature.

Without doubt, the Constitution is one of the grandest political achievements of the modern world. In spite of this marvelous record, two schools of constitutional jurisprudence are engaged in a long – running battle. According to Clifford Wallace (1980), the competing positions in this constitutional battle are often summarized by a variety of labels: "judicial restraint versus judicial activism, strict construction versus loose construction, positivism versus natural law, conservative versus liberal, interpretivism versus non-interpretivism." (p.287)

The difference between the 'interpretivism' and 'non-interpretivism' rests on the principle. By 'interpretivism' Wallace means the principle that judges, in resolving constitutional questions, should rely on the express provisions of the Constitution or upon those norms that are clearly implicit in the text. By contrast, under non-interpretivism review, judges may freely rest

their decisions on value judgments that admittedly are not supported by, and may even contravene, the text of the Constitution.

The basic function of the judicial protection of constitutionality is to decide if statutes and executive regulations are in conformity with the Constitution. Therefore, the interpretation of the Constitution is the basic activity of bodies exercising the judicial review of constitutionality. The basic aim of such interpretation is to give or to determine the appropriate meaning (the contents) of constitutionality as concerns a concrete case, however, having an erga omnes(to work within the context) effect. This comparison involves the comparison of the contents and the form.

Finally, I want to point the proposal concerning the public control and the public nature of the activities of the CC. The public nature of the activities of the CC is declared by the Constitution, but mainly by the CC Act. This principle may be realized in some different forms, such as public hearings.

These public activities function as a control or supervision of the impartiality and legality of the decision-making process. Beyond that, the Constitution sometimes provides for the so-called legal reservation: the exclusion of the public is reserved in order to protect the interests of a minor or of public morality. For instance, the activities of the Slovenian CC are to be conducted in public in accordance with the CC Act (Article 3 of the Constitutional Court Act). The purpose of the mentioned principle is to ensure a control on the activities of the Court to the parties of the proceedings and also other citizens (the unlimited circle of individuals). The CC may exclude the public from a hearing or part thereof on the grounds of protecting public morals, public order, national security, the right to privacy and personal rights (Articles 37 and 38 of the Constitutional Court Act).

Another form of the public control and the public nature of the activities of the CC can be the publications of Court decisions in official gazettes, magazines, official digests, as well as in legal journals. In Slovenia, for example, providing information to the public concerning decisions of the CC is, moreover, one of the functions, following the principle of the public nature of the activities of the CC, set forth in laws and in other regulations. Slovenian constitutional case-law has been published and offered to interested parties.

According to the Article 20 of the LCCA, the Sessions of the CC shall be held in public. The decisions and findings adopted by the CC shall be announced publicly during the Sessions of the Court. The CC may allow the Sessions to be photographed, taped, video recorded, or broadcast.

Constitution is not a document; it is an institution[20]. As such, it involves a process in which many other formal and informal, authoritative and functional actors participate. Theoretically, it is claimed that the Actions of the CC of Armenia are publicized, but in actual life one cannot find a process of decision making on any kind of case made by the CC of Armenia. I would like to stress the lack of one important tool that the CC of Armenia is not "aware" of. It is the worldwide used Internet. This passivity is not because of the lack of ability to use the Internet but rather because of unwillingness to use the Interred.

[20] W. Michael Reisman, "International Incidents: Introduction to a new Genre in the study of International Law," p.10, 1984.

Recommendations

This study has led to certain general conclusions, to the revealing of the main tendencies in the further development of the system of constitutional oversight and to understanding of the main lessons of the past. All these can be reflected in the recommendations based on the above provided analysis.

First recommendation I want to bring in, refers to the forms of review of the cases by the CC of Armenia. In the case of the European model, preliminary, mandatory and abstract review are that system's biggest advantages. There are certain entities, which, if they assume that contradictions may arise between a given law and the constitution, may appeal to the constitutional court which will then determine whether such contradiction exists or not. If the court finds such contradiction, then it can stop the implementation of that legal act.

This issue is extremely important for our society. The Armenian Constitution, Article 116, Section 2 states that in the Republic of Armenia, such legal acts, which contradict the Constitution, will not be implemented. This is a noble idea. In Article 100, Section 1, the right to determine the constitutionality of a given issue is reserved for the CC, and this Court must make the appropriate determinations.

At the same time, it is noted that the constitutional court may not arrive at such a determination unilaterally. In each case, there must be a specific applicant. Often, the constitutional court itself approaches appropriate entities and proposes that they appeal to the court. However, usually, such entities hesitate. These situations can create dead-end situations for society.

Meanwhile, that same Hungarian constitutional court has reserved for itself the right to rule on constitutional matters presented by applicants, or taken up for review on its own

initiative. And its decision during this case is binding. That decision can be directed at those governmental bodies which within their jurisdiction that can resolve certain issues as foreseen by the constitution. In other words, to function efficiently, the entire system of constitutional oversight assumes several mandatory conditions which are contingent upon what kind of oversight is being implemented; preliminary, future, abstract, etc., and how they are interrelated. This is one of the most important concerns.

In France during the Fifth Republic, right after the war, when the legal framework needed to be quickly changed, they created a constitutional council. The French found that it was very important that a normative act undergo constitutional review even before it becomes. In the case of the European option, particularly when the French in 1973-74 through changes in the constitution and legislation were able to make the application of the oversight system more productive, the following principles came to the surface. There are a series of laws, which must necessarily first undergo constitutional review before they are accepted and applied. Here all the organic laws, particularly the regulations of the chambers of parliament, are subject to mandatory preliminary review. This means that until parliament adopts a law, the constitutional council examines and expresses its opinion as to whether in a specific case, there are any unconstitutional elements. If such is the case, then either the council itself proposes an acceptable modification, or the parliament must find such a reformulation that is not unconstitutional. Only then can the law be implemented.

This procedure is often criticized by various European countries which note that such activity on behalf of the French CC fundamentally affects the workings of the French Parliament In essence, it becomes part of the legislative process. Sometimes, such negative implications take on absolute dimensions. Particularly, as they refer to parliamentary regulations, where my

personal view is that they must be subject to preliminary review, but not before parliamentary deliberations, rather after consideration by parliament but before reaching the president for his signature. This can ensure the balance of power and it could be very helpful.

The next recommendation of exceptional importance is what mechanisms and opportunities are available for individuals to appeal to the court. This issue, too, is resoled differently in different countries. The system of constitutional review is incomplete until review of human rights protection has become part of this system. They receive the right to apply directly through the court of general jurisdiction, after they have exhausted every means to find a solution to their problem. There are countries where citizens receive the right to apply, through the institutions of ombudsman or people's defense counsel. This is among those issues, which is very important especially for countries, which are in a transition period. In my view, one of the shortcomings of the workings of our constitutional court and this system, in general, is that this issue has not been resolved completely.

According to Louis Fisher (1988), for their own institutional protection, courts must take account of social movements and public opinion. When it strays outside and opposes the policy of elected leaders, it does so at substantial risk to its legitimacy and effectiveness. The Court maintains its strength by steering a course that fits within the permissible limits of public opinion.

De Tocqueville noted in the 1840s that the power of the Supreme Court "is enormous, but it is the power of public opinion. They are all powerful as long as the people respect the law; but they would be impotent against popular neglect or contempt of the law."[21]

[21] See Alexis de Tocqueville, Democracy in America, Vol. I, pp. 151-152.

According to Finn (1991), in a constitutional state political power must be utilized in the public interest. Following the distinction between absolute and arbitrary power, the principle of necessity seeks not to limit the scope of power but rather requires that all exercises of emergency power must be subject to review by someone other than the holder of the power.

I would like to quote the idea expressed by Randal R. Reider and Kirk Boyd during the seminar held at the American University of Armenia in Yerevan. They stated that the western states have unreservedly delegated the role of individual human rights protection to the judiciary and hold that the judiciary should have power and independence and should enjoy respect. I would only add that there is no alternative to this approach, the only problem remaining is its implementation.

The research conducted by the staff of the CC of the RA and the seminars held during the last year in Yerevan and in different regions of Armenia show that, there is a great deal to do both in terms of legislative basis and institutional solutions. Two things are evident. First, people are really confused in their knowledge of their rights and what concerns the reasonable steps in the protection of those rights. A study of twenty thousand petitions filed with different bodies of state power showed that 57.8% of these petitions were addressed to bodies or officials who did not have the authority to deal with that particular issue. The traditions of our communist past are not the only reason: the new realities have not yet been adequately understood and realized.

Second, the legal system of human rights protection as such is not a comprehensive one and is not trusted so that people would try to seek justice in the court, rather than in the beaurocratic system.

The settlement of these two problems is an urgent necessity for a newly independent state of Armenia and requires a comprehensive and structural approach. It is my firm belief that the

establishment of reliable guarantees of human rights protection is unimaginable without the system of constitutional justice.

Allow me to explain/illustrate my words with one concrete example. Article 38 of the Constitution of the RA says, ”Everyone is entitled to defend in court the rights and freedoms engraved in the Constitution and the laws.” According to Art. 100, par.1, the CC has the power to decide whether laws and resolutions, decrees and orders of the bodies of state power are in conformity with the Constitution. and, according to the Constitution of the RA the CC is a part of the judiciary.

In reality, however, the citizens do not have the possibility to exercise the afore-cited right of theirs when there is a problem concerning their rights and the conformity of a legal act with the Constitution.

The third recommendation I propose for the improvement of the COM is the amendment of the Constitution of Armenia. The texts of constitutions usually do not refer to the principle of balance of powers. The principle is rather realized by the limited overlapping among the competences of the power branches, and in the peculiar regulation of them. This balance results in the mutual control of the organs of the different powers. An important aspect of the question is the relation between sovereignty and the power branches. According to most of the constitutions all powers emanate from the People or Nation. They are exercised in a manner established by the Constitution.

Constitutional oversight in the field of human rights protection is carried out in Armenia in an indirect way, not in a systematic manner. The CC carries out this authority in relation to its control, supervision of laws and international agreements. This is obviously not sufficient for a newly independent country, which has chosen the path to democracy. The problem is even more

complicated as virtually a deadlock situation has emerged: this important function is not carried out and citizens are confused and at a loss.

What would I amend or add in the Constitution if I have an opportunity to do it? The institutional solution of the balance of powers was realized in the American Constitution in an institutional solution known as "checks and balances". Only when this balance results in the mutual control of the organs of the different powers, the Constitutional review can have influence the balance and stability of the State Power, establishment and deepening of Democracy, enforcement of the Rule of Law.

CONCLUSIONS

Judicial review is the last word, logically and historically speaking, in the attempt of a free people to establish and maintain a non-autocratic government. It is the culmination of the essentials of Revolutionary thinking, and, indeed, of the thinking of those who a hundred years and more before the Revolution called for a government of laws and not of men. Judicial review was the natural outgrowth of ideas that were common property when the Constitution of United States was established.

A comparative analysis of constitutional review enables us, firstly, to uncover the common and the necessary, without which these systems cannot exist as such; secondly, to reveal the features and characteristic details of constitutional review in some countries that can be instructive and useful for others; thirdly, to be particularly noted is the emerging need for generalizing the lessons of historic development of the system of constitutional review as a guarantor of ensuring the sustainable character of societal development.

The basic conclusions and methodological approaches on improving the system of constitutional review and constitutional control, consolidating the place and role of the CC within the system of state authority consists in the following. Early in the 20th century objective prerequisites emerged for the transition to a qualitatively new system of judicial constitutional review. This was in the first place relevant to the active reformation of public relations, up to systemic transformation, as well as to the origination in a number of countries of extreme situations in the administration of society. The problem of ensuring the constitutionality of regulatory acts does not any more exclusively or predominantly amounts to the issue of human right protection.

The problem of establishing intrastate mechanisms of human rights protection, according to Sartori (1994), was raised to a qualitatively new level, with the specialized institutes of constitutional review attaining a special place. The assumption is that a natural and inalienable virtue is the source of human and civil rights and freedoms, while the people and the state when exercising power are restricted by these rights and freedoms as by a directly acting law. In transitory and extreme situations the priority is given to the prevention of negative consequences rather than to overpowering them. In this regard the deployment of the system of preventive review is becoming tangible, which is incompatible with the American model of constitutional review.

The system of specialized constitutional review, particularly for countries in the transitional period, creates great potential for legal resolution of political differences. Efficiency of constitutional review is not determined by the number of submitted appeals or cases to be considered. The main criterion for evaluating the activities of the institutes of constitutional review consists in how much their activities actually affect social processes, the retention of social balance, the sustainable development and the deepening of democratic processes in the society.

Examining the constitutionality of laws and providing the supremacy of the Constitution using the new systems of constitutional review has also modified the methods of approach, has moved the assignment from the law-enforcement dimension to the one of public administration. The establishment of specialized institutes of constitutional review has enabled us not only to adopt a complex approach to ensuring the constitutionality of regulatory acts at the stage of their drafting, adoption and enactment, but also to establish widespread democracy by a substantial expansion of the subjects of review. The specialized system of constitutional courts has

substantially consolidated the effect of constitutional review upon the betterment of legislative work up to a further improvement of the constitutional decisions.

More possibilities emerged for retaining the balance of separation of powers, successful application of the mechanism of checks and balances. In many countries the bodies of constitutional review started to be endowed with the powers not so characteristic for their functional role, which has a negative effect upon the efficiency of their work. A fruitful and coherent work of the bodies of judicial constitutional review can be expected when a complex approach is adopted with regard to the establishment of this system, an integral system of powers is clearly defined and fixed in the Constitution, and when genuine prerequisites are formed for its implementation.

Armenia has significant resources for a substantial improvement of the system of constitutional review. This is possible to implement both on the basis of the acting Constitution, and within the framework of constitutional reforms, with regard to the guidelines suggested by the respondent. I would like to mention the specific importance of these circumstances and draw the conclusion that a state, which has chosen the path to democracy, cannot bypass them.

REFERENCES

Հարությունյան, Գ.Գ., Վ.Վ. Ստեփանյան, Վ.Հ. Հովհաննիսյան, (1997) ՍԱՀՄԱՆԱԴՐԱԿԱՆ ՎԵՐԱՀՍԿՈՂՈՒԹՅՈՒՆ, Ուսումնական Ձեռնարկ Բուհերի Ուսանողների Համար, ՆԺԱՐ Հրատարակչություն, Երեվան

———————. (1997), ՍԱՀՄԱՆԱԴՐԱԿԱՆ ՎԵՐԱՀՍԿՈՂՈՒԹՅՈՒՆ, Համեմատական Վերլուծություն, ՆԺԱՐ Հրատարակչություն, Երեվան

Arthur, John. (1995) WORDS THAT BIND: Judicial Review and the Grounds of Modern Constitutional Theory. Colorado: Western Press Inc.

Bell, John S. (1992) French Constitutional Law. New York: Oxford University Press, Inc.

Beardsley, John. (1975) Constitutional Review in France. New York: Oxford University Press

Constitution of the Portuguese Republic. Third Revision, 1992

Constitution of the Republic of Armenia. Adopted in July 5, 1995

Constitutional Court of Armenia. Law on the Constitutional Court of the Republic of Armenia December 9, 1997

Constitutional Court of Armenia. Europen Commission for Democracy Through Law of the Council of Europe. October 1997

Consel Constitutionel of the French Republic. Law on the Consel Constitutionel of the Fifth Republic on 4 October 1958

_____ . Decree on the Constitutional Council. November 1958

Constitutional Court of Germany. Constitutional Court Act. March, 1951

Constitutional Court of Hungary. Law on the Constitutional Court of the Republic of Hungary. January 1990

Constitutional Court of Italy. Organization and Proceedings of the Constitutional Court Act. March, 1953

Constitutional Court of Slovenia. Law on the Constitutional Court of the Republic of Slovenia. February 1964

Elster, John, and Rune Slagstad. (eds.) (1998) "Consequences of Constitutional choice: reflection on Tocqueville." In Constitutionalism and Democracy. Cambridge University Press and Unversitetsforlaget Press

Finn, John E. (1991) Constitutions in Crisis: Political Violence and the Rule of Law. New York: Oxford University Press, Inc

Fisher, Louis. (1988) Constitutional Dialogues: Interpretation as Political Process. Princeton, New Jersey: Princeton University Press

General report of the 10th Conference of the European Constitutional Courts. Separation of powers regarding the constitutional court's jurisdiction

Harutyunian, Gagik G. (1996) The Role of the Constitutional Court in Armenia. New York: CIS Law Notes

_____ . *(1997) Constitutional Control: Comparative Analysis. Yerevan*

_____ . (1999) Constitutional Court in the System of the State Power: Comparative Analysis. Yerevan

_____ . (2000) Constitutional Justice in the Republic of Armenia. Yerevan

Harutyunian, Gagik G., and A. Mavcic. (1999) The Constitutional Review and its Development in the Modern World: Comparative Constitutional Analysis. Yerevan - Ljublyana

Herbert, Jacob. (1996) Courts, Law, and Politics in Comparative Perspective. Michigan: Yale University, BookCrafters, Inc.

Khachatryan, Henrik M. (1998) THE FIRST CONSTITUTION OF THE REPUBLIC OF ARMENIA. United Nations High Commissioner Refugees

Litch, Robert A. (ed.) (1993) Is the Supreme Court the Guardian of the Constitution?. Washington, D.C.: American Enterprise Institute for Public Policy Research

Mueller, Dennis C. (1996) Constitutional Democracy. New York: Oxford University Press, Inc.

"National Assembly Chairman Tenders Resignation, But Remains On His Post Due To Unclear Procedure." (2000) Noyan – Tapan Report. September 27. (Webpage: www.noyan-tapan.am/)

Perry, Michael J. (1982) The Constitution, the Courts, and the Human Rights. New Heaven and London:Yale University Press

Sartori, Giovanni. (1994) Comparative Constitutional Engineering: An Inquiry into Structures, Incentives and Outcomes. Washington Square, New York: New York University Press