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Development of the Constitutional Doctrine and the Stability of the Legal Positions of the Constitutional Court (on the example of the Republic of Armenia)

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Constitutional Court, legal positions, change of the legal positions, constitutional values, the principle of "expedient self-restraint"

One of the most important features of the Constitutional Court legal positions is their binding nature. According to Article 61, Part 5 of the RA Law "On the Constitutional Court" the decisions of the Constitutional Court on the merits of the case are mandatory for all the state and local self-government bodies, their officials, as well as for the natural and legal persons in the whole territory of the Republic of Armenia. It is obvious that the mentioned legislative provision itself implies that it concerns the whole decision of the Constitutional Court, hence, the legal positions, expressed both in the operative and in the reasoning parts of the decision. It is not accidental, as on the contemporary stage of the development of constitutional law decisions of the Constitutional Court are no more perceived as a document just determining constitutionality or unconstitutionality of legal acts, but more emphasis is given to the circumstance that the latter are primary means for formation of a uniform constitutional doctrine and development of the Constitution. Therefore, the realization of the mentioned mission requires proper consideration not only to the conclusion on the issue of the constitutionality of the legal act, but also to other legal positions of the Constitutional Court. The last ones are primary means for ensuring the stability and development of the Constitution and in this sense are no less important than the above-mentioned conclusions. Moreover, from the aspect of legal consequences the legal positions are equivalent to them.

As it was mentioned in the decision of the Constitutional Court of the Republic of Armenia DCC-943 of 25 February 2011 the legal positions expressed in

the Court decisions shall ensure more complete and uniform understanding of the RA Constitution and constitutional lawfulness in the law enforcement practice, and shall purposefully direct the law enforcement practice to the understanding and application of the normative acts in accordance with their constitutional legal content. Declaring the challenged act as in conformity with the Constitution, the Constitutional Court often reveals the constitutional legal content of disputed legal norms through their interpretation and in the operative part of the Decision, declares those norms as in conformity with the Constitution or as in conformity with the Constitution within the framework of certain legal positions or partially within the framework of certain legal regulation, thus indicating:

– the legal limits of understanding and application of the given norm;
– the legal limits beyond which the application or interpretation of the given norm shall lead to unconstitutional consequences;
– the constitutional legal criteria, based on which the competent authorities are obliged to provide additional legal regulations for the full application of the norm in question.

Therefore, it is not possible to fully implement the decision of the Constitutional Court without taking the above-mentioned legal positions into consideration, which, in its turn, presupposes that the legal positions expressed not only in the operative, but also in the reasoning part of the Constitutional Court decision are subject to mandatory implementation[1].

In this context we would like to mention also the practice of the Lithuanian Constitutional Court, which stated that its rulings constitute a whole. The resolving part is based on the arguments of the reasoning part. The perception of constitutional provisions and other legal arguments, presented in the reasoning part of the Constitutional Court decision, are binding for bodies, adopting corresponding acts, i.e. for the Seimas, the President of the Republic, the Government in the course of adopting new acts or amending them. So, it is not the resolving part of the ruling of the Constitutional Court that legitimates and legalizes the part of reasoning, but on the contrary – the decision established in the resolving part is a logical and, for this reason, legally inevitable continuation and ending of the constitutional argumentation[2].

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[1] In the context of the presented analysis the regulation, prescribed in Article 61, Part 2.1 of the Law of the Republic of Armenia "On the Constitutional Court", according to which the decisions and resolutions of the Constitutional Court shall be in conformity with the requirements of the principle of legal certainty, gains exceptional importance. We think that the formation of the proper system of the realization of the Constitutional Court legal positions requires necessary attention to the mentioned provision.

[2] See Decision of 12 January 2000, http://www.lrkt.lt/dokumentai/2000/d000112.htm, Ruling of 30 May 2003, http://www.lrkt.lt/dokumentai/2003/r030530.htm, Kūris E. (with others). *Constitutional justice in Lithuania*, Vilnius 2003, pp. 222–225.

The Constitutional Court of the Russian Federation has also turned to the binding force of legal positions several times, defining that the legal positions of the Constitutional Court are binding and apply directly. They are mandatory for all representative, executive and judicial, as well as law enforcement bodies. Moreover, the Court stated that it is impermissible for the legislator to overcome not only the Constitutional Court decisions, but also its legal positions. The norms, reproducing the provisions of normative acts challenged at the RF Constitutional Court, can be interpreted only on the basis of the legal positions formed by the Court[3].

In this context the issue raises whether the Constitutional Court legal positions are binding also for the Court itself.

Undoubtedly, one of the main conclusions of the presented analysis is the following: the mentioned legal positions are mandatory for all the state and local self-government bodies, their officials, as well as for the natural and legal persons in the whole territory of the Republic of Armenia.

This circumstance leads most of the authors to a conclusion that the noted binding force concerns also the Constitutional Court itself[4]. However, there is also another viewpoint in legal literature, according to which the mentioned rule concerning the mandatory force has one exception in the sense of its scope of application, that is the Constitutional Court, as the latter is endowed with opportunity of changing the principles prescribed in its case-law[5].

Regarding the situation in the Republic of Armenia concerning the discussed issue it should be mentioned that also in our perception the body, administering constitutional justice, is bound by its legal positions. Other situation can lead to the distortion of such values, underlying the state governed by rule of law, as the predictability of the Constitutional Court activities, the continuity of its practice, abidance by the principle of legal certainty, etc. This is the reason that in the course of its activities the RA Constitutional Court adheres to its previously expressed legal positions, regularly recalling them in the decisions[6]. But

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3 See В.А. Кряжков, О. Н. Кряжкова, *Правовые позиции Конституционного суда РФ в его интерпретации*, «Государство и право» 2005, № 11, p. 13.

4 See М.Н. Марченко, *Источники права*, Москва 2008, p. 414, В. Кампо. *Правовые позиции Конституционного суда Украины как необходимый элемент обеспечения судебно-правовой реформы,* «Конституционное правосудие: Вестник Конференции органов конституционного контроля стран молодой демократии» 1(47) 2010, p. 27; E. Ku'ris *Constitutional Law as Jurisprudential Law – the Lithuanian Experience, with Special Reference to Human Rights*, «Конституционное правосудие: Вестник Конференции органов конституционного контроля стран молодой демократии» 1(51) 2011, p. 111.

5 See D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London 1997, p. 54.

6 See, for example, the decisions of the Constitutional Court of the Republic of Armenia DCC-754 of 27 May 2008, DCC-852 of 19 January 2010, DCC-943 of 25 February 2011, DCC-1027 of 5 May 2012, etc.

the above-mentioned doesn't presuppose that the noted legal positions are, by essence, absolutely unchangeable.

It is obvious that the formation of the constitutional doctrine by the Constitutional Court is not a single-step process, but a process, being fulfilled permanently and gradually[7]. Therefore, the latter isn't a petrified phenomenon and can be changed along with the development of the social relations. Not by chance is the Constitutional Court endowed with such an opportunity in many states, such as, for instance, the Russian Federation, Germany, Lithuania, Hungary, etc.[8] The Lithuanian Constitutional Court even expressed legal position concerning the discussed issue, stating that another interpretation would imply inter alia the fact the Constitutional Court does not administer constitutional justice and guarantee the supremacy of the Constitution[9].

It is just important for the Constitutional Court to use the mentioned opportunity, taking as a basis not the unlimited discretion of the discussed body, but a concrete constitutional necessity, that is the change in the corresponding constitutional norm or its perception. In other words, the main key for the effective solution of the discussed issue is finding balance between the continuity and predictability of the practice of the Constitutional Court and the values, underlying the development of the constitutional doctrine, in each concrete situation, accompanied with the observance of the principle of "expedient self-restraint" by the Constitutional Court.

In the mentioned context the regulation prescribed in Article 68, Part 14 of the RA Law "On the Constitutional Court" is worth mentioning, which defines a pos-

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7 In this sense the legal position of the Lithuanian Constitutional Court is worth mentioning, according to which the official constitutional doctrine is not formulated all «at once» on any issue of the constitutional legal regulation, but «case after case» (see Ruling No. 33/03 of the Constitutional Court of the Republic of Lithuania of 28 March 2006, http://www.lrkt.lt/dokumentai/2006/r060328.htm). This is the reason that the viewpoint, according to which the stability of the legal positions of the Constitutional Court doesn't mean that they can't be concretized, clarified or changed along with the changes in the Constitution and the laws, as well as in the social and public life, is widespread in legal literature (see, for example, Н. Витрук, *Конституционное правосудие,* Москва 2005, p. 119; Н. Бондарь, *Судебный конституционализм в России,* Москва 2011, p. 130; В. Зорькин, *Современный мир, право и Конституция*, Москва 2010, p. 167).

8 See В. Зорькин, *Принцип разделения властей в деятельности Конституционного суда Российской Федерации*, «Конституционное правосудие: Вестник Конференции органов конституционного контроля стран молодой демократии» Ереван, 2(40)–3(41) 2008, pp. 34–35; D.P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London 1997, p. 54; Ruling No. 33/03 of the Constitutional Court of the Republic of Lithuania of 28 March 2006, http://www.lrkt.lt/dokumentai/2006/r060328.htm.

9 See Ruling No. 33/03 of the Constitutional Court of the Republic of Lithuania of 28 March 2006, http://www.lrkt.lt/dokumentai/2006/r060328.htm.

sibility for the Constitutional Court to review any of the decisions on the merits of the case mentioned in Part 1 of this Article within 7 years after the ruling of the noted decision if: a) the provision of the Constitution applied for the case is changed, b) a new understanding of the provision of the Constitution applied for the case has emerged, which may be a basis for a differing decision on the same case and if the issue has a principle constitutional legal significance.

Some authors consider that in this case one should concern the review of not the Constitutional Court decisions, but the legal positions of the latter, as the review of the Constitutional Court decision leads to a change in the legislative and law enforcement policy, formed on the basis of the previously made decision, while the review of the legal position of the Constitutional Court means that the Constitutional Court changes its previously formed position and, conditioned by essential changes in social life, reviews the perception of the constitutional norm in the new case. The change of the legal position of the Constitutional Court can't have a retrospective significance and leads to a change in the legislative and law enforcement policy, formed on the basis of the previously made decision[10].

It is obvious that the formulation "review of the decision", prescribed in the RA Law "On the Constitutional Court", concerns also legal positions. At the same time we consider that the aim of the discussed provision is to define regulations concerning the review not of the legal positions of the Constitutional Court, but of the final conclusion regarding the constitutionality or unconstitutionality of the act, and it concerns legal positions so far as their change is necessary for the review of the discussed conclusion. This is testified also by the corresponding judicial practice of the states, where there is an opportunity to review the Constitutional Court decisions, as in the frames of the latter (according to such provisions) the final conclusion of the Court is reconsidered on the basis of the change of the previous legal position[11].

While the international practice of constitutional justice shows that besides the above-mentioned, there may be situations, when the necessity of the change of the legal position rises not for the review of a previously made concrete decision and for the change of the final conclusion, but for making a decision in a new case. It is obvious that the latter, in comparison with the review of the previously

[10] See Ա. Ղամբարյան, *ՀՀ սահմանադրական դատարանի որոշումների վերանայման թույլատրելիությունը*, «Իրավագիտության հարցեր» N 1-2, Երևան 2009, p. 50.

[11] See, for example, the resolution N 3-56/97 of the Constitutional Court of the Republic of Belarus of 15 April 1997 on the review of the resolution of the Constitutional Court of the Republic of Belarus of 4 November 1996, http://www.lawbelarus.com/repub2008/sub39/text39295.htm, the decision № 7 of the Constitutional Council of the Republic of Kazakhstan of 24 September 2008 on reconsideration of the decisions № 22/2 of 26 December 2000, № 16-17/3 of 13 December 2001, № 2 of 18 May 2006 of the Constitutional Council of the Republic of Kazakhstan, http://www.constcouncil.kz/rus/resheniya/?cid=11&rid=448.

made final conclusion, concerns not the "destiny" of the already resolved case, but is necessary for the development of the constitutional doctrine and for making decisions in new cases, hence, has a principal constitutional-legal significance in any case[12].

Therefore, in such situations the change of the legal position can't be conditioned on such preconditions, as the concrete type of the previous decision or the time frame of its adoption. While the regulation, prescribed in Article 68, Part 14 of the RA Law "On the Constitutional Court", concerns only the cases, when at least 7 years have passed after the ruling of the decision on the merits of the case and the appeal doesn't refer to the legal acts (their certain provisions) that were found unconstitutional and invalid by the decision of the Constitutional Court.

Therefore, we consider that the main goal of the mentioned provision, prescribed in the RA Law "On the Constitutional Court", is to define regulations concerning the review of the final conclusion regarding the constitutionality or unconstitutionality of the act and it doesn't concern the change of the legal positions of the Constitutional Court in the above-mentioned other situations, which don't have the mentioned goal orientation. The opposite approach will form a petrified system of the practice of the Constitutional Court and the constitutional doctrine, endangering the whole legal security of the state.

Summarizing the above-mentioned it should be noted that the legal positions of the Constitutional Court are mandatory for all the state and local self-government bodies, their officials, as well as for the natural and legal persons in the whole territory of the Republic of Armenia. Moreover, not only the noted subjects, but also the Constitutional Court itself is bound by them, though these legal positions can be changed in case of existence of corresponding bases. In any case, while making the mentioned changes one should take into account the main key for the effective solution of the discussed issue – finding balance between the continuity and predictability of the practice of the Constitutional Court and the values, underlying the development of the constitutional doctrine, in each concrete situation, accompanied with the observance of the principle of "expedient self-restraint" by the Constitutional Court.

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[12] In this sense the viewpoint, expressed in legal literature, is worth mentioning, according to which the operative part of the Constitutional Court decision refers to the past. The function of the latter is to withdraw the act, contradicting the Constitution, from the legal turnover, while the reasoning part of the decision refers to the future and fulfills not only the function of justifying the adopted decision, but also a preventive function, a function of guiding the legislator to certain constitutional criteria, from which it can't deviate (see Э. Курис, *Конституционное правосудие. Вопросы теории и практики*, Ереван 2004, p. 37).

Abstract

The article considers the issues concerning the binding nature of the legal positions of the Constitutional Court. The author conludes that the legal positions of the Constitutional Court are mandatory for all the state and local self-government bodies, their officials, as well as for the natural and legal persons in the whole territory of the Republic of Armenia. Moreover, not only the noted subjects, but also the Constitutional Court itself is bound by them, though these legal positions can be changed in case of existence of corresponding bases. In any case, while making the mentioned changes one should take into account the main key for the effective solution of the discussed issue – finding balance between the continuity and predictability of the practice of the Constitutional Court and the values, underlying the development of the constitutional doctrine, in each concrete situation, accompanied with the observance of the principle of "expedient self-restraint" by the Constitutional Court.

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