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The present publication includes reports presented during the Conference devoted to the 80th Anniversary of the Law Department of Yerevan State University. Articles relate to different fields of jurisprudence and represent the main line of legal thought in Armenia. Authors of the articles are the members of the faculty of the Law Department of Yerevan State University. The present volume can be useful for legal scholars, legal professionals, Ph.D. students, as well as others, who are interested in different legal issues relating to the legal system of Armenia.

## Contents

Artur Vagharshyan	
ISSUES OF LEGAL REGULATION OF FILLING THE GAPS OF POSITIVE LAW IN THE REPUBLIC OF ARMENIA .....	9
Taron Simonyan	
NASH EQUILIBRIUM AS A MEAN FOR DETERMINATION OF RULES OF LAW (FOR SOVEREIGN ACTORS).....	17
Alvard Aleksanyan	
YEZNIK KOGHBATSI'S LEGAL VIEWS .....	25
Sergey Kocharyan	
PRINCIPLE OF LEGAL LEGITIMACY IN THE PHASE SYSTEM OF LEGAL REGULATION MECHANISM.....	34
Gevorg Danielyan	
CURRENT ISSUES OF PUBLIC SERVICE ON THE BACKGROUND OF ADMINISTRATIVE IMPROVEMENTS.....	41
Norik Ayvazyan	
CERTAIN ASPECTS OF THE IMPROVEMENT OF THE ELECTORAL CODE OF THE REPUBLIC OF ARMENIA .....	53
Gagik Harutyunyan	
ROLE AND PLACE OF THE RULE OF LAW IN THE SOCIAL BEHAVIOUR OF AN INDIVIDUAL AND A CITIZEN .....	68
Vardan Ayvazyan	
METHODOLOGICAL ASPECTS OF EMPHASIZING THE ESSENCE OF LAW IN THE LAW-FORMATION PROCESS .....	76
Anahit Manasyan	
BINDING NATURE OF THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA: FROM THEORY TO PRACTICE .....	91
Gnel Mughnetsyan	

CERTAIN CONSIDERATIONS ON INSTITUTION OF ADMINISTRATIVE CLAIMS AND THE IMPLEMENTATION THEREOF.....	111
Edgar Shatiryan	
THE ISSUE OF IMPROVEMENT OF SOME STRUCTURES OF LEGAL PROTECTION OF INDIVIDUAL'S HONOR, DIGNITY AND BUSINESS REPUTATION IN THE REPUBLIC OF ARMENIA.....	124
Rustam Makhmudyan	
MAIN THEORETICAL AND PRACTICAL ISSUES OF STATE SERVICE IN THE STAFF OF HUMAN RIGHTS DEFENDER (OMBUDSMAN) OF THE REPUBLIC OF ARMENIA .....	140
Vahram Avetisyan	
MODERN ISSUES OF CORPORATE LEGISLATION AND THE WAYS OF THEIR SOLUTION IN THE REPUBLIC OF ARMENIA.....	150
Armen Haykyants	
ISSUES OF CODIFICATION AND INSTITUTIONAL DEVELOPMENT OF CONFLICT OF LAWS IN THE REPUBLIC OF ARMENIA LEGISLATION .....	174
Tatevik Davtyan	
IT IS TIME TO MAKE AMENDMENTS IN THE HAGUE INTERCOUNTRY ADOPTION CONVENTION: THE NEW ACCREDITATION MECHANISM FOR SUPERVISING AND MONITORING ADOPTION AGENCIES WOULD ENSURE THE QUALITY OF ADOPTION AGENCIES AND GUARANTEE SUCCESSFUL ADOPTIONS.....	187
Ara Gabuzyan	
CRIMINAL VICTIMIZATION IN THE REPUBLIC OF ARMENIA (ACCORDING TO THE OFFICIAL STATISTICS).....	214
Anna Margaryan	
JUVENILE DELINQUENCY IN ARMENIA .....	229

Sergey Meghryan	
BASES FOR EXEMPTION FROM PROOF IN CIVIL PROCEDURE.....	244
Aida Iskoyan	
THE ISSUE OF LOCUS STANDI OF NON GOVERNMENTAL ORGANIZATIONS IN THE SPHERE OF ENVIRONMENTAL PROTECTION (CONSTITUTIONAL-LEGAL ANALYSIS).....	259
Vahe Hovhannisyan	
PARTICULARITIES OF THE OPERATION PRINCIPLE OF COMPETITION IN THE PHASE OF APPEALS .....	271
Gevorg Petrosyan	
PARTICULARITIES OF DISTRIBUTING THE OBLIGATION OF PROVING OF LABOR DISPUTES IN CIVIL PROCEDURE.....	285
Gor Movsisian	
BOUNDARIES TO APPROVE THE INDISPUTABILITY OF THE CLAIMS IN BANKRUPTCY PROCEEDINGS .....	296
Gagik Ghazinyan, Hrayr Ghukasyan	
MODERN CHALLENGES OF CRIMINAL JUSTICE IN THE REPUBLIC OF ARMENIA .....	308
Samvel Dilbandyan	
ROLE OF JUDICIAL SUPERVISION OVER THE PRE-TRIAL PROCEEDINGS IN ENSURING PERSON’S RIGHTS AND FREEDOMS.....	321
Davit Melkonyan	
CONCEPT OF THE RULE OF LAW IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS .....	339
Vahe Yengibaryan	
BASICS AND IMPROVEMENT PERSPECTIVES OF CRIMINALISTICS AND THEORY OF FORENSIC SCIENCE IN THE REPUBLIC OF ARMENIA .....	350
Artur Chakhoyan	

ORIGIN, DEVELOPMENT, CURRENT STATE AND PERSPECTIVES FOR DEVELOPMENT OF CRIMINALISTICS AND FORENSIC EXAMINATION IN ARMENIA .....	363
Sergey Marabyan	
BASIS AND SUBJECT OF CIVIL LAWSUIT IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF ARMENIA (SCIENTIFIC-PRACTICAL ANALYSIS).....	383
Gevorg Baghdasaryan	
LEGAL REGULATION OF THE RECONCILIATION PROCEEDINGS IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF ARMENIA .....	399
Vigen Kocharyan	
DEVELOPMENT AND CONTEMPORARY UNDERSTANDING OF THE PRINCIPLE OF SELF-DETERMINATION OF PEOPLES.....	409
Karen Gevorgyan	
CONCEPT OF STATE SOVEREIGNTY: MODERN ATTITUDES .	431
Artur Ghazinyan	
IMPLEMENTATION AND MEASUREMENT ISSUES FOR THE PRECONDITIONS OF THE RULE OF LAW IN THE EU ACCESSION PROCESS .....	449
Arman Sargsyan	
LISBON LEGAL REGIME OF CONCLUDING INTERNATIONAL AGREEMENTS BY THE EUROPEAN UNION .....	464
Gor Torosyan	
JUDICIAL APPROXIMATION PROBLEMS OF THE RA LEGISLATION IN THE CONTEXT OF EUROPEAN INTEGRATION .....	474

## FOREWORD

The materials published in the present volume are the proceedings of the conference devoted to the 80<sup>th</sup> anniversary of the Law Department of Yerevan State University. Yerevan State University Law Department represents the core legal doctrine of the country. The faculty is diverse, representing all areas of the legal discourse: Theory of Law, Constitutional Law, Administrative Law, Environmental Law, Criminal law, Criminal procedure, civil law, civil procedure, international law, EU law, etc.

The legal culture and doctrine in Armenia is influenced by the continental legal tradition. However, since independence in 1991, Armenian legal system and doctrine has been developing intensively, also adopting legal traditions and concepts from common law system. The Constitution of Armenia has been adopted in 1995, which has been amended in 2005. Under the provisions of the Constitution, Armenia is a legal state, where the power is exercised based on the principle of separation powers and through democratic elections. The membership of the Republic of Armenia in different international organizations, such as the United Nations, Council of Europe, Organization of Security and Cooperation in Europe, etc. has expedited the development of the legal system of the country. The judicial and legal reforms are continuously implemented, to bring the legal and judicial system of the country in compliance with international commitments, assumed under different international treaties.

In particular, the Armenian legal system is being heavily influenced by the jurisprudence of the European Court of Human Rights. The Council of Europe Venice Commission of Democracy Through Law has a decisive role in the content of the constitutional law and relating laws and statute on different aspects. Armenia also implements the recommendations of the treaty bodies of the United Nations.

The increased phase of legal, judicial and governance reforms require immediate reaction in the academia, in order to discuss the

issues and find effective solutions. Thus, one of the main objectives of the research should be the strong link with the real life. A part of faculty members also are attorneys, law professionals, governmental official, which helps to create this strong link between the academia and practice.

The authors discuss contemporary issues of the Armenian legal system. The range of issues discussed includes problems of theory of law and legal history, constitutional law, criminal law, criminal procedure, civil law and procedure, international law, EU Law. The idea of publishing the present volume in English is to represent the Armenian legal doctrine to the foreign legal scholars and practitioners. It may foster international links between legal scholars and professionals internationally, for continuing legal research in a comparative and broader perspective. Many views, positions expressed by the authors may be interesting for a foreign reader, since the same legal problem may exist in many countries, however the method of resolving may vary from country to country.

The Law Department of Yerevan State University expresses its deep gratitude and appreciation to Mr. Arkady Hambardzumyan, Member of the National Assembly of Armenia, for supporting the publication of the present volume.

## **ISSUES OF LEGAL REGULATION OF FILLING THE GAPS OF POSITIVE LAW IN THE REPUBLIC OF ARMENIA**

**Artur Vagharshyan<sup>1</sup>**

Positive law is realized in different ways in the Romance-Germanic legal traditions. As a result, law is realized in the behavior of actors of social relations, and the legal regulation reaches its objective. The positive legal regulation and the special form of positive legal norms – the implementation of law – have an important role in that process. The implementation of law is done strictly within the framework of and in accordance with the substantial and procedural positive norms. It means that the subject/actor of the law implementation finds the resolutions “not from the air”, but implements the specific norms of positive law upon the specific social relations or fact by adverting them. But sometimes the subject/agent of law implementation does not find a norm for the particular case. A problem arises, which is called a gap of law (or of legal regulation) in the science of law.

It is natural that the gaps of the positive law must not exclude the further activity of the legal regulation mechanism. The legalization of law must continue, and the legal regulation must achieve its goal. A question can arise here: how? While answering this question, we will explain` the concept of “gap of law” or “gap of legal regulation”.

When dealing with gap of law, one usually understands the whole or partial absence of legal regulation in such areas of social life which objectively demand regulation<sup>2</sup>. This definition shows that the concept of “gap of law” concerns only the positive legal

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<sup>2</sup> General Theory of Law. A.S. Pigolkin (ed.), MGTU Publishing, Moscow, 1996, P. 276 [Общая теория права. Под ред. А.С. Пиголкина. М., Изд-во МГТУ им. Н.Э. Баумана, 1996, С. 276].

regulation. The law/right differentiated from law/positive law has no gap or cannot be in gap. That phenomenon can be non-realized in a whole or in all spheres for different reasons. In this regard one must agree with V.V. Lazarev's opinion: "[o]ne can speak about gaps only in regard of the positive law. Natural law cannot be open in its philosophical sense, it is without any gaps.<sup>3</sup>" So the concept of "gap of law" has positive-legal sense, it concerns only positive law or positive-legal regulation. Therefore, the ideas of those authors, who form that concept as "gap of legislation" and not gap of law, are well founded<sup>4</sup>. But as the concept of "legislation" creates some fields for disputes in the legal science, in our opinion, it will be better to use more capacious concept – "the gap of positive law".

The gap of positive law is a legal issue, and the concept reflecting that issue has a legal meaning. In V.I. Leushin's view: "[a] gap of legislation is the absence of a necessary concrete norm for regulation of a relation that is in the sphere of legal regulation<sup>5</sup>." This means that there is a gap in positive law only in the case when a certain relation is in the sphere of legal regulation and it must be regulated by legal means, but the concrete resolution for that relation is not covered by a positive legal source. Therefore, in its legal meaning, it can be regarded as a case of a gap when a certain social relation, while being all in the space of legal regulation, is not regulated by a specific legal norm as a result of different reasons. For this reason there is no legal gap in its legal meaning, when some spheres of relations are not covered by legal regulation. For example, as there are no norms in laws on love and friendly relations, we cannot insist that there is a gap in positive law as those relations are not in the space of legal regulation. So, the gap of positive law is the absence (whole or partial) of a concrete normative provision for the factual circumstances that are in the sphere of legal regulation. The

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<sup>3</sup> Theory of State and Law. G.N. Manov (ed.), Moscow, BEK 1995, P. 211. [Теория государства и права. Под ред. Г.Н. Манова. М., Изд. БЕК, 1995, С. 211].

<sup>4</sup> Theory of State and Law. V.M. Korelsky and V.D. Perevalov (eds.), Moscow, 1997, P. 390. [Теория государства и права. Под ред. В.М. Корельского и В.Д. Перевалова. М., Издательская группа ИНФРА. М-НОРМА, 1997, С. 390].

<sup>5</sup> *Ibid.*, P. 390.

problems of concretizing the essence of law and further realization of law, raised as a result of a gap of positive law, are solved by such ways of filling the gap as eliminating the gap through law-creation and overcoming the gap through analogy. The general way to fill the gap is law-creation, which means that the official state or local self-government bodies, who have such capacity, adopt the missing legal provision, order, norm, and implement it. The gap can be eliminated through law-creation. But the legal analogy, as another way of overcoming the gap of positive law, has also been developed in the theory of law and accepted by the legislation. Legal analogy does not eliminate the gap. It allows only overcoming the gap of positive law when dealing with a specific case. The best way to fill the gap of positive law is to eliminate it through law creation. However, one of the requirements of law implementation is operational efficiency. The elimination of a gap by law-creation, being a slow procedure, deprives the law implementation of its effectiveness. And the opportunity to overcome the gap of law through legal analogy defined by laws is to insure the efficiency and effectiveness of law-implementation. As a temporary measure of overcoming gaps of positive law, the legal analogy can be divided into two types: analogy of *lex* (analogy of statute) and analogy of *jus* (analogy of law). The analogy of *lex* can be seen when the case is solved on the ground of the nearest norm in the sense of the content: it means, law is implemented upon cases which are not regulated directly by a norm. If there is no such norm in case of a gap, the analogy of *jus* is applied. In this case the principles and common provisions of pan-legal, or a legal branch, or a legal institute are applied on the pending case. The pan-legal, branch or institutional principles are developed and founded in the general theory of law, the theory of positive law. They are partially defined in legislation and partially not. The contents of some of the defined ones are presented, while the others are not. This means that the theory of law (doctrine) is recognized as a source of the acting law in the sphere of implementing the analogy of law. For example, the RA Civil Code only numbers the principles of civil law without stipulating their content. Therefore, the science

of civil law becomes a source of regulation for civil relations. The implementation spheres of analogy are under disputes in the theory of law. There are some theorists, who find the analogy is allowed everywhere if there is no special prohibition<sup>6</sup>. Other authors find the gaps of positive law to be filled by analogy only if it is directly allowed by law<sup>7</sup>. We find the last view right: filling the gaps of law through analogy can be done only in such spheres where a law/statute directly allows. And this position has a constitutional background. Filling the gaps of law through analogy is done in the process of law-implementation. The last one is a type of official activity. The second part of Article 5 of the RA Constitution provides: “[s]tate and local self-government bodies and public officials are competent to perform only such acts for which they are authorized under the Constitution or laws.” Therefore, if the possibility of applying analogy is not specifically defined by law, then it is prohibited. This logic shows that the applicability of analogy must be defined by law, based on special norms or principles of branches or institutions of laws (other normative legal acts), and not upon subjective evaluations, opinions, or upon discretion of state officials.

The institute of analogy is regulated by the legislation of the Republic of Armenia. But there are some shortcomings in that regulation. Article 88(1) of the Law of the Republic Armenia “On legal acts” (Application of the norms of legal acts by analogy) defines: [w]here the law or other legal acts do not expressly regulate the emerged relations, legal acts regulating similar relations may be applied to such relations only in cases provided for by law (analogy). This article has no efficiency. This article must not be defined in the Law “On legal acts“, as it points a specific law which must define the implementation of analogy. Therefore, analogy is a subject of

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<sup>6</sup> General Theory of Law and State. V.V. Lazarev (ed.), Moscow, 1994, P. 176. [Общая теория права и государства. Под ред. В.В. Лазарева. - М.: Изд-во Юрист, 1994, С. 176].

<sup>7</sup> Комаров С.А., General Theory of State and Law. Moscow, 1997, P. 317. [Комаров С.А., Общая теория государств и права. М., Юрайт, 1997, С. 317].

regulation of that particular law. Besides this, by using the term – “legal act”, the article allows for the possibility of analogy of an individual legal act, which, in its sense, is nonsense.

Article 88(2) of the RA Law “On legal acts” defines that analogy may not be applied where it restricts the rights, freedoms of natural or legal persons or provides for a new obligation or liability for them, or makes stricter the coercive measures applied to natural persons and the procedure for their application, the procedure for paying taxes, duties and other mandatory payments by natural or legal persons, the conditions and procedure for exercising control and supervision over the activities of natural and legal persons. Bearing in mind the position of democracy and, of course, the verity, the implementation of analogy, in fact, is limited in the above-mentioned spheres. But a collision emerges between the solution given by the Law “On legal acts” and the regulation given by a legal branch. Article 9(3) of the Civil Code defines that the application by analogy of norms restricting civil rights and prescribing liability is not permitted.

It is obvious that legal analogy should not be applied in the fields of criminal law and administrative fees. This approach is coming from the fact that “similar” and “not similar” notions can be different for public officials, and the inferences vary from each other. This can lead to the jeopardy of arbitrariness<sup>8</sup>. Therefore, the application of analogy is inadmissible in the spheres of criminal and administrative responsibility from the legality point of view. Here we find the following rule: “There is no offense without law; thus, there are no punishment and penalty”. This rule is a safeguard for a person’s immunity and sustainability of legal regulation. The law-enforcing body cannot consider the absence of a norm of the legislation as a gap of positive law. This logic is based in the wording of the Article 5(2) of the RA Criminal Code, which prohibits application of analogy. As it concerns the Code on Administrative Offences, one cannot find such a rule there. However, it does not mean that the law enforcement authority can choose to

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<sup>8</sup> Komavrov S.A., *General Theory of State and Law*. Moscow, 1997, P. 315.

apply analogy when discovering any gap in law. The result of solving a case is the termination of that case. The above-mentioned gives us a ground to conclude that a law enforcement authority, when discovering an absence of a norm, must consider it either as legitimate, or as a real gap of law; and the only way to overcome it is through an appropriate norm.

Besides being regulated by the law on “Legal acts”, the analogy has been regulated also by other codes such as the Family Code, Labor Code, Civil Procedure Code, and the Civil Code. Some shortfalls can be found in each of them, and these need to be rectified in accordance with the legislative procedure. Thus, Article 5 of the RA Family Code, when defining the applicability of family and civil legislation in the procedure of analogy, uses the term “regulating identical [հույնսպիսի] relations”, which is wrong. The right term should be “similar [համանման]”. Besides this, while defining the analogy of law as through “gap of legislation”, it would be better to name it as analogy of the family legislation, but not analogy of law.

Article 10 of the RA Labor Code has used a more appropriate term than the Family Code – “similar”. But there is an essential collision between these two codes. Thus, the Labor Code defines that where the labor law is not directly regulated by the law, the norms of labor legislation (law analogy) regulating similar relationships are applied if it does not contradict their essence. One can conclude from this that a gap of law can be filled with norms of legislation. A question arises whether a gap of other regulatory legal acts (except law) can be filled with norms of the labor legislation, or not? The principle of legality gives directly a negative answer, which is not right. This means that the term “analogy of law” in the Labor Code must be renamed as “analogy of legislation”, and its definition must be clarified.

From this point of view, the Family Code has defined a more appropriate position. It has taken the concept of gap of “family legislation” and the opportunity to fill that gap by a “similar norm”. The Labor Code has not defined any hierarchy of sources and means of legal regulation.

There is a completely different definition of analogy given by the Article 10(3) of the RA Civil Procedure Code. One must say that it is irrelevant to have that article there. Anyway, it is apparent from the definition that it has a substantial, but not procedural meaning. This means that it is about applying substantial norms by analogy but not procedural norms. The article gives rise to misunderstandings in a way that a law enforcement authority can decide to apply a procedural norm by analogy. Besides this, here the point is the gap of law and other legal act, which can be filled also with norms of the law regulating similar relations. It means that the Civil Procedure Code sees the application of a norm of a similar law as the only way of filling “a gap of the legislation”. Application of the norms of other normative acts is prohibited. The existence of contradiction between the provisions of analogy of the Labor Code and the Family Code is obvious.

The legislative regulation of analogy given by Article 9 of the RA Civil Code is a better one in this context. The article, first of all, defines the hierarchy of legal sources and means regulating civil relations, where the analogies of *lex* and *jus* are the sixth and seventh. Second, the word “similar” is used here, which is more appropriate. Third, when there is a gap in law, and there is no agreement between the parties, nor there are customary business practices, then a law enforcement authority may apply legislative norms, provided that we understand the term “legislation” as it is defined in the RA Law “On legal acts”. But we have an essential contradiction between the RA Civil Code and the RA Law “On legal acts”. The Civil Code, while speaking about legislation, takes in mind only the integrity of laws containing norms of civil law (Article 1). But Article 4(1) of the Law “On legal acts” defines legislation as the Constitution and the laws of the Republic of Armenia, decrees and executive orders of the RA President, decisions of the RA Government and the decisions of the RA Prime Minister. Besides this, the restricted fields of applying analogy are also contradictory in the Civil Code and the Law “On legal acts”.

The legal analogy is an exceptional measure to fill the gaps of

law. Bearing in mind that fact, a set of requirements and conditions has been developed in the theory of law that ought to ensure its due application<sup>9</sup>. Those requirements and conditions ought to ensure the jus legality during analogy application and not to allow having an arbitrary resolution of a case. Let us try to represent the requirements and conditions for due application of analogy in a systemized way brought to the light by the theorists of law:

a) analogy is applicable if it is directly permitted by law, which is a constitutional requirement;

b) the situation asking for a regulation by analogy must have legal essence and require legal solution;

c) the law enforcement authority must be sure that the particular situation has not been regulated by law or has been regulated partially;

d) while applying norms of law by analogy one must bear in mind that the similarities must be in essential issues, and the difference - in particularity<sup>10</sup>;

e) the situations developed and applied by using analogy must not contradict any of acting commandments of law;

f) the law enforcement authority must provide a well-grounded explanation on causes of applying analogy.

The comparative analysis of the legislation of the Republic of Armenia and doctrinal provisions developed by theory of law for filling gaps in law, shows that the legislative regulation of analogy in the RA Law “On legal acts” and other codes has essential shortcomings, laps and contradictions. Thus, it is required to do a systemized review of the given acts, in the light of the theoretical provisions of legal dogmatics on analogy.

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<sup>9</sup> General Theory of Law and State. V.V. Lazarev (ed.), Moscow, 1994, P. 176; Theory of Law and State. N.I. Matuzov and A.V. Malko, Moscow 1999, pp. 423-424; Theory of Law and State. G.N. Manov (ed.), Moscow 1995, P. 212. [Под ред. Н.И. Матузова и А.В. Малько. М., Юристъ, 1999, С. 423-424; Теория государства и права. Под ред. Г.Н. Манова. М., Изд. БЕК, 1995, С. 212].

<sup>10</sup> Mukhaev R.T. Theory of Law and State. Moscow 2001, P. 398 [Мухаев Р.Т., Теория государства и права. М., Издательство ПРИОР, 2001, С. 398].

## **NASH EQUILIBRIUM AS A MEAN FOR DETERMINATION OF RULES OF LAW (FOR SOVEREIGN ACTORS)**

**Taron Simonyan<sup>1</sup>**

Social behavior and relations, as well as relations of states in international area, are regulated by rules most of which have normative character. The 20th and 21st centuries can be characterized also by the fact that the quantity of legal rules and norms – trying to regulate all the above-mentioned relations and behavior – have increased, sometimes in geometric progression. But there are still some relations that are not regulated by written law or clear customary norms, and in order to regulate those relations one needs to determine rules of law in order to have a particular relation regulated in a due manner. And some questions may arise here: where have those rules and norms come from; what are the sources of such rules; have those rules and norms come from other social norms; are they transformed types of other social norms; how can those rules be determined; what methodology can be used for that determination, etc.?

If it is mostly clear that in the case of domestic affairs and relations a sovereign state provides the norm of law either by the parliament, by the executive power (in Civil Law countries), or by the court (in Common Law countries), the situation is different with respect to international relations, where the main source of international law is the will of states, and the main means, stipulated by the Statute of ICJ, are the forms reflecting that will of states:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;*
- b. international custom, as evidence of a general practice*

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*accepted as law;*

c. *general principles of law recognized by civilized nations.*

The same article provides also the secondary means for the cases when it is unclear where to find the crystallized will of states: “*judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law*”<sup>2</sup>.

In the present research I will concentrate on the issues of determination of rules of international law and a small part of domestic law (mainly in civil law, where the actors are relatively sovereign); both of them will appear in the present research as “law”. I will try to show that a very interesting foundation of the Game theory, the principle or concept of Nash equilibrium, can have a very useful and productive role for the due determination of rules of law, which are difficult to find and apply, and try to make some inferences on the paths of determination of rules of law.

The practice of the past fifty years shows that it is very hard to determine rules of law by only the existing means. We need something more, the missing elements or element, which can provide more opportunities for researchers and practitioners to find and apply the right norm. In this regard Dr. Eyal Benvenisti shows that the existing means for the determination of rules of international law are not enough and offers another vision: the vision on law from the point of the efficiency: “*the doctrine on customary international law is inherently linked to the principle of efficiency. Efficiency justifies the doctrine. Put differently, efficiency is the underlying principle – the grundnorm – of customary international law.*”<sup>3</sup>

This is a very innovative approach in theory of law and especially in international legal studies, and it shows the necessity of changing the paradigms on legal research and legal practice. One can argue that by changing the paradigms we shift our point of view from

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<sup>2</sup> Article 38, 1, Statute of International Court of Justice.

<sup>3</sup> Eyal Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency; The Impact of International Law on International Cooperation, Theoretical Perspectives, Cambridge University Press, 2004, pages 85-116.

legal studies to philosophical studies, but it has already been stipulated by several researchers and scientists that law, as such, is a complex system and cannot be researched otherwise than through its very complex, interconnected essence, using interdisciplinary vision, if one needs to analyze its real role and features in social behavior. And for deep, comprehensive research and analysis in the 21st century, one needs new approach, new paradigm meeting the requirements of the interconnected world where all elements are in a process of synergy, and the whole is much more than just the amount of its elements. This complex and interconnected reality in law can be studied by new methodology, new theory that is the complexity theory, as “[c]omplexity theory provides an analogical foundation for that new paradigm of legal theory.”<sup>4</sup>

By using this vision “[o]ne might accept the presence of invisible hands throughout social life and the value of using complex adaptive systems theory to understand them better, but nonetheless resist applying complex adaptive systems theory to legal systems on the ground that the law is where humans write the rules for other social systems. But this misses two fundamentals. First, the legal system, as a source of rules for regulating other social systems, should take into account how those systems operate. If one wishes to regulate a complex adaptive social system, one ought to think like a complex adaptive social system. Second, law, as in the collection of rules and regulations, is the product of the legal system, a collection of people and institutions. Law, in this sense, is simply an emergent property of the legal system the same way prices are an emergent property of markets.”<sup>5</sup>

When trying to understand new ways of determination rules of law, which can show a broader vision to legal reality, I try to use the benefits of the Game theory (Nash equilibrium) along with the

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<sup>4</sup> Ruhl. J. B., Complexity theory as a paradigm for the dynamical law-and-society system: A wake-up call for legal reductionism and the modern administrative state, Duke Law Journal, volume 45, 1996a, 849-928, page 906.

<sup>5</sup> Ruhl. J. B., Law's Complexity, Georgia State University Law Review Symposium Issue, Forthcoming, FSU College of Law, Public Law Research paper No. 313, 885-911, page 897.

Complexity theory.

First of all, one must say that the Game theory has been a focal point in research and studies of international relations for several decades, but its appearance generally in law and particularly in international law is of a far more recent vintage. As Jens David Ohlin says, “*the best way to understand international law is as a Nash Equilibrium – a focal point that states gravitate toward as they make rational decisions regarding strategy in light of strategies selected by other states.*”<sup>6</sup>

Nash equilibrium is a fundamental concept in the theory of games and the most widely used method of predicting the outcome of a strategic interaction in the social sciences. It is defined as “*a steady state of the play of a strategic game in which each player holds the correct expectation about the other players’ behavior and acts rationally.*”<sup>7</sup>

Mathematician John Forbes Nash in his 1951 article, “*Non-Cooperative Games*”, was to define a mixed strategy Nash Equilibrium for any game with a finite set of actions and prove that at least one (mixed strategy) Nash Equilibrium must exist in such a game. This concept was created in contradiction of Adam Smith’s concept, according to which “*in competition, individual ambition serves the common good*”, and that “*the best result will come from everybody in the group doing what’s best for himself, and the group*”. Whereas John Nash, considering Adam Smith’s concept as incomplete, adds the cooperation as an important tool to get the best outcomes for each participant of the game, creating an equilibrium in social or other behavioral environment.

Since the 1960s social scientists and political leaders have been using the inferences of the Game theory to have a sophisticated matrix for modeling state relations. Thomas Schelling was one to

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<sup>6</sup> Jens David Ohlin, Nash Equilibrium and International Law, Cornell Legal Studies Research Paper No. 11-20, Cornell Law Review, Vol. 96, pages 869-900, 2011, page 869.

<sup>7</sup> Martin J. Osborne & Ariel Rubinstein, A Course in Game Theory 14 (1994).

write a comprehensive research on this issue<sup>8</sup>. The theory is widely spread also in econometrics, political science other social sciences. And by this tool social scientists could not only explain why some states had acted the way they did, but might also predict future behavior under certain conditions<sup>9</sup>.

While game theory offered theorists of international relations a model for explaining state relations, the methodology has had a far more explosive effect among international lawyers. Recent accounts have harnessed alleged lessons learned from game theory in service of a new brand of realism about international law.<sup>10</sup> These skeptical accounts conclude that international law loses its normative force because states that “follow” international law are simply participants in a Prisoner’s Dilemma seeking to achieve self-interested outcomes.<sup>11</sup> States comply with international norms in specific interactions with a particular state when there are good reasons to believe that the other state will reciprocate such compliance.<sup>12</sup>

The new realists proceed to argue that compliance in a Prisoner’s Dilemma is based on reciprocity that is hard to come by. A state will prefer to violate the treaty or customary rule while their competitor adheres to it, though this state of affairs is hard to achieve as all competitors share the exact same preference.<sup>13</sup>

But in any case, most of the researches insist: “[t]he fact that states are self-interested is no way undermines the normativity of international law. In the end, states cooperate by complying with international legal norms and this commitment is necessarily grounded by their self-interest.”<sup>14</sup>

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<sup>8</sup> Thomas C. Shelling, The Strategy of Conflict, 3-20 (2<sup>nd</sup> ed. 1980).

<sup>9</sup> Joel P. Trachtman, The Economic Structure of International Law, 4-5, (2008).

<sup>10</sup> Jack L. Goldsmith & Eric A. Posner, The Limits of International Law (2005); Eric A. Posner, Do States Have a Moral Obligation to Obey International Law?, 55 Stan. L. Rev. 1901 (2003).

<sup>11</sup> Jack L. Goldsmith & Eric A. Posner, *ibid.*, page 184.

<sup>12</sup> Jack L. Goldsmith & Eric A. Posner, *ibid.*, pages 87-88.

<sup>13</sup> Jack L. Goldsmith & Eric A. Posner, *ibid.*, pages 32-35.

<sup>14</sup> Jeans David Ohlin, Nash Equilibrium and International Law, Cornell Legal Studies Research Paper No. 11-20, Cornell Law Review, Vol. 96, pages 869-900, 2011, pages 885.

All this mean that if a sovereign actor, a subject of law, is *rational* and holds the correct expectation about the other actors' behavior, acts rationally, a new equilibrium will come to life, which will have reciprocal agreement of all actors in its essence in a written or non-written form. In this equilibrium all actors will benefit from each other, no one will be defeated in the relation, no one will lose from the "game", and the system of social relations and behavior will get some kind of its state of "*pareto optima*", which can give rise the efficiency of the whole system in itself and for all actors within, increasing the system's productivity.

Eyal Benvenisti in his essay on "*Customary International Law as a Judicial Tool for Promoting Efficiency*" describes his view on customary international law as a tool for international courts, mainly International Court of Justice, to develop international law and promote efficiency.

He stipulates: "*when states or any other players interact, they rationally find themselves in Nash equilibria that may be inefficient. A judicial declaration of one equilibrium as the one that is binding as custom is likely to lead all players to modify their activities to conform to the judicially sanctioned equilibrium. This equilibrium will thus become the new practice, the new custom. This suggests that one state's deviation from prior practice in favor of a more efficient one need not be regarded as a breach if the deviation conforms to the underlying norm of efficiency. Rather, such a deviation has a very good chance of becoming, sooner rather than later, and certainly with the help of an intervening court, the new practice, the new norm.*" And in the end he concludes: "[e]fficiency, in the sense of efficient allocation of resources among states, has been all along the driving force behind the development of international law in general and customary international law in particular. State practice has often proven a reliable proxy for determining what constitutes efficient behavior for all states to follow. This proxy enabled international tribunals and other actors to impose sanctions on free riders or others seeking to deviate from the efficient norm. But this proxy fails when global or regional

*conditions lead states to pursue inefficient behavior. In such situations, tribunals and other third parties can make a difference by pushing states towards new, more efficient Nash equilibria.”*<sup>15</sup>

The author takes the concept of “efficiency” as another mean for determination of rules of law, especially customary law, and describes Nash equilibrium as a set of relations that attracts state practice and the “belief that this practice is rendered obligatory”<sup>16</sup>, namely – “*opinio juris*”.

I offer to view to the reality of relations between the sovereign actors (states or other actor, e.g. contracting parties in civil law relations) from another point of view. When it is unclear where can the rules of law be derived from, there is no apparent evidence of the existence of customary international law, only the concept or principle of efficiency cannot give the answer to risen questions. It is the equilibrium of Dr. Nash that can contain in itself the path of law-creation and law-development acceptable by all actors in a given relationship, if these actors, of course, are rational and ready to act rationally, which means that they want to earn the most benefits from the system of relations and not just to do harm to other actors, even if they get less from these relations. This means that Nash equilibrium already contains in itself the most favorable efficiency for the actors and the system as a whole. We should look at the set of social or international relations from above, from the point of view of the most favorable efficiency for that particular time, which in its case, can be found only in Nash equilibrium.

Thus, Nash equilibrium is the driving force for the development of international and social relations of rational actors, covering and regulating system of law either international, or domestic. From this vision one can make an inference that a subject of law, an actor,

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<sup>15</sup> Eyal Benvenisti, Customary International Law as a Judicial Tool for Promoting Efficiency; The Impact of International Law on International Cooperation, Theoretical Perspectives, Cambridge University Press, 2004, pages 85-116.

<sup>16</sup> North Sea Continental Shelf (F.R.G. v. Den./Neth.), I.C.J. Reports 1969, page 3, at para. 77. The Permanent Court of International Justice first enunciated the doctrine of *opinio juris* in the Lotus Case (France v. Turkey), P.C.I.J. Reports, Series A, No. 10 (1927) at 28.

while getting the highest level of satisfaction of his/her/its interests and making the minimum inconvenience for other subjects/actors, harmonizes his/her/its private interests with common interests and makes a ground for relative equilibrium of the system, and the center, foundation of that equilibrium becomes the focal point and source of rules for common behavior, thus, rules of law of that particular period of time.

This conclusion can be considered as a reflection of law's essence as the guarantee and expression of social equilibrium (as well as equilibrium in supranational relationship) and sustainability. The actors of a given relationship, if acting rational, will come to the final conclusion of acting in cooperation regime, where synergy can be reached and it can bring more satisfaction for the system as a whole and for each participant in particular than if they act in pure competition regime aspiring to get more at the expense of other actors' interests.

Therefore, bearing this position in mind, it is not hard to realize the significant role of Nash equilibrium in the determination of rules of law for relatively sovereign actors. And that role can be compared with another concept of the theory of Complex Systems – the concept of *Attractor*, which can be described as a set towards which a variable, moving according to the dictates of a dynamical system, evolves over time. And even if the social behavior or international relations are slightly disturbed, while getting close enough to that attractor, those relations and behavior will remain close to it. But this can be a subject for another research.

## YEZNIK KOGHBATSI'S<sup>1</sup> LEGAL VIEWS

**Alvard Aleksanyan<sup>2</sup>**

At the end of the 4th century, Armenia, which was divided between Persia and the Roman Empire (Byzantium), was in a serious condition. The invaders have tried by all means to assimilate the Armenian people. Under these conditions, preparation for national-liberation movement had become a major issue for the Armenian public figures. This struggle required theoretical ideas that would help abandoning the then popular ideas about substantial existence of evil, moving souls, superstition and the like that were coming from certain sects. Simultaneously "...During the transition from fire-worship to the Christian monotheism, there was a need to theoretically deny the Zoroastrian and Manichean ideas, local Hellenistic religions, the ideas of a dualistic understanding of goodness and evil protected by the Gnostic sects, the idea of the substantial existence of the evil, which are completely contrary to the teachings of Christian monotheism and the moral foundations"<sup>3</sup>

The main disagreement between Christianity and other religions and sects was the question of the nature of occurrence of the good and evil. Yeznik Koghbatsi's observations on the matter captured the

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<sup>1</sup> Yeznik Koghbatsi "Yeznik of Kolb" was born in approximately 380 in Koghbat village of the Tjakathq region. He studied at Ashtishat's school; then continued his studies in Urfa, Constantinople. He was Armenian philosopher, translator, and socio-religious figure. He was one of Mesrop Mashtots's pupils. Koghbatsi participated in the translation of the Bible, etc. In their works, Koryun, Yeghishe, Movses Khorenatsi mentioned about Yeznik. He participated in Artashat synod at 449 as a bishop of Bargevand and one of the authors of the letter to the Persian court. This letter is one of the ideological justifications for Vardanian national revolt. The extant work of Koghbatsi is "Yeghts Aghandots" (Refutation of the Sects), which is one of the first works of the Armenian philosophy. Koghbatsi died in 450.

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<sup>3</sup> See "Armenian art's prominent figures in 5-18 centuries", Yer., 1976, page 46.

attention of many scholars. Zoroastrian and other teachings of the religion and the nature of good and evil, common in the Middle East for centuries, misled people by their dogmas, saying that as if good and evil exist independently from the will and unconscious of people, that evil is inevitable in society, it is an expression of the will of the Creator. The evil is substantial and it is impossible to prevent it. In “Yeghts Aghandots” (Refutation of the Sects) treatise, Koghbatsi was struggling with those who were against Christian monotheism.

According to the available views on the nature of evil, Koghbatsi divided them into three groups. The first group consisted of the judgments of Greek philosophers, because their teachings penetrated and found a wide audience in Armenia. They believed that in parallel with the existence of God, there is also substance, *i.e.*, *Matter*, from which all beings and things are created, as well as the evil itself. Apologists of Christianity found in their teachings elements of polytheism, so they considered it their duty to defend the doctrine of Christian monotheism, despite the fact that they had found some aspects of Greek philosophy to be true. In the second group he included Zurvanist dogmas, according to which Zurvan fathered has twin sons. Everything that was created by Ormizd was good and kind, and that which was created by Ahriman became evil and wrong.<sup>4</sup> Third group includes religious sects that believed in three principles: good, justice and evil.

Yeznik Koghbatsi rejects “... polytheism, as the beginning takes only one Truth, one Being”<sup>5</sup>. This one Being is God. He tried to convince people that the only supernatural creature and the Creator of all things is God, who is unchangeable, eternal and has no beginning or end. God “...God is eternal. He has no beginning or end. He owes His existence to no one. By definition there is nothing higher than God.”<sup>6</sup>. No one is similar or equal to Him; God is “alive

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<sup>4</sup> Yeznik Koghbatsi, Yeghts Aghandots, Yer. 1994, page 95.

<sup>5</sup> Abeghyan M., Works. P.S. Yer., 1968, page 156.

<sup>6</sup> Yeznik Koghbatsi, Yeghts Aghandots, Yer. 1994, page 7.

and gives life, he himself remains complete and in life”<sup>7</sup>. He found that it is impossible to understand the essence of the Creator, because no aspect of His essence is subject to study, as God has no beginning and no end.

Claiming that God is sovereign and omnipotent, Koghbatsi is considering human qualities such as good and evil. And if good and evil as human properties are unconscious, then the presence of evil in society is inevitable. It is the destiny of everyone. To counter these and other tenets, Koghbatsi, first, for himself and for the reader, clarifies what is actually the meaning and essence of good and evil. Koghbatsi concludes that all of the phenomena that occur in nature and in society, which help people live a happy life and be in harmony with themselves are good, and those that cause physical, psychological and moral harm to people are evil. In the end, a person's actions are considered good or evil according to the correctness of their implementation. The evil consequences happen when the need is looked after in a wrong way<sup>8</sup>.

But where and how the evil enters in humans? Koghbatsi denied that God created the evil and various natural disasters, denied the substantial existence of evil. "From the well-wisher cannot be born evil, because he only creates the good."<sup>9</sup> But if God only created the good in humans, from where comes the evil in human's souls, from where comes such disharmony? "If God is the creator of good things, so from where comes the darkness, from where comes the evil, illiberality, pains, sometimes from the stuffiness, sometimes from the cold or whence undertakes evil between two native people who crave the blood of each other"<sup>10</sup>.

Going back to the establishment of evil, Koghbatsi assumed that evil is inherent to people without God's intervention. People at the time of the creation by God did not have evil intentions; they have appropriated them in the future. "The man at birth does not have any

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<sup>7</sup> Ibid, page 9.

<sup>8</sup> Ibid, page 33.

<sup>9</sup> Yeznik Koghbatsi, Yeghts Aghandots, Yer. 1994, page 9.

<sup>10</sup> Ibid, page 17.

evil intentions, and in adulthood they become ill due to their freedom”<sup>11</sup>. The human being is created by God free and reasonable; then he chooses how to be. God gave man the freedom and sovereignty, "called for the use of freedom in the good intentions"<sup>12</sup>. However, many have abused the freedom given by God, and become carriers of the evil.

However, many have abused the freedom given by God, and become carriers of the evil. Thus, according to Koghbatsi all men are created equal, and with good temper, but love of freedom gave them the right to serve whom they want, to do what dictates their will, and this way from generation to generation passed on the freedom of man's will. “The first man created by God had the liberty and will, the same is passed on to his descendants”<sup>13</sup>. Many people abusing the freedom crossed the line, and then became a villain.

Yeznik Koghbatsi, according to the Christianity dogmas, talking about kindness, equality and justice that come from God, presents himself as a supporter of the natural right theory. According to the theory of Christianity, the main ideas of God’s rule for humans are freedom and truth. The necessity of a rule like this is conditioned by the fact that the human due to their imperfection and weakness retreat from justice and need for salvation. In general, the legal view of the early Christianity is natural-legal. In the base of the rule and social norms, according to the sources of the New Testament, are truth and justice coming from the God.<sup>14</sup>

After centuries, in the Armenian present the “natural right” is perceived by Mkhitar Gosh also as a right by God: “Gosh under this concept sometimes meant something like the natural right. He said that the first rules were given to humans by the God, so this first rule – natural right is given by the supernatural creature – the God, as well as the Bible. Therefore, these enduring, eternal rules come from

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<sup>11</sup> Ibid, page 27.

<sup>12</sup> Ibid, page 35.

<sup>13</sup> Ibid.

<sup>14</sup> “The history of the political and legal teachings”. M., Nauka, 1985, page. 332.

the nature of the things and without our will.<sup>15</sup>

Truly, Yeznik Koghbatsi, not specifically talking about natural right, but explaining his concepts about justice and equality, postulated the start of all these modern doctrines about the present-day waves of the discussions about the natural right. According to these concepts, he distinguished between heavenly and human rules. Heavenly rules come from above, from the God, and must be observed unconditionally. Each person has a set of divine laws that he has committed to. These are divine mandates that a person must accept and abide by them in any action. With the help of the law, truth was the right of conduct restricting the freedom.<sup>16</sup>

If a man violates the divine laws, so the right is when each one gets what he or she deserves.<sup>17</sup> Some humans break up the harmony in the socium; that is why human rules are defined. “The rules [are] coming from the kings, rebukes coming from the ministers, the punishments coming from the judges... for stopping the evil.”<sup>18</sup> Thus, the evil is inside the humans, not created by God, but depends on the non-observance of the natural rights, commandments and precepts. The first human created got an order from God, but defying his precept, he turned to evil<sup>19</sup>.

Developing the concept about the freedom and the autonomy of the human will, Koghbatsi declined the widely spoken fatalistic teaching that every person’s date of death was determined before the birth. The causes of their luck and misfortune are the stars. The luck of a person is determined by the types of stars that meet at the time of his or her birth. All kinds of evil, wars and the like are explained in the light of fatalistic teaching.

Koghbatsi declined in its entirety the concept of fate and proved that it does not exist. The prescribed punishment for the evil means

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<sup>15</sup> Tovmasyan A., Ancient and middle century Armenian criminal rule. Yer., 1962, page 62.

<sup>16</sup> “The history of the political and legal teachings”. M., Nauka, 1985, page 332.

<sup>17</sup> Yeznik Koghbatsi, Yeghts Aghandots, page 37.

<sup>18</sup> Ibid, page 49.

<sup>19</sup> Ibid, page 37.

that the offender commits a crime and it is not the will of the fate, but the will of the person who violated the other person's right to freedom. "If the event should take place by the will of the fate, then no kings should give orders to murder, and no judges should torture and kill the killer"<sup>20</sup>.

The destiny of every person and nation is not prescribed beforehand, they all are endowed with the freedom and autonomy of their will and they are free to manage their actions and their fates. Nobody has the right to force any person or nation or people to blindly obey them, reasoning that it is their destiny. According to Koghbatsi, not only individual persons are endowed with autonomy, but also nations and people: "And it is not random that the one of the most important cornerstones of the national liberal struggle is the teaching about autonomy, that was established in the Armenian people in the fifth century and did not lose its viability during the entire future history of Armenia"<sup>21</sup>.

With the ideological struggle against the teaching about fate, Koghbatsi aspired to get to the point when people will not bow to the fate and will protect their own rights. "When the invaders intrude to rob and destroy the country, if not expose the troops, let them not to organize troops for attacking the enemy, reasoning that "it is the country's fate to be destroyed by the enemy, thus why one should go against the fate? However, when they gather troops and force the enemy to get out of the country, they prove that the massacres do not happen based on a fate, rather based on the coercion of the invaders/robbers"<sup>22</sup>.

In the Armenian version of the Assyrian-Romanian Law Book, the law is viewed as an expression of God's will, the crime is viewed as a violation of the commandments, and the punishment is a comprehension for the violations (this part was missing in Assyrian and Arabian versions). Thus, Adam and Eva violate God's

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<sup>20</sup> Yeznik Koghbatsi, Yeghths Aghandots, page 131.

<sup>21</sup> Safaryan G., Armenian legal-political meaning, 11-13th century. Yer., 1995, page 43.

<sup>22</sup> Yeznik Koghbatsi, Yeghths Aghandots, page 133.

commandments by tasting the forbidden fruit of the garden and are punished for disobeying God. After the adoption of Christianity the violation is presented as a phenomenon in this way. In Mkhitar Gosh's Code of Laws, the actions of the people are divided into three groups: kind, evil and average behavior. Only people with evil and average behavior are to be held liable. Thus, Yeznik Koghbatsi, reviewed the evil and kind deeds as a philosophic category, and , at the same time, in the fifth century provided a definition for deeds that are dangerous and not dangerous for the socium according to the Christianity. "The crime is a willed violation of the inviolable commandment, and punishment is prescribed for that violation"<sup>23</sup>.

However, Koghbatsi, actually goes beyond his time and gives a more general definition of the violation; he noted that ultimately a deed is evil and must be judged when the needs are satisfied in an illegal way, and it means that the evil is the violation of the legitimacy. His views about the establishment of the crime were advanced for his era because he proved that a human commits an evil deed by his will. In the meantime, he showed that evil is the product of human's free thinking, his addictions, social conditions, but not something given to them by God. So people can in any time forsake his evil thoughts and prevent the evil deed. With this thesis, Koghbatsi declined the teaching about the fact that humans could be born evil and that they have evil souls inside them. People are not born criminals, they become outlaw during the course of time under the influence of the social conditions.

Koghbatsi with his analysis comes to a conclusion that absolute evil deeds do not exist. The good and evil are relative concepts. The same deed may be viewed as good and legitimate occurrence, but in another situation it may be evil, punishable and judgeable. Human's deed is good if it is legal, and it is evil if it is illegal. If someone gets something in competition, he or she is kind and good, and if someone gets something through violation, this person is evil. In this case, the circumstances are different. Every time, to describe a deed you should taking into consideration the main goal, time, factors, which

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<sup>23</sup> Ibid, page 231.

ultimately decide the legitimacy of the deed.

Reviewing the causes of a crime, Koghbatsi has noted heartburning as a cause of the establishment of the evil: “Heartburning is the beginning of the evil”<sup>24</sup>. The historians of the fifth century, namely Yeghishe, Ghazar Parpetsi also judge the facts of punishments without crime and sin. Reviewing the subjective aspect of the crime, Yeznik Koghbatsi put the sin in the base of the criminal liability during the crime process. He demanded that judges must review the level of the crime. Koghbatsi could discern sin from non-sin, performer from inducer, voluntary from the forced and etc.; he believed that if someone commits a crime under threat, he should not be guilty. A person who has committed a crime on his own, must be punished to the extent of the crime<sup>25</sup>.

With these thoughts Koghbatsi emphasizes the connection between the crime and punishment, noting that if there is no crime, there is no punishment. The understanding of punishment is linked to crime and misdeed. The punishment should be fair and for the committed acts: “Punishment be fair and for actual acts”. Based on the fundamentals of Christianity, he considers the punishment as compensation to the acts. Though, going forward from his contemporaries, voices the logic that punishment has a goal to prevent and keep people away from thoughts for the crime, it is an educating method: “...the crimes of humanity prompt God for the later punishment of people”<sup>26</sup>. Do the same goals have the punishments defined by kings. Those meant to “prohibit the misdeed”<sup>27</sup> and “to remove the detrimental”<sup>28</sup>.

Koghbatsi says that punishment for the outlaw will have its significant role in prevention of misdeed. In the Armenian reality, for the elimination of criminal acts and misdeed, he paid special attention to the improvement of the conscious state of people. The

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<sup>24</sup> Yeznik Koghbatsi, Yeghts Aghandots, page 41.

<sup>25</sup> Yeznik Koghbatsi, Yeghts Aghandots, page 43.

<sup>26</sup> Ibid, page 69.

<sup>27</sup> Ibid, page 49.

<sup>28</sup> Ibid.

consciousness of people should reach to a stage where they recognize the moral and positive sides of the act and keep away from misdeed. Koghbatsi considered the punishment of criminals to be fair.

He was against absolute freedom of one's will. Every person should know his boundaries of freedom, by adjusting his acts to the current laws. And a person can do that since he is born, from the nature, as a rational being, and has to realize the consequences of his acts and, if needed, be able to refrain from the misdeed, otherwise to take a punishment for the sake of justice.

As an apologist to feudal state, he considered the obedience as a quality of a true Christian. Every human's obligation is the fulfillment of the orders of lords and kings, showing highest respect: "When somebody wishes to tame a strict lord, one cannot go and announce that directly. One has to come near with sweet expressions to say "You, my lord, are kind to everybody, everybody is contented and consider you as reverend".<sup>29</sup> This is the message that Koghbatsi conveys, in the best interests of the leading class

He criticized also the weak sides of society. Koghbatsi was far from the thoughts that wealth, power are given to people from above, therefore those are intact. And it is clear that sky is not the source for royalty or power, especially when we see wealthy people pure, and pure people wealthy.

Thus, Koghbatsi with his legal views has defended the interests of feudal secular and sacred categories, as well as the ideology of Christianity, meanwhile expounding progressive thoughts, which are having a significant role for the political and legal learning of Armenia, particularly caused also by the fact that his thought had an important role for the future thinkers' formation of mentality for the political and legal views.

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<sup>29</sup> Yeznik Koghbatsi, Yeghths Aghandots, page 51.

## **PRINCIPLE OF LEGAL LEGITIMACY IN THE PHASE SYSTEM OF LEGAL REGULATION MECHANISM**

**Sergey Kocharyan<sup>30</sup>**

The principle of rule of legal law in a legal state and the methodological approach built on the legal hypothesis of legal understanding set a new task before the universal principle of legality, *i.e.* to convey legal (official-authoritative, obligatory) force only to the law, and at the same time the law to be legislative always, in all cases and in all legal areas. As a result of the fulfillment of this issue, a new concept, *i.e.* “legal legitimacy”, is generated. The first requirement of the legal legitimacy principle is the reflection of rights in the law, and then a universal requirement arising from the obligatoriness of the law endowed with legal qualities for anybody and everybody to incessantly implement those laws (and also orders defined in other legal forms). The first requirement is set for the state and its authoritative branches and the second for anybody and every individual. Thus, the legal legitimacy considers the concept of legitimacy and involves its crucial requirement as its part. A new requirement is added to the requirements of legitimacy with common, traditional sense, *i.e.* to make positive and obligatory only the law and its essence, requirements and principles, for example natural rights, and as a result attach a formal character only to legal law.

The place and role of legal legitimacy among legal phenomena is most clearly and obviously expressed while observing it in the legal regulation mechanism, because that mechanism reflects the whole process of the formation, legal regulation and function of the law more comprehensively. The more complete and systematic model of the legal regulation social structure implies that this

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mechanism is a multi-element system, consists of social and legal measures, subjects of the mechanism, significant legal activities and the results of such activities. This system is not static but operating, which consists of five phases:

- a) Law formation,
- b) Law-making,
- c) Legal informatization,
- d) Law implementation,
- e) Social-legal control<sup>31</sup>.

The approaches of law theoreticians to the issue of place and role of legal legitimacy, for example in the legal regulation mechanism, are very general and indefinite. First, it should be stated that most of the theoreticians ignore that issue.<sup>32</sup> Others refer to it partially, trying to allocate some place to legitimacy in the legal regulation mechanism as well. One of such attitudes concludes that the legitimacy mode and legal awareness are considered special and so-called intangible components of the legal regulation mechanism. “However, their intangibility does not impede them from having an active effect on the whole process of legal regulation. The productive work of all the components of legal regulation mechanism depends on the level of legal awareness and actuality of the legitimacy mode”<sup>33</sup>.

Thus, one of the perspectives on the place and role of legitimacy in the legal regulation mechanism theory is that it is viewed as a special component of that mechanism, together with other components of law norms, legal relations, and law implementation

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<sup>31</sup> Sociology of Law. Ed. Sirikh V. M., M., Legal House “Yustitsinform”, 2001, page 98.

<sup>32</sup> See, for example, Mukhaev R.T., Theory of State and Law, M., PRIOR Publishing House, 2001 pages 455-458; General Theory of State and Law, Academic course in two volumes, Ed. Marchenko M. N., Vol. 2 Theory of the Law, M., “Zertsalo” Publishing House, 1998, pages 439-442; Skakun O. F., Theory of State and Law, (encyclopedia course). Textbook, Kharkov, Espada, 2005, pages 774, etc.

<sup>33</sup> Legal Regulation and Its Mechanism, in Theory of State and Law, Ed. V. M. Korelskiy & V. D. Perevalov, M. INFRA Publishing Group, M-NORMA, 1997, page 270.

acts. The second approach to the role and place of legitimacy, as the demand for the accurate and incessant observance of the laws and sub-legal acts by all subjects, in legal regulation mechanism, comes to the conclusion that legitimacy and legal awareness are considered not components but factors of legal regulation mechanism.<sup>34</sup> The supporters of this view, considering legitimacy as a factor for legal regulation mechanism, find that it is that mechanism's "basic and unconditioned attribute, but not regulation component. Without legal awareness and legitimacy, any component and phase of the mechanism is broken, functions inadequately and distorts the main significance of the legal regulation".<sup>35</sup>

We should definitely agree with the judgments about the significance of legitimacy in the legal regulation mechanism. However, legitimacy cannot be considered a common factor of that mechanism. A factor cannot be basic and a definitely important attribute. Both approaches to the place and role of legal legitimacy in the legal regulation mechanism are built on the concept of legitimacy and not legal legitimacy. Being the universal establishing principle of the law and being obligatory and highly imperative, legal legitimacy defines the process of formation, development and functioning of the law. Therefore, it is manifested in the legal regulation mechanism as its component-principle, which is characteristic of all its components; it acts in line with other principles with similar characteristics in all phases of the legal regulation mechanism.<sup>36</sup> The complex and multidimensional nature of legal legitimacy is determined by this very fact; because it is manifested uniquely in any phase sub-mechanism of the legal regulation mechanism's general system. It carries out specific functions and makes special demands on every status group of the participating subjects.

In the first two phases of the legal regulation mechanism, *i.e.* the

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<sup>34</sup> Theory of State and Law. Ed. V. P. Malakhova, V. N. Kazakova, M., Academic Project, Yekaterinburg, Delovaya Kniga, 2002, page 153.

<sup>35</sup> Theory of State and Law. Ed. V. P. Malakhova, V. N. Kazakova, M., Academic Project, Yekaterinburg, Delovaya Kniga, 2002, page 153.

<sup>36</sup> It is about the combination of belief and compulsion, combination of promotion and limitation, and in federal states also the principles of federalism.

formation (development) of the law and law-making, the normative legal basis of the legal regulation mechanism is formed, expressed by different resources of the law (regulatory legal acts, legal precedents), in which the behavior content of the subjects of the law, its limits and the conditions for the generation of its rights, duties, authorities and responsibilities are defined. Thus, as a result of these two phases of legal regulation in our legal system, the requirements of the legal regulation are revealed, and as a final outcome, a formal legal document, i.e. a normative legal act is adopted. The main subject acting in these phases is the state represented by its competent law-making authorities. However, the subjects of this activity are also the citizens, parties, social unions, and of course the people, in case of a referendum. As a type of activity, law-making is carried out based on its special principles, *i.e.* scientism, democracy, publicity, etc. Certainly, one of the principles is considered legitimacy.<sup>37</sup> The principle of legitimacy for this phase of legal regulation is usually observed from the formal point of view, causing it not to fall beyond the framework of the procedural requirements and the competence of the authorities adopting the act.<sup>38</sup> However, the concept of legal legitimacy makes completely different demands on these two phases of the legal regulation mechanism.

The significance and meaning of law-making is to choose such versions of legal regulation, which will more completely correspond to the interests and goals of the people and individuals. This means that besides the issue of formal legitimacy of regulatory legal acts, the legal legitimacy also puts forward the issue of their content

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<sup>37</sup> In the principles system of law-creation, as a complex and multidimensional social phenomenon, as a rule the principles of scientism, democracy, coordination, publicity, professionalism, adequacy of the law for life conditions, humanism and morality, and legal perfection are also included. (See Golovistikova A. N., Dmitriev Yu. A., *The Problems of the Theory of State and Law*, M. Publishing House Eksmo, 2005, pp. 453-470, *Legislative technique: Scientific-technical handbook*, M. 2000, pages 26-42; Apiyan N. A., Safaryan G. H., Hakobyan J. H., *Issues of the Theory of State and Law*, Yerevan 2001, pages 217-236).

<sup>38</sup> See, for example *Theory of State and Law*, Ed. V. M. Korelskiy & V. D. Perevalov, M. INFRA Publishing Group, M-NORMA, 1997, page 295.

legitimacy. As a result of the fulfillment of those requirements, a law of legal nature (normative act) is positivized. Thus, the principle of legal legitimacy requires the subjects participating in these phases of the legal regulation to change only the law into positive law through legal procedures. That requirement of the legal legitimacy turns into a responsibility for the state to recognize, follow, ensure and protect human rights. With this regard, the formulation of Article 3 of the RA Constitution has defined only one obligation of the state, *i.e.* protection of human rights, whereas from the position of legal legitimacy the state bears also the responsibility of recognition, observance and assurance.

In the phase of law-making, the guarantees for the implementation of the legal legitimacy principle are the legal regulation of the law-making legal procedure, legal forms, the highest legal force of the Constitution, the institutional system of the human and citizen rights, distribution of authorities, the human right for challenging the legality of a normative act at the Constitutional and (or) other courts, and so on. Thus, the legal opportunity for the subjects interested in the law to challenge the legality of normative acts from the position of legal legitimacy requirements is consistent with the constitutional responsibility of the state.

At the next phase of the legal regulation, *i.e.* legal informatization, the publication of the adopted regulatory legal act takes place. Article 6 of the RA Constitution regulates the procedural basics of this phase of the legal regulation mechanism, pursuant to which, “[l]aws shall enter into force following their publication in the Official Journal of the Republic of Armenia. Other regulatory legal acts shall enter into force following their publication as prescribed by law. International treaties shall enter into force only after being ratified or approved.” The RA Law “On legal acts” comprehensively regulates the publication manner of legal acts, including that of regulatory legal acts.<sup>39</sup>

An important place in the legal regulation mechanism is of the

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<sup>39</sup> RA Law “On legal acts” was adopted on 3 April, 2002, RA Official Journal, № 15 (190) May 21, 2002, Chapter 6, Articles 46-67.

law implementation and exercise phase, which in its turn is split into three mechanisms of immediate implementation of the law, the application of the law and the application of the state enforcement. In this phase, the formal aspect of the legal legitimacy, *i.e.* the genuine legality, is emphasized as a most serious requirement for all the subjects of the law participating in that phase to use, follow, exercise the orders of the functioning law norms, to exercise the application of the positive law and state enforcement in accordance with law norms. However, in this phase of the legal regulation, the principle of legal legitimacy also functions, because when encountering acts violating their constitutional rights and freedoms, the subjects of the law can use the judicial and other procedures to appeal them. In this phase of the legal regulation, the principle of legal legitimacy becomes a means-guarantee, with the help of which the individuals, who are subjects of the law, and their unions are protected from the violation of their rights and freedoms; in case of need they can require other individuals, organizations, state bodies and officials to perform legal duties. Thus, the principle of legal legitimacy and its incessant implementation provide the security of the individuals and protect them from antisocial manifestations and arbitrariness. Legal legitimacy is a guarantee for humans and the implementation of their rights. In this phase of the legal regulation, the state and its bodies bear their constitutional responsibility, which arises from the legal legitimacy requirement to act strictly according to the law and based on it. According to this responsibility, in addition to a duty for citizens, following legitimacy becomes a subjective right with regard to the state, its bodies and other persons and organization.

Finally, the principle of legal legitimacy determines the last phase of the legal regulation mechanism, *i.e.* social-legal control, as the main content of the activity of the society and state, because this is exercised with the goal of protecting legal legitimacy. According to V. M. Sirikh, the goal of social-legal control is to provide the incessant implementation of the acting norms through the elimination of the conditions and causes, which contribute to committing violations, as well as the revelation and accountability of the persons

committing them.<sup>40</sup> The whole meaning and significance of the last phase of the legal regulation, i.e. social-legal control, is supervisory activity from the perspective of legal legitimacy principle.

Hence, the legal legitimacy principle functions not only in the law-formation and law-making, but also in the law implementation phase. It is right that in this phase formal legitimacy is already emphasized as the most serious requirement for all the subjects of the law participating in that phase to implement the orders of the acting law norms, to exercise the application of the positive right and state enforcement in accordance with law norms. However, in this phase of the legal regulation, as a result of the implementation of the principle of legal legitimacy, when the subjects of the law encounter acts violating their constitutional rights and freedoms, they can use the judicial and other procedures to appeal their constitutionality and unlawfulness. In this phase of the legal regulation, the principle of legal legitimacy becomes a means-guarantee, with the help of which the individuals, who are subjects of the law, and their unions are protected from the regulatory legal acts violating their rights and freedom.

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<sup>40</sup> Sociology of Law. Ed. Sirikh V. M., M., Legal House “Yustitsinform”, 2001, page 102.

# **CURRENT ISSUES OF PUBLIC SERVICE ON THE BACKGROUND OF ADMINISTRATIVE IMPROVEMENTS**

**Gevorg Danielyan<sup>1</sup>**

Public service is ranked among the state legal institutions which, in fact, being quite new and somehow in discord with local legal ideas in the terms of independent state, however, can be introduced as an established system with improvement trends. This institution plays a major role in due, professional execution of state functions, as well as ensuring of legal standards of democracy. At the same time, yet, we cannot exclude lack of adequate understanding of legal culture of some independent institutions, the reality of public service staff policy based purely on party affiliation, certain gaps in the process of employment of public servants, obstacles in professional skills and other similar practices.

Discovery of actual origins of such phenomena and outlining of more preferred ways of their overcoming is extremely important in the terms of practical point of view. In my opinion, analysis related to formation of areas and types of public service, evolution and future trends are the most valuable among proposed questions.

Currently the key issue of imperfection of the legal grounds of the public service is out of discussions; however, we are sure that the proposed methodology, the actual disproportionate situation of their perception behind the related scientific debate, still does not allow getting rid of the most fundamental obstacles, strictly understanding the vulnerable sectors of the local legal culture and at the same time outlining the improvements of such institute.

I believe the problem is partly dictated by the lack of professionalism in the field of law-making activities, particularly by perceiving contemporary democratic institutions as Soviet institutions. It is true that even five years after the adoption of the

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Constitution on July 5, 1995, which unequivocally stipulates that local self-government bodies are non-state bodies in their essence, a draft law “On public service” was circulated, which considered community service as a type of state service. *However, drafts of legislative acts circulated later outlined the two main directions of the public service — state and community.*

It is worth mentioning that the exact nature and status of local self-government bodies have not yet been fully reflected in the RA Constitution. Thus, as per Article 2 of the Constitution, local self-government bodies are the public administration bodies: the people shall exercise their power through local self-government authorities; meanwhile Article 18, which is dedicated to the protection of the rights of individuals before the state bodies mysteriously referred to ‘the judicial, as well as other state bodies only. It turns out that people are deprived of effective remedies before local self-government bodies. Such legal regulations are still based on the false idea that local self-government bodies are not public administration bodies, which in its turn is conditioned by undue identification of terms “public” and “state”.

Of course, the aforementioned problem has been solved by the current legislation, particularly by the Administrative Procedure Code, but the fact is that the country's constitutional law has ignored it. In terms of the new constitutional realities, I believe we should agree with all those authors who identify “representative democracy” with “representation of the people”<sup>2</sup>.

In this regard legislator G. Harutyunyan has given an accurate assessment to this: “Representative democracy is the execution of people’s power through state government (Parliament) and local self-government bodies (Council of Elders and Head of Community), officials (elected President) provided by the Constitution”<sup>3</sup>.

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2 Armen Jagaryan, Natalya Jagaryan, Public bodies of representative democracy and their place in the contemporary system of Russian local self-government, Comparative constitutional law, № 3(88)2012, pages 111-112.

3 Comments to the Constitution of the Republic of Armenia (joint edition G. Harutyunyan, A. Vagharshyan, Yer., Law, 2010, page 61.

For comprehensive identification of issues related to types of public service, we should make a possibly equivalent reference to the analysis of terms related to this legal issue. In these terms, the problem of definition of the public service related term has now obtained an unprecedented urgency. I think before undertaking scientific debate on definition of each term we should methodologically consider the fact that legislative definition of the terms may sometimes be insufficient basis for their definition on scientific standards<sup>4</sup>. The most practical, pragmatic issues are now set before the legislation and no definition proposed by legislative act can become the issue of scientific analysis, moreover of debate in the terms of current developments, where the legislation features with the most sophisticated system enriched with new institutions.

Besides, note that the terms mostly have practical importance in the legislative act in the frames of relations regulated by such legislative act, or a separate branch of legislation, at its best, which goes to show that in this case we deal with legal concepts perceived with conventional idea. Moreover, in some cases one or another term has the practical importance in the frames of particular section of the legislation only. Of course, it would be more practical if *in the terms of sufficient grounds* legal definition of certain terms should have legal meaning for other branches of the legislation, *i.e.* a universal character; but it should be accepted that this problem has not been yet practically solved; moreover, it has not been adequately understood due to a number of subjective reasons.

Below we try to separate in the systematic form public service type related legal grounds, including social and psychological obstacles:

1. No legislative act devoted to the legal regulation of public service clearly sets the exact scope of the term “public service”. Particularly, Article 3(1) of the RA Law “On public service” defines as follows: “Public service is the execution of powers assigned to the state by the Constitution and laws of the Republic of Armenia, which

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4 N. V. Varlamova, Typology of legal consciousness and contemporary tendencies of development of theory of law. Saint-Petersburg, Fenniks, 2010, pages 8-9.

includes the state service, community service, state and community offices”. This definition implies that the “public service” includes not only state and community service, but also state and community offices; however, Article 5(1)(4) of the same Law stipulates the following: “Public servant – a person holding any position provided for by the list of positions for state and community service (except for temporarily vacant positions) or, in the cases and manner prescribed by law, being in the corresponding human resource reserve list for public service”.

In other words, the legislation is based on obvious internal idea: on the one hand it is stipulated that public service includes also state and community positions, and on the other hand the term “public servant” does not include such official positions. It is natural that such terms could not have any other content, and undue confusion prevents full legal regulation process of other associated institutions.

2. In some cases, some legislative acts include such legal terms that simply do not regulate the given legal act. Essentially, we cannot exclude the phenomenon of definition of the same legal term in different legislative acts; moreover, we cannot exclude that they possibly may differ from each other in terms of content, as each legislative act regulates some definite relationship. Moreover, in such cases it is better to stress that definition of the given term is used only concerning the relations regulated by that law, while defining any term set out in the legislative act.

However, this permissible method expressly loses its original logical idea, when we attempt to fix a term related to another legislative branch through a legislative act. It is clear that such terms as “official”, “public servant”, “high-ranking official” and so on, are mostly related to public service, and make the components of the latter; however, the domestic legislation is full of legislative acts that have nothing with legal regulation of such service; they incorrectly reflect those terms and have features that are very different from each other. The pragmatism of such legislation is emphasized to such extent to ignore the basic requirements of law provisions.

Let us give a concrete example on the above-mentioned. Article

308 of the RA Criminal Code establishes criminal liability for the abuse of official powers, and at the same time gives definition to the term “official”. The following is the definition of “official” as per the above article: “persons performing organizational-managerial, administrative-economic functions” in state bodies, local self-government bodies and the organizations thereof. Practically, no unified understanding has been developed on the term “organizational-managerial, administrative-economic functions”, it is obvious that it will cause a number of serious legal problems. However, even more troubling is the fact that having recognized the officers of local self-government bodies and organizations thereof as “Officials”, the legislator at the same time included abuse of official powers and similar crimes in the chapter “Crimes against the State Service”. As I have mentioned above, I believe we are aware that the activities of local self-government bodies and organizations thereof cannot be identified with “state service”; however, I think we can state that we failed to form such a legal culture which clearly separates the above mentioned institutions, and while choosing materials of legislative regulation we should prefer more basic methodology.

What should be the exact behavior of the legislator to escape such misunderstanding? In my opinion, the solution of the problem is related to at least two tricks of legal technique: the first, it would refrain from regulating any of components of the public service by criminal code, since it is quite different from being subject of this field of legislation, and in this case it would be better to make a reference to appropriate norm of legislative act devoted to such public service. The second, it would be legitimate to consider by the Criminal Code such persons able to commit crimes against public (not state) service, using their status or position, without being public servants, hence they should be considered as subjects of crimes against public service.

In fact, it is not accidental that understanding of the need of the above mentioned issues led to making amendments to the Criminal Code in 2008, as a result of which “public servants not considered as

officials” and “persons using real or alleged influence for mercenary purposes” are recognized as subjects of similar crimes. Of course, these solutions are hard to be perfect ones (it is sufficient to notice that the term “public servants - non officials” itself is problematic, since the term “official” has never included public servants only), but awareness of the need of systematic solution to the problem is welcomed in this case.

However, the problem is not so much related to legal techniques, as to fixed undue and various state behavior towards some separate types and directions of public service itself. Particularly, the criteria used by the Criminal Code for separation of exclusively “state service” is unclear; why the entire public service has not been recognized as object of criminal defense?

I believe this is another phenomenon typical to the Soviet legal culture. Let’s remember how the Soviet criminal legislation was regulating the criminal liability for encroachment on different types of property: sanctions set for crimes against personal property were incomparably softer than the same type of crime against state property.

This differentiated approach was revised only three years after the independence, but it was a technical review only, as a number of significant issues still have not got their solution. They just set a single sanction for theft irrespectively of the type of property.

The fact that the legal culture still bears the influence of Soviet legal ideas is motivated by the following facts: on April 18, 2003, ten years after the above legislative reviews mentioned by me, they have adopted a new Criminal Code, which was officially announced to be consistent with the contemporary standards of democracy and significantly differed from the previous version of the Criminal Code adopted in the Soviet period and slightly amended thereafter. However, here, in the same Code we can meet non-uniform legal protection of property types, as well as evidence samples of classification of a person, his life, honor and dignity to the class of property. Thus, in the terms of existence of an issue related to the recognition and protection of property right as stipulated by the

Constitution, it is at least unclear by what criteria is the Criminal Code guided in setting responsibility for inaccurate use of credit facilities given under international agreements, funds of the state or international institutions, particularly; why the problem of community property protection was ignored; why such acts which infringe on human life and health are still in the list of crimes against property (e.g. robbery and assault).

3. The next issue is conditioned by inadequate awareness of international practice, its partial copying and legal culture of unreasonable attraction. Thus, I deeply believe that the RA Law “On public service” includes some legislative solutions related to the above mentioned institution of Germany.

Comprehensive study of international practice and the implementation process itself are welcoming, since there are no prototypes in the domestic legal systems. Nevertheless, it should be noted that serious flaws sometimes accompany implementation of international practice, in some other cases it turns to mechanical phenomenon only<sup>5</sup>. Moreover, while trying to separate the most significant arguments, we should have to stress neglect of specifications of formed legal culture and issues of the Constitution. There is another example: administrative legislation of Germany has adopted such starting point, according to which illegal regulative acts or activities of administrative bodies should at first be appealed in administrative order, by applying to the superior and only after that it has the legal opportunity to judicial complaints. But the problem is that these important legal features were not considered proportionally within the frames of local legislation. Besides, the fact that term “inactivity” in the same administrative legislation of Germany is identified with rejection of the claim or application. However, there is a real confusion in local legislation, as both activity/action and inactivity/inaction here equally became subject of legal regulation in separate sectors, and in some other sectors inaction was ignored. Another example: Article 68(3) of RA Administrative Procedure

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5 Zorkin V., Challenge of globalization and world order legal conceptions. Constitutional justice, № 4(50)2010, pages 25-26.

Code states: “Through a claim for recognition the plaintiff may request to consider an interfering administrative act with no legal effect or action as illegitimate if the plaintiff is justifiably interested in recognition of the act or action as illegitimate”. About a year ago this legislative provision was appealed in the RA Constitutional court; it is interesting that on the stage of the initial discussion many people (I mean official responds of the National Assembly of the Republic of Armenia, the Court of Cassation of the Republic of Armenia) were sure that the above-mentioned legislative norm had no conflicts with the Constitution, as it repeated the rule of law in Germany and had passed a serious examination. However, partners need to focus on the fact that the German administrative law, as I have already said, adopted quite different legal settlements on the matter of this issue. Let me add, that the Constitutional Court made a unique decision on this issue, according to which term “action” should be understood in this Code with double meaning, it should also mean “inaction”. At the same time Article 114(1)(5) of the above-mentioned Code was acknowledged conflicting with the Constitution on the part where the administrative act<sup>6</sup> only was considered subject to appeal.

4. The next problem concerns the issue of reasonable use of facilities, including human resources. However, this issue has probably some inconsistency in the terms of the study of international practice. Particularly, the problem refers to the establishment of committees dealing with assessment of professional and administrative skills of public servers, as well as to organization of professional trainings. These questions almost do not cause any serious problems on state service, particularly on civil service, which is quite different on the matter of community services. In my opinion and unfortunately, our young scientists represent exceptionally superficial study of international practice and protect very logical

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6 See Decision of the RA Constitutional Court SDVo-942 of February 22, 2011 on resolving the issue on the compliance of Article 68(3) of the RA Administrative Procedure Code with the RA Constitution on the basis of application of the Party “Republic”.

and reasoned conclusions by ignoring specific regional features while choosing thesis on improvement of community services; however, these are considered to be so at the first view only. Particularly, without any reservations they offer to include lawyers, economists with scientific degree in certification committees on obligatory basis. The problem is that the same professionals would not even envision what kind of huge and unrealistic costs are required in order to implement such recommendations. Another important factor: the effective legislation provides establishment of certification committees in every community. And now let us try to analyze and visualize what happens if at least one certified lawyer is included in such committee. I wonder if it is difficult to understand that in such cases the solution may develop at least in two directions: either there is a need to expand communities or establish certification commissions not in every community but in inter-community unions. Unfortunately, we have not yet experienced attempts to open inter-community unions up to now, which is quite different, but as much important. In any cases we feel lack of necessary practice and customs.

5. The next issue refers to the unity of legal settlements. This principle is recorded with the breakdown on civil service. I think speaking of a unified legal settlement in the terms of different, sometimes significantly divisible types of public service is at least unrealistic and unreasonable. But these extremes, which are currently recorded by various laws and regulations, are at least related to the constitutional principle of equality before the law for everyone but have the lack of effective administration logic. There is no explanation why public servants performing the same duties, having the same responsibilities and working under the same conditions, for example, should be paid taking into account the fact of being employed by different state authorities of different units of the same authority.

We could somewhere consider such differentiated approaches fair if the legal solutions would have been conditioned by at least corruption risks, but this factor was not taken into account. Upon

deeper examination of the nature of the problem, we notice that the authorities have managed to get certain privileges set by the law, through lobbying and other ways while trying to make the service more attractive and competitive; however such privileges, in my opinion, are groundless.

Initiatives such as the so called off-budget accounts in state bodies authorized to ensure collection of fines and other obligatory payments from physical persons and legal entities are groundless and have nothing common with management improvements; 5% of such collections are deposited in the accounts, while 70% of amounts available thereon are given in the form of bonuses. This unreasonable policy raises many questions, but let us separate at least one of them: I wonder if activities of all these officials (including senior officials, members, etc.) that are not directly related to collection of fines and obligatory payments is less important and less paid.

Currently it should be clearly pointed out what specific issues need to contain definition of uniform approaches of legal settlement of service.

In fact, I believe, it is groundless to set such obstacles in the matter of replacement of officials in the field of civil service. Particularly, in the terms of such flexibility, ratios of officials of state service such restrictions are not realistic.

6. Given the underlined importance of problem of professional skills of public servants, the procedure of repeated participation of persons who “failed” on the competition within a short period of time is highly vulnerable. Most unacceptable is when the person who has repeatedly failed is given the possibility to participate in the competition within a short period of time and take responsible positions.

Let us refrain from making unequivocal statements about the existence of corruption in a given case, but it should be noted that such “forgiving” legislative regulations towards apparent lack of professional knowledge in conformity with legal practice cannot overcome the problems of public service.

Comprehensive analysis of international practice shows that the person who has failed should be given the next opportunity to participate in the exam at least six months later, it means he or she needs a reasonable period to obtain sufficient skills.

7. Finally, adoption of such approach, which results in the reduction of discretionary powers of public servants in anti-corruption matter, is very disturbing. In this matter, it is clear that initially unpromising factors of inadequate understanding of international legal standards are put in the origins of the reform. Particularly, the confusion is due to inadequate understanding of limitation principle of discretionary powers.

Thus, Article 6(2) of the RA Law “On the Fundamentals of Administrative Action and Administrative Proceedings” reads as follows: “In exercising discretionary power the administrative body shall be guided by the need of protection of human and citizens’ rights and freedoms enshrined in the RA Constitution, by principles of their equal rights, proportionality of carrying out administrative action and prohibition of arbitrariness, as well as shall pursue other goals envisaged by law”.

Note that in this case, the norm literally incorporated from administrative legislation of Germany marked the necessity of limitation of discretionary power rather than its reduction, it means the administrative authority may be vested with discretionary power; just while using it the administrative authority should be guided rather by certain standards provided by the law, including the predetermined purposes, than by arbitrariness.

Unfortunately, this simple legal problem, was practically considered with unnecessary distorted commentaries, as a result of which we have the dominant way of thinking, according to which we must do our best to minimize direct contact between officials and private persons. In this case it is unacceptable that we base on the idea that any official has undeniable tendency to allow abuse of power and arbitrariness. Instead of preventing entry of such persons into the public service, preference is given to the most sophisticated methodology: to prevent their communication to people.

We also do not rule out the necessity of limiting direct communication of individuals with officials and making such scope possibly reasonable, but we also cannot ignore that existence of certain discretionary powers is necessary for several reasons: a) it enables improvement of intellectual and practical skills of public servants as they are forced to be creative in their approach to solving tasks; b) it enables to identify the exact scope of truly empowered and able to promote officials as reasonable and intelligent choice among existence of a few options is considered the most reliable criterion for assessing official capacities; c) it makes possible to take into account the most true and concrete solutions among multi-nature functions performed by the public servant in proportional way, etc.

There is no doubt, the number of key issues in the field of the public sector still waiting for their comprehensive solution is too many; we have just tried to separate those, which, in our opinion, are the most actual. It should be added that slow moving in the field of public service improvement will have too expensive outcome on the general situation in the state management area; lingering in this case is at least unacceptable, especially when we are talking about the kind of decisions that will not require investment of additional financial or human resources, but on the contrary, intended to record major success with more modest means.

At the same time, having understood that the above approaches are not the ultimate truth, I would like these issues to become a topic of wide-range discussion, which would enable to have a number of approved solutions. In this regard, it is appropriate to recall and summarize the material with the following idea of B. Kistyakovski, the famous Russian scholar: "... no field of science has so many conflicting theories, as Jurisprudence has<sup>7</sup>".

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7 Kistyakovski B. A., Social science and law. Features on methodology of social science and general theory of law. M., 1916, page 374.

## CERTAIN ASPECTS OF THE IMPROVEMENT OF THE ELECTORAL CODE OF THE REPUBLIC OF ARMENIA

Norik Ayvazyan<sup>1</sup>

From the first days of the independence of the Republic of Armenia, the legal regulation of social relations was accompanied by reviewing, re-establishing (like in any country being in the phase of transition) the values and priorities in many areas of the country's life (economic, social, political, etc.). A special re-evaluation is implemented in regard to the issues of organization, execution of the state authority, the bearer of the state authority and the mechanisms of the organization and realization of the state authority which belongs thereto.

This process was reinforced in the Declaration about the independence of Armenia, adopted on August 23, 1990, according to which: "The bearer of the Armenian statehood is the people of the Republic of Armenia, which exercises the authority directly and through its representative bodies..." (paragraph 3)<sup>2</sup>. Then this idea was legislatively reinforced in Article 2 of the RA Constitution adopted in 1995: **"The people shall exercise their power through free elections, referenda, as well as through state and local self-government bodies and officials provided for by the Constitution."**

The text of the Article implies that in the discussed question the Constitution gives preference to the forms of immediate democratic governance: free elections, referenda, through which the representative institutions of democratic governance are formed.

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<sup>2</sup> Collection of Legal Acts of Armenia (1990-1995), Yerevan, 1995, pp.9-10 [Հայաստանի գործող օրենքների ժողովածու (1990-1995թթ.), Երևան, 1995թ., էջեր 9-10].

The experience of the organization of elections in different times proves that the important institute of immediate democratic governance in the Republic of Armenia is yet in essence in the stage of formation. “In the Republic of Armenia, there have not yet been formed democratic elections in line with the international standards on the legislative prerequisites, institutional decisions as well as the organization, realization of the process.”<sup>3</sup>

There are plenty of objective and subjective factors which are an obstacle for this institute to be sustained, such as the shortcomings of the electoral legislation, the poor socio-economic condition, the low level of the culture of free and fair elections, and other circumstances which are used by influential individuals of the Republic: during the elections the political parties count the voting results in their favor.

As a result, the public at large raises some complaints, and the confidence toward the formed authorities is undermined, which considerably hinders the progressive development of the country.

In the range of the mentioned factors, the gaps and shortcomings that exist in the electoral legislation are distinguished, which have negative consequences, and the suggestions made as a result of a scientific analysis and their practical application will give the possibility to somewhat mitigate the contradictions existing in public life and concerning the discussed sphere, as well as to contribute to the restoration of confidence among the people towards the authorities.

In the context of expecting such results, Article 11(1) of the RA Electoral Code<sup>4</sup> plays a very important role; according to the article: “The list of electors of the Republic of Armenia, except for the lists drawn up in military units as well as the ones lists signed by electors,

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<sup>3</sup> Harutyunyan G.G. Introductory remarks on the 13<sup>th</sup> Yerevan International Conference : “The role of the Constitutional Courts in safeguarding democratic elections” (5-7 October, 2006), Almanac, Yerevan, 2006, P. 5. [Арутюнян Г.Г. Вступительное слово на XII Ереванской международной конференции: “Роль конституционных судов в обеспечении демократических выборов”, (5-7 октября 2006г.) Альманах, Ереван, 2006, стр. 5].

<sup>4</sup> Adopted on May 26, 2011 (Official Journal of the Republic of Armenia, N36 (839), 16.06.11).

shall be open to the public.

Lists signed by electors shall not be published, and no carbon copy of these lists shall be made, they shall not be photographed and videotaped.”

There are prohibitions of such contents envisaged in Article 31(1)(3) and Article 33(1)(2) of the Code.

Making the list signed by voters confidential and limiting the publication (in any way) of the information contained therein are not perceived by the society, political areas in a definite way.

This approach is not clear to the citizens of the Republic even in the sense that there are many cases when following the summarization of the voting results, names of deceased people have been found there or names of people who have left the Republic, while in front of their names there have been signatures.

Naturally, even if these cases are just exceptions, anyhow, there is some distrust in the society regarding the fairness of the electors' processes.

The parliamentary and extra-parliamentary discussions organized upon the suggestion of some political powers of the Republic engaged with this issue also finished without success. The question was presented to the Constitutional Court of the Republic of Armenia. On May 5, 2012 the Constitutional Court of Republic of Armenia started the examination of the application presented by 29 members of the National Assembly of the Republic on April 28, 2012 concerning the compliance of certain norms (Article 11(1), Article 31(1)(3), Article 33(1)(2)) of the RA Electoral Code, reinforcing the confidentiality of signed electoral lists, with the RA Constitution.

Discussing the application presented by the Members of the National Assembly, while formulating his legal position, he followed the requirement reinforced in the sub-point 3 of the point 4 (Secret suffrage) of the document of the Venice Commission of the Council of Europe, titled “Code of good practice in electoral matters:

guidelines and explanatory report”<sup>5</sup>, according to which “lists of persons actually voting should not be published”, the meaning of which is explained in point 54 of the mentioned document, according to which: “...since abstention may indicate a political choice, lists of persons voting should not be published.”<sup>6</sup> With this and other justifications, as a result, the Constitutional Court rejected the proposal presented in the application of the members of the National Assembly and recognized that the mentioned norms of the Electoral Code are not in violation of the Constitution<sup>7</sup>.

Here the problem is not at all whether the legal position of the Constitutional Court regarding discussed issue is justified or not, but the problem is to what extent it contributes to the mitigation of the tense socio-economic, legal and political situation that exists in the country.

As it has already been mentioned, the migration in the Republic continues and the society finds that the reason behind this migration are the activities (not contributing to the nation) implemented by the authorities which are not formed as a result of free and fair elections.

Consequently a provision of primary importance for the President and the Government of Republic of Armenia was announced, according to which it is planned not only to completely prevent the migration, but also take efficient measures towards repatriation.

In our opinion, in this case it would be appropriate if besides invoking the relevant norms of the documents adopted by European bodies regarding the justified nature of not publishing the lists signed by the voters, the Constitutional court took into account also the following circumstances:

First, the document titled “Code of good practice in electoral matters: guidelines and explanatory report” of the Venice

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<sup>5</sup> Adopted by the Venice Commission during the plenary session 52 (Venice, October 18-19, 2002) CDL-AD (2002) 023 rev.

<sup>6</sup> See *ibid*, page 28.

<sup>7</sup> See Decision of the Constitutional Court of the Republic of Armenia #1027 adopted on May 5, 2012.

Commission of the Council of Europe stipulates as follows: “The list of persons actually voting should not be published (sub-point (c) of point 4), ... since abstention may indicate a political choice...” (point 54).

It turns out that, according to the document “the confidentiality of the list of persons who actually voted is meant to ensure “the confidentiality of persons who did not vote””, which may have a political dimension. In our opinion, such a setting of this issue is justified for the voters of European countries, where exists a proper political culture, the political parties and citizens have a clear political orientation; however, the same cannot be said about the reality of the Republic of Armenia.

First of all, it is known that the vast majority of more than 70 political parties registered in the Republic do not have an orientation, a clear activity program. It is also a general phenomenon that the citizens included in them often change their party affiliation exceptionally due to their personal motives. In such conditions, making the lists of persons who signed them confidential according to the procedure defined by legislation and considering the fact that the citizens of the Republic of Armenia do not participate as a “testimony of political choice” is at least a fallacy.

Then, the RA Constitution reinforces the principle of election’s confidentiality (Article 4) as an important principle of the suffrage of citizens. What concerns the confidentiality of “not electing” or “not participating in the elections”, then let us say that there is no such principle envisaged by the Constitution. Since it is known that the Constitution has supremacy over international legal acts, we, therefore, can rely on the Constitution regarding the discussed issue.

Especially, the basic law of the Republic (Article 2) says that in Armenia the only source of power is the people and the power belongs to the people who exercise their power directly, as well as through state and local self-government bodies and officials over which the people have the right to direct supervision. It means that the ones who realize the power which belongs to the people cannot keep secrets from the people and the subjects who present the

interests of their representatives, including the limitation of the right to have a free access to the list signed by the voters.

Besides, in favor of disclosure of the electoral lists we can invoke another important basis which is Article 63(1) of the Law “On the Constitutional Court of the Republic of Armenia” adopted on June 1, 2006, which gives the Constitutional Court the possibility to evaluate “... both the act and the law enforcement practice” while determining the constitutionality of a legal act.

In this sense the practice of applying Article 11 of the RA Electoral Code, which makes the signed electoral lists confidential, is more than rich with undesirable consequences for the social and political life of the Republic about which we talked above.

There is another suggestion which can contribute to the review of the RA Electoral Code’s norm (Article 11(1)) about making the signed electoral lists confidential. As it is mentioned in the legal position of the Constitutional Court expressed regarding its decision adopted on May 5, 2012 (Decision of the Constitutional Court SDVo-1027) despite the fact that the restriction of publishing the signed lists by voters has been a subject of discussion in the international practice for various times, “the choice of the frames of the possible options and limitations of legal regulation is considered to be an issue under the jurisdiction of the legislator of the given country” (paragraph 5).

Another important circumstance is tightly related to the issue under discussion. The point is that the issue of citizenship of the Republic of Armenia is led by the “blood” principle which means that wherever, in which country is or lives the citizen of the Republic of Armenia, he does not lose the citizenship and is not withdrawn from the registration; therefore, he or she does not lose the right to participate in the relevant elections. As a result, while making the electoral lists of the participants of national elections, the names of persons who have the right to vote are included in the voters' register of the Republic of Armenia.

However, nearly no condition is envisaged in the current RA Electoral Code for exercising the right of voting by the mentioned persons. Thus, in Article 2(2) of the RA Electoral Code adopted in 1999 it was prescribed that “During the preparation and conduct of the elections, the citizens of the Republic of Armenia who reside or are outside of Armenia, have the right to vote. Diplomatic and Consular Representations of the Republic of Armenia, in accordance with the procedures set by this Code and by the Central Electoral Commission, guarantee the exercise of the electoral right of Armenian citizens.”

With the purpose of solving this problem, the old 1999 Electoral Code entitled the heads of diplomatic or consular representations working abroad, in accordance with the procedures set forth by the Central Electoral Commission, to compile the electoral lists of RA citizens who have the right to vote and who live or are in the relevant countries (Article 9(5)).

The citizens who were included in those lists were exercising their electoral right in the polling stations formed at the Diplomatic and Consular Representations of the Republic of Armenia for national elections (Article 15(4)).

The precinct commissions were summarizing the poll results in accordance with the procedure set forth by the Electoral Code and sending to the Central Electoral Commission of the Republic of Armenia.

This procedure continued to exist until 2007 when as a result of an amendment to the Electoral Code adopted on March 6, citizens who were abroad or were residing abroad were prohibited to exercise their electoral right in the polling stations formed at the diplomatic and consular representations.<sup>8</sup>

The RA Electoral Code published in 2008 (with amendments and supplements made on December 18, 2007) was prescribing that “in the Republic of Armenia the elections are held in the territory of the Republic of Armenia” (Article 1(5)).

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<sup>8</sup> See Law of the Republic of Armenia “On making amendments and supplements to the Electoral Code of the Republic of Armenia”, HO-79-N, 06.03.07.

The same procedure is prescribed also by the current RA Electoral Code: “Voting shall take place in the polling stations established on the territory of the Republic of Armenia...” (Article 54(1)).

The evaluation of such approach of the RA Electoral Code in the discussed issue is not our task. We can just suppose that the citizens who left the Republic are, first of all, the persons who had a misunderstanding with the current authorities regarding this or that issue; therefore, they cannot have an objective conduct concerning their political orientation.

Regardless of all the circumstances, assumptions, in our opinion holding the poll only in the territory of Armenia deprives the citizens of the Republic of Armenia who are or live abroad from their electoral right as hardly ever will the citizen of the Republic of Armenia living abroad visit Armenia, participate in in the poll and then return to the country where he lives.

The Electoral Code envisages an exception from the general rule (exercising the right of voting in the territory of the Republic of Armenia) for electors who are on diplomatic service in diplomatic and consular representations of the Republic of Armenia, as well as the members of their families residing abroad with them and having the right to vote, who may, in case of being outside the territory of the Republic of Armenia on the voting day, participate in national elections by voting electronically within the time limits and as prescribed by the Central Electoral Commission (Article 60(1)).

This procedure is applied also to the voting staff of overseas representations of legal entities registered in the Republic of Armenia (irrespective of the form of ownership), as well as the voting members of their families residing abroad with them (Article 60(3)).

In such situation when there is a single list of voters for holding elections in the Republic, which includes also the citizens of the Republic of Armenia who reside abroad and have the right to vote, if the free access to the electoral lists is prohibited among the participants of the electoral process, the public will naturally have

reasonable doubts that the votes of the citizens residing abroad are used by the political powers participating in the elections in favor their interests. Hence, there arises a doubt about the legitimacy of the elections and distrust towards the winning political powers.

In this regard, we think the following offer may become an option for solving this issue. As it has already been said, until 2007 the citizens of the Republic of Armenia being or residing abroad exercised their electoral right in the polling stations formed in the Diplomatic and Consular Representations of the Republic in the procedure prescribed by the Central Electoral Commission. For these very aims, the latter was drawing up the electoral lists and electoral precinct centers where the citizens were exercising their electoral right.

According to the current Electoral Code, nowadays the citizens who live abroad can exercise their electoral right only in polling stations established on the territory of the Republic of Armenia (Article 54(1)). In this regard, it will be appropriate if the Diplomatic and Consular Representations in foreign countries, according to the procedure prescribed by the Central Electoral Commission, draw up the lists of the RA citizens who are or reside in the given country and present to the state government body authorized by the Government which runs the state register of the population, which can give them to the precinct electoral centers in the prescribed period (heads of penitentiary institutions and of facilities for holding arrestees, and the commanders of military units draw up the lists of eligible electors).

These lists can be posted in the relevant electoral precinct in a visible place both before and after the poll, noting that in that way the “confidentiality of voting” of the Armenian citizens living abroad will not be violated as their number will not be that high, we guess.

As a result of the justifications and conclusions made regarding the discussed issue, we can offer the following amendments and supplements to some of the articles of the RA Electoral Code.

**First**, in Article 7 of the RA Electoral Code (“Maintaining the register of electors; drawing up lists of electors”) besides the heads of penitentiary institutions and facilities for holding arrestees, as well

as the commanders of military units, entitle also the heads of diplomatic missions and consular representations in foreign countries to draw up lists of voters. In this regard, Article 7(3) of the RA Electoral Code shall read as follows: “3. Heads of diplomatic missions and consular representations in foreign countries, penitentiary institutions and facilities for holding arrestees, as well as commanders of military units shall also draw up lists of electors in cases and in the manner prescribed by this Code”.

**Second**, Article 8 of the RA Electoral Code (Including electors in the list) prescribes the procedure for including in the list the citizens of the Republic both in national elections and in the elections of local self-government bodies. As the citizens of the Republic of Armenia who reside or are abroad can participate only in national elections, in Article 8 of the Code a paragraph can be added with the following contents (it is appropriate to add it after paragraph 8): “In national elections, citizens of the Republic of Armenia having the right to vote, who submitted an application and who reside or are out of the territory of the Republic of Armenia, are included in the lists of electors according to the procedure prescribed by the Central Electoral Commission.

In case of absence of diplomatic and consular representations of the Republic of Armenia in foreign countries, the citizen of the Republic of Armenia may apply for being registered at the diplomatic or consular representation of the Republic of Armenia which operates in the state near the place of his or her residence”.

**Third**, Article 10 of the RA Electoral Code prescribes the procedure for providing the lists of electors to the electoral commissions and to the person possessing the premises of a polling station. According to that article, “the authorized body shall, two days before the voting day, provide to chairpersons of precinct electoral commissions the lists of electors drawn up by the authorized body as per electoral precincts and the addresses of residential buildings (houses) included in the electoral precinct, in two printed carbon copies” (paragraph 3).

In the same procedure, the commander of the military unit,

heads of penitentiary institutions and places for holding arrestees compile the relevant electoral lists and provide them to the chairperson of the precinct electoral commission 2-3 days prior to the voting day.

There is another problem in case of electoral lists which are compiled outside the territory of the Republic of Armenia. Those lists are compiled, paginated, and each page is signed by the heads of diplomatic and consular representations of the Republic of Armenia in foreign states. And as there may be citizens in the list who are registered in different communities of the Republic, the heads of diplomatic or consular representations of the Republic of Armenia who compile the lists send the electoral list to the governing body authorized by the Government of the Republic of Armenia, conducting the State Population Register.

In this regard, it is appropriate to envisage a separate paragraph in Article 10 of the RA Electoral Code (after paragraph 3) with the following contents:

“After having received the electoral lists, the authorized body shall, based thereon, draw up a single list of electors as per electoral precincts and the addresses of residential buildings (houses) included in the electoral precinct, in two printed carbon copies (the first carbon copy of the lists of electors shall be drawn up in the form of a book, and the second carbon copy shall be for posting in the polling station)”.

**Fourth**, the lists drawn up outside the territory of the Republic of Armenia are considered to be the integral part of the register of electors of the Republic of Armenia. Upon receiving the lists of electors drawn up by the heads of diplomatic and consular representations of the Republic of Armenia in foreign states, the state governing body authorized by the Government (the authorized body) which conducts the State Population Register coordinates them as per the place of registration and provides two copies of it to the relevant precinct electoral commission as a single list.

The electoral precinct uses the first copy of the lists drawn up in the form of a book for organizing the poll of the citizens of the

Republic of Armenia, residing abroad, and the second copy posts in the polling station.

After the elections are finished and the results of the voting are summarized, the copy of electors list which was signed by the electors when voting, is posted in the constituency within the period prescribed by the Central Electoral Commission and is freely accessible.

In this regard, the following supplement to Article 11(1) (“Accessibility of the lists of electors”) of the Electoral Code may be made: “The list of electors of the Republic of Armenia and ***the signed list of electors who are or reside abroad*** are freely accessible, except for the lists drawn up in military units as well the lists signed by the electors”.

The signed lists of electors should not be published, photocopied, photographed or videotaped, except for ***the lists signed by electors who are or reside abroad.***”

***Fifth***, Article 31(1) of the RA Electoral Code (“Rights, obligations, and guarantees for activities of observers and mass media representatives”) entitles the observers and mass media representatives to freely familiarize with election documents under the disposal of the electoral commission, to receive copies or excerpts thereof, except for the lists signed by the electors.

In our opinion, this exception should not apply to the lists drawn up outside the territory of the Republic of Armenia, including the electoral lists signed by voters. In this regard it is appropriate to make the following supplement in the text of Article 31(1)(3) of the Electoral Code: after the words “the relevant statement provided to the electors by the authorized body” in the 7<sup>th</sup> line of the mentioned paragraph add “, the lists drawn up outside the territory of the Republic of Armenia which are signed by the electors”, then leave the rest unchanged.

***Sixth***, the RA Electoral Code gives rights with the same contents to the proxies of the candidates as well. According to Article 33(1)(2) the proxies are entitled to freely familiarize with election documents under the disposal of the electoral commission,

receive their copies or excerpts thereof, except for the lists signed by the voters. In our opinion this exception for the observers, mass media representatives as well as the proxies should not be applied to the lists compiled outside the territory of the Republic of Armenia, including the electoral lists signed by voters. Thus, it is appropriate to make the following amendment to the text of Article 33(1)(2) of the Electoral code: after the words “the relevant statement provided to the electors by the authorized body” in the 7<sup>th</sup> line of the mentioned paragraph add “, the lists drawn up outside the territory of the Republic of Armenia which are signed by the electors”, then leave the rest unchanged.

**Seventh**, the given article (Article 33) of the RA Electoral Code envisages a range of other rights and responsibilities for proxies. The most important ones are: during the summarization of the voting results freely familiarize with the cast ballot papers and indications made therein, be present during the counting of ballot papers and summarization of voting results (paragraph 1, part 7), etc.

But, in our opinion, the controlling function of the proxy over the electoral processes is considered as even more important by the precinct electoral commission while summarizing the results of the voting, as the results of voting (both for objective and subjective reasons) are mostly falsified in this case.

This is proved by the Council of Europe's Observation Mission Final Report regarding the Parliamentary Elections of May 6, 1912, where it is stated that “[o]ne fifth of observed vote counts were assessed negatively, mainly due to procedural problems, such as failure to perform basic reconciliation procedures, cases of non-transparent counts, problems completing the results protocols, and isolated cases of serious violations”<sup>9</sup>.

In this regard, Article 67(4) (“Procedure of summarization of voting results in electoral precincts”) of the RA Electoral Code envisages that the chairperson of the precinct electoral commission shall open the ballot box, take one ballot envelope out of the ballot

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<sup>9</sup> Republic of Armenia Parliamentary Elections, 6 May 2012. OSCE/ODIHR Election Observation Mission, Final Report. Warsaw, 26 June 2012, page 3.

box, and announce out loud whether the envelope is of established sample or not, then demonstrate it in such a way that it is visible to those present. If requested, the ballot envelope shall be passed on to the other commission members.

In this process the proxy who is, in essence, the most interested party of a fair outcome of election actually does not have the possibility of direct supervision and plays just the role of a passive observer. Hence, the Electoral Code should provide a real possibility for the proxies to control the activity of the electoral precinct commission mostly in the stage of calculating the votes and summarizing the results of the elections. In this regards, in our opinion, it is appropriate to stipulate a provision in Article 67(4) of the Electoral Code, whereby if requested the commission chairperson shall pass the ballot paper not only “to the other commission members”, but also to the proxy. Thus, it is necessary to add the words “and to the proxy” after the expression “to the other commission members”, at the end of the first sentence of Article 67(4) of the Code.

Besides, it is appropriate to entitle the proxy with the right to raise an objection if he disagrees with the opinion expressed by the chairperson of the precinct electoral commission during the counting of the votes. This objection is envisaged for the commission members.

In this regard it is necessary to add the words “or the proxy” after the expression “commission member” on lines 6, 7, 8, 16 and 17 of Article 67(4) of the Electoral Code, and after the phrase “to the other commission members” on line 15 add the words “and to the proxy”.

In our opinion, in this way we will solve several key issues closely related to keeping the electoral lists signed by the citizens secret and related to their disclosure.

a) The prohibition of publishing the electoral lists signed by voters of the Republic of Armenia, except for the electoral lists signed by the citizens of the Republic of Armenia who are or reside abroad, will no longer cast doubt that those lists may be falsified.

b) There will be no other opinion that there is a requirement of introducing Article 54 of the international document of Venice Commission of the Council of Europe with the title “Code of good practice in electoral matters: guidelines and explanatory report” into the RA Electoral Code, which reads as follows “...since abstention may indicate a political choice, the lists of persons voting should not be published”.

c) The Republic of Armenia citizens’ faith in free and fair elections, therefore also in the state authorities and local self-government bodies formed as a result of it, will be restored.

d) It will be possible to find out the actual number of citizens who reside in the Republic of Armenia and have electoral rights and the number of citizens who participated in the voting of each national election which will give a possibility to obtain an understanding of the statistics of citizens' participation in the elections.

# ROLE AND PLACE OF THE RULE OF LAW IN THE SOCIAL BEHAVIOUR OF AN INDIVIDUAL AND A CITIZEN

Gagik Harutyunyan<sup>1</sup>

It is indisputable that the discussed issue is timely in the international aspect and numerous questions linked with it need a thorough scientific summarization. This is especially needed for the new democracies, where there is a conceptual confusion on the layers of state-political and public perception up to the level of scientific thought. A comprehensive study of international experience on the issue has led us to the conclusion that in any country the success of establishing a legal, democratic state, is first of all conditioned with the level of equivalent understanding of the principle of the Rule of Law, its adequate constitutional stipulation, legislative provision, rooting in the state and public mindset and *modus operandi*. The question is not only that the limited perception of the fundamental principle of the Rule of Law often leads to confusion of its identification with the Rule of the Law (Rule of the Statute). It is more important that in such circumstances the cornerstone of establishment of legal, democratic state cannot be laid properly, and all the efforts aimed at this do remind the illusion of construction of the castle in the sand, without a stable foundation.

Concerning the subject of the discussion we attach a special importance to the following circumstances:

**First**, how precisely the principle of Rule of Law is legally comprehended and clearly formulated;

**Second**, how precisely the essence of this principle has become the initial element of the legal and political culture of the given country;

**Third**, how it is reflected in the level of constitutional solutions;

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**Fourth**, how precisely the guarantees for the implementation of this principle are legislatively stipulated;

**Fifth**, how the law enforcement practice precepts and implements the principle of the Rule of Law;

**Sixth**, how this principle has become necessary, comprehended and naturally enforceable element of social behavior of an individual and a citizen;

**Seventh**, how the state and civil society monitor the implementation of this principle and overcoming the obstacles hindering it.

From the numerated circumstances, let us highlight the conceptual approaches of particularly the last two items, on the basis of the following reasoning:

1. The Rule of Law, as a cornerstone of the rule-of-law state, first of all implies that even people, who hold the power and are the source thereto, are limited by inalienable human rights as possessing direct effect. For many countries, this has become the core constitutional provision. Consequently, all other aforementioned circumstances are necessary for creation of an environment necessary for making the Rule of Law the core of the social behavior of an individual and a citizen, axiological basis for his/her self-expression and self-realization. If this is not the case, other specified circumstances become an end in itself.

2. System monitoring for the transformation of the Rule of Law as the core of human social behavior is the main condition that is necessary for the consistent identification, assessment and overcoming of all the possible obstacles of limiting the power by law.

In a more general form, the principle of the Rule of Law implies that:

- Human rights shall be constitutionally declared, legislatively secured, as well as ensured and protected by equivalent institutional solutions;

- Restriction of the power by law and the direct effect of the

fundamental human rights should become a norm of behavior for all the layers of the social society;

- The principle of equality before the law should be respected and guaranteed;

- Justice must be independent and impartial;

- Laws and other legal acts should be in conformity with the principle of legal certainty, be predictable, precise, with no gaps and ambiguity;

- Exercise of the power shall be based on the legality, equity, and reasonableness;

- Issues related to the subjective rights of individuals should be considered and decided on the basis of law, not arbitrarily;

- Legal disputes should have the necessary mechanisms for their effective resolution exclusively by legal remedies;

- Concerning the issues of guaranteeing, ensuring and protecting human rights, the state should sequentially fulfil its national and international obligations.

Guaranteeing the principle of the Rule of Law presupposes simultaneous existence of all these inter-conditioned and complementary legal conditions, which, unfortunately, is often not properly perceived in the political and legal systems of the countries of new democracy.

These approaches are also derived from the positions stipulated in the Report of the Venice Commission of the Council of Europe CDL-AD (2011) 003rev of April 4, 2011 regarding the Rule of Law.

On September 24, 2012, the UN also adopted the Declaration of the High-level Meeting of the UN General Assembly on the Rule of Law at the National and International Levels. Emphasizing the exclusive importance of the Rule of Law at the national and international levels, the aforementioned declaration highlights the importance of the independence of the judiciary, access to justice, fight against corruption, terrorism and transnational organized crime. It contains appeals to all the member states to make the Rule of Law the basis for activities of the national authorities.

We do believe that in this context the main emphasis should not

be on the importance of the discussed issue, which is obvious, but on the necessity to specify the priorities of guaranteeing the Rule of Law on the basis of the conceptual summarization of other existing European and international experiences and the necessity to reveal the real possibilities of restriction of the power by law as a result of the systemic evaluation of the objective realities.

We do strongly believe that the starting point for solving this problem is a human being with the level of system-value understanding of the social behavior, level of public legal personality, existence of objective environment for its implementation. Consequently, for the establishment of the Rule-of-law state, the place and the role of the Rule of Law in the social behavior of the individual becomes pivotal, creating an equivalent system of relations of individual-society-state, becoming the initial criterion for the establishment of the civil society and the Rule-of-law state.

Nowadays the social behavior of an individual has become a subject of serious scientific discussions by philosophers, sociologists, psychologists, and representatives of other sciences. However, in our opinion, an approach towards the problem of the legal assessment of the social behavior of the individual, relevant to its actuality, has not been manifested yet.

Social behavior of an individual is first of all a comprehended and rational behavior: it has axiological background, motivation of manifestation, featured forms and ways of expression, which guide the self-expression of a person in multilayered social links. The axiological basis of the social behavior is the assessment, understanding of the place and role of the human being in public life in accordance with the value system of his/her perception of the World.

It is well known that at the beginning of the last century the so-called “La Pierre Paradox” proved that the constant and main feature of the human social behavior is his/her axiological orientation, the value system, serving as a basis for his/her rational self-cognition and self-expression.

Spiritual and physical needs of a human being, diverse motivations of his/her expectations, interests and goals dictate the relevant *modus operandi*, which, in itself, has a meaningful axiological manifestation. The reality is that the values correspond to the society and the individual. Axiological motivation of the individual, in its turn, is both of subjective and objective social feature and significance. The core issue here is the following: how the dialectic of satisfying of the needs of the individual is, via which motivations of satisfying these needs an individual gets involved in a dynamic process of social relations, deriving from the objective reality that every satisfied need creates new ones. Taking this circumstance into consideration, at the end of the last century Robert Lucas, the Nobel Prize laureate, in the framework of the theory of rational expectations suggested to put the concept of influence on the social expectations of the people in the background of public administration.

The formula to achieve satisfaction and happiness through deterrence of expectations has also become the spiritual value of millenniums.

The social significance of social interrelations and social behavior of an individual is increasing in the civil society parallel to valuing his/her place and role. In such a society, social behavior of an individual should be sustainable, predictable and harmonic to his/her ideals, aspirations, expectations and comprehended benchmarks of the social links. This is possible only if there is a strong axiological basis for the rational human existence and in the terms of formation of the relevant social environment.

In this perspective such urgent social issues should be estimated, and adequate solutions should be found concerning them, as, for example, the demographic issues in case of our country.

Simultaneously, in a democratic society it is necessary that the value orientations of social behavior of an individual are in harmony with the value system, fully acknowledged in the society.

In this context, the fact that the social behavior of the individual is not a systemless display of his/her social psychology, but its main

feature is normativeness, deserves attention. The latter is formed both on the grounds of customs, traditions, spiritual values, various impacts to the social environment, and also primarily as a result of the legal regulation of the relationship between people and their groups.

In this respect, the lessons of the history are also rather instructive. Mkhitar Gosh, one of the greatest representatives of the Armenian medieval legal thought, in Chapter B of the “Introduction” to his *Datastanagirk* (Code of Laws), motivated the need of regulation of legal relations, in particular, by the following circumstances:

- Evil in people, evil in general has multiplied, and people do not know the laws; therefore, their decisions are incorrect or deviate from the laws;

- the Mosaic laws, the writs of prophets and the Gospel, being written once, remained intact, petrified; meanwhile, the human behavior and morals are different and altering in the course of time people and the Universe. Therefore, such a Code of Laws, which will reflect these changes, is needed;

- At the beginning, the Holy Spirit influenced on people and assisted fair justice to be exercised, and the Spirit was the Law, depicted in the people's hearts, so there was no need for the written law. Now, when the Holy Spirit does not already have the former impact and people “perverted” from the path of Christian brotherly love, veracity, the need to write the Code of Laws has emerged;

- Lawsuits usually end with an oath, but the evil multiplied in people and they, in spite of the fact that Lord imposed a ban on oath, were swearing aptly or inaptly and often in vain. In order to restore the violated legal order, the Code of Laws was written;

- Code of Laws was to establish legality and order, so that justice shall be impartial, imperishable, and fair.

These and other statements, which justify the need for the Code of Laws, are available due to a thorough and unbiased scientific evaluation of the events of XII century. They also suggest that the nature and necessity of legal regulation are also conditioned by

human social behavior, axiological guidelines of its manifestation and the social environment where a person will express himself/herself as a socio-cultural creature with rational and creative commencement.

We do believe that the conclusion is unequivocal: social society is a healthy, viable, naturally existing and developing system only in the case, when the social expectations of the individual are in harmony with axiological guidelines of the society, and objective, as well as reasonable and thoroughly acknowledged values lie on their basis.

For such a role neither spiritual nor secular thought, due to the millennial experience, have found anything new, but human rights and fundamental freedoms acknowledged as highest and inalienable values.

Recognition of the principle of the Rule of Law is the highest point of the human self-recognition and comprehended self-expression of his/her social existence. Therefore, the following truth is indisputable: expectation of social harmony and development becomes senseless in a society, where the guarantee of the principle of the Rule of Law is not the cornerstone for the individual and his/her public self-expression.

In the rule-of-law and democratic state, constitutionally, on the basis of the fundamental law of the civil society, due to the relevant state policy, a social environment, where the Rule of Law is the core of the generation and manifestation of social behavior of individuals, their groups, authorities and the society as a whole, should be formed. As the great Armenian genius Grigor Narekatsi stated in his divine prayers in 10th century: human sins are not his crime, but his misfortune. A person needs a necessary environment and opportunity for a normal and dignified life. Nevertheless, the lessons of history indicate that this can only be guaranteed in the rule-of-law and democratic state.

The highest mission of the rule-of-law state is such a regulation of social behavior of the individual, society and the state, when the inalienable rights of an individual become main guarantees of his/her

freedoms, when such a social environment is formed where not the external influence, but the self-guidance based on the Rule of Law, become the highest form of guiding the social behavior of an individual. In such a society, where the Rule of Law is the starting point for both the state and an individual, where law-obedience, shame and conscience have incomparably greater and decisive impact on the behavior of the individual than penalty and its preventive essence.

This undeniable truth should become a reality first of all in the Basic Law of the country, and, not by mechanical adoption, but by comprehended stipulation and strict implementation on the basis of public consent. However, it is more important, on the one hand, to guarantee the latter in real life, transform the constitutional fundamental values into the rule of life, into the norm of behavior of an individual, society and state, on the other hand, to ensure such system of monitoring of guaranteeing constitutionalism, which, in the state of permanence, will be able to reveal, assess and overcome any deviation from this fundamental principle under the influence of different factors, providing the social organism with the necessary and sufficient immune system.

There is just one conclusion: the constitutional destiny of the country is conditioned by the circumstance of proper axiological guidance of the HARMONIOUS social behavior of an individual and a citizen based on the principle of the Rule of Law; there is simply no other way.

# METHODOLOGICAL ASPECTS OF EMPHASIZING THE ESSENCE OF LAW IN THE LAW-FORMATION PROCESS

Vardan Ayvazyan<sup>1</sup>

The issue of perception and study of the essence and content of law has been and still remains the challenge of top priority ever emerged for the worldwide legal thought. In this respect, the greatest thinkers of all times have suggested various, and sometimes even mutually exclusive concepts of study and perception of the essence of law, as a result of which, the legal thought could not achieve an unequivocal perception of the essence of law. In this regard, genius German philosopher Immanuel Kant, classifying law as one of the philosophic sciences, states that “In mathematics, definitions are the concept (ad esse), in philosophy definitions explain the concept (ad melius esse). In philosophy, the definition with its specificity and clarity should complete the work, rather than launch it. It is always pleasant to come to a definition, but very often, it is rather difficult. *Lawyers have so far been searching for their definition of law.*<sup>2</sup>

In respect of the above mentioned issue, the concepts of natural law (jusnaturalism), leggism, as well as libertar-juridical concept<sup>3</sup> are more widespread. The past and modern concepts regarding the essence of law which are more or less developed, as a combination of theoretical knowledge on law (essence and phenomenon), differ from each other, first of all, by their methodological approaches to the study and perception of the subject. This is conditioned by the fact that the methodology of legal and philosophic theories of past

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<sup>2</sup> Kant I. The Critic of Pure Reason. Translated from German by N.Lassky. 1998, pp.730-731. [Кант И. Критика чистого разума, Пер, с нем. Н. Лосского.- Мн.: Литература, 1998, С. 730-731].

<sup>3</sup> Nersesyan V. S. Philosophy of Law: Liberal-legal concept, *Issues of Philosophy*, 2002, # 3, pp. 3-15. [Нерсесянц В. С., Философия права: либертарно-юридическая концепция, Вопросы философии, 2002, N 3, С. 3-15].

and present has been limited to the framework of the subject of their concept, and the same phenomenon (law) within the scopes of different concepts has obtained totally different substantive expression in the sense of its recognition and meaning. For example, the concept of non-conflict society and that of the conflict society, which is opposed to the latter, establish different methodological systems with respect to the essence of law, wherein the description of phenomena and the complex of conclusions regarding the causal logical links not only contradict each other, but also do not intersect at the level of conceptual terms and may not have common theoretical standards with respect to carrying out comparative assessment. Particularly, Soviet socialist economic planning law could not be compared to the capitalist commercial law, as it did not differentiate between public and private law and, moreover, considered it impermissible. Though from the perspective of positive law these two as systems for ensuring compulsory rules of conduct were practically equivalent.

The emphasis of the essence and content of law is conditioned by the issue of origin or *formation of law*, which makes it possible to understand the quality of laws, whereof the ensuring of balance and harmony of all social processes is dependent. The understanding of law and its functional mission (assignment) presupposes the formation of a respective concept. If ignored, it will create a systemic conflict, which nowadays is expressed in the form of recurrences of critical and actual disruptions, such as, for example, the overthrow of multicultural model of society in the territory of the European Union. As a bright example of the abovementioned fact, let us take the confession made by Angela Merkel, Chancellor of the Federal Republic of Germany, one of the key countries of the European Union, in her speech at the meeting held in Potsdam with the youth wing of the political party “Christian Democratic Union”, which particularly underlined that the idea of multicultural society within the territory of the country completely failed.<sup>4</sup> This systemic conflict emerged when Germany decided to solve the problem of lack of

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<sup>4</sup> For more details visit: <http://www.newsru.co.il/world/17oct2010/merkel409.html>.

workforce not through the systemic scientific-methodological, but through situational approach, that is by the means which was the easiest and fastest one at that moment. Particularly, for the purpose of involving cheap workforce in the economy, the gates to the country were hospitably opened for the billions of working migrants from Turkey, Greece, Spain and Yugoslavia, who were completely satisfied with the German standard of living. As a result, the systemic integrity and homogeneity of the German civil society, which was then at its highest level of development, was disrupted. Such phenomena also influenced France and Great Britain.

Meanwhile, the essence of law requires a deep scientific methodological study, with the availability of a serious methodological toolbox of law formation. The law formation process starts at the law creation level, which should have scientific logical formulation, and if we do not study natural law, it will be understood as a God-given reality. The methodological approach of natural law presupposes the existence of objective harmony, the essence of which should be scientifically studied irrespective of the fact whether it functions and ensures functional balance of social relations or not. In this respect, the issue of law itself becomes the ensuring of functional balance, the standards whereof shall be based on the objective logical model of the concept.

But if a person does not set himself a task to study the essence of harmony and emphasize the essence of law, he or she will get use of the law so long as it is still in force. Thus, we see that the formation of law may not take place without the perception of the essence and nature (not as a fact) of law, and the essence of law should be emphasized with certain paradigm of law.

In our view, in the concepts suggested from the perspective of methodological approach of emphasizing the essence of law in the law formation process, a number of key questions have been left unanswered; particularly, the question of whether the law has originated spontaneously or it always existed; whether it has originated at all, or is simply a God-given reality; if originated, then how it happened; whether it has originated by itself, or as a result of

conscious perception of the essence of law and development of law formation mechanisms on the basis of the latter, which is the space of coordinates of law; how to move from the space of “non-law” coordinates to the level of coordinates of law, and vice versa; how to prevent the transfer of law to the level of “non-law” coordinates, and a number of other questions. As a result of synthesis of the mentioned questions, we get the following conceptual question, comprehensively summarizing the issue:

*“Is it possible to establish rules of conduct and value judgements, which may, for all the people, be objectively true and at the same time be defined by a person himself, and not forced by “authority”?”*

The answer (Yes or No) to this question serves as a basic principle, which predetermines the central aspect of dividing the methodological approach of emphasizing the essence of law in the law formation process within the framework of a relevant concept.

In case if the answer is “No”, we get such a conceptual approach of emphasizing the essence of law, which predetermines a separate methodological direction (branch) by adopting the basic thesis, according to which the ability of a person to establish accurate objective rules of conduct is rejected.

As a result, a principle is formed, according to which value judgements are not objectively credible and are simply arbitrary, unreasoned preferences and antipathies of an individual, which at the end becomes the subject and norm of law with its subsequent formulation in the legislative system (by using the whole methodological toolbox of creation of positive law).

In this case, the whole conceptual base is formed on a model of value system, whereto the definition of any desirable weal is assigned, and here the desire becomes a measure of value, and not vice versa. Naturally, in this case the legal essence (nature) of value is defined and generated at the subjective level within the framework of desires and preferences of an individual.

Such subjective formation of law (value based formation of norm) is based on the idea that if pleasure is weal for a person, and

suffrage – evil, the principle according to which the desires serve as a determinative factor for the assessment should apply, that is, only those desires may serve as a Value, the fulfillment of which gives pleasure, and all the others may not.

Such extreme subjectivism in its nature is not compatible with the idea of comprehensiveness of ethic norms and their availability for all the people and, therefore, may not serve as a basis for the formation of compulsory rules of conduct for the society. And if such subjectivism was the only form of legal ethics, we would have to face a choice between ethical authoritarianism and rejection of all the claims to having comprehensive ethical norms ensuring objective rights of a person.

What arguments can be brought for people, who reject the ability of a person to establish objective accurate rules of conduct? In this case, as an argument we choose the answer “Yes” by applying totally controversial methodological direction of defining the essence of law, which is based on the concept of acknowledging and accepting the objective nature of values. Based on this logic, Jean Jacques Rousseau, leading conceptual thinker during the French revolution, suggested a concept, which was based on the principle that “Everything that is considered to be weal and corresponds to the order, is considered as such by the nature of things and is not dependant on the agreement between people”.<sup>5</sup>

As a result of such ideological approach a principle is formed, according to which values are of objective nature, value judgements express objective credibility and may be presented in the form of formal logical models of a norm by enshrining them in a respective law in the scopes of a complete legislative system. Thus, the whole methodological toolbox of creation of a norm of natural (objective) law is put to use.

In this case the establishment of logical models of norms shall be based on the knowledge obtained as a result of systemic research and further learning process. The mentioned process shall take place within the framework of science on law, wherein the essence of law

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<sup>5</sup> Руссо Ж.-Ж., Указ соч., С. 176.

is emphasized as a key issue of top priority.

It is important to mention that the conceptual basis for the perception of law, which predetermines the law formation and enforcement process, is formed at the level of choosing the ideological platform.

*The category of “essence” should include such qualitative features, without which the subject, the essence whereof is discussed in this article, cannot exist in general.*<sup>6</sup> Particularly, the essence of law should be emphasized in such a way so as to reveal and describe the essence and semantic content of law as a genesis of law, which includes all its qualities, goals, features, reasons of its existence and historic destinies.

Otherwise, within the scopes of legal regulation system a systemic conflict of “conceptual default”<sup>7</sup> emerges, which results in the absence of metrics of methodological adequacy of the legislative system in all of its stages (development, introduction and operational enforcement of law).

“Conceptual default” may be emerged for the following reasons:

- a) The conceptual position stating that the essence of law does not exist in general;
- b) The “NO” answer;
- c) In case of the “YES” answer, the absence of a complete system of the complex of uniform unequivocal concepts, which would make it possible to reveal and describe the essence and semantic content of law as a genesis of law, which includes all its qualities, objectives, features, reasons of its existence and historic destinies.

Therefore, the issue of comparative legal studies also remains

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<sup>6</sup> For more details see Leist O.E. The Essence of Law: Problems of Theory and Philosophy. Moscow 2002, P. 8. [Лейст О.Э., Сущность права, Проблемы теории и философии права, Москва, Зерцало-М., 2002, С. 8].

<sup>7</sup> For a more detailed description of the term see Vardan Ayvazyan, Legal Aspects of Conflictology and legitimacy. *Jurisprudence*, #139.3, Yerevan, 2013, p. 15. [Вардан Айвазян, Правовые аспекты конфликтологии и легитимность, Вестник Ереванского университета, общественные науки, Правоведение, 139.3, Ереван, 2013, С. 15.]

unsolved, as *without a common definition of “law” it is impossible to define law of different times (eras), and decide on what should be compared with what*. At the same time, it becomes impossible to explain the reasons of succession (continuity) in law and theory of law.

It is obvious that the essence of law may systemically be emphasized only within the framework of scientific-disciplinary learning at the fundamental level. The problem is that the law formation process in any case takes place according to the presumption that any complex social process, official powers or society may not be situated within the framework of this or that legal regime – outside the management system prescribed by the relevant legislation, aimed at preventing ungovernability and chaos. As a result, from the perspective of practical priority of ensuring law order, taking into account the lack of time and content of academic reservoir of knowledge, the whole methodological complex is replaced by a rapidly introduced methodical toolbox of the hastily developed legislative system. As a rule, this takes place by borrowing other ready-made laws and through their transplantation into tissues of state structure. It is obvious that in this case the aspects of the discussion of the essence of law at the methodological level simply collapse. Meanwhile, according to the French thinker C. Montesquieu “Law is human intelligence, as it governs all the peoples on the Earth, and the political and civil laws of any nation should be nothing else but a separate expression of that intelligence”. They should correspond to the physical characteristics of the country – its climatic conditions (cold, warm or mild), soil quality, its state, size, way of living of its inhabitants (farmers, hunters or shepherds), level of freedom ensured by the state regime, religion, habitudes, wealth, number of population, trade, morals, and habits. Lastly, they are linked to each other and are conditioned by their origin, legislative goals, fitness of things, on the bases of which they are approved.<sup>8</sup> In the law formation process the consideration of the

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<sup>8</sup> Charles Loui Montesquieu, *Selected Works on the Spirit of Law*. Moscow 1999, P. 16. [Шарль Луи Монтескье, *Избранные произведения о духе законов*, Москва, Мысль, 1999, С. 16].

above mentioned facts predetermines the aspects of methodological approach of the essence of law.

Though the systemic conflict of “conceptual default” of the essence of law exists in practice at the systemic level, it is officially considered as a non-existing phenomenon, as it is not discussed in general and is not seen.

Naturally, if there is no essence of law, the metrics of methodological adequacy of the technically approved legislative system is also absent. In this case, the legal content of a norm is narrowed down to the scopes of the feature of imperative obligation, wherein all the other features arising from its model of legal content are absent. As a result, law is viewed not as a *legal*, but *juridical* object, and the legislative system – as a *system of obligatory rules*, and never as a *system of legal regulation* which involves the essence of law. In this case the semantic structure of the complex of concepts and the structure of conceptual hierarchy of the legal model of the society, state, complex social process either collapse, or are replaced by technical implants borrowed from different legislative systems, which create a legal confusion (collage) and are not subject to any contextual assessment. As a result, the *legal* nature of law is transformed into *juridical* one taking the law formation to the technical level of norm creation.

The above mentioned facts give reasons to state that *the systemic conflict of “Conceptual default” serves as a means to separate the law (legal relations) and statutory law (legislation, state regulatory acts and orders), which is very important in defining the logic of legal nature of all public relations systems, which in combination may in a consolidated manner and in legal format present the essence of law already as a philosophic-legal category.*

At the same time, such approach, in our view, makes it possible to perform operational refinement at the level of methodological adequacy of the legal nature of legal perception system of this or that “legal world-view” (for example, leggism, jusnaturalism, libertar-juridical), which gives a conceptual description of the origin, sources and goals, nature, role and designation of law and of legislation.

Besides, it also makes it possible to give the typological description of legal systems, based on the criteria parameters of methodological adequacy of the legal nature of law formation in the process of their genesis. For example, it becomes possible to study the formation of *systems of conditional, conventional or situational law* in the context of displaying the legal dimensions of natural and positive law, as well as to ensure their navigation within these legal dimensions.

Nowadays, in the context of emphasizing the essence of law, it is very important to study and reveal the legal nature of the new manifestations, such as the system of relations in the virtual space of internet, where more and more social transactions within the framework and in a new format of global interaction are transferred in a high speed, thus transferring the system of public relations to cyberspace. In this respect, our era becomes a witness of dynamic junction of constitutional rights and digital sphere.<sup>9</sup>As a result, public relations of new qualitative format are formed, where the public relations are transferred to a completely new cyberspace. Such are for examples social network, social communications, commercial and payment transactions, business intercourse, legal transactions in the format of electronic signatures and documents, even any emulation of online interaction in legal format, such as the remote court sittings.

All these facts predetermine the necessity to elaborate a new type of cyber legislation in an unprecedented form of expression of the essence of law. In this case the current tendencies of applying “mechanism of leggism” aimed at giving post factum legislative formulation to the relations practically existing at the non-law coordinate space through the introduction of an operative norm creation process becomes ineffective and sometimes even useless. And again, it takes place as a result of systemic conflict of “conceptual default” existing in the legal regulation system of cyberspace, in case of which the law formation concept at the

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<sup>9</sup> Michel Rosenfeld, Andras Sajo, Constitutionalism: Foundations for the New Millenium, New Millenium Constitutionalism: Paradigms of Reality and Challenges, Njar, Yerevan 2013, page 11.

cyberspace is not studied in the context of the essence of law or is completely absent. It is replaced by the aspects of informational-technological description of the norms regulating relations. In this case, as a rule, the attention of the powers is concentrated on the elimination and exclusion of the existing and developing recidivism, as a result of which these give orders for the elaboration of prohibiting and preventing mechanisms. Meanwhile, the description of the legal context of a norm should serve as a basis for the comprehensive elaboration of legal regulation system, on the basis of which the legislative system will be able to fundamentally solve the issue. The unsolved issues of protection of copyright, imposition of taxes, information security, and private information space of a person, as well as those on protection from illegal impacts system in the sphere of education, moral development, entertainment, exclusion of the exploitation of global network resources for the purpose of organized crime and others, which from the perspective of law enforcement on cyberspace are in critical condition, are classified among such issues.

At the same time, the peculiarity of cyberspace is described by the fact that within this space such high technological instruments for the implementation of relationship systems are dynamically initiated, in comparison with which the traditional technology of social interaction and communication, with its inertia, is simply incompatible. Besides, the origination of crime and the elaboration of mechanisms for deviating from the prescribed legal norms develop with extremely high speed. That is, crime, as well as legal regulation, law enforcement and the whole law enforcement system have completely different mechanisms of functional implementation in the traditional legal environment and within the cyberspace.

The given judgments bring forth the following question *“Is it possible to establish rules of conduct and make value judgments, which may, for all the users of global network, be objectively accurate and, moreover, be defined by users themselves, and not simply forced by ‘authority’”*.

In our view, we do not have a “No” answer for this question.

But in that case, in order to give a “Yes” answer, it becomes necessary to solve the issue of revealing the essence of law in cyberspace by excluding the systemic conflict of “conceptual default”. The solution to the problem may be given only in case of availability of a basic concept of the legal model of global network, which should be elaborated at the level of a methodological synthesis of all the sciences regarding the application and development of law and global network. Here the key point is the methodological ability of formatting of all processes in the sphere of global system, by emphasizing the legal nature of each of them. The key factor of law formation is the study and revelation of legal nature of information through elaboration and implementation of the key conceptual principles of libertar-juridical model. It gives an opportunity to preserve the open and common functional nature of global system, as a key peculiarity of ensuring the global processes. The unsolved issues regarding the legal context of information, due to their double nature (useful or harmful) make it necessary to deviate to some extent from its open nature and introduce relevant censorship and nationalize the global network through the authorized “authority” performing restricting and prohibiting functions. As a matter of fact, it may result in the change of the global system as a means for development and of libertar-juridical status or even to its elimination creating a new substance with the possible tendencies of moving towards default and stagnation.

From the legal perspective, an example may be the vague definition of the prohibition or authorization of information containing negative content (for example, suicidal ideas, child pornography, pedophilia, homosexuality, nationalism, religious intolerance, terrorism and other types of propaganda). It may be viewed as a positive method of legal regulation for the purpose of preventing the repetition of the negative precedence. At the same time, the referred information may potentially have the peril of stimulating non-compliance with the legal norm, leading to a number of offences. Crystallization attempts have in this context been undertaken; however, it is still not clear whether the concepts

stimulating the prevention of offences may be used for classifying the legal content of information and defining standards. It is obvious that describing the content of information from a limited technical perspective may form a conceptual default in the context of the essence of law (data protection law), adversely affecting the formation and enforcement of law in its every aspect.

From the perspective of emphasizing the essence of law, the main issue remains unsolved also in the context of global law formation and formulation of international law. Here, too, the central question is the following: *“Is it possible to establish rules of conduct and discuss such values which may, for all the member states of the UN, be objectively true, and be developed by the UN within the framework of international law and defined by the member states, instead of being forced by “authority” on behalf of a group of super powers or supranational unions and groupings which formulate the geopolitical position.”*

This question may not be answered negatively, since the whole historical process of the formation of international law, starting with the postwar period until present has been based on the idea of precedence of international law over use of force. This means that the applied formula was not based on a negative answer; furthermore, it was based on a positive answer, resulting in formation of law on the global level by developing, applying and coercing international law. This basically implied large-scale centralization of ideas concerning law from all over the world for the development of the conceptual basis of international law which would define the legal content of globalization. The latter, in its turn, had to ensure the legal model of the world, including all the issues, for the purpose of ensuring the balance between supranational and national legal territories.

This means that the solution of the problem first required development of a system of methodological tools, which would allow to clearly define the essence of law through comprehensive categories, ensuring the legal integration of all countries within the framework of a single international law. While it is currently based

on the formula not involving a “negative answer”, it is still possible, depending on the interests of states possessing geopolitical powers.

As a matter of fact, it was the first major attempt of law formation on the basis of systems, by abandoning the practice of leggism, considering that during the pre-war colonial period the main model of international law used leggism as the most practical and favorable method of legitimizing and legalizing geopolitical dominance in all its aspects. In particular, taking into account the conflicting nature of the two ideological systems based on the geopolitical blocks and super powers, as well as the responsibility of nuclear disarmament, the competition between socialism and capitalism, the fundamental potential of legal systems required the development of international law, the methodology whereof would include such comprehensive legal means which would be able to combine two incompatible legal models within international law (socialism and capitalism). In particular, this approach predicted both the unique significance of the UN and the impossibility of disregarding the key importance of their research. This circumstance undoubtedly promoted the development of law for both scientific and application purposes minimizing the simplified and easy approach based on leggism, making it thus possible to balance the development of the legal system and legal norms in a single process of legal formation within the international law system.

This all predicted the growing role of international law, and the UN was viewed as both a scientific methodological center for the development of international law and governance system, and a system for applying the international law through the mechanisms of Security Council. As a result, since the formulation of the UN and conclusion of international treaties, international law norms have played a key role in the international and domestic relations.<sup>10</sup>

Thus, the complexity of the main issue of the essence of law was indirectly addressed on the level of a specific system and received respective solutions, excluding the systemic conflict of

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<sup>10</sup> For more details see Harutyunyan G.G., Judicial Power; From European cooperation development experience, Yerevan, “NJAR”, 2002, page 14.

“conceptual default” (conceptual lack). Furthermore, the assertion of the absence of the essence of law was completely excluded, whereas the global community refused to accept the idea of an irresponsible nature of law, possibility of chaos and the coercion of tyranny through wars, taking into account the fresh memories from the Second World War. As a result, global developments made it impossible to use leggism for the purpose of colonization and legalization of occupation.

In this regard, a respective chain of law formation was formed which developed the conceptual model of all political, economic and cultural aspects, political unions, decolonized countries, supranational integration unions, *excluding the self-forming principle of law formation*. As a result, such law formation processes, as the formation of British cooperation, restoration of Europe and Japan, were implemented in strict compliance with systemic programs (for example, the Marshall plan). Such law formation processes included also the formation of European cooperation, economic cooperation, as well as of the OSCE, NATO and Warsaw agreement, which lasted until the collapse of the USSR.

Following the collapse of the USSR, this process was unfortunately terminated, and a new positioning was formed where the advantage of geopolitical authority was transferred to the USA, as a matter of fact causing instability in the system of global governance. From this perspective, on the one hand, the cornerstones for the stability of the international systems are still being developed, whereas on the other hand the current international institutions serving that purpose are losing their former significance.<sup>11</sup>

We think that this circumstance in its turn affected globally the development and deepening of global cataclysms happening around the Earth (for example, the Arab spring or the crisis of financial and monetary systems).

As a result of lack of the key significance of the international law, the practice of leggism was revived, for which reason the issue of recognition of countries having acquired independence was

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<sup>11</sup>See *ibid*, page 12.

transferred from the UN level and from the jurisdiction of international law to the level of coalition law resulting in a tendency of transferring law formation within the regime of *coalition leggism*. For this reason, the conflicts concerning the Nagorno Kharabakh, Abkhazia, South Ossetia and Kosovo have not yet been resolved. Whereas one of the key principles of international law, *i.e.* the right of nations to self-determination acquired an unclear legal content, causing tendencies of its subjective perception and interpretation, depriving it of its significance and, consequently, the only possible way of its implementation was an armed conflict. Examples of coalition leggism may include the Group of Eight, the Group of Twenty, etc., which minimize the role and significance of the UN and thus hinder the development of the system of international law. From the perspective of legal methodology, this stimulates the rebirth of the concept of legal chaos, which does not recognize any essence of law. This results in tendencies of conceptual anarchism, which transfer the system of global governance to the *level of self-formation*, officially allowing “conceptual default”.

We thus think that the resolution of the issue requires development of a system of comprehensive methodological tools which would enable a more complete, clear and comprehensive perception of the essence of law.

# **BINDING NATURE OF THE LEGAL POSITIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF ARMENIA: FROM THEORY TO PRACTICE**

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One of the most important features of the Constitutional Court legal positions is their binding nature. According to Article 61(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 SDVo-943 of 25 February 2011, the legal positions expressed in the Court decisions shall ensure more

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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<sup>2</sup>, which, in its turn, presupposes that the

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<sup>2</sup> In this context we would like to mention 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 (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>, 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,

legal positions expressed not only in the operative, but also in the reasoning part of the Constitutional Court decision are subject to mandatory implementation<sup>3</sup>.

This is the reason that pursuant to the Decision of the RA Constitutional Court SDVo-943, an amendment was made to Article 68(8) of the RA Law “On the Constitutional Court”, according to which the Constitutional Court can make decisions not only on finding the challenged act or its challenged provision in conformity with the Constitution or finding the challenged act fully or partially invalid and in non-conformity with the Constitution, but also on finding the challenged act or its challenged provision in conformity with the Constitution **by the constitutional legal contents revealed by the decision of the Constitutional Court**. Moreover, Article 69(12) of the RA Law “On the Constitutional Court” prescribed that in the cases defined by the mentioned Article if the provisions of the Law applied against the applicant are recognized as invalid and contradicting the Constitution, as well as when **the Constitutional Court, in the operative part of the decision, revealing the constitutional legal content of the provision of the law, recognized it in conformity with the Constitution and simultaneously found that the provision was applied to him in a different interpretation**, the final judicial act made against the applicant is subject to review on the grounds of new circumstances in

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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 Constitutional Court of the Russian Federation, can be interpreted only on the basis of the legal positions formed by the Court (Кряжков В. А., Кряжкова О. Н. Правовые позиции Конституционного суда РФ в его интерпретации // Государство и право, 2005, N 11, с. 13).

<sup>3</sup> In the context of the presented analysis the regulation, prescribed in Article 61(2.1) of the RA Law “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.

accordance with the procedure prescribed by law.

The systemic analysis of the legal regulations regarding the discussed issue leads us to the conclusion that they are aimed to the formation of a thorough system of the execution of the legal positions expressed in the reasoning part of the Constitutional Court decisions and serve as an evidence of their binding force<sup>4</sup>.

It should be mentioned that the practice of recognizing the challenged provision in conformity with the Constitution within the frames of the legal positions expressed in the Constitutional Court decision is widespread in the activities of constitutional courts of various other states, including, for instance, Germany, Lithuania, Russian Federation, Slovenia, Spain, Hungary, and Bosnia and Herzegovina. Though each of them has its peculiarities, the circumstance that the interpretation presented in the decision becomes binding for all other state bodies is common for all the mentioned courts. In this sense, the following position of the European Commission for Democracy through Law (Venice Commission) regarding the discussed issue should be noted: *“An explicit legislative – or even better constitutional – provision obliging all other state organs, including the courts, to follow the constitutional interpretation provided by the constitutional court provides an important element of clarity in the relations between the constitutional court and ordinary courts and can serve as a basis for individuals to claim their rights before the courts”*<sup>5</sup>.

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<sup>4</sup> In most states legal positions of the Constitutional Court have binding force. Moreover, the practice, when this circumstance gains legislative regulation, is becoming widespread (see, for example, Article 79 of the Federal Constitutional Law “On the Federal Constitutional Court of the Russian Federation”, Article 32 of the Law of the Republic of Latvia “On the Constitutional Court”, Article 41a of the Act of the Slovak Republic “On the Organization of the Constitutional Court of the Slovak Republic, on the Proceedings before the Constitutional Court and the Status of its Judges”, Article 182<sup>2</sup> of the Statute of the Seimas of the Republic of Lithuania).

<sup>5</sup> See CDL-AD(2010)039rev, Study on Individual Access to Constitutional Justice, Adopted by the Venice Commission at its 85th Plenary Session (Venice, 17-18 December 2010), §165, <http://www.venice.coe.int/docs/2010/CDL-AD%282010%29039rev-e.pdf>.

Notwithstanding the above-mentioned, one of the most important problems existing in the sphere of interrelations of the Constitutional Court and other judicial bodies is the absence of a uniform point of view concerning the judicial bodies granted with the competence of the interpretation of laws subject of constitutional justice and the issue of differentiation of jurisdiction in the mentioned sphere. At first sight the solution of the mentioned problem can be seemed univocal, that is the interpretation of laws is administered only by ordinary courts and the interpretation of the Constitution – by the Constitutional Court. While the mentioned solution, which seems uncontroversial in the theoretical sense, is difficult to apply in practice, first of all taking into account the peculiarities of the status, goals and tasks of the Constitutional Court.

The circumstance that the Constitutional Court is not bound by the interpretation of law given by other courts is a formed reality in the judicial practice of most states<sup>6</sup>. In the Republic of Armenia this circumstance is testified also by current legislative regulations. Particularly, Article 68(8) and Article 69(12) of the RA Law “On the Constitutional Court”, which were already presented above, as well as the provisions, stated in the Civil Code and the Criminal Procedure Code of the Republic of Armenia as the result of the changes made on 26 October 2011, according to which the cases when the Constitutional Court of the Republic of Armenia recognizes the provision of law applied by the court in the given civil or criminal case invalid and in non-conformity with the Constitution or **recognizes it in conformity with the Constitution, but in the operative part of the decision, revealing its constitutional legal content, finds that the provision was applied in a different interpretation**, are grounds for reviewing judicial acts based on new circumstances<sup>7</sup>. On the basis of the above-mentioned one can conclude that when exercising its competences, the Constitutional

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<sup>6</sup> See the reports, presented in the frames of the XIIth Congress of the Conference of European Constitutional Courts, <http://www.confconstco.org/reports/>.

<sup>7</sup> Article 204.33(1) of the Civil Procedure Code of the Republic of Armenia; Article 426.4(1)(1) of the Criminal Procedure Code of the Republic of Armenia.

Court can reveal the constitutional legal content of the challenged provision of law. Moreover, if according to Article 15(4) of the RA Judicial Code the reasons (including the interpretation of law) of the judicial act of the Court of Cassation or the European Court of Human Rights on the case with concrete factual circumstances are binding for **courts** (emphasis added – A.M.) during the consideration of cases with the same type of factual circumstances ..., the same cannot be referred to the Constitutional Court, as the decisions of the latter on the merits of the case, hence, also the constitutional legal content of the provision of law revealed in them, as we already mentioned, are binding for **all the state and local self-government bodies, their officials, as well as for the physical and legal persons** in the whole territory of the Republic of Armenia. Summarizing the above-mentioned, it should be noted that when exercising its competences, the Constitutional Court can reveal the constitutional legal content of the challenged provision of law, and this legal position has binding force.

Therefore, the main problem in this context is how the jurisdiction of the mentioned courts should be differentiated in the discussed sphere and what kind of technique should be applied in order to achieve this goal. In this sense Article 92 of the RA Constitution should be mentioned, according to which the highest judicial instance of the Republic of Armenia, except for matters of constitutional justice, is the Court of Cassation, **which is called to ensure the uniform application of the law** (emphasis added–A.M.), and in pursuance to Article 93 the Constitutional Court shall administer constitutional justice in the Republic of Armenia. On the basis of the above-mentioned, one can conclude that the Constitution determined the mission of each judicial body, granting the Court of Cassation (as a body administering justice) the competence of ensuring uniformity in the implementation of law, and the Constitutional Court the function of administering constitutional justice.

Therefore, we consider that in the context of the mentioned constitutional regulations the solution of the discussed problem

should have such form, within which each of the judicial bodies implements the function of interpretation of law in the frames of the spheres of its jurisdiction, just for ensuring the fulfillment of its mission. Otherwise, the initial criterion, conditioning the spherical border of the interpretation of laws by the mentioned judicial bodies, is the goal, underlying their activities. On one hand, the Court of Cassation of the Republic of Armenia, when interpreting a provision of law, has a goal to ensure uniformity in the implementation of law, and on the other hand, the Constitutional Court of the Republic of Armenia fulfills the function of ensuring the administration of constitutional justice, and the indicated functions should underlie self-restraint of the mentioned judicial instances<sup>8</sup>. Approaching the issue of interpretation of laws by the Constitutional Court from this aspect, we draw a conclusion that the latter can implement this function only with the goal of revealing **the constitutional legal meaning** of the law or its corresponding provisions, but not for giving interpretation of law in the whole<sup>9</sup>.

The next important issue, which is necessary to take into account in this context, is the following: though one of the tasks of the Court of Cassation is to ensure uniformity in the implementation

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<sup>8</sup> In this context the viewpoint presented in the frames of the Hungarian practice should be noted, according to which the mentioned two interpretations have fundamentally different functions. Constitutional requirements are determined in the framework of the control of legal norms, while decisions on legal unity are aimed at the elimination of controversial judicial practices (see “The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts // Report of the Constitutional Court of Republic of Hungary prepared for the XIIth Congress of the Conference of European Constitutional Courts”, <http://www.confconstco.org/reports/rep-xii/Hongarije-EN.pdf>).

<sup>9</sup> It should be noted that the above-mentioned is an accepted and steadily exercised practice also at the Federal Constitutional Court of Germany, which reveals the content of legislation only **in the light of the Constitution**. Moreover, this interpretation is also binding for other bodies and has force of law (see Rainer A. The decisions of the German Federal Constitutional Court and their binding force for ordinary courts, [www.constcourt.gov.az/en/download/.../9.../10.Rainer\\_Arnold\\_\(eng\).doc](http://www.constcourt.gov.az/en/download/.../9.../10.Rainer_Arnold_(eng).doc)). The same concerns the Constitutional Court of the Russian Federation and bodies administering constitutional justice in several other states.

of the law, within the frames of the presented constitutional regulations we are not about an arbitrary document, having the title of “law”, but a **constitutional law**. In this sense it should be mentioned that the law, implying several interpretations, can be considered constitutional only in case it is perceived in the context of corresponding constitutional requirements. This, in its turn, presupposes that in the mentioned cases the interpretation of law recognized in conformity with the Constitution, particularly in this case - given by the Constitutional Court, should be subject to application, as it is just the task of the body administering constitutional justice to mention the legal limits, in the frames of which the given norm should be perceived and applied, and beyond which the applied or interpreted norm will lead to unconstitutional consequences. Hence, the Constitutional Court’s competence of interpreting laws is bound by the mentioned frames and cannot be executed beyond them<sup>10</sup>.

At the same time, one should take into consideration that the above-mentioned point concerns the existence of such interpretations, when one of them contradicts the constitutional requirements. While in cases, when courts apply an interpretation, which is in conformity with the Constitution, it is not effective from the aspect of differentiation of jurisdiction to interpret the law by the Constitutional Court otherwise. Taking the above-mentioned into consideration, we believe that in cases where the interpretation of law given by other judicial bodies is in conformity with the Constitution, it is expedient that the Constitutional Court applies this interpretation and reveals its constitutional legal meaning otherwise

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<sup>10</sup> In this context the viewpoint of one of the judges of the European Court of Human Rights is worth mentioning: “It is progressively becoming more evident that the most crucial task of constitutional courts is the interpretation of constitutional precepts. This implies providing judges, legislators, attorneys and civil servants with general guiding criteria, not only as to how interpret the constitutional text, but also as to how to interpret ordinary (infraconstitutional) laws, so that their application conforms with the mandates of the constitution” (see Guerra L. *Latent and Manifest Functions of Constitutional Courts* // Альманах (Конституционное правосудие в новом тысячелетии). Ереван, 2011, с. 54).

only in cases where there is a contradiction between the accepted perception of the norm and the constitutional requirements<sup>11</sup>.

Therefore, the main criteria concerning the discussed issue, which, in our belief, will also give an opportunity to effectively ensure the differentiation of jurisdiction between various judicial instances, can be summarized as follows:

- The initial criterion, conditioning the spherical border of interpretation of laws by the Constitutional Court and other judicial instances, is their goal, which circumstance should underlie self-restraint of the activities of the discussed bodies;

- The task of the Court of Cassation is to ensure uniformity in the implementation of the **constitutional law**, but not an arbitrary document, having the title of “law”, which also presupposes interpretation of law, which is in conformity with the constitutional requirements;

- It is the task of the body administering constitutional justice to mention the circumstances when the interpretation of law is in conformity with the Constitution and when it is not, otherwise, the legal limits, in the frames of which the given norm should be perceived and applied, and beyond which the applied or interpreted norm will lead to unconstitutional consequences;

- The Constitutional Court can implement the mentioned function only with the goal of revealing **the constitutional legal**

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<sup>11</sup> In this sense the practice accepted in the Republic of Slovenia, where the Constitutional Court interprets the Constitution and regular courts interpret statutes, except for cases of violation of the Constitution, is worth mentioning. It is possible for the Constitutional Court, however, to interpret laws in instances, when the statutory provision could be interpreted in two ways, one of which would be counter to the Constitution, and the other one in agreement with the latter, as determined by the Constitutional Court in a so called interpretative decision. Such interpretation of a statutory provision is undoubtedly legally binding on courts. However, if the statutory provision allows many possible interpretations, none of which is unconstitutional, then it is the affair of ordinary courts to decide in what way to apply the mentioned norm (see The relations between the Constitutional Courts and the other national courts, including the interference in this area of the action of the European courts // Report of the Constitutional Court of the Republic of Slovenia prepared for the XIIth Congress of the Conference of European Constitutional Courts, <http://www.confueconstco.org/reports/rep-xii/Slovenia-EN.pdf>).

**meaning** of the law or its corresponding provisions, but not for giving an interpretation of law in the whole;

- In cases, when the norm can be interpreted in different ways and the interpretation given by courts is in conformity with the Constitution, from the aspect of differentiation of jurisdiction it is expedient that the Constitutional Court applies this interpretation;

- In cases when the norm can be interpreted in different ways and there is a contradiction between its accepted perception and the constitutional requirements, it is expedient that the body administering constitutional justice, revealing the constitutional legal content of the latter, presents an interpretation, which is in conformity with the Constitution;

- Taking into consideration the above-mentioned changes in the sphere of the RA legislation concerning the types of the Constitutional Court decisions and the basis for review of the judicial acts on the grounds of new circumstances and taking into account the necessity of the observance of the principle of legal predictability, we consider that it is expedient to form a uniform practice of making decisions by the Constitutional Court in case of existence of various possible interpretations of law, applying the “principle of interpreting the law in conformity with the Constitution” and recognizing the norm contradicting the Constitution only in cases, when it cannot be interpreted in the context of constitutional requirements.

Despite the fact that the binding force of the Constitutional Court legal positions is a reality, which nowadays raises no doubts in theory<sup>12</sup>, there is also a viewpoint in legal literature, according to which not all the legal positions are endowed with the mentioned feature and they should be differentiated into the following types: 1) generally binding legal positions, and 2) legal positions, having legally guiding and coordinating nature<sup>13</sup>. Notwithstanding this

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<sup>12</sup> Harutyunyan G. International Almanac. “Constitutional Justice in the new millenium”. Yerevan, 2011, pp. 39-44; Арутюнян Г. Международный альманах “Конституционное правосудие в новом тысячелетии”. Ереван, 2011, С. 39-44.

<sup>13</sup> Kryazhkov V.A., Lazarev V. A. Constitutional Justice in Russian Federation. Moscow, 1998, P. 248. [Кряжков В. А., Лазарев Л. В. Конституционная юстиция в РФ. М., 1998, С. 248].

opinion and the circumstance that according to the Anglo-American doctrine of precedent also only the principle underlying the court decision (*ratio decidendi*) is obligatory, and other expressed positions (*obiter dictum*) don't have binding force<sup>14</sup>, there is a more common approach in theory and practice, according to which the legal positions of the Constitutional Court are by their nature closer to *ratio decidendi*, are comparable with the mentioned institute of the English law<sup>15</sup>, hence, have binding force without distinction<sup>16</sup>. The Constitutional Court of the Republic of Armenia does not present such a classification, either, thus, considering all its legal positions as

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<sup>14</sup> See, for example, [http://www.oup.com/uk/orc/bin/9780199557745/hw7e\\_ch06.pdf](http://www.oup.com/uk/orc/bin/9780199557745/hw7e_ch06.pdf), Kališ R. Is the English Doctrine of Judicial Precedent Becoming Only an Illusion?, <http://www.law.muni.cz/sborniky/dp08/files/pdf/mezinaro/kalis.pdf>.

<sup>15</sup> See, for e.g. Kazhlaev S.A. Judicial discretion in the functioning of the Constitutional Court of the Russian Federation. Journal of Russian Law.# 11, 2003, pp. 156-157; Zorkin V.D. Precedential Significance of the Decisions of the Constitutional Court of Russian Federation// Journal of Russian Law, #12, 2004, P. 4; Ivanova T.V., Role of the Constitutional Court in the process of norm creation in the Republic of Belarus: theoretical aspects; Krasikova A. V. Constitutional Justice in Russian and Mongolia: Comparative Legal Analysis. Ph.D. Dissertation resume. [Кажлаев С.А. Судебное усмотрение в деятельности Конституционного суда РФ // Журнал российского права, N 11, 2003, pages 156-157, Зорькин В.Д. Прецедентный характер решений конституционного суда Российской Федерации // Журнал российского права, N 12, 2004, р. 4, Иванова Т. В. Роль Конституционного Суда Республики Беларусь в процессе правообразования: теоретический аспект, [www.law.bsu.by/pub/31/Ivanova4.doc](http://www.law.bsu.by/pub/31/Ivanova4.doc), Красикова А. В. Конституционная юстиция в России и Монголии: сравнительно правовой анализ: Автореферат диссертации на соискание ученой степени кандидата юридических наук). Омск, 2009, [omsu.ru/file.php?id=4400](http://omsu.ru/file.php?id=4400) России и Монголии: сравнительно-правовой анализ (Автореферат диссертации на соискание ученой степени кандидата юридических наук). Омск, 2009, [omsu.ru/file.php?id=4400](http://omsu.ru/file.php?id=4400). At the same time, one should have in mind that even in the frames of the Anglo-American doctrine of precedent there is a viewpoint, according to which all attempts for differentiating *ratio decidendi* and *obiter dictum* are inefficient and are doomed to failure in advance (see Marchenlp M.N. Sources of Law. Moscow, 2008, P. 632. [Марченко М. Н. Источники права. М., 2008, page 632]).

<sup>16</sup> The constitutional doctrine of Lithuania is interesting in this sense, in the frames of which it is directly mentioned that both *ratio decidendi* and *obiter dicta* of the Constitutional Court decision are obligatory (see Constitutional justice in Lithuania. Vilnius, 2003, pages 212-215).

binding<sup>17</sup>. To our mind, however, the study of the practice of the Constitutional Court of the Republic of Armenia leads us to a conclusion that from the point of view of legal consequences not all the legal positions of the discussed body have identical significance. In this sense the position, expressed in the decision SDVo-758 of 9 September 2008, for instance, can be mentioned, according to which “taking into consideration also the requirements of Article 68(17) of the RA Law “On the Constitutional Court”, the Constitutional Court finds that till the further regulation of the issue ... by the National Assembly of the Republic of Armenia the legal regulation concerning the noted institute determined by the Law HO-39-N of 18.02.2004 may be valid”. It is obvious that in this case the Court presented not a legal position subject to mandatory execution, but mentioned the legal regulation, **which may, but will not necessarily be valid**, till the further regulation of the issue by the National Assembly of the Republic of Armenia. Therefore, from this point of view the mentioned position has not binding, but guiding nature.

Taking the above-mentioned into account, in this context it is necessary to consider the issues concerning differentiation of the noted legal positions of the Constitutional Court. In this sense we consider that the RA legislation itself resolved the mentioned issue from the aspect that it determined necessary regulations for self-restraint of the body, administering constitutional justice<sup>18</sup>. The study of the practice of the Constitutional Court shows that the latter, as a rule, is guided by them in the course of its activities. Particularly, turning to issues which are not included in the context of the subject

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<sup>17</sup> See the Annual Reports of the Constitutional Court of the Republic of Armenia (2006-2010), the decision of the Constitutional Court of the Republic of Armenia SDVo-943 of 25 February 2011.

<sup>18</sup> For example, according to Article 63(2) of the Law of the Republic of Armenia “On the Constitutional Court”, the Constitutional Court shall adopt decisions and resolutions only **regarding the issues that are raised in the appeal**, or in compliance with Article 68(9) of the same law while determining the constitutionality of any normative act mentioned in Article 100(1) of the Constitution, the Constitutional Court shall also establish the constitutionality of any other provision of the act **systematically interrelated with the challenged provision**, etc.

mentioned in the appeal or are not subject to consideration in the frames of the given case, the Court emphasizes this circumstance. In this sense the Decision SDVo-780 of 25 November 2008, for instance, can be mentioned, within the framework of which legal positions were expressed concerning Article 135(1) of the Administrative Procedure Code. However, at the same time, taking into account that in this situation Article 68(9) of the Law “On the Constitutional Court” is not applicable, the Court just gave importance to the circumstance of paying attention to the presented issue by the National Assembly of the Republic of Armenia.

Along with the above-mentioned, it is necessary to take into consideration also the following: to our mind, there is a principal difference between the two legal positions of the Constitutional Court presented in the discussed context. If in the first case the Court mentioned a solution, which has just guiding nature for the regulation of the concrete issue and can also not be implemented in practice, then the situation is different in case of the Decision SDVo-780. Not having an opportunity to make a conclusion concerning the constitutionality of the discussed provision in the operative part of the decision, the Constitutional Court expressed legal positions regarding this issue in the reasoning part. Needless to say that as a result of them provisions of the law were not found in non-conformity with the Constitution and invalid; hence, the consequences prescribed by the RA legislation in this regard were not applied to them<sup>19</sup>.

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<sup>19</sup> It should be mentioned that some constitutional courts distinguish *ratio decidendi* and *obiter dicta*. The Czech Constitutional Court, for example, directly states in the frames of the decision, which legal positions are the *ratio decidendi* and which one - the *obiter dicta* (see, for example, decisions 2008/01/31 - Pl. ÚS 24/07, 2009/11/22 - IV. ÚS 956/09, 2011/03/22 - Pl. ÚS 24/10 of the Czech Constitutional Court, <http://www.concourt.cz/view/726>). The Federal Constitutional Court of Germany has developed the following practice: the essential reasoning of the decision is binding, that is the legal positions, which cannot be left out of the decision without the concrete conclusion of the decision being lost (see CDL-JU (2003) 18, The Binding Effect of Federal Constitutional Court Decisions upon Political Institutions // Report by Ms Anke Eilers (Federal Constitutional Court, Karlsruhe), Strasbourg, 22 May 2003, <http://www.venice.coe.int/docs/2003/CDL-JU%282003%29018-e.pdf>).

At the same time it is obvious that regardless of the above-mentioned circumstance, such legal positions, expressed in case of existence of serious problems in the sense of constitutionality, should get necessary attention by their addressees. Otherwise, a formal approach will be demonstrated to the essence of the institute of constitutional justice. Moreover, proper attitude to the above-mentioned legal positions by the corresponding bodies vested with state authorities is conditioned by their functions in the sphere of ensuring the continuity of state power, inviolability of the foundations of constitutional order and protection of constitutional rights and freedoms. Therefore, the absence of necessary attention to these positions indicates also the fact of disregarding the mentioned functions and of distorting the goals of the noted body's activities<sup>20</sup>.

The above-mentioned leads us to a conclusion that the solution of the discussed issue should not be mechanistic, and the simple technique of differentiating the binding legal positions of the Constitutional Court from the guiding judgments cannot underlie it. As we already mentioned, this circumstance is important for considering the peculiarities of the concrete legal positions' implementation. But it influences in no way the significance of the latter in the sphere of development of the legal system of Armenia. It is obvious that the Constitutional Court is the body, administering constitutional justice in the Republic of Armenia, and the solution of constitutional legal issues is vested just in the mentioned judicial body. Therefore, in cases, when the Constitutional Court expresses legal positions concerning the above mentioned issues, it indicates their correct solutions (in the sense of constitutionality), which leads

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<sup>20</sup> In this sense the Annual Report of the Constitutional Court of the Republic of Armenia concerning the execution of the decisions adopted in 2008 is worth mentioning, by which the Court stated: "The Constitutional Court decisions first of all concern the law making and law enforcement practice and include obligations to undertake certain actions. Particularly, determination of legislative gaps by the Constitutional Court cannot remain without consequences. An obligation to fill the legislative gap through a proper legal regulation and to remove the non-quality one arises as a result of the Constitutional Court decision. Leaving the decision without no response or partial filling of the gap by the legislator is considered as an anomaly of the legal order".

us to the conclusion that these positions cannot remain without consequences. At the same time we believe that the noted solutions can be effective only in case when the Constitutional Court, in its turn, follows the requirement of “expedient self-restraint”<sup>21</sup>, taking into account the mentioned circumstances and the constitutional legal restraints existing with respect to its activities<sup>22</sup>.

The next issue we consider necessary to discuss in the mentioned context is the circumstance whether the Constitutional Court’s legal positions are binding also for the Court itself. Undoubtedly, one of the main conclusions of the presented analysis

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<sup>21</sup> In this sense an opinion was expressed in legal literature, according to which if the constitutional court or some other organ which interprets the constitution with finality, is not prepared to exercise self-restraint, this endangers the principles of the separation of powers (see Pavcnik M. Constitutional Interpretation (in Continental Europe) ([http://ivr-enc.info/index.php?title=Constitutional\\_Interpretation\\_%28in\\_Continental\\_Europe%29](http://ivr-enc.info/index.php?title=Constitutional_Interpretation_%28in_Continental_Europe%29))). In this context the approach, expressed in the dissenting opinion, presented by Mr. G. Gadzhiev – a judge of the Constitutional Court of the Russian Federation – on case on the interpretation of Article 103(3), Article 105(2) and Article 105(5), Article 107(3), Article 108(2), Article 117(3), Article 135(2) of the Constitution of the Russian Federation, is worth mentioning, according to which while resolving the issue of the admission of petitions concerning the interpretation of the Constitution an expedient self-restraint of the judiciary is necessary in order not to involve the Constitutional court in the political process of law-making. The rules regarding the admission of petitions concerning the interpretation of the Constitution are based on the principles of separation of powers (Article 10 of the Constitution) and of restraint of the Constitutional Court by the competence of other bodies (Article 3(3) of the Federal Constitutional Law “On the Constitutional Court of the Russian Federation”) (see <http://www.constitution.ru/decisions/10004579/10004579.htm>).

<sup>22</sup> In the sense of the discussed issue the regulation, prescribed by Article 40 of the Law “On the Constitutional Council of the Republic of Kazakhstan”, is interesting, according to which the recommendation and the offer on perfection of the legislation, contained in decisions of the Constitutional Council, shall be subject to obligatory consideration by the authorized state bodies and officials with the obligatory notice of the Constitutional Council on the accepted decision. Article 47 of the Law “On the Constitutional Court of the Republic of Tajikistan” is also worth mentioning, in compliance with which in case of revealing concrete violation of the Constitution and laws of the Republic of Tajikistan, the court states this circumstance, drawing the attention of the competent authorities and officials, who committed it, to the violation and the need to eliminate it and the Constitutional Court shall be informed on the measures taken concerning it within the prescribed period.

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<sup>23</sup>. 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 the opportunity of changing the principles prescribed in its case-law<sup>24</sup>.

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. Otherwise, it 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 Constitutional Court of the Republic of Armenia adheres to its previously expressed legal positions, regularly recalling them in the decisions<sup>25</sup>. But the above

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<sup>23</sup> Marchenko M.N. Sources of Law. Moscow, 2008, P. 414; Kampo V. Legal Positions of the Constitutional Court of Ukraine as a necessary element for guaranteeing the legal and judicial reforms// Constitutional Justice: Bulletin of the Council of Constitutional Control Bodies of the States of New Democracy. Published by the Center of the Constitutional Law of Armenia, #1(47) 2010, P. 27 [Марченко М. Н. Источники права. М., 2008, р. 414, Кампо В. 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, С. 27]; Ku'ris E. 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, С. 111.

<sup>24</sup> Kommers D. P. The Constitutional Jurisprudence of the Federal Republic of Germany. Duke University Press, Durham and London, 1997, page 54.

<sup>25</sup> See, for example, the decisions of the RA Constitutional Court SDVo-754 of May 27, 2008, SDVo-852 of January 19, 2010, SDVo-943 of February 25, 2011, SDVo-1027 of May 5, 2012, etc.

mentioned does not 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<sup>26</sup>. Therefore, the latter is not 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.<sup>27</sup> 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, *i.e.* the change in the corresponding constitutional norm or its perception. In other words, the main key

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<sup>26</sup> 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, Vitruk N. *Constitution Justice*. Moscow., 2005, P. 119; Bondar N. *Judicial Constitutionalism in Russia.*, Moscow 2011, P. 130; Zorkin V. *Contemporary World, Law and Constitution*. Moscow 2010, P. 167 [Витрук Н. *Конституционное правосудие*. М., 2005, р. 119, Бондарь Н. *Судебный конституционализм в России*. М. 2011, р. 130, Зорькин В. *Современный мир, право и Конституция*. М., 2010, р. 167]).

<sup>27</sup> Zorkin V. *Principle of Separation of Powers in the Practice of the Constitutional Court of Russian Federation*. Зорькин В. *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, Kommers D. P. *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>. 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 (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>).

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(14) of the RA Law “On the Constitutional Court” is worth mentioning, which defines a possibility for the Constitutional Court to review any of the decisions on the merits of the case mentioned in Part 1 of this Article within seven 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 it should not concern the review of the Constitutional Court decisions, but of 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 cannot 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<sup>28</sup>.

It is obvious that the formulation “review of the decision”, prescribed in the 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 of

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<sup>28</sup> Ghambaryan A.A., The admissibility of Reviewing of the Decisions of the Constitutional Court // Issues of Jurisprudence, # 1-2, Yerevan, 2009, P. 50. [Դամբարյան Ա. ՀՀ սահմանադրական դատարանի որոշումների վերանայման թույլատրելիությունը // Իրավագիտության հարցեր, N 1-2, Երևան, 2009, էջ 50].

the final conclusion regarding the constitutionality or unconstitutionality of the act, and not of the legal positions of the Constitutional Court, and it concerns legal positions in 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<sup>29</sup>. 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 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<sup>30</sup>. Therefore, in such situations the change of the legal position cannot be conditioned on such preconditions, as the specific type of the previous decision or the

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<sup>29</sup> 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>.

<sup>30</sup> 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 Kuris E. Constitutional Justice. Issues of Theory and practice. Yerevan, 2004, P.37 [Курис Э. Конституционное правосудие. Вопросы теории и практики. Ереван, 2004, С. 37]).

time frame of its adoption. While the regulation, prescribed in Article 68(14) of the Law “On the Constitutional Court”, concerns only the cases when at least seven years have passed after the ruling of the decision on the merits of the case and the appeal does not 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 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 does not concern the change of the legal positions of the Constitutional Court in the above mentioned other situations which do not 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 notion “legal positions” of the Constitutional Court determines the attitude of the latter to concrete constitutional legal issues, which is expressed in the acts of the mentioned body. 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. 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.

# **CERTAIN CONSIDERATIONS ON INSTITUTION OF ADMINISTRATIVE CLAIMS AND THE IMPLEMENTATION THEREOF**

**Gnel Mughnetsyan<sup>1</sup>**

With the adoption of the Administrative Procedure Code<sup>2</sup> of the Republic of Armenia, the mechanism for the implementation of administrative justice was implemented in the legal system of the Republic of Armenia, aiming at subjecting the administrative and procedural process to legal regulation. The frame of the subjects entitled to apply to the Administrative Court of the Republic of Armenia, likewise the types of administrative claims and a range of other issues were stipulated.

The Constitution, being the cornerstone and summary of the legal value system of a public regulated society, comprises fundamental, initial orders of each legal sphere, wherefrom the legal regulation of an exact sphere originates, starting from law-making processes till exercising rights. These orders direct the whole process of legal regulation, and even a minor deviation thereof shall, undoubtedly, result in undesirable social and legal consequences. The administrative justice and as a form of the implementation thereof, the administrative procedure are not an exception with its structuralism and procedurally (statics and dynamics). Certain provisions of general type received legal ratification by the RA Constitution, which predetermine the content, the essence of all remedies (including administrative procedure, separate institutions thereof), their legal ratification and implementation, which, in the final analysis, are nothing else than one of the most important features for a lawful state establishment.

Within the frame of this article, we find it necessary to introduce the Institution of claim ratified by the RA Administrative Procedure

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<sup>2</sup> Official Journal of the Republic of Armenia, 2007.12.19/64 (588).

Code and the practice of exercising rights formed in the result of it, in the light of the “effectiveness requirements”, presented to the remedies by the Republic of Armenia Constitution, as well as international legal acts, forming a part of the legal system of the Republic of Armenia.

The RA Constitution, Article 18(1) states that *everyone shall — for the protection of his or her rights and freedoms — have the right to effective judicial remedies, as well as effective legal remedies before other state bodies.*

The Convention for the Protection of Human Rights and Fundamental Freedoms stipulates that *everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity*<sup>3</sup>.

As a result of the literal interpretation of the foregoing norms and systematic analysis, we may conclude that the effectiveness of

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<sup>3</sup>The full text of the Convention for the Protection of Human Rights and Fundamental Freedoms is available at: <http://conventions.coe.int/treaty/en/treaties/html/005.htm> (last visited on 06.06.2013). The meaning of the provision put in the “Convention for the Protection of Human Rights and Fundamental Freedoms” was revealed by a range of judgments of the European Court of Human Rights, e.g. judgment of 06 September 1978 *Klass, others v. the Federal Republic of Germany* (European Court of Human Rights, Selected solutions, in two volumes, Volume 1, M., 2001. - page 168), judgment of 22 May 1984, *De Jong, others v. the Netherlands* (European Court of Human Rights, Judgment Collection, Book Third, Antares, Yer., 2004- page 316-317), judgment of 18 December 1996, *Aksoy v. Turkey* (European Court of Human Rights, Selected solutions, in two volumes, Volume 2, M., 2001. - page 339), judgment of 19 February 1996, *Kaya v. Turkey* (European Court of Human Rights, Selected solutions, in two volumes, Volume 1, M., 2001. - page 475), judgment of 02 September 1998, *Yasha v. Turkey* (European Court of Human Rights, Judgment Collection, Book Third, Antares, Yer., 2004- page 464-465), judgment of 26 October 2000, *Kudla v. Poland*, ([http://www.concourt.am/armenian/library/cclibrar\\_y/2002/026.doc](http://www.concourt.am/armenian/library/cclibrar_y/2002/026.doc) (link as at 06.06.2013), judgment of 13 June 2002, *Angelova v. Bulgaria*, (European Court of Human Rights, Judgment Collection, Book Third, Antares, Yer., 2002- pages 64-65), judgment of 03 May 2007, *Baczowski, others v. Poland* (European Court of Human Rights, Judgment Collection, Book Third, Antares, Yer., 2008- pages 205-206).

the legal protection of rights and freedoms shall be provided, guaranteed in a lawful state, and everyone may hope for restoration of his or her rights, legal interests, if need be. The obligation to develop effective legal remedies and to make such remedies serve their goal shall be carried out by the state. The said obligation is the inalienable obligation of the lawful state in the man-state relationship context, and for the implementation thereof the state shall bring to life and refill the legal regulation mechanism with such effective legal remedies, which shall be addressed to the protection of human rights, restoration of violated rights, which is one of the initial (substantive) conditions for the legal system formation.

An effectiveness is such an attribute, that we may speak about the effectiveness or non-effectiveness of the phenomenon (in this case of the administrative procedure, being a remedy, separate institutions thereof) only and only during the implementation and the results thereof. In most cases a legal remedy from the point of view of legal formalization is more than ideal; however, during the processes of exercising and protecting their rights, the subjects of law become confident of the opposite due to the very circumstance that the executive and (or) judicial power for some reasons (either subjective or objective) never use or do not duly use the exact legal remedy for the protection of the right, which the subject of law refers to.

The institutions certified by the Administrative Procedure Code are such legal remedies which are addressed to defining the manner (via court control) of judicial protection of public subjective rights of people with disputes arising from public legal relations, and, through the implementation of this mission, to the establishment of the legal system.

The described reality received legal ratification through Article 1 of the RA Administrative Procedure Code: *this Code sets forth the procedure for exercising the right to judicial protection for natural and legal entities against regulatory legal acts and administrative acts, actions or inaction of the state and local self-government bodies and the officials thereof, as well as the procedure for*

*considering the statements of claim of administrative bodies and officials against natural and legal entities in the Administrative Court of the Republic of Armenia (hereinafter referred to as “the Administrative Court”), the Administrative Court of Appeal of the Republic of Armenia (hereinafter referred to as “the Administrative Court of Appeal”), as well as the Civil and Administrative Chamber of the Court of Cassation of the Republic of Armenia (hereinafter referred to as the “Court of Cassation”; altogether referred to as “the court”).*

The administrative procedural process starts upon submitting an administrative claim by a person (in certain separate cases by an authority) and ends upon enforcement of the relevant judicial act, resolving the dispute on the merits.

Prior to submitting an administrative claim, the procedure directed to the regulation of an administrative litigation process represents an integrity of procedural legal norms, which is just a carrier of a legal potential energy, that is to say it may be only used in regulating administrative procedural relations and nothing more<sup>4</sup>.

The submission of an administrative claim is the jural fact, after which the administrative litigation process “being in passive state” before that, launches and starts proceeding, including the relevant legal consequences. The submission of an administrative claim is the stimulus and motive power, which “puts into action” the administrative litigation process. The fact of filing an administrative claim as the initiation of an administrative litigation process shall be subject to ratification also by the RA Administrative Procedure Code; in particular in compliance with the provisions stipulated by Article 64, *the Administrative Court instigates a case on the basis of a claim.*

Chapter 11, Section 3 of the Administrative Procedure Code

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<sup>4</sup> For more detailed information about the validity, required conditions for the implementation of the right, active rating of the subjects of the law as an important pre-condition for the implementation of the right, legal norms as carriers of legal energy, and for the conversion of such energy see Goiman V.I. Action of the Right (Methodological Analysis): RF MIA Academy, 1992, pages 39-41, 118-128.

(“Basis for initiating a case and types of claim”) is dedicated to the institution of an administrative claim. Articles 65-68 of the Administrative Procedure Code provide for the following types of claims: claim for contesting, claim for obligation, claim for performing an action, claim for recognition.

Based on the summary of the literal (linguistic-logic) interpretation and systematic analysis results of the right-stipulating norms, ratifying the said concepts, we come to the conclusion that such norms provide sufficient basis for almost complete security of court remedies implementation of the public subjective rights concerning disputes arising from administrative relations with administrative bodies.

Nevertheless, the effective implementation of the court remedy with the said types of claims, in most cases, depends on the claiming subjects themselves (their wish, status, opportunities). Giving an importance to the role of the participant in the issue of implementing administrative litigation process, we think that the implementation of the administrative justice functions shall become sufficiently complicated (in certain cases it may not be implemented), if the parties fail to show high professional readiness in the phase of initiating the claim. The whole impression the parties have about legal regulation of the administrative litigation process and the manifestation of the procedural behavior, conditioned by it, shall directly have a preventive role due to the restriction of court arbitrariness<sup>5</sup>.

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<sup>5</sup> Thus, as the reply to the statement of claim filed by the RA MoJ State Register of Legal Entities, the Respondent to administrative case VD/4680/05/09, was filed in violation of the two-weeks term, provided by the norm stipulated under Article 83(1) of the RA Administrative Procedure Code, the representatives of the Plaintiff filed a motion for not considering and returning the reply, since the Respondent (RA MoJ State Register of Legal Entities) has failed to file a motion on restoring the missed time-frames. As to a legal basis, the representatives of the Plaintiff have referred to the norm stipulated by Article 53(2) of the RA Administrative Procedure Code, according to which *the statements of claim, complaints and other documents submitted after the elapse of the procedural time-frames shall not be considered by the court and shall be returned to the persons who have submitted them, if a motion for restoring the right to carry out activities under the missed procedural time-*

In administrative procedural practice, the cases when as a result of wrong procedural behavior shown by the parties themselves (the representatives appearing on their behalf) even the Court cannot improve the situation, are not small in number. The matter is in particular about the choice of the procedural remedies (claims, motions, appeals)<sup>6</sup> and the duly use thereof by the persons participating to the case. Thus, in the matter of protecting the public subjective rights of a person it is of great importance to correctly formulate the choice of the relevant remedy, the factual and legal basis thereof, as well as the claim making the basis for the action. In some cases the claimants fail to correctly formulate the object of action and (or) the cause of action, which in its turn hinders the effective exercise of their rights through administrative procedural

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*frames has not been filed.* The RA Administrative Court, with reference to the said motion, indicated that the consideration of such motion shall be delayed, and a reference shall be made to it in the judgment to be rendered for administrative case VD/4680/05/09. Objecting against the decision indicated by the Court, the Plaintiff's party, having put in the basis of its position the provision stipulated by Article 5(2) of the RA Constitution, declared that the RA Administrative Court cannot delay the consideration of the said motion and solve it by judgment, since the Court fails to have such a power ratified by the administrative litigation legislation. Moreover, the Plaintiff attracted the attention of the Court to the fact that the norms stipulated by Article 99 of the RA Administrative Procedure Code also regulated the procedural matters concerning the motion consideration and making decisions in regard thereto. After the objections of the representatives of the Plaintiff, the RA Administrative Court started rendering a decision on the motion submitted, and in the result concluded that the reply to the statement of claim, as provided by the norm under Article 53(2) of the RA Administrative Procedure Code, is an exception of the "other documents". We find it necessary to indicate that in the enforcement (judicial) practice there are contradicting approaches to the use of the norm stipulated by Article 53(2) of the RA Administrative Procedure Code. In particular, the RA Administrative Court granted the claim of the Plaintiff in the administrative case VD/4680/05/09 (**the justifications for the motion were the same as in the above mentioned administrative case VD/4680/05/09**), and based on the norm stipulated by Article 53(2) of the RA Administrative Procedure Code, without considering the reply of the Respondent party to the statement of claim, it was returned to the Respondent.

<sup>6</sup> About the importance of parties to the trial in judicial processes see, for example, Kolesnikov P.P. Procedural remedies for the protection of rights / NovGU after Yaroslav the Wise. Great Novgorod, 2004, page 18.

remedy. In such cases the Court is “powerless” to make anything, since it is shackled by the relevant type of action chosen by the plaintiff, the claim making the object of action and by the basis thereof. The importance of the said facts is that these predetermine the fact of proof, limits of proof, thus imparting legal certainty to the judicial proceedings: methodological (in the sense of proceedings) instruction, conceptual (in the documentary sense) exactness, teleological starting point.

The importance to exactly indicate the causes of action and object of action also appears in that in case of public disputes hearing, stipulated by the RA Administrative Procedure Code, Chapter 21 (“New examination of cases with judicial acts resolving the case on merits and reversed by higher court”) people shall have no right to change the cause of action, object of action or the amount of the claims. All these also have a preventive role, since the RA Administrative Court is shackled by the object and cause of the action. By a range of decisions, the RA Court of Cassation recorded that making other claims a matter of consideration except the claims making the cause of the action, and rendering a judgment in regard by the RA Administrative Court shall be a basis for reversing the judicial acts.

Based on the analysis of the norms set forth by Article 64 of the RA Administrative Procedure Code, as well as by Article 113(1)(4) of the same Code, the RA Court of Cassation recorded by the judgment rendered for case VD/0476/05/08. *“The foregoing shows that a court shall instigate an administrative case only on the basis of a relevant claim (action), to hear the case and solve the dispute only within the claims submitted in such case”*<sup>7</sup>.

We find it necessary to mention that no remedy provided by procedural institutions may be effectively implemented, since no types of relevant actions (claims) are stipulated for the exercise of

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<sup>7</sup>Judgment VD/0476/05/08 by the RA Court of Cassation of September 26, 2008. The RA Court of Cassation expressed a position on the same content also by judgment VD/7703/05/08 of July 24, and judgment VD/ 2068/05/08 of May 27, 2009.

human rights.

Chapter 24 of the RA Administrative Procedure Code provides the procedural institution for challenging the legitimacy of the regulatory legal acts (“Proceedings of cases relating to challenging the lawfulness of regulatory legal acts”); however, the Administrative Procedure Code fails to stipulate the type of action (claim), by applying which people may, with the use of the above mentioned institution, realize the protection of their rights. The court practice runs with the “inertia” force along the way, where the proceedings of cases relating to challenging the lawfulness of regulatory legal acts are initiated on the basis of the actions filed by people, which are introduced as matters of disputes (for example VD/0676/05/08, VD/4394/05/09, VD3/0283/05/09, VD/3275/05/09, VD/0275/05/10 and other administrative cases).

Article 65 of the RA Administrative Procedure Code expressly states that *the plaintiff may, with a claim for contesting, demand to completely or partially annul or change the interfering administrative act.*

According to the norm fixed in Article 53(1) of the RA Law “On fundamentals of administrative action and administrative proceedings”, an administrative act is an individual legal act and not a regulatory legal act.

The RA Administrative Court, upon its decision VD3/0283/05/09 of 10 December dismissed the procedure of an administrative case initiated on the basis of the action (claim) by the Governor of the RA Vayots Dzor Region, motivating that the Governor missed the two-month period provided for disputing the action (claim). As a result of considering the cassation appeal brought against the said judicial act, the RA Court of Cassation with its decision VD3/0283/05/09-2010 of June 25, 2010 declared a position that the two-months period provided for disputing is not applicable in this case, and the RA Administrative Court shall be guided by the term stipulated under Article 136(4) of the RA Administrative Procedure Code. The RA Court of Cassation by the said decision failed to refer to questions such as what type of action

(claim) the Governor of the Region submitted and what are the amounts presented to this action.

As a result of the practical application of the institution of administrative claim, however, there are some problems in regard to the actions (claims) filed by administrative bodies (including on levying execution, on recognizing license invalidity in court and so on), the forms and contents of the actions (claims), terms for submitting actions (claims), legal consequences for not submitting such actions (claims) within the stipulated terms. Practically, the actions (claims) on levying execution are submitted also in the form of a counterclaim, and the RA Administrative Court, as a rule, takes such actions (claims) for consideration and renders judicial acts resolving the dispute on the merits on administrative cases instigated on the bases thereof, without having such authority.

As a result of incomplete legal regulation (legislation) of the above mentioned matters in an administrative procedural process, the judicial enforcement practice “stipulated” for the administrative body favored conditions, which definitely contradict to the objectives of administrative procedure and hinder the implementation of the right to fair trial in part of the public subjective rights of people.

In compliance with the norms fixed in Article 3(2) and Article 3(4) of the RA Administrative Procedure Code:

*“2. Administrative bodies or officials shall also have the right to apply to the Administrative Court:*

*1) with a claim to subject a natural or legal person to administrative liability, where it is provided for by law that only the court may subject to an administrative liability;*

***2) with a claim to deprive natural or legal persons of certain rights or to impose certain obligations thereon, where this is reserved by law to the court;***

***3) with a claim to levy execution from natural or legal persons based on an administrative act;***

***4) with respect to a dispute regarding the competence of another administrative body, unless such dispute is subject to be resolved by way of superiority.”***

*“4. A faction of the Council of Elders of Yerevan may also apply to the Administrative Court with a claim to verify the compliance of the acts of the Council of Elders of Yerevan with the regulatory acts having a higher legal force as compared to them (except for the Constitution of the Republic of Armenia).”*

Under the said norm, the virtue that the right to bring an action, the RA Administrative Court also considers cases with disputes arising from public legal relations, which are initiated on the basis of actions (claims) of the administrative bodies. However, in court practice the administrative bodies file actions, which as we have already indicated, are not stipulated by the administrative procedure legislation.

Unlike the Administrative Procedure Codes of other countries<sup>8</sup>, the aims and objectives of the administrative procedure are not stipulated by the RA Administrative Procedure Code. However, the study of the Administrative Procedure Code, as a whole regulatory act, directly shows that the aim of the administrative procedure, which is a form of implementation of justice, is to secure the court protection of the public subjective rights of people and the right to fair trial through performing court supervision.

A question arises in such a situation: do the submitting actions (claims) not stipulated by an administrative procedure legislation,

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<sup>8</sup> For example, according to the Article 2(1) of the Ukraine Administrative Procedure Code (adopted on 6 July 2005, by law 2747-IV), *the objective of administrative procedure is the protection of the rights, freedoms and interests of natural persons, the rights and interests of legal entities in the sphere of public relations from violations of public authorities, local self-government bodies, their officials and servicemen, subjects performing administrative functions on the basis of the legislation, as well as other subjects implementing delegated powers.* According to the norm stipulated in Article 1(1) of the Moldova Republic Law on Administrative Court, adopted on 10 February 2000 under law 793-XIV, *the Administrative Court as an institution of law, aims at restricting the abuse of power, overuse of authorities by the public authorities due to the protection of rights stipulated by the law, as well as aims at regulating the activity of public authorities and securing the law and order.*

initiation of cases on the bases thereof, rendering judicial acts in the result thereof proceed from the principle of legality set forth in the Article 5 of the Constitution<sup>9</sup> of the Republic of Armenia, Articles 18-19<sup>10</sup> of the Constitution, Articles 6 and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 5-6 of the Administrative Procedure Code of the Republic of Armenia, and do they indeed secure the implementation of the aims and objectives of administrative procedures.

Article 5(2) of the Constitution states: *state and local self-government bodies and officials shall be competent to perform only such actions for which they are authorized under the Constitution or laws.*

Although, pursuant to Article 3(2)(3) of the RA Administrative Procedure Code, the administrative bodies are also authorized to apply to court with a request to levy execution with regard to natural or legal person based on an administrative act, as well as with other requests under other legal acts, however, the mechanisms for exercising this power are not thoroughly provided for in the RA Administrative Procedure Code. The only mechanism for the implementation of such power is the mechanism stipulated by Chapter 27 of the RA Administrative Procedure Code relating to the cases on giving payment orders.

Moreover, Article 114 of the RA Administrative Procedure Code specifies the types of the judicial acts disposing of the case on the merits, which are rendered by the RA Administrative Court. Thus, the Administrative Court renders the following types of judicial acts disposing of the case on the merits:

- 1) *on declaring an administrative act invalid in full or in part;*
- 2) *on obliging an administrative body to adopt an administrative act, which the administrative body has refused to adopt or has failed to adopt;*
- 3) *on obliging the participants of the procedure and other persons to carry out or refrain from carrying out certain actions;*

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<sup>9</sup> Official Journal of the Republic of Armenia 2005.12.05/ Special edition.

<sup>10</sup> Official Journal of the Republic of Armenia 2002.06.05/17(192).

- 4) *on the existence or absence of legal relations or nullification of an administrative act in full or in part;*
- 5) *on considering an interfering administrative act as having no legal force;*
- 6) *on declaring a regulatory legal act invalid in full or in part;*
- 7) *on considering a regulatory legal act that has lost its force illegitimate in full or in part.*

As we can see, the RA Administrative Procedure Code failed to define the types of judicial acts on rendering a judgment for levying execution, on recognizing the license lapsed in a judicial manner. In this case, within the context of regulation by the above said legal norm of the RA Constitution (Article 5), the judgments rendered by the RA Administrative Court as a result of considering the above mentioned actions (claims), are also not lawful.

Time-frames for submitting claims for contesting, claims for obligation, claims for performing an action, and claims for recognition are also provided by Article 71 of the RA Administrative Procedure Code. Where persons bring a claim after the elapse of stipulated time-frames, it is considered a basis for refusing to accept the claim for proceedings and for dismissing the claim already accepted for consideration. For the types of the claims filed with administrative bodies no time-frames are stipulated by the administrative procedure legislation. Practically, the administrative bodies submit such actions (claims) when they find it expedient. In most cases, under the administrative cases instigated on the basis of the challenged action (claim) of a natural or legal person (which are heard for one or more years already), the administrative bodies file counterclaims, which are accepted by the courts for consideration without any obstacles.

According to the norm stipulated by Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, *in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and*

*impartial tribunal established by law.*

By comparing the foregoing with the provision set forth in Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms, we find that the right of a person to a fair trial is violated, since for the participant of a trial, which is an administrative body, unlike for natural or legal persons, favorable procedural conditions are provided. In our opinion, such a situation also contradicts to the aims of an administrative procedure. In particular, the aim of the administrative procedure in the legal regulation mechanism is the security of the judicial protection of the public subjective rights of people and implementation of the right to a fair trial on disputes arising from public legal relations. If the legislation body (with positive lawful procedural incomplete regulations) or the court (under a custom, inertia force of law enforcement practice) in the administrative procedure provide (actually secure) favorable conditions, that will definitely hinder the implementation of the administrative procedural objectives, exercise of the right to a fair trial.

As we think, supplements and (or) amendments shall be made to the RA Administrative Procedure Code, as a result of which the actions (claims) submitted by administrative bodies (including requests to levy execution), the form and content of the claims, terms for submitting claims, the legal consequences for failing to submit the claims within such terms, the types of judicial acts disposing of the cases on the merits in regard to claims by administrative bodies shall be subject to complete adequate lawful regulation.

# **THE ISSUE OF IMPROVEMENT OF SOME STRUCTURES OF LEGAL PROTECTION OF INDIVIDUAL'S HONOR, DIGNITY AND BUSINESS REPUTATION IN THE REPUBLIC OF ARMENIA**

**Edgar Shatiryan<sup>1</sup>**

In accordance with already formed legal positions of the European Court of Human Rights (hereinafter ECHR), freedom of expression is one of the supporting columns of democratic society and one of the main terms of its development, as well as self-improvement of each individual. It is implementable not only regarding such “information” or “notions” which are accepted favorably or are concerned as secure and neutral, but in the cases when insult, physiological stress or concern is being caused. Demands of tolerance, pluralism, and open-mindedness are the ones without which natural subsistence of “democratic society” is not possible<sup>2</sup>.

Freedom of expression or right to respect human honor and dignity, which is more important? The long-lasting dispute on this issue continues up to now. By systemic analysis of Articles 3, 14, 27, 43 and 47 (first part) of the Constitution of the Republic of Armenia, it could be stated that the restriction of the rights and freedoms, which derive from of the human dignity, may be justified only within lawful frames, and such an approach has been envisaged in a number of relevant international documents.

Within the framework of this article, the appropriateness of some current issues are touched upon, in particular that of prescription of legal liability for non-public insult, as well as

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<sup>2</sup> Grinberg v. Russia (appl. no. 23472/03), judgment of 21 July 2005; Handyside v. the United Kingdom, judgment of 7 December 1976, Series A no. 24, page 23, ¶ 49; Jersild v. Denmark, judgment of 23 September 1994, Series A no. 298, page 26, ¶ 37).

appropriateness of criminalization of slander and insult in terms of legal regulation of legal protection of individual's honor, dignity and business reputation. To ensure the accuracy of the study, international practice has also undergone relevant analysis.

First, let us state that the term "defamation"<sup>3</sup>, which is typical for the legal system of the USA and European countries, is not used in the legislation of the Republic of Armenia. This term also cannot be found in the legislation of the Russian Federation, regarding which the Decision of the Supreme Court Council of the Russian Federation, dated February 24, 2005, prescribes that the courts, while examining the relevant disputes, shall consider that the notion of defamation used by the ECHR is in concordance with the notion of dissemination of assaulting information which does not correspond to the reality, which is envisaged in Article 152 of the Civil Code of the Russian Federation<sup>4</sup>. On the contrary, some jurists suggest applying the term "defamation" as dissemination of assaulting information which is true. In particular, it is suggested that defamation should be understood as dissemination of information concerning the private life of a person, without the person's consent, which corresponds to reality, which is his/her private or family secret, and which assaults his/her honor, dignity or shatters his/her reputation, if it does not touch upon the interests of society and other people<sup>5</sup>. At the same time, there is a rather wide interpretation of the

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<sup>3</sup> This term has Latin origins (*diffamatio, diffamare*) and means to bring into disrepute or assault (see, for instance, Осаке К. Сравнительное правоведение: схематический комментарий. М.: Юристъ, 2008, С. 536).

<sup>4</sup> Decision of the Plenary of the Supreme Court of Russian Federation, 24 February 2005, # 3 "On the judicial practice on protecting the dignity and honor of citizens, also on business reputation of entities" (para. 1) // Bulletin of the Supreme Court of Russian Federation. 2005 #4. [Постановление Пленума Верховного Суда РФ от 24 февраля 2005 г. No 3 "О судебной практике по делам о защите чести и достоинства граждан, а также деловой репутации граждан и юридических лиц" (п. 1) // Бюллетень Верховного Суда РФ. 2005. No 4].

<sup>5</sup> See, for instance, Nurkaeva T. Sherbakov S. Criminal Legal protection of honor and dignity. Russian Justice, 2002, № 2, С. 51.[Нуркаева Т., Щербаков С. Уголовно правовая охрана чести и достоинства // Российская юстиция. – 2002, № 2, С. 51].

term “defamation”, pursuant to which any kind of dissemination of information, which assaults honor, dignity and business reputation, is considered as defamation<sup>6</sup>.

Deriving from the subjective approach concerning correspondence of disseminated information to reality, the following types of defamation are highlighted:

1. Dissemination of false assaulting information: *deliberately non trusty defamation or slander*,

2. Imprudent dissemination of false information; *imprudent non-reliable defamation*,

3. Dissemination of assaulting information which corresponds to reality: *reliable defamation*<sup>7</sup>.

The provisions of the civil legislation of the Republic of Armenia, as a rule, do not allow imposing liability for dissemination of information which assaults the person’s honor, dignity, and business reputation if it has been proven that they correspond to reality<sup>8</sup>, in respect to which, such cases do not get proper legal

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<sup>6</sup> See, for instance Commentaries to the Criminal Code of Russian Federation (V.M. Lebedev eds.), Moscow, 2007, P. 325 or Erdelevskiy A.M. Compensation of moral damage: Analysis and commentaries of the legislation and judicial practice. Moscow, 2004. [Комментарий к Уголовному кодексу Российской Федерации / под ред. В. М. Лебедева. - М., 2007, С. 325 or Эрделевский А. М. Компенсация морального вреда: анализ и комментарий законодательства и судебной практики. - М., 2004].

<sup>7</sup> See, for instance, Erdelevskiy A.M. Defamation // Lawfulness .- 1998, #12, pp. 11-15. [Эрделевский А. М. Диффамация // Законность. – 1998, № 12, С. 11-15].

<sup>8</sup> Public statement may not be deemed as an insult in the given situation and by virtue of its content where it is based on accurate facts (except for congenital disorders) (Article 1087.1(2) of the Civil Code of the Republic of Armenia). The facts are considered accurate when they are substantiated by evidence at the time of the publication of the information or are well-known facts (not demanding proof), see Decisions issued on the basis of civil cases YeKD/2293/02/10 and N LD/of the Cassation Court of the Republic of Armenia of April 27, 2012.

Analysis of the provision of Article 1087.1(3) of the Civil Code of the Republic of Armenia shows that one of the criteria for assessment of slander is the requirement of non-conformity of the specific statement to reality, *i.e.* the statement must be false, unsubstantiated or unreliable. At the same time, the legislator envisages the terms when public communication of factual data is not considered as slander (for details see part 5 of Article 1087.1).

response.

*Publicity* is one of the mandatory elements of the characteristics of defamation, which is present even in the case of passing information to any third party<sup>9</sup>. Interpretation of the term “public communication” is provided in the decisions of the Cassation Court of the Republic of Armenia. Meanwhile, verbal statements made and facts presented in the presence of a third party may be considered public. The latter is considered as accomplished in presence of a third party also in the case when the third party also makes verbal statements and presents facts, which by virtue of their contents are related to the verbal statements or facts made and presented by the tortfeasor. In such cases, the fact of causing joined damage is present<sup>10</sup>.

In fact, in our Republic in the conditions of the current legal regulations, the verbal statements made *non-publicly*, which assault the individual’s honor, dignity, and business reputation, are not considered as insult and in this case, the person does not enjoy the means of protection prescribed by law<sup>11</sup>. In such a situation, persons, whose honor, dignity or business reputation are assaulted non-publicly, are deprived from the legal protection, which, at least, is dubious as, for instance, no legal liability is prescribed for swearing a person non-publicly or insulting, *e.g.* spitting on his or her face.

Regarding the abovementioned, a number of cases are worth to be mentioned. For instance, the General Jurisdiction Court of Administrative Districts of Achapnyak and Davitashen declined the case YeAQD/2492/02/12 on April 29, 2013, initiated by T. Tovmasyan, the head manager of “Jokhovurd Terti Khmbagrutyun” LLC (Editorial Office of *Johovurd* Newspaper) and S. A. Grigoryan against Kh. Khachatryan concerning the issue of

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<sup>9</sup> The same issue is touched upon also in Decision SDVo-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011.

<sup>10</sup> See in details decisions issued on the basis of civil cases N YeKD/2293/02/10 and N LD/of the Cassation Court of the Republic of Armenia of April 27, 2012.

<sup>11</sup> Necessity of resolving the issue of legal regulation of defense from non-public insult is pointed out in Decision DCC-997 of the Constitutional Court of the Republic of Armenia of November 15, 2011.

demand to oblige to apologize for the expressions assaulting the honor and dignity. According to the facts of the case, during the telephone conversation the Respondent insulted the Plaintiff S. Grigoryan saying, "...my dear, you are not a journalist, you are a prostitute (emphasis added – E.Sh.), and you may put this down too," and disconnected. The Court, in particular, stated that the evidence provided by the Plaintiffs did not substantiate publicity of the "insult" of the Respondent as it was made during the personal telephone conversation and was non-public. There is no factual confirmation that the Respondent by means of a verbal expression, in writing, in pictures, through gesture or through acts, had made any public expression assaulting the honor, dignity or business reputation of the Plaintiff.<sup>12</sup>

Meanwhile, the respondent mentioned, inter alia, as legal argument the substantiations of a judgment of another case rendered by the RA court, which entered into force<sup>13</sup>. In particular, in accordance with the facts of the case, the Respondent called the Plaintiff "illiterate" (emphasis added – E.Sh.), disconnected, and as a response to the second call, during which the Plaintiff wanted to clarify the reason of being called "illiterate", the Respondent used abusive expressions (emphasis added – E.Sh.) and again disconnected the telephone. The Decision of the RA Appeal Court of October 12, 2011 stated that the Respondent's opinion is the person's personal attitude towards the Plaintiff, and the Respondent's opinion, personal attitude would have stopped being as such from the moment it was announced in public, but, meanwhile, in this case this fact is not present. It derives from this argumentation that the "expression"

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<sup>12</sup> See the Judgment of the General Jurisdiction Court of Administrative Districts of Achapnyak and Davitashen of April 29, 2013 on the case YeAQD/2492/02/12.

<sup>13</sup> See the Judgment of the General Jurisdiction Court of the Administrative Districts of Avan and Nor Nork of June 7, 2011 on case YeAND/0251/02/11 based on the claim brought forward by G. Balasanyan, journalist of the newspaper "Hetq" against R. Hayrapetyan, deputy of the RA National Assembly, demanding to compensate the damage caused to his honor and dignity. This judgment, after being appealed in accordance with the appeal and cassation procedure, remained unchanged and entered into force on January 19, 2012.

made by the Respondent is not information assaulting the honor and dignity of the Plaintiff; therefore, as to satisfying the appeal, the relevant norms of the RA Civil Code are not applicable and thus the enforcement of Article 1087.1 of the RA Civil Code and subjecting to liability for such action are excluded (by virtue of Article 1087.1(3))<sup>14</sup>.

Regarding this, we would like to mention that pursuant to Article 3 of the Constitution of the Republic of Armenia human dignity is one of the highest values, and pursuant to Article 14 dignity of a person shall be respected and protected by the State as an inherent foundation for his or her rights and freedoms<sup>15</sup>. Namely, human dignity is inviolable substance of his or her rights and freedoms and their respect and protection is the obligation of the State, which, in its turn, assumes protection of the person from any kind of humiliation. Meanwhile, analysis of the norms of Article 43 of the Constitution states that on the basis of this Article, Article 14 of the Constitution is not subject to restriction.

In a number of decisions, the Constitutional Court of the Republic of Armenia touched upon the issue of recognizing the constitutional legal contents of human dignity as highest value (SDVo-834, SDVo-913, etc.), emphasizing that this right is of utmost importance for free, non-restricted and guaranteed implementation of

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<sup>14</sup> Registering the above mentioned, the Court of Appeal stated that in such cases, when by the explanations presented in the case as well as evidence obtained during case examination, it was not confirmed that the Respondent with the means of "verbal expression, in writing, in pictures, through gesture or through acts made any public expression assaulting the honor, dignity or business reputation" in such circumstances which could be proved as a fact of insult, the Plaintiff's demand was refused and the Court came to such a lawful conclusion.

<sup>15</sup> Such formulations can be seen in the Constitutions of a number of democratic states, where immunity and inalienability of the human dignity, respecting and protecting the dignity of a person are obligations of the State. For instance, in the Fundamental Law of the Federal Republic of Germany of 1948, it is stipulated that that human dignity is inviolable, and the respect and protection thereof shall be the obligation of the State (Article 1(1)). According to the Constitution of Poland of 1997, the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities (Article 30).

all fundamental rights and freedoms of an individual and a citizen, which also assumes implementation of certain activity and expression of will, as well as relevant obligation of the State to protect them.

*Deriving from current legal regulations concerning the challenged issue, it may be stated that the State does not implement its constitutional obligation to protect human dignity completely as the structures for legal protection from non-public insult have not been prescribed.*

Now, let us touch upon the issue of appropriateness of decriminalization of defamation on the basis of studies of the current international tendencies.

The European Council of Parliamentary Assembly in its Resolution 1577(2007) of 04.10.2007 towards decriminalization of defamation<sup>16</sup>, in particular, stated anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility. After adoption of this Resolution, number of European Council member states, among them Republic of Armenia, initiated relevant legislative amendments directed towards decriminalization of defamation. In 2010, Articles 135 and 136 of the RA Criminal Code were repealed, and the RA Civil Code was supplemented with the challenged Article 1087.1. However, was it appropriate to undertake such an action, and by decriminalization of defamation, has not the human dignity been infringed? To answer these questions, let us, first, study the best practice of a number of foreign countries.

In the states of custom law, defamation is often defined as delict (civil infringement), although in a number of cases by dissemination of evidently assaulting information criminal persecution may be filed against the tortfeasor. Thus, for instance, in Great Britain the activity directed towards dissemination of such kind of information is classified as libel and slander. The first one is comprehended as a written or any other kind of false statement, which provides the

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<sup>16</sup> The Parliamentary Assembly of the Council of Europe (PACE), Resolution 1577(2007) (4 October 2007), “Towards decriminalization of defamation.”

disseminated information with permanent essence, while slander is an oral or other form of libel, which provides the disseminated information with temporary form. Here libel acts as independent *corpus delicti*, meanwhile slander may be criminalized when it is combined with insult and in a number of other cases. Satisfying the Applicant's demands is possible, if the victim proves that information was assaultive, concerned him/her and was disseminated. Meanwhile, fair comment regarding public significance of assaultive information, which has become known to the Respondent, does not bring to liability for defamation. An opinion or a comment may be considered *bona fide* if the Respondent considered it fair and had no intention to damage the victim. The necessary term for exclusion of liability for the interpretation is its "public significance" which is widely interpreted by the English courts if the action interests many people and may happen with them or other persons<sup>17</sup>. Simultaneously, there is not liability for "innocent defamation", if the tortfeasor offers denial of disseminated assaultive information to the victim.

In the *USA* compensation for damage is the main form of liability for defamation. Depending on what kind of compensation of damages demands the Plaintiff, the court is authorized to enforce diverse legal principles. The American law points out two forms of compensation of damage - compensation damages, which are imposed for real damage (moral damage, loss of earning capacity because of stress, legal costs, etc.) and punitive damages, which are imposed for "punishing" the offender and keeping him or her devoid from further offenses. The Respondent also pays back the sums of

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<sup>17</sup> М. Е. Жаглина, "Диффамация и защита чести, достоинства и деловой репутации" // Вестник Воронежского института МВД России, 2009, № 2 (<http://cyberleninka.ru/article/n/diffamatsiya-i-zaschita-chesti-dostoinstva-i-delovoy-reputatsii>). It should be mentioned that foreigners often choose Great Britain as a place for judicial disputes against respondents. For instance, the Russian businessman B. Berezovsky submitted a defamation plea against the author of the article published in the American journal "Forbes", despite the circumstance that none of the parties had any concern with Great Britain (*Berezovsky v. Michaels* [2000] 1 W.L.R. 1004, HL).

“punitive” damages to the Plaintiff. Meanwhile, concerning the cases of defamation, according to the legislation of the majority of the states of the USA, for the officials there are restrictions of the right to demand compensation for “punitive” damages. In the USA, in case of defamation the illegality of the behavior is manifested according to which the statement shall be factual and assaultive towards a certain person, *i.e.* shall damage the reputation<sup>18</sup>, shall be caused by the third party (through means of mass media, radio, television) and somehow personify the victim of libel, *i.e.* it shall be clear to the third party that the information concerns that certain person<sup>19</sup>. Besides, the guilt of the slanderer must be proved. The principle of actual malice, the action, which first covered all public figures, and since 1974 has also covered private persons,<sup>20</sup> is of great importance. Generally, the American tendency of imposing gross majority of compensations indicates that the possibility of achieving civil-legal liability may serve as better suppressing factor than the risk of filing a criminal case. Despite, in the USA judicial practice successive priority of the First Amendment of the Constitution, which envisages the freedom of speech, is more noticeable regarding the protection of honor and dignity, especially when it concerns public figures.

In the states of continental law, dissemination of information assaulting honor, dignity and business reputation, as a rule, serves as grounds for enforcement of criminal-legal norms. In the European states, which are ranked with the Romance-Germanic legal system, in criminal-legal aspect dissemination of allegations or assaultive facts are mainly considered as defamation. For instance, in the Federal Republic of Germany, three types of defamation are specified: insult, assaulting display and intentionally mendacious judgment. In the case of insult, the trustworthiness of display is not demanded to be proved or challenged if its assaultive essence is connected with the circumstances of the form and dissemination of display. If it concerns allegations, and it turned out that the displayed

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<sup>18</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>19</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>20</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

information has been disseminated as intentionally mendacious, then *corpus delicti* is present and as justification the accused is authorized to prove that, to his or her opinion, he or she has disseminated true information. Legislative separation of factual statements and expression of opinion, typical to a number of states, is the most important element of the German legislation regarding defamation and, meanwhile, the latter is under ultimate protection of the law. For defamation crimes, the German Criminal Code envisages a number of means of liability, including imprisonment<sup>21</sup>. However, the criminal persecution is implemented very rarely, thus providing possibility for resolving identical cases by civil-legal order<sup>22</sup>.

In *France* liability for defamation is envisaged in the Act on Freedom of Press of 1881 where insult and libel were differentiated. The latter is defined as *allegation or imputation* of an act, which dishonors or damages a person's honor, dignity, and reputation. Demonstration or reproduction of such allegation or imputation are liable to punishment even if has been done as an assumption and certain people are not pointed out but they could be recognized on the basis of the information provided. Any insult is defined as an outrageous expression, terms of despise or invectives that *do not contain* any fact to the insulted person and are considered as insult<sup>23</sup>. Here as a rule, examination of the cases on defamation are held without the participation of juries. No imprisonment is practically imposed. Usually the accused is fined, compensating the damage caused to the victim of the insult or libel. Although the criminal law is relatively "lenient", it is more frequently used in France than in other European states, and a tangible part of the judgments are adopted in favor of the plaintiff (victim). Criminal persecution on

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<sup>21</sup> German Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [Bundesgesetzblatt] I p. 3322, last amended by Article 3 of the Law of 2 October 2009, Federal Law Gazette I p. 3214, Chapter fourteen, Libel and slander.

<sup>22</sup> Sergey Dikman, Problems of responsibility for Defamation: the experience of foreign countries and international standards. [Сергей Дикман, Проблемы ответственности за диффамацию: зарубежный опыт и международные стандарты] ([www.hrights.ru/text/b25/Chapter3%204.htm](http://www.hrights.ru/text/b25/Chapter3%204.htm)).

<sup>23</sup> Law on the Freedom of the Press of 29 July 1881, Article 29.

charge of defamation is terminated if the accused is able to prove the correspondence of the disseminated information to reality. However, presentation of such evidence is excluded if the assaulting information concerns the victim's private life. If the accused is not able to confirm the reliability of the disseminated information, then the law derives from the presumption of “unfairness” of his or her actions. In such a case, the accused may also prove the opposite but it is not enough just to prove that he or she was convinced in the truthfulness of the disseminated information. He or she must prove that the disseminated information was precisely checked by him or her and was disseminated by lawful aims and, in certain circumstances of the case, as cautiously as possible<sup>24</sup>.

According to the *Criminal Code of Switzerland*, *any person who in addressing a third party, makes an accusation against or casts suspicion on another of dishonorable conduct or of other conduct that is liable to damage another's reputation and disseminates such accusations or suspicions*, is criminally liable. If the accused proves that the statement made or disseminated by him corresponds to the truth or that he had substantial grounds to hold an honest belief that it was true, he may not be held guilty of an offence except for cases, when his statements are not directed towards protection of public interests, in particular, concern private or family life and are done with intention to show the victim as a negative person<sup>25</sup>. *Insult*, that is, any person who attacks the honor of another verbally, in writing, in pictures, through gestures or through acts of aggression is criminally liable. Meanwhile, if the "insulted" party has directly provoked the insult by improper behavior, the court may dispense with imposing a penalty on the offender. If there is an immediate response to the insult by way of a retaliatory insult or act of aggression, the court may dispense with imposing a penalty on either

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<sup>24</sup> Erdelevskiy A.M. Compensation of Moral Damage: Analysis and commentaries of legislation and case law/ 3-rd edition, Moscow, 2007, P. 79. [Эрделевский А. М., Компенсация морального вреда: анализ и комментарий законодательства и судебной практики / . – 3-е изд., испр. и доп. – М.: Волтерс Клувер, 2007, С. 79].

<sup>25</sup> Criminal Code of the Swiss Confederation of 21 December 1937, Article 173, pages 1-3.

or both offenders<sup>26</sup>.

In accordance with the Criminal Code of Sweden, if a person points out someone as being a criminal or of leading reprehensible way of living or otherwise furnishes information intended to cause exposure to the disrespect of others, shall be subject to criminal liability. If the person was duty-bound to express himself or if, considering the circumstances, the furnishing of information on the matter was defensible, or if he can show that the information was true or that he had reasonable grounds for it, no punishment shall be imposed<sup>27</sup>.

The Austrian legislation prescribes both criminal and civil liability for defamation. Although imprisonment is prescribed as punishment likewise, it is rarely implemented. During the past years, the main part of the cases on libel and insult have been examined through civil procedure which is mainly conditioned with the circumstance that in the civil cases, where the main burden of proof is on the respondent, the plaintiffs may achieve better results, as well as in the aspect of compensation of moral damage. Besides the formed practice, Austria prescribes special protection for the employees of the mass media<sup>28</sup>. The journalist is not punishable for a media contents offence for which the proof of truth is admissible, not only if the truth of the statement has been proved but also in such cases if the public had a predominant interest in the publication and, also in application of the journalistic diligence required, there was sufficient reason to take the statement for true and he has shown such a professional approach which is in compliance with the standards of ECHR.

The Criminal Code of the *Russian Federation prescribes slander as spreading deliberately falsified information that denigrates the honor and dignity of another person or undermines his reputation*. Liability is prescribed also for slander contained in a

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<sup>26</sup> Ibid, Article 177.

<sup>27</sup> Criminal Code of the Kingdom of Sweden, Chapter 5, section 1.

<sup>28</sup> Federal Act on the Press and other Publication Media of 12 June 1981 (Media Act Austria), Section 5, page 29.

public speech or in a publicly performed work, or mass media libel and abusing official position for libel. Libel concerning false information about disease, which endangers the surrounding, as well as sexual libel or accusing a person of committing a grave or especially grave crime is also punishable. No imprisonment is prescribed for the mentioned actions.<sup>29</sup> It is noteworthy that the article of the Criminal Code of the Russian Federation on insult was decriminalized<sup>30</sup>, and for insult administrative liability is prescribed. The Code of Administrative Offences of the Russian Federation *defines insult as indecent humiliation of the honor and dignity of a person*. Liability is also prescribed for insult contained in a public speech or in a publicly performed work, and mass-media libel, or for not undertaking measures aimed at not allowing insult contained in a public speech or in a publicly performed work, and mass-media libel<sup>31</sup>. In the meantime, Article 319 of the Criminal Code of the Russian Federation prescribes *for public insult* of a representative of the authority during the discharge by him of his official duties, or in connection with their discharge<sup>32</sup>.

Taking as grounds the abovementioned, we would like to mention that decriminalization of slander and insult may not be admissible unequivocally. Although Article 1087.1(7) and Article 1087.1(8) of the current Civil Code of the Republic of Armenia, together with material compensation, prescribe non-material compensation, to our opinion, in the cases of unlawful abuse of

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<sup>29</sup> Criminal Code of Russian Federation, 13.06.1996 N 63-ФЗ (ред. от 05.04.2013), art. 128.1. [“Уголовный кодекс Российской Федерации” от 13.06.1996 N 63-ФЗ (ред. от 05.04.2013), ст. 128.1 (введена Федеральным законом от 28.07.2012 N 141-ФЗ)].

<sup>30</sup> Article 130 of the Criminal Code of the Russian Federation was repealed (see: Федеральный закон от 07.12.2011 N 420-ФЗ).

<sup>31</sup> Administrative Offences code of Russian Federation, 30.12.2001 N 195-ФЗ, article 5.61. [“Кодекс Российской Федерации об административных правонарушениях” от 30.12.2001 N 195-ФЗ (ред. от 05.04.2013), ст. 5.61 (введена Федеральным законом от 07.12.2011 N 420-ФЗ)].

<sup>32</sup> Article 318 of the Criminal Code of the Republic of Armenia, prescribing liability for public insult of a representative of the authority, was repealed on May 19, 2008 on the basis of the Law HO-67-N.

freedom of speech legislative prescription of material and non-material compensation cannot serve as an effective guarantee for protection of the dignity of a person. Otherwise, a person who abuses his or her prosperous position may regularly publicly “violate” the dignity of another person, clearly comprehending that he or she is able “to buy” it. We state that libel (also taking into consideration the public danger of the latter) shall be envisaged as a criminally liable action<sup>33</sup> and fine or imprisonment for a certain term shall be imposed as means of punishment. Meanwhile, in accordance with the RA Criminal Code in the case of impossibility of paying the fine the court may replace the fine or unpaid part of the fine with public works (emphasis added – E.Sh.).<sup>34</sup> The latter is imposed by the court, in the area determined by the competent body, as execution of unpaid socially useful, authorized work by the convict. Public works may be imposed on persons who committed not grave or medium gravity crimes and are sentenced to not more than two years of imprisonment. Public works are assigned as an alternative punishment to imprisonment, following certain time periods as well as in the case mentioned above (Parts 1-3 of Article 54 of the RA Criminal Code). To our opinion, the public works may serve as more

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<sup>33</sup> Meanwhile, the RA Criminal Code prescribes liability for defamation of a judge, prosecutor, investigator, person carrying out inquest or a judicial acts compulsory enforcement officer (Article 344). Such actions are punished with a fine or imprisonment.

Dissemination of defamatory information concerning a candidate, a political party (alliance of political parties) during elections to mislead electors also results in criminal liability and is punished with a fine or imprisonment (Article 151 of the RA Criminal Code).

<sup>34</sup> Article 51(4) of the RA Criminal Code, as the result of calculation for replacing the fine or the unpaid part of the fine with public works, does not appropriately guarantee the legal possibility of implementation of public works less than two hundred seventy hours regarding the persons who cannot afford paying the fine, therefore blocking the implementation of the effective means of their of legal protection, as well as differentiated approach is not shown between the impossibility of the circumstances of paying the fine and avoiding it, which in accordance with the Decision SDVo-1082 of the RA Constitutional Court of April 23, 2013 was recognized as contradicting Article 18 of the RA Constitution and thus null and void.

effective means for the protection of human dignity than forms of material and non-material compensation prescribed by the RA Civil Code. In this regard, we welcome the prescription of punishment in the form of “compulsory work” for defamation envisaged in the Criminal Code of the Russian Federation. This compulsory work consists of the performance of unpaid socially useful works by the convicted person during his spare time (Article 49(1) of the Criminal Code of the Russian Federation).

Regarding insult, a number of articles of the RA Criminal Code prescribe liability for insulting persons of certain categories. This regards insulting the RA Human Rights Defender with regard to the exercise of his powers (emphasis added – E.Sh.) (Article 332<sup>2</sup>). Contempt of court, which is expressed by insulting the participants of the proceeding, as well as by insulting the judge with respect to the exercise of the official powers of the latter (emphasis added – E.Sh.) also result in criminal liability (Article 343(2) and Article 343(3)). The mentioned actions are punished with a fine or imprisonment<sup>35</sup>. Regarding this, it should be mentioned that criminal liability imposed with respect to the execution of official powers of officials and insulting them has been prescribed by the legislation of a number of states, and in this concern, the above-mentioned legal regulations in our Republic are justified.

Simultaneously, Article 360 of the RA Criminal Code prescribes *corpus delicti* for insulting a serviceman. According to this, insulting a serviceman, i.e. *obscene humiliation of a serviceman’s honor and dignity by another serviceman in relation to performing the duties of military services* (emphasis added – E.Sh.)... It derives from the formulation that insulting a serviceman by another serviceman shall be committed *in the military base or other location of military service, i.e.* the category of subjects who insult or the place of insulting has been legislatively specified.

In all cases, it is evident that this definition differs from the

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<sup>35</sup> The mentioned articles are in the Chapter titled “Crimes against Justice” of the RA Criminal Code.

definition provided in the RA Civil Code, *i.e.* in this case the legislator showed differentiated approach to the notion of insult, its legal consequences, as well as in the aspect of the legal stipulation of the frames of the victim, which, to our opinion, cannot follow lawful goals.

*Deriving from the above-mentioned we can conclude that the immunity and inalienability and duty of the state to respect and protect human dignity, as a constitutionally declared ultimate value, are directly envisaged in the Fundamental Laws of a number of democratic states, as well as in the RA Constitution, the acting legal structure which shall protect the above mentioned personal non-property rights are not precise and do not precisely guarantee protection of highest constitutional values and need further elaboration.*

# **MAIN THEORETICAL AND PRACTICAL ISSUES OF STATE SERVICE IN THE STAFF OF HUMAN RIGHTS DEFENDER (OMBUDSMAN) OF THE REPUBLIC OF ARMENIA**

**Rustam Makhmudyan<sup>1</sup>**

The institute of the Human Rights Defender (hereinafter referred to as “the Defender”) plays a particular role among the intrastate mechanisms for the protection of human rights and fundamental freedoms. Guided by the fundamental principles of lawfulness, social co-existence and social justice, the latter protects the human rights and fundamental freedoms violated by the state and local self-government bodies and their officials.

Having regard that in accordance with Article 30.2 of the Constitution of the Republic of Armenia, citizens shall have the right to equal access to public service as prescribed by law, and taking into account the fact that the service in the Staff of the Human Rights Defender of the Republic of Armenia (hereinafter referred to as “the Defender’s Staff”) is a type of public service, the principles and organizational procedure of public service prescribed by law should apply to it as well.

Moreover, according to the constitutional norm everyone shall have the right to receive — on the grounds and as prescribed by law — the assistance of the Human Right Defender for the protection of his or her rights and freedoms. And as it is simply impossible to ensure such protection alone, the Defender forms his or her Staff.

Since the first day of the establishment of the Defender’s institute, the Staff thereof with its legal status has been subjected to substantial contextual changes. It particularly refers to the type of service in the Staff, as well as to the legal status of the employees of the Staff.

The study of international practice shows that almost in all

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democratic states the service performed in the Defender's (Ombudsman's) Staff is a state service, and the employees are state servants. Particularly, in Sweden, Spain, Lithuania and Estonia the status of Ombudsman's Staff is very clear. Although in these countries the legal status of the Staff has not been clearly defined by law, no problematic situations with respect to it have occurred so far, which cannot be claimed with regard to the Republic of Armenia.

The situation in the state service system of the Republic of Armenia entirely changed when the National Assembly adopted the RA Law<sup>2</sup> "On public service", as a result of which the content of the concept of public service is defined in a clearer and more comprehensive manner. Besides, the given law defines that "[t]he law shall also apply, *inter alia*, to persons holding positions provided for by the list of positions of public service in the Staff of the Human Rights Defender". Though an attempt had been made to clarify the legal status of the Defender's Staff before the adoption of the mentioned law, the abovementioned provision was the first to be defined at the legislative level.

Our studies show that the solution to the discussed issue may be given generally in two ways: a) through legislative amendments, b) by making clarifications in the law enforcement practice. But before addressing that question, it should be mentioned that subject to the requirements for improving the state administration system, nowadays proper organization of and reforms within the state service stand at the forefront of attention. The political and economic reforms currently in process in our country require making changes in the state service which is considered as an inseparable component of statehood, so that the state apparatus would be able to perform its functions in modern conditions.<sup>3</sup>

Though it is difficult to unequivocally classify the Defender's staff as a state body; however, taking into account that the Defender is a public-legal institution, it is more appropriate to use the term of

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<sup>2</sup> The law was adopted on May 26, 2011.

<sup>3</sup> Administrative Law of the Republic of Armenia, manual, by joint edition of Professor G. Danielyan, PHD of Law, YSU edition, Yerevan 2012, page 232.

“public service”. Public service is the exercise of powers conferred upon the state by law, and besides the state and community services, it also includes state and community positions.

The disputes regarding the concepts of “state service” and “state servant”, taking into account their institutional meaning, still continue. According to these opinions, state service includes all the employees of not only state bodies, but also those of different state offices and organizations.<sup>4</sup>

All types of public service included in the RA Law “On public service” are in this or that manner regulated not only by the mentioned law, but also by other legislative and sub-legislative acts, with the exception of the Defender’s Staff, with respect to which it is undoubtedly necessary to clarify the provisions defining its legal status.

Service in the Defender’s Staff and the legal status of the Staff employees are somehow similar to the service in the Staff and the legal status of Staff employees of the National Assembly of the Republic of Armenia. Thus, state service in the Staff of the National Assembly is a type of state service and the state servant of the staff is a person holding a position provided for by the list of positions of state service (except for the temporary vacancies) or included in the short-term personnel reserve of state service. And the RA Law “On public service” defines the state service as a professional activity, aimed at solving issues and performing functions conferred upon the state bodies by law.

Based on our definition, the legal status of the Defender’s Staff may be described as a complex of rights and obligations conferred upon the Staff by law, which ensures or contributes to the ordinary flow of the Defender’s activities.

The amendments regarding the legal status of the Defender’s staff have undergone two stages:

1. The Defender’s staff had by law been defined as a state

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<sup>4</sup> Bakhrakh D.N. Administrative Law. General Part, Moscow 1993, P. 97. [Бахрах Д.Н., Административное право, Часть Общая, М.:1993, С. 97, Манохин В.М., Советская государственная служба, М.: 1966, С. 20].

office, without addressing in any manner the legal status of its employees;

2. The status of both the staff and its employees had been regulated by law; however, nowadays there is no clarification at all.

The legal status of the Defender's staff formed on March 1, 2004 was not very clear. The law simply prescribed that for the purpose of ensuring the Defender's activities, the Defender shall form a staff. The Defender's Staff shall implement the juridical, organizational, scientific-analytical, informative aspects of the Defender's activities.

The Defender's Staff is a state office, which has a seal bearing the image of the national Emblem and its name.

The biggest problem of the Staff during the first stage was the fact that by the former amendment of Article 23(4) of the RA Law "On Human Rights Defender" it was only mentioned that "*The Defender's staff employees are not civil servants and work on the basis of temporary employment contracts*". The provision with such content caused a problem every time an employee of the Defender's Staff transferred to another system of state service, as his or her status was not clear, and even when employed in that service it was not clear what service it was made equivalent to. Of course some lawyers (both academics and practising) constantly state that the absence of the clarification of the legal status of the Defender's Staff is an issue, however, no amendments have been made throughout many years. Moreover, upon the joint efforts of the Civil Service Council of the Republic of Armenia and the Government of the Republic of Armenia a draft law had been put into circulation, according to which the employees of the Defender's staff had to be classified as civil servants, however, later it was rejected as upon the former Defender's initiative the draft law had been sent to the Venice Commission for the purpose of obtaining a professional opinion. The mentioned Commission concluded that the adoption of the draft law would not only endanger the independence of the Ombudsman's institute, but would also contradict both the general idea of Paris principles, and the principles of the classic model of similar

institutes. Besides, from our point of view, the draft could not be adopted by two other reasons:

1. Legal, social and other guarantees prescribed for the civil servants by the RA Law “On civil service” were entirely different from the guarantees conferred upon the employees of the Defender’s Staff, including those of immunity, for not being interrogated as a witness and the like;

2. If the employees of the Defender’s Staff were classified as civil employees, the objective consideration of the letters of complaint of the citizens against the Civil Service of the Republic of Armenia would cause doubts, for during the consideration of the lawfulness of this or that activity of the body or its official appointing the mentioned employees, the factor of dependency would always exist.

The second stage of the legal status of the Defender’s Staff was conditioned by the amendments to the Law in 2010, as a result of which the Defender’s Staff was defined as a state administration institution without a status of a legal person, where state service referred to as Service in the Staff of the Human Rights Defender is performed.

Based on the logic of the concept of state service prescribed by law, the State Service in the Staff of the Human Rights Defender is a professional activity carried out in the Defender’s Staff with a view to ensuring the exercise of the powers conferred upon the Defender with the Constitution of the Republic of Armenia and the Law. With the exception of the activities related to the technical maintenance functions, the professional activity in the staff is state service, and the employees holding relevant positions in the staff are state servants.

As opposed to the former definition prescribed by law, the amendment mentions that separated subdivisions of the Defender’s Staff may be established in the regions.

At first sight the above mentioned formulations seem to have given answers to all the questions of defining the legal status of the Defender’s Staff, while there are still a lot of gaps and

contradictions.

For example, according to the new Article 23.1 added by the same amendment to the Law, the provisions of the RA Law “On judicial service” shall apply to the relations connected with the state service in the Defender’s Staff insofar as these in themselves apply to the state service in the Defender’s Staff and do not contradict the Law.

When applying the provisions of the RA Law “On judicial service” to the relations connected with the state service in the Defender’s staff:

1. Judicial service shall imply state service in the Staff of the Defender;

2. The powers conferred upon the head of the judicial department shall be exercised by the head of the Defender’s Staff;

3. The powers conferred upon the Council of Courts' Chairpersons of the Republic of Armenia and the Chairperson of the Court of Cassation of the Republic of Armenia shall be exercised by the Defender;

4. The powers which the Chairperson of the Court of Cassation of the Republic of Armenia exercises acting on the opinion of the Council of Courts' Chairpersons of the Republic of Armenia, shall be exercised solely by the Defender.

However, the logic of the above mentioned amendments to the Law is unclear first of all because it is not clear why the legislation on judicial service should apply to the Service in the Defender’s Staff, or whether there are so many similarities and generality between the powers and functions. To the best of our belief, the application of the given legislation to the service in the Defender’s Staff and its employees is not convincing and substantiated, though certain standards for the scope of application have been provided for; however, these standards apply only in cases when the legislation on judicial service contradicts the provisions of law. It is obvious that though there are no such contradictions to the law; however, the issues of the service in the Defender’s Staff remain unsolved.

By analyzing the provisions of the RA Law “On judicial

service” it becomes clear that the current structural units of the Defender’s Staff should correspond to the structural units of the Judicial Department, the administration body of the judicial service, and the status of the employees should correspond to that of the Department’s employees, while no clarification has been given so far. Moreover, according to Article 4(6) of the RA Law “On public service”, *discretionary position is an appointive position, and the official holding that position shall adopt decisions and coordinate the implementation thereof within the scopes of liabilities vested in him or her in accordance with the Law of the Republic of Armenia. Any official holding a discretionary position may be replaced as a result of a change in the distribution of political powers.*

The given definition is followed by the statement that besides positions held in other bodies, the position of Advisors to the Human Rights Defender of the Republic of Armenia and that of Press Secretary are also considered as discretionary positions within the meaning of this Law.

It should be noted that the term of discretionary position within the system of the judicial service is not used in any manner; therefore, based on the provisions of the RA Law “On public service”, we can state that the legislation on judicial service does not apply to the Advisors to the Defender and Press Secretary.

The next reason is that the transitional provisions of the RA Law “On making amendments and supplements to the Law of the Republic of Armenia on the Human Rights Defender” envisage a list of activities, which in case of being carried out chronologically, would have resulted in the introduction of all the procedures of judicial service in the Defender’s Staff. Particularly, it referred to the issuance and approval of job description cards and, then to the training, attestation and granting of class ranks, meanwhile besides the approval of job description cards, nothing else has been carried out. The problem is that, for example, the first training of state servants should have been held in the Defender’s Staff since the first

day of the sixth month following the entry<sup>5</sup> of the Law on the discussed amendments into force; however, already two years have passed and no training has taken place so far. Of course, the Defender's Staff is trying to "justify" this with the fact that relevant amounts haven't been allocated from the state budget, but, in our opinion, it may not serve as justification, as the procedure for training of the employees of the Staff of the National Assembly of the Republic of Armenia is organized individually, by concluding contracts with the relevant institutions and making relevant payments. In our opinion, the training process in the Defender's Staff might be organized even with the assistance of international human rights organizations.

As a first step, taking into account that the powers of the Council of Courts' Chairpersons of the Republic of Armenia are identified with the Defender's powers, the Defender should have adopted relevant acts with respect to the training process, attestation and granting of class ranks. This is substantiated with the fact that on August 25, 2006 the Council of Courts' Chairpersons of the Republic of Armenia adopted the Decision No 06-N "On the procedure for holding trainings of judicial servants", as well as on October 17, 2006 adopted the Decision No 05-L "On the procedure for assessment of the activities of judicial servants"<sup>6</sup>, whereby all the procedures were subjected to legal regulation.

Thus, the failure to allocate certain amounts from the state budget does not mean that it is impossible to develop and adopt standards of procedures.

Again returning to the content of amendments and supplements, it should be mentioned that if up to now it would have been possible to organize the training of employees of the Defender's Staff at the "Judicial School of the Republic of Armenia" SNCO, by virtue of the RA Law "On the Justice Academy" entering into force on September 1, 2013, such opportunities do not exist anymore, since the Academy

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<sup>5</sup> The mentioned law entered into force on January 6, 2011, *i.e.* it should have been implemented on July 1.

<sup>6</sup> The mentioned decisions are available at [www.court.am](http://www.court.am) website.

does not carry out such activities. Thus, in accordance with Article 3(1)(3) of the RA Law “On the Justice Academy”, *the Academy shall organize and carry out the training of judicial servants, state servants of the staff of the Prosecutor’s Office and judicial bailiffs*. In this case nothing is mentioned regarding the training of the employees of the Defender’s Staff.

Some mathematical calculations were done in the Law with respect to the salaries of the employees of the Defender’s Staff, taking the compensation to judicial servants as a base rate, which was then multiplied by the prescribed coefficients, thus defining the amount of the salary.

It is extremely important that the appointment at the Defender’s Staff be carried out according to the prescribed procedures (through written and oral exams), certain trainings be held in order to ensure the skills of the Staff employees, as well as the social safeguards prescribed by law be ensured by the Defender. And the recommendations regarding the solution to the mentioned issues should correspond to the main principles of the public service mentioned in Article 6 of the RA Law “On public service”, for example, the stability of public service, legal equality of public servants before law, publicity of public service, equal access to the public service for the citizens in accordance with their professional knowledge and working abilities, the skills of public servants, the legal and social security of public servants and so on.

In order to avoid such approaches, as well as to maintain the reputation of institutions dealing with the protection of human and citizen’s rights, we suggest the following:

Taking into account that the amendments and supplements to the Law which entered into force in 2011 were not fully implemented at the Defender’s Staff, by reason of making them subject to regulation of another legislative act and which to the best of our belief are ineffective mechanisms, we think that relevant legislative amendments should be made. In our opinion it would be appropriate to make supplements to the RA Law “On Human Rights Defender”, by adding a Chapter titled “State Service in the Staff of

the Human Rights Defender, and the Staff of the Defender”, wherein the legal relations with respect to the state service and the legal acts regulating thereof would be stipulated in details, especially when such regulation is provided for by the RA Law “On the Prosecutor’s Office”.

Of course, in such conditions separate legal acts should be adopted by the Defender regarding the procedures for training, attestation, and granting of class rank. Moreover, class ranks should serve as class ranks of the state service based on the current hierarchy of positions in the staff.

As an alternative suggestion might serve the adoption by the National Assembly of the Republic of Armenia of a separate law “On state service in the Staff of the Human Rights Defender”, where as opposed to the latter, all the procedures regarding the legal status of the Defender’s Staff and its employees should be given in a more detailed manner.

# **MODERN ISSUES OF CORPORATE LEGISLATION AND THE WAYS OF THEIR SOLUTION IN THE REPUBLIC OF ARMENIA**

**Vahram D. Avetisyan<sup>1</sup>**

The legal regulation of market relations, which are in the formation process in the Republic of Armenia, was put on a new qualitative level through the RA Civil Code (hereafter: the Code) adopted on May 5, 1998. However, the 14 years of its application allowed revealing various shortcomings and gaps in the Code and in the laws adopted on its basis. A certain part of those shortcomings and gaps do not allow clearly fixing the factual frames of social relations which are regulated by civil legislation, and the other part hinders the normal process of market relations' development. The legislation<sup>2</sup> regulating corporate legal relations stands out with its abundance of such issues.

It was tried to regulate both the “trivial” or classic civil relations arising between physical individuals or by their participation and the relations arising between the persons who are engaged in business activities or by their participation, in essence, through the Code and a range of laws adopted on its basis, excluding dualism of private legal relations.

As a result, Article 1 and Article 2 of the Code stipulate the scope of relations which are regulated by the civil legislation, in particular, it defines that the civil legislation, as well as the decrees of the President of the Republic of Armenia and the decisions of the Government of the Republic of Armenia containing norms of civil law (hereinafter referred to as “other legal acts”) determine the legal status of the participants in civil circulation, the grounds for arising

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<sup>2</sup> Within the framework of the present study, the issues existing in this field are mainly discussed on the basis of the Code and the legislation on joint-stock companies as this sphere is one of the most regulated fields.

and the procedure for the exercise of the right of ownership and other property rights, exclusive rights to the results of intellectual activity (intellectual property), regulate contractual and other obligations as well as other property relations and personal non-property relations related to them.

The application and study of the Code and other laws adopted based on it, with respect to different organizational-legal forms of legal entities allow stating that the scope of relations regulated by the Code is not entirely reflected in the above-mentioned norm. In particular, the civil legislation regulates an independent group of social relations which have received the name “corporate legal relations” in theoretical literature.

The RA legislation does not actually clarify the concept of the term “corporation”, but, in essence, it uses the term “organization” as a synonym for that concept. But there are certain manifestations of the use of the term “corporation” in the RA legislation: for example, the Convention on Transnational Corporations, the RA Law “On investment funds”, the Article 3 of which defines the concept of corporate funds, etc. The study of foreign legislation allows us to point out the circumstance that recently some countries which formed their civil legislation based on the CIS model of civil code try to give the formulation of corporate legal relations and clarify the concept of corporate organizations.

For example, the corporate relations in the Civil Code of the Russian Federation, with amendments made on December 30, 2012, are characterized as relations linked to participating in corporate organizations or managing them (Article 1 of the Civil Code of the Russian Federation)<sup>3</sup>, The Economic Code of the Republic of Ukraine, Article 167(1) gives the definition of corporate rights, characterizing it as the rights of the person having his or her share in the charter fund (property) of the economic organization, including authority to participate in the management of the economic organization, receipt of certain part of profit (dividends) of this organization and assets in case of its liquidation pursuant to the law,

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<sup>3</sup> <http://base.garant.ru/10164072/>

and other authorities prescribed by the law and statutory documents<sup>4</sup>.

We share the opinion of those theorists of continental legal system who find that the definition of corporation covers all the organizational-legal forms of *private law* legal entity prescribed by legislation: joint-stock companies, companies of limited and supplementary liability<sup>5</sup>, limited and full partnerships<sup>6</sup>, cooperatives, as well as the unions of commercial organizations (associations, concerns, holdings, etc.)<sup>7</sup>.

The organizational relations specific to modern market economy principally differ from the organizational relations of the Soviet period economy. Nowadays, the subjects of civil law act in favor of their interests, make decisions concerning the creation, reorganization and liquidation of the corporation; the management bodies of the corporation adopt decisions and ensure their exercise, determine the development policy of the relevant corporation, distribute the profit or create additional mechanisms for exercising their social, cultural or non-commercial profits, that is to say they organize and manage the activity of the corporation by the civil-legal renewed principles.

Thus, we can note that corporate relations have independent nature and can be characterized as an independent type of civil legal relations, complex legal relations which regulate property relations

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<sup>4</sup> <http://www.yurist-online.com/uslugi/yuristam/kodeks/016/165.php>

<sup>5</sup> We find that the organizational-legal form of supplementary liability company is artificial and not viable in RA legal system. In particular, during 14 years no legal entity of such organizational-legal form was created in Armenia, hence we suggest not to envisage this organizational-legal form of legal entity in the Code.

<sup>6</sup> The legal regulation of the Code regarding partnerships is also quite incomplete as a result of which during 14 years of the Code's operation no partnership has been created in Armenia. In order to exclude such situation, it is necessary to make relevant changes regarding the subject and founding document of partnerships which will, in our opinion, contribute to the increase in the number of partnerships of such organizational-legal form in Armenia.

<sup>7</sup> See Corporate Law. Textbook (I.S. Shishkina eds.), Moscow 2007, p.7; Kashanina T.V. Corporate Law. Textbook. Moscow 1999, P. 1. [Корпоративное право: Учебник /Под ред. И.С. Шишкина. М. 2007, С. 7, Кашанина Т. В., Корпоративное право, Учебник, М. 1999, С. 1].

and organizational-management relations<sup>8</sup> closely related to them, concerning values of non-property nature.

Taking into account the above-mentioned, we suggest to make a supplement in Article 1(2) of the Code and within the scope of relations regulated by civil legislation add “(corporate relations) related to participating in organizations and managing them” after the words “other obligations” and make relevant changes in the relevant norms of the Code and other laws regulating corporate relations consistent with the change.

First of all it is necessary to review the framework of civil legal-relations’ participants as the imaginary comprehensive listing of civil legal-relations’ participants mentioned in Article 1(2)(2) of the Code does not actually reflect the reality of things. Now, in fact, the subjects of civil legal-relations are not only physical persons, legal entities, communities and the Republic of Armenia, but also the international organizations, diplomatic missions, etc., and in corporate relations the subjects who deal with the internal side of corporate relations: the participants of corporation (members, shareholders, etc.), management bodies, as well as the bodies which control the activity of the corporation.

There is no single approach in theory and practice concerning the nature of the decisions adopted by the bodies managing the corporation, any order confirmed by the corporation, regulation, charter, etc., whether they are transactions or legal acts<sup>9</sup>. The practical and theoretical meaning of this question comes up while

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<sup>8</sup> We will justify the independent nature of corporate legal relations in more detailed way in our previous works, see Avetisyan V.D. Features of Corporate legal Relations. “Bulleting of the Yerevan State University” 2011, #134.3, pp. 27-38; [Ավետիսյան Վ.Դ., Կորպորատիվ իրավահարաբերությունների առանձնահատկությունները, «Բանբեր Երևանի Համալսարանի 2011, N 134.3, էջ 27-38.]

<sup>9</sup> About this as well as about the particularity of corporate transactions see in more details Avetisyan V.D. Features of Corporate legal Relations. “Bulleting of the Yerevan State University” 2011, #134.3, pp. 27-38. [Ավետիսյան Վ.Դ., Կորպորատիվ իրավահարաբերությունների առանձնահատկությունները, «Բանբեր Երևանի Համալսարանի 2011, N 134.3, էջ 27-38].

examining the question of justifying the requirements of recognizing them as invalid and applying the consequences of the invalidity. The point is that in such situations it is necessary to protect not only the interests of the persons relating to the internal side of corporate legal relations but also, from the perspective of providing the civil legal relations with stability, the interests of the third persons which can be violated by recognizing such decisions as invalid.

Let us imagine a situation when “X” joint-stock company was reorganized in form division and as a result “Y” and “Z” joint-stock companies were created. After three months, the company “Y” was again reorganized in form division, as a result of which “V” and “F” companies were created. And company “Z” was liquidated eight months after the reorganization.

In addition, the shareholders of “V” and “F” companies were changed, bonds were issued and distributed, and different transactions were made. Two years after the reorganization of “X” joint-stock company, shareholder A appears who was abroad for immigrant work and was not aware of the processes taking place in the company and finds out that if he had participated in that meeting and voted against the decision on reorganization made in violation of the law, he would have prevented the process of events described above. Or let us imagine a situation when while making the decision the shareholder voted for it under the influence of violence or threat. Addressing to the court, shareholder A demands to recognize the shareholders’ general assembly’s decision as invalid.

A question arises here: what will be the consequences of invalidity in case of sustaining the demand? If the court considers the decision of the general assembly and the procedures and other documents confirmed on its basis as a transaction, then it will apply the general rules of transaction’s invalidity, and if it recognizes it as a legal act then it is not clear what will be its attitude. Besides, in such situation, the further fate of the obligations of the new organizations created as a result of reorganization as well as the issue of the protection of the persons’ interests related to the turnover of the issued securities is unknown.

We would like to mention that in this field the incompleteness of corporate legislation does not allow giving a fair solution to the situations mentioned above and every time the courts decide on the consequences<sup>10</sup> of the invalidity of the mentioned acts within their discretion. And the main reason is that the issue of corporate transaction conditioned by the particularity of corporate relations is not regulated in the Code.

In this regards we would like to highlight that within the meaning of the RA Law “On legal acts”, the above-mentioned acts can be characterized as individual or internal legal acts (Article 23(1) of the Law “On legal acts”) but this does not exclude that the internal legal acts can be also considered as a transaction with the consequences deriving therefrom.

In our opinion the main reason for such a legal uncertainty is the incomplete definition and legal regulation of transaction in Article 289 of the Code which does not express the essence of modern civil legal relations. In particular, the mentioned norm defines transactions as the actions of citizens and legal entities which are aimed at the establishment, change, or termination of civil law rights and duties. It is obvious that transactions can be made not only by citizens and legal entities but also by all the above- mentioned participants of civil legal relations, including the participants of corporate legal relations.

We find it necessary to mention that several states of continental legal system, mainly the followers of the post-soviet system, the German legal system tried to formulate the concept of transaction, and in the countries of common law system as well as in Roman law this term is not used. For example, Article 50 of the Civil Code of Georgia, defines the transaction as a unilateral, bilateral or multilateral declaration of will aimed at creating, changing or terminating<sup>11</sup> legal relations.

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<sup>10</sup> See the decision of Cassation Court in the case number YeED/1246/02/09 and the circumstances of the case.

<sup>11</sup> Chanturia L.L. Contract and expression of will in civil law// Journal “Jurist”, March, #3, 2006. [Чантурия Л.Л. Сделка и волеизъявление в гражданском праве// Журнал “Юрист”, март, N 3, 2006].

From this definition it is clear that the Georgian legislator avoided listing the subject composition of a transaction, which gives grounds to suppose that all the participants of civil legal relations can be transaction performers.

We suggest amending Article 289 of the Code to read as follows: “Transactions shall be the actions of the participant (participants) of civil legal relations, which are aimed at creating, changing or terminating legal relations”.

Also, Article 290 should be supplemented, by adding a new paragraph 4: “4. The action of a participant (participants) performed regarding the participation in organizations or their management is considered to be a transaction, the rules of the present part are applied thereon only if not otherwise prescribed by law, other legal acts, charter or documents of internal regulation concerning the transaction’s form, contents and validity.” It is also necessary to regulate the relations connected with the consequences of invalidity of certain decisions both in general provisions about legal entities of the Code and in special laws regulating the particularities of this or that organizational-legal form of a legal entity.

The shortcomings of the Code and why not, also the shortcomings of the norms regulating corporate legal relations of the laws regulating the relations concerning different organizational-legal forms of a legal entity can be divided into:

- shortcomings in the phase of legal entity’s creation,
- reorganization,
- exercising the rights of corporate legal relations’ participants,
- in the phase of liquidation.

Even in Article 50(1) the definition of a legal entity does not actually reflect the factual state of things. By characterizing a legal entity as an organization “which has separate property as ownership...”, the legislator contradicts its logic with its further legal regulation. In particular, by eliminating the minimum amount of statutory capital the legislator created such a situation that a legal entity can be created without having something in its ownership at the moment of its creation.

The situation is even more obvious in case of foundations for which the Code does not prescribe any requirements of having property in its ownership at the moment of its creation. So, in fact, in the current legal regulation the feature of having property in ownership is just the fixation of the possibility to have property by the right of ownership and this circumstance must be clearly expressed in the formulation of the legislative concept of legal entity.

Besides, the incomplete regulation of the process of legal entity's creation makes it objectively impossible to have property by the right of ownership at the moment of its creation<sup>12</sup>.

Let us examine this issue by the example of a joint-stock company. The legal entity is considered as created from the moment of its state registration (Article 56(3) of the Code). Moreover, the current legislation allows the founders of limited liability companies to pay a certain part of the statutory capital during the period of one year after the state registration (Article 30 of the Law of the Republic Armenia "On limited liability companies"), and in case of joint-stock companies the legislation prescribes a mandatory condition according to which the shares must be entirely paid before the state registration of the company (Article 30(2) of the Law of the Republic Armenia "On joint-stock companies").

The study of corporate legislation allows dividing the process of joint-stock company's creation into two stages: first stage is the establishment of the company, and the second stage is the state registration<sup>13</sup> of the already established company. Article 10(3) and Article 30(3)(3) of the RA Law "On joint-stock companies"

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<sup>12</sup> Avetisyan V.D. Features of Corporate legal Relations. "Bulleting of the Yerevan State University" 2011, #134.3, pp. 27-38. [Ավետիսյան Վ.Դ., Կորպորատիվ իրավահարաբերությունների արանձնահատկությունները, «Բանբեր Երևանի Համալսարանի 2011, N 134.3, 27-38].

<sup>13</sup> In case of on limited liability companies this classification does not work, as Article 8(4) of the RA Law "On limited liability companies" just prescribes that the company is considered to be established from the moment of its state registration in accordance to the procedure defined by law. And, depending on the peculiarities of the company's field of activity, in particular, banks, insurance companies, etc., the company is considered to be created from the moment of being registered in the authorized body. For example, see the Article 27(5) of the RA Law "On banks and bank activity".

prescribe<sup>14</sup> that when establishing the company all its shares must be distributed among the founders. Article 111(3) of the Code also has a similar legal regulation, but there is an exception: it uses the term *distribute* instead of the term *allocate*. Here a question arises: from which moment is the company considered as established and what do we understand by saying distributed and allocated shares?

The analysis of the current legislation allows to state that the company is considered as established from the moment of issuing the decision on the establishment of the company by its founding assembly (Law of the Republic of Armenia “On joint-stock companies”, Article 12). So, it turns out that the law recognizes the fact of the joint-stock company’s existence without the state registration of the legal entity, while the state registration shall be the recognition by the state of the legal capacity of the given legal entity (Law of the Republic of Armenia “On the state registration of legal entities”, Article 3(1)).

The law does not clarify the question how it is possible to allocate the shares of the company which has not been created yet among the founders at the time of the company’s establishment. And the term allocation, within the meaning of Article 33 of the Law “On joint- stock companies” means the shares which are sold and factually handed to the shareholders. The point is that we can speak about the allocation of the company’s shares only after the creation of the company as only in that case can the company issue securities of documentary or non-documentary form. In our opinion, the use of the term allocation instead of the term distribution in the Civil Code actually makes it impossible to implement the requirements of the mentioned norm of the law.

Hence, we suggest using the term *distributed* instead of the term *allocated* in Article 10(3) of the RA Law “On joint-stock companies”, and repeal the Article 30(3)(3) since it unnecessarily

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<sup>14</sup> We find it necessary to mention that in the Law “On joint-stock companies” there are cases when a norm regulating the same legal relation is unnecessarily repeated, for example Article 10(3) and Article 30(3)(3) of the RA Law “On joint-stock companies”.

repeats the contents of the above-mentioned norm. Some other amendments conditioned by the mentioned amendment should be done also in other articles, for example in Article 12(3)(g), etc.

It is also necessary to amend the Article 42(2) to read as follows: “2. At the time of company’s establishment, after the state registration of the company, in compliance with the founding contract the value of shares which are to be handed to the shareholders must be fully paid until the state registration of the company.”

It is also necessary to add a new paragraph 5 in Article 51 with the following contents: during 10 working days after handing the conducting and maintenance of the Registry to the professional organization, the Company must hand to the founders the shares which belong to them by the founding contract”.

The study of the corporations’ creation experience has shown that giving any property to the entity which has not been created or to empower it with property rights is quite problematic, and if we talk about real estate, then it is absolutely impossible.

In order to get out of such situation, some authors suggest envisaging in the law the possibility of creating a “preliminary company” which is applied in German law, according to which from the moment of signing the contract about creating the company by the founders (this is called the company’s establishment) up to its registration we have a preliminary company which is not a legal entity but is empowered by some jurisdiction<sup>15</sup> characteristic only to the subjects of law. A similar procedure is envisaged by the Finnish law<sup>16</sup> about organizations. While, for example in England the law,

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<sup>15</sup> Yem V.S., Kozlova N.V., Selyakow N.Yu. Eternal Lamp // article in a book; Suvorov N.S. On Legal Entities from the point of view of Roman Law. Moscow 2000, P. 13. [Ем В. С., Козлова Н. В., Селяков Н. Ю., Неугасимая лампада // Вст. статья к книге: Суворов Н. С., Об юридических лицах по римскому праву. М., 2000г. С. 13].

<sup>16</sup> Kozlova N. V. Legal status of joint stock companies and limited liability companies in Finland // Legislation, 2001, #10, pp. 68-73. [Козлова Н. В., Правовое положение акционерных обществ и обществ с ограниченной ответственностью в Финляндии // Законодательство. 2001г. N 10. С. 68-73].

which dates back to 1844, envisages the organization's re-registration process preliminary, which must be done until the final establishment of the organization, consequently until receiving the governmental concession and final approval. Until the final approval (registration) no transaction can be made<sup>17</sup> related to the shares of the organization.

We believe that if we implement the mechanism of "preliminary company" (which exists in German law) in our legislation or if we remove the requirement of paying the statutory capital at the moment of the corporation's creation will help to a great extent to solve the above mentioned problems.

At first sight it seems that the relations linked to the reorganization of the legal entity are the sectors the most thoroughly regulated by the Code and by the RA Law "On joint-stock companies". But the study of the mentioned institute allowed us to reveal some issues which appear in this field and have their negative influence not only on the normal course of corporate legal relations but also they break the stability of civil legal relations in general.

The reorganization of a corporation is an legal phenomenon which is characterized by the processes of legal entity's creation and termination of its activity. The RA Civil Code as well as the RA Law "On limited liability companies" and the RA Law "On joint-stock companies" do not formulate the concept<sup>18</sup> of reorganization but simply define the forms of reorganization: merger, acquisition, separation, reformation.

A lot of formulations have been given in the theoretical literature in particular; some authors find that reorganization is a transaction, the others find that reorganization is a set of legal facts a

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<sup>17</sup> Kaminka A.I. Stock companies. Part 1, Saint Petersburg, 1902, P. 225. [Каминка А. И., АКЦИОНЕРНЫЕ КОМПАНИИ. Т. 1. СПб., 1902, С.225].

<sup>18</sup> We agree with the point of view expressed in literature according to which the word "reorganisation" is not rightly used in the Civil Code of RA. In essence, reorganisation is one of the types of reconstruction. See about this in more details in Barseghyan T. K. Civil Law of the Republic of Armenia. Part 1. Yerevan 2009, P. 126. [Բարսեղյան Տ. Վ., Հայաստանի Հանրապետության քաղաքացիական իրավունք, առաջին մաս, Երևան, 2009, էջ 126].

part of which consists of transactions, etc.<sup>19</sup>. But, in our opinion, the reorganization of a joint-stock company can be characterized as creation of a new subject or subjects of law on the material basis of an already existing legal entity through the termination of the existence of the subject of law which existed or by the expansion or reduction of the material basis.

Both the interests of the company's **creditors** and the shareholders constituting a **minority** can be often violated as a result of joint-stock company's reorganization. That is the reason why the Code and the RA Law "On joint-stock companies" prescribed some guarantees for protecting the rights of the mentioned persons. In particular, within 30 days after deciding to reorganize the company, the company shall provide a written notice thereon to all of its creditors. The notice shall contain information on the date of rendering the decision on reorganization, the type of reorganization, the parties involved, and the legal succession of the company's obligations.

In this case the creditors of the reorganizing company become entitled to demand from the company to provide additional guarantees that the obligations will be met, termination of obligations or early fulfillment, as well as compensation of losses. In case of receiving the notice about reorganization in form of merger, acquisition, separation or reformation, they must present these demands within 30 days from the moment of receiving the notice in case of merger, acquisition, or reformation, and within 60 days from the moment of receiving the notice in case of division or separation.

We think that giving quite broad rights to the creditors of the reorganizing company, the legislator did not take into account the interests of the reorganizing company. For example, two companies are reorganized in form of merger and the creditor's right to demand is ensured by pledge of property. A question arises here: why in such

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<sup>19</sup> Naumov O.A. On the Protection of credits in the case of reorganization of debtors// Arbitral Practice. 2001, #3; Gabov A., Fedorchuk D. Reorganization of Stock Companies // Journal for shareholders. 2003, #4, pp. 33,34. [Наумов О.А., О защите прав кредиторов при реорганизации должников // Арбитражная практика. 2001. N 3; Габов А., Федорчук Д., Реорганизация акционерных обществ // Журнал для акционеров. 2003. N 3, С. 33, 34].

a situation do we give right to the creditor to demand from the company to provide additional guarantees that the obligations will be met, termination of obligations or early fulfillment, as well as compensation of losses?

We find that the creditor should use these rights only in case of such obligations, the fulfillment of which came up at the moment of giving the notice about the reorganization or the fulfillment is conditioned by the demand. In other cases, if the creditor offers an equivalent fulfillment of obligation, he must be deprived of the right to present the above mentioned demands.

The study of the reorganization process of joint-stock companies allowed discovering some issues characteristic to all the forms of reorganization which arise or may arise as a result of the reorganization of joint-stock companies.

The issues which arise during the reorganization are mainly related to the registry holding correlations of the reorganizing company and the company's share owners, as well as the problems which arise in case of recognizing the decision about reorganization invalid.

The point is that the companies, as a rule, provide the information about the reorganization processes which occurred or were occurring both before starting the reorganization process and after it to the registry holder of the share owners only after a certain period of time following the termination of the reorganization process.

In such conditions some practically insoluble problems appear during the times when the owners of the shares hold the registry which directly influence the persons who obtain the shares of the company which is undergoing reorganization or is already reorganized, as well as the protection of the rights of other participants of civil turnover<sup>20</sup>.

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<sup>20</sup> Avetisyan V.D. Some issues of reorganization of joint stock companies in Armenia. "Legality", Yerevan 2011, # 68, pp. 17-25. [Ավետիսյան Վ.Դ., Բաժնետիրական ընկերությունների վերակազմակերպման իրավական կարգավորման որոշ հիմնահարցեր Հայաստանի Հանրապետությունում, «Օրինականություն», Եր., 2011, թիվ 68, էջ 17-25].

In order to raise the effectiveness of the reorganization process of legal entities, we suggest as a mandatory condition to envisage an obligation for the reorganizing company to inform, within two working days after rendering the decision on reorganization, about it the body which carries out the state registration of legal entities and the registry holder, and to establish an obligation of publishing that information or providing the interested persons with this information. This will help minimizing the above mentioned problems arising in connection with the third persons who are related to the securities of the reorganizing company.

The problem becomes even more complicated when the decision on reorganization, as it was shown in the example of “X” company, is recognized as invalid and there is necessity to ensure the stability of civil legal regulation, to form trust towards the notes made in the registry of legal entities.

From this perspective we propose to prescribe a special three-month period for the demand of recognizing the decision on reorganization as invalid, and, at the same time prohibit by the Code the reorganized company to reorganize again or get liquidated until the termination of the mentioned period. Then, it would be expedient to define the consequences of invalidity which are applied in case of recognizing the decision on reorganization as invalid during the mentioned period; in particular, allow restoring the state which existed before making the decision on reorganization and envisage mechanisms for protection of the interests of creditors of the companies which were created as a result of reorganization. Afterwards, during the period of limitation of actions, it is necessary to exclude the possibility of invalidating the decision on reorganization and to establish joint liability for compensating the damages to the interested persons which were caused as a result of actions which were made by the persons who carried out an illegal reorganization.

We are deeply convinced that the shortcomings that exist in the phase of exercising the rights of corporation’s participants are conditioned by the principle of legal regulation, according to which the interests of the corporation are often assimilated with the interests

of a major participant.

As a result, the major shareholders often abuse their right<sup>21</sup> by presenting their wishes as if these are the activities deriving from the corporation's interests, as a result of which not only the interests of the minority participants, but also the interests of the corporation are violated. We find it necessary to mention that such approach is not justified from the perspective of forming an atmosphere of development of corporate relations and the protection of the investments, especially when we talk about the joint-stock companies created as a result of privatization and their shareholders which are more than 150000 and constitute a minority. In this regard, the Law "On joint-stock companies" needs to be reviewed, in particular, the financial-economic crisis showed that while regulating corporate legal relations the preference should exclusively be given to the interests of the corporation and the remaining legal regulation must be built on that basis.

And, at the moment, we have plenty of norms which give the major shareholder the possibility to abuse his right. We can meet this kind of situations in case of consolidation, when upon the discretion of the major shareholder the minority shareholders can be thrown out of the company at the time of distributing the dividends, or in case of distributing the property remaining after the liquidation among the participants and in other cases.

Taking into account the necessity of balancing the interests of a joint-stock company, the company and the shareholder, individual shareholder and shareholder groups, as a solution<sup>22</sup> of problems

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<sup>21</sup> Avetisyan V.D. Features of abuse of right in corporate legal relations// Judicial Power, Yerevan 2013, #2/163. Pp.45-51. [Ավետիսյան Վ.Դ., Իրավունքի չարաշահման առանձնահատկությունները կորպորատիվ իրավահարաբերություններում, Դատական իշխանություն, Եր., 2013, թիվ 2/163, էջ 45-51].

<sup>22</sup> See about this in more details in Avetisyan V.D. Features of Consolidation of shares and problems of legal regulation in the Republic of Armenia: "Violation and legal responsibility", Materials of international academic-practical Conference, Tolyatti, 2012, pp. 1-13. [Аветисян В. Д., Особенности консолидации акций и проблемы правового регулирования в Республике Армения: "Правонарушение и юридическая ответственность", Материалы международной научно-практической конференции, Тольятти, 2012, С. 1-13].

which have arisen due to the consolidation of shares, we suggest making relevant amendments to the RA Law “On joint-stock companies” and condition the possibility of carrying out consolidation of shares by the following circumstances:

- the consolidation of shares must be carried out exclusively in favor of the company’s corporate interests but not in favor of the interests of individual shareholders or a group of shareholders;
- the decision on consolidation must be made not by simple, but by quantitative majority of the votes;
- do not allow applying such a formulation of consolidation as a result of which the company will be obliged to change the size of the statutory capital;
- shareholders possessing fractional shares must be given the possibility to combine the fractional shares belonging to them in a certain period after making a decision on the consolidation and in this way form complete shares’;
- in case of not using the right to combine the fractional shares in the period prescribed by the fractional shares’ owners, an obligation has to be envisaged for the company to buy them back at a fair price.

The right of the corporation participant (shareholder) to take part in the distribution of profit is one of the key rights of the participant<sup>23</sup>. As a rule, by making an investment in the corporation the person has the objective of receiving a certain share from the profit.

The shareholder exercises his right to participate in the distribution of the profit by<sup>24</sup> receiving dividends corresponding to the shares belonging to him and among the share owners according to the sizes of shares they have in their statutory capital.

We find it necessary to mention that the RA Law “On limited

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<sup>23</sup> In this work, the peculiarities of the exercise of this right is mostly discussed in the example of a shareholder, within the framework of the law on joint-stock companies as the legislation about limited liability companies does not regulate this matter in details.

<sup>24</sup> Mogilevskiy S.D. Joint-stock Companies. Moscow, 1998, P. 83. [Могилевский С.Д. “Акционерные общества“, изд-во “Дело”, М., 1998, С. 83].

liability companies” does not define the concept of “profit” and the RA Law “On joint-stock companies” just uses the concepts profit and accumulated profit. In general, we call dividends just the part of the profit (that is to say, the profit which remained after paying all kinds of taxes and mandatory payments) which is subject to be distributed among the shareholders according to their participation in the shares and is counted per share<sup>25</sup>. Besides, in case of joint-stock companies, it is allowed to include in profit also the profit that was accumulated during the previous years but has not been paid (Article 49(2) of the RA Law “On joint-stock companies”).

The subjective right of the corporation participant to receive a dividend arises after the authorized body of the corporation renders the decision about distributing the profit among the corporation participants, because only the declared profit is subject to be paid. The decision of the general assembly or the council of directors about paying dividends is the only legal fact and the obligation of the corporation to make a payment in the terms and procedure defined by the decision.

V. V. Laptev finds that before the corporation makes the relevant decision, the shareholder (the participant) does not have any subjective right to receive dividends which allow him to talk about<sup>26</sup> the conditional nature of this right. Indeed, until making the relevant decision the participant of the corporation does not have the right to receive dividends: a right which can be exercised within the framework of regulated legal relations, a right which can be protected by court, and the corporation does not bear the obligation to pay dividends. But the size of the dividends in the joint-stock companies, depending on the type and category, can be different.

Some authors find that in case of preferential shares for which the size of dividends subject to be paid is predetermined by the

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<sup>25</sup> Commentaries to the Federal Law on Joint Stock Companies. Moscow 2002, P. 240. [Комментарий к федеральному закону об акционерных обществах. изд-во “Юринформцентр”. М., 2002, С. 240].

<sup>26</sup> Laptev V.V. Joint-Stock Companies. Moscow, 1999. P. 67. [Лаптев В. В. Акционерное право. М., 1999. С. 67].

charter of the company and no decision is required for it, the company is obliged to pay the dividends to their owners. The company, which refuses to pay the annual dividends by such shares, will be considered as a lawbreaker, and the shareholder will have the right to present a demand of confiscating the non-declared dividends except for the case if the profit was paid partially or a decision was made about<sup>27</sup> not paying dividends at all.

Until adopting the Russian Federation Law “On joint-stock companies”, in Russia there was a Regulation on the procedure for paying interests for the dividends and bonds which was adopted by the Ministry of Finance and Economy on January 10, 1992. The Regulation also prescribed that the payment of dividends with equity shares is not considered to be the obligation of the company and if the income of the company is sufficient for paying fixed dividends with preferential shares, the company does not have any right to refuse to pay it to the owners of the shares.

Upon the Decision of the RA Government No 1194 of December 5, 2001, in order to regulate the process of paying the dividends which are received from the state shares in companies with state participation, the government defined when it is mandatory for the general assembly to make a decision on paying the annual dividends, for example in case of companies with more than 50 percent state participation, the general assembly of the shareholders has to vote and approve the issue of paying 20 percent of the profit received for the state participation as an annual dividend to the state budget of the Republic of Armenia.

We think that in the conditions of legal regulation existing in RA, in case of not making a decision about paying dividends, the shareholder is deprived of the right to demand shares from the

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<sup>27</sup> Legal Regulation of the Joint-Stock Companies (Corporate Law). Gubina E.P. (ed.) Moscow, 1998, P. 152; Management and Corporate Control in Joint-stock Companies (E.P. Gubina, ed.)- Moscow, 1999, pp. 70-74 (Chapter written by D.V. Lomakin). [Правовое регулирование деятельности акционерных обществ (Акционерное право) Под ред. Е. П. Губина. М., 1998, С. 152; Управление и корпоративный контроль к акционерном обществе/ Под ред. Е. П. Губина.- 1999, С. 70-74 (автор главы Д. В. Ломакин)].

company by judicial procedure. Moreover, in such conditions the law allows the owner of equity shares to participate in the management of the company on equal basis with the owners, and if during the succeeding three years the dividends which belong to the preferential shares are not paid, the shareholder can apply to the court demanding the liquidation of the company through a judicial procedure (Article 38(7) of the RA Law “On joint-stock companies”).

Regarding this problem, the RA Court of Cassation expressed the following position in its decision rendered with respect to the case No 3-789(TD): deciding the size of the limited liability company’s profit subject to be distributed is the exclusive authorization<sup>28</sup> of the general assembly which is the highest management body of the company. And in the given case, the first instance court sustained the claimant’s request to determine the profit subject to distribution (in essence, made a decision about paying dividends instead of the assembly) and oblige the company to pay it, while the right to make a decision concerning the mentioned matters is the exclusive authorization of the general assembly. In this case, the RA Court of Cassation, in essence, responded to the issue when the participant of the company obtains the right to receive dividends, conditioning it with the circumstance of making the relevant decision by the authorized body.

There are some countries the legislation of which has another approach for this matter; for example, in England and in the USA the shareholder has the right to demand through a judicial procedure to be paid the dividends that belong to him even in case the company did not declare any dividends, but there is profit accumulated as a result of the corporation’s activity.

In the cases of the mentioned category, the claimants must prove that the corporation has the funds necessary for paying dividends and the effectiveness of using those funds, as well as the fact that the directors or the owner of the control package have

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<sup>28</sup> Decision of the Court of Cassation of the Republic of Armenia of May 18, 2007 with respect to the civil case No 3-789 (TD).

abused<sup>29</sup> their rights.

We find that the reason behind such problems is the incompleteness of the RA legislation regarding the payment of dividends. In particular, the management bodies of the company should not have the possibility, for example, to not make decision about paying dividends for 10 consecutive years and use the accumulated profit for this or that program's realization, because in such a situation the rights of shareholders who constitute a minority can be violated. Let us imagine a situation when a major shareholder is at the same time the director of the company, the president of the council and is not keen on making a decision about dispensing the profit, because without that decision he receives premiums, buys an expensive car, a service apartment for him, etc., and according to the current legislation, the shareholders who constitute a minority are deprived from the possibility to object his actions.

We suggest making relevant amendments in the RA Law "On joint-stock companies" and in the RA Law "On limited liability companies" and limiting the term of not making a decision about paying dividends by two years. After that, the shareholders who are keen on the company's development can receive their dividends, issue supplementary shares and again do their investment in the development of the company. We think that in this way it will be possible to balance the interests of the corporation, the interests of the major shareholders and the interest of the shareholders comprising a minority.

The joint-stock has the right to make a decision (announce) about the payment of quarterly, semi-annual, or annual dividends for distributed shares (Article 49(1)(10) of the RA "Law on joint-stock companies"). And the limited liability company can make a decision about dispensing the profit only once a year (Article 24(1) of the RA "Law on limited liability companies").

The company has to pay dividends announced for each type (category) of shares. As a rule, dividends are paid in monetary terms;

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<sup>29</sup> Mozolin V.P. Corporations: monopolies and law in the United States. Moscow, 1996, P. 349. [Мозолин В. П. Корпорации; монополии и право в США. М., 1996, С. 349].

however, in cases prescribed by the charter, they can be paid also by other property, including the company's shares. If the company's charter envisages the possibility of paying the dividends by other property, then it is necessary to clearly define in the charter the cases and the procedure for paying the dividends by other property.

We think that by saying to pay to the shareholder another property instead of dividend, we should understand any property which is not removed from the turnover or does not have limited turnover. In our opinion, giving the right to do payments by other property can become a reason for various violations; for example, in that way the property in the ownership of the company can become the ownership of the shareholder or shareholders, or while making the decision about paying dividends by property it may be decided to pay dividends to a group of shareholders in one type of property and to the other group in another type. For example, to hand the finished product to the major shareholder, and the semi-finished one to the shareholders comprising a minority.

In order to exclude such situations, we suggest excluding the possibility of paying dividends through property.

Dividends are paid from the net profits or accumulated profits of the company. And for a certain category of preferential shares, dividends can be paid from the account of funds of the company which are created especially for that purpose.

According to the types and categories of the shares, the council makes the decision about interim (quarterly and semi-annual) dividends payment, the size and payment form of dividends, and the general assembly, upon the council's suggestion, makes the decision about the annual dividends payment, the size and payment form of the dividends.

The interim dividend size cannot exceed the 50 percent of the dividend which was distributed by the results of the previous financial year. And the size of annual dividends cannot be more than the one offered by the council and less than the size of the interim dividends which are already paid. If the annual dividends' size, per individual types and categories of shares, is defined by the council's decision as equal to the interim dividends which are already paid, then annual dividends are not paid for that types and categories of

shares. And if the annual dividends' size, per individual types and categories of shares is defined by the assembly's decision as more than the sizes of the already paid interim dividends, then the annual dividends for those types and categories of shares are paid by the difference of money of the defined annual dividends and the interim dividends which were already paid during the given year.

The RA Law "On joint-stock companies" does not give an answer to the question about how we should act in case when while summarizing the annual results it turns out that after paying the dividends for the quarter, with the financial year's results, the company has no profit or worked with losses. In current legal regulation, no claim can be presented to the shareholders who received the dividends, except for the case when it turns out that the decision was made as a result of doing mandatory indications by the shareholder, and the company is close to bankruptcy. In this case the rights of the corporation's creditors, and why not, also the interests of the corporation are violated.

In order to exclude the possibility of the above-mentioned situations, we suggest limiting the jurisdiction of the council in making a decision about the payment of interim dividends and give the joint-stock company the possibility to make a decision about the payment of dividends only after summarizing the results of the financial year.

The deadline for paying the annual dividends is prescribed by the charter or by the council's decision about paying dividends. The deadline for paying the interim dividends is defined by the council's decision on paying the interim dividends, but not later than 30 days after the moment of rendering the decision.

For each payment of dividends, the Council shall compile the list of shareholders who are entitled to receive dividends, which includes: in the case of interim dividends, the shareholders of the company that were listed in the company's shareholder registry at least 10 days before the adoption of the Council decision on payment of interim dividends; and in the case of annual dividends, the shareholders of the company that were listed in the company's shareholder registry at the date when the list of shareholders who are entitled to participate in the company's annual meeting of

shareholders was compiled (Article 49(4) of the RA “Law on joint-stock companies”).

In our opinion, giving jurisdiction to the council to compile the list of the persons who are entitled to receive dividends 10 days before making the decision on the payment of interim dividends may give the council members the possibility for making different abuses.

For example, the president of the Council, or his friend, his relative sold his shares or a part of them 7 days before making the decision on the payment of interim dividends and suggests compiling the list of the persons who are entitled to receive dividends 9 days before making the decision. As a result, the dividend is received not by the new owner of the share, but by the former owner which, in our opinion, is inadmissible. That is the reason why we suggest compiling the list of the persons who are entitled to receive interim dividends after the date when the council makes the relevant decision.

In case of a company undergoing liquidation, the right to receive a certain part of the property is one of the most important rights of the shareholder. The liquidation commission, in compliance with the procedure (Article 27(2)(2) of the RA Law “On joint-stock companies”) approved by the assembly for distribution of the property remaining after the satisfaction of the creditors’ claims, distributes it among the shareholders in the following sequence: firstly, the payment for shares that must be bought back by the claim of the shareholders; secondly, the payment for the dividends accrued for the preferential shares but not paid; thirdly, the payment of liquidation value of preferential shares; fourthly, the distribution of the remaining property of the Company amongst the holders of equity (ordinary) shares and all types of preferential shares.

Taking into consideration the comparative best practice and foreign legislation, we find that the above-mentioned sequence prescribed by RA Law “On joint-stock companies” is not fair and should be changed. In particular, the logic of the legislator is not clear regarding the fact of giving a priority right to the claims of equity share owners who presented a buying-back claim towards the owners of preferential shares. In such conditions, 25 percent of share owners, taking advantage of the right given to them by law, may

demand the buying-back of the shares and as a result make it impossible to fulfill the claims of the preferential share owners. That is why we suggest moving the people of the first priority who have the right of the claim into the third priority, and the claims of second and third priorities respectively to the first and second priorities.

Besides, it is also unclear that the owners of preferential shares who *received the liquidation value* of preferential shares have the right to participate in the distribution of the remaining property along with the equity share owners of the fourth turn. Moreover, how can an owner of preferential share having 1000 Armenian drams nominal value participate in the distribution of the remaining property along with an owner of equity shares having 10000 drams nominal value? We find that such a legal regulation is illogical, and the owners of preferential shares should be deprived from the fourth turn's right to demand.

Giving by law the possibility to the general assembly to confirm the procedure for the distribution of the remaining property after the fulfillment of creditors' claims, can lead to the violation of the rights of the shareholders who constitute minority. In particular, according to that procedure, the shareholder who has 76 percent participation in the company can set that, for instance, the real estate passes to the major shareholder, and the remaining removable stuff (equipment which is out of order, materials used in the production cycle, etc.) passes to the shareholders constituting minority.

We suggest setting the procedure for distributing the property remaining after the fulfillment of creditors' claims by law. In particular, prescribe that the mentioned procedure must be confirmed by the unanimous votes of the assembly participants. In case there is no unanimous agreement, the property must be sold by public auctions, and the other accumulated financial means must be distributed among the shareholders in the proportion mentioned in law.

# ISSUES OF CODIFICATION AND INSTITUTIONAL DEVELOPMENT OF CONFLICT OF LAWS IN THE REPUBLIC OF ARMENIA LEGISLATION

Armen Haykyants<sup>1</sup>

The conflict of law rules regulate private legal relations across countries, in other words, when either the subject of the private legal relation is a foreign national, or the object is in a foreign country, or the legal fact occurred in a foreign country.<sup>2</sup> The presence of a foreign element renders the private relation into a private international relation that is concerned with the jurisdiction of more than one country. All the countries involved in private international dealings (which concern all the existing states without any exceptions) must prescribe conflict of law rules addressing those dealings.

The Republic of Armenia legislation also provides conflict of law rules which are established in Articles 1253-1293 of the RA Civil Code, Articles 141-152 of the RA Family Code, Articles 7-8 of the RA Labor Code. Conflict of law rules are provided in international bilateral and multi-party agreements signed by Armenia which are part of the RA legislation according to Article 6 of the RA Constitution. It is understood that the conflict of law rules, like the entire legislation, should not be studied in statics but in dynamics; these must change and develop alongside changes and developments in private dealing. Taking a critical look at the conflict of law rules set forth in the RA legislation from this aspect, it should be noted that there are separate issues which could be viewed in two dimensions: codification and legal-institutional matters regarding conflict of laws. In reality, we view issues relating to the legal-institutional matters regarding conflict of laws as an organic whole

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<sup>2</sup> Haykyants A., Private International Law, Textbook, YSU Press, Yerevan, 2010, pages 9-10.

for the sole purpose of formal scientific cognition in two dimensions to make sure that separate aspects are highlighted more distinctly.

1. Issues of codification of conflict of law rules. In the RA legislation, the conflict of law rules are codified in three sources: RA Civil Code, the RA Family Code, and the RA Labor Code. Armenia has inherited such codification from the Soviet system where the conflict of law rules were provided in separate laws<sup>3</sup>. In the soviet system, such an approach was justified because under a state monopoly and totalitarian rule the possibilities of development of private international dealing were highly limited, and the regulation of conflict of laws was treated accordingly. Immediately after the independence of Armenia, activities were aimed at regulation of private relations, development of a “new generation” of sources, therefore, it was difficult to rid of the fossilized legal approaches of soviet decades. Especially that in the first years of independence international private dealing was not that intensive either.

Presently, more than ever in the last two decades, Armenia is experiencing intensive private international dealing. The Armenian economy is being rapidly internationalized, foreign and joint companies are established, migration rates are very high, external tourism is activated, modern science and technology open up new opportunities for remote international contacts. At the same time, the huge amount of private international dealing cannot allow the RA rules of conflict of laws remain static. Moreover, the conflict of law rules applying to dealing itself should be rapidly modified to meet the modern needs. The first step towards the development of the conflict of law rules should be their consolidation in one source, *i.e.* consolidated codification is necessary. The tactics of regulation of conflict of laws requires not only multiple rules and provisions on conflict of laws but also certain combination and hierarchy put in place; only in this case will it be possible to judge the presence or absence of a system of provisions on the conflict of laws, mutual

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<sup>3</sup> Private International Law: Contemporary Issues, М. ТЕИС 1994, р. 315 [Международное частное право: современные проблемы. М. ТЕИС. 1994, С. 315].

relations and counteraction, contradictions or harmony.<sup>4</sup>

It should be noted at the very beginning that incorporation of conflict of law rules in the above mentioned codes of the Republic of Armenia is not justified, primarily due to the subject matter of regulation. For example, Article 1 of the RA Civil Code states that the civil legislation and other legal acts regulate relations among persons, whereas the conflict of law rules do not regulate private relations but look for and find the jurisdiction of the country that shall regulate the private relations. The ultimate goal of the conflict of law rules is the regulation of private relations but the conflict of law rules pave their way to that goal indirectly, not directly. Other regulations (criminal, administrative etc.) which, however, have their separate sources of codification indirectly address the private relations. The best international practice is to codify the conflict of law rules in a separate source which is entitled International Private Law in almost all the countries. Such laws exist in Austria, Germany, Switzerland, Poland, Hungary, Luxembourg, Turkey etc.<sup>5</sup> Of the post-Soviet states, Georgia<sup>6</sup> and Ukraine<sup>7</sup> have adopted similar laws. By the way, in the Russian Federation the conflict of law rules are still provided by separate sources of law but the Russian legal circles have been considering the appropriateness of such an approach for a long time now. Still in the 1990s, there was confidence that Russia would adopt a separate private international law.<sup>8</sup> It has not been adopted yet but we believe that it is a matter of time, and sooner or later the theory of private international law will choose this option.

Consolidated codification is also preferable in terms of practical use. It is easier for both law enforcement and private persons to deal with one consolidated source of law than several sources of law, especially if there might be contradictions or misinterpretations

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<sup>4</sup> *Ibid.*, (p. 31)

<sup>5</sup> Международное частное право: современные проблемы, С. 314 [Private International Law: Contemporary Issues, 1994, page 314]

<sup>6</sup> <http://pravo.hse.ru/intprilaw/doc/050301>

<sup>7</sup> [http://base.spinform.ru/show\\_doc.fwx?rgn=16954](http://base.spinform.ru/show_doc.fwx?rgn=16954)

<sup>8</sup> Международное частное право: современные проблемы. М. ТЕИС. 1994 (Private International Law: Contemporary Issues, М. ТЕИС, 1994).

among these sources. In this regard, several systemic or codification issues in the RA legislation are brought below. Twelfth Section of the RA Civil Code, titled *International Private Law* is a pandect which has its general provisions set down in Articles 1253-1261 and special provisions set down in Articles 1262-1293. The General Provisions are: Determination of Legal Concepts; Clarification of the Content of Norms of Foreign Law; Application of the Law of a State with Multiple Legal Systems; Reciprocity Principle; Derogation on Public Order; Application of Imperative Norms; Invoking Foreign Law; Retorsions.

A look at the other two sources of law, the Family Code and the Labor Code, reveals the following:

- Part VII of the Family Code envisages only two of the above-mentioned general provisions, Ascertaining of the Norms of Foreign Family Law (Article 151) and Restriction of Application of Foreign Family Law (Article 152);

- The Labor Code does not even contain a special section for labor-related conflict of law regulations, while the two modest Articles 7 and 8 addressing regulation of conflict of law in international labor relations do not even mention the above mentioned provisions.

The answer to the question whether the general provisions on the conflict of law in international family and labor relations set forth in the Twelfth Section of the Civil Code are applicable could be found in Article 1(4) of the Civil Code, “Family, labor relations, relations pertaining to the use of natural resources and protection of the environment shall be regulated by civil legislation and other legal acts, unless otherwise provided for by family, labor, land, nature conservation and other special legislation [emphasis by author].” Since the Family Code and the Labor Code do not envisage the general provisions on conflict of law already known to us, we can suggest that the general provisions on conflict of law can be applied also in the event of regulation of conflict of law in international family and labor relations. We used and emphasized the phrase “we can suggest” because in this case one may only suggest but not

assert. We cannot assert because the phrase “unless otherwise provided for by family, labor, land, nature conservation and other special legislation” is used in Article 1(4) of the Civil Code and it does not stem directly from this that the clauses of the Civil Code shall apply unless otherwise provided; “unless otherwise provided” may mean that nothing else may be applied at all. This is also a possible option and an equally logical one, like the first interpretation. For example, Article 152 of the RA Labor Code on the restriction of application of foreign family law states: “The norms of foreign family law are not applied if such application contradicts to the legal system (public order) of the Republic of Armenia. In such cases the legislation of the Republic of Armenia is applied.” In regard to the derogation of public order, Article 1258(1) of the RA Civil Code states, “A norm of foreign law to be applied in accordance with Article 1253(1) of this Code shall not apply where the consequences of its application explicitly contradict the fundamentals of the legal system (public order) of the Republic of Armenia. In this case, the relevant norm of the law of the Republic of Armenia shall apply, as necessary.” Article 1258(2) states: “The refusal to apply a norm of foreign law may not be solely based on the circumstance that the legal, political or economic system of the relevant foreign state differs from the legal, political or economic system of the Republic of Armenia.” As we can notice, Article 152 of the Family Code does not envisage an imperative order unlike Article 1258(2) of the Civil Code. One may presume that the requirement set forth in Article 1258(2) of the Civil Code may be applied to international family relations in the event of derogation of public order or, vice versa, it may not be applied because if the RA Family Code does not envisage that, this is what was intended – that such a provision is not applicable to international family relations, *i.e.* the RA Family Code “envisages not envisaging such a demand” [emphasized by the author].

Here is another example: the RA Labor Code does not mention whether *Lex voluntaris* may be applied to international labor relations.

Here a question arises: if it is not foreseen, it means that Article 1253(2) or Article 1284(1) of the RA Civil Code can be applied and application of *Lex voluntaris* is permitted, or on the contrary, it should be considered that if it is not foreseen, one should assume that *Lex voluntaris* is not acceptable in respect to conflict of laws in international labor relationships. This and other similar examples bring us to the conclusion that no misunderstandings shall occur if a consolidated codification is conducted by RA legislation: in case of codification by one source, at least similar problems would be brought to a minimum.<sup>9</sup>

Unambiguously, it should be stated that the adoption of the RA Law on “Private international law”, implementation of consolidated codification of conflict of law is a necessity and imperative of time given the current reality of the Republic of Armenia.

2. Institutional issues of conflict of laws. In case of RA conflict of law norms and institutions, there are a number of institutional issues, the existence of which evidence some circumstances: either doctrine requirements were strongly disregarded, or the movements in public-state life were strongly disregarded. Here are some examples on the stated aspects.

Article 1253(1) of RA Civil Code establishes: “The law applicable by the court to civil law relations involving the participation of foreign citizens, including individual entrepreneurs, foreign legal persons and organizations not considered as legal persons in accordance with foreign law, stateless persons, as well as in cases when the object of civil rights is located abroad shall be determined on the basis of this Code, other laws of the Republic of Armenia, international treaties of the Republic of Armenia and international customary practices recognized by the Republic of Armenia.” Here the legislator established the subject of conflict of law norms, namely those private relationships, which are encumbered by foreign component. In private international law doctrine “foreign component”<sup>10</sup> means that either the subject of

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<sup>9</sup> *Ibid.* p. 317.

<sup>10</sup> [http://www.cisg.ru/content/download/ipr\\_ua\\_rus.pdf](http://www.cisg.ru/content/download/ipr_ua_rus.pdf)

private legal relation is a foreign person, or the object of private legal relation is located in foreign state, or the legal fact took place in foreign state. In Article 1253(1) of the RA Civil Code the legislator committed doctrinal omission not stating anything about legal fact.

Article 1256 of the RA Civil Code: “In cases when the law of a state in which multiple legal systems are in effect, and it is impossible to determine the legal system [note of the author: including ours] to be applied, the legal system with which the given relation is most closely connected shall apply.” Here, the legislator for application of law foresees application of *Lex causae* in case of a state with several legal systems, “when ... it is impossible to determine the legal system to be applied”. And it is not clear, how is the impossibility to determine the applicable legal system established, and under the law of which state the impossibility should be established. Here the non-consistent tendency of the doctrine can be noticed. As evidences the private international law doctrine, in case of application of the law of the state with several legal systems that state’s national legislation should determine especially which of the several legal systems should be applied for regulation of the relationships, and only in case of impossibility to determine by the national legislation of that state the court may apply *Lex causae*<sup>11</sup>.

Article 1267 of the RA Civil Code established that “A foreign citizen or a stateless person shall be declared as having no or limited active legal capacity by the law of the Republic of Armenia.”<sup>12</sup> The RA legislator did not take into consideration the circumstance that the foreign citizen or stateless person can be recognized as not having active legal capacity or having limited active legal capacity under the Republic of Armenia law only in the Republic of Armenia, whereas in case of current formulation of the effective norm, we come across to real doctrinal nonsense.

Article 1289 of the RA Civil Code establishes: “Obligations arising due to causing damage shall be governed by the law of the

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<sup>11</sup><http://pravo.hse.ru/intprilaw/doc/050301>.

[http://www.cisg.ru/content/download/ipr\\_ua\\_rus.pdf](http://www.cisg.ru/content/download/ipr_ua_rus.pdf)

<sup>12</sup> Similar approach is also displayed in Article 1269 of the RA Civil Code.

state where the action or the circumstance that has served as a ground for the claim on compensation for damage occurred, unless otherwise provided for by the agreement of the parties [note of the author: ours].” As shown by comparative study of legislative approaches of different states, in delictual obligations it is not proper to leave the choice of applicable law to the autonomous will of the parties<sup>13</sup> since it may cause damage to the interests of aggrieved who has already suffered because of the caused damage. In contrary, the choice of applicable law in case of delictual obligations should depend on the discretion of the aggrieved, who should decide within the law of which state the most complete and fair compensation of the damage can be ensured.

Article 1292 of the RA Civil Code establishes the following: “1. The law of the state where the testator had the last place of residence shall apply to succession, unless the testator has designated in the will the law of the state of which he or she is a citizen. 2. The ability of a person to make and revoke a will, as well as the form of a will and of the act on its revocation shall be determined by the law of the state where the testator had his or her place of residence at the moment of making the will or drawing the act on its revocation. However, failure to observe the form shall not serve as a ground for declaring the will or the act on its revocation as invalid, where the will or the act on its revocation meets the legal requirements of the place of drawing thereof or the legal requirements of the Republic of Armenia.” Article 1293 of the RA Civil Code establishes the following: “The succession of immovable property shall be determined by the law of the state where the property is located.” As a result of the combination of the two articles directed to conflict of law regulation of succession relationships, it is not clear whether the testator can chose the law of his or her citizenship in the will drawn up in relation to a real estate, or only *Lex rei sitae* law, that is the law of the place where the real estate is located, is applicable in case of

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<sup>13</sup> [http://www.cisg.ru/content/download/ipr\\_ua\\_rus.pdf](http://www.cisg.ru/content/download/ipr_ua_rus.pdf),  
<http://pravo.hse.ru/intprilaw/doc/050301>, <http://pravo.hse.ru/intprilaw/doc/041101>,  
<http://pravo.hse.ru/intprilaw/doc/042901>

inheritance of real estate on the basis of a will.

Now, let us refer to those issues of RA conflict of law, which relate to the lack of consistent reflection of changes in public-state sector.

Article 1262(1) of RA Civil Code establishes that “[w]here a person has citizenship of two or more states, his or her personal law shall be the law of the state with which that person is most closely connected”. Article 1262 of the RA Civil Code does not separately refer to the category of RA dual citizens, in this way regarding the RA dual citizens as the dual citizens of other states and displaying corresponding legal approach towards them. Such approach is not anyhow justified; it was necessary to display a differentiated approach. And it is based on the following reasons.

The amendments of November 27, 2005 to the Republic of Armenia Constitution served as a basis for the new state-legal status. One of the core demonstrations of those amendments was the introduction of dual citizenship. The amended RA Constitution foresees that “Rights and responsibilities of persons holding dual citizenship shall be prescribed by law.” On the basis of that constitutional provision, the RA Law “On the citizenship of the Republic of Armenia” adopted on October 23, 1995 was supplemented by a provision under the RA Law adopted on February 26, 2007, namely Article 13.1 was added, which states the following:

a) A person holding the citizenship of more than one state shall be deemed to be a dual citizen;

b) A person holding the citizenship of another state (countries) in addition to the citizenship of the Republic of Armenia shall be deemed to be a dual citizen of the Republic of Armenia;

c) For the Republic of Armenia, a dual citizen of the Republic of Armenia shall be recognized only as a citizen of the Republic of Armenia;

d) A dual citizen of the Republic of Armenia shall have all the rights provided for a citizen of the Republic of Armenia and shall bear all the responsibilities and liability provided for a citizen of the Republic of Armenia, except for the cases provided for by the international treaties and law of the Republic of Armenia.

In Armenia, in the conditions of introduction of dual citizenship

institution we come across to a very serious legal problem if in the Republic of Armenia our dual citizens' civil-legal status also is made dependent on the principle of the law of a closer connection. And the law with the closest connection may be as the law of the Republic of Armenia, as the law of any other state, with which our dual citizen may have a close connection (by virtue of the place of residence, place of property or the most valuable part thereof, language of thinking, nationality and other circumstances). In case of such approach to the issue, we violate the provision of Article 13.1 of the RA Law "On the citizenship of the Republic of Armenia", that "[f]or the Republic of Armenia, a dual citizen of the Republic of Armenia shall be recognized only as a citizen of the Republic of Armenia". Due to this aspect the RA citizen and the RA dual citizen are put in an unequal condition. It is true that in case the principle of the law of closer connection is applied towards the RA dual citizen, there is a possibility that the RA law will be selected for application towards him or her, and in that case, virtually, the inequality identified by us will disappear; however, the selection of the RA law under the principle of the law of closer connection is one of the possible options and not the only one. Thus we cannot be satisfied with only that possibility and legislatively maintain a not desired situation. Especially, we would like to record that at legislative introduction of the dual citizenship institute, it was not taken into account the requirements of the RA conflict of law requirements, in the RA legal system an unbalanced condition was created, as public-legal regulation does not efficiently complement private-legal regulation.

Which are the ways for resolution of the issue? It must be noted that such situations are not new, there is a well-developed practice in the world, which should be studied and adopted. The researches show that countries such as Hungary<sup>14</sup>, Austria<sup>15</sup>, Russia<sup>16</sup>, Latvia<sup>17</sup>,

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<sup>14</sup> International Private Law: Foreign legislation/condition and research. Edited. A.N.Zhiltsov, A.I.Muranov / STATUTE. M. 2001, page 231.

<sup>15</sup> Ibid, page 159.

<sup>16</sup> Dmitriev G.K. Comments to Civil Code of Russian Federation, Part three, Section "International Private Law". NORMA, M. 2002, pages 88-89.

<sup>17</sup> International Private Law: Foreign legislation/condition and research. Edited. A.N.Zhiltsov, A.I.Muranov / STATUTE. M. 2001 page 400.

Lichtenstein<sup>18</sup>, Poland<sup>19</sup>, and Romania<sup>20</sup> have clear legal regulatory mechanisms in relation with similar cases. For example, Article 9 of the Austrian Federal Act on International Private Law establishes that “[t]he private law of natural person is the law of the state to which that person belongs to. In case along with foreign citizenship natural person has also Austrian citizenship, the latter shall be decisive. In case the natural person has citizenships of several countries and does not have Austrian citizenship, his or her private law is the law of the state, with which the person is most closely connected”. As the example of Austria shows, in case the dual citizen has a citizenship of a specific country, it is regarded by that state as its citizen, and the other citizenship of the person is disregarded, and legislatively private law is regarded as private citizenship law.

Along with the amendments to the RA Law “On the citizenship of the Republic of Armenia”, it was also necessary to make relevant supplements to Article 1262 of the Civil Code as follows: “The personal law of the person having dual citizenship, who also has the citizenship of the Republic of Armenia, is the law of the Republic of Armenia.” As a result of this supplement, the Republic of Armenia would fully meet the public-legal requirement that “the person having dual citizenship of the Republic of Armenia will be considered only as the citizen of the Republic of Armenia”.

Article 1289 of the Civil Code referring to regulation of conflict of laws of the obligations deriving as a result of causing damages, defines common collision norms without distinction (*Lex loci delicti*, *Lex voluntaris*) against all the liabilities caused by damage. This is not justified, in particular in the context of all the activities undertaken at the level of the UN, focused on a more effective protection of the consumers’ rights, and these efforts are not reflected in the RA legislation in terms of the choice of the law. It is known that in 1999 the United Nations Guidelines for Consumer

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<sup>18</sup> Ibid, page 407.

<sup>19</sup> Ibid, page 469.

<sup>20</sup> Ibid, page 494.

Protection<sup>21</sup> were adopted, the Article 32 of which defines that the Governments should establish or maintain legal and/or administrative measures to enable consumers or, as appropriate, relevant organizations to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. So what kind of examples can be exemplary and educational for us? Here we can mention about the Russian approach. Thus, taking into consideration the current international requirements of the trade turnover, the legislative power of Russia has identified a collision volume, which refers to the liabilities deriving from the damage caused as a result of defects of the product (activities, services). According to the Article 1221 of RF Civil Code, the choice of the law of the country applied to these obligations shall be left to the discretion of the complainant, who can select any of the following options:

- the law of the country where the seller or the producer of the given product (activity, service) has residence or address,
- the law of the country where the complainant has residence or address,
- the law of the country, where the product was purchased, the service was delivered or the activities were carried out.

The rules of the mentioned article are applied also to those cases when the damage is caused as a result of providing wrong or incomplete information about the product (activity, service).

If the complainant does not chose any law of any country, the law to be applied shall be chosen according to the rules established by Article 1219 of the RF Civil Code, *i.e.* *Lex loci delicti* principle shall be applied.

An approach similar to the Russian legislative approach is applied also in the Ukraine Law on Private International Law<sup>22</sup>.

Being limited with the illustrated examples, I would like to sum up and tell that the conflict of laws seemed to be provided by the RA legislation to the extent that the Twelfth Section of the RA Civil

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<sup>21</sup> <http://www.un.org/ru/ecosoc/docs/1999/r1999-7.pdf>

<sup>22</sup> [http://www.cisg.ru/content/download/ipr\\_ua\\_rus.pdf](http://www.cisg.ru/content/download/ipr_ua_rus.pdf)

Code was not amended or supplemented since it was adopted, Part 7 of the RA Family Code was not amended or supplemented either except for Article 150 (supplemented on February 8, 2011). While conflict of laws is the mirror of private international circulation, they reflect the processes of social life, and when they do not reflect them properly, they reflect the attitude of the state and the society to those norms, which is not adequate in our case.

In the introduction of the 2012-2016 Strategic Program of the RA Legal and Judicial Reforms it is noted that the reforms only in one direction can make no sense or be ineffective if related reforms are not carried out in other relevant areas. So the planned reforms should have systematic approach in all the directions in parallel, in particular a number of material laws should be adopted or improved based on the revised RA Constitution and international best practice.

Identification of the problems related to integrated codification of conflict of laws, as well as institutional issues of the Republic of Armenia, also this modest analysis and recommendations are fully in line with the main issues specified in the 2012-2016 Strategic Program of the RA Legal and Judicial Reforms and can be useful for the development and improvement of the national legislation.

# IT IS TIME TO MAKE AMENDMENTS IN THE HAGUE INTERCOUNTRY ADOPTION CONVENTION: THE NEW ACCREDITATION MECHANISM FOR SUPERVISING AND MONITORING ADOPTION AGENCIES WOULD ENSURE THE QUALITY OF ADOPTION AGENCIES AND GUARANTEE SUCCESSFUL ADOPTIONS

Tatevik Davtyan<sup>1</sup>

## Introduction

Imagine you are visiting a place where no one speaks your mother language and you wake up one day to find that the group you went with has all gone home and you are left there alone. Ironically, you will forget quickly about this relatively unpleasant first impression of being adopted by foreigners, when you then will be locked overnight in a damp unheated pump room by your new parents<sup>2</sup>, who by the way were officially found eligible to adopt you and care about you; or you will be severely beaten by your new parents and have bruises, scars, cuts<sup>3</sup>; or you will be sexually abused

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<sup>2</sup> Viktor Matthey, age 6, of New Jersey, died of cardiac arrest due to hyperthermia after adoptive parents locked him overnight in a damp unheated pump room. Viktor was also severely beaten by his adoptive father. Both parents are sentenced to 10 years for confining Viktor to a pump room, 10 years for excessive corporal punishment and 7 years for failing to provide medical care. Viktor was in the US ten months before his death in 2001. See at [http://adoption.about.com/od/adoptionrights/p/russian\\_children\\_murdered\\_by\\_adoptive\\_parent.htm](http://adoption.about.com/od/adoptionrights/p/russian_children_murdered_by_adoptive_parent.htm)

<sup>3</sup> Alex Pavlis, age 6, of Illinois, was beaten to death by his US adoptive mother in 2003, six weeks after his adoption from Russia. He was found to have 32 bruises, scars, and cuts. Adopted mother was charged with involuntary manslaughter. See [http://adoption.about.com/od/adoptionrights/p/russian\\_children\\_murdered\\_by\\_adoptive\\_parent.htm](http://adoption.about.com/od/adoptionrights/p/russian_children_murdered_by_adoptive_parent.htm).

In the other case, Nikolai Emelyantsev, age 14 months, of Utah died in 2008 from a skull fracture, the result of what is believed to be blunt force trauma to the head. The infant also suffered from a bruised face, head, knee and anus. Adoptive mother was charged with one count of first-degree murder. [http://adoption.about.com/od/adoptionrights/p/russian\\_children\\_murdered\\_by\\_adoptive\\_parent.htm](http://adoption.about.com/od/adoptionrights/p/russian_children_murdered_by_adoptive_parent.htm)

and exploited by your adoptive pedophile parent<sup>4</sup>; or you will be physically abused and neglected by your mentally ill and alcoholic parent<sup>5</sup>; or your adoptive parent will suddenly dissolve the adoption and send you, a little child, back to your home country, alone<sup>6</sup>. And, ironically, nobody will know about these continuing abuses in order to prevent them, even though the responsible authorities in this field were expected to monitor regularly your life conditions and prevent such abuses.

These scenarios are taken from the real stories in relatively recent intercountry adoption cases. Moreover, other examples<sup>7</sup> indicate also the corruption and child trafficking practice in intercountry adoption. So, the questions in these cases are: how the

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<sup>4</sup> Masha Elizabeth Allen, was five-years-old in 1998 when 41-year-old Matthew Mancuso adopted her from a Russian orphanage and brought her to his home in the small western Pennsylvania hamlet of Plum. Over the next five years, Mancuso sexually abused and exploited Masha, videotaping and photographing her in various stages of abuse, and posting the images on the internet to share with others members of an online community of pedophiles and child pornography fans. Masha was rescued by the FBI in 2003. [www.wikileaks.org/wiki/One\\_Child%27s\\_Unending\\_Abuse\\_-\\_From\\_Disney\\_World\\_Girl\\_to\\_Drifter](http://www.wikileaks.org/wiki/One_Child%27s_Unending_Abuse_-_From_Disney_World_Girl_to_Drifter)

<sup>5</sup>See [www.wikileaks.org/wiki/One\\_Child%27s\\_Unending\\_Abuse\\_-\\_From\\_Disney\\_World\\_Girl\\_to\\_Drifter](http://www.wikileaks.org/wiki/One_Child%27s_Unending_Abuse_-_From_Disney_World_Girl_to_Drifter)

<sup>6</sup> Bethanie Barnes, A critique of the US-Russian adoption process and three recommendations for the US-Russian bilateral adoption agreement; Comment; *Emory International Law Review* 2013, 401-403.

<sup>7</sup> Peter S. Goodman, *Stealing Babies for Adoption; With U.S. Couples Eager to Adopt, Some Infants Are Abducted and Sold in China*, *Wash. Post*, Mar. 12, 2006, at A01- cited in Rachel J. Wechsler, *Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy*, *Article Pace International Law Review*, winter, 2010. For instance, in China was uncovered child trafficking group in 2005, and nine individuals in China were convicted of trafficking and twenty-three local government officials were fired for their involvement. A child trafficking enterprise was discovered in Cambodia in 2002. Two American owners of a US adoption agency had led the enterprise through which they collected approximately eight million dollars from American adoptive parents. In this scheme, Cambodian children were taken from their birth parents under false pretenses. The two Americans leading the enterprise were prosecuted for conspiracy to commit visa fraud, conspiracy to launder money, and structuring. See Trish Maskew, *Child Trafficking and Intercountry Adoption: The Cambodian Experience*, 35 *Cumb. L. Rev.* 619, 632 (2004-05).

alcoholics, mentally ill people, pedophiles can manage to adopt children and become parents? Or, how can the trade in children, child laundering<sup>8</sup> and abduction occur in a “proper” intercountry adoption system? Whose fault is this? How to undermine or minimize this abusive practice?

These are quite ambitious questions and require complex research of different aspects of intercountry adoption. However, the above-described scenarios, to some extent, are also the results of improper and unethical work of adoption agencies, involved in intercountry adoption, their lack of professionalism and their failure to operate accountably and transparently. And the involvement of such unprofessional and poor quality adoption agencies in the adoption process becomes possible due to improper supervision over those agencies, failure to monitor them and improve their quality.

Adoption agencies are non-profit organizations that provide adoption services and are the main players in intercountry adoption, having their specific functions in all phases of intercountry adoption<sup>9</sup>. For instance adoption agencies screen and select prospective parents<sup>10</sup>, organize courses for the preparation of adoptive parents for an intercountry adoption<sup>11</sup>, collect and disseminate information about the child (background, family and medical history, and any special needs of the child, etc.) to facilitate the adoption<sup>12</sup> in the pre-adoption phase; initiate and assist the

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<sup>8</sup> David M. Smolin, Desiree L. Smolin, [The Aftermath of Abusive Adoption Practices in the Lives of Adoption Triad Members: Responding to Adoption Triad Members Victimized by Abusive Adoption Practices](https://www.google.com/#q=David+and+Desiree+Smolin%2C+The+Aftermath+of+Abusive+Adoption+Practices+in+the+Lives+of+Adoption+Triad+Members), slide 12. Available <https://www.google.com/#q=David+and+Desiree+Smolin%2C+The+Aftermath+of+Abusive+Adoption+Practices+in+the+Lives+of+Adoption+Triad+Members>

<sup>9</sup> Usually, an intercountry adoption process consists of three phases, *i.e.* pre-adoption, adoption, and post adoption phases

<sup>10</sup> Georgia Gebhardt, [Hello Mommy and Daddy, How in the World Did They Let You Become My Parents?](#) Article, American Bar Association, Family Law Quarterly Fall, 2012, 433-434.

<sup>11</sup> Guide to Good Practice No 2, para 173, available at [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)

<sup>12</sup> Bethanie Barnes, [A critique of the US-Russian adoption process and three recommendations for the US-Russian bilateral adoption agreement](#), Comment, Emory International Law Review, 2013, 432-433.

adoption proceedings<sup>13</sup>, match the child with a suitable family in the adoption phase<sup>14</sup>, and also promote post-adoption services.<sup>15</sup> Moreover, adoption agencies operate as intermediaries between the prospective adoptive parents, the various players referred to above, the various authorities of the receiving states and states of origin, and the children to be adopted<sup>16</sup>. Obviously, this critical and complex role of adoption agencies requires high professionalism, adequate resources, an ethical approach to intercountry adoption<sup>17</sup> on the one hand, and strict supervision of adoption agencies on the other hand.

So, who should supervise adoption agencies and assure their quality and how? To this end the main international convention in this field, the Hague Intercountry Adoption Convention, requires the signatory states' authorities to supervise the adoption agencies by compulsory accrediting<sup>18</sup> and verifying that the agency has the competence to properly carry out its tasks and functions<sup>19</sup>.

To sum up, there are adoption agencies that, indeed, exercise actual intercountry adoption; the state authorities that supervise the adoption agencies and the accreditation as the means of supervising and monitoring the adoption agencies and assuring their quality. However, the effectiveness of current accreditation, thereby supervision and monitoring the adoption agencies, is not satisfactory<sup>20</sup> and there are still cases in which poor quality adoption agencies are involved, which creates a high risk of abusive practice as it was in the above described scenarios.

So what is the problem? The problem that this paper addresses focuses on the lack of proper accreditation of adoption agencies as the means of supervision and monitoring the adoption agencies and

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<sup>13</sup> See Hague Intercountry Adoption Convention, Art. 9 (a)

<sup>14</sup> See Guide to Good Practice No 2, para. 211., available at [http://www.hcch.net/index\\_en.php](http://www.hcch.net/index_en.php)

<sup>15</sup> See Bethanie Barnes, *id.*

<sup>16</sup> See Guide to Good Practice No 2, para. 211.

<sup>17</sup> See Guide to Good Practice No 2, para. 5.

<sup>18</sup> Hague Convention, Art. 10, 11

<sup>19</sup> See *Id.*

<sup>20</sup> Guide to Good Practice No 2, para. 211

assuring their quality. And in order to suggest possible solutions to this problem it seems reasonable to discuss the causes of this problem and their effects on intercountry adoption practice.

The main cause of mentioned problem is the failure of the Hague Convention to regulate many issues of accreditation leaving the signatory states free and flexible to determine those issues at the national levels. This very flexible approach of the Convention leads to negative effects and, ultimately, to the improper supervision and monitoring of adoption agencies and to their poor quality.

Particularly, the Convention's failure to define what accreditation is results in the practice in which the signatory states are mixing up accreditation and licensing processes, whereas accreditation is more than mere licensing. Except for supervising and punishing elements, accreditation includes elements of continuous monitoring and assuring adoption agencies' quality.

The Convention's failure to determine which authority of a signatory state is in charge of accrediting, thereby, supervising and assuring the quality of adoption agencies may bring about a state's government monopoly and corruption in adoption practice, as well as improper supervision and poor quality of agencies.

Finally, the Convention's failure to provide uniform accreditation procedure leads to the very diverse accreditation practice in the signatory states, the negative effects of which are confusions and difficulties in adoption process as well as inconsistency in quality of adoption agencies and the degree of their supervision in the signatory states.

Thus, as potential solutions, this paper suggests the following: first, defining accreditation, thereby, recognizing it as a tool of supervision, monitoring and quality assurance and as a safeguard for proper and professional work of adoption agencies; second, providing uniform accreditation procedure (that combines supervising, monitoring and quality improving elements) as dealing with diverse accreditation practice and ensuring the consistency in quality and degree of supervision of adoption agencies; third, introducing at the national level a new accrediting and supervising

body - Quality Assurance Body (hereafter QAB), that would not only supervise and assure the quality of adoption agencies through accreditation, but also regularly monitor adoption agencies and improve their quality. This professional body would also create accreditation standards and criteria.

All those three proposed amendments to the Hague Convention together form the new mechanism for accreditation and should be made together as a whole in order to affect positively the adoption practice.

It is worth mentioning that the problems of supervision over the adoption processes were widely discussed in academia and several solutions were proposed to oversee the adoption processes in whole and the signatory states' compliance with the Convention, including, creating an International Ombudsman office<sup>21</sup>; International Family Court,<sup>22</sup> International Supervising Agency,<sup>23</sup> and an International Committee of participating member,<sup>24</sup> etc.

However, the proposal in this paper would work better: first, because the QAB would be a national body that would strongly consider the local needs and traditions of a signatory state in creating the accreditation standards and criteria, whereas other suggested mechanisms would be international supervising bodies from outside that with their rules and decisions, somehow, may push the countries to refuse ratifying and/or opt-out from the Convention.

Second, QAB would be not only a supervising, but also quality assurance body that would continuously monitor and improve the quality of adoption agencies, whereas the suggested international

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<sup>21</sup> "Problems and Solutions" Before the House Committee on International Relations, Testimony of Cindy Freidmutter, Esq. Executive Director, Evan B. Donaldson Adoption Institute. International Adoptions, May 22, 2002 at [http://commdocs.house.gov/committees/intlrel/hfa79760.000/hfa79760\\_0f.htm](http://commdocs.house.gov/committees/intlrel/hfa79760.000/hfa79760_0f.htm)

<sup>22</sup> Rachel J. Wechsler, Giving Every Child a Chance: the need for reform and infrastructure in intercountry adoption policy, Article Pace International Law Review, winter, 2010

<sup>23</sup> See *Id.*

<sup>24</sup> See the Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption: are its benefits overshadowed by its shortcomings?

mechanisms would have mostly supervising and/or punishing effects.

Third, the structure and specific working procedure of QAB would guarantee its own accountability and transparency and exclude monopoly or corruption in this body, whereas the mentioned international mechanisms sometime may be seen as external levers on signatory states lacking transparency and accountability in their operations.

Fourth, the mechanism of QAB and the proposal of uniform accreditation procedure are focused on supervision over the adoption processes, hence, through accrediting adoption agencies and improving their quality. This mechanism emphasizes the accreditation as a supervising tool and its goal to assure the quality of adoption agencies as a guarantee of successful adoptions. In contrast, other proposals suggested in academia are focused on general supervision over adoption processes and not through accreditation but through examining a signatory states' compliance to the Convention's provisions in general. So those proposals are more general and are not specifying the accreditation or focusing on the quality of adoption agencies as the proposal in this paper does. Thus, the tasks and functions of other suggested in academia solutions may be too broad to ensure their effectiveness.

And fifth, the proposal in this paper suggests supervising adoption agencies through the new mechanism of accreditation. Indeed, the signatory countries somehow are accrediting adoption agencies now, and already have some background and resources, rather than they would start from zero<sup>25</sup> as in other suggested mechanisms. So, the new mechanism for accreditation, including creation of QAB would be less expensive than the other above suggested solutions (Ombudsman, Family Court, etc.).

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<sup>25</sup> Hague Conference published many materials, including guides, explanatory reports, and recommendations to support good intercountry adoption practice. It also lunched training programs for signatory states. Other international organizations develop rules and standards for successful intercountry adoptions. They are the Nordic Adoption Council (NAC), EurAdopt, the Danish Adoption Group, International Social Service, and International Reference Centre for the Rights of Children Deprived of their Family (IRC), etc.

Thus, Section I of this paper emphasizes the role and functions of adoption agencies and shows the need of proper supervision and monitoring of adoption agencies through proper accreditation process. Section II presents the history of intercountry adoption and discusses the establishment of compulsory accreditation requirement in the Hague Convention and also analyzes the deference between accreditation and licensing. Section III introduces the problems in current accreditation practice, shows their effects on the adoption process and emphasizes the need for changes in the Hague Convention. Section IV proposes the new accreditation mechanism for supervising and monitoring the adoption agencies. This section discusses the role, functions, working procedures of the QAB, provides definition of accreditation and uniform accreditation procedures. Also this section points out the strengths and weaknesses of the new accreditation mechanism.

### **I. The role and functions of adoption agencies involved in intercountry adoption**

Usually, an intercountry adoption process consists of three phases: pre-adoption, adoption and post adoption<sup>26</sup>. And numerous players, such as psychologists, social workers, lawyers, public officials, adoption agencies, etc., are involved in this process having their special duties and functions in the mentioned phases. Of course a successful adoption requires all players in the adoption process to perform their duties and functions properly. However, the proper performance by adoption agencies<sup>27</sup> of their functions and duties are crucial for a successful adoption, because of their significant role in all phases of intercountry adoption.

Adoption agencies are private non-profit organizations that provide adoption services. Their functions as well as the minimum requirements to their composition, operation and financial situation are set forth in the main international convention in this field, the

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<sup>26</sup> Under the Hague Convention on Intercountry Adoption.

<sup>27</sup> Adoption agencies are not necessary to be involved in adoption process. A state decides itself to have or not to have adoption agencies, consequently, to perform adoption functions through other competent authorities.

Hague Convention of May 29, 1993 on the Protection of Children and Co-operation in Respect of Intercountry Adoption (hereafter also “the Hague Convention” or “the Convention”). The Convention was the result of a multi-year process hosted by the Permanent Bureau of the international organization known as the Hague Conference on Private International Law<sup>28</sup>.

Incidentally, the Convention uses the term “accredited body” for an adoption agency. Also the Convention does not require but encourages the signatory states to use the adoption agencies in intercountry adoption process. Instead, the Convention provides the regime of Central Authorities that requires each signatory state to create a Central Authority (usually as the Central Authority, a state appoints its Ministry of Justice, Ministry of Education, Ministry of Labor and Social Issues etc.) to oversee all intercountry adoptions involving that state and also to perform actual adoptions. However, the Central Authority of a state may delegate its functions pertaining to the actual adoptions to private adoption agencies, considering, inter alia, the lack of its adequate resources for implementing actual adoptions. So, it is the province of a single state in the face of its Central Authority to involve or not adoption agencies in adoption processes.

However, usually the Central Authority of a state keeps the functions of the development of policy, procedures, standards and guidelines for the adoption process<sup>29</sup>, whereas the function of actual adoptions (Article 9, Articles 14-22 of the Convention) delegates to adoption agencies<sup>30</sup>. For instance, Articles 14-22 of the Convention set forth the procedural requirements for intercountry adoption.<sup>31</sup>

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<sup>28</sup> Jena Martin, Esq, The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate, Article, U.C. Davis Journal of International Law and Policy, Spring 2007, 192-193. See also Peter H. Pfund, Intercountry Adoption: The 1993 Hague Convention: Its Purpose, Implementation, and Promise, Special Issue on International Family Law, Family Law Quarterly, American Bar Association, Spring, 1994, 55-56.

<sup>29</sup> Guide to Good Practice No 1, *supra*, note 22, para. 173.

<sup>30</sup> Guide to Good Practice No 2, *supra*, note 22, para. 189.

<sup>31</sup> Bethanie Barnes, A critique of the US-Russian adoption process and three recommendations for the US-Russian bilateral adoption agreement, Comment, Emory International Law Review, 2013, 432.

Particularly, prospective adoptive parents must apply for an adoption through the Central Authority of their state.<sup>32</sup> The Central Authority must determine whether the prospective adoptive parents are “suitable” and have been adequately “counselled as may be necessary.”<sup>33</sup> Also it should reveal the information about the applicant, family and medical history, social environment, reasons for adoption, and overall suitability to adopt.<sup>34</sup> The Central Authority must prepare a report about the adoptive child including information on his or her background, family, medical history, and any special needs of the child<sup>35</sup> and ensure the proper consents are obtained<sup>36</sup>. Also it must determine whether the adoption is in the child's best interests.<sup>37</sup>

Thus, most of the states<sup>38</sup> now use adoption agencies to perform the above-described functions of Central Authorities supporting the prospective adoptive parents during and after the adoption process<sup>39</sup>. To this end, the general responsibilities of adoption agencies in whole adoption procedure are: collecting and disseminating

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<sup>32</sup> See *Id.*

<sup>33</sup> Donovan M. Steltzner, Intercountry Adoption: Toward a Regime That Recognizes the “Best Interests” of Adoptive Parents, Note, Case Western Reserve Journal of International Law, Winter 2003, 140.

<sup>34</sup> Bethanie Barnes, *Id.* 432.

<sup>35</sup> Hague Convention Article 16(1)(a)(b).

<sup>36</sup> Hague Convention Article 16(1)(c).

<sup>37</sup> Hague Convention Article 16(1)(d).

<sup>38</sup> See the laws of Canada (Quebec) (Youth Protection Act, R.S.Q. c. P-34.1, Division VII, §2), Italy (Law No 184 of 4 May 1983, Article 31(1)), Norway (Act of 28 February 1986 No 8 relating to adoption, section 16(f)), and Sweden (Intercountry Adoption Intermediation Act (number 1997:192), section 4).

<sup>39</sup> International Social Service, Accredited Adoption Bodies of receiving States – AABs (I): The Nature and Advantages of their Intervention, Fact Sheet, No 38, July 2007, available at [www.iss-ssi.org](http://www.iss-ssi.org) (last consulted on 14 April 2012, hereinafter, “ISS Fact Sheet No 38”), page 2. For a discussion on independent adoptions, see Guide to Good Practice No 1, *supra*, note 22, para. 191, and I. Lammerant and M. Hofstetter, Adoption: at what cost? For an ethical responsibility of receiving countries in intercountry adoption, Lausanne, Terre des hommes, 2007, available at [www.terredeshommes.org](http://www.terredeshommes.org) under “Resources and Links” then “Publications” (last consulted on April 14, 2012, hereinafter, “Adoption: at what cost?”), pages 11 and 29.

information about the child to facilitate the adoption<sup>40</sup>; initiating and assisting the adoption proceedings;<sup>41</sup> promoting pre-adoption counseling and post-adoption services<sup>42</sup>, and creating transparency between governments concerning particular adoptions<sup>43</sup>. The particular functions<sup>44</sup> of adoption agencies associated with these general responsibilities and with their delegated obligations in Articles 14-22 of the Convention may include:

***Pre-adoption phase***

a) Informing persons interested in adopting a child about adoption in general and the current situation of intercountry adoption in different countries;

b) Organizing courses for the preparation of adoptive parents for an intercountry adoption;

c) Informing the prospective adoptive parents of the requirements for adoption in the specific State of origin, the procedures to be observed, the documents required, the profile and health of adoptable children;

d) Ensuring that the prospective adoptive parents are assisted to meet the requirements of the State of origin, by preparing complete and correct case files;

e) Sending the completed dossier to the State of origin concerned;

f) Establishing good collaboration with all the parties and authorities in the receiving State in order to secure the proper performance of each adoption case;

g) Keeping the prospective adoptive parents informed of the progress of their application<sup>45</sup>;

***After matching***

h) Forwarding details of the child to the prospective adoptive

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<sup>40</sup> See *Id.* Art. 9 (a).

<sup>41</sup> See *Id.* Art. 9 (b).

<sup>42</sup> See *Id.* Art. 9 (c).

<sup>43</sup> See *Id.* Art. 9 (d-e).

<sup>44</sup> By the way, adoption agencies have functions in both the receiving State (the state of adoptive parents) and the State of origin (the state of the adoptive child).

<sup>45</sup> See the whole list in Guide N 2. Para 211

parents and ensuring that they have obtained all the information and services required for an informed decision;

i) Replying to any additional request by the authority of the receiving State in charge of supervising adoptions, and of the State of origin, for each adoption case, if appropriate;

j) Offering any services and advice relating to the proposed adoption, including preparation for travel;

***Post-adoption phase***

k) Informing the authorities concerned in the receiving State of the child's arrival;

l) Ensuring that the prospective adoptive parents finalize all the steps to secure the legal status for the child,

m) Preparing and sending the child's follow-up reports to the State of origin;

n) Supporting adoptive parents and the child during the integration of the child into the family.

All above-mentioned functions determine the significant role of adoption agencies in the adoption process, as, *inter alia*, "guarantors of the ethics, professionalism and multidisciplinary nature of the intercountry adoption process"<sup>46</sup>. In addition, such role and functions of adoption agencies justify the minimum standards that the Hague Convention sets forth for an adoption agency desiring to be involved in adoption process. Those minimum standards assure that an adoption agency will pursue non-profit objectives;<sup>47</sup> employ personnel who are qualified by ethical standards and trained to work in the field of intercountry adoption<sup>48</sup>; and be subject to supervision by competent authorities of that state<sup>49</sup>. And one of the forms of supervision of adoption agencies by competent authorities is the accreditation<sup>50</sup>.

However, accreditation of adoption agencies seems imperfect

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<sup>46</sup> Articles 20 and 21 of the UNCRC. See also International Social Service Fact Sheet No 38, *ibid*.

<sup>47</sup> Hague Convention Article 11(a).

<sup>48</sup> See *Id.* Article 11(b).

<sup>49</sup> See *Id.* Article 11(c).

<sup>50</sup> Articles 10-11.

and not satisfactory nowadays<sup>51</sup>. Consequently, the current intercountry adoption practice is described with the lack of proper supervision, monitoring, and assuring the quality of adoption agencies through proper accreditation. And the below-described problems as causes of the created situation in accreditation practice require quick measures of changes and improvements.

## **II. The problems in current accreditation practice and the need for changes**

The imperfect and not satisfactory accreditation of adoption agencies is mostly determined by the gaps and deficiencies of the Hague Convention, *i.e.* the Convention's silence to the meaning of accreditation and the Convention's failure to identify the accrediting and supervising body and to provide a uniform accreditation procedure. The effects of those failures ultimately lead to the involvement of poor quality adoption agencies in the adoption process and to the high risk of their abusive practice.

### ***A. The Convention's failure to define accreditation causes identification of accreditation with licensing which results in the improper supervision and the poor quality of adoption agencies***

The Convention's failure to define what accreditation is reduces the significant role of accreditation as a tool of supervision, continuous monitoring and assurance of adoption agencies' quality. This lack of the Convention allows the signatory states to interpret the accreditation as a mere permit or a license. This confusion brings about improper supervision and lack of monitoring and improvement of the quality of adoption agencies.

Before discussing the meaning of accreditation and its differences from mere licensing, it is worth to briefly describe the evolution of accreditation and its establishment as a compulsory requirement for all adoption agencies involved in intercountry adoptions.

The history of intercountry adoption shows that shortly after

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<sup>51</sup> Guide to Good Practice No 2, para. 225.

increased popularity<sup>52</sup> of this phenomenon in the 1980s the world community recognized that intercountry adoption was causing “serious and complex human and legal problems”<sup>53</sup>, and admitted that the adoption practice was “chaotic,” “incoherent,” and vulnerable to child trafficking<sup>54</sup>. They also recognized the lack of existing legal tools and regulations<sup>55</sup> both in national and international levels, which signifies the necessity of “multilateral”<sup>56</sup> solution in this field.<sup>57</sup> To this end, the Hague Convention was adopted<sup>58</sup>.

The abusive pre-Hague intercountry adoption practice was emphasized by J.H.A. (Hans) van Loon<sup>59</sup> in his 1990 Report on Intercountry Adoption,<sup>60</sup> which constitutes one of the most significant document in the preparatory materials for the Hague Convention<sup>61</sup>.

The Report described the abduction, buying, or selling children for intercountry adoption as a form of child trafficking, and pointed out three methods of existing at the time abuses: the sale of children,

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<sup>52</sup> Explanatory Report to the Hague Convention of May 29, 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, by G. Parra-Aranguren, at para. 6, available on the [www.hcch.net](http://www.hcch.net)

<sup>53</sup> Outline. Hague Intercountry Adoption Convention, page 1, available on the [www.hcch.net](http://www.hcch.net)

<sup>54</sup> David M. Smolin, [Child Laundering and the Hague Convention on Intercountry Adoption: The Future and Past of Intercountry Adoption](#), Article, University of Louisville Law Review 2010, 461-462.

<sup>55</sup> Andrew C. Brown, [International Adoption Law: A Comparative Analysis](#), Comment, International Lawyer Fall 2009, American Bar Association, 1138-1140.

<sup>56</sup> Outline *Id.*

<sup>57</sup> See *Id.*

<sup>58</sup> The Convention was the result of a multi-year process hosted by the Permanent Bureau of the international organization known as the Hague Conference on Private International Law<sup>58</sup>. It was the first time that the non-member states of Hague Conference also participated in drafting of the Convention<sup>58</sup> because of the “chaotic,” “incoherent,” and vulnerable to child trafficking<sup>58</sup> practice of international adoption.

<sup>59</sup> J.H.A. van Loon later became the Secretary General of the Hague Conference on Private International Law. See David M. Smolin *Id.* 452-54.

<sup>60</sup> J.H.A. van Loon, [Report on Intercountry Adoption](#), Preliminary Document No. 1 of April 1990, in Preliminary Work, Proceedings of the Seventh Session 101 (May 10-29, 1993).

<sup>61</sup> David M. Smolin *Id.* 453.

consent obtained through fraud or duress and child abduction, and combinations of those three.<sup>62</sup> The Report raised out the issues of corrupt intermediaries in the adoption process, such as lawyers, notaries, social workers, hospitals, doctors, children's institutes, who "sometimes turned into complete 'baby farms,' and work together to obtain children and make profit"<sup>63</sup>.

And as the main reasons for that chaotic situation the Report identified the commonplace private and independent adoptions<sup>64</sup>; the absence of supervision by public authorities, and the absence of involvement of professional licensed agencies in intercountry adoption.<sup>65</sup>

Hans van Loon, thus, wanted to replace this pre-Convention intercountry adoption practice with a highly ordered and regulated intercountry adoption system, in which each significant actor was either the government, or a non-profit entity accredited by the Government.<sup>66</sup> Hans van Loon's mechanism for achieving the required regulation, inter-governmental coordination, and ordered intercountry adoption system was a regime of "Central Authorities"<sup>67</sup> and the strategy of the new Convention of greater regulation, international coordination, and restrictions on "the freedom of agencies to act as intermediaries in intercountry adoption."<sup>68</sup>

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<sup>62</sup> J.H.A. van Loon, Report on Intercountry Adoption *Id.* 51-52.

<sup>63</sup> See *Id.*

<sup>64</sup> Independent adoptions are those that are arranged directly between adoptive parents and biological parents without assistance from an accredited adoption agency. See Georgia Gebhardt, Hello mommy and daddy, how in the world did they let you become my parents? Article, American Bar Association, Family Law Quarterly Fall, 2012, 432.

<sup>65</sup> Guide to Good Practice No 2, para 27.

<sup>66</sup> David M. Smolin, Child Laundering and the Hague Convention, page 456.

<sup>67</sup> See *Id.*

<sup>68</sup> See *Id.* page 455. So, the draft of the new Convention was examined in the Seventeenth Session of the Hague Conference on Private International Law convened on May 10, 1993 and unanimously approved on May 29, 1993<sup>68</sup>. The new Convention set forth the purposes: (1) to establish safeguards to ensure that intercountry adoption is in the best interests of the child (and with respect of his fundamental rights); (2) to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected; (3) to prevent abduction, child trafficking, and baby buying; and (4) to make sure that adoptions between the states are given "full faith and credit".<sup>68</sup>

Thus, the pre-Hague intercountry adoption was described as poorly regulated with the commonplace private adoption practice and the rare involvement of licensed adoption agencies, which lead to abusive and unethical adoption practice<sup>69</sup>. As a solution, among other things, was recommended the compulsory accreditation of adoption agencies involved in intercountry adoption<sup>70</sup>. And it was the unethical adoption practices of some adoption agencies and individuals that a number of delegates to the Convention negotiations wanted the agencies and individuals excluded from the procedure at all<sup>71</sup>.

However, a compromise was reached in the Convention that allows only public authorities and private bodies (adoption agencies) that are duly accredited and that comply, at least, with certain minimum requirements established by the Convention<sup>72</sup>, to perform Convention adoption functions. The Convention, thereby, recognized that the adoption agencies continue to play an active role in intercountry adoptions, but they must be properly accredited and more closely supervised<sup>73</sup>.

So, the draft of the new Convention was examined in the Seventeenth Session of the Hague Conference on Private International Law convened on May 10, 1993 and unanimously approved on May 29, 1993<sup>74</sup>. The new Convention set forth the purposes: (1) to establish safeguards to ensure that intercountry adoption is in the best interests of the child (and with respect of his fundamental rights); (2) to establish a system of co-operation amongst contracting states to ensure that those safeguards are respected; (3) to prevent abduction, child trafficking, and baby buying; and (4) to make sure that adoptions between the states are

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<sup>69</sup> Guide to Good Practice No 2, para 92.

<sup>70</sup> See *Id.*, para 32.

<sup>71</sup> See *Id.*

<sup>72</sup> See *Id.*

<sup>73</sup> See *Id.*, para 34.

<sup>74</sup> Jennifer M. Lippold, Transnational Adoption From an American Perspective: The Need for Universal Uniformity, Note, Case Western Reserve Journal of International Law Spring/Summer, 1995, 492.

given “full faith and credit”.<sup>75</sup>

As to accreditation, the Hague Convention states: “Accreditation shall only be granted to and maintained by bodies demonstrating their competence to carry out properly the tasks with which they may be entrusted” (Article 10). “An accredited body shall – *a*) pursue only non-profit objectives according to such conditions and within such limits as may be established by the competent authorities of the State of accreditation; *b*) be directed and staffed by persons qualified by their ethical standards and by training or experience to work in the field of intercountry adoption; and *c*) be subject to supervision by competent authorities of that State as to its composition, operation and financial situation” (Article 11).

Thus, the Hague Convention stipulates the requirement of compulsory accreditation of adoption agencies and sets forth minimum international standards on adoption agencies for their structure, accountability, ethics and professionalism<sup>76</sup>.

While now, the involvement of accredited adoption agencies in intercountry adoption is the norm, and accreditation of adoption agencies is one of the Convention's important safeguards<sup>77</sup>, the very flexibility of the Convention in regulating accreditation issues threatens the proper supervision of adoption agencies and the improvement of their quality. Particularly, the Convention's failure to define what accreditation is creates the practice in which the states mix up the processes of accreditation and licensing. Indeed, the Convention is vague<sup>78</sup> about those two processes, and Articles 10 and 11 of the Convention leave room for two possible interpretations.

First version: the Convention uses the term “accreditation” but implies mere “licensing” under that concept and sets minimum requirements that adoption agencies should meet to be involved in adoption process. So in this case Convention equates accreditation

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<sup>75</sup> Jena Martin, Esq, The good, the bad & the ugly? A new way of looking at the intercountry adoption debate, Article, U.C. Davis Journal of International Law and Policy, Spring 2007, 192.

<sup>76</sup> Guide to Good Practice No 2, para 144.

<sup>77</sup> See *Id.* para 36.

<sup>78</sup> The vague terminology of Hague Convention was widely criticized.

with licensing. Second version: the Convention requires only licensing for the adoption agencies under the minimum standards (to their structure, adequate personnel); however, it also encourages the signatory states to create higher standards<sup>79</sup> for ensuring adoption agencies' competence to properly carry out their tasks. Nonetheless, this ambiguity creates confusion and difficulty in accreditation practice and should be clarified.

It is worth mentioning that the main difference between accreditation and licensing is that licensing requires meeting the minimum standards<sup>80</sup>. Accreditation exceeds the minimum requirements for licensing, and focuses on the quality helping to reach the highest quality<sup>81</sup>. In theory, there is little room for the licensor's discretion in evaluating compliance. Accreditation, specifically allows for a varying level of compliance rather than a fixed level<sup>82</sup>. In other words, licensing requires supervising and ensuring the minimum standards, whereas accreditation requires supervising, monitoring to achieve the highest possible standards, the assurance of quality, and improved efficiency and effectiveness<sup>83</sup>.

Accreditation as a tool is widely used in educational space and constitutes a professional peer review process by which educational institutions and programs are provided technical assistance and are evaluated for quality based on pre-established academic and administrative standards. A primary goal of accreditation in educational system is to assist postsecondary institutions to identify and achieve goals in order to protect the public and to establish and maintain high educational standards and ethical business practices for the accredited, member schools.<sup>84</sup> Moreover, accreditation procedure usually includes monitoring, when the accrediting agency monitors each accredited institution or program throughout the

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<sup>79</sup> Guide 2

<sup>80</sup> See at [http://aplaceofourown.org/question\\_detail.php?id=161](http://aplaceofourown.org/question_detail.php?id=161)

<sup>81</sup> See at [http://aplaceofourown.org/question\\_detail.php?id=161](http://aplaceofourown.org/question_detail.php?id=161)

<sup>82</sup> Mary Eschelbach Hansen; Daniel Pollack, [The Regulation of Intercountry Adoption](#), *Articles Brandeis Law Journal* Fall, 2006, 118.

<sup>83</sup> See [http://tiger.uic.edu/depts/ovcr/research/protocolreview/irb/aahrpp/DOC\\_7.pdf](http://tiger.uic.edu/depts/ovcr/research/protocolreview/irb/aahrpp/DOC_7.pdf)

<sup>84</sup> See e.g. [http://azppse.state.az.us/student\\_info/accreditation.asp](http://azppse.state.az.us/student_info/accreditation.asp)

period of accreditation granted to verify that it continues to meet the agency's standards and improve its quality<sup>85</sup>.

Thus accreditation is more than mere licensing and is designed to assure the quality of adoption agencies to the higher standards. And we think that the Hague Convention should define accreditation and recognize it as the tool of supervision of adoption agencies and assurance of their quality. This would strengthen the position of accreditation among other supervising tools and allow the states to supervise and improve all aspects of adoption agencies' operations, including financial operations.

The meaning and goals of accreditation in intercountry adoption should include supervision over the composition, operation and financial situation of an adoption agency, as well as the continuous monitoring of its quality and assuring its compliance with high standards.

These goals of accreditation may be achieved only in the existence of a corresponding accreditation mechanism that this paper suggests, *i.e.* the Quality Assurance Body and the uniform accreditation procedure. QAB would create high standards and criteria for accreditation, and due to its transparent working procedure and the uniform accreditation procedure QAB would ensure the proper supervision, monitoring of the adoption agencies and assure their quality.

***B. The Convention's failure to assign the accrediting and monitoring body causes unprofessional accreditation and improper supervision of adoption agencies***

The Convention is silent as to the authority that is to issue or withdraw the accreditation. Currently in many states these functions perform the Central Authorities of these states<sup>86</sup>. However, The Explanatory Report<sup>87</sup> provides enlightenment, specifying that it is not necessarily the Central Authority's role: "since accreditation is not a specific task of the Central Authority, it was included neither in

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<sup>85</sup> See e.g. <https://www.google.com/#q=goals+of+accreditation>

<sup>86</sup> Guide to Good Practice No 2, *supra*, note 22, para. 113.

<sup>87</sup> Explanatory Report, *supra*, note 19, para. 245, available at [www.hcch.net](http://www.hcch.net).

Article 7 nor in Articles 8 or 9<sup>88</sup>. The Special Commission of 2000 made a Recommendation that the state should make an official public designation of the authorities competent to grant accreditation, to supervise accredited bodies<sup>89</sup>.

So what is the problem that the Central Authority of a state accredits adoption agencies as it does now in many states? First, when the Central Authority is in charge of accrediting and supervising adoption agencies, it may have a monopoly over intercountry adoptions, because the Central Authority is the key authority that is responsible for all adoption processes and implementing Convention's functions. Due to its role and functions, the Central Authority may be involved in each phase of an adoption process, so it may simply come into agreement about corruption or other illegalities, in a particular phase of an adoption process, with adoption agencies that are accountable before the Central Authority.

Second, since the Convention does not provide an enforcement mechanism for accreditation that would require the Central Authority of each state to be accountable for granting or refusing accreditation, the risk of illegal actions of the Central Authority increases. For instance, the Central Authority of a state, which is not accountable before anyone, may simply "close the eyes" on violations and failures of the adoption agencies, simply because, for example, the Central Authority with adoption agencies are involved in corruption or child-trafficking practice, or the Central Authority does not want to punish its agencies, etc. This may lead to the involvement of improperly accredited and unprofessional agencies in adoption processes and ultimately to violations and abuses.

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<sup>88</sup> Parra-Aranguren G., Explanatory Report to the Convention of 29 May 1993 on Protection of Children and Co-operation in Respect of Intercountry Adoption, in Hague Conference on Private International Law, *Proceedings of the Seventeenth Session (1993)*, Tome II, *Adoption – co-operation*, pages 539-651, paras 242-243, available at [www.hcch.net](http://www.hcch.net).

<sup>89</sup> Report of the 2005 Special Commission, *supra*, note 60, para. 55: the receiving States shared the same practice, *i.e.* that "the accredited body was appointed by a competent authority according to published criteria and supervised by the Central or other government Authority".

To this end a correct criticism in academia was expressed. For instance, some scholars argue that “[a]lthough the Convention has good intentions, it lacks any form of enforcement mechanism to ensure compliance”<sup>90</sup>. This allows each country to police international adoption as it sees fit<sup>91</sup>. In addition, when each country's Central Authority is essentially its own judge, it is highly unlikely to admit to its own faults and failures with regard to international adoption procedures and harmful consequences<sup>92</sup>. Other scholars argue that the governmental system in a country that would allow for child-trafficking or corrupt adoption procedures could simply appoint a corrupt Central Authority that would look the other way or justify such procedures allowing them to continue or expand<sup>93</sup>. Other arguments lead to the conclusion that the Convention lacks the enforcement mechanisms to hold the Central Authorities accountable for their own actions.<sup>94</sup> Since no specific enforcement mechanism is suggested by the Convention, the operation of its functions depends on each member nation's good faith<sup>95</sup>. The system under the Hague Convention allows each country to police its own intercountry adoptions, as was the case prior to the treaty<sup>96</sup>.

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<sup>90</sup> See Id.

<sup>91</sup> See Id.

<sup>92</sup> Notesong Srisopark Thompson, “Hague is enough?: A call for more protective, uniform law guiding international adoptions”, Notes and Comments, Wisconsin International Law Journal, Spring 2004, 466.

<sup>93</sup> Erica Briscoe, “The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption: are its benefits overshadowed by its shortcomings?” Comment, Journal of the American Academy of Matrimonial Lawyers, 2009, 449.

<sup>94</sup> Lindsay K. Carlberg, The Agreement Between the United States and Vietnam Regarding Cooperation on the Adoption of Children: a more effective and efficient solution to the implementation of the Hague Convention on Intercountry Adoption or just another road to nowhere paved with good intentions? Notes, Indiana International & Comparative Law Review, 2007, 134.

<sup>95</sup> See Jennifer M. Lippold, Transnational Adoption from an American Perspective: The Need for Universal Uniformity, Note, Case Western Reserve Journal of International Law Spring/Summer, 1995, 497.

<sup>96</sup> See Rachel J. Wechsler, Giving Every Child a Chance: The Need for Reform and Infrastructure in Intercountry Adoption Policy, Article, Pace International Law Review, Winter 2010, 28.

Third, the Central Authority may lack of adequate human and other resources and professionalism to duly accredit adoption agencies and supervise them as well as create accreditation criteria and procedures. So, this situation may lead to improper accreditation and to the involvement of poor quality adoption agencies into adoption processes.

Thus, we think that the function of accrediting and supervision over adoption agencies should be taken from the Central Authority and be vested to a professional and independent body.

The new proposed body, the QAB, solves this problem, because it would be a professional body possessing adequate human and other required resources for properly accrediting, monitoring and improving the quality of adoption agencies. As opposed to the Central Authority of a state, this body would have no adoption functions; consequently, it would not be involved in actual adoptions with adoption agencies. And finally due to its unique structure, working procedure and the uniform accreditation procedure this body would not only supervise and assure the quality of adoption agencies but also operate accountably and transparently.

***C. The Convention's failure to provide a uniform accreditation procedure causes very diverse accreditation practice that is characterized by inconsistency, unfairness and the improper supervision***

Although the Hague Convention recognizes the accreditation as a Convention safeguard and suggests minimum standards which the adoption agencies must meet, the Convention is either silent or very flexible pertaining to some important issues of accreditation. Instead, the Convention leaves the establishment of accreditation standards and procedures to the discretion of the states. Each state develops its own standards and procedures for accreditation that differ widely from similar regulations of other states. So, the understanding and implementation of Convention's obligations and terminology vary greatly. This diverse accreditation practice creates inconsistency in criteria and procedures of accreditation; in types and levels of supervision over adoption agencies; in quality and professionalism of adoption agencies not only among different states but also within the

same state<sup>97</sup>.

Moreover, this practice may cause a state not to trust the accredited agencies of another state that do not comply with its requirements. In addition, in this confusing situation intercountry adoptions may be not in harmony with the Convention's objectives, and may cause more difficulty and confusion for participants involved in legitimate adoption procedure. Also this situation may lead to improper supervision over adoption agencies and to their poor quality. Ultimately, this may lead to the evils in intercountry adoptions that were described in the real cases mentioned before.

Finally, this situation creates unfairness because in the same adoption process may participate duly and unduly accredited adoption agencies respectively from the sending and receiving states, and although one of agencies is duly accredited and provides quality adoption services, the unduly accredited agency may affect negatively the whole adoption process.

All of the above mentioned justify an urgent need to bring some common or shared understanding to this important aspect of intercountry adoption.

If accreditation criteria are more difficult to unify and require strong consideration of local traditions and needs, accreditation procedure may be successfully unified. The uniform accreditation procedure that this paper suggests is one of the elements of new accreditation mechanism and can work in conjunction with the other elements of the new mechanism of accreditation, *i.e.* within the QAB system. This procedure includes self-study or self-evaluation, on-site evaluation, accreditation, monitoring, and re-evaluation of adoption agencies.

### **III. Proposal. The new accreditation mechanism: definition of accreditation; creation of the Quality Assurance Body, and the introduction of the uniform accreditation procedure**

Pertaining to the current intercountry adoptions, this paper argues the need for recognition of the significant role of accreditation, the need for proper supervision over adoption agencies

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<sup>97</sup> Guide to Good Practice 2, Para 331.

and assuring their quality through the proper accreditation, the need for the new mechanism of accreditation.

Thus, this paper suggests introducing in the Hague Convention the definition of accreditation, the uniform accreditation procedure, and the Quality Assurance Body as the professional accrediting, supervising and quality assurance body.

#### **A. Definition of accreditation**

The definition of accreditation would be: “Accreditation shall mean the recognition by the component authority of the compliance of adoption agencies (their operation, composition, financial situation) and the quality of their services with state standards and criteria”. This would emphasize accreditation as the tool for monitoring, supervising and quality assurance.

“Quality assurance shall mean the continuous process of compliance of adoption agencies and their services quality with state accreditation criteria and with accreditation standards and the improvement thereof”. So, the goal is to gain the maximum benefits from accreditation.

#### **B. QAB as the professional accrediting, supervising and monitoring body: the role and functions**

QAB would be the national body for accrediting, supervising, monitoring and quality assurance that would have adequate resources to properly carry out its functions. Those functions would be: a) to develop accreditation standards and criteria, b) to supervise adoption agencies and accredit them, c) to monitor continuously adoption agencies and improve their quality.

Due to its structure, working procedures and the uniform accreditation procedure, QAB ensures the quality of adoption agencies, their accountability and transparency as well as the transparency of its own operations.

#### **C. QAB’s structure and working procedure as safeguards for transparency and accountability**

QAB would be an independent (from Central Authority) nonprofit organization, which would consist of Executive Director and the Governing Board. The Governing Board would consist of governmental and nongovernmental experts and stakeholders in intercountry adoptions, and also experts from the Hague Conference.

This representativeness of the Governing Board that includes private, public and international experts would ensure the transparency of QAB operations and the objectiveness of QAB decisions. The Governing Board would make decisions on accreditation and other issues pertaining to QAB's functions.

In developing the accreditation criteria and standards, QAB would widely cooperate with the Hague experts and get their substantial assistance. This would ensure the development of high standards and criteria and their compliance with Convention's objectives. And finally QAB would give regular reports to the Hague Conference about its accreditation and the quality assurance practice.

Thus, the structure and working procedure for QAB would ensure the representativeness and transparency of QAB and would also include Hague indirect (through sending experts and also admitting reports from QAB) participation to the accreditation process.

#### **D. The uniform accreditation procedure**

The uniform accreditation procedure would include:

**Self-study:** Adoption agency prepares an in-depth self-evaluation study that measures its performance against the standards established by the accrediting body, the QAB. So, an adoption agency observes its goals and objectives, structure and staff, its activity, achievements and failures, and presents a report.

**On-site Evaluation:** A team of experts selected by the accrediting body visits the adoption agency to determine first-hand if the applicant meets the established standards. So, the experts observe if the information is correct or incorrect, to examine other documents and information, to take surveys. Then make a report and point out the problems, including violations.

**Accreditation:** QAB's Governing Board discusses the report and makes final decision on accreditation, assuring or not the quality of an adoption agency.

**Monitoring:** QAB monitors adoption agencies throughout the period of accreditation granted to verify that it continues to meet the stated standards and assists in improving the quality of adoption agencies.

#### ***D. The strengths and weaknesses of the new mechanism***

##### **Strengths of this solution are:**

- a) Accountability and transparency in adoption agencies' operations and also in their accreditation processes.
- b) Uniformity in the accreditation practice due to the uniform accreditation procedure.
- c) Trust of states to each other pertaining to the adoption agencies which they accredit through the uniform mechanism.
- d) The increased quality of adoption agencies.

##### **Weaknesses of this solution are:**

a) QAB would not work in states where the Central Authority does not delegate its adoption functions to adoption agencies, therefore, does not use adoption agencies. However, considering the roots of Convention that supports the accredited agencies' involvement in adoption processes, maybe it is the time also to require mandatory participation of the accredited adoption agencies in adoption processes. This is question for the future and is beyond of this paper. The other suggestion may be to allow QAB to supervise other public agencies (at least in terms of their financial situation) that would be involved in an adoption process instead of adoption agencies.

b) It may be argued that the QAB system would impose a new financial burden on states. However, this argument seems to be weak, because the accreditation of adoption agencies is a compulsory requirement and Convention's obligation imposed on a state, which uses adoption agencies in its intercountry adoptions. In other words, all states that use adoption agencies are bound by the Convention to accredit adoption agencies. And usually the Central authority of a state accredits the adoption agencies. Thus a state finances accreditation processes within its territory and equips it with human and other resources. And it does not matter the quality of such accreditation, funds are spent on it and they are spent ineffectively. From this point of view, the proposed mechanism seems not to burden the state with a new financial obligation but rather suggest the scheme of effective distribution and use of funds designed by the state for the accreditation of its adoption agencies.

c) The lack of adequate human resources and local quality assurance experts in a state; however the Hague Conference would help with trainings and preparations.

### **Conclusion**

This paper addressed the issues of unprofessional and unethical adoption agencies that are involved in intercountry adoption due to their improper accreditation. Considering on the one hand the critical role of adoption agencies as intermediaries between the prospective adoptive parents, the various players referred to above, the various authorities of the receiving states and states of origin, and the children to be adopted, and the corrupt and abusive practice of such agencies on the other hand, this paper concluded that if we “cure” the “ill” adoption agencies and improve their quality, many problems may be simply eliminated. And the accreditation seems the exact tool that combines elements of supervision, quality assurance and continuous monitoring of adoption agencies.

Thus, by focusing on accreditation and discussing the problems in current accreditation practice and the effects of those problems on intercountry adoptions, this paper emphasized the need for changes in the Hague Convention. Particularly, this paper proposed that the Hague Convention take strict approach to accreditation issues and to provide the definition of accreditation, assign a professional accrediting body and suggest the uniform accreditation procedure. Thus, the new mechanism of accreditation that this paper suggested as a solution for proper accreditation includes amendments to the Hague Convention, which would define the meaning of accreditation by recognizing it as a powerful tool for supervision of adoption agencies and assurance of their quality; introduce the Quality Assurance Body as a professional accrediting body, and provide for a uniform accreditation procedure. These amendments, if made together as a whole, will ensure successful intercountry adoptions.

## CRIMINAL VICTIMIZATION IN THE REPUBLIC OF ARMENIA (ACCORDING TO THE OFFICIAL STATISTICS)

Ara Gabuzyan<sup>1</sup>

Among the criteria for the assessment of criminality's public danger, except for the structure and level of criminality, an essential significance has also the population's victimization<sup>2</sup> level. It allows us to have an understanding about the real "value" of criminality, to assess the population's protection level, the status of the fulfillment of state's obligation concerning human rights and freedoms. Furthermore, the analysis of the population's victimization level, the changes taking place in it and factors which contribute to those changes gives the opportunity to obtain a deep understanding of the victimological factors of certain kinds of criminality and crimes and to process effective means for victimological prevention of criminality on that basis.

Population's victimization level can be analyzed by several indicators: the number of people who are victims of crimes, the rates of victimization, the number of people who are victims of certain crimes, and the rates of victimization, the relevant data<sup>3</sup> regarding the victims of crimes committed by different types of motivation of criminal behavior.

The analysis of the mentioned indicators can be carried out both

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<sup>2</sup> Victimization has two meanings: 1) the process of being victimized from the crime (criminality), 2) the level of population's suffering from crimes, which indicates the real state of the society's criminalization.

<sup>3</sup> Sitkovsky A.L. Analysis of Criminal Victimization in the Russian Federation and the opinion of citizens on personal security. State system of prevention of violations: current state and perspectives of development// Materials of interagency academic-practical conference. Moscow 2007, P. 413. [Ситковский А. Л., Анализ криминальной виктимизации в Российской Федерации и мнения граждан о личной безопасности. Государственная система профилактики правонарушений: современное состояние и перспективы развития //Материалы межведомственной научно-практической конференции. М., 2007, С. 413].

based on the study of the data and the criminal affairs recorded by official statistics and the researches aimed at the discovery of latent criminality.

Therefore, it should be mentioned that the data of official statistics never reflect the reality, because a considerable part of the criminality remains latent, hence the victims stay latent as well. The researches carried out by us allow making a conclusion that the 70%<sup>4</sup> of criminality in Armenia remains latent.

Thus, analyzing the data of the official statistics concerning the population's victimization level, it is possible to have only the approximate image of the population's victimization level. Nevertheless, it is possible to obtain an understanding of the intents of victimization by comparing the data of the official statistics with the development trends of criminality, with the socio-economic, political, legal, ideological, cultural processes taking place in the country.

The analysis of the data obtained from the official statistics of the RA population's victimization level allows us to conclude that there is an upsurge. Thus, if in 2004 the official statistics recorded 2672 people being victims of crimes, in 2005 there were 3119 people, and in 2010 there were 6746 people who became victims. Even though these data concern the cases when the victims are mentioned in official statistics, which can also be a more complete result of presenting data about the victims, nevertheless, considering the increase of criminality's level, it can be confirmed that the number of victims of the recent years is increasing. Moreover, in comparison with 2004, it has increased for 2.5 times<sup>5</sup> in 2010 (see figure 1).

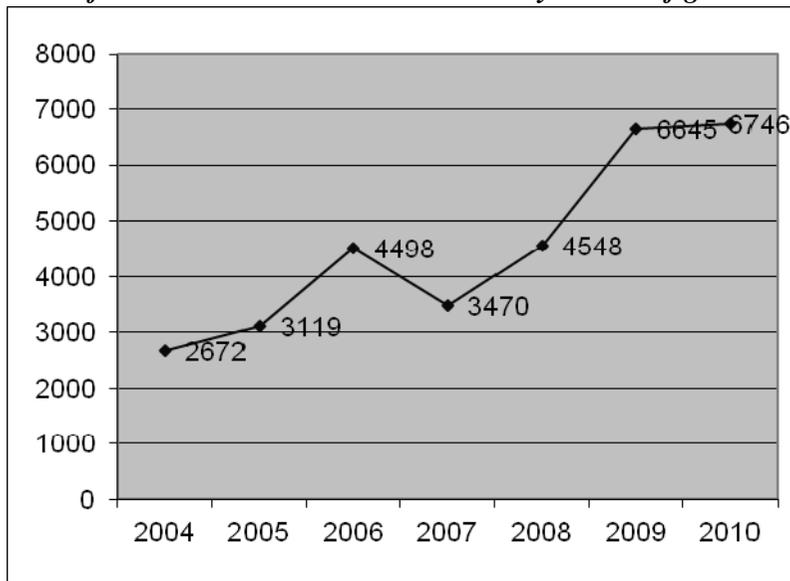
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<sup>4</sup> Gabuzyan A.A. Problems of Crime in the Republic of Armenia in the Transition Period. Yerevan, 2007, P. 14. [Габузян А. А., Проблемы преступности в Республике Армения в переходный период. Ереван, 2007, С. 14].

<sup>5</sup> Taking into consideration the fact that there are no concrete data about the RA population number, we have not counted the victimization level by coefficients. At the same time, as the negative rate of migration has been a subject of discussion of the recent years, therefore, it can be supposed that the level of victimization is actually higher.

Figure 1

*Level of criminal victimization in Armenia by absolute figures*



*An important regularity has to be mentioned: the pace of population's victimization level's increase surpasses the pace of criminality's increase.*

If in 2010 the level of victimization increased for 2.5 times, then the level of criminality of the same year increased for 1.5 times. This circumstance can be assessed as augmentation of the degree of public danger. This means that every year from each crime more people suffer. The main reason of such a situation is the change in the criminality structure.

During the discussed period the specific weight of the crimes against human (person) increased in the structure of criminality. So, in 2010 these crimes, in comparison with 2004, increased by 51.2%.

There has also been recorded an increase of certain types of crimes against public order and property. In particular, the crimes against public security, public order and population's health increased by 52.2%, thefts by approximately 30%, robberies by 47%, and frauds by 30%.

However, during the same period of time some crimes against state power, service and governance order have decreased. Thus, according to the official statistics, in 2009 in comparison with 2008 the cases of corruption decreased by 11,1%, the cases of official authorities' abuse decreased by 21.5%. Furthermore, in recent years a decrease has been noticed in such kind of appropriation, such as embezzlement or defalcation (in 2010 in comparison with 2009 this type of crimes decreased by 23.7%).

Thus, our research also proves the regularity discovered by other specialists, according to which the number of victims is more there, where there is a higher level of such crimes which include a direct contact between the criminal and the victim<sup>6</sup>.

The increase of the number of victims can be conditioned also by the fact that in case of certain types of crime, as a result of the criminal activity of a certain person, there is a big number of people who become victims, whereas due to the legal regulation's particularities of that type of criminal activity, in the official statistics it is reflected as one crime.

In particular, the act of a person, who committed two or more frauds during the discussed period of time, was qualified as a double fraud, which was included in the statistics as one crime, while more than one, even a dozen of persons become victims of a criminal activity.

It is obvious, that along with the increase of the level of fraud, the number of victims also increases; moreover, even a minor increase in the crimes can result in the augmentation of the number of victims for several times. This is proved also by the official statistics data. Thus, during the discussed period of time, the number of victims of frauds surpassed the number of recorded cases by 1.3-2 times. It is approximately the same image for the other crimes.

Very important factors related to the particularities of victimization are the socio-demographic features of the victims of

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<sup>6</sup> Kuri Kh. Development of Crime, Sanctions and positions of the Population./ in "Criminal Law and Crime. Development in Central and Eastern Europe". Bochum, 2004, P. 14. [Кури Х., Развитие преступности, санкции и позиция населения. / В кн.: "Уголовное право и преступность. Развитие в Средней и Восточной Европе". Бохум, 2004, С. 14].

crimes. The discovery of these features will allow carrying out measures aimed at targeted victimological prevention of criminality and its certain types, and augmenting their effectiveness.

The analysis of the mentioned features was carried out on the basis of the statistical data of certain crimes which compose the core of criminality (murder, damage to health, hooliganism, sexual crimes, racketeering, extortion, robbery, theft, fraud).

According to the official statistics, men become victims of crimes more often and their specific weight is 53-54% among the whole mass of victims. At the same time, this correlation among the mass of victims of certain types of crimes is changing.

In particular, according to the official statistics, women more often become victims of crimes such as robbery, sexual crimes, and during certain years also the infliction of willful light damage to health. Thus, women suffer from robberies from two to three times more often than men, from sexual crimes - from five to fifteen times, from infliction of light damage to health - approximately one and a half times.

This kind of situation is conditioned by this or that type of particularity. It is obvious, that, for example, the fact that women more often become victims of robberies is related to the circumstance that they more often wear obviously expensive jewelry, bag, which can be taken just by grabbing.

Furthermore, because of their physical possibilities, women are less able to resist these crimes and in such cases the less probability of possible resistance is one of the essential elements of the motivation of criminal behavior.

What concerns the cases of infliction of light damage to health, then here, in our opinion, it is of essential significance the fact that in recent years due to the activation of feministic movements, women more often inform the law enforcement bodies about cases of domestic violence. However, it should be mentioned, that these official statistics cannot be considered as totally reliable.

The point is that in a lot of cases the victimization of women remains latent, because women are less prone to refer to law enforcement bodies. This regularity was discovered by some

researchers<sup>7</sup>.

One of the criteria of the moral and psychological atmosphere of a society is the attitude towards children, disabled and old people. The official statistics data of the victims of crimes are worrying in this regard. So, in 2010, as compared to 2004, the cases in which the victims are children have increased for one and a half times; moreover, at the same period of time, the number of underage victims who died from crimes rose by 65 %.

According to the official statistics, during the recent years there has been an increase in the number of sexual crimes committed against the underage. In our opinion, this is the result of the increase in strengthening the control over a lot more schools and child institutions and the revelation of the mentioned crimes on its basis.

It is not excluded, however, that because of the ongoing negative moral and psychological phenomena in society, the number of these crimes has indeed augmented. It can be contributed both by the shortcomings taking place in sexual education and the negative influence of the media, as well as the phenomena happening in the microenvironment of the person.

What concerns the disabled, the jobless and the pensioner, then in recent years a decrease of their specific weight among the mass of the victims is noticed. This can be conditioned, in particular, by the decrease of the number of pensioners, the emigration of a considerable part of jobless people as well as by the incomplete official statistics regarding the victims of crimes of the recent years. The point is that the data concerning the victims of crimes are largely absent in the official statistics.

Such situation does not contribute in any way to the real image of criminality, to the revelation of its public danger and, finally, to the development of effective measures aimed to the prevention of criminality. We think that it would be right to impose through administrative methods the law enforcement bodies to reflect in full the possible information concerning victims of crimes in the relevant statistical cards. However, even if the data of the official statistics

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<sup>7</sup> Vishnevskiy K.V. Criminological Victimization of Social Groups in the Contemporary Society. M., 2010, P. 86. [Вишневецкий К. В., Криминогенная виктимизация социальных групп в современном обществе. М., 2010, С. 86].

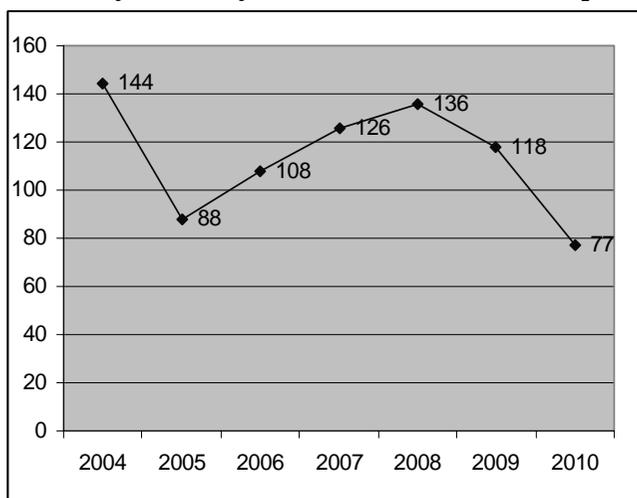
reflect the reality, nevertheless, it should be taken into account that pensioners and old people are an even more vulnerable group just for the reason that they easily become victims of crimes and suffer more harms due to their physical, health state and often because of their social isolation; hence, a special attention should be drawn to this social stratum.

In recent years, there has been an increase in the number of foreigners within the victims of crimes. Thus, if in 2004, there were 57 cases recorded where the victims were foreigners, in 2010 the number has already reached to 136 cases. It is obvious that along with extending the interstate relations and the globalization, it can be expected to note an increase of crimes against foreigners. In our opinion, these tendencies should become the basis of the development of a new direction of realizing victimological prevention measures.

Let us refer to the tendencies of victimization of certain types of crimes. The official statistics shows that in recent years there is a decline in the number of victims of murders and murder attempts (see figure 2).

Figure 2

*Number of victims of murders and murder attempts by years*



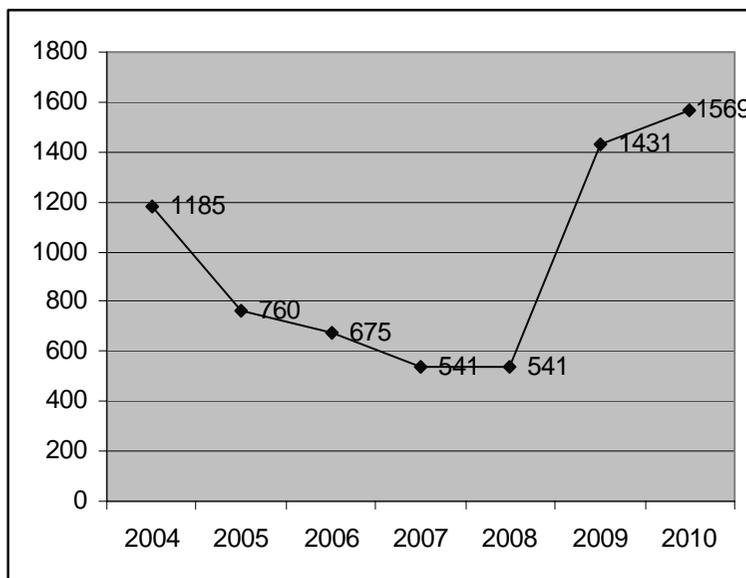
As it can be seen from the figure, as compared to 2004, in 2010 the number of victims of murders and murder attempts is two times less. Hence, it is highly important to reveal the intents of the victimization of crimes which are being committed by violent-aggressive motivation. That is why, besides murder we have chosen the most spread crimes which are being committed by violent-aggressive motivation: inflicting willful severe, medium or light damage to health, rape, violent sexual actions, hooliganism.

What concerns the sexual crimes, it must be mentioned that the number of their victims is small: 22-33 victims. Of course, we should take into account also the latency of these crimes.

Unlike sexual crimes, the victimization of inflicting damage to health displays a tendency of upsurge, which can be seen in the following figure.

Figure 3

***Number of victims of cases of inflicting damage to health***



However, it should be mentioned that the intent of this increase has happened mainly to the expense of the cases of inflicting light damage to health. It can be supposed that either the cases of inflicting willful severe and medium damage to health have actually decreased, or the problem is in recording the crimes.

Against the background of the diminution of murders, the decrease of the cases of inflicting willful severe and medium damage to health seems to be real. At the same time, there are some grounds to suppose that the official statistics does not totally give the objective image.

In particular, one of the indicators of the latency of murders is the number of the missing. It should be mentioned that in 2008 and 2009 their number augmented in some extent, and in 2010 it decreased. But the problem is that each year the number of the found missing people composes almost the half of the missing.<sup>8</sup> That is to say, the fate of 50% of the missing remains unknown.

The studies show that the victims of murders account for a certain percentage of the missing. Thus, in 1999 in two of criminal cases filed in connection with missing it was revealed that the missing person became a victim of murder, and in the other cases, the circumstances of people's missing were not revealed because of the absence of a complete and thorough examination<sup>9</sup>.

What concerns inflicting severe damage to health, the augmentation of the level of its latency can indirectly prove the official statistics about the dead from crimes, accidents, poisonings and injuries.

So, in 2010, in comparison with 2004, the number of the dead from crimes has increased by 7.1%, and the number of the dead from accidents, poisonings and injuries by 20.5%. While at the same

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<sup>8</sup> "Information materials of the Police of the Republic of Armenia" Yerevan, 2010. [«ՀՀ ոստիկանության ինֆորմացիոն-տեղեկատվական նյութեր», Երևան, 2010թ].

<sup>9</sup> Minutes of the Sitting No 4 of 25 May 1999 of the General Prosecutor's Office of the Republic of Armenia.

period of time, the cases of inflicting willful severe damage to health were decreased by 20%. Of course, it must not be stated that these tendencies prove the augmentation of the level of latency in the cases of inflicting severe damage to health. But such hypothesis has the right to existence, even more if we take into account the fact that in the recent years, according to the official statistics, there is also a diminution of the number of the traffic accidents with lethal outcome, which allows to suppose that the recorded upsurge of the dead from accidents, poisonings and injuries, according to official statistics, indirectly proves the increase in the level of latency in inflicting severe damage to health.

The decrease of this type of crime and the increase of the level of latency can be conditioned also by the errors in the qualification of the acts, when infliction of severe damage to health is qualified as infliction of severe damage by negligence. Furthermore, in recent years an unprecedented growth of suicides is noticed in the Republic of Armenia. This means that the level of violence and aggression has not decreased in the republic. The indirect proofs of this can be the rates of hooliganism and assaults. Though the latter is considered as a crime with violent-mercenary motives, nevertheless, it is also a particular display of violent-aggressive motives.

What concerns hooliganism, it must be said that according to the official statistics, its dynamics is saw-shaped: the upsurge of some years is followed by a decline, then again by a further upsurge.

Thus, as compared with 2006, in 2007 the number of victims of hooliganism decreased by 83; as compared with 2007, it increased by 24 in 2008; as compared with 2008, it decreased by 21 in 2009; and as compared with 2009, it increased by 38 in 2010. Almost the same image belongs to the cases of assaults. Moreover, in 2007, in comparison with 2008 and 2009, an increase of two more times was recorded, and in 2010 there was a certain decrease.

Taking into consideration some negative socio-psychological factors (in particular, economic crisis, some political processes related to polls) taking place in the republic, it is possible to foresee that the dynamics of the crimes committed by violent-aggressive

motives and their victimization will be unfavorable also in the future, with the tendencies of decreasing in some years.

The analysis of some particularities reflected in the official statistics of the victims of crimes accompanied by violence allowed us to reveal the following regularities.

As it was expected, the victims of racketeering and hooliganism, in particular, more often become men. With the exception of certain years, we have the same image also for the victims of murders, inflicting damage to health and extortions. There is also a big number of unemployed and pensioners who are among the victims of inflicting damage to health. This can be explained by the mentioned people's social state and by the tension of interpersonal and interfamily relations which arise from their social state.

The biggest specific weight within the structure of criminality belongs to the crimes which are being committed by mercenary motives. In all the countries of the world, including in the Republic of Armenia, the crimes committed by mercenary motives account for 70-90%.

And though the mercenary criminality, not accompanied by violation, has a relatively less dangerous nature, nevertheless, the material and moral damage caused by it is quite considerable. Mercenary criminality (especially the corruption criminality) can disorganize the activity of state bodies, contribute to the formation of organized crime and shady economy, break the development of economy, lead to a decline in the population's standard of living, to deformation of the moral and psychological atmosphere and, finally, threaten the national security. Hence, the revelation of particularities of victimization of these crimes is crucial.

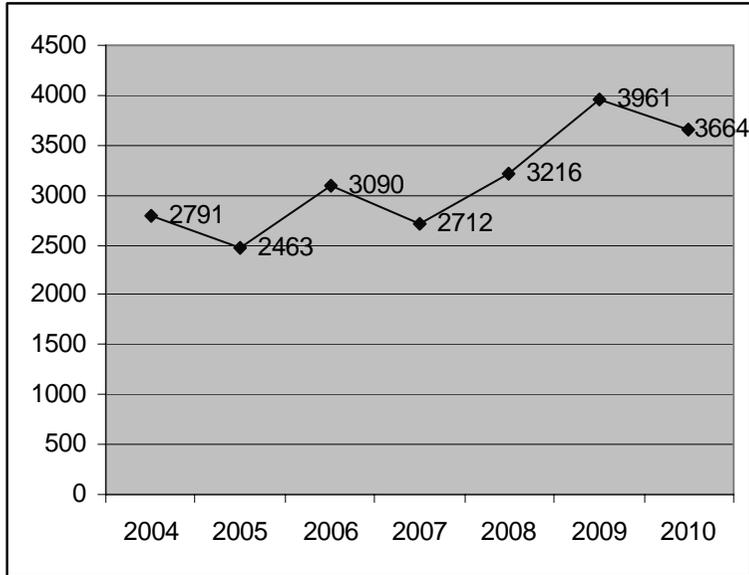
In order to reveal the victimization tendencies of the crimes which are being committed for mercenary purposes, let us analyze the most widespread crimes: theft, robbery, fraud.

As there are a lot of cases when the victims of the above mentioned crimes are not indicated in the official statistics, we have carried out the analysis of the tendencies of crimes' victimization on the basis of the dynamics reflected in the official statistics.

You can see the dynamics of thefts committed during the discussed period of time in the figure below.

Figure 4

*Dynamics of thefts by absolute figures*



The tendency of the upsurge of thefts during the discussed period of time is obvious. Naturally, the level of victimization also rises. Moreover, the slight decrease recorded in the last year cannot be considered essential and cannot affect the general mark of the dynamics of thefts and the crimes committed by mercenary motives, because the slight decrease of thefts in 2010 is accompanied with the increase of frauds, which can be seen in the figure.

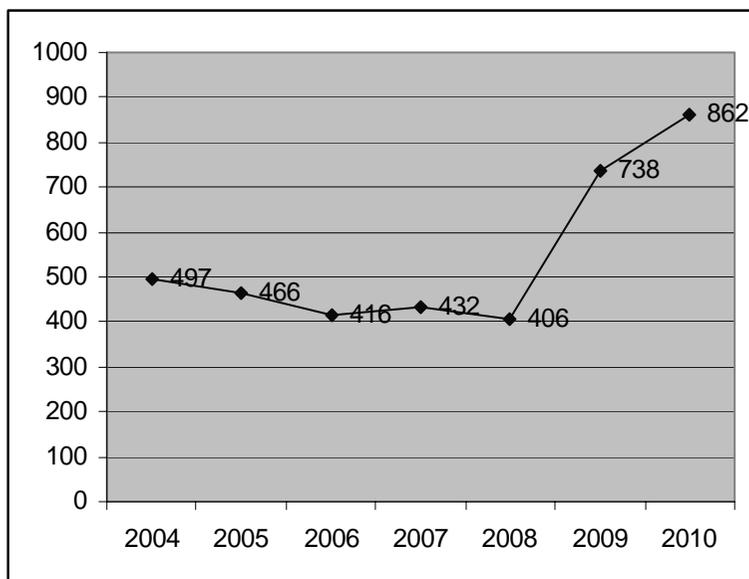
The same situation is recorded in the Russian Federation<sup>10</sup>. This

<sup>10</sup> Sitkovsky A.L. Analysis of Criminal Victimization in the Russian Federation and the opinion of citizens on personal security. State system of prevention of violations: current state and perspectives of development// Materials of interagency academic-practical conference. Moscow 2007, pp. 417-418. [Ситковский А. Л. Анализ криминальной виктимизации в Российской Федерации и мнения граждан о личной безопасности.

is conditioned by a number of circumstances: growth of competition between the number of commercial organizations and economic entities, increase in the number of financial-economic bargains, increase of the probability of bankruptcy, economic crisis, etc. Taking into account the probability of deepening of the mentioned phenomena, it can be supposed that growth of frauds must also be expected in future.

Figure 5.

*Dynamics of frauds by absolute figures*



If we add to the above mentioned also the fact that in recent years the official statistics records also an upsurge<sup>11</sup> of corruption crimes, it will be clear that in the republic there is an increase in the

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Государственная система профилактики правонарушений: современное состояние и перспективы развития //Материалы межведомственной научно-практической конференции. М., 2007 pp. 417-418].

<sup>11</sup> See the socio-economic state of the RA in 2009 and 2010, January-December [www.armstat.am](http://www.armstat.am)

level of victimization of such crimes which are taking place with mercenary motives.

The particularities of victims of the discussed crimes are also of big interest. According to the official statistics, both the victims of the thefts and frauds are more often the jobless and the pensioners. Moreover, the specific weight of the jobless is bigger in the cases of frauds. This can be explained by the psychological state of the jobless, who quite often have the feeling of impasse and try to do everything possible to get out of that state and do such bargains which fraudsters use in their favor.

The above mentioned allows concluding that the level of criminal victimization in the Republic of Armenia displays a tendency of a stable growth. This is contributed not only by some traditional factors stimulating the increase of criminality such as the socio-economic polarization, the unemployment, the poorness, the deformation of the moral and psychological atmosphere, the cultural and legal factors, but also some shortcomings of preventing the criminality and its certain types, including the sphere of victimological prevention.

It should be mentioned that in the republic proper attention is not being drawn to this problem: the level of victimological knowledge of the population is low, and though the state bodies which carry out the problem of the prevention of criminality have already started taking some measures towards it, however the latter does not have a systematized nature.

Furthermore, the researches aimed at the revelation of the victimological problems of criminality are few (in the recent years just one comprehensive research was carried out)<sup>12</sup> which could contribute to the effectiveness of the victimological prevention.

In our opinion, special attention should be drawn to the victimological prevention of criminality and its certain types, which

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<sup>12</sup> Margaryan A.R. The Fear Against Crime and Victimization in Armenia, "Bulletin of Yerevan University, Jurisprudence", #135.3, 2011, pp.19-41. [Մարգարյան Ա. Ռ., Հանցավորության նկատմամբ վախը և վիկտիմիզացիան Հայաստանի Հանրապետությունում, «Բանբեր Երևանի Համալսարանի, Իրավագիտություն», թիվ 135.3, 2011, էջ 19-41]

should represent a system of state and social measures aimed at the decrease of the risk of population and its certain persons of becoming victims of crimes. And, in order to achieve this result, it is necessary to carry out deep scientific researches in view of identifying the victimological problems of criminality and, on this basis, developing and realizing certain measures aimed at the victimological prevention and raising the level of the population's victimological knowledge.

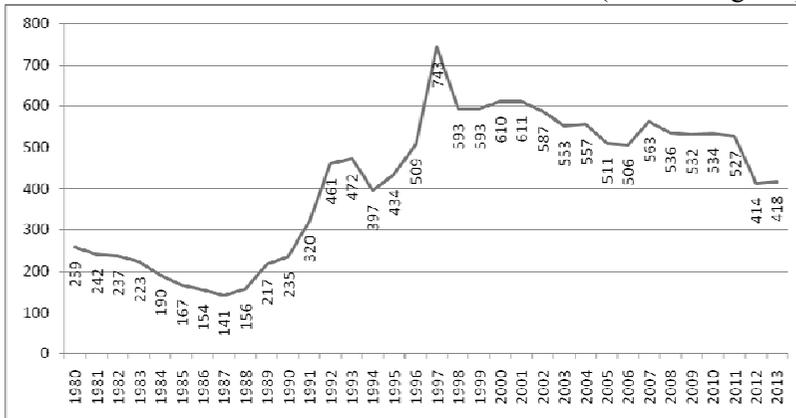
# JUVENILE DELINQUENCY IN ARMENIA

Anna Margaryan<sup>1</sup>

Juvenile delinquency and criminal behavior are one of the most debated issues both in criminal law theory and practice. The level of juvenile delinquency varies across the societies and states however its perception as one of the most serious social problems remains almost the same regardless to the social-economical welfare of a state. Though states adopt different approach and penal policy in regard to the juvenile criminal behavior, the main task set by the states is the prevention of the juvenile's criminal career through the neutralization or elimination of the factors leading to deviancy and delinquency.

Traditionally, the level of juvenile delinquency in Armenia has been low and hasn't caused serious concerns in the society. However, according to the official crime statistics, in the recent years the absolute numbers of juvenile crimes have increased significantly when compared to 1980.<sup>2</sup>

Picture 1. Officially registered juvenile crime in Armenia, 1980-2013 (absolute figures)

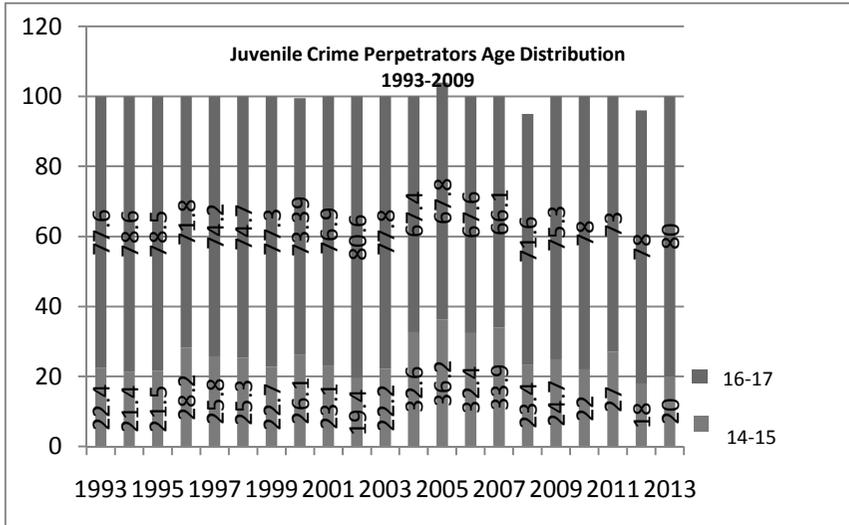


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<sup>2</sup> Information Centre of RA Police.

The increase of the juvenile crime<sup>3</sup> was accompanied by the structural changes of the juvenile criminality. When compared to 1990-ies, criminal activation of the juveniles of the younger ages is observed. In 1993 only 22.4% of the juvenile crime perpetrators were aged 14-15, while in 2005 –36.2% and in 2013- 25.7%.

Picture 2. Age distribution of juvenile crime perpetrators, 1993-2013



According to official statistics, juveniles were responsible for 3.3% of all crimes known to the police in 1993, and 5.5% in 2004. Typical offences committed by juveniles in Armenia are thefts, hooliganism, assaults and group fights. Fights among groups of juveniles are rather common, but rarely registered in official statistics, as are offences committed by juveniles in general. The Armenian society has lenient attitude towards juveniles and they are being brought to criminal responsibility only in rare cases.

<sup>3</sup> The age of Criminal responsibility in Armenia is 16. However, juveniles aged 14 can be held responsible for such offences as theft, robbery, hooliganism, homicide, rape, serious assault, extortion.

In this aspect rather interesting are the results of ISRD-2 study conducted in Armenia. The results of the mentioned study show that theft and assault are the most often experienced by Armenian juveniles. Although theft and robbery are less common than in most Western societies, probably due to a less “favorable” opportunity structure, assault is rather frequent, even more so than bullying. It could seem strange that students reported more often becoming victims of assault than of bullying. This may be related to the characteristics of Armenian machismo. Solving the interpersonal problems using violence is part of a “behavioural stereotype” for juveniles, especially for males

**Table 1: Last year prevalence of victimization and reporting to the police (in %)**

	victimization		reporting to the police <sup>a</sup>
	%	% missing	%
robbery/extortion	1.1	0.4	4.3
assault	4.6	0.5	6.3
Theft	9.0	0.5	3.7
Bullying	2.6	0.6	1.9

Unweighted n = 2099; percentages based on valid cases

<sup>a</sup> percentage based on number of victims

As to self-reported delinquency, the most often admitted offences are: group fighting, carrying a weapon, vandalism, computer hacking, assault and shoplifting.

**Table 2: Life-time and last year prevalence of offences (in %)**

Offences	life time		last year <sup>a</sup>	
	%	% missing	%	% missing
Group fight	23.5	3.3	18.4	4.0
Carrying a weapon	9.5	3.3	5.8	3.4
Assault	2.7	3.3	1.4	3.4
Pick pocketing/snatching	0.5	3.2	0.0	3.3
Robbery/extortion	0.5	3.2	0.4	3.2
Vandalism	8.3	2.9	3.3	3.0
Shoplifting	2.1	2.9	0.5	2.9
Bicycle/motor bike theft	0.5	3.0	0.2	3.0
Car break	0.7	3.2	0.3	3.2
Burglary	0.5	3.0	0.2	3.0
Car theft	0.5	3.0	0.3	3.1
Computer hacking	4.0	3.2	2.8	3.2
Drug dealing	0.2	3.4	0.1	3.4
XTC/speed use	0.1	2.9	0.0	2.9
LSD/heroin/cocaine use	0.2	2.9	0.1	2.9

Unweighted n = 2099; percentages based on valid cases

<sup>a</sup> XTC/speed and LSD/heroin/cocaine use: last month prevalence

Overall, Armenian juveniles are committing violent offences at rates that are comparable or higher than in Western countries, but property and drug offences are extremely rare, obviously reflecting different opportunity structures. The same explanation applies to the relatively low rate of hacking.

Table 3 aggregates several offences into larger categories: frequent violent offences, rare violent offences, rare property offences and hard drug use.

**Table 3: Life-time and last month prevalence of aggregated offences (in %)**

Offences	life-time		last year <sup>a</sup>	
	%	% missing	%	% missing
frequent violent offences <sup>b</sup>	25.8	3.2	19.7	3.3
rare violent offences <sup>c</sup>	3.3	3.2	1.7	3.2
vandalism	8.3	2.9	3.3	3.0
shoplifting	2.1	2.9	0.5	2.9
rare property offences <sup>d</sup>	1.8	3.0	0.9	3.0
computer hacking	4.0	3.2	2.8	3.2
drug dealing	0.2	3.4	0.1	3.4
hard drugs use <sup>e</sup>	0.3	2.9	0.1	2.9

Unweighted n = 2099; percentages based on valid cases

<sup>a</sup> hard drug use: last month prevalence

<sup>b</sup> group fight and carrying a weapon

<sup>c</sup> pick pocketing/snatching, robbery/extortion, and assault

<sup>d</sup> burglary, bicycle/motor bike theft, car theft, and car break

<sup>e</sup> XTC/speed and LSD/heroin/cocaine use

According to ISRD-2 results, boys committed almost all types of offences significantly more often than girls. This can be explained by more severe social control towards girls than boys. What is restricted for girls often is allowed to boys. Girls are taught that their most important role in the society is the role of mother, wife, housekeeper, while boys are expected to be more independent, and to be able to take care of themselves and their family, even with the use of force. Perhaps that is why boys are more frequently involved in violent behaviour than girls.

**Table 4: Gender and last year prevalence of offences (in %)**

Offences	Female (n =1108)	Male (n=895)	
Group fight	2.8	37.3	**
Carrying a weapon	1.4	11.1	**
Assault	0.0	3.2	**
Pick pocketing/snatching	0.0	0.1	**
Robbery/extortion	0.0	1.0	**
Vandalism	0.3	6.4	**
Shoplifting	0.1	1.1	**
Bicycle/motor bike theft	0.0	0.4	**
Car break	0.2	0.5	**
Burglary	0.0	0.4	**
Car theft	0.0	0.8	**
Computer hacking	0.9	5.0	**
Drug dealing	0.0	0.3	*
XTC/speed use	0.0	0.1	Ns
LSD/heroin/cocaine use	0.1	0.1	Ns

Percentages based on valid cases, \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

As to victimization, females and males have almost identical victimization rates for theft, robbery and bullying. At the same time boys become victims of assault more frequently than girls. This can be explained by the fact that the perpetrators of this offence are mainly males and they think that it is beneath of their dignity to commit violence towards a female.

**Table 4: Gender and last year prevalence of victimization (in %)**

	Female (n =1112)	Male (n=982)	
robbery/ext.	1.0	1.2	Ns
Assault	3.5	5.8	*
Theft	9.8	8.0	Ns
Bullying	2.8	2.4	Ns

Percentages based on valid cases, , \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

When coming to the deviant behaviour of victims, rather interesting is the factor of alcohol and drug consumption among the juveniles. According to the law of Republic of Armenia on Children's rights, no child under the age of 18 can be offered or sold any alcoholic beverages. Moreover, any person above the age of 18 who induces a child to regular use of alcoholic drinks, strong or other narcotic drugs not for medical purpose, is punished with a fine or with custody of up to 5 years (article 166 of the Armenian Criminal Code). Strong alcohol (except of cognac) advertising is entirely prohibited on television and radio, whereas in newspapers, such advertisements cannot be placed on the first and last pages.

In reality, however, Armenian juveniles have no difficulty with getting alcohol. Armenia is a country producing wine and cognac. Traditionally juveniles are allowed to taste small quantities of alcohol (wine, liqueur, rarely – cognac or vodka) during celebrations or other special events. However, due to moderate consumption of alcoholic beverages, drinking has never been treated as a social problem either for adults or for juveniles. That is why Armenians are rather tolerant to alcohol consumption.

The situation is different, however, with respect to drugs. Armenia's policy on trafficking and use of the narcotic drugs is extremely harsh. Severe criminal punishments are provided for illegal use, manufacture, processing, procurement, keeping, trafficking or supplying of narcotic drugs or psychotropic materials. More important, however, may be the fact that Armenia lives in isolation from the outside world. It has relatively open borders with Georgia (and, indirectly, Russia) only, whereas the borders with Turkey and Azerbaijan are hermetically closed and controlled by Armenian and Russian troupes. The Iranian border is open now to some extent, although still heavily controlled, but used to be entirely closed over many years. This may explain why importation of drugs into Armenia remained at a marginal level at best, despite the fact that its neighbors Iran and Turkey are experiencing extended drug trafficking. This has kept drug consumption and drug related crimes at a very low level. In turn, the absence of consumers and, therefore, of any significant demand for drugs has probably also slowed down

initiatives to develop importation. However, according to official statistics, drug use seems to have increased during the last years. From 2003 to 2013, for example, cases of drug related crimes known to the police have doubled, from 346 to 1139. It remains to be seen whether reduced restrictions on transborder mobility will ultimately change that picture in the next years.

The results of the Armenian ISRD-2 survey showed that almost two out of three surveyed juveniles already consumed beer or wine in their life, and one out of 6 strong spirits.

**Table 5: Life-Time and last month prevalence of alcohol and soft drug use (in %)**

	life-time		last month	
	%	% missing	%	% missing
beer/wine	66.3	2.4	23.4	2.9
strong spirits	18.1	2.7	5.8	2.8
marijuana, hashish use	1.4	2.6	0.5	2.6

Unweighted n = 2099; percentages based on valid cases

Unlike to Russia, Armenia has never experienced high level of strong spirits consumption among adults or juveniles. Alcoholism has never been a major problem for Armenian society. Juveniles can use small quantities of alcohol, mostly wine, during social events and usually in the presence of their parents. Strong spirits are not popular even among adults.

In contrast to the high level of alcohol consumption, using drugs is very uncommon among Armenian juveniles. Marijuana (hashish) was used by 1.4% only, ecstasy by 0.1%, heroin, cocaine, and LSD by 0.2% of the respondents. Only 0.2% of the respondents reported selling or intermediating drugs. Despite the common border with Iran and Turkey (two countries experiencing extended drug trafficking), the country's relative isolation<sup>4</sup> during the last 20 years may have prevented drugs from spreading into Armenia and the emergence of a significant drug market there.

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<sup>4</sup> See details under 1.2.

**Table 6: Life-time and last month prevalence of risk factors (in %)**

	life-time		last month <sup>a</sup>	
	%	% missing	%	% missing
Alcohol total <sup>b</sup>	66.9	2.4	24.4	2.5
marijuana, hashish use	1.4	2.6	0.5	2.6
Truancy	-	-	61.7	0.7
two risk factors present	-	-	18.5	2.5

Unweighted n = 2099; percentages based on valid cases

<sup>a</sup> Truancy refers to the last year, whereas alcohol and drug use have been asked for the last month.

<sup>b</sup> beer/wine and strong spirits

<sup>c</sup> "risk" assesses whether at least two of the following three behaviours have been reported: (1) Having drunken beer/wine or strong spirits at least once during the last month, (2) having used marijuana/hashish at least once during the last month, and (3) being truant at least once during the last year.

Alcohol consumption and hashish use is more frequent among male respondents. Hard drug use rates are very low and are almost the same for both sexes.

**Table 7: Gender and last month prevalence of alcohol and drug use (in %)**

	Female (n =1117)	Male (n =989)	
Beer/wine consumption	17.5	30.0	**
Spirits use	1.5	10.8	**
Marijuana, hashish use	0.1	1.1	**
XTC use	0.0	0.1	Ns
LSD/Heroine/Cocaine use	0.1	0.1	Ns

Percentages based on valid cases, \* p≤0.05, \*\* p≤0.01,\*\*\* p≤0.001

It is evident, that truancy is very common among Armenian juveniles. According to ISRD-2 results, 62% of juveniles reported having missed one entire school day at least once during the last year.

**Table 8: Truancy and last month prevalence of alcohol use (in %)**

	Yes (n=924)	No (n=423)	
Beer/wine consumption	28.0	14.5	***
Spirits use	8.0	1.9	**

Percentages based on valid cases, \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

The results show that juveniles who were absent for one day at least, use twice more often beer/wine, and even four times more often spirits than other adolescents. With delinquency, the situation is almost the same, truants offending three to four times more often than those who have never missed classes. More time spent outdoors obviously increases the risk of offending. Truancy may also go along with increased presence in Internet clubs that became very popular in Armenia during the last 10 years.

**Table 9: Truancy and last year prevalence of offences (in %)**

Offences	Yes (n=924)	No (n=423)	
Group fight	24.0	7.8	***
Carrying a weapon	8.0	1.8	***
Assault	1.8	0.8	Ns
Vandalism	4.7	0.9	***
Computer hacking	3.6	1.3	***

Percentages based on valid cases, \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

Contrary to offending, truants do not experience victimizations more often than other juveniles, with the only possible exception of theft (where the difference, however, is not significant).

It has been often shown that truancy is correlated with delinquency, either as a symptom of weak social bonds (Gottfredson & Hirschi, 1990) or because it offers more time for more deviant activities (Felson 2002). That these correlations hold even in such

different a context as Armenia is noteworthy, particularly if we take into account that truancy is, as stated in the paragraph on response rates (2.3), to some extent related to taking private lessons rather than just hanging around. On the other hand, it seems that partially “justified” truancy by 9<sup>th</sup> graders offers a legitimate excuse to younger students as well. There even is some social pressure on “conformist” students to skip school as well in order to remain accepted in their class. Even if we consider private lessons, truancy is, thus, far more frequent in Armenia than in other countries.

In order to understand juvenile delinquency, it is necessary to discuss also the issues of social bonds, especially with the family, friends, neighbourhood.

Many studies (Antonyan Yu., Enikeev M, Eminov V., 1996; Antonyan Yu. 1995; Antonyan Yu, Kudryavcev V, Eminov V 2004, Bartol C. 2004) have found that stronger relationships with parents go along with lower rates of juvenile delinquency. In Armenia and according to our results, good relationships with parents are common among juveniles: 86% of the respondents reported having very good relationships with their father, and the same percentage said their relationship with their mother to be very good. Just 0.3% said the relationships with their father to be “bad”, and only 0.2% said being on “bad” terms with their mother. Among the respondents, 82% said having dinner with their parents daily, and 77% spend leisure with their parents at least once a week.

Parents of 74% of the respondents always know the friends with whom they spend time, and only 3% never do so. Parents of 90% of the respondents insist on their children to be back at home at a certain hour, and 74% said to respect always that limit. This conformity of children is typical for Armenian society, where the family ranks among the most important values. Parents live not for themselves, but for the children. Everything is done to protect the child, and to satisfy his/her needs. At the same time, children are being taught from early childhood to respect their parents and elderly people, and to obey to whatever their parents tell them to do. The following Table shows that parental supervision is a very powerful variable in explaining delinquency, problem behaviour and victimization.

**Table 10: Parental supervision and delinquency, alcohol use and victimization (in %)<sup>56</sup>**

Offences	Parents know friends			Parents tell time		
	Always (n=1530)	Never (n=67)		Yes (n=1200)	No (n=128)	
Group fight	11.2	41.8	***	23.8	32.0	*
Carrying a weapon	3.2	20.9	***	7.1	14.1	**
Assault	1.0	8.9	***	1.9	1.6	Ns
Computer hacking	1.8	8.9	***	3.3	6.3	Ns
Beer/wine consumption	18.4	38.9	***	25.8	32.8	Ns
Spirits use	3.2	22.4	***	6.9	14.1	Ns
Victimization of assault	3.9	11.9	**	5.5	21.4	Ns

Percentages based on valid cases, \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

According to the Armenian ISRD-2 study, 74% of the respondents reported that they like school, whereas the others have a weaker attachment to the school.

**Table 11: Attachment to school and alcohol use and delinquency (in %)<sup>7</sup>**

	Strong attachment (n=1559)	Weak attachment (n=536)	
Beer/wine consumption	19.9	31.3	***
Spirits use	3.6	11.6	***
Group fight	14.0	28.5	***
Carrying a weapon	4.1	9.9	***

Percentages based on valid cases, \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

<sup>5</sup> The results of ISRD-2 study in Armenia.

<sup>6</sup> The rates of delinquency and victimization refer to the last year, whereas the rates of alcohol use refer to the last month.

<sup>7</sup> The rates of delinquency refer to the last year, whereas the rates of alcohol use refer to the last month.

It is evident, that juveniles with little school attachment use alcohol including spirits far more often than those who like school. They also commit offences, such as group fights and carrying a weapon, about twice as often. With respect to other offences and victimization, the differences are small or hard to interpret, given low cell frequencies.

Overall, 56% of ISRD-2 survey respondents reported that they spend leisure-time with a group of friends. 8.1 % (171 students) said they belong to a group that is accepting illegal things to be done, and 6% (123 students) admit their group is doing illegal things. Only 1.5% (31 students) described their group of friends to be a “gang”.

**Table 12: Group characteristics and last year prevalence of victimization, alcohol/drug use and delinquency (in %)**

	Illegal things accepted			Illegal things being done		
	Yes (n=171)	No (n=1017)		Yes (n=123)	No (n=1066)	
Experiencing an Assault	7.1	3.8	Ns	9.0	3.8	**
Beer/wine consumption	44.4	26.5	***	48.4	26.8	***
Spirits use	17.2	6.5	***	21.3	6.5	***
Marijuana, hashish use	1.8	0.6	Ns	3.3	0.5	*
Group fight	43.2	18.7	***	51.6	18.8	***
Carrying a weapon	20.7	5.6	***	24.6	5.8	***
Assault	6.5	1.2	***	9.0	1.1	***
Robbery/extortion	3.0	0.2	***	4.1	0.2	***
Vandalism	12.4	3.3	***	17.2	3.1	***
Computer hacking	7.7	3.3	**	10.7	3.1	***

Percentages based on valid cases, \*  $p \leq 0.05$ , \*\*  $p \leq 0.01$ , \*\*\*  $p \leq 0.001$

Juveniles belonging to groups that engage, from time to time, in illegal activities, or that at least accept such activities by its members, have substantially higher risks of being victims of assault. They also use far more alcohol (especially spirits) and marijuana/hashish, and commit all sorts of offences, including violent and property offences<sup>8</sup> and computer hacking, far more often than other respondents.

In sum, belonging to a group where delinquency is accepted and acceptable goes along with higher rates of delinquency, victimization and problem behaviour. It is noteworthy that this correlation, first observed by Sutherland and Cressey (1978) and other writers of classical criminology hold in remote a country as Armenia.

The ISRD-2 results showed that delinquent behaviour is connected to several family, school, peer and neighbourhood related social variables. However the most significant factors were neighbourhood problems, while gender, truancy and school attachment have an impact depending on the type of offence.

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<sup>8</sup> Not shown due to low cell frequencies

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## BASES FOR EXEMPTION FROM PROOF IN CIVIL PROCEDURE

Sergey Meghryan<sup>1</sup>

Some facts which have certain significance for the examination of the case and for its solution with the direct indication of law are not included in the subject of proof, are not examined during the trial and cannot be denied. Those facts are considered as truth which has no need to be proved.

The grounds for exemption from proving are envisaged in the Article 52 of the Civil Procedure Code titled as “Grounds for being exempt from proving”. There are two types of circumstances envisaged by law, which do not need to be proved:

1) notorious circumstances (from Latin term “factum notorium” which means a well-known fact if translated),

2) prejudicial facts (from Latin term “praejudicium” which means pre-determined, preceding judgment).

**Notorious circumstances:** Though the law does not directly mention about it (while it must have mentioned), taking into account the circumstance that the subject of proving is determined by the court, it can be concluded that the right to recognize this or that circumstance as notorious, belongs to the court. The person who participates in the case is entitled to object both the existence and the notoriety of the fact presenting his or her position regarding it; however, in any case, the matter<sup>2</sup> of the fact’s notoriety determines the court.

The Civil Procedure Code does not define the criteria of the notoriety which, in our opinion, creates legal uncertainty and can be

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<sup>2</sup> Fursov D.A., Kharlamova I.V. Theory of Justice. Part 2: Civil Litigation as a Form of Justic. Moscow, 2009, p. 343. [Теория правосудия. В 3-х томах. **Фурсов Д.А., Харламова И.В.**, Т. 2: Гражданское судопроизводство как форма отправления правосудия. – М.: «Статут», 2009, page 343].

a reason for controversy in practice. We believe that it would be appropriate to determine by law that the facts can be recognized by court as notorious and not be included in the subject of proving only in case of the existence of the following three criteria:

- a) it is well-known to the court which examines the case,
- b) by the inner conviction of the court, it is well-known or should be well-known for a wide scope of people (for the majority of the population of Armenia or the judicial territory), including the persons who participate in the case, and
- c) credible information about those facts can be received from public sources (from encyclopedias, official publications, periodicals, etc.).

If the mentioned criteria exist at the same time, any circumstance which can have significance for the solution of the case, can be recognized as notorious. While recognizing the fact as notorious, in essence, the court relies on<sup>3</sup> the experience of justice.

According to L. E. Vladimirov's opinion, this or that circumstance can be recognized as notorious if it has been recognized so by<sup>4</sup> all the persons participating in the case. Such position does not seem justified. As the person participating in the case can object the notoriety of the fact so as not to lose the case, with the intent of delaying the procedure or for other motives. Hence, in our opinion, the application of the above mentioned criteria should be considered enough. Furthermore, in certain cases, admitting the fact is also a basis for not including it in what needs to be proved, but it does not make the fact notorious.

A suggestion concerning the recognition of this or that fact as notorious which has significance for resolving the case can be done also by the persons who participate in the case; however, the right to make the definitive conclusion about the issue belongs to the court.

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<sup>3</sup> Baulin O.V. The Burden of Proof in Civil Litigation. Ph.D. Dissertation – Moscow, 2005, P. 115. [Баулин О.В., Бремя доказывания при разбирательстве гражданских дел. Дисс. докт. юрид. наук. - М., 2005, page 115].

<sup>4</sup> Vladimirov L.E. Theory of Evidence. Tula, 2000, P. 178. [Владимиров Л.Е., Учение о доказательствах. – Тула, 2000, page 178].

Whereas, during the trial preparation of the case or the trial, the court is obliged to let the parties know about the recognition of this or that fact as notorious at the moment of sharing the obligation of proving, respectively making notes in the registry<sup>5</sup> which is conducted during the preliminary court session or case proceedings.

If the court recognizes as notorious this or that fact which has significance for the solution of the case, its position about it should be reflected also in the judgment. Moreover, the conclusion of the court about the fact being notorious in the jurisdiction can be made without adverting any proof, if the circumstance of its notoriety is known to the court.

**Prejudicial facts:** In procedural science, these facts are also called “prejudicials”, “prejudicial facts”, “pre-determined facts” or facts which are confirmed by court judgments which entered into force.

Articles 52(2) and 52(3) of the Civil Procedure Code release the case participants from the obligation of repeatedly proving the previously determined facts.

In particular, Article 52(2) of the Civil Procedure Code defines that circumstances that have been previously examined and confirmed upon an enforced civil judgment under a civil case shall not be proved again, and according to Article 52(3) a criminal judgment entered into force shall be mandatory for the court only in respect of facts which confirm certain actions and persons having committed them.

Thus the legislator stipulates that the judicial acts of the court of first instance of general jurisdiction which solve the case on merits have such feature which is called prejudice (prejudicial nature). The latter is, in essence, conditioned by the definitive nature<sup>6</sup> of the

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<sup>5</sup> Baulin O.V. The Burden of Proof in Civil Litigation. Ph.D. Dissertation – Moscow, 2005, P. 116. [Баулин О.В., Бремя доказывания при разбирательстве гражданских дел. Дисс. докт. юрид. наук. - М., 2005, С.116].

<sup>6</sup> Meghryan S. G. The Legal Acts of the First Instance Court in Civil Case, Yerevan, 2010, P. 158. [Մեղրյան Ս. Գ., Առաջին աստիճանի դատարանի քաղաքացիական գործերով դատական ակտերը, Երևան, ԵՊՀ հրատ., 2010, էջ 158].

respective judicial acts.

For the persons who participate in the case, the prejudiciality means a release of the obligation of proving in certain limits, as well as a prohibition of denying the repeated or such other circumstances in further procedures, and for the court it supposes an obligation of introducing such circumstance in the judicial act which is being made.

So, the law actually prohibits the persons participating in the case and their legal successors to object the facts confirmed by the judgments which entered into force within the framework of other proceedings. The court which examines the case, in its turn, by the force of prejudice, deprives of the possibility to doubt some facts which were pre-determined, as well as to study the proofs which confirm or deny them. In other words, the prejudice of a judgement which entered into force is that the facts, which were formed in the judgment and confirmed by the court after the judicial act solving the case on merits entered into force, cannot be doubted or be repeatedly studied with the participation of the same persons at the examination of other cases.

The reciprocal obligatoriness is explained by the following: examining a civil case with the participation of the same persons, thoroughly studies all the evidence and makes a judgment corresponding to the reality identified in the court. And when the judgment comes into force, the facts, acts and legal relationships confirmed by it do not bring doubt<sup>7</sup> any more.

The reciprocal obligatoriness of judgments is the result of the thing that the same legal fact can evoke different material and legal consequences, different legal relationships at the same time, which can become subjects of a trial in different times, by different factors, in different judicial instances and in order to not confirm the same fact every time, the fact confirmed by the judgment of the first case

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<sup>7</sup> Petrosyan R. G. Civil Procedure of Armenia, 3-rd edition, Yerevan, 2007, P. 355. [Պետրոսյան Ռ.Գ., Հայաստանի քաղաքացիական դատավարություն, 3-րդ հրատ., Երևան, Երևանի համալս. հրատ., 2007, էջ 355].

is considered as obligatory also for the other cases<sup>8</sup>.

D. A. Fursov has a justified opinion according to which the reinforcement of the prejudicial links of judicial acts by law is implemented for the purpose of simplifying the process of proving, taking into account the circumstance that the legal facts and composition of facts had already been the subject of the case examination of the same persons who had the possibility to express their doubts, arguments and their position.<sup>9</sup>

The prejudice is of great significance from the perspective of preventing the problem of procedural frugality, the insurmountable contradictions among the legal acts and the problem of legal acts' competition. Due to that feature of the judgment which entered into force, in practice the different, contradictory assessment of the same facts is excluded, which can create legal uncertainty, become the reason for the fall of judiciary power's rating and be considered as a violation of the principle of supremacy of law<sup>10</sup>. The prejudice of the judicial act of first instance court of general jurisdiction has objective and subjective limits.

**The objective limits** are all the circumstances mentioned in the descriptive part of the judgment which entered into force, the ones which the court considered as confirmed and proved in the result of the case examination on merits and the evidence assessment as well as the circumstances of some actions and their realization by a certain person (persons) confirmed by a judgment which entered into force. Moreover, prejudicial significance can have both positive (confirming) and negative (denying) circumstances<sup>11</sup>.

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<sup>8</sup> Ibid.

<sup>9</sup> Theory of State. Part 2, P. 328. [Теория правосудия. Т. 2, С. 328].

<sup>10</sup> Zagaynova S.K. Judicial Acts in Civil and Arbitral Process: Theoretical and Practical Problems. Ph.D. Dissertation, Yekaterinburg, 2008, P. 386. [Загайнова С.К., Судебные акты в гражданском и арбитражном процессе: теоретические и прикладные проблемы. Дисс... д.ю.н., Екатеринбург, 2008, С. 386].

<sup>11</sup> Fursov D.A., Kharlamova I.V. Theory of Justice. Part 2: Civil Litigation as a Form of Justic. Moscow, 2009, P. 326. [Теория правосудия. В 3-х томах. **Фурсов Д.А., Харламова И.В.**, Т. 2: Гражданское судопроизводство как форма отправления правосудия. – М.: «Статут», 2009, page 326]. An example of a negative circumstance: the absence of the guilt or the fact of commission of crime, as confirmed by a judgment.

It is noteworthy that Article 52 of the Civil Procedure Code mentions only the prejudice of circumstances, the ones which are confirmed by enforced judicial acts made exclusively in civil and criminal cases. Previously examined circumstances in administrative cases with the participation of the same persons within the framework of a civil case have not been evaluated by the legislator in any way. This circumstance may perhaps be considered as a considerable omission.

As a comparison, let us mention that Article 27(2) of the old Administrative Procedure Code defines that the facts, which have been established by a court judgment having entered into force on a previously examined civil or administrative case do not need to be proved again when examining another case with the participation of the same parties. It is obvious that the circumstances established by the judgment of the administrative court also must have a prejudicial significance for the civil case where the participating persons are the same.

While referring to the matter of objective limits of the legal acts' prejudice (prejudicial link), the RA Cassation Court in one of its decisions attached importance to two circumstances, referring to which is extremely appropriate.

*First:* the circumstances established by the judgment while examining another case with the participation of the same persons cannot have judicial significance for the court, if those circumstances in the previously examined civil case were established without respecting the procedural rules, through a gross violation of the rules of collecting, studying and assessing the evidence.

*Second:* the circumstances established by the judgment of the examination of a civil case which came into a legal force while examining another case with the participation of the same persons cannot have judicial significance for the court also in cases when they were not relevant to the subject of the previously examined civil case's claim, they should not have been included in the range of the circumstances subject to be confirmed and must have been included in the subject of proving. While deciding upon the prejudice of the

circumstances the Cassation Court, with its judgement, in fact, gave importance also to the question of the correct identification of the circumstances which are significant for the litigation and are subject of proving. According to the Cassation Court, the objective limits of the prejudice are determined by the framework of circumstances which are to be confirmed by a judicial act having entered into force, hence the arbitrary extension of the limits of the subject of proving leads to the exclusion of the prejudice of some circumstances confirmed by a legal act made within the case<sup>12</sup>.

While talking about the objective limits of prejudice, it has to be taken into account that a prejudicial significance can have the factual circumstances confirmed by a legal act and not the evidence which confirm them.

Prejudicial significance cannot belong also to the legal position of the court which examined the case about the interpretation of the law. In this regard, the RA Cassation Court, in one of its decisions, mentioned that the legal position cannot be considered as prejudicial, though the court is authorized to make some conclusions on the basis of its own apprehension of law. According to the Cassation Court, in this case prejudicial can be considered the confirmed circumstance, but not the legal position<sup>13</sup> of the court. The prejudicial facts which are confirmed by a judicial act should be distinguished also from the facts confirmed by an act of administrative and other bodies (prosecution, preliminary investigation body, police, arbitration, etc.). The procedural law does not release the case participants from the burden of proving the facts confirmed by the acts of the mentioned bodies. Those facts are included in the subject of proving. Meanwhile, being written evidence, such acts can and sometimes have to be attached to the civil case.

The prejudice is the reciprocal obligatoriness of judicial acts which is displayed in their prejudicial link. The prejudice, by the

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<sup>12</sup> Decision No 3-93 (VD) of May 29, 2008 of the RA Court of Cassation with respect to a civil case.

<sup>13</sup> Decision No 3-132 (VD) of March 27, 2008 of the RA Court of Cassation with respect to a civil case.

force of law, plays a predetermining role for the new judicial act. The prejudice of the initial judicial act which entered into force conditions the contents of the judicial act in so far as it concerns the already confirmed circumstances of another previously examined case.

**The subjective limits** are the persons for which the circumstances confirmed by judicial act have a prejudicial significance. From the contents of Article 52 of the Civil Procedure Code directly arises that facts can have a prejudicial significance only for the persons who participated in the examination of the case. The application of the institute of prejudice is inadmissible in cases when within the framework of initial and succeeding procedures the persons participating in the case coincide partially<sup>14</sup>. The change among the participating persons cannot lead to the requalification of the previously determined circumstances. But the case participants who did not participate in the trial of the previous case may object the credibility and existence of such facts. This is proved by the expression “between the same persons” used in Article 52 of the Civil Procedure Code. At the same time, there are two noteworthy circumstances which uniquely influence the undeniability and stability of the circumstances confirmed by a judicial act.

1) If the composition of the participants of the previous case examination narrows, the succeeding composition of the participants of the proceeding formally changes. However, there are no other subjects who have different points of view concerning the collected evidence and the circumstances confirmed by the previous case or new subjects who do not have possibility to protect their interests and participate in the proceeding. Consequently, in our opinion, in such cases the application of prejudice must be admissible.

2) If the composition of the participants in the previous case examination expands, the application of prejudice can be considered

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<sup>14</sup> Fursov D.A., Kharlamova I.V. Theory of Justice. Part 2: Civil Litigation as a Form of Justice. Moscow, 2009, P. 329. [Теория правосудия. В 3-х томах. **Фурсов Д.А., Харламова И.В.**, Т. 2: Гражданское судопроизводство как форма отправления правосудия. – М.: «Статут», 2009, page 329.

as admissible solely in case the persons, who did not participate in the previous examination of the case, have no objection regarding the existence and credibility of the circumstances confirmed by the given case.

While talking about the subjective limits of the prejudice (prejudicial link) of judicial acts, it is necessary to take into account also another important circumstance which was specially underlined by the Cassation Court of the Republic of Armenia.

To decide upon the prejudice of any circumstance, the procedural rule is extremely important, according to which the prejudice of any circumstance confirmed by the case must be conditioned by the fact that the given circumstance is confirmed by the competitive procedure. When the circumstance is confirmed in conditions of the limitation of one of the party's procedural possibilities (for example, when one party did not participate in the trial for the reason of not being properly notified), the court which examines another case must not recognise the circumstance confirmed by the judgement as prejudicial for the case which is being examined by it<sup>15</sup>.

According to the legal position of the Cassation Court, each case of prejudice's exclusion is subject to be thoroughly checked by the court for a certain case and only with the results of such check the examining court can come to a conclusion<sup>16</sup> about the prejudice of the circumstances which are confirmed by a judicial act having entered into force.

I. Zaytsev and S. Afanasev in a general way call the notorious and prejudicial facts "indisputable facts", which according to the characterization of O. V. Bowlin does not arise from the particularities of the given phenomena. According to the author, both the notoriety and the prejudice of the fact can be objected in court,

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<sup>15</sup> Decision No 3-93 (VD) of February 29, 2008 of the RA Court of Cassation with respect to a civil case.

<sup>16</sup> Decision No 3-93 (VD) of February 29, 2008 of the RA Court of Cassation with respect to a civil case.

which fundamentally excludes the application<sup>17</sup> of the term “indisputable” over such facts.

It is required to present only the copy of the judicial act (criminal judgment, civil judgment) which was made and entered into force to the court which examines the case in order to confirm the prejudicial circumstances. While recognizing the fact as prejudicial, the court has to indicate the evidence (criminal judgment, civil) by which the prejudicial nature of the given fact is being justified. No other justifications and argumentations are required.

***Indisputable facts:*** In procedural science and procedural legislation the basis for releasing from the obligation of proving is considered also the admission or the non-objection of the fact in result of which the factual circumstance is considered as admitted or non-objected and in some cases can be excluded from the subject of proving.

So, in fact they appear in case when one of the parties admits the facts which underlie the demands or objections of the other party. On the whole, such circumstances are often called “indisputable facts”. The procedural legislation does not use the terms “indisputable circumstances” and “non-objected circumstances”.

In Article 52 of the Civil Procedure Code titled as “Grounds for being exempt from proving”, the indisputable facts are not mentioned for a simple reason according to which “the admission of the fact by one of the persons participating in the case is a private and non-absolute case of releasing from the obligation of proving<sup>18</sup>”.

According to Article 64(2) of the Civil Procedure Code, the court shall not make it mandatory for a participant of the case to admit the facts through which the other person substantiates his or her demands or objections.

The court can consider an admitted fact established, if there are

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<sup>17</sup> Baulin O.V. The Burden of Proof in Civil Litigation. Ph.D. Dissertation – Moscow, 2005, P. 114. [**Баулин О.В., Время доказывания при разбирательстве гражданских дел.** Дисс. докт. юрид. наук. - М., 2005, page 114].

<sup>18</sup> Treushnikov M.K. Evidence in Court. Moscow, 1999, P. 32. [Треушников М.К., Судебные доказательства. - М., 1999, С. 32].

no doubts that this corresponds to the facts of the case, and the party did not admit this because of deceit, under threat of violence, intimidation, because of confusion, as a result of malicious collusion with the representative of the other party, or with the purpose of concealing the truth.

If these doubts exist, the court includes the given fact into the subject of proving and in court session studies the proofs which confirm or deny it.

Furthermore, the court can include this or that admitted fact in the range of facts which are to be proved based on the interests of jurisdiction or the rules of the admissibility of proving means.

For example, if a fact is admitted, the credibility of which is obvious or which is considered as a prerequisite for examining the claim (for instance, the circumstance of being joint-owners for examining a claim for sharing the property which belongs to the parties by joint ownership right) or which can be proved by the evidence envisaged solely by law (for instance, the facts of being a owner of real estate, originating of a given person, being recognized as incapable by court judgment), the court must include that fact into the subject of proving and while distributing the obligation of proving it must put the burden of proving on an appropriate person.

The analysis of Article 64 of the Civil Procedure Code allows concluding that the court's authorization of considering the admitted fact as confirmed is discretionary. While implementing it, the court must determine in the descriptive part, must mention one by one which facts were recognized as indisputable and by what motives, indicating which one of the participating persons put forward the given fact, who admitted it and how<sup>19</sup>.

If the court considers this or that fact indisputable, then it is put out of the subject of proving, it is considered as confirmed and is accepted as a ground for solving the litigation on the basis of absence of dispute regarding it.

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<sup>19</sup> Meghryan S. G. The Legal Acts of the First Instance Court in Civil Case, Yerevan, 2010, P. 126. [Մեղրյան Ս.Գ., Առաջին ատյանի դատարանի քաղաքացիական գործերով դատական ակտերը, Եր., ԵՊՀ հրատ., 2010, էջ 126].

A question about when it is allowed to talk about admitting the given fact has practical significance for considering the fact as indisputable.

The analysis of the current procedural legislation allows us to conclude that first of all we can talk about admitting the fact in all the cases when the circumstance posed by one party is admitted by the persons who participate in the case and are on the opposite side, by a procedural document (in written form) presented by them or by an announcement made during the court session (orally). In procedural science, the way of admitting the fact is often called “confession”<sup>20</sup>. It should be taken into account that the confession which is made out of the court (extrajudicial) is not a proof, but an evidentiary fact which is to be proved in its turn, if the party does not confirm it in the court, as well.

The facts accepted by a procedural document or an announcement made during the court session, as a type of indisputable facts, are called “admitted” facts which should be distinguished from the “non-moot” facts.

According to Article 95(5) of the Civil Procedure Code, the court may consider failure to respond as admitting by the defendant of the facts brought up by the plaintiff. Besides, according to Article 48(3) of the Civil Procedure Code, if a party refuses (avoids) answering the questions of the court or of participants of the proceedings or giving testimonies to the court, the court may, upon the motion of the other party or by its own initiative, consider the refusal (avoidance) from testimonies or answers as unjustified, whereas the factual circumstances in respect of which the party refuses (avoids) to give testimonies or answers may be considered as proven thereby.

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<sup>20</sup> For more details see, e.g. Petrosyan R. G. Civil Procedure of Armenia, 3-rd edition, Yerevan, 2007, P. 373-374; Civil Procedural Law. Shakaryan M.S. (Ed.), Moscow, 2004, P. 183; Civil Procedure. Treushnikov M.K. (Ed.), Moscow, 2003, pp. 266-267, etc. [Պետրոսյան Ռ.Գ., Հայաստանի քաղաքացիական դատավարություն, 3-րդ հրատ., - Եր., Երևանի համալս. հրատ., 2007, էջ 373-374; Гражданское процессуальное право. Под ред. М.С. Шакарян. - М.: «Проспект», 2004, С. 183, Гражданский процесс. Под ред. М.К. Треушникова. М.: «Городец», 2003, С. 266-267, etc].

The presence of such norms in a procedural law allows concluding that the court may consider this or that fact as indisputable and confirmed also in cases when the party does not directly accept it, but does not also object it by inactivity displayed in the above mentioned way. In this case it is appropriate to talk about “non-moot” facts which are types of indisputable facts.

In procedural science, there is an opinion according to which any fact should be considered as indisputable against which the parties did not object or admitted it by silence<sup>21</sup>. In the conditions of RA civil procedure such position can be considered as justified only from the perspective of applying the provisions fixed by Article 95(5) and Article 48(3) of the RA Civil Procedure Code. Except for the above mentioned, no other ways of passive behavior (including the silence) can have practical significance.

At the same time, the court has to react to the silence of parties regarding this or that circumstance which has significance for the case solution, finding out if they admit the existence of the given fact. And if the party who bears the obligation of proving admits the existence of the given fact, the court may consider the necessity of its further proving eliminated<sup>22</sup>. If the person participating in the case or his representative does not come to the court session<sup>23</sup>, in this case, too, it cannot be considered as admission of the fact. Yet in Roman law such behavior, as well as silence was considered as “absence of response but not consent<sup>24</sup>”.

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<sup>21</sup> Zaitsev I., Afanasev S. Indisputable Circumstances in Civil Cases // Russian Justice.- М., 1998, #3, pp. 27-28, [Зайцев И., Афанасьев С., Беспорные обстоятельства в гражданских делах // Российская юстиция. – М., 1998, № 3, С. 27-28].

<sup>22</sup> Baulin O.V. The Burden of Proof in Civil Litigation. Ph.D. Dissertation – Moscow, 2005, P. 122. [**Баулин О.В.**, Бремя доказывания при разбирательстве гражданских дел. Дисс. докт. юрид. наук. - М., 2005, page 122].

<sup>23</sup> Fursov D.A., Kharlamova I.V. Theory of Justice. Part 2: Civil Litigation as a Form of Justic. Moscow, 2009, P. 323. [Теория правосудия. В 3-х томах. **Фурсов Д.А., Харламова И.В.**, Т. 2: Гражданское судопроизводство как форма отправления правосудия. – М.: «Статут», 2009, С. 323].

<sup>24</sup> Court and Judge in the Selected Excerpts from Digest of Justinian. Moscow, 2006, P. 547. [Суд и судьи в избранных фрагментах из Дигест Юстиниана. - М., 2006, С. 547].

In our opinion, envisaging the provisions concerning the acceptance of the fact by the person participating in the case in the frames of Article 64 of Civil Procedure Code titled as “Testimonies of the participants of the case” is not that right. As a result, in law enforcement practice there are cases when the court considers confirmed the fact which is accepted by an announcement made in the court session, if the party which accepts it, confirms its acceptance also when giving testimonies by his/her or the opposite party’s initiative.

Whereas, it is obvious that the person may accept this or that fact willingly and forcing him to give testimony regarding it does not arise from the principle of procedural frugality and it can be the reason of the pointless delay of the process.

The acceptance of any fact (facts) which underlies the demands and objections of the persons participating in the case, narrows the subject of proving, give a possibility to the court to decide upon the frames of disputable facts and focus only on their proving.

Admitting a fact is a means of procedural frugality which is based on the party’s right (principle of optionality) to dispose his material and procedural rights. In this regard, the admission of a fact (facts) should be distinguished from the full or partial admission of the claim. In the latter case there is not just an admission of a fact (or facts) underlying the claim, but an unconditional admission of the subject of the claim (plaintiff’s claim) and of all the facts underlying it. If in case of full or partial acceptance, the defendant does not have any obligation to explain, then the admission of a certain fact, without accepting the plaintiff’s claim and the other claims underlying it, in the civil procedure of Armenia it is not considered as an unreasoned act of behavior. This is the reason why the legislator gave the court a discretionary authorization of considering the accepted fact as confirmed. In any case, the court is authorized to find out the party’s motives of admitting the fact.

As justifiably mentions D. A. Fursov, it must be forbidden that a subject of private interest behaves disrespectfully towards the public-

legal order<sup>25</sup>.

Taking into account the above mentioned, we find that it would be more appropriate to insert the norms about “confession” and “non-moot facts” which are considered indisputable in Article 52 of the Civil Procedure Code, excluding the possibility of linking the legal provisions related to the admission of a fact solely with the party’s testimony. Regarding this, the existence of Article 27(4) of the Administrative Procedure Code can be welcomed, according to which the facts which are not objected by the opposite party do not have to be proved, except the case when the court finds that these facts need to be proved. In our opinion, recognizing Article 64(2) of the Code as lapsed, Article 52 can be supplemented with paragraph 4 with the following context:

*“The facts which do not have to be proved are those that are admitted by a procedural document presented by him or her, or an announcement made during the court session by the party who bears the obligation of proving or by not presenting objection in accordance with the procedure and terms set in Article 95 of this Code, or by refusing to give testimony or response concerning the factual circumstances during the trial, except for the case when the court finds that their proving is necessary taking into account the interests of jurisdiction or the rules of evidence admissibility.*

*The admission of the fact by a person participating in the case, through which the other person justifies his or her demands and objections, shall not be mandatory for the court.*

*The court may consider the admitted fact as established where there are no doubts that those facts corresponds to the circumstances of the case, and that the party has not admitted them under deception, violence, threat, delusion or as a result of a malicious accord of one party with the other, or for the purpose of concealing the truth”.*

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<sup>25</sup> Fursov D.A., Kharlamova I.V. Theory of Justice. Part 2: Civil Litigation as a Form of Justic. Moscow, 2009, P. 325. [Теория правосудия. В 3-х томах. **Фурсов Д.А., Харламова И.В.**, Т. 2: Гражданское судопроизводство как форма отправления правосудия. – М.: «Статут», 2009, page 325.

# **THE ISSUE OF LOCUS STANDI OF NON GOVERNMENTAL ORGANIZATIONS IN THE SPHERE OF ENVIRONMENTAL PROTECTION (CONSTITUTIONAL-LEGAL ANALYSIS)**

**Aida Iskoyan<sup>1</sup>**

The development of human society in the modern world assumes progressively shifted role of the environment and its quality. Raise of human demands in natural resources for satisfaction of versatile needs often leads to disastrous consequences. In this process non-maintenance of the environmental balance eliminates the reproduction capacity of the natural environment and its elements. This, in its turn, brings to a decline in environmental quality and more often - to environmental catastrophe. Growing misbalance in ecosystems and that in the interactions of the human society and the natural environment raises concerns and anxiety in the world. Such a situation logically brings to intensification of international cooperation in the environmental protection, which in its turn stimulates the environmental policy, ecologization of human coincidence, widens adoption of adequate measures by the states.

Among the adopted measures to recover the ecological balance the law has its important role as a regulator in the sphere of interactions of the human society and the environment. The necessity to ensure healthy environment in the interests of human welfare, sustainable and favorable development as a principle, is established in the international treaties. Adequate protection of the environment is necessary also in terms of realization of the fundamental human rights, including the right to life<sup>2</sup>.

Perfection of the rights to access to information and public

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<sup>2</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN, New York and Geneva, 1999, pp. 38-71.

participation in the process of decision-making and their implementation facilitate the awareness-raising of the society on the environmental issues, enables the society to express its concerns and provides for the public authority to consider such interests duly<sup>3</sup>.

It is a common ground that one of the main motivations for adoption of the UNECE Convention “On Access to Information, Public Participation and Access to Justice in Environmental Matters” (Aarhus, 1998) was the concern that both global and regional environmental treaties “did not work, did not function, were not applied” properly; their low efficiency was highlighted. Within the framework of the Program “Environment for Europe”, European countries came to the conclusion that environmental protection depends on the public participation in the environmental decision-making. Therefore, the Aarhus Convention endowed the public with wide rights taking due consideration of the application of the national legislation. But the environmental protection is a process not a goal. And this process is not over with the adoption of the Law. Adoption of the Law in the sphere of environmental protection as a result of consensus on the necessity of regulation of the state of the environment opens a new chapter in the history of environmental protection and development of democratic abutment of the society.

Application of the citizens’ capacities may significantly enrich and strengthen the process of adoption of legislative acts in the sphere of environmental protection. In the process of participation of the citizens in implementation of the environmental legislation direct connection of the citizens and the environment may be useful as their everyday observations provide with such information on the conditions of the environment, which the Government could not receive timely. The dynamics of relations between the citizens and the Government, organizations responsible for the protection of the environment as a whole or its specific elements supplements the potential efficiency of citizens’ participation in the environmental protection.

Yet in the 20th century William O. Douglas, the Judge of the

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<sup>3</sup> See *ibid.*

Supreme Court of the USA, in his truly valuable and interesting book “The Three Hundred Year War: A Chronicle of Ecological Disaster”, comes to the conclusion that “legislative power is the force which determines for the environment to be as commodious as clean, sustainable and at the same time duly protected”.

Within the framework of the discourse on the human right to healthy and favorable environment, which in the Western Europe goes on for more than thirty years and now also is actual for EECCA countries (Eastern Europe, Caucasus, Central Asia). They came to the conclusion that the formulation of the fundamental right granting the citizen the possibility to request in the court a “clean and healthy environment” is not possible. Even in those countries the constitutions of which had such a formulation, difficulties arose when applying and endowing real content of this right. The provisions of the Constitution of the Republic of Armenia (Articles 10, 18, 33.2, 48.10) are “definitions”, the function of which reminds “declaration of state goals”.

Nonetheless, in order to strengthen the right, its authority, the legal science of the Western Europe has interpreted the right to healthy and clean environment as “a formalized right” consisting of three elements: right to access to environmental information; right to participate in environmental decision-making; right to access to courts. For example, according to the Law of Germany “On Administrative Courts”, each person may, pursuant to the guarantee established in the Article 19 para. 4 of the Main Law, apply to the court to challenge any more or less substantiated breach of individual rights by administrative measures either by not undertaking it.

For taking the case into consideration, it is a decisive issue whether the claimant citizen can prove that his individual right is breached. In this process freedom of action secured by the fundamental rights is often breached as the freedom of the citizen to act “as he or she wants” might be interfered into only on the legal bases and according to the existing law. If the norms on environmental protection are breached, e.g. the rules on protection of species and biotopes, this would not be considered as breach of

individual rights as the species and biotopes are protected not because as specific goods for a citizen but as a common good for society. In this case the individual case of the citizen is not possible even if he or she is willing to achieve correct application of the existing rule. Moreover, even if the permission issued by the authorized body establishes too strict emission normatives or if executive bodies do not take measures when the normative is exceeded, individual rights of the neighbors, according to the prevailing opinion, are considered not to be touched until their health, property are not threatened or essential obstacles raise for their functioning<sup>4</sup>.

Consequently, this means that in the German environmental law legal protection is structured asymmetrically: every single breach of law cannot be basis to apply to the court. Generally, breach of law which makes harm to the environment but not to its goods, which does not enjoy judicial remedies for the reason of absence of violated individual subjective rights.

In the legal system, where the protection of the rights first of all depends on the breach of individual subjective rights, symmetrical and full-scale protection of the existing environmental norm might be achieved only if for the cases when objective but not subjective right is breached, special possibilities are established to file a claim<sup>5</sup>.

From the viewpoint of the legal policy, the right to file a complaint might be endowed to the environmental associations as it is envisaged in the Aarhus Convention (Article 9, para. 2, 3).

In a democratic society the citizens should be enjoy the right to challenge before the court implementation of legal norms which are accepted by the state power on behalf of the citizens. In many states with democratic traditions, e.g. France and USA, such a right does exist. Legal norms should be secured by the possibility of judicial protection. Otherwise they are risky to become symbolic instruments

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<sup>4</sup> O.L. Dubovik, G. Ljube-Volf, Environmental Law, Textbook. Moscow, 2005, pp. 660-661.

<sup>5</sup> O.L. Dubovik, G. Ljube-Volf, Environmental Law, Textbook. Moscow, 2005, pp. 660-661.

of the only “imaginative” environmental policy.

When initiating a case in the court, the “requirement of permissibility” should be satisfied. The issue of *locus standi* is the most important one for the claimant. From the other hand, understanding of these issues may help the public authority whose decisions are being challenged to determine whether the claim will be accepted or not.

In order to initiate a case in the court the claimant should persuade the judge that he or she is actually interested in the concrete case and one or more rights and legal interests are really breached. And here again the standards differ based on whether the case relates to civil or administrative proceedings. The main criteria for whether the person has the right to file a claim depends on what procedure or action is being challenged (Article 9, para. 1, Aarhus Convention): *“Each Party shall, within the framework of its national legislation, ensure that any person who considers that his or her request for information under article 4 has been ignored, wrongfully refused, whether in part or in full, inadequately answered, or otherwise not dealt with in accordance with the provisions of that article, has access to a review procedure before a court of law or another independent and impartial body established by law”*.

As in the decision-making process meeting the category of “public concerned” is a precondition, the claimant needs to prove that he or she will be actually affected by the particular decision (for example, living in the territory for which the permission is issued or where the plan will be realized)<sup>6</sup>.

Perhaps this is the most difficult case to prove the right to file an action. Majority of countries are not inclined to recognize the right of natural or legal entities to file environmental action in the court which do not directly affect their right.

In this regards it is important to mention the provision of the Article 9, para 3 of the Aarhus Convention, which highlights certain

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<sup>6</sup> Guide on Access to justice; Vol. 4. Implementation of the provisions of the Aarhus Convention in the EECCA countries. Guide for the representatives of civil society. Kiev, Ukrain, p. 203.

possibilities to file actions concerning enactment of the legislation in this sphere.

Discussing the issue of the *locus standi* of NGOs in the meaning of the Aarhus Convention, it becomes obvious that the main criteria to apply to the court is the fact of breach of right but, at the same time, sufficient attention is not paid to the aspect that the functions of the court are not limited explicitly to examination of the fact of the breach of right.

Often *locus standi* of NGOs is connected to their “legal interest”. In this present case the content of the term “legal interest” is connected to the term “justice”. When comparing the mentioned terms it becomes obvious that the grounds to apply to the court are both “subjective” and “objective” interest. Herewith, this division is based on the ambiguous meaning of the term “right”, which is “subjective” and “objective” right. As for NGOs, breach of objective right is decisive as only in this case public interest might exist. Even if it is accompanied with breach of subjective right, the last *per se* is not a ground for endowing the NGO with a right to apply to court to seek protection of public interests. In other words, NGO acts for protection of the third parties' rights not in classical understanding or according to the “*actio popularis*” principle, but on the ground of “objective legal interest”, e.g. when objective right is breached. At the same time, every single breach of objective right is not sufficient for the NGO to have *locus standi*. Breach of objective right might be considered as such only if it has public significance, derives from public relations and when the NGO has “sufficient interest” based on its statutory goals.

Upon the decision of the Constitutional Court of the Republic of Armenia SDVo-906 of 07 September 2010 concerning the constitutionality of Article 3(1)(1) of the RA Administrative Procedure Code, explanation is provided why namely NGOs are endowed with the right to apply to court on the bases of “objective legal interest” in the light of interpretation of the word “his or her” coming after the word “breach”.

Returning to the question whether the breach of the sole

subjective right might be the only condition to apply to court, the answer is negative – based on the analysis of the Civil Procedure Code and the Administrative Procedure Code of the Republic of Armenia.

In our opinion, when discussing the issue of NGOs *locus standi*, it is not completely lawful to consider only Articles 18 and 19 of the Constitution of Armenia<sup>7</sup>. Neither the Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms gives an explicit answer. The problem is that these legal acts are related solely to the fundamental rights of natural persons, and the procedural norms are established in so far as they are considered to be guarantees for realization of the right of access to justice.

Article 42.1<sup>8</sup> of the RA Constitution highlights that the fundamental human and citizen's rights and freedoms shall extend also to legal persons insofar as those rights and freedoms are inherently applicable to them. The approach according to which the mentioned formulation is sufficient to determine the content of *locus standi*, especially for legal persons, including NGOs, is not substantiated.

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<sup>7</sup> **Article 18.** Everyone shall – for the protection of his or her rights and freedoms – have the right to effective judicial remedies, as well as effective legal remedies before other state bodies.

Everyone shall have the right to protect his or her rights and freedoms by all means not prohibited by the law.

Everyone shall have the right to receive – on the grounds and as prescribed by law – assistance of the Human Rights Defender for the protection of his/her rights and freedoms.

Everyone shall, in accordance with the international treaties of the Republic of Armenia, have the right to apply – with regard to the protection of his or her rights and freedoms – to international bodies for protection of human rights and freedoms.

**Article 19.** Everyone shall have the right to a public hearing of his or her case by an independent and impartial court within a reasonable time, in equal conditions, meeting all the demands of justice, for restoring his or her violated rights, as well as determining the grounds for the charge brought against him or her.

<sup>8</sup> **Article 42.1.** Fundamental human and citizen's rights and freedoms shall extend also to legal persons insofar as those rights and freedoms are inherently applicable to them.

The RA Law “On non-governmental organizations” established several provisions which are understood ambiguously and raise scientific discourse. Article 15(1)(3) of the mentioned Law<sup>9</sup> provides that for realization of its statutory goals non-governmental organization shall enjoy the right “to represent and protect its rights and lawful interests as well as those of its members before the state and local self-government bodies”.

Herewith, the given formulation raises several problems:

Non-governmental organizations may not be limited to the protection of the rights and legal interests of its members only before the mentioned bodies and the court since Article 18 of the Constitution does not make any reservation in terms of protection of rights. Unambiguously, it is about “judicial remedies” and “legal remedies before other state bodies”, and the term “state body” involves local self-government bodies as well. This was also mentioned in several decisions of the Constitutional Court of Armenia.

It is not clear why the issue of protection of freedoms has not been paid attention to, as Article 15 of the Law indicates only about “rights and legal interests”. But as it is mentioned in the Decision SDVo-906 of the Constitutional Court of 7 September 2010, the given formulation does not exclude the right of non-governmental organizations having legal interest to protect rights and freedoms of third parties.

Herewith, it is worth to mention that the Law “On non-governmental organizations” establishes the status of non-governmental organizations in a slightly different way. According to Article 3 of the Law: “A public organization (hereinafter referred to as “the organization”) is a type of (not for profit) public association which does not pursue the purpose of gaining profit and

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<sup>9</sup> **Article 15. *The Rights of the Organization***

1. For the implementation of its statutory goals, the organization shall, in the manner prescribed by law, have the right to:

3) represent and protect its rights and lawful interests as well as those of its members in other organizations, before the court, state and local self-government bodies.

redistributing this profit among its members, and into which (the organization), based on their common interests, in the manner prescribed by the law, physical persons, including RA citizens, foreign citizens and those without a citizenship, have joint for meeting their non-religious spiritual and non-material other needs, for protecting their and other persons' rights and interests, for providing material and non-material assistance to certain groups and for carrying out other activities for public benefit”.

It should be mentioned that in the formulation “their and other person’s” the conjunction “and” has clear legal meaning. According to Article 45(10) of the RA Law “On legal acts”, “[i]f the application of a norm stated in a legal act depends on conditions separated by the conjunction “and”, the existence of all the listed conditions shall be mandatory for the application of that norm.” Consequently, the status of non-governmental organizations may fully correspond to the requirements of the law only if both conditions exist at the same time. Besides, if there is contradiction between different provisions of the same law, in the relations of natural and legal persons with state and local self-government bodies, the provision which is more favorable for natural and legal persons is applied. However, we do not think that the Law of “On non-governmental organizations” has contradictions, as the Article 15 establishing the rights is not exhaustive.

Concerning the constitutionality of the legislation on NGOs' *locus standi*, it is stated by the decision of the Constitutional Court SDVo-269 of 26 December 2000, considering the constitutionality of the Aarhus Convention, that Armenia has a range of obligations, including “... ensuring under national legislation utmost simplified possibilities for restoration of rights provided by the Convention by means of the justice system or independent and impartial bodies, up to establishing a relevant system for eliminating or reducing the financial or other obstacles to ensuring the access to justice”.

The Constitutional Court also came to the conclusion that both the Law of the Republic of Armenia “On non-governmental organizations” (Article 15(3)) and the Administrative Procedure

Code of the Republic of Armenia (Article 3(1)) do not exclude the possibility of protection of the rights of third parties by non-governmental organizations by the “*actio popularis*” principle provided that there is “sufficient interest”. Articles 18 and 19 of the Constitution of the Republic of Armenia which do not exclude the possibility of applying to court “with the aim of protection of the third parties’ rights”, serve as background for such a conclusion.

The Constitutional Court also made a conclusion that both international treaties and the Constitution along with the current legislation do not exclude the *locus standi* of non-governmental organizations if “objective legal interest” exists.

The right of non-governmental organizations to apply to court for protection of the third parties’ rights in environmental issues is generally connected with the Aarhus Convention which relates only to specific spheres of public relations within environmental protection. Particularly, Article 9, paragraph 2 of the Convention (“Access to Justice”) is related only to disputes with regard to public participation in decision-making on specific environmental issues (access to information and public participation). It is obvious that the Convention regulates the access to justice only from the mentioned viewpoint with a certain logical consistency, e.g. access to justice is norm-guarantee for realization of the two previous rights: right to access to information and the right to public participation in environmental decision-making.

Almost all international treaties related to the given issue recognize the *locus standi* of non-governmental organizations and highlight the importance to secure it in the national legislation. “Each state is entitled to extend the capacity to bring court proceedings. This remedy may for example be available to third parties concerned by the act”<sup>10</sup>. European Commission “Democracy through law” (The Venice Commission) has expressed the following position: “It is a priority, that each person may challenge a decision on a ground that

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<sup>10</sup> Recommendations Rec(2004)20 of the Committee of the Ministers of the European Council for the member states on the judicial review of administrative acts. (Issues of state and municipal governance, 2009, N2), para. 38.

it breaches his/her rights. However, if the decision has not directly breached his/her rights, endowing with the right to challenge it is a task for national legislation”.

According to the Recommendations Rec(2004)20 of the Committee of Ministers of the European Council “On the judicial review of administrative acts” of 15 December 2004, “Member States are encouraged to examine whether access to judicial review should not be opened to associations or other persons and bodies empowered to protect collective or community interests”. “The Recommendation applies solely to cases where the rights or interests are directly affected. This means that there must be a close link between the act and the rights or interests concerned. If the link between the challenged act and the right asserted is too tenuous and distant, the Recommendation does not apply”<sup>11</sup>.

Both in the international practice and national level there is not an absolute right to represent third parties. According to the decision of the Constitutional Court, establishment of relevant criteria is required to ensure proper access to justice. The state through law may establish objective criteria. However, preventive measures are required to avoid abuse of right as in this case public interests might be infringed. In-depth examination of the judicial practice is necessary. The position of the Constitutional Court to improve the situation in this sphere, as even the international practice does not specify clear criteria for determining the “legal interest”. And in this connection it would be useful to open the content of the institution of “interested public” and “sufficient interest”.

For example, such criteria might be timely submission of a request to receive information, active participation in the hearings of the project making suggestions for improvement; including substantiated changes and addendums to the EIA project, etc. The mentioned documentation would help the court in determining the non-governmental organization as interested.

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<sup>11</sup> Recommendations Rec(2004)20 of the Committee of the Ministers of the European Council for the member states on the judicial review of administrative acts. (Issues of state and municipal governance, 2009, N2), para. 39.

Thus, in our opinion systematic approach to the interpretation of the three pillars of the Aarhus Convention, following the internal logic of the Convention brings to application of Article 9 where the main steps are envisaged in the paragraph 1 of Article 9. This is the right to access to information, public participation in the decision-making and access to justice through formulation of legal and philosophical grounds of these rights. This demonstrates, that the mentioned rights are not results *per se*, and their content is that these are measures to achieve the protection of material right – to live in a healthy environment (however, another interpretation of the reference to this right also exists as expression of intentions, but not a subjective right).

The main role given to the public within the soul of the Convention is not encountering shortcomings and criticizing planned activities, but assisting the authorized bodies to develop scientifically substantiated environmental policy.

At the same time, we think that there is a necessity for improvement and perfection of the national legislation, especially in terms of criteria for determining “legal interest” with the aim to follow the philosophy of the Aarhus Convention and its realization.

## PARTICULARITIES OF THE OPERATION PRINCIPLE OF COMPETITION IN THE PHASE OF APPEALS

**Vahe Hovhannisyan<sup>1</sup>**

According to the Article 6 of the RA Civil Procedure Code, civil proceedings are carried out on the basis of the competition and legal equality of the parties. The civil procedure includes both the appeal and cassation proceedings, hence the operation of the principle of competition and equality of rights of the parties is applied equally also on these stages of the procedure, but their application in this proceedings cannot be assimilated to the principles which are being realized during the examination of cases in a first instance court which is conditioned by the particularities of the procedural form of appeal being implemented in Armenia.

The contents of legal literature, the principle of competition is mostly being unveiled from the perspective of the evidentiary activity of the participating persons and the role of the court in that process. In particular, in civil procedure the principle of competition supposes that the persons participating in the case must have a full possibility to participate in the examination of the case, realize an evidentiary activity and present their position in the case<sup>2</sup>.

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<sup>2</sup>Civil Procedure: Textbook / M.K. Treushnikova (Ed.), Moscow 2000, P. 58; Civil Procedural Law: Textbook (Shakaryan M.S., Ed.), Moscow, 2004, P. 54; Shishkina S.A. Competitiveness in Civil and arbitral proceedings. Moscow, 1997, pp. 23, 69-103; Reshetnikova I.V. On the Way from Investigation to Competition in Civil Process: Theoretical and Practical Problems of Reforming the Civil Process. Yekaterinburg, 1998, pp.73-85; Samsonov V.V. Competition in Civil Procedural Law. Ph.D. Dissertation. Saratov, 1999, pp. 6-19. [Гражданский процесс: Учебник / Под ред. М.К. Треушников (автор главы - М.К. Треушников). М., 2000. С. 58. Гражданское процессуальное право: Учебник / Под ред. М.С. Шакарян (автор главы А.Т. Боннер). 2004. М., С. 54. С.А. Шишкин Состязательность в гражданском и арбитражном судопроизводстве. М., 1997. С. 23, 96-103. И.В.Решетникова. Па пути от следствия к состязанию в гражданском процессе //Теоретические и прикладные проблемы реформы гражданской юрисдикции. Екатеринбург, 1998. С. 73-85. В.В. Самсонов. Состязательность в гражданском процессуальном праве: Автореф. дис. ...канд. юрид. наук. Саратов, 1999, С. 6-19].

The content of the competition in civil procedure can be revealed based on the analysis of the legal regulation of the evidence in civil procedure.

The systemic analysis of the norms of the Civil Procedure Code of the Republic of Armenia shows that the competitive procedure in the civil procedure of Armenia implies the following:

- the burden of proof lies with the participants of the case (Article 48 of the Civil Procedure Code),
- the court does not bear the obligation of proving but in the cases envisaged by law it is entitled to obtain evidence at its own initiative, for example, when the court designates an expert examination or, in exceptional cases, calls a witness and interrogates him or her (Article 60 of the Civil Procedure Code),
- the court is responsible for the proper implementation of the proceedings of a civil case, including the organization of the process of proving with the purpose of which it supports the participants of the case to obtain evidence (Article 49 of the Civil Procedure Code), as well as it decides upon the facts essential for the resolution of the case and subject to proof (Article 48(2) of the Civil Procedure Code),
- the court is obliged to provide the participants of the case with equal conditions for the evidential activity,
- the participant of the case are obliged to present evidence, but it is their right to participate in the examination of evidence (Article 49 and Article 28(1) of the Civil Procedure Code),
- the obligation of directly examining and evaluating the evidence bears the court (Article 53 of the Civil Procedure Code).

From the perspective of the study topic, first of all it is necessary to find out in which extent the provisions of the principle of competition are implemented in the stage of appeal. The fact that the appeal proceedings are carried out on the basis of the principle of competition clearly arises from the contents of Article 6 of the Civil Procedure Code, but it must also be mentioned that during the appeal, the competition has some particularities, which require a special attention.

It should be mentioned that in legal literature sometimes there

are discussions about the necessity of limiting the principle of competition in the phase of appeal, which is justified by the impossibility of presenting new evidence by the persons participating in the case as a consequence of which unequal conditions are created in the matter<sup>3</sup> of profiting from means of proving in a first instance court and in presenting counter-arguments.

*We find that in civil procedure any limitation of the principle of competition is inadmissible.*

It must be taken into account that in the phase of appeal, the principle of competition has a limited operation, and here we do not deal with limitations of competitive procedure. In its case law, the European Court referred to the contents of the law in case examination in the conditions of competition giving importance to the implementation of the right to a fair trial, establishing that the principle of competition is one of the main guarantees<sup>4</sup> of trial.

The European Court mentioned that the competitive procedure law supposes the possibility of the parties to learn about the materials, evidence and remarks of the case and comment them in criminal and civil proceedings. According to the European Court, the right to a fair trial at the same time supposes a competitive nature of the procedure, which provides the principal possibility<sup>5</sup> of the parties to be informed about all the evidence or objections presented in the case both in criminal and civil procedures and to present their own position about them.

In this regard sufficient and equal conditions have been created in the appeals procedure to provide for the realization of the right to learn about the materials of the case and present their own position thereon. In particular, according to Article 209(1) of the RA Civil

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<sup>3</sup> Bazarov B. In Appellate proceedings the Principle of Competition May be Infringed. // Russian Justice. 2002, # 3, P. 42. [Базаров Б., При апелляционном производстве возможно нарушение принципа состязательности // Российская юстиция. 2002. № 3. p. 42].

<sup>4</sup> See the case of Kamasinski v. Austria, judgment, December 19, 1989, Point 102.

<sup>5</sup> See the case of Morel v. France, judgment, June 6, 2000, Point 27, Lobo Machado v. Portugal, judgment, September 1, 1996 and January 22, 1996, Point 31, case of Ruiz-Mateos v. Spain, judgment, June 23, 1993, Point 63.

Procedure Code, the appeal shall be properly filed with the Court of Appeal and sent to the persons participating in the case, and according to Article 212 of the Civil Procedure Code the person participating in the case shall, within a period of two weeks after receiving the copy of the appeal, have the right to file a response to the Court of Appeal and other persons participating in the case.

That is to say the law of procedure provides the persons participating in the case at least with the minimum conditions of learning about the appeal and the response of the appeal.

Furthermore, the competition in the appeal proceedings supposes that the appellant bears the obligation to provide substantiations of the violations of the norms of substantive or procedural law mentioned in the appeal, and the person participating in the case, who presented a response, bears the obligation of justifying his or her own standpoint on the grounds and substantiations of the appeal (Article 210(1)(5) and Article 212(2)(4) of the Civil Procedure Code). Thus, the persons participating in the case also bear negative consequences for not substantiating their own standpoint.

In the phase of appeals, the competition does not suggest the claims, the possibility of presenting evidence justifying the factual side of the case, and the persons participating in the case here do not bear the obligation of presenting evidence. In particular, by virtue of Article 219(2) of the Civil Procedure Code, the Court of Appeals shall have no right to accept new evidence, except if during the examination of the case the evidence has not been submitted in the Court of First Instance by reasons beyond the control of the parties. In this case the Court of Appeals just examines the evidence from the perspective of having essential significance for the case solution, and has no jurisdiction to confirm a new fact based on it.

It follows that in the appeals proceedings the parties do not bear the obligation of proving the facts which they invoked in a lower judicial instance but they are obliged to justify only the violations of norms of substantive or procedural law. Herewith, where the person participating in the case objects the fact confirmed by the first

instance court, the Court of Appeals simply checks the legitimacy and rightfulness of the lower instance conclusions concerning the confirmation of the fact.

***Consequently, the competitive procedure in the phase of appeals supposes not the obligation of proving the facts underlying the own claims and objections but the obligation of substantiating the circumstances (violations of the norms of the law) underlying the appeal and the response of appeal.***

It should be mentioned that some domestic authors criticized the Article 218(2) of the Civil Procedure Code mentioning that the procedural legislation of the Republic of Armenia does not contain enough proceeding guarantees for providing the right to examine the case in competitive conditions<sup>6</sup>. Thus, according to the above-mentioned article, in case of a need to give explanations, the person having lodged the appeal, as well as the persons involved in the case, may be summoned to the sitting of the Court of Appeal, who shall be in due manner notified of the time and venue of the sitting. In particular, during the proceedings of a civil case in the civil court of appeals of Armenia, in case of calling one of the procedure participants to the court to give explanations, the presence of the other party is not provided, which does not let the given party present its remark concerning what the other party told.

We find that the mentioned point of view cannot be considered as fair. First of all, in order to provide the conditions of competitive procedure, the legislation established a procedural mechanism for getting acquainted with the appeal and its response, and the court of appeals is empowered just with the positive obligation of providing the right of the persons participating in the case to learn about the materials of the case, to be informed about the venue and time of the court session.

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<sup>6</sup> Ter-Vardanian H.M. The Constitutional Foundations of Fair Trial in Armenia. Ph.D. Dissertation. 2009, pp. 111-114. [Տեր-Վարդանյան Հ.Մ., Արդար դատարանության իրավունքի սահմանդրաիրավական հիմքերը Հայաստանի Հանրապետությունում, Ի.գ.թ. գիտական աստիճանի հայցման ասեռնախոսություն, Երևան, 2009, էջ 111-114]

That is to say the legislation stipulates a clear procedural mechanism for getting acquainted with the contents of the appeal and its response (if it was presented), and the Court of Appeal bears the obligation of notifying the persons participating in the case about the venue and time of the court session. Consequently, each party decides on its own upon the question of using their rights by discretion, at the same time bearing all the negative consequences of not using them.

If the person participating in the case is called to the court session to give explanations and the Court of Appeal bears the obligation of ensuring the presence of the other persons participating in the case, the logic and dispositivity's basic provisions of the civil procedure legislation will be violated. In our opinion, the reinforcement of the right of the persons participating in the case to learn about the contents of the appellate appeal and its response and to be present in the examination of the appeal (in the court session), which is accompanied with the positive obligation of the Court of Appeal to provide conditions for exercising that right, is sufficient. And the question about how and in what extent the persons participating in the case will use their rights is just the matter of their discretion. It is not random that there is a provision fixed in the next paragraph of the discussed article according to which the fact that the persons participating in the case are not present cannot be an obstacle for the case examination.

Herewith, from Article 218(2) it arises that in case of a need to give explanations the Court of Appeals may summon both the person who lodged the appeal and the other persons participating in the case. The obligation of the Court of Appeal to notify the persons participating in the case of the venue and time of the court sitting itself implies the provision of the conditions for exercising the right of the persons involved in the case to be present at the court sitting.

In the phase of appeal, the Court of Cassation of the Republic of Armenia<sup>7</sup> expressed its standpoint about providing for the principles

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<sup>7</sup> See Decision of the Court of Cassation YeAQD/1516/02/08 of July 24, 2009 with respect to a civil case.

of competition and legal equality of the parties.

In particular as a result of a systematic analysis of Article 212(1) (response to the appeal), Article 217(4) (in the Court of Appeal, during the examination of the case, the rapporteur judge presents the arguments of the appeal and those of the response submitted against the appeal), Article 220(2)(4) (the decision of the court of appeal must contain an indication of the grounds for and substantiations of the appeal, the demand of the person having lodged the appeal, in case of availability of a response to the appeal also the standpoint and substantiations of the person having submitted the response) of the Civil Procedure Code of the Republic of Armenia, the Court of Cassation of the Republic of Armenia found that by establishing the right of the persons involved in the case to lodge an appeal, the legislator reinforced the exercise of the principle of competition and legal equality. At the same time the Court of Cassation defined that during the case examination the principles of competitive procedure should be kept.

In addition, ... in legal literature it is considered as violation of competitive procedure if according to the civil procedure code regulating the legal relations of lodging appeals, the person participating in the case has the possibility to comment and express his or her position only about the grounds and justifications presented in the appeal, and what concerns the arguments mentioned in the response of the appeal, then there is no<sup>8</sup> possibility of commenting envisaged in the legislation for the person who lodged the appeal or for the other persons participating in the case.

In this regard, it was suggested to stipulate a legal regulation in the procedural legislation of Armenia by establishing a relevant provision or through a relevant commentary in the judicial practice according to which during the review proceedings of a judicial act no

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<sup>8</sup> Ter-Vardanian H.M. The Constitutional Foundations of Fair Trial in Armenia. Ph.D. Dissertation. 2009, pp. 111-114. [Տեր-Վարդանյան Հ.Մ., Արդար դատարանության իրավունքի սահմանդրաիրավական հիմքերը Հայաստանի Հանրապետությունում, ի.գ.թ. գիտական աստիճանի հայցման ատենախոսություն, Երևան, 2009, էջ 111-114].

provision reinforcing the rights and obligations of the participants can be commented as a limitation of the possibility to present the comments of the latter concerning the remarks of the appellant's appeal or the proceedings participants which were made in oral or written form.

In our opinion the law of procedure is already based on this starting point. The grounds of the appeal are the violations of the substantive and procedural norms which were made during the case examination in the first instance court, the new or newly emerged circumstances. The necessity of providing the conditions of equal and competitive procedure orders that the other persons participating in the case also have an equal possibility of expressing their position concerning the influence of the grounds of appellant appeals and justifications, that is to say on the breach of procedural law norms and on the outcome of the case. Consequently, the basic provisions of equal and competitive procedure can be considered as kept.

Herewith, the law of procedure clearly established that both the appeal and the response to the appeal are presented in a written form. What concerns the remarks and explanations which are made orally during the court session, the rules of Article 28 of the Civil Procedure Code apply, which are general for all the stages of civil procedure and establish that the persons participating in the case may present their arguments concerning the questions which arise during the case examination as well as they may object against the arguments of other persons.

The requirement of examining the case in conditions of equality as it is fixed in RA Constitution is obligatory for all the stages of the procedure. According to the case law of the European Court, the principle of equality between the weapons (procedural means) is an element<sup>9</sup> of a broader notion which includes also the fundamental principles of competitive proceedings.

As we see, in the case law of the European Court, the requirements of case examination in equal conditions and competitive procedure are considered in the same context; moreover,

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<sup>9</sup> See the case of Brandstetter v. Austria, judgment, August 22, 1991, Point 66.

the legal equality itself supposes the own position, including the possibility of presenting the evidence justifying it, which is one of the basic provisions of the principle of competition. The European Court mentioned that the principle of weapon equality in the sense of the “fair balance” between the parties requires that each party has the possibility to present its position in such conditions which will not put the latter into an essentially unfavorable or advantageous state<sup>10</sup>.

Consequently, the legal equality of the parties supposes the possibility of exercising the institutes of competitive procedure in fair, effective and equal conditions. For example, sharing the burden of proof between the persons participating in the case in equal conditions and in correspondence with the rules of competition which in the phase of appeal is distinguished from the rules of proving which are applied in the first instance court and supposes only the obligation of justifying the grounds for the appeal, the response to the appeal and the positions existing in them.

In the practice of the RA Court of Cassation, the principles of competition and legal equality between the parties is also considered in a correlation but, in our opinion, legal equality is a broader notion and, as in its contents, it includes not only the possibility of the persons participating in the case to justify their own position and the possibility of proving equally but it includes also basic provisions of establishing equal procedural rights and obligations for the latter, providing equal conditions for exercising them.

In one of its decisions the RA Court of Cassation mentioned that the principle of legal equality between the parties in the procedure, in the sense of “fair balance” between the parties, is one of the basic elements of the fair judicial examination guaranteed by Article 6(1) of the Convention and it requires that each party be provided with a reasonable possibility to present the case in such conditions which will not put him in a less favorable state unlike the other party ( the decision of the European Court in the case *Ancler v. Switzerland*<sup>11</sup>).

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<sup>10</sup> See the case of *Werner v. Austria*, judgment, November 24, 1997, Point 63.

<sup>11</sup> See the Decision of Court of Cassation YeAQD/1516/02/08 of July 24, 2009 with respect to a civil case.

Herewith, it is necessary to differentiate the procedural and factual equality of the parties. The legal equality is manifested in giving equal possibilities to the parties (rights and obligations) and in providing them, but in what extent each party will use those possibilities is another question. As mentions G. L. Osokina: “If the person participating in the case uses the possibility of acting in the appeal through an advocate, but the other party refuses the service of an advocate by some material or other considerations, then it is inadmissible to talk about the violation of the principle of procedural-legal equality just on the grounds that the interests of one of them were defended by an advocate but the ones of the other were not. The legislation guarantees for everyone the possibility of acting in the procedure through representative (principle of legal equality), and exercising this possibility directly depends on the will’s expression of the parties (the principle of dispositivity<sup>12</sup>)”.

In professional literature there is a point of view according to which in market economy each party of the procedure, taking into account his financial state, can participate in the case with or without a representative. Consequently, it is more appropriate to give the court the necessary possibilities to legislatively discover the truth of the case.

In this sense, the civil procedure must be built on the principle of competition but it should be filled by the right of the court to lead the procedure and in case of necessity also interfere in the competition. Hence, it is suggested to carry out the civil procedure including the appeal, in such a combination of competitive and investigatory procedural basic provisions where will predominate the elements of competition, but the court will meanwhile be empowered by such authorities which will be aimed to the support of evidentiary activity, the provision of legal equality and will provide necessary

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<sup>12</sup> Osokina G.L. Civil Process. General Part/ Moscow, 2003, pp.145-146.[Осокина Г.Л., Гражданский процесс. Общая часть / Г.Л, Осокина.- М.: Юрисгъ, 2003, С.145-146].

conditions for discovering the objective truth<sup>13</sup>.

We find that the mentioned point of view must not be considered as justified as in civil procedure the principle of competition supposes not the discovery of the objective truth but the discovery of judicial truth. As to the support to the evidentiary activity of the persons participating in the case, the provision of legal equality for competition, the court is empowered by sufficient procedural means envisaged by the RA legislation.

Moreover, one must talk about the objective or judicial truth in the phase of appeal with a strict derogation. In legal literature the argumentative necessity of reaching the legal truth is quite justified in competitive procedure conditions, meanwhile mentioning that the competition itself does not suppose the absence of objective or judicial truth and the procedure must be carried out by the precise or, in case of impossibility considering the legislative appropriation, by the possible confirmation way<sup>14</sup> of the circumstances which have essential significance for the case solution.

Disagreeing with that idea, it should be mentioned that the RA Civil procedure code clearly establishes the rules of bearing the negative consequences of sharing the burden of proof between the persons participating in the case carried out in competitive procedure, including the ones of the facts which remain disputable after the examination of the evidence.

The competitive procedure supposes the confirmation of those factual circumstances which are made on the basis of the conclusion

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<sup>13</sup> Chistyakova O.P. The Problem of Judicial Activism in the Civil Proceedings. Resume of Ph.D. Dissertation. Moscow, 1997, P. 6; Ryazanovskiy V.A. Unity of the Process. Moscow, 1996, pp. 66-67. [Чистякова О.П., Проблема активности суда в гражданском процессе РФ, Автореф. дис. ...канд. юрид. наук. М., 1997. С. 6. Рязановский В.А., Единство процесса. М., 1996. С. 66-67].

<sup>14</sup> Samsonov V.V. Competition in Civil Procedural Law. Ph.D. Dissertation. Saratov, 1999, P. 7; Krylev S.V. Understanding and Guarantees of Principle of Objective Truth. Ph.D. Dissertation. Collection of works (Shakaryan M.S., ed.), Part 51, Moscow 1977, P. 7. [Самсонов В.В., Состязательность в гражданском процессуальном праве, Автореф. дис. ...канд. юрид. наук. Саратов, 1999. С. 7. СВ. Курылев. Понятие и гарантии принципа объективной истины // Труды ВЮЗИ / Под ред. М.С. Шакарян. Том 51. М., 1977. С. 7].

concerning the admissibility, credibility and relevance of the assessment of the evidence investigation solely in the court session, which itself composes the contents of judicial truth.

Herewith, the due confirmation of factual circumstances of the case, on their basis, in accordance with the legislation, determining the material rights and obligations of the persons participating in the case is aimed at the realization of the goals of civil procedure such as the complete provision of the right to judicial defense of the persons, the due and timely examination and resolving of civil cases, that is to say the exercise of the principle of judicial economy, which first supposes the due and timely solution<sup>15</sup> of civil cases by court which is carried out through the most efficient use of labor resources, through the rational use of judicial means of protection of subjective rights and legitimate interests.

Consequently, the discovery of truth and the due confirmation of the factual circumstances of the case in competitive procedure conditions are guarantees of the principle of judicial economy or frugality.

The court of appeals does not directly investigate the evidence, hence, the principle of directness does not have a classic sense in this stage. In particular, during the examination of the appeal, the Court of Appeal takes as bases the facts which are confirmed by the Court of First Instance, except for the cases when in the appeal those facts are being objected (Article 219(3) of the Civil Procedure Code).

In this case the Court of Appeals checks the rightness of the conclusions made by the Court of First Instance as a result of studying and assessing the evidence, and in the cases envisaged by law also confirms new facts or considers a fact as non-confirmed based on the pieces of evidence investigated by the lower instance court (Article 219(3) and Article 219(4) of the Civil Procedure

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<sup>15</sup> Tikhonovich V.V. On the Issue of Procedural Economy in Soviet Civil Procedural Law // Moscow, 1977, P.15; Sheglov V.P. Soviet Civil Procedural Law. Lectures for Students. Tomsk, 1976, P. 41. [Тихонович В.В., К вопросу о принципе процессуальной экономии в советском гражданском процессуальном праве // Труды. 1977. Т. 51. С. 15. Щеглов В.П., Советское гражданское процессуальное право. Лекции для студентов. Томск, 1976. С. 41].

Code).

From the logic of the law it arises that in the court session the court of appeal does not directly study the evidence, that is to say it does not interrogate the witnesses, the persons participating in the case, does not examine the material evidence, etc. And in the cases where by virtue of Article 219(1) of the Civil Procedure Code the Court of Appeal accepts new evidence, then studies and assesses the evidence from the perspective of its essential significance for resolving the case and without confirming a new fact on its basis, overturns the judicial act by remitting the case to the lower instance for new examination.

***We find that it will be even more logical to establish a positive obligation of directly examining the evidence existing in the case, in case the court of appeal confirms a new fact, if the court has reasonable doubts regarding the adherence to the rules of examining the evidence by the first instance court.***

From the contents of point 1 of the Recommendation No. R(95)5 of February 7, 1995 of the Committee of Ministers of the Council of Europe concerning the introduction and improvement of the functioning of appeal systems and procedures in civil and commercial cases arises that the Contracting States are obliged to provide the right of the persons participating in the case to the fair judicial examination in the instances which exercise a judicial review.

It follows that the principles of the contents of fair judicial examination law's organic and functional elements are applicable in the phase of appeal, that is to say the principle providing the rights to the case examination by a court created based on the law, the public case examination by the court, the court availability which are organizational in their nature, and the principles providing the rights to a case examination in equal conditions between the parties, a competitive examination in a reasonable period and the rights to receive a justified judicial act which are functional in their nature, have some particularities of being exercised in the appellant proceedings and foreclose the procedural form of judicial acts'

appeal.

Just the principles of dispositivity, competition and judicial-legal equality of the parties, with some reservations also the directness of case examination, are aimed at the provision<sup>16</sup> of the functional elements of the law of trial.

Generalizing the aforesaid, we can state that:

- *In the stage of appeal the competitive procedure supposes not proving the facts underlying the own claims and objections, but the obligation of justifying the circumstances (violations of the norms of law) underlying the appeal and the response of the appeal;*

- *We find that it will be even more logical to establish a positive obligation of directly studying the evidence existing in the case, in case the court of appeals confirms a new fact, if the court has reasonable doubts regarding adhering to the rules of examining the evidence by the first instance court.*

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<sup>16</sup> Philip Leach, Taking a Case of the European Court of Human Rights, Second Edition, Oxford University Press, 2005, P. 256, Case of Beer v. Austria, judgment, February 6, 2001, Point 18, Case of Ruiz-Mateos v. Spain, judgment, June 23, 1993, Point 63, Case of Helle v. Finland, judgment, December 19, 1997, Point 60.

# **PARTICULARITIES OF DISTRIBUTING THE OBLIGATION OF PROVING OF LABOR DISPUTES<sup>1</sup> IN CIVIL PROCEDURE**

**Gevorg Petrosyan<sup>2</sup>**

The demand to act in a reasonable manner and exercise the rights established by regulatory legal acts, with grounds for keeping the labor legislation and with other ones causing labor rights and obligations set by the RA Labor Code<sup>3</sup> (Article 37), concerns both the employers and the employees.

During the organization and application of hired work, it is either sometimes impossible or not appropriate to entirely keep the obligations arisen between the parties of labor relations, which is conditioned by various objective and subjective reasons.

The labor misunderstandings arisen around different problems are often turned into a labor dispute when it is impossible to regulate by direct negotiations of the parties and one of the parties applies to the authorized body in order to solve the misunderstanding.

According to Article 264(1) of the Code, the labor disputes shall be examined in legal form, as prescribed by the Civil Procedure Code of the Republic of Armenia.

Article 6 of the Civil Procedure Code<sup>4</sup> of the Republic of Armenia establishes that civil proceedings are carried out on the

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<sup>1</sup> By saying a “labor dispute” we mean the misunderstandings which occur between the employee and the employer and the judgments and conclusions made in the job concern only the judicial disputes where they participate. In this regard those judgments and conclusions are not relevant to the disputes which arise from the correlations between administrative bodies and employers of the same labor relations which are examined by the administrative procedure order in accordance with the RA Administrative Procedure Code.

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<sup>3</sup> Hereinafter: the Code

<sup>4</sup> Hereinafter: the Procedure Code

basis of competition and legal equality of the parties<sup>5</sup>. In line with it, Article 48 of the same code establishes that each participant of the case should prove the facts he or she has referred to. Consequently, the labor disputes also shall be examined by the rules of the competition between parties and equality of rights.

The fact that the competitive procedure is an important guarantee in supporting the judicial body to make a justified judgment, is indisputable, as the court is a “sedentary” body and normally studies and evaluates the evidence underlying the case solution usually in the place of his activity, except for the cases of impossibility or difficulty to bring the evidence to court, when the court, upon the motion of the parties or at its own initiative, carries out on-site examination and study of the evidence (Article 50 of the Civil Procedure Code).

At the same time we must not ignore that the competitive procedure is a means of performance of justice, but not an aim, and as it should be directed to the realization of the objectives of civil procedure. It should be derived that as the organizer of the competition between the parties the court should “care about” the competition contributing, but not hindering the comprehensive, complete and objective examination of case circumstances, consequently contributing also to the effective protection of the persons<sup>6</sup> who seek for the defense of the court through a legitimate and justified judgment.

First of all it is necessary to refer to the expression “equal competition” which, in our opinion, must not be understood in the

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<sup>5</sup> In this regard it is noteworthy that the Judicial Code of the Republic of Armenia (hereinafter: Judicial Code) establishes that “the trial is competitive...”. Thus, according to the Judicial Code, the competitive nature belongs not to the whole procedure, but only to one phase of the procedure.

<sup>6</sup> In this case by saying “persons who seek for the defense of the court” we mean not only the claimant who applied to the court for defending his or her violated or moot right (rights), but also the respondent who even did not apply but by becoming a participant of the procedure unwittingly becomes also a person who seeks for his or her rights’ defense from the court just by the sense that he or she has the objective of preventing the issuance of a judicial act which violates his or her rights and legitimate interests.

sense of equally sharing the subject of proving between the parties in all the cases.

After determining the subject of proving or the same thing as the frames of the facts and (or) the consequences which are subject to be proved, the next important step is sharing the burden of proof between the parties on the right implementation of which depends the possibility of discovering the objective truth of the case and making a justified judgment.

For the right organization of the judicial proving, the comprehensiveness of the proving material, the provision of the direction and regular process of the proceedings, it is very important which of the procedure participants has the burden of proof<sup>7</sup>.

First of all, we consider it important to underline that in the Procedure Code, in our opinion, the legal provision called “to push” the court to make a justified judgment is not well-formed.

In particular, the Article 53(1) of the mentioned code sets forth that the court evaluates each piece of evidence upon moral certainty based on a comprehensive, complete and objective examination of all evidence existing in the case. This does not fill the gap of the law concerning the court’s obligation to examine all the essential circumstances of the case in a comprehensive, complete and objective manner.

By comparison, let us mention that this problem was solved in the ASSR Civil Procedure Code of 1964, wherein Article 10 defined that the court, not being limited by the submitted materials and explanations, is obliged to take all the measures envisaged by law to find out the real circumstances, the rights and obligations of the parties in a comprehensive, complete and objective manner (paragraph 1). Thus, according to the current Procedure Code, the court does not have the duty to reveal all the factual circumstances of a case and adopt a judgment based on that, rather it bears the

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<sup>7</sup> Meghryan S. G. Evidence in Civil Procedure of Armenia. Lectures. Yerevan, 2012, P. 67. [Մեղրյան Ս. Գ., Ապացուցումը Հայաստանի Հանրապետության քաղաքացիական դատավարությունում: Դասախոսություններ: Երևանի պետ.համալսարան: Եր., ԵՊՀ հրատ., 2012, էջ 67].

obligation to evaluate any obtained piece of evidence of the case on the basis of a comprehensive, complete and objective investigation of the other piece of evidence.

If the mentioned formulation of the law does not hinder the entire clarification of the real case circumstances in the proving process of other category cases, then the same cannot be said about the judicial proving in labor disputes.

According to the current legislation of Armenia, in organizations the management is led unilaterally by the organization, and the employees who are in labor relations with the latter are dealing with that management in so far as it concerns them. The law-making activity and directing the management which reflects it are the exceptional jurisdiction of the organization and receiving any information concerning it, except for the cases envisaged by the Code, is made by its factual possessor, that is to say upon the wish and consent of the organization. Various circumstances, which may be remarkable in case of a labor dispute and may be included in the frames of the proving subject, may be examined by the organization through being provided, confirmed and denied, an opportunity which does not possess the other competing party, i.e. the employee.

In our opinion, the equal distribution of the burden of proof while examining labor disputes is not a justified and appropriate approach in these conditions, if we admit that the main goal of the civil procedure is to discover the objective truth of the case.

First of all, we consider it necessary to clarify the essence of the notion “distribution of the burden of proof” in the frames of this work. While using the mentioned expression in the work, we meant not only the mechanical split of the factual staff of the subject of proof, i.e. which competing party must prove which fact (circumstance), but also the determination of each competing party’s correlation with each fact (circumstance) included in the subject of proof, i.e. determining the obligation of proving the same fact (circumstance) for each of the participating parties individually. In the last case there comes a necessity to define a sequence of proving each certain fact (circumstance) as a result of which the party who

will have to bear the relevant fact (circumstance) is determined (can be determined). In this regard, the distribution of the burden of proof can be organized through two main principles:

1. to clearly determine the frames of the facts (circumstance) which are to be proved by each party and in case of not proving it (including not presenting admissible and relevant evidence), consider it as a justification of the other party's demand or objection, or

2. to determine the subject of proving in the case or, which is the same, the whole scope of all the evidence (circumstances) which is to be proved establishing the priority of each evidence based on the objective circumstance of obtaining and presenting each piece of evidence, and while deciding upon the question of priority of proving, we should consider exclusively or mainly the question as to for whose activities' evaluation it is necessary to prove or deny the given fact or circumstance.

The research of the discussion practice of the judicial cases on labor disputes shows that the wrong distribution of the burden of proof considerably complicates the comprehensive, complete and objective study of the real circumstances of the case, which, as a result, endangers the possibility of providing for the procedure participants' lawful expectation concerning the achievement of a legitimate and justified judicial act. Finally, if we accept the court as a body which resolves the plaintiff's claim based merely on the existing evidence but not on the real circumstances of the case, then, in our opinion, the reputation and weight of the court as the main institution of legal defense, is directly being derogated. As a result of an imprudent organization of the competition between the participating parties in a labor dispute, more precisely as a result of a wrong distribution of the burden of proof of the examined case the possibility of having a fair judgment essentially decreases, which must certainly be considered as an alienable part of the right to fair trial. However, in case of stating the vice-versa, when making a fair judgment is omitted from the right to fair trial, the fair trial becomes an end in itself and a non-led activity which is deprived of the ability to have real influence on the protection of the rights and legitimate interests of the law subjects.

While deciding the question of the distribution of the burden of

proof, the court must not give importance to the fact about which of the components of the subject of proving dominates - the factual (for example not being absent from the workplace, being present at work, the proper fulfilment of the task, etc.) or the documented (for example, the change made in the staff list, the results of a competition or a certification, making a wrong or a false document, the note in the workbook, etc.)? The court has to consider which of the competing parties has the functions of receiving each evidence underlying the case solution, whose obligation is to create and keep that evidence and who is responsible for it both in internal (we mean labor) and external (we mean civil, administrative) legal relations.

For example if the lawfulness of the termination of the labor contract due to lay-offs in jobs is litigated in the court, then the burden of proof must bear the employer. In particular, the employer must prove that:

a) actually there was a lay-off of the employee's position which must be confirmed by a similar legal act by which the position was created;

b) the decision (another legal act) about the lay-off was adopted by law, by another regulatory legal act or by a person authorized by the statute of the employer;

c) an individual legal act was released about the termination of the labor contract;

d) the individual legal act entered into force as prescribed by law;

e) a written notification to the employee about terminating the labor contract preceded the adoption of the individual legal act;

f) the contents of the notification corresponds to the law requirements;

g) another job corresponding to the professional readiness, qualification and health state of the employee was offered but the employee refused it;

h) in case of not offering another job, the absence of the relevant job (vacancy).

This kind of distribution of the burden of proof is explained by the thing that the Code, when terminating the labor contract of the employee for the reason (on the basis) of lay-off, establishes some

obligations the fulfilment of which is obligatory in any case, regardless of the form of employer's property, the organizational-legal type, the particularities of the activity and other circumstances. In such cases, the "removal" of the subject of proving to the court is often impossible, and sometimes depends on big difficulties and inconvenience by which overloading the competing parties is not reasonable and realistic.

For example in what extent is it reasonable to put an obligation on the employee concerning the denial of the fact of the signatures' belonging to the Council members, which is put under the decision on confirming the staff list, in case when putting the obligation of proving the mentioned signatures' belonging on the employer is incomparably easy and manageable. In the same manner, in our opinion, it is not reasonable, for example, to put the obligation of proving the fact of having worn an established type of clothing (obligatory outfit) on the employee, if the fact of not wearing such outfit can be proved by the employer with the help of the recording devices and other technical means placed around him. In this regard we think that while solving the problem of the distribution of the burden of proof, the court must act also by the principle of economizing the time and the means, however, provided that this economy is not on the expense of the complete, comprehensive and objective study of the real circumstances of the case.

Practically it is possible to have a situation when the parties have different evidence at their disposal which, in the opinion of the party possessing it, can confirm this or that circumstance and deny the other one. In this case, in our opinion, the Court must put the obligation of proving the same fact on both the competing parties and afterwards evaluate the credibility of the evidence presented by each party.

The examination of the norms of the Procedure Code and the analysis of the judicial practice application concerning the distribution of the burden of proof allow us to state that the rules of the distribution of the burden of proof are not regulated in details in them.

The provision that each party is obliged to prove the facts he or she has referred to (Article 48(1)) is a general rule which should

underlie the process of proving as a baseline principle of the competitive procedure. At the same time it should be noticed that making that rule absolute may often threaten the interests of discovering the real circumstances of the case, creating a situation when the court decides the litigation arisen between the parties not on the basis of factual circumstances, but on the basis of the evidence about some circumstances presented to the Court.

As in conditions of labor legal relations, all or at least the main regulating documents of those relations are under the possession of the employer, thus obvious difficulties may appear while putting the obligation of proving the case circumstances by the mentioned documents (evidence) on the employer.

Nevertheless, putting the obligation of proving the indicated facts on each party is not the only rule of organizing the competition of the parties. From this general rule the Procedure Code sets an exception empowering the court with the jurisdiction of determining the subject of proving and distributing the burden of proof between the parties. It is another problem that the criteria and the definitive rules of distributing the burden of proof are not established in the Procedure Code in sufficient details, which may lead to rendering a judgment or another judicial act which does not reflect the real circumstances of the case.

According to Article 149.8(2)(5) of the Procedure Code, the Court discusses with the parties the scope of the facts to be proved in the preliminary court session and distributes the burden of proof in compliance with the rules in burden of proof distribution.

From the contents of the mentioned legal provision, we can think that it is a legal guarantee for making the process of proving even more effective, for omitting from the process the facts which have no significance for the right solution of the case and for duly organizing the competition of the parties, and that the significance of this guarantee does not decrease in case of existence of a legal provision establishing the burden of proof of the indicated facts for each party.

Moreover, we think that the legal provision about determining the subject of proving and distributing the burden of proof among the parties should be considered dominating as the Court who knows the

law, at the same time finds it necessary to deviate from the general provision by setting for each party the facts which are to be proved. In this regard we think that while distributing the burden of proof, the Court must not be bound with the circumstance as to which party referred to the facts that are to be proved.

Otherwise, the law would establish only one exceptional rule - Article 48(1) of the Procedure Code, and the competitive procedure would be organized by that logic, contributing to the enrichment of the subject of proving and letting the Court have the duty of a too passive “jury”.

The process of correctly organizing the competitive procedure must not be limited just by the right distribution of the burden of proof. It is also important to make the legal regulation of the problem of evaluating the facts which are presented by distribution. The Procedure Code must regulate also the problem of legal consequences of failure to fulfil or improper fulfillment of the obligation of proving. It should be read by taking into account that the Court must not be allowed (have the possibility) to do “a turnaround of the burden of proof”, that is to say when one party is overloaded with proving the contrary of the facts which are not proved by the other party and the failure to fulfil it may influence the outcome of the case. We mean that if the Court puts the obligation of proving this or that fact on one of the parties during the preliminary court session, then it means that the Court indirectly releases the other party of the obligation of proving the contrary and not proving the contrary must not be considered as a ground for solving the competition to the detriment of that party.

Let us bring an example<sup>8</sup> from practice. On April 5, 2011, the company provided the employee with a written notification about terminating the employment contract after three months, as of July 1, 2011, under which the employee made a note with the following contents “I have read the order and received a copy of it” and mentioned his disagreement with the subject of the notification. The employee continued his work till the day of employment contract’s

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8 The example is brought from a specific civil case (see the civil case materials of YeKD/1643/02/11)

termination and only on the day of the termination, on July 1, 2011, settlement payments were done, he received his employment record book, but the copy of the order was not handed to him with the argumentation that it was handed to him on the day of the notification, on April 5, 2011, and in connection with it the employee had already made the relevant note.

On July 22, 2011, *i.e.* after the settlement payments and twenty-two days after having received the employment record book (before the expiration of a one-month period), the employee applied to the court with the claim of objecting the dismissal. In the preliminary court session, upon the motion of the claimant, the respondent was obliged to prove that on April 5, 2011 the claimant received the disputable order. The respondent did not prove it, but the court, based on the application of the statute of limitation, explained the rejection of the claim with the argument that the claimant did not prove that he was provided with another order, but not with the disputed order. That is to say, the court made a turnaround of the burden of proof, *i.e.* first he put the obligation of proving on the respondent but afterwards, as the fact was not proved by the respondent, he came to the conviction that the claimant did not perform the obligation of proving the contrary either.

Thus, the Court neglected several circumstances, including the ones that:

1. the respondent was under the obligation to prove the fact of having handed the disputable order to the claimant,
2. the claimant was not under the obligation to prove the fact of having handed another order,
3. the confirmation of the fact that the claimant received another order was not significant for resolving the case, but rather the confirmation of the fact that the respondent handed the claimant the very disputable order.

While distributing the burden of proof, it is necessary to follow a certain rule. Establishing for each party the obligation of proving the circumstances they have referred to (the general rule of distributing the burden of proof), being the cornerstone of the

competitive procedure in civil cases in general, however, in certain category of cases, in particular, for example in labor disputes, it can be applied by some exceptions, conditioned by the circumstance of the unequal distribution of the evidentiary material, the negligence of which endangers the stemming of the judicial act from the real circumstances of the court, which, in its turn, endangers also the interest of the real protection of the violated or disputable rights of the persons seeking the right to protection from the court.

While distributing the burden of proof in labor disputes, *the circumstance of the centralization of the evidentiary material, the objective possibilities of their presentation and the principles of economizing the time and the means* should be considered as basic conditions and requirements.

Taking into account that the main staff of the documents concerning the labor activity of the employee is under possession of the employer, we think that while distributing the burden of proof in labor disputes the Court must deviate from the general rule of distributing the burden of proof and demand the evidence in correspondence with<sup>9</sup> the centralization of the evidentiary material, the objective possibilities of their submission and the principles of economizing the time and the means.

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9 By the way, the direction of deviating from the general rule of distributing the burden of proof has been known to the legislation of Armenia while examining other types of disputes as well. In particular, there is such private approach in the RA Civil Code, and there is an exception made from the general rule about the cases regarding person's honor, dignity and business reputation. According to article 1087.1(4) of the Civil Code of the Republic of Armenia, “[u]nder the cases on slander, the burden of proof in respect of the availability or absence of necessary factual circumstances shall lie with the defendant. It shall be transferred to the plaintiff, where the burden of proof requires from the defendant unreasonable actions or efforts, whereas the plaintiff possesses all the necessary evidence”. In our opinion, in this case, too, the legislator took as a basis *the circumstance of the centralization of the evidentiary material, the objective possibilities of their presentation and the principles of economizing the time and the means* invoked by us.

# BOUNDARIES TO APPROVE THE INDISPUTABILITY OF THE CLAIMS IN BANKRUPTCY PROCEEDINGS

Gor Movsisian<sup>1</sup>

## I. PREFACE

The number of bankruptcy cases in Armenia initiated within 2011<sup>2</sup> was 1098 which, compared to the number of 552 of 2010, is an absolute increase of 50,2%<sup>3</sup>. Although there is a need of additional statistical data covering several years to conclude a sustainable growth in the number of cases, it is undeniable that each bankruptcy case replenishes the economic reality with exclusive situations and issues. As a matter of fact, the legal prescriptions introduced by the case law, sometimes, are insufficiently substantiated partly because of the deficiency of legal provisions and partially because of amorphous nature of law enforcement in this particular field.

The Law on Bankruptcy of the Republic of Armenia<sup>4</sup> (hereinafter the LBA or the Law) makes it possible to declare the debtor bankrupt and register creditor's claim if the latter entails from indisputable claims. Indeed, those indirect rules on approval of the claim in combination with the rules of moratorium apparently put the law enforcement practice either in non-conformity with the principal task of bankruptcy proceedings or deprive an entity from the right to fair trial (Article 18 of the Constitution of Armenia<sup>5</sup>). Though the

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<sup>2</sup> The Report on the Course of Bankruptcy Cases in the RA courts in 2011, available at <[http://www.court.am/?l=lo&id=50&cat\\_id=0&page\\_num=3](http://www.court.am/?l=lo&id=50&cat_id=0&page_num=3)> (Last retrieved on 20 June, 2013).

<sup>3</sup> The Report on the Course of Bankruptcy Cases in the RA courts in 2010, available at <[http://www.court.am/?l=lo&id=50&cat\\_id=0&page\\_num=5](http://www.court.am/?l=lo&id=50&cat_id=0&page_num=5)> (Last retrieved on 20 June, 2013).

<sup>4</sup> Adopted on December 25, 2006, entered into force on February 10, 2007, Official Journal of the Republic of Armenia, 2007.01.31/7(531) Art.139.

<sup>5</sup> Adopted on July 5, 1995 by Referendum, Special edition of the Official Journal of the Republic of Armenia, 2005.12.05/ Art. 1426.

court is vested only with the power to approve the indisputable nature of the claim, the law enforcement practice has drifted far from this crucial point of departure, suggesting us entirely different case law practice. Needless to say that this kind of case law isn't in compliance with the features of bankruptcy proceedings; however it provides a reasonable opportunity to the potential creditors to resolve the dispute and to apply for the registration of relevant claim under the same bankruptcy procedure. And this is in the case when the potential creditor possesses no right to initiate a civil lawsuit under the Civil Procedure Code of the Republic of Armenia (hereinafter CPC)<sup>6</sup> given to the limitations existing as a part of moratorium.

Amid the analysis of a set of case law, some aspects of theory of bankruptcy law and legislation, this article suggests amendments to the provisions of the law to eliminate the ambiguity of the described situation, without excluding the mentioned interests (the tasks of bankruptcy proceedings or the right to fair trial).

The article proceeds as follows; Part II. Scope of legislation based on which the above mentioned practice has emerged, Part III. Interdict to hear property claims under the bankruptcy procedure in the context of case law of Armenia, Part IV. Limitations of moratorium and prohibition of dispute settlement, Part V. Conclusion.

## **II. SCOPE OF LEGISLATION**

As a matter of fact, there is a “sensitive” procedural line between the approval of the fact of indisputability of the bankruptcy claim and the settlement of the dispute itself. By the same token, while approving the indisputability of the bankruptcy claim (*i.e.* comparing the factual substantiation of the claim with the underpinned by the Law) the court may cross a “red line” by settling dispute emerged between the debtor and the potential creditor. The courts may come across to the mentioned situation when:

- a) deciding the admissibility of bankruptcy relief,

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<sup>6</sup>Adopted on June 17, 1998, entered into force on January 1, 1999, Official Journal of the Republic of Armenia, 1998.09.09/20(53).

- b) declaring the debtor's bankruptcy,
- c) approving the claims of creditors (Article 46).

a) The court may stand on the edge of approving the indisputability of bankruptcy claims and settlement of disputes while deciding the admissibility of the involuntary bankruptcy claim based on the Article 3 and in accordance to the procedure underpinned by Articles 13 and 14 of the Law. Article 3(2) of the Law stipulates the following: "The debtor may be declared bankrupt by a court judgment,

1) on the basis of an application for compulsory bankruptcy if the debtor has delayed, for 60 or more days, the fulfilment of indisputable payment liabilities which exceed 1000-fold of the minimum monthly salary as defined by law [*AMD 1,000,000*], and if the mentioned delay continues at the moment of making the judgment, even if the debtor is not insolvent. A payment liability is indisputable, if the debtor does not object thereto or if the debtor objects to the mentioned liability, but:

(a) the payment liability is recognized by a judgment having entered into legal force, and there is no possibility for set-off;

(b) the claim is based on a written transaction, and the debtor does not prove the fact of possessing sufficient grounds for objecting to the given claim (including the set-off of the claim);

(c) the claim derives from the obligation of the debtor to pay taxes, duties or other mandatory payments, and the debtor does not prove the fact of possessing sufficient grounds for objecting to the given claim (including the set-off of the claim);

(d) the undisputed part of the claim exceeds 1000-fold of the minimum monthly salary as defined by law."

According to the Article 14 of the Law, the court declares inadmissible the claims filed against a person who by virtue of the Law may not be a debtor. This requirement refers also to persons whose debts are deemed disputable in respect to the rules of Article 3.

b) The second bordering situation may occur just after the positive outcome of admissibility under the issuance of bankruptcy relief. Conversely, at this point the emergence of new evidences may spread a light on the debtor's contractual or other type of obligations, and thus turn the latter from indisputable to disputable. Pursuant to the wording of the Article 16.2 of the Law: "If the insolvency of the debtor is disputable, the judge - within 10 days after accepting the application for proceedings - shall set a court sitting whereto the debtor and creditors mentioned in the application shall be invited." The rules of the Article 17.2 of the Law have the same nature: "In case the debtor disputes its bankruptcy by submitting written objections thereto to the court within 15 days after receiving the court decision, the court - within 10 days after receiving the objections - shall hold a court sitting by properly notifying of the date and venue thereof to the debtor and the person (persons) having submitted the application."

In both abovementioned cases the disputability of debtor's bankruptcy coincides with the disputability of debts having in regard an undeniable truth that the declaration of bankruptcy rests wholly on the payment debts.

c) The period dedicated to the registration of the creditor's claims under Article 46 of the Law is the third possible phase of the bankruptcy procedure, at which the court may face the problem of deciding the indisputability of the claims. Article 46 of the Law has the following wording:

"1. Creditors shall file their claims with the court within a one-month period after the announcement of bankruptcy.

2. The following shall be stated in the claim of the creditor:

(a) for the creditor filing a claim:

- the name and the registered office of a legal person;

- the name and the place of residence of a natural person;

(b) the liability wherefrom the claim derives, as well as the satisfaction period;

(c) the size of the claim by stating separately the amounts of the

principal debt, losses, surcharge (fine, penalty) accompanied by corresponding calculations;

(d) circumstances substantiating the claim.

Substantiating documents shall be submitted attached to the claim.

The claim and the documents attached thereto shall be submitted in three copies. [...]

7. When - within seven days after the publication in printed media that publishes information on the state registration of legal persons - the Administrator, the debtor and the creditors file a written objection against the priority of the preliminary list of claims or against a claim of any of the creditors, the judge shall convene a court sitting - within seven days after receiving the objection - and shall notify the Administrator, the debtor and the creditors about the venue and the date thereof - at least three days prior to the sitting - by making an announcement in printed media that publishes information on the state registration of legal persons or by sending a notification.

8. As a result of considering the objections, the court shall determine the lawfulness, size, priority, security of the claim and adopt a decision on approving the final list of claims.

The decision on approving the final list of claims may be appealed.”

The above mentioned rules bring us to the idea that the court has more discretion, given the fact that the decision of the court on the lawfulness of the claim, a matter with multilayer features, may in fact settle the property dispute between the debtor and creditor.

In order to underline the principal nature of an interdict to hear property disputes in bankruptcy proceedings, we find it necessary to refer to the Articles 8, 9 and 33 of the Law of the Russian Federation on Bankruptcy (Insolvency)<sup>7</sup>, Articles 5, 9, 10 of the Law of the Republic of Lithuania on Bankruptcy of Enterprises<sup>8</sup>, as well as the

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<sup>7</sup>The body of Law in Russian is available at <http://www.consultant.ru/popular/bankrupt/> (last retrieved on 20 June, 2013).

<sup>8</sup>The body of Law is available at <http://www.litlex.lt/Litlex/eng/Frames/Laws/Documents/21.HTM> (last retrieved on 20 June, 2013).

Articles 3 and 45 of the Law of the Republic of Serbia on Bankruptcy (Insolvency)<sup>9</sup>, which reiterate the same regulations as the Law of the Republic of Armenia on Bankruptcy.

### **III. INTERDICT TO HEAR PROPERTY CLAIMS UNDER THE BANKRUPTCY PROCEDURE IN THE CONTEXT OF CASE LAW OF ARMENIA**

In any meaningful sense the bulk of the mentioned regulation is the interdict to hear a property disputes as far as it is incompatible with the principal aim of bankruptcy in economic turnover. That is to say, the involuntary bankruptcy claims may only be absolute because of the fact that it worsens in many instances the economic state of an entity. The same holds truth for the bankruptcy claims to be registered afterwards. The requirement on the absoluteness entails from the incontrovertible truth that the bankruptcy proceeding is successive, respectively only an entity bearing absolute obligations may be declared bankrupt.

The dual nature of bankruptcy relations requires a certain level of abstraction over the routed approaches to the system of law and the affiliation of certain institutes to the branches of law. The bankruptcy relations can be divided into three categories: 1. judicial-procedural relations, 2. civil-substantial relations, and 3. civil-procedural relations (non-judicial). As a matter of general scientific presumption, the bankruptcy is considered interdisciplinary institute sharing the traditions of civil law and civil procedure.<sup>10</sup> This is an approach which may be considered relevant to solve the issue of the institute's affiliation to a certain branch of law; however, one may argue the effectiveness of the approach from the practical point of view. For the bankruptcy proceeding to be considered as a kind of civil procedure, the former should conform to the widely accepted criteria of the latter. The mentioned is sufficient enough to discard

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<sup>9</sup>The body of the Law is available at [http://www.lexadin.nl/wlg/legis/nofr/eur/arch/ser/bankruptcy\\_law.pdf](http://www.lexadin.nl/wlg/legis/nofr/eur/arch/ser/bankruptcy_law.pdf) (last retrieved on 20 June, 2013)

<sup>10</sup> POPONDOPULO W.F. Legal regulation of bankruptcy. Scientific-practical textbook., Moscow, 2012, at 51. KARELINA S.A., Legal regulation of insolvency (bankruptcy). Educational-practical textbook., Moscow 2007, at 13.

the assumption that the bankruptcy may be considered as a general kind of civil lawsuit. In case of special civil lawsuit, it is sufficient to mention that the ultimate aim of the bankruptcy procedure is not to approve a certain legal status of a natural entity nor does it mean to declare absence or presence of legal facts.

The interdict to hear the civil cases has become an issue of the following cases of the Cassation Court of Armenia: No 3-2475/TD<sup>11</sup>, No HYQD/0414/04/08<sup>12</sup> and No EKD/0074/04/09<sup>13</sup>. Henceforth, I would refer to the details of the case No 3-2475/TD where the court explicitly stated that no civil disputes may be resolved under the bankruptcy proceedings.

## **BANKRUPTCY CASE OF “IMPERIAL JEWELRY” LIMITED LIABILITY COMPANY No 3-2475/TD**

### **1. Legal and factual background**

According to the facts of the case the grounds for the bankruptcy stipulated in the Article 3 of the RA Law on “Bankruptcy (Insolvency)”<sup>14</sup> were not explicit in the proven case<sup>15</sup>. By the judgment of the Economic Court of Armenia from July 22, 2003 the settlement agreement signed between the parties of the case which declared only debt of 4,000,000 AMD. During the oral hearings of the case the plaintiff supported only 94 053 323 AMD debt under the Article 441 of the Civil Code<sup>16</sup> from the day of delay of the payment.

### **2. The issue**

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<sup>11</sup>3-2475/TD, Bankruptcy case of “Imperial jewelry” LLC, available at <[www.armlaw.am](http://www.armlaw.am)>, (Last retrieved at 20.06.2013).

<sup>12</sup>HYQD/0414/04/08, Bankruptcy case of “Tonton Investing” LLC, available at <[www.armlaw.am](http://www.armlaw.am)>, (Last retrieved at 20.06.2013).

<sup>13</sup>EKD/0074/04/09, Bankruptcy case of “Mining Industry” CSJC, available at <[www.armlaw.am](http://www.armlaw.am)>, (Last retrieved at 20.06.2013).

<sup>14</sup>Adopted on 17 December, 2003, entered into force on January 30, 2004, repealed on February 10, 2007. Official Journal of the Republic of Armenia 2004.01.29/6(305) Art.112.

<sup>15</sup>The case was decided when the previous Law on Bankruptcy (Insolvency) was in force.

<sup>16</sup>Adopted on 05 May, 1998, Entered into force on 01 January, 1999. Official Bulletin of RA 1998.08.10/17(50).

The explicitness of the indisputability of the claim and the possibility to have a civil dispute settlement under bankruptcy case.

### **3. The ruling of the Cassation Court**

As a result of the analysis of the merits of the case, the Cassation Court of Armenia found that there has been a civil property dispute in course of bankruptcy proceedings. In particular, the company with substantial arguments challenged the lawfulness of applying Article 411 of the Civil Code on the particular circumstances. Indeed, the possibility of application of Article 411 is crucial to decide the applicability of the Article 3 of the RA Law on “Bankruptcy (Insolvency)”. In the given context the Cassation Court found the features of bankruptcy to be implicit. Meanwhile, the Cassation Court declared that when rejecting the bankruptcy claim as a result of its disputability the court has no mandate to address the dispute itself not to prejudice the right of the plaintiff to initiate a separate civil procedure.

## **IV. LIMITATIONS OF MORATORIUM AND PROHIBITION OF DISPUTE SETTLEMENT**

To conclude the analysis made under the previous sections we may state that there can be no more specific grounds for indisputability rather than the once stipulated in the article 3 of the ALB which leaves the discretion to decide the indisputability to the court case by case.

One may as well conclude that in each case when the court passes the stated red line of disputability and indisputability, it does not apply the law in a manner it is obliged to, and additionally it breaches the logic of the relations. However, this conclusion is fully applicable only for the two prior stages (initiating the procedure and bankruptcy relief) and is fractional for the third stage (registration of claims). Article 39.2 of the Law has the following wording: “From the moment the judgment on declaring the debtor bankrupt enters into legal force:

[...]

(b) initiation of any civil or administrative proceedings giving rise to liabilities in rem for the debtor, where the latter is a defendant or a third party on the side of the defendant not having independent claims against the subject of dispute as regards the debtor, shall be prohibited;

(c) civil proceedings related to the bankruptcy proceeding or impacting the process thereof, and giving rise to liabilities in rem for the debtor, where the debtor is a defendant or a third party on the side of the defendant having no independent claims in regard to the subject of dispute as regards the creditor, shall be terminated.”

In other words, the potential creditors with non-absolute claims of confiscation of a sum of money or of property under the relevant regulations are automatically excluded from the list of creditors. To put it simple, in case of rejection of a claim with reference to the fact of being challenged or being in non-compliance with the requirements of law, a potential creditor is deprived of any opportunity to claim the settlement of dispute either under the civil or bankruptcy proceedings. Generally, within each bankruptcy proceedings a single entire list of claims is being approved, and the potential creditor excluded from the list, as a matter of fact, will have no access to the review procedures on merits. This logical conclusion is true if the interdict on hearing the civil property disputes under bankruptcy procedure is fully obeyed and the consistency between the rules of Article 46.8 on review of lawfulness and of Article 3 on the features of indisputability is reserved.

I will go so far as to say that practically the courts resolve the given situations by factually settling civil disputes. This conclusion is proved by the relevant case law in Armenia. In practice, the described situations find their solution through resolving property disputes by the bankruptcy court. Under Article 46.8 of the Law, court is entitled to review the lawfulness of the claim in case it is challenged, which in essence, is a dispute settlement under the bankruptcy procedure. This conclusion is derived from the case law in the relevant field and the case provided henceforth is an explicit illustration of the breach of “red line”.

## **BANKRUPTCY CASE OF HERIKNAZ KHACHATRYAN HYQD/0128/04/08<sup>17</sup>**

### **1. Legal and factual background**

Upon the judgment from June 28, 2007 of the Court of General Jurisdiction of the First Instance, Heriknaz Khachatryan was declared bankrupt.

Applying to the bankruptcy court, Lyuba Azatyan and Gevorg Harutunyan required including the amount of 587,714 AMD in the final list of the claims. The request was rejected referring to the fact that the potential creditors do not owe the claim. The potential creditors - Lyuba Azatyan and Gevorg Harutunyan - lodged an appeal before the Court of Appeal of Armenia against the decision of the bankruptcy court. The applicants substantiated their request referring to the Articles 1186.1, 1242.2, 1243, 1244, 190.3, 194.1, 163.1, Article 46 of the Civil Code and Article 46 of the Law on Bankruptcy.

### **2. The issue**

Does the Court of Appeal, as a matter of fact, require the first instance court to decide the dispute on its matters by reversing the decision of the lower instance partially and sending it back for a new hearing?

### **3. The ruling of the Court of Appeal of the Republic of Armenia**

Summarizing the facts of the case and legal provisions applicable to them, the Court of Appeal considered the appeal partially and found it necessary for the court of lower instance to hold a new hearing to ensure full and comprehensive examination of the case in terms of taxes, fees and other obligatory payments.

When the claim of the potential debtor has not been approved by the bankruptcy court with regard to its disputability, the appeal may touch only upon the grounds of rejection to approve. Namely, the court may develop conclusions only on the indisputability.

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<sup>17</sup>HYQD/0128/04/08, Bankruptcy case of Heriknaz Khachatryan, available at <[www.armlaw.am](http://www.armlaw.am)>, (Last retrieved at 20.06.2013).

Meanwhile, in the mentioned case, among others issues, the court not only addresses the question of indisputability but in case of negative answer the court goes further into the details of the dispute, thus resolving it on merits. The latter, in its turn, consequently leads to the registration of the claim or to its denial. Despite the fact that in this case court conducts the proceedings not in a formal legal manner, it factually provides protection of rights and reallocation of means of material turnover.

## **V. CONCLUSION**

When comparing the mentioned legal values (the formality of procedure and the protection of rights through reallocation of means of material turnover), one may support the priority of getting satisfaction of their claims. There can be arguments as well in support of keeping the procedure in full compliance with the wording of bankruptcy legislation and the provisions of the Code, thus diminishing any opportunity to become a creditor on equal basis (Article 46 of the Law). With due account to the existing state of affairs in the field and based on the wording of the Articles 39.2, 46.8, we do consider the second option to be the somehow relevant as far as it is backed by the principal of the formality of law.

However, there can be an option beyond covering both values under one regulation. By this we argue that the right to fair trial to decide whether an entity can become a creditor in bankruptcy and the bankruptcy procedure itself may coincide being in full compliance with the principal of formality of law.

The suggested model should retain the aforementioned limitations of moratorium, except the disputes which derive from the challenged claims. Additionally, to provide completeness of regulation, the provisions of the Chapter 19 on Accelerated Court Examination should be applicable. In particular, Article 125(1)(3)(a) stipulates that the court shall conduct an accelerated court examination, where it arrives at the conclusion that the necessity to conduct an immediate examination arises from the nature of the case.” There can be no argument opposing the fact that these cases

bare the mentioned nature as far as they are directed to settle the dispute in a manner and within a timeframe which will allow registering the claim later but within 30 days time-limit prescribed by the Law. Following the settlement of the dispute under the accelerated court examination, the relevant legal and (or) natural entity may facilitate the registration of claims as a creditor of bankruptcy.

## **MODERN CHALLENGES OF CRIMINAL JUSTICE IN THE REPUBLIC OF ARMENIA**

**Gagik Ghazinyan<sup>1</sup>**

**Hrayr Ghukasyan<sup>2</sup>**

The last decade of the 20th century in the Republic of Armenia was marked by political, economic and other stormy events deriving directly therefrom. The achievement of independence (1991) and the following drastic changes of economic relations predetermined the adoption (1995) of the new Constitution which, in its turn, outlined new directions and criteria of development in all legal fields, including the sphere of criminal justice. The logical continuation of this process was the adoption (1998) of the new Criminal Procedure Code (hereinafter referred to as “the Code”) and its application (1999).

The Code is one of the most important legal acts adopted as a result of judicial and legal reforms implemented in the Republic of Armenia. It regulates the legal relations linked with the examination and resolution of criminal cases in a unified, coordinated and comprehensive manner, yielding, by its legal force, only to the Constitution in the system of legal acts regulating the criminal proceedings.

In the correlation of time and conditions of its adoption, the Code was certainly progressive. The main democratic principles and guarantees providing the protection of the rights and legitimate interests of a person were reinforced therein for the first time. Besides, the Code outlined a range of key criteria related to the restriction of person's constitutional rights and freedoms. It

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established and introduced ideas and institutions in the RA legal system, which were unknown prior to that (for example, the judicial supervision over the pre-trial proceedings or the review of judicial acts by appealing procedure). Thus, the clear purpose and direction of the Code was obvious and even within the shortcomings revealed in the course of time it had a certain internal logic.

However, shortly afterwards, it became clear that the most conservative and stable sectors of Soviet years, the criminal procedure stopped being so and by the order of time it had to become more flexible and be ready for changes.

The reasons for that were mostly objective. Firstly, within its obvious advantages and positive significance the Code was applied just four years after adoption of the Constitution and in such conditions it could not objectively realize the democratic values fixed by the basic law of the new legal state. In addition, in the initial period of application of the Code, some events were regularly taking place in the social and political life of the country, which presupposed inevitable changes in the regulation linked with the relations of criminal case examination and resolution. Firstly, they were conditioned by the country's undertaken international obligations, in particular, by signing (2002) the *Convention for the Protection of Human Rights and Fundamental Freedoms* (1950).

This event was the beginning of a new cycle of the internal legal processes which determined the key changes taken place in the RA Constitution through the referendum (2005). Those changes had a logical and expected influence on the sphere of criminal justice making the modification of the Code inevitable.

Conditioned by mentioned processes and not only by those, some essential and significant amendments and supplements were made in the Code (2004, 2006, 2007 and 2008) which did not have only positive, but also negative manifestations during their application. Not denying the reasonable and progressive nature of the great part of those changes, however, we must say that most of them were made without conceptual development and scientific justification. In addition, the amendments and supplements were not

complex; they mostly had an episodic nature and were often not coherent to legal acts, institutions and norms.

While in the legal system of the state the role and significance of the Criminal Procedure Code definitely allows us to conclude that the key shortcomings and mistakes existing in such legal act cannot be corrected through individual or situational amendments and supplements. Therefore, they could not completely fulfill the aim for which they were implemented.

Thus, automatically, the amendments made to such conditions also had contextual crucial consequences for the Code, for the sphere which is regulated by the Code. At the moment of its adoption the Code was endowed with a certain ideology and presented a system of certain logic, in the form of an internal link between different criminal procedural institutions and principles. In many cases the above mentioned amendments broke the balance, arose contradictions in its different provisions, as well as between the Code and other legal acts.

Though important but also to some extent strange (for example the accelerated procedure of the trial), and for the given times also weird institutes (modifying or filling the charge in the court) were introduced in the criminal procedure legislation which organically did not integrate in the current system, thus causing a lot of theoretical and practical problems.

The permanent legislative amendments also resulted in institutional instability which in recent years has had a negative impact on the formation of law enforcement and particularly judicial practice. Perhaps, it is enough to mention the range of amendments and supplements to the functions and powers of the Cassation Court during few years.

The judicial practice made some attempts to rectify the situation. In particular, in dozens of their decisions the RA Constitutional Court and the Cassation Court assessed a number of shortcomings and omissions revealed during the Code's application. In particular, in a range of cases (2006-2012) which were examined by the RA Constitutional Court, the court recognized a dozen of

norms unconstitutional and invalid (in particular, the provisions regarding sending the case for an additional investigation).

The RA Cassation Court in its case-law gave interpretations of different provisions of the Code aimed at the regulation of the law enforcement practice (in particular, it is worth mentioning the adjustment of a range of criteria related to the application of the arrest).

Of course, this surgical intervention had a significant, largely also a positive influence on the regulation of criminal-judicial legal relations, and in certain cases, even changed the ideology of legal understanding and application of some principal provisions of the Code. The time showed that in a long-term perspective, this tool either cannot be the most effective option for solving the existing problems.

The set of the factors listed above, as well as the constant and rapid development of public relations led to a situation in which the Code with its philosophy and logic, structure and potential, successful and unsuccessful amendments, integrated and not integrated institutions, progressive and modern provisions, diverse and contradictory interpretations, spotted and controversial practice was objectively unable to comprehensively regulate the procedure for examination and resolution of a criminal case, to ensure the balanced protection of public and private interests, consequently also the achievement of goals and the solution of problems in criminal justice.

Hence, taking into account the set of all the existing objective prerequisites (legal, economic, social, political, etc.) the RA President's Decree (2010) marked the beginning of the new RA Criminal Procedure Code development process. The first visible result was recorded on March 10, 2011 when on the scientific basis and practical experience the Government reinforced the concept of the new Criminal Procedure Code of the Republic of Armenia (hereinafter referred to as "the Concept").

The duty of both the Concept and later also the new draft

Criminal Procedure Code<sup>3</sup> (hereinafter referred to as “the Draft”) developed on the basis of the Concept is to ensure a smooth transition of the semi-competitive (in separate episodes — also inquisitorial) trial into a complete competitive system without any uneven shocks. It is also aimed at fixing such objective and productive prerequisites that should ensure court-centered formation of the criminal procedure, as well as under the effective exercise of person’s fundamental rights and freedoms in the framework of criminal proceedings.

Taking into account the requirements of the RA Constitution and RA international obligations, the Draft outlines the main directions of further development of the RA criminal justice. In this regard, the development of the new Criminal Procedure Code is firstly considered as a unique phase for the normal development of criminal justice in Armenia and is perceived as a means of testing (approbation) the ideas, institutes which will be applied in the further stage of development of the RA criminal procedure legislation.

Such an approach is mostly conditioned by the fact that the essence of the current system of criminal procedure institutions and the drastic change can have a significant negative impact on the practice of law (professional, psychological, moral and other aspects) In addition, the current criminal justice system is not ready for such a drastic change for different objective and subjective reasons (personnel, material, etc.). At the same time, the investment of new procedural ideas inevitably requires a fairly bold initiative and innovation which must be combined with moderate conservatism.

Based on these principles, the Draft outlined the problems of the future criminal-procedural system, as well as it envisaged the tools the application of which must allow to solve those problems even more effectively. Let us try to discuss the basic ones:

1) One of the primary objectives of the reform of the criminal justice system is to ensure the balanced protection of public and private interests based on the well-known principles of law in the

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<sup>3</sup> Currently, the RA new draft Criminal Procedure Code is discussed by the Permanent Committee of State and Legal Affairs of the National Assembly.

process of criminal-legal disputes and their resolution. The solution of this problem is sought in all the legal systems and in all the countries which carry out reforms with the expectation of finding a perfect balance. Armenia is not an exception either, the approaches of which are very cautious regarding this issue. The problem is that during a long time while determining the correlation of public and private interests the Armenian criminal justice had polarized or extreme approaches. During the Soviet period and the preliminary years succeeding the independence, the criminal-procedure legislation was obviously bent to the public interest (for example, the highlighted incriminatory inclination of the court or the practice of the nearly widespread application of detention). Later, after the adoption of the Constitution and the Code, the center of gravity shifted to the defense of person's rights, sometimes ignoring the justified public interest (for example, endowing the accused of the privilege of giving false testimony or the lack of legal mechanisms to confront unfair behavior of the litigation participants, in particular, the defense attorney). Therefore, this problem first of all presupposes the existence of such mechanisms which will not only allow to determine the priority of this or that interest in a certain situation but will also provide the criteria of fair decision-making. For example, according to the criteria of the Draft, in pre-trial proceedings while making a discretionary decision about not filing a criminal prosecution the prosecutor must take as a basis not only the facts of person's compensation of the damage caused by the crime and the facts supporting the disclosure of the crime's circumstances, but also take into account the circumstance that in order to correct the person or to restore the social justice there is no need of criminal liability. Or the court refuses to apply reconciliation proceedings if, examining the criminal case, comes to the conclusion that the act which the guiltiness of which is addressed to the accused was obviously done by another person who is not an accused or by his participation or the legal assessment of the act of the accused obviously does not correspond to the factual circumstances of the accusation. These and other similar settings enable to balance the public and private

interests in different stages of the proceedings or different situations by giving the preference to one or to the other criterion based on reasonable justifications.

2) The next important issue mentioned in the Draft is the enhancement of the role and significance of the judiciary power and the court in the sphere of criminal justice. Actually this issue has a strategic role and is aimed at taking the burden of examination of criminal cases from the pre-trial proceedings to the court as well as to reduce the volume and the influence of the preliminary investigation in criminal proceedings. It is not a secret that even after some constitutional reforms and perfection of the procedural legislation the criminal justice of Armenia continues to be bipolar: the preliminary investigation nearly does not yield to the case examination by its content and meaning, and in some cases factually exceeds the very process of administering justice by its consequences. In order to achieve significant and rapid changes in this issue, the Draft envisages both procedural and just a range of contextual innovations. They are primarily aimed at reducing the volume of preliminary investigation. In particular, it is planned to move the investigation of private charge proceedings to the court, as well as carry out the preliminary investigation of small and medium-gravity crimes proceedings by a simplified procedure (in short terms and with a limited subject of proof). In addition, it is envisaged to expand the scope of judicial supervision in the pre-trial proceedings by giving greater opportunities and significant influence to the court at this stage of the proceedings. For example, the confidential investigative operations<sup>4</sup> can be done only by a court decision, and putting an arrest on the person's property during the proceedings is subject to mandatory judicial review. Finally, the court gets a greater freedom while determining the admissibility of the evidence collected during the preliminary investigation or the questions of

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<sup>4</sup> As confidential investigative operations are considered: the internal and external review, the supervision over correspondence and other non-digital communications, the supervision over telephone conversations, the supervision over financial deals and imitation of taking bribe and giving bribe.

their restrictions (for example, in case of objecting the expert's conclusion or the opinion the evidence cannot be used without questioning the expert), as well as it is constrained only by the underlying charge facts, but not by the legal evaluation of the defendant's act given by the preliminary investigation body. That is to say, the court is empowered by an exclusive jurisdiction to make autonomous and final decisions regarding all the key issues discussed during the criminal proceedings and, in particular, during the judicial examination (turn a verdict of guilty including the case when the prosecutor rejects the charge).

3) One of the key ideas underlying the Draft is the creation of effective mechanisms guaranteeing the exercise of fair trial's elements, in particular the provision and implementation of full competition in criminal procedure. The proposed regulations are intended to turn the competition from a procedural principal into a procedural form (mode). The solution of this problem is firstly related to the expansion of the rights of defense party in pre-trial proceedings. In particular, the accused and the defense attorney are entitled to represent evidence to be examined (which must be attached to the case materials by the investigation body) and the defense attorney also has the possibility to get an expert's opinion about some questions which require special knowledge for carrying out the protection of the accused. This opinion is an individual type of evidence.

Some considerable changes have been made for the accused and the defense attorney regarding the access borders of factual data received during the preliminary examination. Firstly, the accused is entitled to receive for free, upon his or her request, the copy of the record of proving and other procedural operations carried out by his participation, as well as the copy of the expert's conclusion, and the defense attorney may, upon his or her request, receive the copies of the records of proving and other procedural operations carried out by his or his defendant's participation, as well as the copies of such procedural documents which his or her defendant is entitled to receive according to the present Code. Besides, the possibility of the

defense attorney to obtain evidence has been expanded as he received an unconditional right to participate in any proving or other procedural operations which are carried out by his or her defendant's participation, as well as participate in a proving or other procedural operation which are carried out by his or her or his or her defendant's motion. In other cases, the defense attorney may participate in the proving or other procedural operation upon investigator's proposal. One of the new and key tools which strengthen the competition in the pre-trial proceedings is the institution<sup>5</sup> of judicial deposition of testimonies. The deposition guarantees for the defense party the right to have a counter questioning in case when there is a justified assumption that the person who is subject to be interrogated may not be represented in the trial or may lawfully refuse to give testimony during the trial.

Furthermore, it makes a possibility to interrogate the accused who gives a confession testimony and does not have a defense attorney, in the presence of the judge (it is the first step of introducing the mechanism of making the accused stand in front of the court for the first time and accusing him in the presence of the judge).

The proper implementation of this procedure, which is carried out with the participation of the parties, solves several problems at once. Firstly, in the pre-trial proceedings the exercise of the fundamental right of the accused — envisaged by Article 6 of the European Convention regarding examination of the persons who witnessed against him or her — is ensured. Secondly, the probability of extorting confession testimony from the accused by unlawful means in the pre-trial proceedings is considerably reduced (we may even say that it is reduced to zero). Finally, due to this kind of mechanisms some objective prerequisites of carrying out an

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<sup>5</sup> The procedure for deposition is a completely new phenomenon for the Armenian criminal justice. It was implemented based on the summary of the results of judicial process monitoring and represents a special format of person's interrogation in the pre-trial proceedings which is called to ensure the lawfulness of getting his testimony in case of further use.

appropriate proving are created during criminal proceedings.

As to ensuring competition during judicial proceedings, let us mention that it is first of all displayed in the form of procedural equality. It presupposes equal rights in proving process, the main pledge of which is guaranteeing equivalent possibilities for presenting evidence and participating in their examination.

At the same time, the Draft clearly indicates that the procedural equality of the parties must be perceived more broadly spreading it not only on the factual but also on the legal side of the proceedings. For example, in response to the prosecutor's initial speech, the defense attorney may have an opening statement, too, and after the speech, before the court leaves for a separate room, he or she is entitled to represent to the court in a written form his or her justifications or formulations concerning the application and interpretation of law regarding some questions which are to be solved by the court while delivering a decision.

Moreover, while doing preparatory operations, amongst other issues, with the participation of the parties the court must solve also the issues regarding the volume of the evidence subject to examination, as well as the issues regarding the admissibility of the evidence, and during the examination of the evidence the defense party gets a full possibility of disputing the charge (for example the possibility of obligatorily interrogating in the court the witnesses who were interrogated during the preliminary investigation or to call to the court the investigator or the policeman who obtained the evidence).

4) The solution of the aforementioned problems may not be effective and ensure the desired result if the protection of the rights and freedoms of the person involved in criminal-procedural field is not guaranteed, no proportionate, and transparent mechanisms of their limitation are not developed and reinforced based on the famous principles of law. This is the next decisive issue predetermined by the Draft, the solution of which assumes envisaging and operation of complex and interrelated mechanisms. In this regard the issues concerning the provision of person's liberty, personal security,

confidentiality of private and family life, as well as the right to judicial protection in criminal proceedings (in particular, in pre-trial proceedings) are very important. In particular, in order to provide harmony in the domestic legislation and the case law of the European Court of Human Rights and another international obligations of RA, the order and conditions of the arrest have beyond a reasonable doubt been clarified and made more predictable, the minimal rights of the arrested person (for example, the right to remain silent, to call for an attorney, to be subject to a medical examination, etc.), as well as the guarantees necessary for their implementation have been defined. The review of the grounds and procedure for applying detention, including the augmentation of the effectiveness of judicial supervision over its legitimacy, the expansion of the frames of alternative detention means of restraint (home detention, police surveillance, etc.), as well as with the tendency to reduce the application of detention envisaging the possibility of the application of combined alternative means of restraint have the same purpose.

The Draft has also a highlighted intent to strengthen the protection of the confidentiality of the private life of the persons who are involved in the criminal proceedings. This standard requires that:

- a) the apartment search, the seizure, the examination;
- b) the supervision over telephone conversations, mail, telegram and other communications must be carried out only by the court decision;
- c) the information containing bank, notary, and insurance secrecy must be collected only by the court decision.

At the same time, the Draft draws a special attention to the optimization of providing compensation to the victims of judicial errors, which presupposes both the establishment of rehabilitation institute and the possibility of filing a lawsuit for the compensation of the damages from which the justified person suffered, within the framework of criminal proceedings, and the possibility of its solution.

Along with all this, the Draft does not ignore the issue of protecting the rights and legitimate interests of the victim of a crime.

The clarification of the victim's status, the expansion of his rights (being presented by a professional attorney, representing evidence, receiving the records of the proving operations carried out with his or her participation), as well as giving greater opportunities for requesting judicial protection against the actions and decisions of the investigation body can balance the means of procedural battle for the persons who are involved in the criminal proceedings but are in different procedural camps.

5) One of the conceptual directions of the reform of the criminal justice system is the creation of even more optimal and effective procedures for the examination of crimes. That is why; the system of criminal proceedings has been changed to a considerable extent first of all by refusing some stages remaining yet from the Soviet years, such as bringing a criminal case (the preparation of materials) and the performance of judicial acts. The first of them traditionally preceded the preliminary investigation, but for the reason of tight deadlines, the limited scope of actions and not definite regulations it was never able to contribute to the effective solution of the pre-trial proceedings problems. The Draft included this stage in the content of preliminary investigation organically integrating it in a more simplified model of the pre-trial proceedings. As well as the stage of performing the judicial acts is concerned, it should be mentioned that the complex analysis of its frame of participants, the questions which are to be solved and the court decisions made as a result of it clearly shows that all these legal relations are out of the boundaries of criminal proceedings; consequently, they are out of the boundaries of criminal procedure regulation. The modification of the criminal proceedings system includes both the change of the current stages' content and the implementation of completely new stages. In particular, the Draft reviewed the criminal-procedural correlation of the constitutional notions "inquest" and "preliminary investigation". In this way, it was tried to incorporate the operational and search action to the Criminal Procedure Code considering it similar to the inquest. As a result, "the inquest" did not precede the "preliminary investigation" but became a supportive, serving activity which

included also the operational-search measures and the performance of confidential investigative operations. At the same time, taking into account the requirements of the practice and the theoretical justifications, the Draft undertook the realization of the idea of establishing the institute of preliminary court hearings (of middle judicial proceedings). According to it, this obligatory procedure which has the aim to solve clear frames (the volume of evidence subject to be proved the admissibility of evidence, the application of means of restraint, etc.) of issues and occurs within the competition and equality of the parties, must ensure a more rational check of the results of the pre-trial proceedings and the effective performance of the future trial. The Draft considers the development of the simplified procedures of certain category case examination and solution as well as the expansion and perfection of the differentiated proceedings as an inalienable component of the effectiveness of the criminal proceedings. They must entirely ensure harmonious combination of human resources, means, the justified time savings and the protection of the interests of justice.

In particular, the application of the simplified procedure (conciliation proceedings) of trial in case the accused agrees upon the presented charge in the court or envisaging clear grounds, conditions and guarantees of signing a prejudicial agreement about collaboration with the accused (collaboration proceedings) for the sake of justice allows us not only to perform the international practice which has been studied, but also to considerably reduce the corruption risks and other similar negative phenomena in the sphere of criminal justice.

Thus, the aforementioned directions reinforced in the Draft in essence predetermined the new vector of the development of the RA criminal procedure. It has a highlighted progressive and evolutionary nature, intends to develop the achievements of the international experience study and domestic reforms and finally to form a new system of justice which works effectively and is based on democratic values.

# **ROLE OF JUDICIAL SUPERVISION OVER THE PRE-TRIAL PROCEEDINGS IN ENSURING PERSON'S RIGHTS AND FREEDOMS**

**Samvel Dilbandyan<sup>1</sup>**

Taking into account that during the preliminary investigation the prosecuting party is empowered by extensive authoritative powers the unfair realization of which will inevitably lead to arbitrariness, the problem of creating guarantees for ensuring rights of citizens in criminal proceedings has been urgent for a long time; guarantees which will exclude the groundless limitations of their rights and freedoms, as well as the possible obstacles during realizing their legitimate interests.

When taking over the examination of the case, the agency for inquest and the investigator become empowered by broad authorities of implementing procedural actions and making decisions, actions which are often accompanied by limitation of the rights of both the participants in the criminal procedure and the other persons who are involved in the procedural relations.

Meanwhile, the defense party is not empowered by such authorities, which would be counterweight to the rights arisen from the state and legal status of the bodies in charge of conducting the proceedings. In this regard, there arises a necessity of creating an effective system of protecting the rights, freedoms and legitimate interests of all the participants of the proceedings, including the pre-trial proceedings. This kind of system represents the judicial supervision over the pre-trial proceedings, which is regulated by Chapter 39 of the RA Criminal Procedure Code.

Judicial supervision over the pre-trial proceedings is a characteristic feature of the criminal procedure of many democratic countries. Due to it, the defense party gets the right to quite effectively protect person's rights and freedoms, as well as realize

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his or her legitimate interests already at the stage of pre-trial proceedings.

The issue of judicial supervision in the pre-trial proceedings has always been in the center<sup>2</sup> of legists' attention. The subject of their discussion has been the creation of such a system of judicial supervision which will become a reliable dam against the possible abuses by prosecutors, investigators and the bodies of inquiry, thereby creating conditions of realizing rights and freedoms for all the participants in the criminal procedure.

However, not all the participants of the mentioned discussion agree that the main issue of judicial supervision is the protection of the rights and the legal interests of all the participants in the criminal procedure.

Thus, N. A. Kolokolov supposes that the judicial supervision has two goals: 1) to support the effective realization of the preliminary investigation 2) to create optimal conditions to administer justice<sup>3</sup>.

It should not be denied that the goals indicated by N. A.

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<sup>2</sup> Ghazinyan G. Historical and Contemporary issues of Criminal Procedure in Armenia. Yerevan 2001, P. 432; Avetisyan D.Z. The Issue of Detention in the Criminal Procedure of the Republic of Armenia, Yerevan, 2006, P. 156; Hovsepyan A., Shahinyan V., Ghambaryan A., Problems of Pre-Trial Stage in Criminal Procedure of Armenia: Academic-practical manual. Yerevan, 2009, P. 286; Avetisyan H. G. Issues of Judicial Control over Pre-Trial Process. Yerevan, 2010, P. 216. [Ղազինյան Գ. Քրեական դատավարության պատմական և արդի հիմնահարցերը Հայաստանում: Եր.: Երևանի համալս. հրատ., 2001թ. 432 էջ, Ավետիսյան Դ.Զ. Կալանավորման հիմնահարցերը Հայաստանի Հանրապետության քրեական դատավարությունում, Երևան համալս. հրատ.: -Եր.: 2006, 156 էջ, Հովսեփյան Ա., Շահինյան Վ., Ղամբարյան Ա. Մինչդատական վարույթի հիմնախնդիրները Հայաստանի Հանրապետության քրեական դատավարությունում: Գիտագործնական ձեռնարկ., Եր.: ԵՊՀ հրատ., 2009, էջ 286, Ավետիսյան Հ.Գ. Մինչդատական վարույթի նկատմամբ դատական վերահսկողության հիմնահարցերը. -- Եր.: ԵՊՀ հրատ., 2010, էջ 216].

<sup>3</sup> Kolokolov N.A. Judicial Control in the Phase of Pre-Trial Investigation: Reality, Perspectives// State and Law, 1998, #11, P. 33. [Колоколов Н.А. Судебный контроль в стадии предварительного расследования: реальность, перспективы // Государство и право, 1998, - № 11, - с. 33].

Kolokolov are present at the stage of preliminary investigation. But limiting the judicial supervision only by these goals may not express the very essence of this institute. Herewith, the aims mentioned by N. A. Kolokolov can hardly be considered as the goals of judicial supervision.

They can be considered as goals of preliminary investigation only on condition that by saying an effective realization of the preliminary investigation it means the protection of the rights and legal interests of all the participants in the criminal procedure, and not just reaching the truth by a certain criminal case. That is why; the main goal of judicial supervision is the protection of the rights and legal interests of all the participants in the criminal procedure.

In connection with the realization of this goal, there arises the problem of hindering the arbitrary implementation of authoritative powers belonging to the investigator, the body of inquiry and other officials, which creates favorable conditions for the protection of the rights and legal interests of the participants in the criminal procedure at the preliminary investigation stage.

Through the judicial supervision, the participants in the criminal procedure get the opportunity of protecting their rights and implementing their legal interests. But, along with it, other goals are being realized. In particular, the legitimacy of the preliminary stage of investigation is ensured. In particular, with the help of judicial supervision barriers are put against arbitrariness of a prosecutor, investigator and the body of inquiry, conditions are set for them in order not to violate the rights and freedoms of the participants in the criminal procedure during the preliminary investigation.

Consequently "... every time a state body commits an illegal or not clever or unfair act"; the judicial supervision is called to regain the legitimacy of preliminary investigation of each specific criminal case.

According to Article 278(1) of the RA Criminal Procedure Code: "[t]he court shall examine motions with regard to conducting investigative, operational intelligence activity and imposing procedural coercive measures restricting constitutional rights and

freedoms of a person.”. Part 2 of the same Article states the following: “[i]n cases and as prescribed by this Code, the court shall examine appeals regarding the lawfulness of decisions and activities of inquest bodies, investigators, prosecutors and bodies carrying out operational intelligence activity.”.

Thus, it is obvious that the sphere of judicial supervision is quite comprehensive. Hence, in the theory of criminal procedure, three forms of judicial supervision during the preliminary investigation are distinguished:

1. revisory judicial supervision,
2. preliminary judicial supervision,
3. further judicial supervision...<sup>4</sup>

The essence of the revisory judicial supervision over pre-trial proceedings is that the procedural actions and decisions afterwards, during the trial, become subjects of discussion in order to find out their correspondence to the law. The mentioned form of judicial supervision has been well-known for a long time.

The very structure of criminal procedure when one stage is followed by another presupposes that the mentioned form of supervision is not always judicial. Well, during the preliminary investigation, the decisions — made at the stage of filing the criminal case — are checked. They can be checked by the investigator, sometimes even the very investigator who has made the decision of filing a criminal case. It is comprehensible that this kind of supervision may not be considered as judicial, but it does exist and is considered to be a guarantee for providing the legitimacy of criminal procedure. An example of such supervision is the check of conclusions which underlie the decision of filing a criminal case and the check of corpus delicti’s existence in the act.

The investigator checks this conclusion during the whole

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<sup>4</sup> Criminal Procedure of the Republic of Armenia: Special Part. Third Ed. Yerevan 2010, P. 246. [Հայաստանի Հանրապետության քրեական դատավարություն: Հատուկ մաս, (3-րդ հրատարակություն, լրացումներով և փոփոխություններով) - Երևանի պետ. համալս. - Եր.: Երևանի համալս. հրատ., 2010, էջ 246].

preliminary investigation through various investigative and other judicial actions. However, taking into account that the judicial procedure follows the stage of filing a criminal case and the stage of preliminary investigation, the above mentioned form of judicial supervision is implemented in connection with the activities carried out and the decisions made in that judicial stage. So, during the trial the admissibility of the evidence collected during the preliminary investigation is decided upon. That is the result of the general rule set forth in Article 106(1) of the RA Criminal Procedure Code according to which: “[i]n admissibility of using factual data as evidence, as well as the possibility of their restricted use in proceedings shall be established by the body conducting proceedings on its own initiative or upon motion of a party”.

That is to say, in all the stages, including the trial stage, the question of admissibility of specific evidence is decided. Furthermore, the court may find inadmissible specific evidence if they have been obtained by considerable violations of the rights of participants in the trial.

So, according to Article 105(1) of the RA Criminal Procedure Code: “[m]aterials may not serve as a basis for charges in criminal proceedings and may not be used as evidence if they have been obtained:

1) (1) through violence, threat, deception, by ridiculing a person, as well as through other unlawful actions;

2) (2) through significant violation of the right of the suspect and the accused to defense, and of supplementary guarantees provided for by this Code with regard to the rights of persons with no knowledge of the language of proceedings”.

This requirement also relates to the trial stage when the court examines how the mentioned evidence have been obtained and, based thereon, makes a conclusion on admissibility and inadmissibility of specific evidence. That is the essence of the judicial supervision which is implemented over the preliminary investigation.

As the principle of competition is mostly implemented during

the trial, the revisory judicial supervision becomes one of the ways of introducing the mentioned principle in pre-trial proceedings. After having discussed the stances of the parties, the court makes conclusions regarding legitimacy and justification of particular judicial activities which could afterwards have great influence on returning the verdict. That is to say, the competition of the parties serves as the basis for the revisory judicial supervision upon which its effectiveness is conditioned.

The judicial supervision is a prerequisite for administration of justice since without it, it is impossible to conduct such trial as a result of which a justified verdict will be delivered. First of all, one must be sure that the court presents the materials which have been obtained according to the law without any violation of the rights and legitimate interests of the persons participating in the criminal procedure.

That is to say, before administration of justice it is necessary to revise the materials of already existing criminal case and only based on that revision decide which of the mentioned materials may be used during the trial. Due to it, some conditions are set for the comprehensive, complete and objective examination of the case circumstances.

The next form of judicial supervision is the preliminary judicial supervision. It is based on the necessity of preventing the violation of rights and legitimate interests of participants in the criminal procedure. Its essence is that it is called to prevent the unjustified limitations of person's rights, freedoms and legitimate interests during criminal procedure. In order to carry out judicial actions towards the above mentioned limitations, it is required to have the court decision which will allow to carry out the mentioned actions. So, according to Article 279 of the RA Criminal Procedure Code: “[s]earch of an apartment, as well as investigative activities relating to restriction of confidentiality of correspondence, telephone conversations, postal, telegram and other communications shall be conducted upon a court decision.”

In Article 280 of the RA Criminal Procedure Code the following

requirements are envisaged: “[t]he following criminal procedural coercive measures shall be imposed exclusively on the basis of a court decision: imposing detention as a measure of restraint, putting the suspects, the accused and persons whose mental state does not allow for them to be involved as an accused in medical institutions for conducting forensic psychological, forensic psychiatric or forensic medical examination.”.

It may be assumed from the above mentioned criminal procedural norms that the preliminary judicial supervision is called to prevent the possibility of violating the rights and legitimate interests of the participants in the criminal procedure. It should be mentioned that by choosing detention as a measure of restraint, the court examines the question of justification of that measure of restraint. So, according to Article 137(4) of the RA Criminal Procedure Code: “[s]imultaneously with taking a decision on detention the court shall decide on the possibility of releasing the accused from detention on bail and, by recognizing the possibility of such release, shall set the amount of bail.” That is to say, the court may decide upon the question by considering it appropriate to apply another measure of restraint: the bail. It is clear that by this the court tends not to let that unjustified violations of the rights and legitimate interests of the accused happen. Moreover, it is necessary to take into account that the same paragraph of Article 137 of the Criminal Procedure Code of RA states: “[l]ater on the court may review the decision on inadmissibility of bail or on the amount of bail”.

That is to say, in this case, the court decision is not yet definitive as it presupposes the possibility of change of the circumstances which have served as a basis for the choice of measure of restraint, hence it is also possible to return once again to the discussion of the question of choosing a measure of restraint.

It should be mentioned that the criminal procedure legislation gives the opportunity to appeal the court decision on applying judicial measures of restraint, which limits the rights and legitimate interests of participants in the criminal procedure. Thus, Article 137(5) of the RA Criminal Procedure Code of states: “[t]he decision

of the court on imposing detention as a measure of restraint may be appealed against to a higher court.”

It is necessary for avoiding any error or judicial arbitrariness while deciding the question of applying measures that essentially limit the rights and freedoms of the citizens. By setting forth the mentioned provision, the legislator tends to minimize illegal and unjustified decisions, while choosing the detention as a measure of restraint for the accused in question.

Such approach corresponds to the requirements of democracy which present the modern society and the state to the justice and which consider the humanitarian values as their goals.

Moreover, courts decisions on the detention should be based on both the RA domestic legislation and the requirements of international and legal acts of the RA. First of all, this judgment arises from the requirements of the case law of the European Court of Human Rights. In particular, the Court has mentioned that the task of judicial supervision is to check the correspondence of person’s detention both to the domestic law and requirements of the Convention (*CHAHAL v. THE UNITED KINGDOM*, 15 November 1996, point 128).

The regulation of the order of discussion on applying the detention as a measure of restraint is undoubtedly one of the merits of RA current criminal procedure legislation. But it is necessary that the mentioned procedure be defined afterwards. So, it would be fairer if the accused be present during the discussion of the motion, irrespective whether he or she is free or not. Hence, it would be right to read paragraph Article 285(3) as follows: “[t]he accused — against whom the motion on choosing detention as a measure of restraint has been filed — must be present in the court session”.

The provision of the principle of competition is also important during examinations of the appeals brought against the court decision on choosing detention as a measure of restraint or on prolongation of person’s detention deadlines. In this regard, the European Court of Human Rights has expressed certain position. In particular, in the case *Nikolova v. Bulgaria*, the Court mentioned: “[a] court examining

an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure “equality of arms” between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client’s detention ...” (NIKOLOVA V. BULGARY, 25 March 1999, point 58).

The European Court has expressed similar position also in the decision of *Wloch* against Poland: “[i]n proceedings in which an appeal against a detention order is being examined, equality of arms between the parties, the prosecutor and the detained person must be ensured” (WLOCH v. POLAND 19 October, 2000, point 126).

Along with the above mentioned, the European Court has also mentioned that “[i]n the regard of the examination of appeals, the totally written and adversarial procedure would be one of the primary reasons of tardiness, which should be avoided in the case.” (NEUMEISTER v. the Netherlands, 7 May 1974, point 24).

According to Article 281(1) of the RA Criminal Procedure Code: “[o]perational intelligence measures in relation to restricting the right of citizens to confidentiality of correspondence, telephone conversations, postal, telegram and other communications shall be carried out upon a court decision.”

According to paragraph 2 of the same Article: “[t]ypes of operational intelligence measures carried out upon a court decision shall be specified in the Law “On operational intelligence activity”.”

That is to say, according to the RA criminal procedure legislation, the operational and intelligence activities which limit the rights and legitimate interests of citizens are conducted only by a court authorization. This law protects the participants of criminal proceedings from unjustified limitations of their rights and freedoms.

Such supervision over operational and intelligence bodies is an effective mechanism through which manifestations of their arbitrariness are prevented. Creation of such guarantees for the protection of the rights and legitimate interests of the participants in

criminal procedure is a significant achievement in modern Armenia.

The mentioned grounds for carrying out operational and intelligence activities which limit the rights and freedoms of citizens are envisaged by law. So, according to Article 284(3) of the RA Criminal Procedure Code: “[t]he permission to carry out operational intelligence measures provided for by this Article shall be based on the reasoned decision of the head of the body carrying out operational intelligence activity which shall contain a motion for receiving permission to carry out operational intelligence measures. The decision shall specify the grounds for carrying out operational intelligence measures, the data to be received as a result thereof, the place and timeframes for carrying out the measures, as well as all the information necessary for the court to take a decision. All the materials justifying the necessity of carrying out operational intelligence measures shall be attached to the decision. The decision and materials attached to it shall be submitted to the court by the head of body carrying out operational intelligence activity or the deputy thereof.” In the mentioned Article the grounds for the possibility of applying to court with a motion on conducting the above mentioned operational intelligence measures only in case of emergency have been clearly set forth. That is to say, serious obstacles are created against the possible violation of the rights and legitimate interests of the participants in criminal procedure. Thus, a preliminary judicial supervision is carried out, which hinders the implementation of such measures which unjustifiably breach the rights and freedoms of citizens.

Article 284(4) of the RA Criminal Procedure Code of reads as follows: “[t]he motion shall be examined by a single judge in a closed court session with the participation of the official who has filed the motion or his or her representative. The motion shall be examined and decided on within 12 hours upon its receipt.”

As we can see, unlike the discussion of the motion on choosing detention as a measure of restraint, while examining the question of authorizing the implementation of such operational intelligence activities which limit rights and freedoms, the court discusses the

motion in the absence of other participants in the procedure. This is conditioned by the very nature of the operational intelligence activities which may succeed only in case of providing the secrecy of their implementation. However, also in this case, the court has the possibility of preventing the unjustified limitation of citizens' rights and freedoms.

While deciding on the authorization of conducting such operational intelligence activities which limit rights and freedoms of citizens, the court checks the validity of the motion. According to Article 284(5) of the RA Criminal Procedure Code: “[a]t the request of the judge other materials justifying the necessity of carrying out operational intelligence measures shall be submitted to him or her except for cases of danger of disclosure of a state or official secret, or when regular undercover agents of bodies carrying out operational intelligence activity and persons secretly collaborating with those bodies, sources of relevant information and means of receiving it may be disclosed thereby. The judge may request explanations and additional materials from the respective officials for the purpose of verifying the sufficiency of grounds for carrying out operational intelligence measures.”

As we can see, while deciding upon the question of authorizing the implementation of such operational intelligence activities which limit rights and freedoms, the court is entitled to require the materials. That is to say, the justification of limiting rights and freedoms is thereby guaranteed, which is inevitable while conducting operational intelligence activities.

It should be mentioned that the above mentioned authorization is given for a specific period.

So, according to Article 284(7) of the RA Criminal Procedure Code: “[t]he validity period of a court decision shall be calculated from the day it was arrived at and may not exceed six months unless otherwise provided for in the decision. Timeframes for carrying out operational intelligence measures may be extended on the basis of a reasoned decision of the head of the body carrying out operational intelligence activity that contains a relevant motion, as prescribed by

this Article.”

Such requirement of the law is totally justified by the fact that the unlimited period can give an opportunity to the operational intelligence bodies to carry out arbitrary actions. Hence, by setting certain deadlines, the legislator sought to prevent the limitations of the rights and freedoms of citizens, conditioned by unjustified uncertainty of deadlines.

The preliminary judicial supervision is also encountered during the implementation of investigatory actions which limit the rights and legitimate interests of citizens.

Such investigatory actions are the search of an apartment, as well as investigative activities relating to restriction of confidentiality of correspondence, telephone conversations, postal, telegram and other communications (see Article 279 of the RA Criminal Procedure Code).

While deciding upon the question of authorization of investigatory actions of apartment search, as well as actions concerning the confidentiality of correspondence, telephone conversations, postal, telegram and other communications, the court should not solely rely on procedural matters, but should be entitled to examine the evidence which justify the necessity of implementing the above mentioned investigatory actions.

The third form of judiciary supervision is the further judiciary supervision. Its essence is that the court discusses all the complaints which have been received in connection with the already violated rights and legal interests. That is why; the mentioned form of judiciary supervision is called further. Unlike the preceding form, this one, in terms of time, follows the already implemented unjustified restrictions of citizens' rights and freedoms.

The further judiciary supervision is envisaged in Article 290(1) of the RA Criminal Procedure Code: “[a]ppeals against unlawfulness and groundlessness of decisions and actions of officers of inquest bodies, investigators, prosecutors, bodies carrying out operational intelligence activity, provided for by this Code, may be lodged to the court by the suspect, accused, counsel, victim, participants in the

criminal procedure, other persons, whose rights and lawful interests have been violated by those decisions and actions, and where their appeals have not been upheld by a prosecutor.”

Furthermore, paragraph 2 of the same Article reads as follows: “[t]he persons specified in part 1 of this Article shall also have a right to appeal to the court against refusal of an inquest body, an investigator and a prosecutor to accept crime incident reports, to initiate a criminal case, as well as against decisions on suspending, terminating the criminal case or discontinuing criminal prosecution, in cases provided for by this Code.”

As we see, a sequence of appeals concerning the actions and decisions which limit the rights and freedoms of citizens is set forth by the law. First, it is necessary to appeal the mentioned decisions and actions to the prosecutor and only after that, if his or her decision is not satisfactory, appeal to the court. It is necessary to mention that such legislative regulation does not arise from the constitutional legal contents of Articles 18 and 19 of the RA Constitution.

We think that envisaging an alternative opportunity of appealing would allow the persons whose rights have been violated, to personally decide upon the way of appealing which they would be consider the most effective one in a certain case and in certain conditions. It is obvious that the judicial supervision and prosecutorial control are different by nature, aren't they? They have different capabilities and different methods of implementation. That is the reason why their effectiveness will be different in different conditions. Hence, giving the opportunity of choosing among them to those whose rights have been violated, the law gives those persons the opportunity to personally, by analyzing the certain situation, decide which of them will be more effective.

About the necessity of providing effectiveness of means of protection of rights (both by law and in practice) is mentioned also in the decisions of the European Court of Human Rights (for example, the case of IATRIDIS v. GREECE, 25 March, 1999, paragraph 66).

The order of discussing the complaints of the participants in the criminal procedure is quite thoroughly regulated in the RA criminal

judicial legislation

So, according to Article 290(4) of the RA Criminal Procedure Code: “[t]he appeal shall be examined by a single judge within ten days upon its receipt, informing thereof the applicant and the body conducting proceedings. Failure of the applicant or the body conducting proceedings to appear shall not preclude the examination of the appeal, however, the judge may consider the presence of the mentioned persons mandatory. The body conducting proceedings shall be obliged to submit to the court materials relating to the appeal. The body conducting proceedings and the applicants shall have the right to give explanations.”

As we can see, in order to discuss the received appeal, the judge has to examine quite thoroughly the limiting circumstances of rights and legitimate interests of a certain person who thinks that his rights have been violated. Due to this order, it is possible to provide a comprehensive, complete and objective discussion of the appeal.

According to Article 290(5) of the RA Criminal Procedure Code: “[w]hen considering the appeal substantiated, the judge shall decide on the obligation of the body conducting proceedings to eliminate the violation of rights and freedoms of the person. The court shall take a decision on rejecting the appeal when it finds that the actions appealed against have been carried out in line with the law, and rights or freedoms of the person have not been violated. The carbon copy of the decision of the judge shall be sent to the applicant and the body conducting proceedings.”

That is to say, if the court decides that violations of person’s rights and freedoms have occurred, it obliges the body conducting proceedings to eliminate the violations: thus, through judiciary supervision, protects the rights and legitimate interests of the participants in criminal procedure at the stage of preliminary investigation.

The fairness of the decision which will be delivered afterwards while examining the criminal case during the trial, depends, to the great extent, on the effective implementation of judicial supervision over the preliminary investigation.

Protection of rights and legitimate interests of the participants in the criminal procedure is an incontestable condition of the unfairness of trial, isn't it? The significance of such type of activity is so great that the effectiveness of examining the criminal cases on merits largely depends on the quality of its implementation.

In order to implement that activity effectively and with quality, some authors<sup>5</sup> suggest to introduce the institute of an investigator-judge. It will give the possibility to make the judicial supervision more independent and self-determined, as the judge in charge for the supervision would carry out only that function. Nowadays, judges consider the judicial supervision as a deviation from the main form of activity; that is to say from examination of criminal and civil cases on merits.

That is why appeals are not examined in a proper thoroughness which often discredits the very idea of judicial supervision. Furthermore, a judge's decision made upon a criminal case at the preliminary investigation stage may have a negative influence on the final decision of the same case at the end of the trial.

This issue has arisen in the literature on domestic procedure and the following option of its solution has been suggested: “[t]o divide the courts of first instance into two branches. The bottom branch, say, will examine the cases of not very grave crimes and will carry out the authorities of judicial supervision over the pre-trial proceedings”. Of course, the mentioned suggestion is the most optimal form of effective activities of the judicial supervision institute over pre-trial proceedings, but taking into account the financial, organizational and other issues, currently its implementation is difficult for our state. In our opinion, the solution of the mentioned issue can be made by introducing the institute of *a judge who implements judicial supervision* in the criminal procedure.

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<sup>5</sup> Demidov I.F. The Role of the Judicial Power in Guaranteeing the Legality of Criminal Investigation// Lawfulness in the Russian Federation. Moscow, 1998, P. 166. [Демидов И.Ф. Роль судебной власти в обеспечении законности уголовного преследования // Законность в Российской Федерации, - М.: Спарк, 1998, - С. 166].

It should be mentioned that the institute of the judge who implements judicial supervision and the investigator-judge whose activity is envisaged by the criminal-judicial legislation of France should not be assimilated. The investigator-judge carries out preliminary investigation and collects evidence. He does not carry out judicial supervisory functions.

Hence, there is no need to establish a similar institute as it is the institute of an investigator-judge in the RA criminal procedure. But it is necessary to discuss the idea of establishing the institute of the judge who carries out supervision over pre-trial proceedings more attentively. The mentioned institute will allow to more attentively examine the grounds and conditions of implementing judicial actions during preliminary investigation which essentially limit the rights and freedoms of persons.

In this case we may hope that common practice in both questions will be ensured: in the realization of procedural means restricting the rights and legitimate interests of participants in the criminal procedure and in the realization of judicial supervision over their application. The extraction of the function of judicial supervision will allow the judge who examines the case on merits, to be independent and impartial as he or she has not carried out,<sup>6</sup> during the preliminary investigation, supervision over the procedural activities of the same criminal case before.

In this regard, the elimination of the provision should be criticized, which was in the Criminal Procedure Code prior to its amendments and according to which in pre-trial proceedings, the judge who has participated in the examination of the case in the court of first instance and court of appeals, may not participate in further examination of the case.

That is to say, it follows from this provision that the judge who has carried out judicial supervision over the implementation of

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<sup>6</sup> Kashepov V.P. The Concept of Judicial Protection of Rights and Freedoms of Citizen and the means of its Realization.// State and Law, 1998, #2, P. 71. [Кашепов В.П. Институт судебной защиты прав и свобод граждан и средства её реализации // Государство и право, – 1998, - № 2, – С. 71].

certain investigatory actions during preliminary investigation, is not entitled to examine afterwards the same criminal case on merits. This kind of requirement has been a guarantee for the protection of rights and legitimate interests of the participants in the criminal procedure.

Envisaging this provision in the Criminal Procedure Code is a serious step for ensuring the impartiality of the court while examining criminal cases and making decisions. The elimination of this rule is not justified from the perspective of impartiality of judges in the current RA Criminal Procedure Code, hence it should be set forth in the criminal procedure legislation again.

We think that the next step towards radical solution of this issue should be the one which will envisage the institute of a judge who carries out judicial supervision over pre-trial proceedings. In this case, it will just be impossible to breach the above-mentioned provision as the judge who has carried out judicial supervision over pre-trial proceedings will examine only cases concerning those of private charges over which no preliminary investigation will be carried out according to the new criminal procedure code. Through this, the impartial attitude of the court in the trial stage will be guaranteed, thus ensuring the protection of the rights and legitimate interests of the persons participating in the criminal procedure.

As we see, the above mentioned arguments indicate the necessity of presence of a judge in the criminal procedure, who will carry out judiciary supervision over procedural actions which the prosecutor, the investigator, the chief of investigation department, and the agency for inquest carry out in pre-trial proceedings. The existence of that institute on criminal procedure will become an additional guarantee for the protection of rights, freedoms and legitimate interests of citizens. Herewith, a guarantee against arbitrariness of the officials, who are empowered by authoritative powers in pre-trial proceedings, will be created.

The aforesaid allows us to conclude that one of the main issues of judicial supervision is the protection of rights and legitimate interests of the participants in criminal procedure in pre-trial proceedings. Its organization and implementation is the procedural

guarantee for the mentioned rights and legitimate interests as due to it, while examining each criminal case, it is possible to hinder the arbitrariness of the officials who are empowered by authoritative powers in preliminary investigation.

However, we think that it is necessary to make several more steps towards enhancement of the mentioned mechanism which will allow to introduce some elements of competition in the preliminary investigation stage.

## CONCEPT OF THE RULE OF LAW IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

**Davit Melkonyan<sup>1</sup>**

The concept of “*prééminence du droit*” or “rule of law” first appeared in the Court’s case-law in the *Golder v. United Kingdom* judgment of 21 February 1975<sup>2</sup>. The Court based its broad interpretation of Article 6 § 1 of the Convention (right to a fair trial), from which it inferred the inherent right of access to the courts, on the reference to the “*rule of law*” made in the Preamble of the Convention. According to the Court, it would be a mistake to see the principle of “*prééminence du droit*” as “*a merely ‘more or less rhetorical reference’, devoid of relevance for those interpreting the Convention. One reason why the signatory Governments decided to ‘take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration’ was their profound belief in the rule of law*”<sup>3</sup>. Since then, the rule of law has become a guiding principle for the Court, it “*inspires the whole Convention*”<sup>4</sup> and is “*inherent in all the Articles of the Convention*”<sup>5</sup>. It is defined as “*one of the fundamental principles of a democratic society*”<sup>6</sup>. The close relationship between the rule of law and the democratic society has been underlined by the Court through different expressions:

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<sup>2</sup> It is interesting to note, however, that the European Commission of Human Rights made a reference to the rule of law in the *Lawless v. Ireland* case, in order to reject the interpretation of Article 17 of the Convention invoked by the Government. The Court, in its judgment of 1 July 1961, followed the Commission without using the notion of the rule of law.

<sup>3</sup> *Golder v. United Kingdom* judgment of 21 February 1975, § 34.

<sup>4</sup> *Engel v. the Netherlands*, 8 June 1976, § 69.

<sup>5</sup> *Amuur v. France*, 25 June 1996, § 50.

<sup>6</sup> *Klass v. Germany*, 8 September 1978, § 55.

“democratic society subscribing to the rule of law”<sup>7</sup>, “democratic society based on the rule of law”<sup>8</sup> and more systematically “rule of law in a democratic society”.<sup>9</sup> Being linked to the notion of “democratic society”, the rule of law is also related to the broader concept of “European public order”.<sup>10</sup>

Although there is no abstract definition of the rule of law in the Court’s case-law, European judges, by using this concept in the context of interpretation of different Articles of the Convention, have developed various substantive guarantees which may be inferred from or linked to this notion. These include the principle of legality or foreseeability, the principle of legal certainty, the principle of equality of individuals before the law, the principle of control of the executive whenever a public freedom is at stake, the principle of the possibility of a remedy before a court and the right to a fair trial. Some of these principles are closely interrelated and can be included in the categories of legality and due process. They all aim at protecting the individual from arbitrariness, especially in the relations between the individual and the State. The equivalence between the rule of law and the protection from arbitrariness is clearly stated in the *Winterwerp* (as regards Article 5 of the Convention) and *Malone* (as regards Article 8) judgments.

On the other hand, the Court does sometimes refer to the principle of the rule of law using the French term “*Etat de droit*” and not “*prééminence du droit*”, which is the expression used by the Preamble of the Convention. In its report<sup>11</sup>, the Parliamentary Assembly distinguishes the notion of rule of law/*Etat de droit* used in these cases from the traditional meaning of the term rule of law/*prééminence du droit* referred above. According to the Parliamentary Assembly report, the expression “*Etat de droit*”

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<sup>7</sup> *Winterwerp v. Netherlands*, 24 October 1979, § 39.

<sup>8</sup> *Vereiniging Weekblad Bluf! v. Netherlands*, 9 February 1995, § 35.

<sup>9</sup> *Malone v. United Kingdom*, 2 August 1984, § 79

<sup>10</sup> *United Communist Party of Turkey and Others v. Turkey*, 30 January 1998, § 45.

<sup>11</sup> Doc. 11343, 6 July 2007, “The principle of the Rule of Law”, Committee on Legal Affairs and Human Rights (rapporteur: Mr Erik Jurgens). Resolution 1594 (2007) of the Parliamentary Assembly.

appears to be used in a more rhetorical way and in cases concerning the courts and administration of justice. In effect, the Court refers in this context to the following expressions: “*State based on the rule of law*”, “*law-governed State*”, “*State subject to the rule of law*”. Whether there is a difference in meaning between both notions of the “rule of law” is not clearly stated in the case-law. However, it appears that this second conception is more related to the institutional framework and the organisation of a democratic State.

The term *Etat de droit* is used in cases concerning the administration of justice in the State. The role of the judiciary is essential in a State based on the rule of law. In this regard, its role in the prevention and repression of crimes, in particular those committed by State agents, is linked to the notion of the rule of law when procedural obligations under Articles 2 and 3 of the Convention are at stake. As the Court stated in *Hugh Jordan v. United Kingdom*, 4 May 2001, “*a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts*”.<sup>12</sup>

The procedural obligations are not limited to the obligation of the authorities to open an investigation; they can also encompass the outcome of the criminal proceedings and the obligation to punish the unlawful acts committed by the State agents. According to the Court, “*judicial authorities must on no account be prepared to let the physical or psychological suffering inflicted go unpunished. This is essential for maintaining the public's confidence in, and support for, the rule of law and for preventing any appearance of the authorities' tolerance of or collusion in unlawful acts*”.<sup>13</sup> The Court is ready to find a procedural violation of these Articles when the outcome of the domestic proceedings is not satisfactory, for instance when the sentence imposed on the State agents involved is too lenient or has

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<sup>12</sup> *Hugh Jordan v. United Kingdom*, 4 May 2001, § 108.

<sup>13</sup> *Okkali v. Turkey*, 17 October 2006, § 65, as regards Article 3.

been suspended<sup>14</sup>, when the criminal proceedings are time-barred because of the delays imputable to the authorities or even in the event of granting an amnesty or a pardon. This means that impunity *de facto* or *de jure* for violations of Articles 2 and 3 is incompatible with the principle of the rule of law. Procedural obligations are not limited to these two provisions and can apply in the context of other articles of the Convention.<sup>15</sup>

The Court has recently considered that the existence of conflicting decisions within a supreme court is in itself contrary to the principle of legal certainty, which constitutes one of the basic elements of the rule of law.<sup>16</sup> It is therefore required that the courts, especially the highest courts within the domestic legal order, establish mechanisms to avoid conflicts and ensure the coherence of their case-law. This is also necessary to strengthen the public confidence in the judiciary. The principle of legal certainty is essential to the public's confidence in the judicial system and the rule of law.

The importance of the role of the judiciary in a society governed by the rule of law makes it necessary to protect it in the context of freedom of expression. The Court reiterated many times that, under Article 10 of the Convention, the criminal sanctions imposed on the applicants for criticizing the judiciary in the press. The Court held that “*regard [...] must be had to the special role of the judiciary in society*”. Indeed, as the “*guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties*”.<sup>17</sup>

The Court has further pointed out the “*key role of lawyers in this field*” considering that it is legitimate to expect them to maintain the public confidence in the judiciary.<sup>18</sup> This means that the State can adopt certain measures to protect judges from excessive criticism by

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<sup>14</sup> *Nikolova and Velichkova v. Bulgaria*, 20 December 2007, as regards Article 2.

<sup>15</sup> Article 1 of Protocol No. 1 in *Novosseletskiy v. Ukraine*, 22 May 2005, § 111.

<sup>16</sup> *Beian v. Romania*, 6 December 2007, § 39.

<sup>17</sup> *Prager and Oberschlick v. Austria* of 22 March 1995, § 34 and *De Haes and Gijssels v. Belgium* of 27 January 1997, § 37.

<sup>18</sup> *Nikula v. Finland*, 21 March 2002, § 45.

lawyers, although restrictions of defence counsel's freedom of expression can be accepted only in exceptional circumstances.<sup>19</sup>

The independence of the judiciary is not usually examined in connection with the principle of the rule of law. However, the Court has pointed out that a tribunal must satisfy the requirements of independence from the executive and also from the parties. The notion of separation of powers between the political organs of government and the judiciary has assumed growing importance in the Court's case-law.<sup>20</sup> For instance, the Court has considered that the referral by a tribunal to a representative of the executive for a solution to the legal problem at issue was not in conformity with the requirements of an independent tribunal with full jurisdiction under Article 6 § 1 of the Convention.<sup>21</sup> It has consistently held that certain aspects of the status of military judges sitting as members of the national security courts rendered their independence from the executive questionable.<sup>22</sup> As regards the simultaneous exercise of advisory and judicial functions of a judicial organ, the Court examines whether the tribunal in question has been involved in "*the same case*" or "*the same decision*", without imposing any theoretical concept regarding the permissible limits of the executive and judicial powers' interaction.<sup>23</sup> However, the requirement of independence is not breached for the only reason that the members of the tribunal are appointed by the executive<sup>24</sup> or by the legislative power.<sup>25</sup> The Court, where the administrative authorities have failed to comply with a domestic judgment, affirms that "*the administrative authorities form one element of a State subject to the rule of law and their interests accordingly coincide with the need for the proper administration of justice*".<sup>26</sup> It also notes that bailiffs "*work to ensure the proper administration of justice and thus represent a vital component of the*

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<sup>19</sup> *Kyprianou v. Cyprus*, 15 December 2005, § 174.

<sup>20</sup> *Stafford v. the United Kingdom* [GC], 28 May 2002, § 78.

<sup>21</sup> *Beaumont v. France*, 24 November 1994, § 38.

<sup>22</sup> *Öcalan v. Turkey*, 12 May 2005, §§ 112 and 114.

<sup>23</sup> *Kleyn and others v. Netherlands*, 6 May 2003, §§ 193 and 200.

<sup>24</sup> *Campbell and Fell v. United Kingdom*, 28 June 1984, § 79.

<sup>25</sup> *Filippini v. San Marino* (dec.), 6 August 2003.

<sup>26</sup> *Hornsby v. Greece*, judgment of 24 February 1997, § 41; *Antonetto v. Italy*, 20 July 2000, § 28; *Surugiu v. Romania*, 20 April 2004, § 65.

*rule of law*".<sup>27</sup> It follows that the obligation to execute final judgments by the administration is an essential characteristic of the State subject to the rule of law. The violation of this obligation may be sanctioned in the context of different types of proceedings (property claims, family matters or environmental issues) and under different provisions of the Convention (Article 6, Article 8 or Article 1 of Protocol No. 1). For instance, in the *Taskin and others v. Turkey* judgment of 30 March 2005, the Court found that the authorization by the authorities to continue production at a gold mine, notwithstanding the final judicial decisions ordering termination of the production, breached Articles 6 and 8 (procedural aspect) of the Convention. It went on to hold that such a situation adversely affected "*the principle of a law-based State, founded on the rule of law and the principle of legal certainty*".<sup>28</sup> This principle also applies within a decentralized State, since the higher authorities of this State are strictly liable under the Convention for the conduct of their subordinates. The Court assesses the responsibility of the Contracting State itself, not that of the decentralized entity. In this regard, in the *Assanidzé v. Georgia* judgment, of 8 April 2004, the Court considered that the non-enforcement by the Ajarian authorities of a final judgment of acquittal rendered by the Supreme Court was in breach of Articles 5 §§ 1 and 6 of the Convention, and that the deprivation of liberty, despite the existence of a court order for release, was inconceivable in a "*State subject to the rule of law*".<sup>29</sup>

In the *Lelièvre v. Belgium* judgment, of 8 November 2007, the Court rejected the argument submitted by the Government to justify the length of a preventive detention, according to which the release would entail risks for the own security of the applicant.<sup>30</sup> Thus, the State governed by the rule of law has the duty to adopt all necessary measures to ensure the security of its citizens and the respect of human rights. This duty is indirectly linked to positive obligations of the State under Articles 2, 3, 4, 5 and 8 of the Convention.

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<sup>27</sup> *Pini and Bertani and Manera and Atripaldi v. Romania*, 22 June 2004, § 183.

<sup>28</sup> *Taskin and others v. Turkey* judgment of 30 March 2005, § 136.

<sup>29</sup> *Assanidzé v. Georgia* judgment, of 8 April 2004, § 173.

<sup>30</sup> *Lelièvre v. Belgium* judgment, of 8 November 2007, § 104.

The State governed by the rule of law is founded on the rule of law and the principle of legal certainty. We will now examine how the Court has used the concept of the rule of law to develop various requirements of legality and due process.

The Convention uses the term “law” in different Articles of the Convention or its protocols (2, 5, 6, 7, 8, 9, 10, 11, 1 of Protocol No. 1, 2 of Protocol No. 4, Protocol No. 7). Apart from the formal notion of law referred to above in the context of the right to a tribunal “established by law”, the notion of law systematically used by the Court is a material or substantive one. This means that the word “law” in the expression “prescribed by law” covers not only statute but also unwritten law (case-law) and regulations. The Court’s task is to assess whether the domestic law as a whole has been complied with in the context of the interferences with one of the rights set forth in the Convention. It may however take into account the fact that a constitutional court declared *ex post facto* the incompatibility with the Constitution of the legal provisions applied in the case.<sup>31</sup>

The compliance with the law is particularly important for the purposes of Article 5 of the Convention, which guarantees the right to liberty. In *Winterwerp v. the Netherlands*, judgment of 24 October 1979, the Court noted the importance of the “*lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law*”.<sup>32</sup> It is consequently ready to find a violation of Article 5 § 1 whenever the domestic law has not been respected.<sup>33</sup> Furthermore, the lawfulness of the detention means that the deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness. Therefore, in some cases, even though the law may have been

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<sup>31</sup> *Bączkowski and Others v. Poland*, 3 May 2007, in which the Court noted that the Polish Constitutional Court had declared the incompatibility with the Constitution of the provisions of the act which were applied for the interference with the Convention right.

<sup>32</sup> *Winterwerp v. the Netherlands*, judgment of 24 October 1979, § 39.

<sup>33</sup> *Bozano v. France*, 18 December 1986; *Wassink v. the Netherlands*, 27 September 1990.

formally respected, the Court finds a breach of the requirements of lawfulness on the grounds that the authorities have attempted to circumvent the applicable legislation.<sup>34</sup> However, the subsequent finding of higher courts that the first-instance court erred under domestic law in making the detention order will not necessarily retrospectively affect the validity of the intervening period of detention. According to the Court, “*for the assessment of compliance with Article 5 § 1 of the Convention the basic distinction has to be made between ex facie invalid detention orders – for example, given by a court in excess of jurisdiction or where the interested party did not have proper notice of the hearing – and detention orders which are prima facie valid and effective unless and until they have been overturned by a higher court*”.<sup>35</sup> The terms “law” or “lawful” in the Convention do not merely refer back to domestic law but also relate to the quality of the law, requiring it to be compatible with the rule of law. This means that the “law” must be “*sufficiently accessible and foreseeable as to its effects, that is formulated with sufficient precision to enable the individual to regulate his conduct*” and that the individual “*must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail*”.

As regards accessibility of the law, the Court takes into account the content of the instrument in issue, the field it is designed to cover and the number and status of those to whom it is addressed. For instance, technical regulations in the field of international telecommunications law, which were primarily intended for specialists and which could be easily obtained, were regarded as sufficiently accessible in the case of *Groppera Radio AG and others v. Switzerland*, judgment of 28 March 1990.

The requirements of foreseeability are much stricter in the Court’s case-law. The realm of Article 8 is particularly rich in this regard. In *Silver v. United Kingdom*, 25 March 1983 (correspondence of detainees), the Court established that “*a law which confers a*

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<sup>34</sup> *Karagöz v. Turkey*, 8 November 2005, § 59.

<sup>35</sup> *Liu and Liu v. Russia*, 6 December 2007 (not final), § 79.

*discretion must indicate the scope of that discretion*". In *Malone v. United Kingdom* (telephone tapping), it noted that "*it would be contrary to the rule of law for the legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and the manner of its exercise with sufficient clarity, having regard to the legitimate aim of the measure in question, to give the individual adequate protection against arbitrary interference*".<sup>36</sup> In the circumstances of the case, the Court concluded that "*the minimum degree of legal protection to which citizens are entitled under the rule of law in a democratic society is lacking*".<sup>37</sup> Whenever the interference is authorized by the judiciary, the rule of law requires the judges' discretion to be confined within certain limits.<sup>38</sup> The Court has applied the qualitative requirements of the law in many cases concerning interferences with the right to private and family life.<sup>39</sup>

In the context of the principle of legality enshrined in Article 7 of the Convention, "*essential element of the rule of law*", the Court uses the same notion of substantive law. This means that the law also covers the progressive development of the criminal law through judicial law-making, "*provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen*".<sup>40</sup> Furthermore, the requirements of foreseeability do not preclude the courts from bringing criminal proceedings against persons who have committed crimes under a former regime, since they cannot be criticized for applying and interpreting the legal provisions in force at the material time "*in the light of the principles*

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<sup>36</sup> *Malone v. United Kingdom*, 2 August 1984, § 68.

<sup>37</sup> *Malone v. United Kingdom*, § 79.

<sup>38</sup> *Kruslin and Huvig v. France*, 24 April 1990.

<sup>39</sup> *Antunes Rocha v. Portugal*, 31 May 2005; *Vetter v. France*, 31 May 2005; *Popescu v. Romania* (n° 2), 26 April 2007; *Hasan v. Bulgaria*, 14 June 2007.

<sup>40</sup> *S.W. v. United Kingdom*, 22 November 1995, where the Court found that the applicant could be convicted of attempted rape, although he was married to the victim.

*governing a State subject to the rule of law*".<sup>41</sup>

The qualitative requirements under the notion of law contained in Article 7 also apply to the penalties imposed.<sup>42</sup>

The principle of legal certainty is "*one of the fundamental aspects of the rule of law*".<sup>43</sup> On the one hand, this principle requires that final judgments must be enforced, and this obligation can be examined under different Articles of the Convention (Article 6 and 1 of Protocol No. 1 in *Immobiliare Saffi v. Italy*, 28 July 1999; Article 8 concerning family disputes in *Nuutinen v. Finland* of 27 June 2000 and *Mezl v. the Czech Republic* of 9 January 2007; Article 8 in environmental issues in *Giacomelli v. Italy*, 2 November 2006). The enforcement of final judgments in private disputes may require the assistance of the police, in order to avoid any risk of "private justice" contrary to the rule of law.<sup>44</sup> On the other hand, where the courts have finally determined an issue, "*their ruling should not be called into question*". This means that the systems which allow for the quashing of final judgments by the authorities for an indefinite period of time are incompatible with the principle of legal certainty. Legal certainty presupposes respect for the principle of *res judicata*.

With regard to the right to liberty and security, the authorities are also obliged to respect final decisions ordering the release of a person. According to the Court, the practice of detaining a person without the basis of a concrete legal provision or a judicial decision is itself contrary to the principle of legal certainty.<sup>45</sup>

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<sup>41</sup> *K.H.W. v. Germany*, 22 March 2001, § 38.

<sup>42</sup> See a recent example in the *Kafkaris v. Cyprus* judgment, 12 February 2008, in which the Grand Chamber considered that the domestic law taken as a whole was not formulated with sufficient precision as to enable to applicant to discern, even with appropriate advice, to a degree that was reasonable in the circumstances, the scope of the penalty of life imprisonment and the manner of its execution.

<sup>43</sup> *Brumarescu v. Romania*, 28 October 1999, § 61.

<sup>44</sup> *Matheus v. France*, 31 March 2005, § 70.

<sup>45</sup> *Baranowski v. Poland*, 28 March 2000, § 56; *Svipsta v. Latvia*, 9 March 2006, § 86, pre-trial detention based on a practice developed in response to statutory lacuna; *Riad and Idiab v. Belgium*, 24 January 2008, not final, § 79, detention in a transit zone while the State refused to proceed with the enforcement of repatriation

Finally, the principle of legal certainty may imply the restriction or limitation of rights, especially when it is considered in relation to time-limits governing the filing of appeals or statutory limitations. As regards time-limits, they are aimed at “ensuring a proper administration of justice and compliance, in particular, with the principle of legal certainty”.<sup>46</sup> However, the Court may find a violation of the Convention if there has been a particularly strict interpretation of a procedural rule (*Miragall Escolano*) or if the time-limits have been applied rigidly, regardless of the individual circumstances of the case (*Phinikaridou*).

The access to a court is one aspect of the principle of the rule of law established by the Court. It was established on the basis of the principle of the rule of law in the *Golder* case. According to the Court, there was no doubt that “were Article 6 § 1 to be understood as concerning exclusively the conduct of an action which had already been initiated before a court, a Contracting State could, without acting in breach of that text, do away with its courts, or take away their jurisdiction to determine certain classes of civil actions and entrust it to organs dependent of the Government”.<sup>47</sup> The right of access must be effective which means that the individual “must have a clear, practical opportunity to challenge an act that is an interference with his rights”.<sup>48</sup> However, the right of access to court is not absolute and it may be subject to limitations. The Court examines in each case whether the limitation imposed has impaired the essence of the right and, in particular, whether it has pursued a legitimate aim and there has been a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.

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decisions.

<sup>46</sup> *Miragall Escolano v. Spain*, 25 January 2000, § 33.

<sup>47</sup> *Golder v. United Kingdom* judgment of 21 February 1975, § 35.

<sup>48</sup> *Bellet v. France*, 4 December 1995, § 36.

# **BASICS AND IMPROVEMENT PERSPECTIVES OF CRIMINALISTICS AND THEORY OF FORENSIC SCIENCE IN THE REPUBLIC OF ARMENIA**

**Vahe Yengibaryan<sup>1</sup>**

Forensic expertise is a type of scientific research which aims at providing evidentiary data on the circumstances significant for the case, using special knowledge in criminal procedure. The term “Expertise” comes from Latin “*expertus*”, which means experienced and aware, whereas “*peritus*” is translated from Latin as competent, skilled in a particular field<sup>2</sup>.

The aim of forensic expertise is, actually, to provide certain evidentiary data to the body in charge for proceedings, recognized as evidence at law, if they meet certain requirements and serve basis for a court ruling.

From the viewpoint in question, forensic research activities are tightly connected with the process of proving which is conducted with the use of special knowledge through issuing an expert conclusion.

In this regard, we would like to outline that the Draft Criminal Procedure Code (hereinafter referred to as “the Draft”) classifies not only expert conclusion as evidence, but also expert's opinion and expert's testimony (Article 86 of the Draft), which is related with certain changes in the judicial status of the expert as a subject of criminal procedure.

It should be mentioned that expert conclusion has different names in different countries, for example, it is an expert testimony<sup>3</sup> in the USA, and an expert report or an expert opinion<sup>4</sup> in Great

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<sup>2</sup> Jeandos Y. Dictionnaire de droit criminel et penal: dimension historique. Paris, 2011, p. 79.

<sup>3</sup> Henderson C. Expert witness. In Siegel J.A., Saukko P.J., Knupfer G.C. (Eds.) Encyclopedia of Forensic Sciences. New York, 2000, Volume 2, pages 724-729.

<sup>4</sup> Freckelton I . Selby H. Expert evidence. Holmes Beach, Florida, 1993, pages 1/5021-1/5026.

Britain, Australia and other Common Law countries. Foreign countries also use the terms “expert evidence”, “forensic evidence” or “scientific evidence”<sup>5</sup> to highlight the probative value of the expert conclusion. Nevertheless, regardless of the names the expert conclusion has in this or that country, it's used as evidence during criminal proceedings both in Civil Law and Common Law countries.

The importance of using special knowledge in criminal procedure has promoted the enhancement of the role of expertise institute in the Draft.

The whole content of the Draft has definitely undergone quality amendments due to raising issues defining conceptual legal ideologies of protecting human rights and freedoms, which is included in the field of criminal procedure through special knowledge.

The adversarial system is a guarantee for the enforcement of human rights in Armenia. The practical implementation of the adversarial system principle was launched with the adoption of the existing Criminal Procedure Code in 1998 (hereinafter referred to as “the Code”), which regulates the procedure for conducting investigatory and procedural actions based on defining the rights of subjects performing functions of defense and prosecution in the proceedings, meanwhile defense counsel’s rights have significantly increased (Article 73 of the Code), while the adoption of the Draft will be its development.

The Model Criminal Procedure Code for Member Nations of the Commonwealth of Independent States lays down that the suspect or the defendant is entitled to conduct alternative expertise upon his/her initiative and expenses, and the expert conclusion can be attached to the criminal case, if they require so (Article 289 of the CIS Model Criminal Procedure Code).

Adversarial system is based on such procedural norms as impunity for human rights, respect for human rights, freedoms and dignity, presumption of innocence, legal aid at any stage of

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<sup>5</sup> Giannelli P.C., Imwinkelried E.J. Scientific evidence, Virginia, 1986, pages 149-174.

proceedings and principles of ensuring the right of defense, which regulate the use of special knowledge in criminal procedure and, first of all, the institute of forensic expertise.

From the viewpoint of forensic initiative, the formulation of Article 60(4) of the Draft should be assessed as positive: “[a]n expert should issue a conclusion or an opinion not only about the questions asked, but also about consequences arising during the investigation within his or her competencies.”

Such formulation of the Article clearly shows that the initiative for forensic examination is prescribed in the Draft as an imperative reality, a procedural duty for the expert, regardless of the fact whether or not the body appointing forensic examination makes a note about it.

It should be mentioned that the use of expert conclusion is tightly associated with the protection of human rights in criminal proceedings. The link between expert conclusion and protection of human rights is mediated with the probative value of expert conclusion. The expert conclusion is used as evidence in civil, administration, criminal, arbitration proceedings, etc., where various issues relating to human rights and legal interests are tried, which substantiates whether or not human rights are violated in combination with other evidence, the nature and gravity, damage caused and its recovery options, etc.<sup>6</sup> In this regard, expert conclusion and human rights are interrelated through the institute of provability which regulates the legal relations of appointing and conducting forensic examination, as well as those of obtaining and assessing its result — expert conclusion as one of the ways to achieve the objectives of criminal procedure and solve problems.

Forensic expertise involves conducting investigations aimed at detecting evidentiary data — relevant to the criminal case in line with the existing criminal procedure legislation — by people who possess special knowledge about any field of science, technology,

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<sup>6</sup> V. Yengibaryan, L. Davtyan, A. Chakhoyan, *Theory of Forensic Expertise /Ethymology, Contemporary Issues and Improvement Perspectives /*, Yerevan, “Antares”, 2012, page 110. (in Armenian)

arts or crafts.

Valuing the institute of forensic expertise, the Draft doesn't consider its appointment as an investigatory action, as the Code provides for, but as an individual institute of the criminal procedure. Chapter 35 of the Code previously entitled “[c]onducting forensic examination”, which was later amended and entitled “[a]ppointing and conducting forensic examination” due to understandable factors.

As an individual probatory action, the Draft regulates these issues in Chapter 33 entitled “Forensic examination”. At the same time, Article 261 in the mentioned chapter thereof regulates also the procedure for sample collecting for forensic examination and its types. The Code considers the taking of samples for examination as an individual investigatory action with an individual chapter devoted to it (Chapter 36).

However, the Draft doesn't exclude taking samples during investigatory actions without stipulating the taking of samples for examination as an individual investigatory action. That is, though the draft doesn't lay down an individual investigatory action of sampling for examination or expert assessment, the investigator is entitled to take samples for forensic examination during any investigatory action, except for sample taking from persons. Though the Draft doesn't directly lay it down, but the investigator is assumed to take samples from persons only with the participation of an expert, or only the expert may take samples from persons, otherwise taking samples from persons would be listed among permissible investigatory actions.

Thus, in line with the provisions of Chapter 33 of the Draft, the investigator or the expert shall, upon investigator's assignment, be entitled to take samples describing the specific features of a human being, corpse, animal, substance and other objects, before appointing the forensic examination or during its conduct, provided that they are necessary for conducting forensic examination. The following may serve as samples: blood, sperm, hair, fingernail clippings, microscopic skin scrubbings, saliva, sweat, and other secretion, patterns of skin prints, molds of teeth and extremities, handwriting,

signature, and other materials reflecting human skills, audio records, experimental samples of finished products, raw materials, substances, weapons, cartridges, bullets, cartridge cases, other materials and items.

The investigator makes a decision on sample collecting and writes down the following: name, family name and the position of the recipient of samples, if the sample is taken from a person, his or her name, family name and status: if the sample is taken from material or other object — its whereabouts and other relevant data, the type, range or amount of the sample, if the sample is taken from a person — when and where the person should appear to give samples, and the purpose of taking a sample.

The investigator invites the person or visits the latter, takes a signature showing he or she gets acquainted with the decision on sample collection, explains the rights and duties to the person. Besides documents, other samples and packages are sealed. In appropriate cases, sample collection is conducted through search or seizure or in parallel with these actions. A protocol is drawn up on collecting samples for forensic examination, which also describes collected samples. The collected samples are properly packaged, sealed, and the protocol is attached thereto.

Under Article 243(1) of the Code: “[f]orensic examination shall be conducted on the basis of a decision of an officer of the inquest body, the investigator, the prosecutor<sup>7</sup>, when special knowledge in

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<sup>7</sup> With regard to the subjects competent to initiate forensic examination, prosecutor’s competence to appoint forensic examination needs to be discussed. According to Article 52(1) of the Code, “[t]he” prosecutor is a state official, who conducts, within the limits of his/her competence, at all stages of the criminal procedure, the criminal prosecution, supervises the legitimacy of the preliminary investigation and inquest, supports the prosecution in court, appeals against the court verdicts and other decisions. The prosecuting attorney supporting the prosecution in court is called the prosecutor.” As it’s known, the system of prosecutor’s office functions and its role and place in the system of state bodies were significantly reviewed due to the legal and judicial reforms in the Republic of Armenia. After adopting the RA Law “On the Prosecutor’s Office” in 2007 and making amendments to the Code, the prosecutor’s office was deprived of its traditional function to conduct investigation and the prosecutor’s office is entitled only to criminal prosecution, exercising

fields of science, engineering, art or craft, including relevant research methodology, is required for discovering circumstances significant for the criminal case. Possession of special knowledge by an officer of the inquest body, the investigator, the prosecutor, specialists, attesting witnesses shall not eliminate the necessity of calling for an expert examination in relevant cases.”

Whereas Article 259 of the Draft states: “1. Forensic examination is conducted when special knowledge in the field of science, technology, arts, crafts or others is needed to reveal circumstances significant for the proceedings, including special knowledge about the methodology of conducting proper forensic examinations.”

Nevertheless, neither the Code, nor the Draft reveals the essence of the concept “special knowledge”, moreover, it lays down that the forensic examination shall be conducted whether or not other people involved in the independent proceedings possess special knowledge.

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control over investigation and judicial administration. Before the amendments made to the Code HO-270-N of November 28, 2007, the amendments to Article 53(1(2)) of the Code laid down that “[t]he prosecutor is authorized to conduct the following during the pre-trial proceedings... to investigate personally the criminal case in its full volume, passing necessary decisions during the preliminary investigation and implementing investigatory and other procedural actions...” That is, before the appropriate amendments to the criminal procedure legislation dated November 28, 2007, the Code authorized the prosecutor to conduct investigative actions, including appointing a forensic examination. Due to the legislative amendments dated November 28, 2007, Article 53(1(2)) of the Code was repealed, which resulted in the prosecutor’s office to be deprived of conducting investigative actions on its own, including the power to appoint forensic examination. It turns out that listing the prosecutor among the subjects authorized to appoint forensic examination contradicts to the role of the prosecutor’s office and its functions prescribed by the criminal procedure legislation. Thus, there is no need to list the prosecutor in Article 243(1) of the Code as a subject initiating the appointment of forensic examination, and the prosecutor shall be removed from this list. We think that listing the prosecutor among the aforementioned subjects is the result of Armenian legislator’s inconsistency, as no proper amendments have been made to other articles after legislative reforms as a result of reviewing prosecutor’s function, including in the aforementioned clause. See more details in V. Yengibaryan, L. Davtyan, A. Chakhoyan, *Theory of Forensic Expertise /Ethymology, Contemporary Issues and Improvement Perspectives /*, edited by V. G. Yengibaryan, Yerevan, “Antares”, 2012, pages 235-246. (in Armenian)

In our opinion, right perception of the concept “special knowledge” is important both for the successful solution of expertise problems and use of special knowledge in various manifestations. The effective use of such knowledge in criminal procedure directly depends on thorough identification of their essence, that’s why we will seek to analyze approaches on this issue in literature.

It's obvious that crimes may be committed in most various fields of human activities and may abuse different social relations, thus it's possible to appoint forensic examinations and use special knowledge in any field of science, technology, arts and crafts.

The general analysis of the Code and the Draft shows that special knowledge is the knowledge not related to law, as Article 84(3) and Article 85(3) of the Code lay down, respectively: “[s]pecialists on legal issues shall not be involved in criminal proceedings. ...”, “[e]xperts on legal issues shall not be involved in criminal proceedings...”, while Article 59(4) of the Draft says: “[a]n expert specializing in the law of the Republic of Armenia or international law is not involved in criminal proceedings.”

Naturally, classifying certain legal knowledge under special knowledge is debatable in literature; nevertheless, the viewpoints on classifying legal knowledge under special knowledge dominate when trying crimes in legal literature.

There are opinions in criminalistics and forensic science on the permissibility to ask legal questions to experts, and it’s proposed to allow appointing “legal forensic examination” during the trial of certain types of crimes, though the question of using legal knowledge shall not be mentioned in the expert conclusion.

For example, the legislation of the German Federal Republic allows appointing forensic examination also to clarify questions of legal nature, when the judge doesn't possess sufficient knowledge from the given field of law not restricting the area of special knowledge in anyway. Such an approach is substantiated, as the judge may not possess all the sources of domestic and foreign laws, and in such cases it would be more efficient to provide legal aid to the judge rather than to allow the judge to interpret a legislative act

of foreign legislation on his or her own, which he or she is not well aware of.

In our opinion, investigators and judges shall be able to solve legal problems and crimes on their own during the trial, while the notion “special knowledge’ shall be permissible only for certain legal knowledge.

Certain legal knowledge shall be classified under “special knowledge” except for the professional knowledge of investigators and judges. “[t]he professional knowledge of an investigator (judge) is legal knowledge, first of all, knowledge on criminal law, criminal procedure and criminalistics and not all branches of law. Studying economic, employment and international laws at universities, as well as a number of other branches of law, investigators may have knowledge about not complicated legal issues from appropriate branches of law. But law also has narrow specializations. The investigator would be wrong to neglect narrowly specializing lawyers with their deep knowledge.”

This issue is particularly valued when we speak about multidisciplinary forensic examinations. In cases when the clarification of some issue in the criminal case is feasible only through a various examinations based on methods and disciplines of different sciences or different fields of one science, a multidisciplinary examination must be appointed (Article 246 of the Code).

Article 246(2) of the Code states: “[e]very expert, within the scope of his or her special knowledge, shall participate in developing a common opinion based on the combination of factual data clarified within the framework of the complex forensic examination.”, while the next points (3 and 4) state that “[e]xperts do not have a right to sign those parts of the opinion of the complex forensic examination that do not fall within their scientific competences. When an institution specialized in forensic examinations is assigned to conduct a forensic examination without a request for conducting a complex forensic examination, the head of that institution may, when necessary, organize a complex forensic examination.”

The USSR Criminal Procedure Code of 1961 did not prescribe any multidisciplinary forensic examination, though it had wide use in the investigatory, judicial and expertise practice, nevertheless, the absence of precise legislative regulation of this issue and its different perceptions in criminal procedure made it one of the most difficult and urgent issues in the procedural science.

The Code puts an end to theoretical disputes by defining this type of forensic examination and stipulating certain regulations.

Legislative prescription of multidisciplinary forensic examination is justified, as not only the scientific opportunities for each type of forensic examination, but also various organizational, methodological and procedural issues related to conduct are decided due to external factors and, first of all, due to development level of science and technology.

At the same time, such forensic examinations are interrelated given the unity of the objective, i.e. the evidentiary data to be clarified in their combination enable making wider conclusions on the questions posed by the investigator or the court.

As we can see, special knowledge and methodologies from different fields may be used in certain forensic examination. The analysis of the forensic examination practice shows that the expert may use independent and individual methodologies during forensic examination, though in some cases they may succeed each other or be applied simultaneously given examination aims or to ensure the integrity of forensic examination. Naturally, in case special knowledge from different fields and different methodologies of forensic examination is used in the frames of the same forensic examination, we deal with conducting multidisciplinary forensic examinations, the legal regulation of which has fundamental significance in this case.

In this context we will outline that the content of Article 246 of the Code poses certain interest, which refers to the procedure for conducting multidisciplinary forensic examinations. Article 246(1) of the Code particularly states: “[a] complex forensic examination shall be called for where clarification of an issue significant for the

criminal case is only feasible in case of simultaneous use of special knowledge in various fields or different research methodologies.” Such formulation of this article makes it clear that two different grounds are needed to conduct a multidisciplinary forensic examination, first, when special knowledge from different fields are needed to conduct certain forensic examination and, secondly, simultaneous use of different methodologies are needed to conduct forensic examination. In the first case, the problem is clear, but in the second case it gets difficult, as we have already mentioned that completely independent and individual methodologies can simultaneously be used during forensic examination in the same field.

As a matter of fact, when conducting forensic examination in the same field a multidisciplinary forensic examination shall be conducted when there is need to use different methodologies. It turns out, if the expert simultaneously uses photographic methodology techniques to detect pickling fact and to recover eliminated text during technical and criminalistic examination of documents in contrasting, invisible infrared and other types of rays, then applies techniques of physical and chemical methodologies copying the examined document in diffusion method or expose the ink to chemical drop reaction, a multidisciplinary forensic examination shall be appointed.

In our opinion, such formulation of the law is incorrect, as the same expert may use different methodologies from the same field during forensic examination in the same field, but it shouldn't serve as a basis for conducting multidisciplinary forensic examination.

In our opinion, the mentioned provision would be proper if we speak about simultaneous use of methodologies from different fields, but the formulation of the article doesn't imply this. In this regard, it would be more correct to formulate the point in the article as follows: “[a] multidisciplinary forensic examination shall be appointed if the clarification of the issue significant for the criminal case is feasible only with the simultaneous use of special knowledge in different fields of science, technology, arts and crafts or simultaneous use of

methodologies in different fields of forensic examination.” In this case, it definitely becomes clear that it’s about examination methodologies from different fields, where the participation of the specialist from other field is inevitably needed. In this regard, it should be mentioned that sometimes the solution of questions posed during forensic examination, as well as ensuring integrity of forensic examination requires the application of methodologies from other fields.

Particularly, special methodologies from the field of chemistry need to be used to clarify the prescription of document preparation and in other cases studying the chemical composition and content of writing substances, when appointing multidisciplinary forensic examination is completely proper. In expertise practice we will bring the example of multidisciplinary forensic examination of receipts and payment slips, when document expertise specialist examines the external structure of documents traits and other qualities by using photographic techniques, luminescent analysis method generated by ultraviolet rays, microscopic examination methods, while gas-liquid chromatography and other chemical methods were used in studying individual substances in the internal composition and content of ink traits to clarify their prescription<sup>8</sup>.

In this respect, it should be mentioned that the Draft went one step forward, and the formulation in question may be found in Article 264(2) of the Draft, which says: “[i]f clarifying any circumstance significant for the proceedings is only feasible based on the simultaneous use of special knowledge and skills from different fields or methodologies from different *fields* (outline made by the author), the investigator appoints a multidisciplinary forensic examination.”

From the viewpoint of discussing multidisciplinary forensic examinations, we would like to refer to another important issue connected with effective conducting of forensic examinations. As we

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<sup>8</sup> Archive of the Ministry of Justice of the Republic of Armenia, expertise proceedings No 27990106, dated January 31, 2002, according to the criminal case No 53401201.

have already mentioned, several experts —who use knowledge of different fields or different methodologies — take part in the conducting of forensic examination, One of the experts shall administer the examination process to coordinate or to guide forensic examination process, as well as to delegate assignments among different experts. It should be mentioned that administration doesn't have procedural or any other nature, and the given person doesn't have any authorities but to arrange or coordinate works. In this case, the coordination of works is directly connected with the effectiveness of conducting the given forensic examination, as it won't be feasible to accomplish simultaneously ongoing forensic examinations on time and with quality without deciding the sequence of methodologies, techniques and equipment.

Still, the USSR Justice Ministry in its decision on arranging forensic examinations in expertise institutions dated December 6, 1972 stated that the head of the expertise institution might appoint one of the experts to coordinate the works of the others if the forensic examination is conducted with the participation of two and more experts.

The professional literature also highlights the need for coordination, which says that the committee head shall be appointed or selected from the experts to coordinate the works of the committee.

Besides, the advantage of multidisciplinary forensic examinations is the opportunity to coordinate the works of experts, to act in line with the general plan, to ensure the application of different scientific and technical methods in certain sequence. Thus, the head is appointed for the expert group to coordinate multidisciplinary forensic examination, who is in charge of developing a general plan for examinations, coordinating expert group works, chairing the meetings of experts, setting durations of individual forensic examinations in the frames of general timeframes and supervising meeting deadlines, as well as maintaining relations with the heads of other institutions and the body having appointed the forensic examination. However, at the same time the head enjoys no

procedural advantage in solving problems.

Thus, the analysis of the professional literature, as well as expertise practice shows that one of the expert group members should be appointed as a head to coordinate the works to ensure the effectiveness of the forensic examination when conducting multidisciplinary forensic examinations, where experts from different fields take part in the forensic examination. The importance of this issue requires it to have legal regulation in procedural legislation, if particularly to take into consideration the availability of such practice, when the issue was solved in the form of prescribing a departmental act by the USSR Ministry of Justice, as mentioned above.

In our opinion, the legal regulation of this issue in regard with appointing multidisciplinary forensic examinations is urgent, and the more superior the legal act will be, the more consistent and targeted multidisciplinary forensic examinations will be.

In this context, it would be desirable that the norms regulating multidisciplinary forensic examinations in the Code contain provisions on the compulsory activities of the person to coordinate and arrange works of forensic examinations, thus giving this right to the head of expertise institution, who will appoint the head of the group taking into consideration work experience, track-record in the given field, as well as the nature and peculiarities of the conducted examination, particularly issues of the field to be covered wider etc.

To our mind, it would be expedient to add part 5 in Article 246 of the Code, which will read as follows: “[t]he head of expertise institution shall appoint an expert group head from the group members to coordinate the process of forensic examinations.”

This provision would be expedient to add in part 4 of Article 264 of the Draft, respectively.

***Thus, the amendments made to the norms on legal regulation of forensic examinations may probably be assessed as a progressive step, the results of which, we hope, will pass the exam in practice.***

# ORIGIN, DEVELOPMENT, CURRENT STATE AND PERSPECTIVES FOR DEVELOPMENT OF CRIMINALISTICS AND FORENSIC EXAMINATION IN ARMENIA

Artur Chakhoyan<sup>1</sup>

In order to keep the entirety of the research material we will try to begin with the formation of the history of forensic examination and special knowledge in Armenia from as earlier times as possible.

The history of the development of forensic examination and criminalistics in Armenia are tightly linked to each other. Armenian scientists who deal with forensic science rightly mention that, in general, the history of applying special knowledge in Armenia or the formation and development of forensic science is mostly linked to the history of development of that science in Russian reality<sup>2</sup>.

In our opinion it also has its objective reasons as in the period of formation of the forensic science Armenia was one of the USSR Republics and as in lots of points, here too, our Republic is both directly and indirectly linked to Russia.

Firstly, let us mention that the history of formation of forensic examination in Armenia is considered as less unveiled but the study of old Armenian manuscripts shows that it rose yet in the 4<sup>th</sup> century. There is lots of information about the development of special knowledge in Armenia also in old Armenian manuscripts: in medical books, in historical works, in codes of law.

Based on the works of Armenian manuscript writers we can

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<sup>2</sup> Ohanyan Levon, Criminalistics. Yerevan, 2004, P. 128; Vahe Yengibaryan, Contemporary Issues of Judicial Forensic Expertise. Yerevan, 2007, P.7. [Օհանյան Լևոն, Կրիմինալիստիկա, Երևան, 2004թ., էջ 128, Վահե Ենգիբարյան, Դատական փորձաքննությունների արդի հիմնախնդիրները, Երևան, 2007, էջ 7].

come to the conclusion that in medieval Armenia, the external examination of the body was determined not only the cause of the death but also the point of what kind of tool's hit caused the death. This proves the exhumation and examination of Ani's Smbat King's corpse, which took place in 989. It was also proved that Smbat King B died a natural death.

“In weighty sources of law such as the codes of law of Davit Alavka Vordi (David Son of Alavik, 12<sup>th</sup> century), Mkhitar Gosh (12<sup>th</sup> century) and Smbat Sparapet (Sempad the Constable) (Cilician code of law, 13<sup>th</sup> century), which relate to judicial evidence, in particular, to confessions, witness testimonies, oaths, written documents, eligible persons' conclusion (forensic examination).

The latter which from the first sight makes us think just about receiving professional conclusions (evidence) by using different spheres of science, concerns only one sphere of science — the medicine. Even in 989, without breaching the law, an exhumation was carried out in order to examine the body of King Smbat and affirm the fact that he died a natural death. This is described in Asoghik's “history in the second”, in the work “Экзгумация трупа” [Exhumation of Body] of E. Makaryan, etc. The solution of this or similar issues were assigned to the persons<sup>3</sup> who had achievements in the science of that time”.

While King Gagik A ordered to do an exhumation, and the results of the corpse examination were widely published.

Later (since 13<sup>th</sup> century) in order to study the death causes and the anatomy, it was allowed to carry out autopsies.

It is hard to say when the forensic examination during the examination of criminal cases was carried out for the first time. However, the study of different sources show that there is information concerning the application of special knowledge in the works of historians, manuscript writers, in different monuments of law, in codes of law, as well as in the works of different researchers.

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<sup>3</sup> Ohanyan Levon, Criminalistics. Yerevan, 2004, P. 151. [Օհանյան Լևոն, Կրիմինալիստիկա, Երևան, 2004, էջ 151].

The examination of old Armenian manuscripts, as well as different works prove that the use of special knowledge in Armenia began yet in the 4<sup>th</sup> century, in particular dating back to year 368; followed by the murder of King Tiran, which was committed by the order of his son Arshak.

From the Armenian history we also know the murder of King Pap (year 374) and the fact that a special examination of King Pap was carried out which gave the possibility to come to the conclusion that Pap died from many stabs of a sharp-stabbing instrument, and the reason of the king's death was the bleeding.

If the written sources of law concerning the judicial law which reached us from the ancient and early medieval times of Armenian law history are quite poor, the same cannot be said about the law of the 10-13th centuries. In the very period next to the mentioned sources the two main sources appeared, the prominent monuments of Armenian political-legal thoughts of the medieval Armenian law — the Law Code of Mkhitar Gosh and the Law Code of Smbat Sparapet in Cilician Armenia.

In different periods of the history of the Armenian people a whole range of monuments of legal thought was created, in which the meaning of conclusions concerning the role of “aware” or “experienced” people during the examinations of crimes, trials and other issues directly or indirectly had importance. Since the 12th century, in Books of Rules, as well as in the orders of certain kings we meet such norms of law the use of which would practically be impossible without applying special knowledge.

As a proof of what we have said, it will be appropriate to mention some examples of medieval Armenia's famous legal monuments such as the works of Mkhitar Gosh, Smbat Sparapet, Davit Alavka Vordi (David Son of Alavik) which prove that yet during the Medieval period in order to confirm the facts of breaching the law, the judge turned to experienced people — the experts. The exact date of the creation of Mkhitar Gosh's Law Code is not known to us. “In the Armenology, there was a disagreement about the date of the invention of Mkhitar Gosh's Law Code. There were two points

of view: a) the Law Code was written in 1184, and b) in 1184 Mkhitar Gosh started to write his Law Code and left it incomplete”.<sup>4</sup>

In the preamble of the Law Code, Mkhitar Gosh mentioned that “[d]uring the proceedings the judge must have two or three experienced people with him and only afterwards must make a judgment so that the trial be fair ... keep two or three people not only as witnesses but also always get educated and skillful through them”.<sup>2</sup>

As we see, Mkhitar Gosh also mentioned that the professional knowledge of the judge is not enough for turning a fair verdict, and besides the professional knowledge, he also needs special knowledge, and he considered that the gap could be filled through people who had special knowledge, or as Gosh mentions: “... through experienced people who always have to be next to the judge”.

Article 235 of Mkhitar Gosh’s Law Code envisages liability for the crimes committed by doctors: “[m]any doctors cause great harm to people by giving them some medicine or by testing a medicine; or they kill people with an ill-will, thus giving them some medicine or because of being ignorant they give them harmful medicine, or being unskillful and illiterate they cannot diagnose the disease, and for these very reasons they kill the sick...”.

The analysis of the content of the article shows that the only special studies would give the possibility to reveal the fact of the crime; that is to say, the judge must appoint a so-called forensic medical examination so that the doctor be liable for the crime he committed, as the medical error can be confirmed only by a person who has special knowledge; in this case, the only person having special knowledge in the field of medicine — the doctor.

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<sup>4</sup> Mkhitar Gosh, Book of Justice. Edited and compiled by Khosrov Torosyan, Yerevan 1975. [YerevanՄխիթար Գոշ «Գիրք դատաստանի», աշխատասիքությամբ Խոսրով Թորոսյանի, Երևան, 1975]

<sup>2</sup> Avagyan R.H. Treasury of the History of Armenian Legal Thought. Part 1. Yerevan, 2001, pp. 370-371. [Ավագյան Ռ. Հ. «Հայ իրավական մտքի գանձարան», գիրք 1-ին, Երևան 2001, էջ 370-371].

According to another article of Mkhitar Gosh's Law Code "If someone opens the pit of grain or seed, puts one of the allies or strangers down into the pit, and if the one who has been put there dies, his blood will be taken from the one who put him there, and in case that person gets sick, the one who put him there will have to pay the price of medicine and the price of becoming disabled because he had to be cautious till the smell of the pit passed and only then put a man down through a rope".

And the cause of the death of the one who was put down to the pit would naturally be determined by a doctor.

During detecting the crimes, for the development of special knowledge, the "Canonical legislation" of Davit Alavka Vordi is also of a unique value. Despite the fact that the "Canonical legislation" was not officially adopted, it was widely used in medieval Armenia.

In one of the rules of Davit Alavka Vordi, in Article 40 the following is mentioned: "If while sleeping, the mother falls on the child, or negligently the baby fell into the fire and got burnt, let the mother repent for 5 years, one year — by observing a fast, two years — by observing week-long fasts, and two years — by observing a fast three times for forty days".

It is clear that in order to confirm the guilt of the mother it is necessary to find out the real cause of the death of the child, that is to say, whether the child died a natural death or drowned by his mother's negligence. And the determination of the real cause of the death without someone who has special knowledge, that is to say without a doctor's help, would be impossible.

A parent admonishing his children, or a husband admonishing his wife: if beats with pity, but anyhow kills, let him stay out for two-year and 5-year stay incommunicable to holiness, and if pitilessly, brutally beats to death, he is guilty. If deliberately, incited from revenge or jealousy, afterwards kills by poisoning, then let such people repent till death by wearing scourging clothes and sprinkling ash, but do not let him be deprived of his pension". In Article 57, Davit Alavka Vordi established a liability for the parents who killed their children in different ways — by beating or poisoning:

“[p]rostitute women who kill their babies must repent until the day of their death.”

In the discussed times it was possible to find out the cause of the death, whether it was a natural death, a poisoning or a result of beating. As we have already mentioned, the cause of the death could be determined only by a person who had special knowledge. And the fact that such people really existed proves the deep study of the rules of Davit Alavka Vordi, as in some of his articles the concept of “a master person”, “a doctor”, “a midwife” were used.

For example, Article 77 of the Rules of Davit Alavka Vordi established that “[i]f the midwife is not attentive to a newborn baby, and if the baby dies for the reason of midwife’s unskillfulness, thus she is bloodguilty. If the baby is wrapped in the womb, then the midwife or someone else who masters this job, should carefully put her hand in and fix the baby so that the mother remains alive.

“...someone who is the master of the job, either a woman or a man who is reliable...”

It is impossible to imagine the study of the history of forensic examination development in Armenia without the “Law Code” of Smbat Sparapet — a famous social and political figure, a lawyer-legislator, a skilled diplomat, an author of brilliant historical and philosophical works.

In the Articles of Smbat Sparapet’s Law Code where the liability for different crimes was established, it is repeatedly mentioned that it is a must to “conduct a justified examination”, “investigate and know the circumstances of death”, naturally considering also the participation of “scientist people who are skillful in their job” in the case examination.

According to Article 569 of the Law Code: “[i]f someone opens the pit and brings someone in without ventilating it, and the latter suffocates from the stifling gas, the one who has made him enter there is obliged to pay the price of the dead person’s blood. But it is necessary to be very cautious, examine and know the conditions of entering there, as well as all the circumstances concerning the death and the accident”.

From the content of the Article it is obvious that scientist people who were skillful in their job should find out the real cause of the death.

In medieval Armenia, among the types of evidence was also the opinion of a person who had special knowledge which was of great importance while deciding the cause of the death.

“In medieval Armenian law the following types of evidence were known: the confession, witness testimonies, oath, written documents, and proficient persons' conclusions”.<sup>5</sup>

It is known that the first Constitution of the world was created in 1779, but a little bit later the first Constitution of France was also created. And so, 6 years after the adoption of the first Constitution of the world, in 1773, in India, in the city called Madras, Armenian man named Shahamir Shahamiryán created the first draft of the Armenian Constitution — the “Vorogayt Parats” (Snare of Glory).

Besides the form, structure of the independent Armenian state, social-political and other issues, the draft Constitution regulated also some issues of criminal procedure.

The study of the mentioned work shows that yet in 1773 Shahamir Shahamiryán envisaged the institution of proficient persons — the experts, with a separate article obliging the state to particularly care for the specialists and establishing who could act as specialists, speaking about the obligation of the specialist to master a certain craft.

According to chapters 127 and 173 of “Vorogayt Parats”: “[t]he state of Armenia particularly cares for the specialists, especially for the specialists in the field of astronomy, medicine, music, rhetoric, etc.” “The specialist who has not yet received a signed certificate from his master which guarantees that he is a perfect specialist, he has no right to practice his craft.”

During the examination of certain crimes the participation of

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<sup>5</sup> Ghazinyan G.S. Contemporary and Historical Issues of Criminal Procedure in Armenia. Yerevan, 2001, P. 24. [Դազինյան Գ. Ս., Քրեական դատավարության պատմական և արդի հիմնասնդիրները Հայաստանում, Երևան 2001, էջ 24].

proficient persons was obligatory. In particular, it is necessary to mention that in cases of murder and sudden death, besides the person who was investigating the case, during the case examination the doctor should also participate so that it was possible to find out the cause of death; in modern terms — the corpse should obligatorily be subject to a forensic medical examination.

This proves chapter 273 of “Vorogayt Parats”, according to which: “[i]f someone suddenly dies at home or in the street, and at the time of dying another one is next to him, be a family member or a stranger, he is obliged to stand in place and alert to the judge courthouse, and a judge and a doctor must be sent from the courthouse so that they come and find out the cause of the death and take a testimony from the people who are near the decedent (the testimony may be made publicly), then order to bury the corpse”.

It is clear from the content of the article that if someone died, the corpse should stay there till the judge and the forensic doctor arrived.

The latter should find out the cause of the death through examination, and only afterwards it was allowed to bury the dead person.

Regarding the application of special knowledge “The Armenian Law Code of Astrakhan” is of great importance too.

“The Armenian Law Code of Astrakhan”, which was made by three deeply legally trained habitants of Astrakhan (Yeghiazar Grigoryan, Grigor Kanpanyan and Hovhannes the son of Sargis) after the order of Empress Catherine the Second about granting autonomy to Armenians living in Russian Empire, became one of the unique monuments of Armenian law.

The creation of the Law Code (the Law Code preparation activities began in 1747-1748 but it was entirely completed in 1765) mostly depended on the establishment of the Armenian Court in Astrakhan, in 1746.

While studying this monument of law it becomes obvious that during the preliminary investigation of crimes as well as during civil procedures there arose a necessity to involve in the case of some

competent persons for confirming or denying this or that fact, to do some examination; moreover a separate chapter (part one of Chapter “JF” of the Law Code) concerning the “Law of making a judgment” was envisaged there.

According to Article 1(1) of Chapter “JF” of the Law Code: “[j]udgment maker is called the person who is appointed by the choice of lawyers or judges to be informed and to give solutions to disagreements, and that is why the name indicates his position, because he is called judgment maker, that is to say, the person who supports the judgment making process”.

As it is clear from the content, the judgment makers must be informed and give solution to any disagreement which occurs during the trials, that is to say, not anyone could be appointed as a judgment maker. That is the reason why the Law Code (Article 2(1) of Chapter “JF” of the Law Code) prohibits the following kinds of people to be appointed as judgment maker:

- those who are subjected to public punishment for their guilt;
- the mad men;
- those who are deprived from their judge degree for their guilt;
- those who are accursed and blamed by the church;
- those who have not reached the age of twenty-five;
- those who have not learnt to write and read.

So, in fact, at that time in order to be a judgment maker one should correspond to some criteria, as it is now regarding the position of a case specialist or an expert, that is to say, one should have several qualities: be informed, honest, capable to work, have some experience (should have reached the age of twenty-five) and some knowledge (must be able to write and read).

The Law Code also regulated such important issues as the ways of being elected as a judgment maker, the liability for making incorrect and illegal decisions as well as for corruption, the deadlines of making decisions, the issue of making a definite decision in case of making different decisions during the participation of several Judgment makers in the case (part one, Articles 3, 10, 11, 13 of

Chapter “JF” of the Law Code) which has common features with the current expert conclusion, appointing an expert or forensic examination, with the order of appointing the liability of an expert, sole and commission forensic examination.

By participating in the case, judgment makers made their conclusions in a written form, and the document was called “Decision”. If someone was elected and gave consent to be a judgment maker, he could not renounce the judgment making process without a legal reason (Article 29(1) of Chapter “JF” of the Law Code).

According to Article 13 of the mentioned chapter: “[i]f the judgment maker takes a bribe for the case, and the examination confirms the fact, he should not only return the bribe to the person from which he had taken it, but he should also pay a fine to the royal treasury, be resigned from his position, and another person should be elected instead of him”.

And Article 15 defines: “[i]f there is one judgment maker, his act is always acceptable. If there are two persons, and their opinions are not similar and they write different opinions, then the judges must choose two other judgment making persons and learn about their disagreements and whatever those persons determine, so should it be, and no one of them should oppose. If there are three persons, and two of them decide in the same way, but the third one in another way, the latter’s opinion must be rejected, and the opinion of the two persons must be confirmed. In other similar cases the same method must be applied”.

In the 18th century, the fact of wide application of special knowledge and the implementation of various criminalistics studies during the examination of crimes are proved also by the content of articles of Astrakhan’s Armenian Law Code. The studies and analyses of the articles show that there was the possibility of doing different studies of documents and manuscripts, in particular it was possible to find out the falsification of documents, since identification of signatures and manuscripts were done. This is proved by analysis of chapter D of Article 19 and chapter JD of

Article 166 of Astrakhan's Armenian Law Code.

According to part 1, chapter D of Article 19 of the Law Code: “[i]f one disowns the bill of credit written by his handwriting or signed by him, which is confirmed by his another handwriting written elsewhere and confirmed by an examination, such apostate must pay his lender twice for the crime and be publicly beaten without mercy.”

And Article 166 of chapter JD envisaged that: “[i]f someone makes a false account book on behalf of someone else so that he causes damage for him, and if it becomes known and confirmed by an examination, then he or she must be punished without any forgiveness and must suffer the damage as a false bill of credit writer.”

It is also necessary to mention that during the examination of crimes the knowledge in medical sphere was also widely applied, and lots of issues were solved only by the “testimony” of doctors, as it is mentioned in the Law Code.

Vivid examples of this are respectively Article 105 of Chapter KC and Article 106 of Chapter JB, according to which: “[i]f someone keeps a dog and does not tie him, but lets him free, and the dog, while going outdoors, bites somebody... and if the person dies, and the testimony of doctors proves that the cause of the death was the dog's biting, and there was no other reason, in this case...” and “If a woman dares to kill his husband by poisoning him or by another way: if it becomes known, and the examination proves it, she must...”

Thus, Armenia's legal heritage studies have shown that even in Middle Ages special knowledge was of great importance, and other science achievements were widely used in the investigation of crimes.

No one can doubt about the correspondence of the writing, the ink, the shape to the original that it is written by the same person and no one else of those centuries”.<sup>6</sup>

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<sup>6</sup> Pivazyan E.A. Philological Examination of Mkhitar Gosh's Judicial Book. Yerevan 1987, P. 29. [Պիվազյան Է.Ա., Մխիթար Գոշի դատաստանագրքի քանասիրական քննություն, Երևան, 1987, էջ 29].

Our studies showed that in the 18<sup>th</sup> century, too, during the examination of crimes special knowledge was applied. The special knowledge was widely used also in social life during the mentioned period of time. For example, not expert, but philological studies of manuscripts were carried out by relevant experts for purely scientific reasons. For instance, V. Hovhannisyan writes the following about number 1738 Manuscript of Mkhitaryan Matenadaran of Venice: “[s]ome sources indicate that the handwriting forensic examination was performed before the revolution by female and male teachers of gymnasiums D. M. Popov, P. A. Kushmanyanyan, A. Sahakov and others.”<sup>7</sup>

According to B. Hovhannisyan, even after 1920, D. M. Popov continued carrying out handwriting forensic examination based on judicial-investigative assignments. In addition to not showing the source, the author of the report does not either mention any information concerning the educational level of those persons, and whether Popov and Sahakov mastered Armenian and its writing and, in general, what education they had.

Application of special knowledge during the examination of crime had a broad peak since the half of 20th century.

After the October Revolution, emergency committees, investigative groups, worker-peasant militia, criminal search of the Republic of Armenia were leading a tense battle against crimes. However, at the beginning of the 20th century during the examination of crimes the special knowledge was not widely used, science crime examination — criminalistics did not exist, there were no forensic examination institutions.

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<sup>7</sup> Contemporary opportunities and routes of development of Judicial Expertise in Soviet Armenia. Materials of Conference devoted to the 25<sup>th</sup> anniversary of the Forensic Expertise Center of the Ministry of Justice of Armenia, Yerevan, 1984, pp. 81-82. [Դատական փորձաքննությունների ժամանակակից հնարավորություններն ու կատարելագործման ուղիները Սովետական Հայաստանում. (ՀՀ արդարադատության նախարարության ԴՓԳՀԼ-ի կազմավորման 25-ամյակին նվիրված գիտապրակտիկ կոնֆերանսի նյութերը), Երևան 1984, էջ 81-82].

In December, 1920, the Peoples Commissariat of Health was established. The Commissioner demanded to immediately create an institution performing judicial-medical forensic examination in Armenia with the aim of keeping and reinforcing the legitimacy.

On August 3, 1921, the second section of the Justice national commissariat applied to the Peoples Commissariat of Health in the form of letter asking to tell if there was a special department in the Peoples Commissariat of Health which could perform medical-legal forensic examination. The second letter followed the first one, in which it was asked to accelerate the organization of that work.

Based on the decisions made by the collegium of the ASSR Peoples Commissariat of August 19 and 27, 1921, the position of City's General Judicial-Medical Expert was created in Yerevan. A specialist of high quality, a skilled forensic medicine organizer V. I. Krzhivinski was appointed for this position, who also engaged in providing services in all Armenian regions.

By the order N22 of the ASSR Peoples Commissioner of Health of March 1, 1924, positions of experts were created for working in the regions of Armenia. From 1924 to 1929 five provincial judicial doctors were engaged in the activities, covering the following provinces: Yerevan, Gyumri, Etchmiadzin, New-Bayazed, Lori.

It is necessary to mention that during this period the examination of both the alive and the dead were obligatory in Armenia in the cases when they had some link with a crime. In the initial period, the conclusions were given mostly based on the external study of the corpse, and afterwards the obligatory examination was legalized by a doctor. Such autopsies had a judicial and medical significance and were carried out both by civil and military doctors, with the participation of an investigator and attesting witnesses, by preparing the relevant forensic document — a “Certificate”.

Thus, based on the studies carried out by E. A. Makaryan, we can state that yet in the 19<sup>th</sup> century Armenian specialists were engaged in forensic medicine both in Armenia and abroad. In 1846 Kalta-Sera medical highest college was established in Turkey, where

the chair of “legitimate medicine” (forensic medicine) was functioning, the head of which was Armenian scientist Serovbe Vichenyan until 1876.

And from 1876 to 1894 the head of the mentioned chair was Hakob Khandanyan.<sup>8</sup>

In 1927 near the Faculty of Medicine of the Yerevan State Medical Institute a chair of forensic medicine was established. E. T. Shek-Hovsepyan was appointed head of the chair.

In 1929 the position of Republic’s general forensic expert was designated, which was held by E. T. Shek-Hovsepyan until 1939. Besides the forensic sphere, Professor E. T. Shek-Hovsepyan was also engaged in the examination of some criminalistics issues.

This is proved by several articles of a criminalistics nature published by E. T. Shek-Hovsepyan, for example “About the issue of determining the distance of shot made from rifle 03-7 of small-caliber”, “About the issue of detecting the invisible seals of fingers”, “About the issue of identifying the torn sheets”.

Certain studies concerning various issues of forensic medicine and criminology played an important role in the activities of the Professor E. T. Shek-Hovsepyan.

It should be mentioned that the material evidence of biological and chemical nature was examined in laboratory conditions by A. A. Hovsepyan, and the episodic examinations of a criminalistics nature were carried out by E. T. Shek-Hovsepyan.

In 1953, after the death of E. T. Shek-Hovsepyan, professor N. M. Avagyan was appointed the general judicial and medical expert of the Republic, whose name is related to the further development of forensic medicine in the Republic of Armenia. His efforts resulted in the creation of the union of forensic doctors and criminalists in the Republic.

Along with several sections of the laboratory of judicial and

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<sup>8</sup> Makaryan Y.A. Materials from Medical History of Armenia. Bulletin of the National Academy of Sciences of Armenia, #10, Yerevan, 1955. [Մակարյան Ե. Ա., Նյութեր Հայաստանի դատական բժշկության պատմությունից, ՀՍՍՌ, ԳԱ «Տեղեկագիր», N 10, Երևան, 1955].

medical examination there was also a physical-technical section which was organized in 1954 and was led by R. Aydinyan (later S. Sargsyan and G. Ter-Movsesyan).

The use of science and technology achievements became a priority in the fight against criminality and in detecting criminals. This issue was solved in 1959 when a scientific research laboratory of criminalistics was organized in the Yerevan State University, by the Decision of the Government of the Soviet Republic of Armenia No 149 of April 25.

M. B. Hovhannisyan, senior laboratory worker of the study cabinet of the Faculty of Law, former experienced MIA operational worker, was appointed head of the laboratory.

The laboratory carried out three main functions: performing scientific research, teaching the students of the YSU Faculty of Law, doing forensic examination upon request of judicial bodies. Various materials were sent from some neighboring countries to the RA Forensic Scientific Research Laboratory for forensic examination: “[...]ots of materials are received for forensic examination not only from our Republic but also from Azerbaijan and Georgia.

Currently, handwriting, technical, traceological, ballistic, and physical forensic examination is carried out in the laboratory, soon chemical and other forensic examination will also be carried out in the near future. In comparison, the handwriting and auto-technical forensic examination are more”.<sup>9</sup>

At the initial period, mainly handwriting, technical, traceological, ballistic, auto-technical and other types of forensic examination were carried out in the laboratory. Through L. P. Ohanyan’s and R. G. Babajanyan’s efforts, forensic examination of technical-forensic documents was also successfully carried out.

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<sup>9</sup> Hovhannisyan B.M. The Three Years of Scientific Criminalistics Laboratory and Upcoming Problems. Issues of Judicial Expertise, Collection 1, Yerevan, 1962, P. 6. [Հովհաննիսյան Բ. Մ., Գիտահետազոտական կրիմինալիստիկական լաբորատորիայի գոյության երեք տարին և մեր հետագա խնդիրները, «Ղատական փորձաքննության հարցեր», ժողովածու 1, Երևան, 1962, ԵՊՀ-ի հրատարակչություն, էջ 6]։

Years later, other laboratory tests were also performed. In addition to the auto-technical examination, the number of other types of forensic examination also increased: judicial accounting, physico-chemical research of material evidence, etc. The latter was organized in 1962 and helped also to clarify the questions posed for solving some forensic examination (for example the clarification of how old the shot is, etc.).

The role and significance of applying special knowledge during the examination of crimes considerably increased in Armenia in the 20<sup>th</sup> century, and without their application it was impossible to detect certain group of crimes.

And in the second half of the mentioned century there were several forensic examination institutions the work of which contributed to the detection of such crimes that were impossible to reveal in any other way.

In the modern era it became apparent that the achievements of science need to serve to the requirements of practical life.

A considerable importance has been attached to the solution of the problem of increasing the efficiency of improving and applying mostly the theoretical foundations of special knowledge, methodology from the perspective of solving justice issues.

Along with the achievements of modern science and technology, it is possible to essentially improve crime investigation, detection and prevention process efficiency through the full application of special knowledge.

In practice, justice and law enforcement agencies often feel a lack of information while assigning forensic examination.

In the current phase of the transition to the information society, there are big threats especially deriving from science regarding confronting many internal and external challenges and crisis phenomena, eliminating or at least lessening spontaneous, often destructive flow of information, preventing the growth of cyber-criminality.

In modern conditions the security of an individual, society and

state essentially depends on the maintenance of information security, and this dependence increases in parallel with science-technological progress.

The solution of a computer security problem is impossible without taking criminological, criminal-legal, criminal procedural, forensic and operational investigative adequate measures against illegal possessing of computer information.

The range of motion is getting the information and technical forensic examination into other types of development.

In cases of crimes against the circulation of computer information, as a rule, the following main types of forensic examination are assigned: technical forensic examination of a computer, technical forensic examination of information security devices, data and software provision forensic examination. Nowadays, other types of information and technical forensic examination have also considerably developed.

Taking into account the particularities of cyber-criminality, development of forensic examination possibilities, their correspondence to modern requirements should be the important direction of the fight against the criminality.

Different types of forensic examination are on different levels of development in the Republic of Armenia. Some of them have been in place for decades, some of them have recently been created, and others are considered to be in the further development of forensic examination. It is also necessary to consider the development of the process of carrying out new forensic examination and its transformation: the creation of new types of forensic examination, transformation of forensic examination forms into individual types.

Currently, there are several forensic examination centers in the Republic of Armenia: “Expertise Center of the Ministry of Justice of the Republic of Armenia“ SNCO, “National Bureau of Forensic Examination of the National Academy of Sciences” SNCO, “Scientific Center of Forensic Medicine of the Ministry of Health of the Republic of Armenia“ SNCO, “Forensic examination-

Criminological Department of the Police of the Republic of Armenia” which operates within the Police system of the Republic of Armenia, “Military Police Forensic Examination Department of the Ministry of Defence of the Republic of Armenia” SNCO and the YSU “Scientific-practical center of studying criminalistics and forensic examination problems“ SNCO.

“Forensic examination center of the Republic of Armenia” State Non-Commercial Organization, as a criminalistics scientific research laboratory, was organized within YSU by the Decision of the Government N 149, on April 24, 1959. In 1966, it was transferred to the Judiciary Committee of the Council of Ministers of the Armenian SSR, and in 1971 — to the Ministry of Justice. In 1998 it was renamed as “Expertise Center of the Ministry of Justice of the Republic of Armenia” SNCO.

On July 22, 2004, by the decision of the Government of the Republic of Armenia N 1127 the “National Bureau of Expertise of the National Academy of Sciences of the Republic of Armenia” State Non-Commercial Organization was established, within the framework of international agreement between the Government of Republic of Armenia and the Government of the United States of America “On Narcotics Control and Law Enforcement” signed on June 11, 2001.

From 2009, there are different forensic examination departments in the “National Bureau of Expertise” SNCO, which carry out forensic examination in already 26 forensic examination directions and in the following types of forensic examination: forensic examination of documents, copyright, photo-technical, portrait, video and audio recording, traceological, ballistic, explosion-technical, materiological, food, biological / soil /, fire technical, construction technical, traffic accident circumstances, vehicle technical state, vehicle traceological, economics, commodity, computer-technical, cultural values, psychological, forensic, forensic-chemical (toxicological).

In 2010, new types of forensic examination were implemented

in the “National Bureau of Expertise” SNCO, which were not applied in our Republic beforehand, but were applied in the European countries and in the USA: forensic examination of the place where the accident occurred, forensic examination related to the identification of human’s smell traces, etc.

It is planned to implement and afterwards develop a range of newest types of forensic examination (for example, by using the method of computer simulation of road accidents, the method of computer identification of different types of traces and samples, etc.) in the framework of computer technical, photo technical, portrait, video and audio recording types of forensic examination, as well as forming DNA identification testing department firstly in the structure of medical-biological forensic examination department and afterwards in a judicial-genetic individual, separate department by using the whole powerful potential of genetic science in order to completely provide the exercise of the most important function in the framework of the fight against crimes.

In 2000, on the basis of the Chair of Criminalistics of the YSU Faculty of Law, the Scientific-practical center for studying criminalistics and forensic examination problems was created, which is located in Yerevan on 1a Kievyan street.

Nowadays, there is a Criminal-forensic examination department within the Police system of Republic of Armenia, where different types of forensic examination are carried out.

Within the system of the Ministry of Internal Affairs, forensic examinations are carried out by the experts of the Forensic-criminal department. The Forensic-criminal department was founded yet on the basis of Science and technology department operating within the System of Internal Affairs which was later renamed as Operational and technical department and is currently called Forensic examination-criminological department.

By summarizing the foregoing, we can say that nowadays the institute of forensic examination is enough, but is in the developing stage in Armenia. This is proved by the formation of new divisions,

departments and other subdivisions in forensic examination centers of the Republic of Armenia, for example the Department of construction-technical and architecture-technical forensic examination, which will also ensure the forensic examination of the electronic, mechanical and mixed devices and equipment, the Department of psychological influence and psycho-linguistic forensic examination, the formation of DNA identification testing department, which will record new progress in the fight against crimes in the Republic of Armenia by using the whole powerful potential of the genetic science.

**BASIS AND SUBJECT OF CIVIL LAWSUIT IN THE  
CRIMINAL PROCEDURE OF THE  
REPUBLIC OF ARMENIA  
(SCIENTIFIC-PRACTICAL ANALYSIS)**

**Sergey Marabyan<sup>1</sup>**

Each lawsuit has its own basis and subject regardless in which form it is filed. There are such structural parts of the lawsuit which are composed of the content of the lawsuit, condition, the independence and individual certainty of the lawsuit in their combination. The basis and subject of the lawsuit give the possibility to make it individual, distinguish it from similar lawsuits, determine the framework of facts which are to be proved and thus ensure the successful operation of the body which carries out the proceedings, the claimant and the respondent and lead to making a legal and justified decision.

In criminal procedure the wrong determination of the basis and subject of the lawsuit, the underestimation of their particularities lead to different interpretations of criminal-procedure law and different errors. This proves the circumstance that in case-law, courts sustain such lawsuits that, according to the logic of the current law, are not subject to examination and deciding upon in criminal procedure.

So, by the civil judgment rendered on December 12, 2007, the First Instance Court of Ajapnyak and Davitashen communities of Yerevan sustained the civil lawsuit filed by victim A. Barsamyan and invalidated the sale and purchase contract on the grounds of being void, which was signed between Anna Ghazaryan and Karen Kosyan on December 20, 2006 with regard to 27 Andranik street, building 27, apartment number 15, as well as on the same basis invalidated the Certificate of ownership registration given to Karen Kosyan by the RA State Committee of the Real Estate Cadastre of Shengavit

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regional subdivision. The ownership right of the victim A. Barsamyany and other co-owners with regard to the apartment on mentioned address was restored by the civil judgment.

Based on the cassation appeal, by reviewing the mentioned judicial act, the RA Cassation Court mentions the following in its decision number CA-43/08 of September 26, 2008: “[p]resenting claims about invalidating both the sale and purchase contract and the state registration of ownership right with regard to the apartment during criminal procedure, does not derive from the requirements of the RA Criminal Procedure Code and is not subject to examination along with the criminal case, but may be decided upon in civil procedure”.

The court conclusion is conditioned by the requirement provided for by Article 60(2) of the RA Criminal Procedure Code, according to which only the matters concerning the compensation of property damages which are caused by an act outlawed by the Criminal Code and to be compensated under criminal procedure may be examined and decided upon in criminal proceedings. That is to say, only lawsuits on compensating material damage may be filed in criminal procedure, moreover if they are the consequence of an act outlawed by the Criminal Code, while in the given example the courts decided upon the matter which did not relate to the compensation of the caused damage, and this is just a consequence of wrong understanding of civil lawsuit’s basis and subject in criminal procedure.

In criminal procedure the wrong estimation of civil lawsuit’s basis and subject also leads to the fact that persons who are not the parties to the lawsuit filed in criminal procedure are included in criminal-procedural relations.

The analysis of the RA Cassation Court decision CA-43/08 of September 26, 2008 shows that the First Instance Court recognized K. Kosyan as respondent who had bought the fraudulently stolen apartment without being aware of the crime, that is to say, the court recognized a good faith acquirer as a civil respondent.

Whereas Article 74 of the RA Criminal Procedure Code directly

sets that “[a] civil respondent shall be considered the natural person or the legal person on whom property liability may be imposed under the law for actions of the accused who has caused property damage by an act outlawed by the Criminal Code on the basis of a claim brought in the course of criminal proceedings.”.

Referring to this question the Cassation Court mentions that a civil lawsuit might not be filed on K. Kosyan in criminal procedure as, according to Article 158(2) of the RA Criminal Procedure Code, “[a] civil claim may be brought against a suspect, an accused or a person on whom property liability may be imposed for actions of the accused”, but in the present case, K. Kosyan is not an accused and not a person who may bear property liability for the actions of the accused either.

The consequence of wrong understanding of civil lawsuit’s basis and subject is also the fact that in the cases concerning tax crimes the damage caused to the State is considered to be the penalties/ fines calculated for not fulfilling tax obligations, and a claim is filed to seize them in criminal procedure.

For example, the penalties/fines were included in the subject of the lawsuit presented by Shahumyan Tax Service in the case EQRD-0532/01/08. Even though the court did not examine the lawsuit bringing the justification that penalties/fines are not considered being a damage directly caused by the crime, we encounter a lot of cases in the law enforcement practice when such lawsuits are sustained by courts. For example in the case EQRD-0299/01/08, the court decided to sustain the civil lawsuit partially, in the amount of AMD 221.649.250, AMD 63.189.879 of which as VAT and profit tax, and **AMD 158.459.701 as the money of penalty/fine**<sup>2</sup>

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<sup>2</sup> In the present case, G. Safaryan, being the founding director of the “Pizza di Roma” LLC, during 2006-2007 as a result of showing the real volumes of the turnover realization of four public food service points belonging to the company by AMD 594.951.800 less, with the support of cashiers A. GH, S.D, T. P, R. P, L. S, K. M and G. E., submitting obviously false data in declarations which are grounds for taxing to the Erebuni Tax Service, maliciously avoided and did not pay to the State Budget AMD 163.189.879, as well as AMD 158.459.701 fine money subject to restoration, thus he committed an act envisaged by Article 205(2) of the RA Criminal Code.

According to a more spread practice, tax debt is levied through criminal proceedings, and penalties/fines are levied by tax bodies through filing a lawsuit in administrative or civil proceedings. For example, bringing appeal against the civil judgment of the First Instance Court in TD/0010/01/09 case, the RA Prosecutor General's deputy mentioned that the First Instance Court had made a judicial error, a violation of criminal-procedural law which had influenced the right decision making and asked to overturn the civil claim on the part of the civil judgment of the General jurisdiction court and seize AMD 38.982.500 from L. in favor of the State as a compensation of property damage caused to the State as a result of the crime.

Then, during the appeal proceedings the prosecutor demanded to seize only AMD 15.859.700 from the defendant's economy as a compensation of property damage the size of which is included in the scope of the defendant's charge, and let the part of the fines and penalties without examination in order to file a civil lawsuit afterwards<sup>3</sup>.

It should be mentioned that in judicial practice there are also some cases when the same money is seized from both the director and the legal person, moreover, the person being subjected to

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<sup>3</sup> In this regard, it is especially remarkable EKD/0151/01/09 case where the civil lawsuit of the size AMD 134.505.800 (one hundred and thirty-four million five hundred and five thousand eight hundred Armenian drams) was filed by the RA Prosecution General and was fully sustained: it was determined to seize it from Hrayr Harutyunyan, the director of "Hrayr Harutyunyan" shopping center, in favor of the State Budget.

At the same time, Myasnikyan Municipal Tax Inspectorate filed a lawsuit in the RA Administrative Court against "Hrayr Harutyunyan" shopping center LLC with the claim to seize AMD 273.882.800 which was sustained by the judgment made on February 3, 2010 and already entered into force, and it was decided to seize AMD 273.882.800 as a fixed payment in favor of the RA State Budget from which AMD 135.505.800 as arrear, AMD 56.573.500 as a penalty, AMD 81.803.500 as a fine. By analyzing in the present case the regulations of Article 154 of the RA Criminal Procedure Code and Article 91 of the RA Civil Procedure Code, the RA Cassation Court came to the conclusion that in such cases the lawsuit filed in criminal procedure must be rejected if during examination of the criminal case another judgment regarding the civil lawsuit presented to the defendant was made by another court and entered into force.

criminal liability, and at the same time they seize the penalties/fines from him through a lawsuit.

The penalties/fines may be included not only in the scope of the subject of lawsuit brought in a criminal case, but also they may not be seized at all (at least from the given person) in case the person is subject to criminal liability for not fulfilling his tax obligations. The point is that penalties/fines are not considered to be as damage caused by crime. According to Articles 23 and 24 of the RA Law “On taxes”, penalties/fines are applied as means of liability for tax violation.

This indicates that if not fulfilling tax obligations leads to a criminal liability, then it excludes subjecting to administrative liability for the same act. Fine and penalty are applied when the act is considered to be a tax (administrative) violation, but not a crime. In case of a crime, penal and legal measures or, in case of necessity, if there exists a damage, restoration sanctions are applied to the person. While, in our reality, it turns out that a person is subject not only to criminal, but also to tax or administrative liability for committing a crime, which is already a gross violation of criminal and administrative legal correlations.

If the simple rule of administrative and criminal liability correlation is neglected, which says that the administrative liability is excluded if the act is considered to be a crime, which also excludes administrative liability along with criminal liability for the same act, then in this case the constitutional and international-legal well-known principle about the prohibition of being judged for the same act will certainly be broken.

Nowadays, the person is subject to both criminal and administrative liability in case when his or her act is qualified as a crime. So, it turns out that the person is subject also to administrative liability for committing a crime, which is already unlawful.

Moreover, here the circumstance that these two types of liability have the same legal nature is also neglected: they are considered measures of public nature liability and are penalty or punitive in nature, furthermore, they have the same aims, etc. And, in order to

apply these two types of liability in a combined manner, as we have already mentioned in the previous chapter of the present work, it is necessary that one of them is private and has a right-restoring nature.

The above mentioned itself excludes the seizure of penalties/fines through a lawsuit and, in general, the seizure of penalties/fines after subjecting the person to criminal liability, who has already borne criminal liability.

***Based on the aforementioned, we think that the lawsuits which are filed for tax crimes in criminal procedure, the subject of which includes also the money of penalties/fines, should be rejected by the court in that part of the presented lawsuit, but not be let without examination because in case of rejection the filing of a lawsuit for seizing penalties/fines is totally excluded.***

The clarification of the basis and subject of civil lawsuit in the criminal procedure has both a great theoretical and practical importance. The **basis and subject** of civil lawsuit predetermine the scope (boundaries) and the direction of the proceedings of the lawsuit in criminal procedure, as well as the framework of the persons who are subject to be included in the sphere of criminal-procedural relations. The basis of lawsuit answers to the question of what kind of facts create the right to file a lawsuit, and the subject of lawsuit answers to the question of what requirement may the claimer present in criminal procedure being based on those facts. The link between the basis and subject of a lawsuit is also the thing that the subject of a lawsuit derives from the basis, hence here we will discuss these two concepts together.

If the legal fact which conditions the creation of material-legal relations does not exist, then the civil lawsuit may not be filed, provided and decided upon in a criminal case. Based on the circumstance that the basis means a reason — a sufficient cause justifying something, we may say that the basis for a lawsuit compose the legal facts from which derive the lawsuit requirement of the claimant and with which the law links the legal relations arising between the claimant and the accused or the person who bears property liability for the actions committed thereby.

The claimant may put different facts and circumstances at the basis of the lawsuit, but only the facts and circumstances which have legal force, that is to say, with which the law (material law norm or norms) conditions the occurrence of material legal relations, consequently also rights and obligations between the parties, have significance for the right solution of the case.

Only in case there is evidence which contain information about the damage which is possible to compensate in monetary terms, and there is evidence that the damage has been caused by the crime, we can prove that there is a basis for a civil lawsuit.

That is to say, the existence of damage is considered to be a fact which gives the possibility to the person who has borne losses in criminal procedure to file a lawsuit only in case there are data about the thing that the damage was caused by the crime. The fact itself acquires a legal significance only in case it concerns a legal relation linked with a crime. Consequently, in order to determine the legal significance of this or that fact, it is always necessary to consider it in the context of legal relations, which arise because of the crime and in which their law-making essence is expressed.

Based on the circumstance that the basis of lawsuit in criminal procedure theory has two types: legitimating or law-making (the legitimating facts in their turn have two types: active basis of the lawsuit or active legitimation and passive basis of the lawsuit or passive legitimation facts) and facts which cause the lawsuit. The facts which make the basis of the civil lawsuit may be classified into three groups.

The first and the most important law-making fact is itself the unlawful act, that is to say, the crime. We include in this group the action facts, the facts which damage and their interconnection.

In criminal procedure the facts of second group which are considered to be basis for a civil lawsuit are the ones which reveal the link between the claimant and the claim he or she has presented (active legitimation). Such facts are the circumstances which show the belonging of a subjective right from which derives the circumstance that the claim belongs to a certain person.

The criterion which qualifies the matter of active legitimation is the right determination of the person who suffered harm from the crime, which carries out the investigator during the process of recognizing the civil-legal claims of the civil claimant and during the essential investigation of the case by the court. Passive legitimation facts are considered to be the consequences which give the possibility to determine the person who must bear the obligation of compensating the losses.

The third group of facts which are included in the basis of the civil lawsuit comprise the so called facts which are the causes of the lawsuit. According to the general rule, the facts considered to be the causes of the lawsuit, are the circumstance of not fulfilling the obligations willingly by the debtor, etc.

It is necessary to mention that in judicial practice there are cases when the above mentioned facts are not rightly qualified, especially the law-making facts of claims, which are not direct consequences of the crime because there is no causal link<sup>4</sup> which leads to the wrong qualification of both active and passive legitimation facts.

For example, by the civil judgment made on April 13, 2007 the First Instance Court of Syunik Marz [Region], it was decided to sustain partially the civil lawsuit of victim's representative E. Harutyunyan and seize AMD 40.000 from A. G. in favor of DA military unit number 34153. A.G. was recognized as guilty for the thing that being included in the military order of guard service as a reserve guard, he accepted the guard service in the collecting depot and, by breaching the rules on being in guard service, he did not prevent the entry to the territory of the collecting depot, as a result of which an unknown person stole 105 liter diesel fuel of the value AMD 31.500 from the fuel tank of "GAS- 33081" brand "ՊԲ 4Կ 163" military license plate car and from fuel tanks of "GAS-3308"

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<sup>4</sup> By studying the judicial practice of civil lawsuit examination in criminal procedure, the RA Council of Courts' Chairmen set forth in its decision number 100 of June 13, 2006 that in judicial practice there are cases when during examination of criminal cases courts examine also civil lawsuits which are not directly linked with the crime.

brand “ՊԲ 4Կ 113” and “ՊԲ 4Կ 117” military license plate cars, stealing in total 335 liter of car petrol amounting to AMD 110.550, thus causing to the military unit number 34153 material damage in the amount of AMD 142.100.

Reviewing the above-mentioned judicial act based on cassation appeal of the RA Cassation Court mentioned in its decision number CC-180/07 of October 26, 2007 that in the present case by the civil judgment of the First Instance Court of Syunik Marz, made on April 13, 2007, it was confirmed that A.G. being included in the military order of guard service as a reserve guard, did not prevent the entry of an unknown person into the territory of the collecting depot, as a result of which 150 liter diesel fuel and 335 liter petrol were stolen from the cars parked in the territory of the military unit, thus causing to the military unit number 34153 material damage in the amount of AMD 142.100.

Based on this, the court concluded that by breaching the rules on being in guard service, A. G. caused damage to the property of the legal person (in fact, the Ministry was presented as a legal person, which is obviously wrong, because it is a State body).

According to the court, there is a causal link between the committed act and the caused damage, hence, based on the aforementioned, the court found that the damage should have been fully compensated, but not partially.

We should also draw our attention to the position of the court according to which what concerns the circumstance of the unveiled framework of person or persons who committed the theft in criminal case, then the court finds that in case the framework of person or persons is revealed, the person who compensated the damage, according to Article 1074(2) of the RA Civil Code may present them a regressive claim as prescribed by the Criminal Procedure Code.

In our opinion, in the example we have brought, both the First Instance Court and the Cassation Court did not correctly estimate the basis of the civil lawsuit, especially the law-making facts of the claim as a result of which the lawsuit was wrongly decided upon, and the obligation of compensating the damage was put on A. G. The

analysis of the Cassation Court decision shows that the crime committed by A. G. — breaching the rules of service, is not considered to be a direct law-making fact for the occurrence of damage.

A law-making fact for the occurrence of damage is the unlawful fact of committing theft. Breaching the service rules was just a condition for committing theft and as a result caused damage to the military unit. In other words, the damage caused to the military unit occurred not because of direct breach of the service rules, but as a result of committing theft because of it, that is to say, there is no causal link between the act of A. G. (breaching the service rules) and the damage.

While, in criminal procedure, in order to decide upon the civil lawsuit, there must be a direct causal link between the crime and the damage. If there is no causal link, then the lawsuit may not be decided upon in criminal procedure.

The liability for the consequences is possible in case those consequences have been considered as a lawful result of the act committed by the person.

If the action or inaction is considered to be just one of the conditions of the occurrence of harmful consequences, it is not linked to an internal, necessary link, it is considered to be just the matter and not the cause of the occurrence of harmful consequences, then it excludes the liability. In terms of criminal liability, a civil lawsuit may be filed not for the thing that a person caused damage to another one, but because that person (the one who has caused damage) is accused in the very crime, by which that damage has been caused directly and which is considered to be the subject of examination.

As you can see from the discussed cases, besides the fact that say there is no direct causal link between the act of A. G. and the caused damage, he has not been accused of committing the crime by which that damage has been caused: the subject of examination is not that crime (the theft) by which the damage has been directly caused.

It should be mentioned that the concept of direct causal link is

justified also by the Cassation Court, moreover, in the discussed case. In the decision of the Cassation Court it is especially mentioned: “[b]y **considering the guilt of the accused, as well as the casual link between the criminal act and the caused damage as proved, the court** decides upon **the civil lawsuit by estimating the circumstance of the proved nature of the grounds and size of the properly presented lawsuit**”. But, by contradicting itself, the Court came to the conclusion that A. G. is considered to be materially liable for the damage caused to the military unit, and the Court factually justified that the obligation of compensating the damage should be put on A. G.

The decision of the Court could have been justified if the law had envisaged property liability not only for causing a direct damage but also for creating conditions contributing to causing the damage. As long as the law does not define liability for creating conditions for the occurrence of damage or for causing indirect damage, there is no doubt that for the caused damage is liable the person who caused it (and in cases prescribed by law — also the civil respondent).

If the person has taken part in causing damage then he is fully liable for it, if his acts have not been the cause of the damage occurrence, then his material liability for causing damage is excluded.

If the damage has been caused in such circumstances when the act of a person has objectively contributed or simplified committing the crime by another person (for example, a person committed theft, the other one negligence which contributed to committing theft), then in this case joint liability is excluded as the damage has not been caused as a result of joint actions. In this case, the direct cause of the occurrence of damage are the actions of the person committing theft, and consequently, the person committing theft bears not only criminal liability, but also property liability.

From this perspective, the justification of the Cassation Court seems groundless, which reads as follows : “[i]n case the framework of a person or persons committing theft is revealed, the person who compensated the damage, according to Article 1074(2) of the RA

Civil Code may present them a regressive claim as prescribed by the Criminal Procedure Code”.

According to Article 1074(2) of the RA Civil Code, “[t]he right of filing a regressive lawsuit belongs to the person who is in some relations, prescribed by law, with the one who has caused damage (contractual relations, service relations, jointly caused damage, etc.) and compensated the caused damage instead of him or her.” There are two important circumstances here which stand out. Firstly, the person who has compensated the damage must have caused damage, too, but with another person and compensated the caused damage instead of him or her. Secondly, the person has not caused any damage directly himself or herself, but by virtue of law or another legal act he or she bears the obligation of compensating the damage instead of the person who has caused the damage.

By mentioning that A. G. must fully compensate the damage on condition to present a regressive claim afterwards, the Court has not taken into account the above mentioned circumstances, that A. G.’s relation to the theft, as well as the circumstance of being in some relations with the persons committing the theft by force of which he is obliged to compensate the damage instead of them have not been proved in the discussed case.

But such position of the Court proves the fact that the Court accepts that actually there is no direct causal link between the act of A.G and the occurred damage.

As to the provision envisaged in Article 5 of the RA Law “On material liability of servicemen” which says that “[s]ervicemen are fully liable for the damage they have caused if it has been caused by the serviceman who should keep, move, use, etc. the property”, then, it should be mentioned that in our opinion the Cassation Court has wrongly interpreted it.

The formulation mentioned in the Law “has been caused by the serviceman who should keep, move, use, etc. the property” means that the serviceman should have caused the damage by his immediate action and his guilt must exist in causing that damage: another interpretation will be broad.

According to Article 86 of the RA Law “On legal acts”: “[a] legal act shall be interpreted according to the literal meaning of the

words and expressions contained therein, taking into account the requirements of the law. An interpretation of a legal act shall not change its meaning.”

So, in the example discussed above, the Court has not interpreted the Law in compliance with the words and expressions contained therein, and has got out of the boundaries of literal meaning of the Law, otherwise it would not put the obligation of compensating on A. G. That Law may relate, for example, to the case when the serviceman realizes the possibility of occurrence of the damage, but lets it occur by wishing or without wishing it or does not take any measures to prevent it, etc.

By summarizing the aforementioned, it should be mentioned that the Court has just ignored the circumstance that if the theft has not happened, the damage would not be either, hence the act of A. G. may not be considered itself criminal without the fact of the theft which, however, was not included in his intent.

In case there was not a theft, if the circumstance of breaching the service rules by the serviceman was confirmed, then he would, at the outside, be subject to disciplinary liability, and the fact that the theft has been committed by another person may not turn the disciplinary breach into crime and as a result cause not only criminal, but also property liability. Furthermore, breaching service rules is considered to be an intentional crime, moreover in a material corpus delicti.

It means that condemning a person by the mentioned article first of all assumes causing a damage by breaching service rules which has been done directly by the serviceman, moreover it has been realized and willfully. Meanwhile, the case materials has not proved the intent of A.G. regarding causing damage.

The facts which are considered to be the basis of the lawsuit, in particular, examples of wrong estimation of the law-making facts of claims and active legitimation facts are the cases when courts decide upon regressive claims in the framework of a criminal case.

For example, in the criminal case ARAD/0002/01/09 the civil judgment of the First Instance Court of Aragatsotn Marz, which was rendered on March 13, 2009, sustained the lawsuit of “Ingo-Armenia” Insurance CJSC in the amount of AMD 1.732.000, to

**whom the right of claim over the person causing damage which derived from the damage caused to the insured one was passed.**

The examination and decision upon regressive lawsuits through criminal procedure are first of all hindered by the circumstance that they are not considered to be “pure” lawsuits concerning the compensation of the caused damage, as the right of lawsuit does not arise as a consequence of causing a direct damage to the regressive party. In case of a regressive lawsuit, the regressive party bears losses as a result of his or her obligations fulfilled by virtue of law, hence in case of regressive lawsuits it is necessary to find out not just one, but two factual and legal systems of the grounds for the compensation of the caused damage — direct and indirect: relations existing among the victims and the third persons who have fully or partially compensated the damages caused by crime.

So, in fact the main particularity of regressive claim is that firstly the damage is not caused by crime, secondly the civil claimant status belongs not to the victim of the crime, but the person who has compensated the damage caused to the victim based on a contract or another basis envisaged by law and thus has been entitled to perform with a lawsuit instead of the victim. That is to say, in case of regressive claims the lawsuit serves not the victim, but “another” persons, moreover it serves the compensation of damage which is not caused by crime.

Right, in Article 60 of the RA Criminal Procedure Code it is not mentioned either that in criminal procedure the property damage subject to compensation must be caused “directly” by crime: there it speaks about property damage which is caused by an act outlawed by the Criminal Code and subject to compensation through a criminal procedure, but, it is doubtless that actually we should speak about the compensation of damage which is caused directly. By the way, the judicial practice has been developed by the concept of direct causal link.

In its decision number CC-150/07 of November 2, 2007 the Cassation Court mentioned: “... in criminal procedure the subject of civil lawsuit composes the property damage directly caused by crime, the claim of compensation of which the claimant presents to the accused or to the person bearing property liability for his or her

actions. In order to determine the subject of civil lawsuit, it is necessary that the damage is caused directly by crime”.

In criminal procedure the concept of damage directly caused by crime is justified also by the Council of Courts' Chairmen decision number 100 of June 13, 2006.

From what we have said it follows that if the damage is not a direct consequence of the crime then the court may not decide upon the lawsuit in criminal procedure. But the point is that we should first clarify what we understand by saying property damage directly caused by crime and subject to compensation through criminal procedure.

The harming consequences of a crime are various, conditioned by the content of social relations which are disturbed by committing a crime. Those damages are in general classified for example into two types: material and non-material. The criterion underlying this classification is the question if there is a material damage or not, occurring as a consequence of the given crime. There exists a material damage in case the crime leads to the reduction of the scope of material benefits of the victim. The non-material damages of the crime, as a rule, are expressed by physical, moral damage, violation of rights, etc. Consequently, physical and moral damage is also a part of charge and leads to criminal liability, hence while determining the subject of the lawsuit, we should take into account the damage which is a part of charge, but not only property damage, but also physical and moral one.

The lawfulness of this approach is that for example both the property damage and physical, moral damage are caused to a person; they are violations of different rights of a person (rights of property, life, health, honor and dignity, etc.). In case we consider those damages separate from the “bearer”, it is also impossible to prescribe criminal liability for them, because the act will lose its public danger.

Taking into account the fact that the liability for causing damages arises to the extent that they belong to the participant of social relations, hence he or she becomes entitled to demand restoration of his or her violated rights, for example, in case of causing damage to ownerless property even criminal liability will not be applied as no one’s right is violated by damaging.

Property damage arises not only in case of directly infringing on ownership relations but also in case of infringing on a person. The property damage which has been caused by the crime leads to the deprivation of persons' material benefits, property, values and money. It is distinguished from physical and moral damage by the possibility of correctly determining and expressing in a monetary equivalent. Property damage arises not only in case of damaging ownership relations but also in case of infringing on a person.

Property damage may be expressed in the form of loss of direct material benefits (damage or destruction of property), in the form of loss or reduction of salary as a result of victim's disability, expenses made for the restoration of health in case of hurting it, supplementary food, indirect care, etc., expenses for funeral in case there is a death as a result of a crime: in this case his or her rights pass to one of his relatives, by his or her ward in the form of loss of the dead breadwinner's salary, etc.

So, in criminal procedure, by saying civil lawsuit basis we understand the facts which directly give birth to the right of filing a lawsuit. If it is not a direct fact giving birth to the right of lawsuit then it may not be a basis of lawsuit in criminal procedure.

Generalizing the aforementioned, we can conclude that in criminal procedure the grounds of filing and deciding upon civil lawsuit are as follows:

- 1) committing a crime;
- 2) existence of property damage caused as a result of a crime and subject to compensation through criminal procedure;
- 3) existence of a direct causal link between the crime and the damage.

***So, in criminal procedure a civil lawsuit may be filed in case the aforementioned factual grounds exist, otherwise the lawsuit should not be sustained in criminal procedure.***

# **LEGAL REGULATION OF THE RECONCILIATION PROCEEDINGS IN THE CRIMINAL PROCEDURE OF THE REPUBLIC OF ARMENIA**

**Gevorg Baghdasaryan<sup>1</sup>**

Reconciliation proceedings are one of the compromise institution in criminal matters. It is envisaged in the new draft RA Criminal Procedure Code as an expression of the extension of the principle of dispositivity. The “compromise” as a phenomenon predetermining the move in criminal case is not new for the RA criminal procedure. It is also displayed in the present Criminal Procedure Code, moreover, both within the framework of traditional and not traditional procedural institutions in terms of domestic criminal procedure concept. On the one hand they come with the reconciliation between the accused and the victim, thus predetermining the outcome of the proceedings in a private prosecution framework, and on the other hand, they are about the accelerated procedure of judicial examination which does not have a long history. In case of reconciliation proceedings and accelerated procedure, of course, we deal with a new quality of compromise which is displayed there, where in case of these institutions the subject of compromise is the State which traditionally has not been considered admissible in domestic criminal procedure.

The present study aims at discovering the nature of the procedural institution of the reconciliation proceedings, its place in the system of simplified proceedings and its main particularities. As the reconciliation proceedings is, in essence, also a result of some development in the institution of the accelerated procedure, consequently, we consider it appropriate to carry out the study of the core particularities of the reconciliation proceedings, by comparing it with the institution of the accelerated procedure.

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The literal interpretation of the notion of the “reconciliation proceedings” means that it represents a system of procedural actions and social relations formulated as a result of it, in which the reconciliation of the subject of that proceedings and its individual elements is carried out. The essence of the reconciliation proceedings is that in case of satisfying the motion about applying the reconciliation proceedings in the conditions envisaged by law, which is brought by a person who is being accused of a non-grave crime or of a crime of medium-gravity, the court gives time to the parties for holding negotiations.

The negotiations start by the prosecutor and are carried out with the accused and the defense attorney, and if the damage caused by the crime is not compensated, the victim also gets involved in the negotiations only in terms of the nature and size of the damage. After reaching an agreement on the nature and size of the damage caused by the crime, the parties start negotiations about the type and size of the punishment which the accused is going to bear.

As a result of the reconciliation proceedings, no size of punishment may be established which will exceed half of the maximum punishment envisaged for that type of crime, and the procedural costs shall not be subject to seizure from the accused.

That is to say, within the framework of the reconciliation proceedings, the subject of the negotiations are (or should be reconciled) the nature and the size of the damage caused by the crime, as well as the type and size of the punishment which is to be assigned to the accused.

As we can notice, the reconciliation proceedings is first of all characterized by a high degree of the principle of dispositivity which is displayed by the expansion of the discretion of participants in the proceedings, in comparison with the accelerated procedure. So, in case of the accelerated procedure of the trial we deal with compromises between the State and the accused, through which the accused releases the State from unnecessary waste of time and material resources, and the State guarantees commutation of the punishment for the accused and releases him from court costs, except

for the damage caused to the victim by the crime, within definite framework envisaged by law without any possibility of discretion of the parties in that regard. And within the framework of the reconciliation proceedings, some negotiations, and of course some bidding characteristic of them take place between the parties to the proceedings, who are empowered by certain discretion to decide upon the issues which are the subject of negotiations.

The negotiations and the discretion deriving therefrom bring *obvious*, compromising elements to the reconciliation proceedings and allow to state that the reconciliation proceedings belongs to the “bargain” type of simplified judicial proceedings.

At the same time, it is not identical to the American plea bargaining — the bargain of accepting the guilt which is also a type of “bargain” which, however, has a higher degree of dispositivity, that is to say, the possibility of determining also the volume of accusation as a result of negotiations. The institution with this feature defined in the draft differs from the reconciliation proceedings which is established in the Criminal Procedure Code of Estonia. Of course, the domestic procedural institution does not bear the name “reconciliation” either, but in that case the accusation is not conciliated, but the nature and size of the damage, as well as the type and the size of the punishment.

So, in fact the reconciliation proceedings differs from accelerated procedure of the trial not only in terms of qualitative but also of quantitative expansion of the action of the dispositivity principle. In other words, besides the fact that in the reconciliation proceedings we deal with negotiations about some issues which does not exist in case of the accelerated procedure, those negotiations concern not only the punishment which is set for the defendant, but also refer to the nature and size of the damage caused by the crime.

Legal regulation of the reconciliation proceedings is distinguished by the fact that the theoretical issue of the delimitation of the basis and conditions for applying the proceedings is clarified in it. Article 453(1) of the draft defines that the court applies the reconciliation proceedings by public charges during preliminary

court hearings based on the motion presented by the accused charged in a non-grave or medium-gravity crime. That is to say, the basis for applying this proceedings is the defendant's motion. The defendant's motion, being the only basis of the reconciliation proceedings, is also highlighted in Article 455(1) of the draft.

Both in case of accelerated procedure and reconciliation proceedings, the conditions of their application are defined not in a unified system but are diffused in different norms establishing this institution. So, Article 45(2) of the draft defines that “[t]he reconciliation proceedings may not be applied if:

1) the accused does not have a defense attorney or has filed the motion without having consulted with him or her;

2) at least one of the accused involved in the proceedings objects against applying the reconciliation proceedings;

3) the public prosecutor objects to applying the reconciliation proceedings;

4) it is obviously justified that the damage caused by the crime is not compensated, and the victim objects to applying the reconciliation proceedings.”

And in Article 455, as a condition of applying the reconciliation proceedings, the voluntary nature of the motion as well as realizing the nature and the consequences of his motion by the defendant are also envisaged.

It is defined in Article 456(2) of the draft that “[t]he court does not accept the protocol on the agreement and continues the preliminary court hearings in a general order, if:

1) By learning about the criminal case during the parties' negotiation, has come to the conclusion that the act for which the person is accused was obviously committed by another person (persons) who are not accused or by their participation;

2) legal evaluation of the act committed by the accused obviously does not correspond to the factual circumstances of the charge.”

As we see, unlike the accelerated procedure, the framework of applying the reconciliation proceedings has been narrowed. It shall

be applicable to the cases concerning non-grave crimes and medium-gravity crimes. That is to say, in this case the legislator has made the limitation of the scope of cases according to the degree of gravity of crimes and refused to apply it in the cases of grave crimes. The draft also defines that the reconciliation proceedings shall not be applicable to the cases of private prosecution. Of course, this approach is conditioned by highlighting the proceedings of private charge as an independent type of proceedings and by its particularities in the draft.

It is remarkable that within the framework of reconciliation proceedings there is no indication in the draft with regard to the time when the accused accepts the guilt, whereas in the accelerated procedure of the trial the acceptance of the guilt by the defendant is directly envisaged as a condition for applying that institution.

Article 455(4) of the draft establishes that the factual circumstances of the crime should, inter alia, also be mentioned in the agreement, as well its legal evaluation which is read in the indictment.

That is to say, even if the charge is not subject to agreement between the parties, however, in essence, it is a component of their agreement which presupposes that the agreement may take place only in case the accused accepts his or her guilt.

The draft has successfully regulated the issue of the role of the victim in the application of the reconciliation proceedings. Herewith, the regulation is based on the legal position of the RA Cassation Court expressed in *the Decision of March 26, 2010 concerning the case of Tigran Kamalyan*, according to which “[t]he position of the victim must have a decisive significance particularly in cases, when the victim:

a) reasonably justifies that the damage caused to him is not entirely compensated;

b) argumentatively objects to the factual circumstances of the case.”<sup>2</sup>

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<sup>2</sup> RA Cassation Court Decision YeShD/0097/01/09 of March 26, 2010 concerning the case of Tigran Kamalyan, points 18-20.

From the perspective of the guarantees of the victim's rights, it is remarkable that the draft envisaged the part of the negotiations by the participation of victims, which concerns the damage caused by the crime. Well, if the damage caused by the crime is not compensated, but the victim has not objected to applying the reconciliation proceedings, the prosecutor, with the consent of the victim, involves him or her in the negotiations. The victim participates only in the negotiations which relate to the nature and size of the damage caused by the crime.

The application of the reconciliation proceedings is excluded when the legal evaluation given to the act of the accused obviously does not correspond to the factual circumstances of the charge. But, unlike the accelerated procedure, in case of reconciliation proceedings, and more specifically, while solving the issue of applying that institution, the court keeps some possibility for evaluating not only the legal, but also the factual side of the charge. So, the application of the reconciliation proceedings is excluded, if by learning about the criminal case during the parties' negotiation, the court has come to the conclusion that the act for which the person is accused was obviously committed by another person (persons) who are not accused or by their participation.

This is, of course, some possibility for evaluating the validity of the charge, which is not characteristic of the current accelerated procedure, in case of which the consent of the accused about the charge excludes referring to the validity of the charge, in any way, by the court.

The conclusion on the validity of the charge made by the court, in essence derives only from the conditions of the accelerated procedure, such as the consent of the accused about the charge laid against him and the absence of a substantiated objection of the victim against the factual circumstances of the case. However, this kind of regulation, in our mind, does not derive from the idea of moderately limited operation of the principle of dispositivity in the criminal procedure. The point is that the consent of the accused with regard to the charge brought against him or her and the absence of a

substantiated objection of the victim against the factual circumstances of the case not always derive from the case materials.

In this regard, Article 316(7) of the RF Criminal Procedure Code establishes that the court passes a verdict of guilty in case it comes to the conclusion that the charge to which the defendant has agreed, is justified, is confirmed by the evidence obtained in the case. The German legislation envisages that in order to carry out the judicial examination in a simplified procedure, it is necessary that the court checks the validity of the charge. The court bears the obligation to check the existence<sup>3</sup> of the factual basis confirming the guilt of the accused.

That is to say, international experience also shows that the verdict of guilty made by the application of similar institutions also must be based on the belief of the court with regard to the validity of the charge. And in case of the reconciliation proceedings, in our opinion, the mentioned problem is really solved. Such regulation of the reconciliation proceedings has its own place in our suggestions concerning the perfection of the institution of accelerated procedure.

The issue of applying the reconciliation proceedings may be arisen only in court during the preliminary court hearings. The parties have the stage of negotiations only by the permission of the court, when the court satisfies the motion of the accused. But even after passing the stage of the negotiation the issue of applying the reconciliation proceedings is not yet considered as solved.

Though in this case we speak about resolving the motion about the application of the reconciliation procedure, by satisfying the motion, in essence, the court just gives the parties the opportunity to pass to negotiations, thus defining the maximum of a two-week deadline for them. In this period, the court implements its possibility of evaluating the factual and legal sides of the charge. Anyhow, the refusal of the court to apply the reconciliation procedure on this basis, the legislator considers that it is tied to non-confirmation of the

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<sup>3</sup> Frase, R.S. German criminal justice as a guide to American law reform: similar problems, better solutions /R.S. Frase, T. Weigend// Boston College Intern. Comparative Law Rev.- 1995. Vol 18. N 2, page 343.

already made agreement. At the same stage, the court does not accept the protocol on the agreement and defines a deadline for making a protocol and presenting it to the court, if the agreed type and size of the punishment is illegal.

If the parties do not present a proper protocol on their agreement within the deadline established by the court, the court continues the preliminary court hearings in a general order.

So, in fact, the issue of applying the reconciliation proceedings is solved through a two-stage procedure. At the first stage, on the basis of the motion on applying the reconciliation proceedings though the court makes a decision about sustaining the motion about applying the reconciliation proceedings, in essence, it does not start the application of the reconciliation proceedings, but passes to the second stage of the procedure, giving opportunity to come to agreement regarding the circumstances which are to be met.

At the first stage the court refers to the conditions of the application of the reconciliation proceedings about the fact that they are mostly formal in nature, which are the degree of the gravity of the crime, the consultation with the defense attorney, etc.

At the second stage, when the agreement made as a result of the negotiations is presented, the court refers to the so-called “evaluative” conditions and to the issue whether in the presented agreement the agreed type and size of punishment correspond to the law. Though, at the second stage the court decides upon the issue about accepting or not accepting the agreement, nevertheless with the very decision the court actually passes to the application of the reconciliation proceedings and, respectively, by not accepting the agreement of the parties, the court continues the preliminary court hearings in a general order, that is to say, it does not apply the reconciliation proceedings.

As we see, in the reconciliation proceedings the expansion of the discretionary opportunities of the parties does not lead to the passiveness of the court. The activeness of the court is displayed both while solving the issue of applying the reconciliation proceedings and by certain supervision over the agreement between the parties. In

the reconciliation proceedings the supplementary court hearings are held upon participation of the defendant, his defense attorney, the victim, the public prosecutor and in case of participating in the negotiations — also upon obligatory participation of the victim. The supplementary court hearings begin with the publication of the protocol on the consent of the prosecutor. After that, the court asks the accused whether the content of the agreement is clear to him or her and whether he or she agrees with it. Then the court finds out whether the defendant has expressed his real consent, whether he or she realizes the consequences of the agreement and whether he or she claims the agreement.

If the parties insist on their agreement, after studying the protocol on the agreement, the court goes into a separate room announcing the place, date and time of the judgment publication in advance. If before the court goes into a separate room, any of the parties refuses the agreement, then the court makes a decision on restarting the preliminary court hearings.

The supplementary court hearings in the reconciliation proceedings are carried out regarding the agreement in order to find out its correspondence of the content to the real will of the parties to the proceedings. As the type and size of the punishment are determined by the agreement of the parties, consequently at this stage the circumstances mitigating the liability and the punishment are not subject to examination, which is characteristic to the accelerated procedure. In other words, the examination of the evidence in the reconciliation proceedings is entirely excluded.

The verdict of guilty turned as a result of the reconciliation proceedings must contain the literal wording of the text of the protocol on the agreement. Based on the verdict of guilty the court appoints the type and size of the punishment established by the protocol on the agreement. The procedural costs are not subject to seizure from the accused.

Thus, the reconciliation proceedings is a qualitatively new procedural institution, which is characteristic of a new content of the principle of dispositivity, that is negotiations between the parties and discretion expressed therein which determines the origin of that

institution as a western type of the simplified proceedings.

At the same time, the feature of dispositivity which is that much criticized in the theory has really dimensionally reasonable limits in the reconciliation proceedings. In this regard, it is first of all important in terms of possibility of the court to assess the validity of the charges and in correspondence with it the absence<sup>4</sup> of the possibility of the parties to express discretion regarding the charge. Besides, the qualitative development of the dispositivity principle in the reconciliation proceedings does not deprive the court from the possibility of being “the chef”.

Though from the conceptual point the reconciliation proceedings is relatively far from the accelerated procedure of the judicial examination and has a clearly expressed another typical belonging, nevertheless we must state that this institution is really a result of the development and perfection of the accelerated procedure. The practice of the application of the accelerated procedure also had that development within the framework of the reconciliation proceedings providing two reasonable and balanced combinations of the directions of the procedural simplification and strengthening the guarantees.

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<sup>4</sup> The theory continuously severely criticized the possibility of the procedure participants to manage the charge. Boikov A.D. The New Criminal Procedures Code of Russia and Problems of Fight Against Crime // Criminal Law, 2002, #3, P. 69; Vykov V. Gromov N. Special Procedure of Adoption of the Decision in the Case of Consent by the Accused with the Indictment.// Criminal Law, 2004, #2, P. 93; Sarsenbaev T. Plea Bargaining in Criminal Procedure in Kazakhstan// Jurist, 2004, # 10(40), P. 92; Makhov V. Peshkov M. Plea Bargain.//Russian Justice. 1998#7, P. 17; Petrukhin I.L. Plea Bargaining is Alien to Russian Mentality.// Russian Justice, 2001, #5, pp. 37-38. [**Бойков А. Д.** Новый УПК России и проблемы борьбы с преступностью. //Уголовное право. 2002, №3, стр. 69, **Быков В. Громов Н.** Особый порядок принятия судебного решения при согласии обвиняемого с предъявленным ему обвинением. //Уголовное право, 2004, № 2, стр. 93, **Сарсенбаев Т.** Сделка о признании вины в уголовном процессе Республики Казахстан. // Юрист, 2004, №10(40), стр. 92, **Махов В. Пешков М.** Сделка о признании вины. //Российская юстиция.1998, № 7, стр. 17, **Петрухин И. Л.** Сделки о признании вины чужды российскому менталитету. //Российская юстиция, 2001, № 5, стр. 37-38].

## **DEVELOPMENT AND CONTEMPORARY UNDERSTANDING OF THE PRINCIPLE OF SELF-DETERMINATION OF PEOPLES**

**Vigen Kocharyan<sup>1</sup>**

The occurrence and reinforcement of the principle of nations and peoples in international law is usually linked with the period of the First World War, though in our opinion there are some grounds to believe that the ideology and practice of national self-determination have deeper and older roots.

Yet, in the Enlightenment period of Europe some thinkers, such as Locke, Grotius, de Vattel, Rousseau, in their works created the prerequisites of justifying the idea of national self-determination.

In addition, the concept of “Sovereignty of peoples” which was put forward during the Great French Revolution made serious foundations for the formation of the principle of national self-determination.

In that process the irredentist movements of the 19<sup>th</sup> century in Europe (Germany, Italy) — acting with the term “national principle” and establishing the right of people’s uniting in their united national state — also played a significant role.

Moreover, it was not only about the ideological justification of people’s right to decide their fate on their own, but also about some practice of interstate relations. In particular, in the 19<sup>th</sup> century referendums were hold for the first time, and the decisions of representative bodies relating to some territories’ status were recognized, which also needs to be considered as an important step forward, in the context of formation and recognition of self-determination principle.

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The term “self-determination of peoples” itself first appeared in 1878 in the Congress of Berlin after which the idea soon became famous and was strengthened in a range of liberal and socialist party programs of Europe. Thus, “the right of nation’s self-determination” was recognized by 2<sup>nd</sup> London International Assembly.

The issue of nation’s self-determination got worse during the First World War, when the ideology of self-determination or “the principle of national identity” was being used in the war against the opponents — the multinational monarchies.

With this respect, “the 14 points”<sup>2</sup> of the American President Woodrow Wilson got a special fame, where, in essence, he declared peoples’ self-determination as a fundamental principle of postwar settlements.

For the sake of justice, it should be mentioned that if the ideas concerning self-determination were afterwards applied selectively, basically towards the opponents who were defeated in the World War, then the Bolsheviks who came to power, applied the principle towards their united monarchical heritage providing Finland and Poland with independence. Later the right to self-determination was fixed in Soviet constitutions.

The next important period for setting forth the self-determination principle in international law was the end of the Second World War and the establishment of the United Nations Organization.

Yet during the war, the USA and Great Britain were the initiators of Atlantic Charter (August 14, 1941) the goal of which was to determine the war issues and the main principles of postwar structure for the allies.

In the document<sup>3</sup> it was declared that the countries which signed it didn’t tend to territorial or other acquisitions: it is compulsory that the territorial changes in the world be “relevant to the free expressed will of interested/concerned peoples” which is, in essence, the

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<sup>2</sup> President Woodrow Wilson, Address before the League to Enforce Peace (May 27, 1916), *reprinted in* 53 CONG. REC. 8854 (May 29, 1916).

<sup>3</sup> ‘The Atlantic Charter’, Declaration of Principles issued by the President of the United States and the Prime Minister of the United Kingdom. [http://www.nato.int/cps/en/natolive/official\\_texts\\_16912.htm](http://www.nato.int/cps/en/natolive/official_texts_16912.htm)

recognition of the prevailing role of self-determination principle in the postwar world.

By adopting the UN charter, finally the reinforcement of self-determination was formed in a new modern principle of international law. It is noteworthy that the principle of jurisdiction and peoples' self-determination is fixed in Article 1, paragraph 2 of the UN Charter ("to develop friendly relations among nations based on respect for the principle of self-determination of peoples") in the general context of the universal organization which indicates the high legal and political state given to the principle.

Afterwards, the status was confirmed by the UN International Court which in its range of decision stated that the principle of self-determination "... is one of the fundamental principles of modern international law" (for instance, UN Court's decision in the case of East Timor)<sup>4</sup>.

After adopting the UN Charter, the principle of legal equality and peoples' self-determination gets its confirmation and further development in other documents:

- in the *Declaration on the Granting of Independence to Colonial Countries and Peoples* (1960)
- in 1966 Covenants on human rights 1966
- in 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (briefly 1970 Declaration on Principles of International Law)
- In Helsinki Final Act

The significance of mentioned documents for revealing the normative contents of the principle of peoples' self-determination is conditioned by the fact that the UN Charter, by fixing it as well as the other principles of international law, does not give its obvious definition.

UN "*Declaration on the Granting of Independence to Colonial Countries and Peoples*" (December 14, 1960) is one of the most

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<sup>4</sup> East Timor (Portugal v Australia) [1995] ICJ Reports, 90.

important documents which reveals the essence of peoples' self-determination. Article 2 reads as follows: "[a]ll peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." According to Article 4: "[a]ll armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence and the integrity of their national territory shall be respected."

International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights (1966) have set forth the self-determination in the context of human rights and in their first articles they state that "[a]ll peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Then it is mentioned that all the State Parties to the present Covenant "...shall promote the realization of the right to self-determination, and shall respect that right".

The Declaration on Principles of International Law (1970) confirming the states' obligation to encourage the right of self-determination, defines the states' obligation "... to refrain from any forcible action which deprives above mentioned peoples from the right to self-determination, freedom and independence". The Declaration envisages some self-determination ways, such as "... the free association or integration with an independent State or the emergence into any other political status freely determined by a people".

The generalization of the main provision of the above-mentioned documents allows to reveal the modern perception of peoples' legal equality and the content of the self-determination principle. S. V. Chernenko has made this kind of attempt, who believes that peoples' self-determination principle includes the following elements:

- "[a]ll peoples and nations have the right to self-determination;

- all members of the international community are obliged to respect that right;
- it is being realized by the free will expression of the people or the nation;
- its realization excludes any external pressure, force or interference;
- it presupposes the people's or nations' choice opportunity of separating from a state or in other conditions integrate in another state, that is to say, it is the free choice of political status;
- it presupposes also the choice opportunity of state's kind (kinds of government, state's structure, political mode);
- finally, it presupposes the choice opportunity<sup>5</sup> of social-economic structure and its own development routes.

At present, the right to self-determination has finally been set forth as a fundamental principle of international law. And if we can notice certainty in legal acts and doctrinal sources concerning the general content of this principle, the same cannot be said about the narrower issue regarding the subject of the right to self-determination.

Neither in the UN Charter, nor in the Declaration on Principles of International Law (1970) and in the Final act ( August 1, 1975) of the Organization for Security and Co-operation in Europe, nor in other documents where the right to self-determination is indicated, there is no definition of “a people” conception under which the right is set forth. Moreover, as one of the authors mentioned, who had quite suspicious approach towards the right to self-determination, it appears to be natural from the first view: let the peoples decide. However, in fact it is absurd, as the people cannot decide until another one does not decide who the people are.<sup>6</sup> Therefore, the answer to the question what the term “a people” means in

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<sup>5</sup> Chernichenko S.V. Principle of Self-Determination of Peoples (Contemporary interpretation). Moscow Journal of Interantioanl Law. #4, 1996, P. 5. [Черниченко С.В. Принцип самоопределения народов (современная интерпретация), Московский журнал международного права, № 4, 1996, ст.5].

<sup>6</sup> Jennings I.W. The Approach to Self-Government. London, 1956, C.55-56.

international law has significant importance to decide whether minorities have the right to self-determination.

First, it should be mentioned that today consent has been acquired in doctrinal sources concerning the question whether both nations and peoples have the right to self-determination. Thornberry P., mentioning that the right to self-determination is fixed in the UN Charter in the part of “peoples”, indicates that the meaning of the term “peoples” was a subject of discussion in San-Francisco Congress and regarding that question it leads to Secretary’s clarification “... “peoples” mean groups of people which can compose (or not compose) a state or a nation”<sup>7</sup>.

“The Secretary’s clarification to the term “peoples” gives to it a broader meaning”: notes another author: A. Rigo Sureda. It may include states, nations and any group of people who can establish a state, be a nation and just compose a strong public. That is why the self-determination is aimed both the peoples and the nations and states<sup>8</sup>. “That is to say, the concept of “peoples” is broad insomuch that it includes the concept of “nation”: notes another observer G. B. Starushenko and comes to the conclusion that “[t]he issue of deciding the subject of the right to self-determination leads to deciding<sup>9</sup> the concept of “people”.

While commenting the concept of “a people” given during the UN Charter drafting, a characterization is being invoked which was suggested by Gros Espiell according to whom a people is “... any human community which is united in the consciousness and wish of forming community and which is able to act in favor of public future”<sup>10</sup>.

Some earlier attempts of characterizing the subject of self-

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<sup>7</sup> Thornberry P. *International Law and the Rights of Minorities*. Oxford, 1992. C.15.

<sup>8</sup> Rigo Sureda A. *The Evolution of the Right of Self-Determination. A Study of United Nations Practice*. Leiden, 1967. C. 100

<sup>9</sup> Starushenko G.B. *Nation and State in Countries Struggling for Freedom*. Moscow, 1967, pp. 105-106. [Старушенко Г.Б. *Нация и государство в освобождающихся странах*. М., 1967. С. 105-106].

<sup>10</sup> Gros Espiell. *The Right to Self-Determination. - Implementation of United Nations Resolutions*. N. UN Pub. 1980 ( UN Sales E.79.XIX.5).

determination right have been made. So, in the work of L. Oppenheim where we meet the term “principle of national identity” relevant to those times, there it is mentioned that “the own state which could live according to its own ideals and create a national civilization” is authorized to have a “society which is composed of lots of persons, which are linked with each other on the common<sup>11</sup> basis of origin, language and interests”.

It should be mentioned that along with quite common formations, there are some attempts of characterizing the concept of “a people” in literature, which are based on some features. Like, according to O. Jureca’s opinion “[e]ven more attention is to be drawn at the characterization suggested by the international commission of jurists regarding the events which happened in Eastern Pakistan: common history, racial and ethnic, cultural, linguistic and ideological ties, common geographical location, common number of the formation.”<sup>12</sup>

A similar attempt of characterizing the concept of “a people” is the special report made in the framework of UNESCO, which is dedicated to the question and where it is said that “a people” is:

a. “[a] group of individual human beings who enjoy some or all the following common features: (i) a common historical tradition, (ii) racial or ethnic identity; (iii) cultural homogeneity; (iv) linguistic unity; (v) religious or ideological affinity; (vi) territorial connection; (vii) common economic life.

b. The group must be of a certain number who need not be large (e.g. the people of micro states) but must be more than mere association of individuals within a state.

c. The group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing

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<sup>11</sup> Oppenheim L. Internatioanl Law. Part 1. Moscow, 1948, P. 99. [Оппенгейм Л. Международное право, т.1, полутом 1. М., 1948. С. 99]

<sup>12</sup> Zhurek O.N. Self-determination of Peoples in Iternational Law// Soviet State and Law, #10, 1990, P. 99. [Журек О.Н. Самоопределение народов в международном праве // Советское государство и право, N10, 1990, С. 99].

characteristics, may not have the will or consciousness.

d. Possibly the group must have institutions or other means of expressing its common characteristics and will for identity.”<sup>13</sup>

From the mentioned features we could in particular single out the existence of “territorial connection”. Perhaps the essential component of the concept of a people is the territorial aspect of the issue. That is to say, from one side for the group it is important the existence of a common territory, from another side it is the affiliation itself to the historical community. “It is impossible<sup>14</sup> without a common territory’s self-determination” and it is obvious.

Another important thing in the perception of the term “a people” which is closely linked with the territorial issue is that under the subject of self-determination it is supposed not a number of individuals or a number on some territory, but their stable generality with joint features. R. A. Mullerson writes about it “[i]n case of self-determination we talk about a people not about a population”. Even if, for example, there are more inhabitants in the region Oktyabrsky of the city Moscow, than in Nagorno-Karabakh, the right to self-determination belongs to the people of Nagorno-Karabakh but not the persons who have registration in the region of the capital. The nation or the ethnic community is more often the basis of the people as the subject of self-determination, with which the territory<sup>15</sup> is identified”.

The link among the mentioned aspects of the concept “a people” is quite clearly expressed by A. E. Kozlov who wrote that “the perception of the subject of self-determination as an ethnic community is perhaps the only approach in case of which the right to

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<sup>13</sup> United Nations Economic and Social Council, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples: Final Report and Recommendations, 1990. UN Doc SHS-89/CONF. 602/7, Paris, 22.2.1990.

<sup>14</sup> Starushenko G.B. Nation and State in Countries Struggling for Freedom. Moscow, 1967, pp. 105-106. [Старушенко Г.Б. Нация и государство в освобождающихся странах. М., 1967. С. 105-106].

<sup>15</sup> Mullerson R.A. Human Rights: Ideas, Norms, Reality. Moscow, 1991, P. 41. [Мюллерсон Р.А. Права человека: идеи, нормы, реальность. М., 1991. С. 41].

self-determination is even replenished with a real content: “[c]ause no matter how conventional are the ethnic boundaries, nevertheless they have a more objective (stable) nature than, for examples, the administrative boundaries”<sup>16</sup>.

Overall, all the existing formulations of subject’s self-determination give us some general but not a clear apprehension of what is understood while using the notion “a people” in relevant international-legal acts.

It is known that the right to self-determination has two sides: external, by virtue of which the people is free to decide its status and the forms of relations with other peoples, which presupposes its right to create its own state, the right to unite or merge with other state, and an internal side which presupposes the right to freely decide its own political and social-economic ways of development. The unity of these two aspects composes the content of the right to self-determination and the essence of national sovereignty.

The external side of the right to self-determination presupposes the right of a people to unite or merge with an independent sovereign state. And if this unification or merger happens it can lead to the formation of a national minority in the state. That is to say, in the consequences of this kind of self-determination may often be the formation of a national minority, the transformation of “the people” into a national minority.

The following question is natural. “Does the people who has become a national minority lose the right of self-determination?” In our opinion, they do not. It is necessary to mention that this kind of position arises from the content and essence of the right to self-determination and there is a range of authors who support it. “Despite the way of how the people have appeared at the state’s power; with force or willingly, it continues to be a subject of self-

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<sup>16</sup> Kozlov A.E. Right to Self-Determination as Principle of Internatioanl Law and Constitutional Human Right// Human Rights and International Relations. Moscow, 1994, pp. 70-71. [Козлов А.Е. Право на самоопределение как принцип международного права и конституционное право человека // Права человека и межнациональные отношения. М., 1994. С. 70-71].

determination”, writes Yu. G. Barsheghov, “[t]he inalienability and indivisibility of the right to self-determination are linked with its essence, nature, content and the legal nature. The subject of that right and its final user is the people. It exists along with the people and, therefore, is independent of this or that state’s existence. The latter can appear and disappear, but the people are the permanent bearer<sup>17</sup> of the right of self-determination.”

That approach finds its direct expression in relevant international legal acts. For example, the Declaration on Principles of International Law (1970) definitely characterizes the self-determination as an “inalienable” right of a people, and the Final Act of the Helsinki Conference shows that the right belongs to the people “forever”. Furthermore, the truthfulness of the conclusion that the right to self-determination is inalienable and indivisible is also confirmed by viewing its internal aspect. Regarding this, it would be an absurd to state that a people or a nation which once decides its political status or social-economic class do not have the right to change it.

There is another argument in favor of the above mentioned point of view according to which the right to self-determination is set forth for “all” the peoples. Moreover, as the majority of the authors mention, it belongs to the peoples that both have statehood and do not have it. Its denial will mean leading the self-determination to colonial situation at the time when the recent international practice is full of “non-colonial self-determinations”. The international law recognizes the right to self-determination just for all the peoples. As good description of that argument may serve the story related to the Indian reservation regarding Article 1 of International covenants on human rights where the self-determination of all peoples and the response of international community to that reservation is set forth.

While ratifying the Covenants the Indian Government announced that: “... in Article 1 the words “right of self-

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<sup>17</sup> Barseghov Yu.G. Self-determination and Territorial Integrity. Moscow, 1993, P. 24. [Барсегов Ю.Г. Самоопределение и территориальная целостность. М., 1993. С. 24].

determination” concern only the peoples which are under a foreign domination and ... those words do not concern the sovereign independent states or to a part of a people or a nation which composes the essence of the integrity”. While this kind of interpretation of the right to self-determination was not admitted and did not have any supporters, moreover, some serious objections against that kind of approach were heard.

For instance, the Netherlands announced that “[t]he right to self-determination was expressed in the Covenants as a right which concerns all the peoples. It arises not only from the text of Article 1 of the Covenants, but also from a more authoritative interpretation of that right which is contained in the Declaration on international law principles.... There is no attempt provided by international documents which tend to limit or make that right conventional and it can itself harm the idea of self-determination and weaken its universal significance”.

France made quite decisive objections against Indian position. In particular, it announced that the Indian reservation was unacceptable as it provided a condition which was not provided in the UN Charter for implementing the right to self-determination”.

In this regard, German Federal Republic expressed unambiguously, announcing that “the right to self-determination as it is expressed in the UN Charter and in Covenants concerns all the peoples and not only to the ones who are under a foreign domination. That is why all the peoples have the inalienable right to freely decide their own political status and the right to freely decide their own economic, social and cultural development. Federal Government cannot consider any interpretation of the right of self-determination in force which is in contradiction with the text of the relevant article. Moreover, it believes that any limit which concerns its belonging to all the peoples does not correspond to the subject and the goals of the Covenants on Human rights.”<sup>18</sup>

If the right to self-determination concerns not only “colonial

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<sup>18</sup> Crawford J. *Outside the colonial context // Self-determination in Commonwealth*. Aberdeen, 1988. C. 18.

situations”, not only the peoples who are “under a foreign domination”, but also all the peoples without any “limits and conditions”, including the peoples which are in the structure of “independent sovereign states”, it would be necessary to admit that the right may concern also the peoples which consist a minority in the structure of a separate state.

Another important fact, which contributes to the understanding of the correlation of the right to self-determination with peoples, which are in the position of a minority, is that the international law recognizes that right just for peoples. The recent attempts which aim to ascribe that right only to peoples which have a “constitutionally recognized status”, or to the so-called “component units” that is to say, to some state or autonomous formations<sup>19</sup> inside the state, considering the above mentioned, are presented like they do not have any legal basis. There is no legal act where it is possible to find an approval of this kind of statement, on the contrary, everywhere it is spoken about peoples and not about something else.

If we admit the option according to which the “constitutional units”, being the unique subjects of self-determination within the state, comprise an attempt of a gradual development, we cannot consider it to be good enough as the first and the most incredible consequence of that kind of innovation will be states’ tendency to liquidate those “units” as the current international contractual law does not include any provision which may hinder it.

The question, which is being discussed, has also other aspects that are closely linked with the protection of peoples’ rights in the light of which the theory of “constitutional units” is not only just non-justified but it is also harmful and dangerous as it bears the danger menacing the international peace and security. In our opinion, the conflicts that took place in the territories of the former Yugoslavia and USSR are the results of expressing such kind of

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<sup>19</sup> Commission on Human Rights. Sub-commission on Prevention of Discrimination and Protection of Minorities. Possible ways and means of facilitating the peaceful and constructive solution of problems involving minorities. Second progress report submit by Mr. Asbjorn Eide - E/CN 4/Sub 2/1992/37.

approach towards self-determination, when the unique subjects were only the former Soviet Republics within the federative states. The latter were self-determined within the boundaries which were until that administrative and often arbitrary and did not take into account the peoples' opinion, who lived in their historical territories, within those boundaries. Maybe we can state that it was an application of the principle *uti possidentis*, which was being admitted as a basis during the process of decolonization of Southern America and Africa, where "the nations were the result of state's existence and not the contrary"<sup>20</sup> but which was being considered outdated and obviously unfair in Europe at the end of the 20<sup>th</sup> century.

As once, one of the members of International Tribunal expressed in an impressive way: "[i]t is the people who has to decide the fate of the territory and not the territory — the fate of the people"<sup>21</sup>, that is why both from the moral and legal perspectives the statement, according to which the right to self-determination has to be recognized for only, so-called "nominal" people as an "integral unit", and the right should be denied for the other indigenous which constitute a minority within the framework of that "unit", is not that clear. That kind of approach creates an impression of "a dual standard", when reformulating Owrel's idea, one can say that all the peoples are equal, but some are more equal.

Well, the special committee created by the European Union for processing standards of recognition of re-formed states, formulated the conclusion which concerns the self-determination of Serbian population of Bosnia and Herzegovina, where it is indicated: "1) the right to self-determination of Serbians out of Serbia is limited by internationally recognized human rights including the rights of minorities' members and 2) the former administrative boundaries must be protected by international law and can be changed only by reciprocal accordance"<sup>22</sup>. One can think that there is no need to refer

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<sup>20</sup> Rigo Sureda A. *Ibid*, C. 220.

<sup>21</sup> I.C.J. Reports, 1975, C. 122. Арчага Э.Х. Современное международное право, М., 1983, С. 167

<sup>22</sup> Hannum H. Documents on Autonomy and Minority Rights, Dordrecht/Boston/London, 1993. C. 84.

to the former Yugoslavia's tragic consequences, moreover the ones which are linked with such approach for all the peoples. They are well-known. In our opinion, the real principal approach which is based on the existing right, is that if in case of solution of some situation the right to self-determination is chosen as a basis, along with it, it's necessary to be consistent and know the right to decide the own fate on its own for all the peoples which this situation concerns.

As an example of tending to such consistency Law of the USSR "On the order for the solution of questions concerning the Soviet Republic's exit from the USSR"<sup>23</sup> can serve as a basis, which despite all disadvantages contained a quite fair and democratic provision which tells that in case of a self-determination which leads to Soviet Republic's separation, this kind of right have also the peoples of autonomous formations and even the foreign population "in the places of living gathered".

Though the political motives of importing that kind of norm are known, it does not depreciate its principal nature and the correspondence to the principle of self-determination in any way. Maybe, the implementation of that state would allow in practice to avoid from the occurrence of an armed conflict in Nagorno-Karabakh and in other regions of the former USSR. The right of Armenian people must not depend on its number, and the peoples within the boundaries of self-determining territory who are in minority, are not just the demographic remnants but they have the right to decide their own fate like it does another great neighbor community.

In our opinion, this kind of approach contains the fair and the only possible mechanism of consistently realizing the right to self-determination, which provides with a real, in the language of the UN Charter: "... the equal rights of men and women and of *nations large and small*" and which eliminates the factor of uncertainty which

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<sup>23</sup> Bulletin of Session of Peoples Deputies of USSR and of Supreme Council of USSR, 1990, #15, P. 252. [Ведомости Съезда народных депутатов СССР и Верховного Совета СССР, 1990, № 15. с. 252].

gives birth to a conflict arising in case of separation or new state's formation.

Another, a non-corresponding to law interpretation of the principle of self-determination is presented to us also in the statement where the subject can be only the whole population of the state. While, as it is being presented to us, that kind of opinion can be true only in case when the state is nationally homogeneous, ethnically uniform. In other cases, that kind of opinion cannot correspond to the spirit and letter of the law. In order to be convinced regarding it, it is enough to indicate that if that kind of approach had corresponded to the law, then in all the international legal tools, anyway in English versions, the right to self-determination would have been set forth for the nations under which by western traditions it is understood as "the whole population of the state" and not for the peoples, which we consider in all documents.

If we consider the self-determination by a historical view, then we can say that it arose and developed as separate people, just national communities' right, who were living in the territories of the existing states. Well, K. Partsch mentions that at the time the term "right of self-determination" concerned the following cases:

- the "peoples" on the whole which consisted a minority within the state (or even a majority), which was governed by another "people" (like, for example, Irishmen before 1919 and Mongolians before 1911/1921),
- the "peoples" which were a minority in more than one state, but they considered themselves as a part of the peoples of the neighbor state (like, for example, Mexicans in California or Hungarians in Romania),
- the "peoples" or "nations" which were separated into several states as a result of external interference (like, for example, Germans living in several states in the 19th century),
- the "peoples" which were considered as a majority (or a minority) in a territory, which had a special status under a foreign

state (the main example: colonies).”<sup>24</sup>

As we see, the right to self-determination historically arose and was perceived first of all as the right of national communities: populations of the existing state in the light of which, the approval that the right’s subject can be only the whole population of the state, seems to be absolutely indisputable.

○ The modern international legal practice also proves it. In particular, we can bring the example of Anglo-Irish agreement (1985) which concerns the settlement of *Olster* issue. In Article 1 of the document, it is said that “[t]he two Governments:

○ (a) affirm that any change in the status of Northern Ireland would only come about with the consent of a majority of the people of Northern Ireland;

○ (b) recognize that the present wish of a majority of the people of Northern Ireland is for no change in the status of Northern Ireland;

○ (c) declare that, if in the future a majority of the people of Northern Ireland clearly wish for and formally consent to the establishment of a united Ireland, they will introduce and support in the respective Parliaments legislation to give effect to that wish.”<sup>25</sup>

Thus, “two governments” agreed that neither the whole “Irish people” nor “the people of Ireland” and nor “the people of Britain”, but just “the people of Northern Ireland” are the subject of self-determination and the future of that territory depends on the will of Northern Ireland’s people. That is to say, in that international legal act find their confirmation all our above-mentioned conclusions about the fact that:

1) the subject of the right to self-determination is the very people;

2) the subject of the right to self-determination can be realized

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<sup>24</sup> Partsch K.J. *Fundamental Principles of Human Rights: Self-Determination, Equality and Non-Discrimination // International Dimensions of Human Rights*, Paris, 1982. C. 64.

<sup>25</sup> Anglo-Irish Agreement 1985 between the Government of Ireland and the Government of the United Kingdom, <http://cain.ulst.ac.uk/events/aia/aiadoc.htm>

not only with the basis of territory but also the subject, that is to say, via the community which is a minority in an even broader combination of geographical or historical frameworks (respectively, in this example, in the frameworks of the Irish Islands and the state of Great Britain);

3) that right is the inalienable and indivisible right of the subject of self-determination's right (the indication of the possible change of Northern Ireland's status: in points 1 and 3).

One can think that there is some interest in the question about how our point of view is agreed to the other principles of international law and first of all with the territorial integrity of the states. Regarding this, some authors write about some contradiction between the right to self-determination and the principle of territorial integrity of the states. Whereas, that kind of opinion cannot be accepted as true even theoretically, as, by agreeing to it, one can inadvertently suspect the existence of the international law itself as a whole process of legal regulation which is known by its general principles.

In the Declaration on Principles of International Law (1970), it is said: “[i]n their interpretation and application the above principles are interrelated and each principle should be construed in the context of the other principles”. If we try to realize it in practice then we will come to the conclusion that those principles not only do not contradict each other, but also are in some harmony. The principle of territorial integrity concerns the domain of interstate relations and is called to protect the territorial integrity and the national unity of states from encroachment of a foreign state, while the principle of self-determination presupposes to decide all the questions of peoples' state existence, including also the aspects that concern the territorial *status quo*'s protection or modification. That is why, one can suppose that in some terms the principle of territorial integrity is called to protect the free implementation of the right to self-determination: it protects from external encroachments and the existing *status quo* which is, in essence, a result of self-determination and a process of territorial changes which may occur on the basis of all the peoples'

right to self-determination.

In this connection, it is always important to mention that the existing *status quo* and its possible changes must be based on the self-determination. As Yu. G. Barsheghov mentioned yet in 1958, “the right of nations’ self-determination serves as the supreme legal title of the territorial demarcation”.

With this not only the content of territorial rights but also their boundaries are being defined<sup>26</sup>. And what concerns the territorial changes, we should take into account that the international law completely and, in particular, the members of negotiations during the development of the UN Charter “based on the circumstance that by prohibiting the war and the aggression, along with it they do not guarantee the *status quo* forever and do not exclude the possibility<sup>27</sup> of state boundaries’ changes”.

In this context we would like to present the opinion of one of the authors who writes: “[o]nly in case of people’s free agreement the territorial status can be defined and only thus the defined *status quo* can guarantee peace and friendly relations among peoples”.<sup>28</sup> The history and the development of recent years’ events totally confirm the true nature of that conclusion.

The Declaration on Principles of International Law (1970) contains also the correlation of principles of self-determination and state’s territorial integrity and some other aspects, the so-called “prophylactic special clause (clausula)” which protects the states from baseless separative pretensions. “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any

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<sup>26</sup> Barseghov Yu. G. Territory in International Law. Legal Nature of Territorial Superiority and Legal Basis for Utilizing the Territory. Moscow, 1958, pp. 117-118. [Барсегов Ю.Г. Территория в международном праве. Юридическая природа территориального верховенства и правовые основания распоряжения территорией. М., 1958. С. 117-118].

<sup>27</sup> A Commentary on Dumbarton Oaks Proposals - Британская “белая книга”. Ю.Г. Самоопределение и территориальная целостность, М., 1993. С. 19.

<sup>28</sup> Speranskaya L.V. Principle of Self-Determination in Internatioanl Law. М., 1961, P. 108. [Сперанская Л.В. Принцип самоопределения в международном праве. М., 1961. С. 108].

action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color”<sup>29</sup>.

An important conclusion of the mentioned provision is that modern international law in some conditions allows “the violation of sovereign and independent states’ territorial integrity and political unity”, that is to say, the latter are not absolute and unconditional values from the perspective of international law. We can come also to other conclusions. First of all, here we find another confirmation for the conclusion about the fact that the right to self-determination applies not only to “colonial cases”, but also to “independent and sovereign states”

And secondly, from the mentioned provision it absolutely follows that in some conditions some minorities can be subjects of the right to self-determination, as the self-determining people is considered as a national minority inside a “sovereign and independent state”.

What concerns the conditions, at presence of which the self-determination is forbidden, which violate the territorial integrity of the state, they, as we can see, are the following: 1) the state “has to follow the principle of legal equality and self-determination in his actions”, 2) the state has “to have a government as a result of it, which will present... the whole people living in that territory”, 3) along with it, it must never put any discrimination.

Only in case of following these conditions should the priority be given to the protection of state’s unity, otherwise it may be put under suspicion.

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<sup>29</sup> It should be mentioned that some authors, making a reference to the provision of the international legal document, prefer to be limited by only the first part putting a full stop after the words “... sovereign and independent states by which they willy-nilly distort its content, which is actually another question.”

And even if these conditions are three, the most essential of them by which the others are determined, is perhaps the first condition. In our opinion, it contains an even bigger key of perception's perspective which is linked with self-determination and the questions concerning modern state's international legal nature.

As the demand for the state of "... following the principle of legal equality and self-determination in his actions", which can be expressed in a certain way, for example, in some cases by holding a referendum, first of all means the unconditional recognition of the right of self-definition for all the peoples, among which are the peoples included in that state's structure.

And the existence of the state, rather maintaining the unity in case of recognition means just one thing that the state is the expression and the product of the self-determination of the peoples. That is to say, only at that time he can "follow in his actions" the principle of the peoples' self-determination, when it is itself the result and the product of that kind of self-determination.

From that point of view, the questions of the co-relations of other principles of the international law with the self-determination are imagined in a new way, the real fundamental nature of that principle reveals. Like, for example, the principle of not interfering is called to protect the internal side of self-determination's right, the principle of sovereign equality of states arises in a limited way from the recognition of peoples' legal equality and serves as a guarantee of respecting the people's (peoples') self-determination, which is expressed in a sovereign state, etc..

Thus, we suggest considering the self-determination as a broader principle, which is not being limited by secessions or other questions. We may suppose that from the perspective of modern international law, all the states (unitary and federative, with one nation and multiethnic) are the result of the existing subjects' (nation, people, nations, peoples) self-determination.

The legitimate and main factor of any state's existence is that it's a way of implementing the existing subject's (subjects') self-determination. Moreover, the existence of such a basis should be

considered as something occasional and simultaneous, which has to correspond to the very moment of the self-determination's implementation and, taking into consideration the circumstance that the "right" is inalienable and belongs to the "peoples" "forever", the self-determination should be understood as a continuous process, the main and permanent condition of its legal and factual existence.

In the light of it, the essence of the "prophylactic clausula" is revealed, according to which only the integrity of the states should be maintained which are based on self-determination of all the people who live in their territory.

The analysis of present normative staff, the consideration of the modern international right's content and the relevant practice lets us come to broader conclusions. The principle of legal equality and peoples' self-determination, being one of the fundamental principles of international law, fixes the inalienable right of peoples to freely choose their own fate. By its virtue, all peoples and nations have the right to self-determination which is being realized by the free expression of the people's or nation's will and presupposes the people's or nations' choice opportunity of separating from a state or in other conditions integrate in another state, that is to say, it is the free choice of political status.

Along with this, it's necessary to take into account that the right to self-determination does not lead to the freedom of separating, but, as it has been mentioned above, it's a broader concept which is not limited by the issue of secession. As one of the authors has truly mentioned: "[i]t is not obligatory for the self-determination be expressed in political separation; but without the recognition of the freedom of separation, there is no right<sup>30</sup> to self-determination".

The admission of the circumstance that peoples can, in the boundaries of multi-ethnic states, in principle, be subjects of self-determination and, by using that right, can choose the way of creating their own state, which can be a serious guarantee for their

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<sup>30</sup> Barseghov Yu.G. Self-determination and Territorial Integrity. Moscow, 1993, P. 8. [Барсегов Ю.Г. Самоопределение и территориальная целостность, М.,1993. С. 8].

rights. As the contrary statement like totally or partially hands the national communities to the government or central government of the majorities as a ransom of mercy and whim, which (the government) can roughly and often violate their rights up to a genocide.

From this point of view, the principle of legal equality and peoples' self-determination is called to serve to the fact that the existing states correspond to a great degree to their own multiethnic nature, to the self-determination of all the subjects included in it, which will be a guarantee of a democratic interethnic agreement, a factor of peace and stability both inside the state and in the international stage.

In other words, the recognition of the right to self-determination can be an important means of protection for peoples, as in those conditions no violations of their rights can stay without a remedial, but can be the reasons for serious and essential changes in their status up to the formation of an independent state.

## CONCEPT OF STATE SOVEREIGNTY: MODERN ATTITUDES

**Karen Gevorgyan<sup>1</sup>**

For decades, international law and public law aspects of the concept of “sovereignty” were in the center of attention of the representatives of legal science. And today, despite the relative elaboration, there is a need to consider various aspects of the problem of sovereignty, which occur in society and in the state, through a prism of changes and in relation to modern ideas about the political system and the polity. According to the former UN Secretary General Boutros Boutros-Ghali, “the main demand of the day is to rethink the problems of sovereignty<sup>2</sup>.”

The notion of “state sovereignty” is the basic concept of modern international law; “it is unthinkable without international law itself, as such<sup>3</sup>”. New trends in considering the problem of state sovereignty create the necessary prerequisites for understanding the nature and character of modern international law, as well as the content of its basic principles.

Sovereignty is a necessary and inalienable political and legal property of any state, its constant attribute.

B. L. Manelis, a Soviet legal scholar wrote: “[s]overeignty should be considered as a social phenomenon, which is closely connected with the state, its role in international relations and the

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<sup>2</sup> Boutros Boutros-Ghali, *Empowering the United Nations*, Foreign Affairs, vol. 71, Winter 1992/93, pages 89, 98-99. Richard B. Bilder, *Perspectives on Sovereignty in the Current Context: An American Viewpoint*, Canada - United States Law Journal, vol. 20, 1994, page 9.

<sup>3</sup> Levin I.D. *On the Issue of Essence and Significance of Sovereignty*. “Soviet State and Law”, 1949, #6, P. 35. [Левин И.Д. К вопросу о сущности и значении принципа суверенитета. “Советское государство и право”, 1949, № 6, с. 35].

regularities of its development.<sup>4</sup> “Just as the very international law, sovereignty arose with the emergence of states.

However, in the late 40’s of the 20th century individual scientists, in particular I. D. Levin, expressed a later origin of sovereignty, linking it to the period of the collapse of feudalism and the establishment of capitalist production relations<sup>5</sup>. This point of view became dominant in the science of international law and was later recognized as erroneous by the author<sup>6</sup>. Considering the possible occurrence of the phenomenon before the development characterizing its concepts, it would be reasonably safe to say that sovereignty was already inherent in the ancient state.

In the initial period of development of the concept of “sovereignty”, it was linked with the personality of the monarch who was considered as the bearer of the sovereignty. In that period the very same concept of “sovereignty” served as a “political and legal supremacy designation of royal power in the country; that is to say, over all the feudal lords and its outside independence from the Roman church, Holy Roman Emperors and other feudal monarchs.”<sup>7</sup>

In Bodin's opinion, the very founder of the concept, the sovereignty acts as a supreme, absolute and independent of the state’s laws power over his subjects, which is, however, limited by divine and natural law. Sovereignty, as something peculiar to the bearer of the supreme state power, that is to say, the absolute monarchy, endowed them the features of absoluteness, universality, limitlessness and eternity.

It is noteworthy that in the 12th century Armenian famous thinker, social and political figure and lawyer Gosh, emphasizing the

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<sup>4</sup> Manelis B.L. Problems of Sovereignty. Resume of Ph.D. Dissertation, Moscow, 1966, P. 9. [Манелис Б.Л. Проблемы суверенитета. Автореф. дис. док. юрид. наук. М., 1966, с. 9].

<sup>5</sup> Levin I.D. On the Issue of Essence and Significance of Sovereignty. “Soviet State and Law”, 1949, #6, P. 35. [Левин И.Д. К вопросу о сущности и значении принципа суверенитета. “Советское государство и право”, 1949, № 6, с. 148].

<sup>6</sup> Ibid. P. 39.

<sup>7</sup> Levin D.B. History of International Law. Moscow. 1962, P. 33. [Левин Д.Б. История международного права. М., 1962, с. 33].

exclusivity of the royal power in his “Law code” dated 1184, presented his interpretation of the concept of “sovereignty”: “[k]ings are those who sovereignly exercise dominion over their peoples and tribute from other people, or if do not tribute then (at least) are not themselves taxed tribute to others (kings)<sup>8</sup>”. Thus, even at that period a unique approach looms to the concept of sovereignty as the supremacy of imperial power within the state and its independence beyond its boundaries.

The growing number of states and the reinforcement of their leading role in the international arena, as well as the complexity of international life in general, has left a significant imprint on the doctrine of sovereignty, turning it into a complex set of different views, interpretations and approaches to the concept of “sovereignty”, by greatly changing the original “Bodinian” structure of the idea of state sovereignty. The very constant changes happening in socio-political life of individual states as well as in the sphere of international relations, the strengthening of integration processes, leading to blurring of the borders between the actual individual states, to strengthening their interconnectedness, preclude the need for a new approach to a number of problems associated with the principle of State sovereignty.

There are many definitions of the concepts which are studied in the theoretical works on international law. In Soviet and Russian international legal literature the most frequently cited definition of sovereignty is given by Professor G. Tunkin. He characterizes state sovereignty as “... the inherent supremacy of the State in its territory and independence in international relations.”<sup>9</sup>

Today you can find the statement that such a definition of

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<sup>8</sup> Armenian Judicial Code of Mkhitar Gosh. Translated from Old Armenian by A.A. Papovyan, (B.M. Narutyunyan, editor and introduction), Yerevan, 1954, P. 141. [Армянский Судебник Мхитара Гоша. Пер. с древнеармянского А.А. Паповяна, редакция и вступительная статья Б.М. Арутюняна. Ереван, 1954, с. 141].

<sup>9</sup> Tunkin G.I. Basics of Contemporary International Law. Moscow, 1956, P. 15. [Тункин Г.И. Основы современного международного права. М., 1956, с. 15].

sovereignty became out of date<sup>10</sup> at the end of the 20th century. In our opinion, such a statement does not correspond to the real situation.

The above mentioned definition of state sovereignty has not become out of date, but acquired a number of new features and qualities. This statement is justified both by the current state of international relations, and the changes that have occurred in international law, in particular the unprecedented pace of development of international cooperation in the field of human rights and the development of international mechanisms for the protection of these rights. In the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE (1991), it is expressly stated that “[t]he matters relating to human rights, fundamental freedoms, democracy and the supremacy of law are of international nature, as respect for these rights and freedoms constitutes one of the foundations of the international order”. It especially emphasizes that the commitments made by States parties in the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the state.

Another well-known Soviet internationalist lawyer D. B. Levin considered the supremacy of state power and its independence from any other power in international relations<sup>11</sup>.

Definitions of “sovereignty” are also given in the consideration and resolution of specific international disputes, which in its turn proves the importance of this concept for the entire international practice. One common definition of state sovereignty is given by an arbitrator Max Huber in the arbitration judgment of the case Island of Palmas, according to which: “[s]overeignty in the relations between states means independence. Independence in relation to area of the globe is the right to exercise his functions within the state, excluding

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<sup>10</sup> International Law. Tunkin G.I. (editor), Moscow, 1994, P. 87. [Международное право. Под ред. Г.И. Тункина. М., 1994, с. 87].

<sup>11</sup> Levin D.B. Basics Issues of Contemporary International Law. Moscow, 1958, P. 200. [Левин Д.Б. Основные проблемы современного международного права. М., 1958, с. 200].

any other State<sup>12</sup>.” In another case, such as in the dissenting opinion of Judge Alvarez on the Corfu Channel case, sovereignty is defined as a set of rights and attributes possessed by the State in its territory excluding any other State, and also in his relations with other states<sup>13</sup>.

In the latest research on the problem of sovereignty, there are definitions that are different from the well-known and widely accepted formulations of the considered concept. So, professor B. S. Krilov considers sovereignty as the property and the state's ability to independently, without external interference, determine its internal and external policies provided the respect for the civil and human rights, protection of minority rights and respect for international law<sup>14</sup>.

A positive aspect of the definition of “state sovereignty” is the direct reference to the need of respecting the norms of international law by the realization of State's sovereign rights. This fact distinguishes the interpretation of sovereignty from the previously encountered characteristics of the observed concept. Thus, the author notes the actual restrict of the sovereignty by these norms and principles. The correctness of this judgment is also confirmed by the current level of development of international law and international relations. For comparison, we can cite other definitions found in the works of modern scholars of sovereignty. A. S. Feshenko defines sovereignty as the full power of the state in its territory and its independence from other states<sup>15</sup>.

Taking into account the strengthening of integration processes

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<sup>12</sup> Island of Palmas case (U.S. v. Netherlands), Reports of International Arbitral Awards, vol. 2, 1928, pages 821, 838. Richard B. Bilder, Perspectives on Sovereignty in the Current Context: An American Viewpoint, Canada - United States Law Journal, vol. 20, 1994, page 10.

<sup>13</sup> Corfu Channel case (U.K. v. Albania), I.C.J. Reports, 1949, pages 39, 43. Richard B. Bilder, Perspectives on Sovereignty in the Current Context: An American Viewpoint, Canada - United States Law Journal, vol. 20, 1994, page 10.

<sup>14</sup> Problems of Sovereignty in Russian Federation. Moscow, 1994, P. 4. [Проблемы суверенитета в Российской Федерации. М., 1994, с. 4 (предисловие Б.С. Крылова)].

<sup>15</sup> Feshenko A.S. Problems of Supranationality in the Functioning of International Organizations and International Law. Ph.D. Dissertation. Moscow, 1988, P. 40. [Фещенко А.С. Проблемы наднациональности в деятельности международных организаций и международное право. Дис. канд. юрид. наук. М., 1988, с. 40].

in interstate relations, the growing interconnectedness of states, as well as the steady increase in the number of problems the solution of which requires the joint efforts of the entire world community, some scientists either directly call for the denial of the term “sovereignty”, arguing that “it is time ... to consider, analyze, re-understand and re-comprehend the concept (of sovereignty - K.G.) and deprive it from normative content, reframe, even reformulate it and gradually remove the term from the language of international relations, in particular the legal terminology<sup>16</sup>” or speak about the incompatibility with the notion of “sovereignty” with the position of states in the international arena, where there is no subordination of one state to another, where the relationship between the states are built on the principles of equality and independence, noting that the term “sovereign state” is more characteristic for their domestic constitutional provisions than their legal status in the international arena<sup>17</sup>.

There are also attempts to find a replacement of the term “sovereignty”, justifying it as follows: “[w]hen the internationalist lawyers say that the state is sovereign, all that they really have in mind is that it is independent, that it is to say; it does not depend on any other state. ... It would be much better if the word “sovereignty” was replaced by the word “independence”. ... In the western world they no longer pray for the sovereignty as before”<sup>18</sup>.

Such views on sovereignty, its nature and content which are appearing in the works of foreign authors, in our opinion, cannot be considered correct. Different views, denying the sovereignty, do not coincide with the real state of things. Sovereignty is the cornerstone

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<sup>16</sup> L. Henkin, *The Mythology of Sovereignty*, in *Essays in Honour of Wang Tieya*, (R. St. J. Macdonald, ed.), Dordrecht – Boston – London, 1993, page 352.

<sup>17</sup> Oppenheim’s *International Law*, (Sir R. Jennings & Sir A. Watts, eds.), 9<sup>th</sup> ed., vol.1, Harlow, 1992, page 125.

<sup>18</sup> Akehurst M. A. *Modern Introduction to International Law*. 6<sup>th</sup> ed., London and New York, 1996, page 16. Dutch scholar G. Schermers calls sovereignty “fiction” and argues that states are not different only in their size and power, but also in terms of real sovereignty, which they have (Schermers G. *International Institutional Law*. L., 1980, page 776).

of modern international law, the same attribute and decisive indication of its major subjects — states. Relationships between states are built on the basis of the principle of sovereignty, it underlies the whole system of international organizations.

Having the property of sovereignty, the states, on the basis of equality and on conditions of mutual independence, are involved in various international legal relations, realizing their basic rights and duties. International law itself, as a set of interrelated legal norms, is the result of an agreement between sovereign states. Respect for the sovereignty is an essential imperative of international relations, the basic premise of mutually beneficial and successful intergovernmental cooperation as reflected in many international documents.

The above mentioned controversy of foreign internationalist lawyers concerning the need for the term “sovereignty” has no basis in reality: a waiver of that term may make suspicious the use of the term “state”. In our opinion, the proposal to replace the term “sovereignty” with the term “independence” is also wrong.

The fallacy of this proposal lies in the fact that the above mentioned concepts are not equivalent. The concept of “sovereignty” in its content is wider than the notion of independence, which is only one of the legal attributes of state sovereignty. As for the fact of limitation of state sovereignty under international law noted above, it cannot be regarded as a waiver of sovereignty, as its “extinction,” the decline, with far-reaching conclusions about the reduction of the role of states in the international arena. The limitation of state sovereignty, as noted in the literature, occurs as a result of the development of international law and international organizations, which, in their turn, is the cause of the development of states<sup>19</sup> cooperation.

In theoretical works on international law and to this day the question of limiting state sovereignty under international law remains quite controversial. On this issue, there are two main doctrinal points

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<sup>19</sup> International Law. (Tunkin G.I., ed.), Moscow, 1994, P. 87. [Международное право. Под ред. Г.И.Тункина. М., 1994, с. 87].

of view. The supporters of one of them (D. Levin, A. N. Talalayev, Yu. M. Kolosov, H. M. Velyaminov and others) believe that international law, any international agreement limits the sovereignty of the state. Professor A. N. Talalayev notes in this regard that “[a]ny agreement is some limitation of the sovereignty of states, but this does not contradict the essence of the agreement, if only based on the principles of voluntariness, reciprocity and *sovereign equality* (emphasized by us - K. G.) and does not go beyond certain limits behind which begins the violation of sovereignty<sup>20</sup>.” Even you can find a statement which tells that states’ voluntary limitation of their sovereignty is one of its manifestations<sup>21</sup>.

The supporters of another point of view (V. A. Vasilenko, I. I. Lukashuk, V. S. Shevtsov) deny the possibility of limiting state sovereignty under international law, international-legal norms.

Their arguments are based on the fact that international law protects and guarantees the sovereignty of states, bringing some order into the system of international relations. “By regulating the relations between equal sovereign states, international law does not limit their sovereignty, but coordinates and organizes interstate relations, establishing a balance between the interests of individual states and the whole international community<sup>22</sup>.”

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<sup>20</sup> Talalaev A.N. Legal Nature of International Treaty. Moscow, 1963, P. 67; See also Levin D.B. Basics Issues of Contemporary International Law. Moscow, 1958, P. 207; Velyaminov G.M. Legal Status of the Subjects of Russian Federation and Problems of Recognition. Moscow Journal of International Law, 1995, #2, P. 9. [Талалаев А.Н. Юридическая природа международного договора. М., 1963, с. 67. См. также: Левин Д.Б. Основные проблемы современного международного права. М., 1958, с. 207; Вельяминов Г.М. Правовой статус субъектов Российской Федерации и проблемы признания. “Московский журнал международного права”, 1995, № 2, с. 9].

<sup>21</sup> Kolosov Yu. Sovereignty. “International Life”, 1976, #6, P. 160. [Колосов Ю. Суверенитет. “Международная жизнь”, 1976, № 7, с. 160].

<sup>22</sup> Vasilenko V.A. Basics of Theory of International Law. Kiev, 1988, P. 154. See also Lukashuk I.I. International Law. General Part. Moscow, 1996, pp. 265-266; Shevtsov V.S. State Sovereignty (Issues of Theory), Moscow, 1979, pp. 46-47. [Василенко В.А. Основы теории международного права. Киев, 1988, с. 154. См. также: Лукашук И.И. Международное право. Общая часть. М., 1996, с. 265-266; Шевцов В.С. Государственный суверенитет (вопросы теории). М., 1979, с. 46-47].

Taking into account the peculiarities of the current stage of development of international cooperation and the increasing role of international law as a regulator of this cooperation, we should recognize as correct the first point of view. It would be desirable to immediately mention that its supporters in their statements, of course, do not deny the regulatory function and universal nature of international law, but the recognition of their ability to limit the sovereignty by international law: international agreements are not withdrawals from the principle of sovereignty.

On the contrary, the main focus of their arguments is the fact that the mere possession of the sovereignty of the state makes it possible to participate in international agreements (and only with the consent of the state) and, as a consequence, it is possible to limit state sovereignty in a certain field of interstate cooperation, especially that in this case there is a limitation of the sovereignty of all parties of the agreement. The state which concludes an international agreement, exercises its sovereign rights and at the same time limits its sovereignty by taking on certain obligations. Actually, the sovereignty of the state in the field of international cooperation, regulated by an international agreement, manifests to a lesser extent than if the state did not conclude the agreement or did not participate in it.

Before proceeding to the analysis of certain features of the state sovereignty, it seems necessary to generally present some individual points of view on the issue of sovereignty implements existing in the science of law. According to some scholars<sup>23</sup>, sovereignty belongs to the government, as a defining element of the notion of state. Others believe that sovereignty does not belong to the government, but to the state itself, as a political organization of the society. One of the proponents of this point of view, professor N. A. Ushakov, justifying his point of view, states that “[i]t particularly manifests in international relations and international law, which considers a

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<sup>23</sup> See for example Manelis B.L. Problems of Sovereignty. Resume of Ph.D. Dissertation, Moscow, 1966, P. 14. [Манелис Б.Л. Проблемы суверенитета. Автореф. дис. ... док. юрид. наук. М., 1966, с. 14].

subject of not the state power, but the state as a whole<sup>24</sup>.”

Finally, the literature has put forward a point of view according to which sovereignty belongs both to the government and the state<sup>25</sup>.

Not stopping at each of the above mentioned points of view one by one, we will only note that professor N. A. Ushakov's justification that sovereignty belongs to the state as a whole, seems the most appropriate and convincing for us. Of course, one cannot deny that the state power is an essential element for the concept of “the state”, and that the state sovereignty is manifested in the activities of public authorities.

However, this does not mean that the concepts of “the state” and “state power” are identical. In our opinion, only such approach to the question of the bearer of state sovereignty makes it possible to correctly elucidate the essence of contemporary international law, as well as certain elements of his system. The properties that characterize the legal nature of state sovereignty are territorial sovereignty (supremacy of the state on its territory) and independence (independence of the state in international relations). Supremacy of the state and its independence are structural properties of state sovereignty, determining its nature and content.

The essence of territorial supremacy is that “the state exercises the highest, supreme authority over all persons and their associates, located in the national territory<sup>26</sup>.” Figuratively speaking, the state is

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<sup>24</sup> Ushakov N.A. *Sovereignty in Contemporary International Law*. Moscow, 1963, P. 17, also see Chernichenko S.V. *State as Personality, Subject of International Law and bearer of Sovereignty*. Russian Yearbook of International Law, 1993-1994, pp. 24-25; *Problems of Sovereignty of Russian Federation*. Moscow, 1994, pp.16-20. [Ушаков Н.А. Суверенитет в современном международном праве. М., 1963, с. 17. См. также: Черниченко С.В. Государство как личность, субъект международного права и носитель суверенитета. “Российский ежегодник международного права”, 1993-1994, с. 24-25; Проблемы суверенитета в Российской Федерации. М., 1994, с. 16-20].

<sup>25</sup> Shevtsov V.S. *State Sovereignty (Issues of Theory)*. Moscow, 1979, P.7. [Шевцов В.С. Государственный суверенитет (вопросы теории). М., 1979, с. 7].

<sup>26</sup> Ushakov N.A. *Sovereignty and its Implications in National and International Law*. Moscow Journal of International Law, 1994, #2, P. 6. [Ушаков Н.А. Суверенитет и его воплощение во внутригосударственном и международном праве. “Московский журнал международного права”, 1994, № 2, с. 6].

the “host” on its territory. Being an inherent feature of state sovereignty, territorial supremacy means the subordination of all individuals and organizations located within the boundaries of the state to the supreme government. At the same time, the supremacy in its territory is manifested in the autonomous and independent exercise of its internal functions, which is particularly reflected in the choice of the main directions of economic and social policy, as well as in determining the scope of authority and the main activities of public authorities, in establishing the rights and duties of the members of society.

“As a result of its internal independence and territorial supremacy, the state may adopt any constitution that will be pleasing to him for organizing its management, as it believes that it is necessary to pass such laws, which are desirable, to organize its armed forces on land and at sea, build and demolish any military facilities, to conduct any trade policy that he wishes, and so on, of course, with the requirements of respecting the demands of customary international law or international treaties which are obligatory for him<sup>27</sup>.”

The implementation of the supreme power over all persons and organizations located on the territory of the state is an essential evidence of the sovereignty of the state within its borders. Thus, the possibility of the simultaneous existence of the state sovereign authority on the state's territory along with the supreme power is being limited.

In this way, the supremacy of the state appears in the absolute power of the state on its territory<sup>28</sup>. In this connection, the position of the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations from October 24, 1970, should be

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<sup>27</sup> Oppenheim's International Law, (Sir R. Jennings & Sir A. Watts, eds.), 9<sup>th</sup> ed., vol. 1, Harlow, 1992, page 384.

<sup>28</sup> Ushakov N.A. Sovereignty in Contemporary International Law. Moscow, 1963, P. 17. [Ушаков Н.А. Суверенитет в современном международном праве. М., 1963, с. 17].

highlighted, according to which: “[e]ach State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by any whatsoever other state.

In addition to the above mentioned, the territorial supremacy of the state is reflected in the subjects of the state power which has the exclusive right to use means of overbearing coercion in necessary cases, as well as the priority of the state, issue generally binding rules of conduct, the realization of which is provided also through measures of overbearing coercion. Professor I. Levin wrote: “So, the concentration of all power in the hands of the state, the monopolization of the overbearing coercion in the hands of the state is an important feature of sovereignty. This does not mean that the state only forces by overbearing methods; but it means that only the state compels by overbearing methods<sup>29</sup>.” The supremacy of the state is expressed in the fact that any exceptions of the territorial supremacy are possible only with the consent of the state.

The territorial sovereignty of the state is also reflected in the fact that lawmaking activities undertaken through the relevant authorities are centralized in his hands. Exclusive prerogative of the state is entitled to lay down legal norms, expressing the interests (will) of all the members of society to protect them and enforce their requirements. The state also sets the order of publication, modification and cancellation of the law. And in this sense, as indicated in the literature, it is above the law.

In the literature on international law there are points which indicate the inextricable link of territorial supremacy with two such properties of the government, as are its unity and legal limitlessness.

The first of these properties of the state is its unity which is reflected in the organization and exercise of state power through a single system and its organs on the basis of law, which together constitute the highest state authority. The unified system of legislative, executive and judicial powers and the set of laws established by the state and determining the competence of these

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<sup>29</sup> Levin I.D. Sovereignty. Moscow, 1948, P. 103. [Левин И. Д. Суверенитет. М., 1948, с. 103].

authorities, the scope of their authority, are the essential and necessary conditions for ensuring the unity of the government. The unity of state authorities thus assumes its organization and internal consistency, which is expressed in the coordinated implementation of the various branches of their powers.

On the whole, the unity of state power legally expresses that: “a) the aggregate competence of those bodies covers all the authority necessary to carry out the functions of the state, and b) various bodies belonging to this system, cannot be prescribed simultaneously by the same subjects in the same circumstances by mutually exclusive rules of conduct”<sup>30</sup>. Legal unboundedness of state’s power is primarily expressed in its sovereignty and in lack of control, which implies a situation in which state power is exercised in the absence of other (alternative) supreme power able to influence him and predetermine his activities. N. A. Ushakov writes: “Legal unboundedness of state’s power only means that there is no supreme power over him to which he is obliged to follow.”<sup>31</sup>

As it is noted above, only the state has the right to set mandatory rules of conduct and ensure the smooth implementation of them which actually means unboundedness of state power by the law. But in any case, the unboundedness of state’s power does not mean the state’s permissiveness. The proof is the activity of the entire system of state bodies and of each body separately, which is done (or at least should be) under their authority, in accordance with legal regulations, and which ultimately aims at ensuring the public interest. Furthermore, the right itself, created by the state, expresses the interests of the society, its common will. Consequently, the “the legal unboundedness of the state does not mean independence from the real conditions society’s<sup>32</sup> life.” The fact, that in the process of

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<sup>30</sup> Ibid. P. 64.

<sup>31</sup> Ushakov N.A. Sovereignty and its Implications in National and International Law. Moscow Journal of International Law, 1994, #2, P. 8. [Ушаков Н.А. Суверенитет и его воплощение во внутригосударственном и международном праве. “Московский журнал международного права”, 1994, № 2, с. 8].

<sup>32</sup> Ushakov N.A. Sovereignty in Contemporary International Law. Moscow, 1963, P. 22. [Ушаков Н.А. Суверенитет в современном международном праве. М., 1963, с. 22].

exercising the state power the interests of other states, as well as other subjects of international law should be considered, should be added to the aforementioned.

Another feature that characterizes the nature of state sovereignty is the independence of the state in international relations. As rightly pointed out in the legal literature, both the above mentioned features are closely interrelated and interdependent, and the absence of one makes impossible the existence of another, thereby depriving the state from sovereignty. Considering this circumstance, we should approach the issue of the concept of “state independence”.

In the most general form of independence of the state can be represented as its ability to freely and independently determine the extent and form of its participation in international relations. Independence in the international arena is primarily expressed in the state's ability to manage its external affairs, independently and, at its own discretion, determine its foreign policy.

From the standpoint of international law, the independence in the international arena is materializing in the form of free implementation of the international legal personality by the state itself. An important prerequisite for understanding the essence of state's independence is also the fact that “international relations are characterized by the lack of power standing above states, mandating them their behavior in international relations, and the mutual independence of states”.<sup>33</sup>

Nevertheless, independence in international relations cannot be interpreted as an absolute freedom (or even arbitrary). The status of the subjects of international law not only empowers the state certain rights but also imposes certain obligations. Every State is obliged to regulate its foreign policy with the generally recognized principles and norms of international law. In connection with above mentioned the idea, expressed by a famous Austrian expert on international law

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<sup>33</sup> Ushakov N.A. Sovereignty and its Implications in National and International Law. Moscow Journal of International Law, 1994, #2, P 9. [Ушаков Н.А. Суверенитет и его воплощение во внутригосударственном и международном праве. “Московский журнал международного права”, 1994, № 2, с. 9].

A. Ferdross, should be recognized, according to which: “[t]his independence does not mean, however, dependence from international law, but only the will of the independence of other states. It is an ability to solve all the cases *on their own* without *obeying* the instructions of another state”<sup>34</sup>.

The system of universally recognized principles and norms of international law restricts to some extent the independence of states in the field of international cooperation. At the same time, these norms and principles provide and guarantee the independence and sovereignty of states both in international relations and in domestic sphere. The activity of states in the international arena must be subordinated to the general international law and order and to the requirements of international legality. It should compulsorily be carried out on the basis of international law and by taking into account the interests of other states.

Giving his own definition of state sovereignty, a prominent Russian scholar-internationalist F. F. Martens clearly notices the difference of sovereignty’s extent in the area of “internal control” and “international relations.” He writes: “[i]n the sovereignty or in the supremacy the independence of the state both in the area of internal control and in international relations is expressed.

"In the sphere of international relations, sovereignty does not have the same extent as it has in state’s government. The difference is immediately detected as soon as the state enters into relations with other nations and wishes to make obligations with them and use the international law: then by the power of things it is forced to make concessions, to respect the legitimate rights and interests of other nations, to abandon its unconditional implementation of its supremacy”<sup>35</sup>.

Thus, the independence of the state in international relations is

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<sup>34</sup> Ferdross A. International Law. Moscow, 1959, P. 120. [Фердросс А. Международное право. М., 1959, с. 120].

<sup>35</sup> Martens F.F. Contemporary International Law of Civilized Nations. Part 1., Moscow, 1996, P. 196. [Мартенс Ф.Ф. Современное международное право цивилизованных народов. Т.1. М., 1996, с. 196].

limited only by the existence of other sovereign states, and the presence of international law which is established in the form of principles and rules defining boundaries of independence in the international arena. All this provides the legal equality of state-parties of international communication. This circumstance, as a fundamental element of international cooperation, has been fixed in such important international documents as the UN Charter, the Declaration on Principles of International Law (1970) and the Final Act of the Conference on Security and Cooperation in Europe (1975), the provisions of which determine the overall direction of state's foreign policy's activities.

In the Declaration on Principles of International Law it reads as follows: “[a]ll States enjoy sovereign equality. They have equal rights and duties and are equal members of the international community, notwithstanding the economic, social, political or other nature of differences. “State sovereignty and legal equality suppose essential balance and harmony of interstate relations. In this sense, it is legitimate the quote of Judge Anzilotti from his individual opinion on the case of the Austro-German Customs Union, where he states that “...the independence, is nothing more than the normal status of states...”<sup>36</sup>

Consideration of various definitions of “state sovereignty” and legal analysis of its individual features lead us to emphasize inner and outer sides in the very notion of “sovereignty”. The emphasizing of inner and outer sides is objectively conditioned by the nature of state sovereignty.

The inner side of the state sovereignty is manifested in the sovereignty of the state within the state borders, in the fullness of legislative, executive and judiciary powers. The right which characterizes the inner side of the sovereignty causes the state's ability to exercise discretion in its territory, taking into account the sovereignty of other states. D. I. Baratashvili writes: “[t]he

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<sup>36</sup>Austro-German Customs Union case, Permanent Court of International Justice, Ser. A/B, <sup>1</sup> 41, 1931, page 57. D. Pharand, Perspectives on Sovereignty in the Current Context: A Canadian Viewpoint, Canada - United States Law Journal, vol. 20, 1994, page 21.

jurisdiction of the state applies to both citizens and foreigners of the state, including the right to nationalize foreign property and the elimination of any privileged status of foreigners. ... These rights imply sovereignty over natural resources of the country, the right of eliminating the foreign military bases on their territory and the withdrawal of foreign military forces.”<sup>37</sup>

The outer side of this concept directly covers a range of rights and corresponding responsibilities, the presence of which allows the state to act in the international arena as competent subjects due to their international personality. Having these rights and responsibilities, as well as the ability to implement them in the field of international relations, are the summands of the international legal concept of “states' subjectivity”.

The enumeration of state's rights, including the rights that characterize the outer side of the sovereignty of the state, can often be found in various textbooks and monographs on international law. By the above mentioned “outer” state rights include: the right to peace, the right to international communication and cooperation, the right to equality with other states, the right to exchange diplomatic, consular and other representatives, the right to participate in international conferences, the right to participate in the universal international treaties without any discrimination, the right to participate in the creation and improvement of international law, the right to membership in international organizations, the right to neutrality<sup>38</sup>.

Since all of the above mentioned rights are equally common to all states, regardless of differences in political and economic and military potential, population and territory size and are meaningful

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<sup>37</sup> Baratashvili D.I. Principle of Sovereign Equality of States in International Law. Moscow, 1978, P. 95. [Бараташвили Д.И. Принцип суверенного равенства государств в международном праве. М., 1978, с. 95].

<sup>38</sup> International Law. (Tunkin G.I., ed.), Moscow, 1994, P. 88; Baratashvili D.I. Principle of Sovereign Equality of States in International Law. Moscow, 1978, pp. 95-96; Talalaev A.N. International Treaty Law: General Issues. Moscow, 1980, pp. 104-105, and others. [Международное право. Под ред. Г.И. Тункина. М., 1994, с. 88; Бараташвили Д.И. Принцип суверенного равенства государств в международном праве. М., 1978, с. 95-96; Талалаев А.Н. Право международных договоров. Общие вопросы. М., 1980, с. 104-105 и др].

points of the concept of “state sovereignty”, in literature it is common to call them basic or sovereign rights. At one time, F. F. Martens correctly noted that “[w]ithout these rights, the state is not able to reach a reasonable goal in international life, and without them they are not members of the international communication.”<sup>39</sup>

In the beginning of the paragraph in connection with the above mentioned definitions of state sovereignty and statements of various scientists about the need to substitute the notion of “sovereignty” or abandoning it, we have presented our point of view regarding the nature of sovereignty at the present stage and the place of the principle of state sovereignty in the modern system of international law.

As it can be noticed from above, in our points of view there is no tendency of going to extremes while resolving the question of the relationship between international law and the sovereignty which in the literature was manifested either in the denial of international law or the sovereignty. In our opinion, we have initially proceeded from the only right assumptions about the interdependence of these two concepts.

I. D. Levin stated: “[i]nternational law and sovereignty are not only compatible, but are also a logically necessary correlation as they presuppose each other.”<sup>40</sup>

Only with such understanding of the nature of their relations and taking into account the qualitative changes in the essence and content of state sovereignty, which have occurred recently, its role and place in the world can be properly and objectively assessed today. In conclusion, we will add that to date and in the near future no alternative to state sovereignty is yet visible.

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<sup>39</sup> Martens F.F. Contemporary International Law of Civilized Nations. Part 1., Moscow, 1996, P. 201. [Мартенс Ф.Ф. Современное международное право цивилизованных народов. Т.1. М., 1996, с. 201].

<sup>40</sup> Levin I.D. Sovereignty. Moscow, 1948, P. 112. [Левин И.Д. Суверенитет. М., 1948, с. 112].

# IMPLEMENTATION AND MEASUREMENT ISSUES FOR THE PRECONDITIONS OF THE RULE OF LAW IN THE EU ACCESSION PROCESS

**Artur Ghazinyan<sup>1</sup>**

The European Union from its very beginning has accepted more than 20 states, and various criteria and standards for the accession were developed and implemented by its institutions. Among the most important criteria for accession are the ones accepted in 1993 in Copenhagen, and a candidate state is obliged to satisfy them. A special importance is given to the criterion of the rule of law and to the demand for its guarantee, which still needs to be clarified despite the condition of its sufficient application.

As a result of the USSR collapse, a new geopolitical situation was created on the European continent, which resulted in the accession of many Central and Eastern European states to the EU. Since the initial stages of enlargement included only three states, the established situation demanded the creation and implementation of new principles and tools to regulate and control the EU accession process for more number of states. To face challenges and to solve the proposed issues, the European Council laid down the EU accession criteria in Copenhagen in 1993, which were integral and essential conditions for a candidate state to meet. The following provision of the conclusions of the EC agreed that “[t]he associated countries that so desire shall become members of the EU”. The membership will take place as soon as a candidate state will assume the obligations by satisfying political and economic conditions required<sup>2</sup>.

The conditions to abide by candidate states are as follows:

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<sup>2</sup> European Council in Copenhagen, Conclusions of the Presidency, (21-22 June, 1993, SN 180/1/93) 12:

➤ Political: stability of institutions safeguarding democracy, the protection of human rights, rule of law and the protection of minorities;

➤ Economic: existence of viable market economy, the ability to respond to pressure of competition and market forces within the EU;

➤ Legal: the adoption of the law of the EU (acquis communautaire).

With the guidance of this principle, where the EU legal norms are to be applied in the given country from the day of accession, which are prioritized over the national legal system, implemented directly and endowed with legal protection, Madrid European Council proposed another condition, which is:

➤ The enlargement of administrative structures through the efficient adoption of the EU law in the national legal system.

The EU also assumes definite obligations besides candidate states. Particularly, Copenhagen European Council provided that “[t]he EU ability to include new states simultaneously maintaining the activeness of integration process is one of the most important condition in the context of common interests between a candidate state and the EU.”

To safeguard and ensure the efficient and integral implementation of the conditions, the EU defined and deeply implemented the administrative system of conditionality through which the EU would assist the states willing to meet the proposed conditions and evaluate the fact of the criteria sufficiently established. The aim of the European Commission was to create a transparent and competitive environment for candidate states throughout their pre-accession stage. This reality was clearly defined in the conclusions of Copenhagen European Council in 1993 and in the “White Paper on Enlargement”, where in the awaited enlargement process the accession of new states to the EU was directly linked with the progress to satisfy the EU defined criteria by that state.

Within the framework of this article, a great attention will be

paid to the political requirements of an accession, in particular, to the requirement for the stability of institutions guaranteeing the rule of law, the respect for and protection of human rights and minorities<sup>3</sup>.

The rule of law requirement is essential for the EU membership, in accordance with the ensued criteria defined by the European Council and by the practice of further enlargement. To answer the question of *what* this principle means for the EU itself and for member-states, it is necessary to go back to the Europe of Middle Ages, where ruling brutal traditions, distorted values and the aspirations of totalitarianism caused numerous pains and sufferings to the peoples of Europe. Ongoing conflicts and ceaseless wars, political persecutions, law violations and its implementation at will resulted in the struggle among the societies and in the long-lasting debate among various ideologies. During the centuries, as a result of this continuous struggle and debates, peoples and states of Europe succeeded in establishing a comprehensive and commonly accepted situation where social ideals would be shaped and formed by including all layers of the society and their all expectations. As a result, the rule of law became the pillar of the European civilization that laid the foundation for the integration of European countries after the World War II. This principle was common not only for the EU institutions, but also for the constitutions of its member states. During some time, the rule of law became a common value, which should be respected in the EU as well as should be encouraged in third states by frequently mentioning it as a precondition for the establishment of bilateral and unilateral international relations and for the provision of technical assistance. In the terminology of international relations, this is called conditionality, which is applied within the scope of both political and economic cooperation.

As it has been mentioned above, the rule of law is of great significance in the Copenhagen criteria, particularly, in the sphere of EU and a third state relations and in the preconditions defined for the provision of technical assistance. Nonetheless, prior to the settlement

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<sup>3</sup> Stefanie Ricarda Roos, "The Rule of Law" as a Requirement for Accession to the European Union. [http://www.kas.de/wf/doc/kas\\_15604-544-2-30.pdf](http://www.kas.de/wf/doc/kas_15604-544-2-30.pdf)

of the requirement of the principle of the rule of law for the third countries, it is necessary to figure out how this principle is understood in the supra-national and interstate legal systems and how the EU being a political body, will carry out the protocoled progress and failures made by these states in the sphere of the rule of law, at the same time informing the double standards applied by the EU. The point is that by establishing requirements for candidate and non-candidate states the EU faces two problems. The first one lies in the question of how to evaluate the fact of this principle's preservation and its implementation in the reality and the second one is in the question of what to do if in reality this law is not prioritized in concrete legal systems of a state, yet a political decision for this country's accession to the EU is to be made. This problem became apparent in the EU enlargement process after 2004, as a result of which states that were quite far from being legal states and far from the implementation of the rule of law still became EU members. This issue needs to be studied in complex, which aims at forming a complete concept of the "rule of law" and to reveal the scope of tools with the help of which it will be possible to evaluate the level of the principle's functioning and its efficiency in the legal system of a third country.

Before 1993 the conclusions made by the Copenhagen European Council were aimed at clarifying, improving and depoliticizing the process of the EU accession, since "[a]ll candidate states were to join the EU on the basis of the same criteria and equal standards"<sup>4</sup>, in reality the process led to unpredictability and obscurity<sup>5</sup>. The EU requires meeting indefinite and common criteria from states willing to access, which resulted in the compatibility and incompatibility of the evaluations of obscure nature given by the European Commission<sup>6</sup>.

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<sup>4</sup> Luxembourg European Council 12-13 December 1997, §10.

<sup>5</sup> Hilton, C. (2000), "Enlargement of the European Union: A legal Analysis", in Arnall, page 402.

<sup>6</sup> Inglis, K. (2000), "The Europe Agreements Compared in the Light of Their Pre-Accession Reorientation", page 1209.

The concept of the “principle of the rule of law” is quite wide in the EU’s internal and external agenda. It includes both the confirmation of common values, such as fundamental equality and dignity of all people and in the narrowest sense, e.g. the completeness of obligatory laws for EU member states and private entities. This principle is equally applied in the EU formation, as well as in the basis of the constitutions of member states, by this forming European constitutional heritage. All scientists agree that the principle of the rule of law should be viewed in terms of governance, i.e. in the correlations between the governing and governed ones. In these correlations the governing party is endowed with the ability to enact laws and mechanisms to implement administrative enforcement, whereas governed ones expect that they will use these mechanisms in a certain way and will undertake certain restrictions. The state is recognized as legal where the governed ones will manage to reach the utmost transparency in the decision making process by including wider public layers in this process, yet the governed ones will willingly accept the proposed laws and will respect their provisions in their everyday life. In this situation the laws will be legal and will be based and will not contradict the natural human rights and freedoms.

During the whole history of the application of the EU enlargement law, the requirements for democracy and the rule of law directly and indirectly were included as the preconditions for the EU candidate states. The links on these principles can be found in the introduction of the Treaty establishing a Constitution for Europe, the opinions<sup>7</sup> of the Commission, in the numerous declarations and statements<sup>8</sup> of the Council, Commission and Parliament as well as in

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<sup>7</sup> European Commission, Opinion of 23 on Greece, May 1979, OJ 1979 L 291; as well as Opinions on the accession of Spain and Portugal; European Commission, Opinion of 31 May 1985, OJ 1985, L 302.

<sup>8</sup> Council Declaration of European Identity, enforcing human rights and democratic rule (13-14 December 1973), Joint Declaration of the European Parliament, The Council and The Commission on the respect of fundamental rights (5 April 1977), European Council Document, adopting the Joint Declaration (7-8 April 1978), Bull. EC 3-1978; European Parliament Declaration on Fundamental Rights and Freedoms (12 April 1989), The Council, Commission and European Parliament Joined Declaration on democracy, transparency and subsidiarity (25 October 1993) and etc.

the Court decisions of the Community. The articles written in the initial founding treaties of the communities that had regulated the Community enlargement process, directly defined that “European states” could apply for the accession, whereas any direct link to the precondition of democracy and rule of law was not made in these articles<sup>9</sup>, which indeed did not mean that democracy and the rule of law were of less importance than other principles of the enlargement basis. The principle of “Europeanization” mentioned in the treaties, in practice was attributed with wider meaning, sometimes including the principles of democracy and the rule of law. In academic literature the possible meaning of the term “European” was discussed in two definitions, i.e. geographical and political, where democracy and the rule of law were included as the tradition and heritage of Europe<sup>10</sup>. Besides scientists, the European Commission, following the theories of the enlargement at an early stages brought forward by scientists, also expressed its position on this question by stating that the term “European” includes geographical, historical and cultural elements<sup>11</sup>. Besides theoretical formulations, the Commission also applied these two principles in the enlargement practice, rejecting the application supplemented by Greece that was in a military coup<sup>12</sup> and application of Spain that was under the dictatorship of Franco<sup>13</sup>.

The preservation of the principle of democracy as the EU

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<sup>9</sup> Article 98 of the European Coal and Steel Community, Article 237 of the European Economic Community and Article 205 of EURATOM.

<sup>10</sup> For more details, see Hoffmeister, F. (2002a), “Changing Requirements for Accession”, in Ott, A. and Inglis, K. (eds.), *Handbook on European Enlargement, A Commentary on the Enlargement Process*, The Hague: T.M.C. Asser Instituut and Fisse, M. (2003), *Political Conditions for “Being a European State”, The Copenhagen Political Criteria and Turkey*, Afyon: Afyon Kocatepe Üniversitesi.

<sup>11</sup> European Commission (1992), “Europe and the Challenge of Enlargement”, 3 *Bull. EC* suppl.

<sup>12</sup> Contogeorgis, G. (1978), “The Greek View of the Community and Greece’s Approach to Membership”, in Wallace, W. and Herreman, I. (eds.), *A Community of Twelve? The Impact of Further Enlargement on the European Communities*, Bruges: De Tempel, Tempelhof.

<sup>13</sup> Carrillo Salcedo, J. A. (1978), “L’impact de l’adhésion sur les institutions et le droit des pays candidats: Espagne”, in Wallace, W. and Herreman, I. (eds.), *A Community of Twelve? The Impact of Further Enlargement on the European Communities*, Bruges: De Tempel, Tempelhof.

accession requirement was clearly introduced by the arguments presented by the Commission in *Mattheus v. Doego*<sup>14</sup> case by uniting geography and democracy. In the same decision the Commission gave the interpretation of Article 237 by declaring that a state can join the EU if only: 1) This state is European, and 2) The constitution of this state guarantees the presence and the continuation of democracy on one hand, and the protection of human rights on the other hand.

In fact, it may be concluded that prior to the definition of the Copenhagen criteria, for the enlargement of its borders the EU implemented more political rather than economic preconditions, as a result of which democracy and the rule of law acquired essential and prioritized importance in this enlargement process.

This condition is important for the reason whether the Copenhagen criteria within the scope of the importance of economic precondition had eventually changed the situation since 1993. The reality is that the criteria brought up for public discussion, developed and proposed by the European Union in Copenhagen were amended in the process of the further activity of the EU institutions by once again prioritizing political criteria. Particularly, the Luxembourg European Council in 1997 defined that for the start of any type of the accession negotiations the satisfaction of Copenhagen political criteria would be sufficient<sup>15</sup>. Despite the fact that in 1999 the European Council changed its position with regard to ascribing high significance to political criteria and by equally evaluating the Copenhagen criteria, the European Commission in 1999 accepting the Composite document adhered a policy adopted by the Council in 1997 which reconfirmed that for a candidate state to meet the Copenhagen criteria would be sufficient for the start of the accession negotiations. In fact, in 1993 in the Copenhagen criteria political requirement was determined essential and prioritized together with economic requirement and the requirement for the protection of

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<sup>14</sup> Case 93/78 *Mattheus v. Doego* [1978] ECR 2203. (6) Case 93/78 *Mattheus v. Doego* [1978] ECR 2203, at 2208.

<sup>15</sup> Luxembourg European Council 12-13 December 1997, 25.

minority rights. In Verheugen's<sup>16</sup> opinion, it became apparent that the EU was not ready to start an accession dialogue with countries, where democracy, human rights protection and the rule of law were still not on the appropriate level or in an obscure condition. Here it should be mentioned that the precondition to satisfactorily meet political requirements does not refer to the final accession to the EU, but it refers to the start of the accession negotiations with a candidate state by the Commission and the Copenhagen criteria are equally obliged to meet for the final accession. To prove the statement, it is sufficient to bring Romania and Bulgaria as an example, when in 2004 their accession was postponed for not meeting necessary economic requirements. If we compare the pre-Copenhagen and post-Copenhagen EU enlargement processes, it may be easily assumed that the requirements and conditions for the EU accession differ significantly. Particularly, if before 1993 the negative evaluation of the economic situation of a candidate state made by the Commission was not an obstacle for that country's accession, nonetheless in the result of Copenhagen criteria an economic condition of a candidate state acquired essential significance.

In reference to the depth and limits of the applicability of the rule of law, there is no discrepancy between the EU and member-states, yet for states, desirous of accessing to the EU and of having economic and political cooperation, this principle is of mixed perception. As a common value, all mentioned states share the importance and significance of the principle of the rule of law, whereas opinions are different regarding the process of the practical preservation and applicability of this principle. The issue is tangible in case of candidate states, since the pre-accession process implies the identification of legal and legislative systems with that of the EU's legal institutions and principles. As for non-candidate states, they do not have a guideline to be applied in the practice of the applicability of the rule of law. The political association is not a membership and it does not imply harmonization of legislation,

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<sup>1</sup> Verheugen, G. (2000), 'The Enlargement of the European Union', in *5 Eur. F. Aff. Rev.*, page 441.

whereas the EU determines the implementation of these proposed preconditions as the necessary condition for the deepening cooperation and with regard to which the European Commission evaluates the accomplished work and composes and publishes its annual reports. At first sight, everything seems clear and simple, yet certain questions arise when issues are studied more profoundly, and to which neither EU nor a third state seem to have any answers. The EU definitely accepts that economic development is totally based on legal definition of intergovernmental economic transactions, as well as on the ability to carry out transactions, on the protection of intellectual property and on the ability to settle commercial disputes through fair court procedures. As a result, the principle of legality strengthens the potential of economic and political systems of any member-state in the actions of the governments.

The EU has conveyed this message by means of various and numerous documents, yet the prioritization of the principle of the rule of law is not unequivocally perceived by national legal systems of the member states. It may be stated that this requirement is quite understandable in the old EU member-states, which reduces their ability to encourage the rule of law without being accused of hypocrisy. Nevertheless, this issue is very apparent in newly accessed Eastern European states, which proves the fact that EU's impact is the highest on the candidate states during the pre-accession period, when the conditionality of cooperation is applied. From the beginning of the accession, the process of domestic reforms is not so interrupted but is rather slowed down and leads to the weakening of the requirement of the rule of law and its promotion in the EU external powers.

The European Commission and other performers in their external activities interpret the rule of law in quite a narrow sense, i.e. the activity of judicial system, particularly, in the criminal sphere, and in certain cases within the framework of the fight against corruption. In this narrow sense, the definition of "the rule of law" overlooks important components, such as activities and decisions of all endowed with governmental functions both in public and in

private sectors as well as the presence of a permanent control over them through administrative and constitutional systems. Moreover, the definition given by the Commission denies the fact that the “rule of law” is only a law and not a right, and just the presence of good laws is not a sufficient precondition to consider the rule of law being established in the legal system of the given state. The reality and the extent to which the law enforcement bodies and institutions of the state are willing to use these regulations in practice is more important, and most importantly the extent of how the final beneficiaries, citizens of good laws are ready to accept these regulations and to meet their requirements, in its turn, acquires social significance. The requirement and precondition of the “rule of law” in the third states, including the promotion and implementation of the EU oriented actions in candidate states do not explain the main function of this concept, i.e. to solve political and social confrontations within the state, which creates obstacles for public and state institutions of the state to fulfill their main social mission and to keep the country in constant conditions of instability and tension. This is mainly typical of states of a non-democratic governing heritage, especially post-social Central, Eastern European and post-Soviet countries. The European integration (accession to the EU) is the most important and the most efficient mechanism to get rid of this heritage and a tool to create a legal state, whereas the EU — prioritizing the geographical and political interest and economic expectations and putting prevailing political interest over fundamental values on the basis of the cooperation with these states — hasn’t managed to get rid of the application of the crucial double standards yet.

This criticism, in fact, is more relevant when we consider the process of the progress of the “rule of law” worldwide. In the EU Commission evaluation reports, few questions referring to the issue of the rule of law is applicable. Moreover, prevailing majority of such progress of “the rule of law” doesn’t follow the analytical limit at all, but describes the institutional characteristics in more details, which are necessary for the state to show its ability to adopt a

modern legal system. The reluctance of the EU to conceptualize “the rule of law”, the EU in fact preferred to accept restriction based on the description, based on one of the analytical restriction, which is equally applied by the Organization of Economic and Cooperation Development, the World Bank, the USA and other international units promoting the rule of law during the last twenty years. Summarizing the above mentioned, it becomes more obvious that this process is present:

- The focus of the attention on state institutions, whereas in practice, the EU evaluation reports are primarily concentrated on judicial systems;

- Agenda established by foreign experts, mostly lawyers, especially legal scholars, attorneys and high-level officials;

- Intention to discover issues of legal system and their legal solutions which refer to the courts, prosecutions, agreements and legislative reforms as well as other institutions and processes, where lawyers have an essential role.

As a result, the financing of a third country by the EU and the measurement of its influence is directed to the concrete sphere of the activity, in particular to the renovation and building of court, the procurement of furniture, computers, materials and other equipment, the development of new laws and regulations, the training of judges, lawyers and other legal staff, the improvement of administrative and management skills of the judicial bodies, the assistance for educational institutions of judges and lawyers, associations of lawyers and other spheres of activities.

Eventually, a situation has been created when any lawyer, a scholar analyzing numerous EU strategic documents comes to a conclusion that the EU in general requires to create “[i]ndependent, highly qualified and well-trained staff, highly paid, respected and easily accessible judicial system for people. This is to have a high level of self-governing, including the process aimed at the training of judges through special schools and the training of judges from other spheres, at the activity of self-governing bodies, as well as the process of judges appointments, and guarantees for non-interference

in the court activities.”

If we try to localize all the mentioned requirements on the activity of judicial bodies of the Western Europe states and on the USA, we will see that in certain cases the appointment of judges takes place by means of political orientation, and whose decisions in future may have shades of political ideologies, they do not get systematic education, the salary is lower than those of lawyers working in private law offices, the process of establishing justice is slower in comparison to other courts. Nonetheless, if the activity of this court happen to be evaluated by the EU, then it will pass the required minimum, as the court in the end establishes justice without getting into the technical and procedural drawbacks and defects.

In the anatomical approach of the principle of the “rule of law”, to make inner challenges and traps more visible, we try to place them in three main spheres: 1) The focus of the unnecessary attention by the EU on the legal and institutional system of the state; 2) state centralization; and 3) complete attention on means rather than on aims.

1. Anatomical approach has narrowed the boundaries of the evaluation of the “rule of law” and the construction of reforms focusing it exclusively on law implementation state bodies, particularly courts, police, the prosecution and penitentiary institutions. Most of the rule of law issues are beyond the jurisdiction of the law enforcement bodies and are in the wide sphere of the relations between authoritative centers. The European Commission, in its evaluation reports, realizes and confirms this fact, yet it does not pay a proper attention to this and it has its own reasons. The most essential reason for EU’s focused attention on these institutions is that EU possesses a comparative advantage and sufficient levers of impact to reach tangible results. Nevertheless, it is not clear which institutions having formal nature should not be a cornerstone for the evaluation and reforms of the rule of law. One of the main consequences of the current modern approach is the ambiguity of legal and institutional, which, on the one hand, the state should ensure the reforms of its institutional system to reach the rule of law

and on the other hand, to guarantee a complete compliance with EU law<sup>17</sup>. As a result, in parallel with the EU developments, the process of spreading sustainable and appropriate laws commences, which entails the change of the national legislation at impermissible frequency and great risks for legal stability and certainty, which are essential and important guarantees for the rule of law. Frequently amended and altered laws as a rule have low quality and do not fully regulate public relations of a concrete sphere. National authorities in this case face the dilemma which is either to safeguard the rule of law or to change the national legislation in compliance with the EU law. These two are considered the most important precondition for the EU membership, and the European Commission is the body responsible for the evaluation and implementation of the control aimed at their execution, and which preferably applies the mathematic and formal legal and institutional evaluation to avoid the inner contradiction.

2. The unnecessarily great attention paid by the EU on the reforms of the national institutional system has its impact on the evaluation process by the EU of the work carried out by the candidate state. This is particularly noticeable when the opinions and conclusions of international experts who derived from the industrialized societies are to be taken into account. The hired experts from Brussels are frequently considered “right way guards” which are to develop strategy for socialization and to try to find more or less answers with this respect in the candidate states. To promote reforms and to make them more efficient, the Commission mainly relies on the body of public administration. The EU experts and officials alongside with NGOs organize discussions on the reforms of previously unjustified and compressed legal system and finance only to praise the implemented work. The more pro-active representatives of the society are rarely included, even if they can

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<sup>17</sup> In the process of identification of the national legislation with the EU law can be replaced with other law only due to the fact that the latter is in compliance with EU law requirements and these two were sufficient for the prior precondition of the rule of law.

lead wide layers of the society.

3. More attention on means than on aims. The above mentioned two tendencies derive from the approaches based on anatomical institutions of the rule of law, especially the focus of the attention more on means than on aims. The evaluation focused mainly on institutions, as a rule, does not answer the question of what is the reason for vulnerability of judicial, criminal and administrative and law enforcement systems despite the financial and technical assistance to the candidate states and what should be done to improve the situation. Since some rule of law issues arise from the resources, yet others also from the lack of training.

As a result, in terms of evaluation the institutional modeling fails the main testing of the strategy, i.e. if it is indeed possible to bring the resources of the problematic state in compliance with the aims and what should do the EU to assist that very state. The progress for the evaluation of this method simply observes any legal institution and law and compares them with identical institutions and laws of the Western states and then tries to create “facilities “ to harmonize them with each other, and does not take into account the weak and strong sides of the national reformers. This restricts the limits for the possible interference and applies tools such as the development assistance and technical aid, underestimating other encouraging methods of changes. Another shortcoming of this approach is the fact that it ignores available inner resources and significance of their opinions of the present issues as well as the origin of factors hindering the process of reforms and well-known methods to neutralize them. This approach views the process of reforms as apolitical without implying the methods by which the reforms of certain spheres may be hindered as a result of the discretionary application of powers reserved by law. Among the mentioned flaws this approach lacks the ability to catch the moment of timely intervention equally in all spheres, whereas it was possible to make use of opportunities for timely political and social changes which would make the process of reforms more efficient.

The EU approach and applicable policy aimed at the promotion

and implementation of the rule of law in the third countries leaves essential participants, i.e. citizens, out of the game. Focusing the attention and resources on state bodies and institutions of public administration and on the other hand, overlooking main barriers for the implementation of the rule of law in involved states, the EU reduces the public credibility and trust of the Progress reports drawn up by itself by distracting the attention, resources and financial means from the issues which the EU tries to solve.

# **LISBON LEGAL REGIME OF CONCLUDING INTERNATIONAL AGREEMENTS BY THE EUROPEAN UNION**

**Arman Sargsyan<sup>1</sup>**

Upon entering into force in 2009, the Lisbon Treaty transformed the integration process of the European Union on a new legal-political level, thus causing various changes in different areas. The changes also touched the area of the EU external relations; one of the forms of reflection is the conclusion of international agreements with other subjects of international law. The procedure for concluding such agreements is prescribed by the Treaty on the Functioning of the European Union which is the integral part of the Lisbon Treaty. Before the Lisbon Treaty entered into force, there were two different procedural legal bases of conclusion by the European Union of international agreements: one of which was applied while concluding international agreements in supranational areas, the second — in the intergovernmental. These legal bases were Article 300 of the European Community Treaty and Article 24 of the European Union Treaty<sup>2</sup>.

After entering into force of the Lisbon Treaty, there is only one procedural legal basis of conclusion by the European Union of international agreements. The procedure for concluding international agreements has been introduced in a new way after the Lisbon Treaty. The legal basis of concluding international agreements is prescribed by Article 218. On the assumption of this article and international practice, the procedure for concluding international

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<sup>2</sup> Article 300 of the Consolidated version of the Treaty Establishing the European Community [2002] OJ C 325/33 and Article 24 of the Consolidated version of the Treaty on the European Union, [2002] OJ C 325/5.

agreements may be divided into several stages.

The first stage is the opening and conduct of negotiations. As it stems from Article 218(2) and (3), before opening the negotiation process the approval of the Council of the European Union should be sought. The proposal to open negotiations may be made by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy. By the time, the European Commission may propose to open negotiations on any issue, whereas the High Representative of the Union for Foreign Affairs and Security Policy may make recommendations to open negotiations only in the sphere of foreign affairs and security policy.

As to the conducting of negotiations, currently it is implemented by the European Commission and the High Representative of the Union for Foreign Affairs and Security Policy. The latter is nominated by the European Council which adopts the decision by a qualified majority. Simultaneously, the High Representative is the deputy of the President of the European Commission. Before the Lisbon Treaty, the negotiations for concluding international agreement in the sphere of common foreign and security policy were conducted by the member state holding the presidency in the Council of the European Union<sup>3</sup>.

The member state holding the presidency in the Council of the European Union, before the Lisbon Treaty, was also responsible for conducting negotiations in the sphere of criminal matters<sup>4</sup>.

Now the negotiations in this sphere are conducted by the European Commission as the Lisbon Treaty does not provide for any provision thereon, and the only provision refers to the common foreign and security policy area.

The circle of subject involved in the negotiations process is not impacted either by the type of the international agreement which the

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<sup>3</sup> Articles 17 (4) and 18 (1) of the Consolidated version of the Treaty on European Union (Lisbon Treaty), [2008] OJ C 115/1.

<sup>4</sup> Article 38 of the Consolidated version of the Treaty on European Union, [2002] OJ C 325/5.

European Union intends to propose to the third state. There are international agreements which involve area competences belonging both to the European Union and third states. For this reason, these competences in EU law literature are called mixed agreements (for example association agreements and cooperation agreements). The mixed agreements are ratified by all the member states, according to their national constitutional procedures, although the member states do not participate in the negotiation process. This is conditioned by organizing the negotiation process more efficiently and representing the European Union on a single face. The negotiations are conducted by the European Commission according to the single mandate formulated in the member states.

Lisbon Treaty envisages another novelty in terms of subjects entitled to conduct negotiations, which was not envisaged in the European Community Treaty and the European Union Treaty. According to Article 218(3) of the Lisbon Treaty, Council of the European Union may, depending on subject matter of the international agreement, adopt a decision to nominate the Union negotiator or the head of the negotiating group<sup>5</sup>. This means that the negotiations, besides the European Commission and the High Representative with the authorization of the Council of the European Union, may be conducted by other subjects. Probably, Article 218 (3) of the Lisbon Treaty by saying “nominate the Union negotiator or the head of the negotiating group” means the cases when the negotiations on international agreement on behalf of the European Union and with its authorization are conducted and signed by the member states. On this matter clarification will be made after practical use of Article 218(3).

The role of the Council of the European Union in the negotiation process is not only limited by authorizing its opening, as the Council is entitled to decide the limits of negotiations. It is reflected in the competence of the EU Council to address directives

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<sup>5</sup> Article 218(3) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1.

to the negotiator<sup>6</sup>. In case of such directives, the negotiations must be conducted in accordance with them. Such directives are the basis of negotiations and are non officially called “negotiating mandates”<sup>7</sup>. Although the directives have general content, sometimes the EU Council prescribes certain results that must be achieved by the negotiator in the result of negotiations as well as permissible deviations which the negotiator is entitled to make.

In addition to adopting directives, the EU Council is also entitled to establish a special committee composed of national government representatives which must be consulted while conducting negotiations<sup>8</sup>. The functioning of the committee is consultative in nature and tends to support the European Commission during negotiations.

The second stage of conclusion by the European Union of the international agreement is the signing of the agreed text of the international agreement. The signing of the agreement is made by the negotiator, but before signing the agreement, the EU Council decides to endow the negotiator with the right of signing. This decision is adopted based on the proposal by the negotiator.<sup>9</sup>

The third stage of conclusion by the European Union of the international agreement is the ratification. Although Article 218 of the Treaty on the Functioning of the European Union uses the term “to conclude”, it refers to the “ratification” as with that action the European Union gives its consent to the international agreement to be binding thereupon. According to the Vienna Convention on the Law of Treaties of 1969 and Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986, by saying ratification it is

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<sup>6</sup> Article 218(4) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1:

<sup>7</sup> Panos Koutrakos, “EU International Relations Law”, North America, Hart Publishing, 2006, page 139.

<sup>8</sup> Article 218(4) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1.

<sup>9</sup> Article 218(5) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1.

understood an action directed to the recognition of compulsory character of the international agreement<sup>10</sup>. In the light of these conventions the use of the term “to conclude” is justified by the fact that according to the case law of the European Court of Justice, the European Union is obliged to preserve international law which implies an obligation to use legal concepts of international law with its precise sense.

Moreover, it should be noted that “conclusion of an international agreement” is a broader concept and can involve all the stages of conclusion of an international agreement. For this reason, in order to characterize the process of recognition of binding character of the international agreement by the European Union it is rational to use the term “ratification” but not “conclusion”.

Ratification of an international agreement is made, upon proposal by the negotiator, by the Council of the European Union.<sup>11</sup> The EU Council does not share this right even with the European Commission. It is apparent from case *France v. Commission* in which the Court of Justice of the European Union annulled European Commission ratification act of the agreement concluded with the USA in the sphere of competition law stressing that “[n]either the essential role of the European Commission in the sphere of competition policy, the practice of concluding administrative international agreement nor analogy with the Euratom Treaty do not give the European Commission the right to ratify and to breach the competences of the Council of the European Union<sup>12</sup>.

Although the right to ratify an international agreement is not the

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<sup>10</sup> Article 2 point (b) of Vienna Convention on the Law of Treaties 1969, United Nations, *Treaty Series*, vol. 1155, p. 331 and Article 2 point (b) of Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations 1986, *Official Records of the United Nations Conference on the Law of Treaties between States and International Organizations or between International Organizations*, vol. II (United Nations publication, Sales No. E.94.V.5).

<sup>11</sup> Article 218 (6) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1.

<sup>12</sup> Case 327/91, *French Republic v Commission of the European Communities*, (1994) ECR I-3641:

sole prerogative of the EU Common foreign and security policy, the EU Council ratifies an international agreement after consulting or receiving the consent of the European Parliament. Prior to the ratification of an international agreement, consultation with the European Parliament constitutes a relatively passive participation form, as the European Parliament gives its opinion on the concluding agreement which the EU Council may not take into consideration. Still, the EU Council does not have the right, based on expediency or other ideas, to ratify the international agreement without the opinion of the European Parliament when by the founding treaties it is required to consult with it. Otherwise, the Court of Justice of the European Union may, upon request of the European Parliament or the European Commission, annul the decision on ratifying the international agreement based on breach of essential procedural requirement. Anyway it presupposes the logic of *SA Roquette Frères v Council of the European Communities* case in which the Court of Justice of the European Union annulled the regulation adopted by the EU Council, as the latter didn't consult with the European Parliament before adopting it<sup>13</sup>.

After the Lisbon Treaty, before ratifying the international agreement it is a general rule to get the opinion of the European Parliament, besides the cases when it is needed to get the consent of the European Parliament. Now, the European Parliament must be consulted even when commercial agreement is being concluded<sup>14</sup>.

As to getting the consent of the European Parliament before ratifying the international agreement, it constitutes more active and involved form of participation by the European Parliament in the process of conclusion of an international agreement, since the EU Council is not entitled to ratify the agreement without getting the

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<sup>13</sup> Case 138/79, *SA Roquette Frères v Council of the European Communities*, (1980), ECR 3333, par. 37:

<sup>14</sup> Article 207(3) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1 and Marc Bungenberg, *The Common Commercial Policy after Lisbon*, in *European Yearbook of International Economic Law*, Vol.1, Christoph Hermann, Jörg Philipp Terhechte, (eds.), Springer publishing, 2010, page 129.

consent of the European Parliament. The Treaty on the Functioning of the European Union clearly defines the cases when ratifying an international agreement, the consent of European Parliament is needed. These are:

1. association agreements;
2. agreement on Union accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms;
3. agreements establishing a specific institutional framework by organizing cooperation procedures;
4. agreements with important budgetary implications for the Union;
5. agreements covering fields to which either the ordinary legislative procedure applies, or the special legislative where consent by the European Parliament is required;

before the Lisbon Treaty, in addition to the agreement on acceding to the European Convention for the Protection of Human Rights and Fundamental Freedoms and agreements covering fields to which special legislative procedure applies, in order to ratify all the other above mentioned agreements the European Community Treaty also envisaged a procedure for getting the consent of the European Parliament by the EU Council.<sup>15</sup>

Some hesitation causes the expression “agreements with important budgetary implications”. How it should decide which agreement has important budgetary implication, which one does not? For the purpose of ensuring legal certainty, the Court of Justice of the European Union has defined several guidelines for determining the important nature of the agreement. Particularly, in case *Parliament v. Council* such guidelines defined the duration of the agreement and the percentage ratio donated for the implementation of the EU external actions. In the above mentioned case the European Court of Justice, the Agreement on Fishing concluded with Mauritania which gave the fishermen the right to fish in the waters under the competence of Mauritania, accepted as having important

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<sup>15</sup> Article 300 (3) of the Consolidated version of the Treaty Establishing the European Community [2002] OJ C 325/33.

budgetary implications as it was concluded for a five year period, and the payment made for fishing in the above mentioned waters constituted 1% of the money donated for the EU external actions.<sup>16</sup>

As to the international agreements covering fields to which the ordinary legislative procedure applies, it should be mentioned that the ordinary legislative procedure is the co-decision procedure which conditioned by the extension of application spheres; now it is called the ordinary legislative procedure. The European Community Treaty also envisaged that in case of international agreements involving spheres where co-decision procedure should be applied, the consent of the European Parliament is needed<sup>17</sup>.

Before the Lisbon Treaty, the situation was a bit different when ratifying an agreement covering fields to which special legislative procedure applies, as in the Treaty on the European Community the notion “special legislative procedure” was not provided for and it was created by the Lisbon Treaty. In many articles of that Treaty we can come across a provision envisaging that legal measures on a specific issue must be accepted with application of special legislative procedure.<sup>18</sup> By the way, the Lisbon Treaty, unlike the approach of ordinary legislative procedure, does not clarify which stages the special legislative procedure consists of. It only envisages a provision that in the specific cases provided for by the Treaties, the adoption of a regulation, directive or decision by the European Parliament with the participation of the Council, or by the latter with the participation of the European Parliament, shall constitute a special legislative procedure.<sup>19</sup> The main feature of special legislative procedure is that the initiation to adopt specific legislative measure

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<sup>16</sup> Case C-189/97, *European Parliament v. Council of the European Union*, (1999), ECR I-4741, pars. 31 32, 33.

<sup>17</sup> Article 300(3) of the Consolidated version of the Treaty Establishing the European Community [2002] OJ C 325/33.

<sup>18</sup> Articles 21(3), 22(1,2), 64(3), 86(1) 89 and *etc.* of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1.

<sup>19</sup> Article 289(2) of the Consolidated version of the Treaty on the Functioning of the European Union (Lisbon Treaty), [2008] OJ C 115/1.

can be made not only by the European Commission but also by the EU Council and European Parliament.

Based on the analysis of the relevant provisions of the Lisbon Treaty, the special legislative procedure may be divided in two groups: special legislative procedure — while adopting a legislative measure the opinion of the European Parliament is needed, and a special legislative procedure — while adopting a legislative measure the consent of European Parliament is needed. By the way, when ratifying an international agreement covering fields to which the special legislative procedure applies, the consent of the European Parliament is only needed in case of a pending decision, while adopting by special legislative procedure — European Parliament must give his consent. As we see, the participation of the European Parliament in the conclusion of international agreements by the European Union is brought to minimal. The latter does not participate in the negotiation process. The European Parliament does not either participate in the signing of an international agreement. The only more or less participation in the process of concluding an international agreement is the right of the European Parliaments to participate in the ratification of the international agreement as prescribed by the founding treaties, advising or giving consent with regard to the text of the international agreement. The Lisbon Treaty has not essentially improved the legal status of the European Parliament in this sphere. The power to conclude international agreements on behalf of the European Union is centralized on the hands of the European Commission and the Council of the European Union.

In addition to the ordinary procedure for concluding an international agreement by the European Union, based on the case-law of the Court of Justice of the European Union and the developed practice, we should separate another procedure for concluding an international agreement in the application of which the agreement is concluded by the member states, but the rights and obligations emerge for the European Union. This procedure differs from the ordinary procedure with respect to its participants. When in case of

the ordinary procedure for concluding an international agreement, the bodies of the European Union (EU Council, European Commission, European Parliament, the High Representative of the Union for Foreign Affairs and Security Policy) are involved in all the stages, in case of concluding an international agreement by the member states this role belongs to the latter. The member states may conclude international agreements on behalf of the European Union only with its authorization. Taking into consideration the fact that the right to ratify an international agreement belongs to the Council of the European Union, the latter gives the right to the member states to conclude an international agreement on behalf of the European Union.<sup>20</sup>

Thus, summarizing the aforementioned we should state that the Lisbon Treaty has made drastic changes in the sphere of concluding by the European Union of an international agreement. It has significantly extended the functions of the European Parliament endowing it with essential role in the process of concluding an international agreement, however in the process of concluding by the European Union of an international agreement the main role continues to belong to the Council of the European Union and by virtue of which the member states make significant control over that process.

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<sup>20</sup> Marise Cremona, "Member States as Trustees of the Community Interest: Participating in International Agreements on Behalf of the European Community", EUI Working Paper, Department of Law, Law No.2009/17, 2009, page 5.

## **JUDICIAL APPROXIMATION PROBLEMS OF THE RA LEGISLATION IN THE CONTEXT OF EUROPEAN INTEGRATION**

**Gor Torosyan<sup>1</sup>**

The increase of reputation of the judicial system and the necessity of reforms of the prosecution system in the implementation context of the Action Plan are clearly emphasized in the Report of the European Commission on Armenia from the European Neighbourhood Policy implementation in 2009.<sup>2</sup> The same document attaches great importance to the proper implementation of the legislation of these spheres. During the two stages of judicial reforms, Armenian authorities tried to undertake many legislative and organizational, as well as institutional measures which will raise the independence and reputation of the judicial system and public trust toward the courts. The concept of judicial reforms also comes from EU-RA ENP action plan requirements.<sup>3</sup> In the sphere of justice, especially in the sphere of judicial power, the EU-RA partnership is carried out within the framework of the ENP Action Plan and for ensuring its implementation.<sup>4</sup> But the measures undertaken in that

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<sup>2</sup> Commission staff working document accompanying the communication from the Commission to the European Parliament and the Council, Taking stock of the European Neighbourhood Policy, Implementing of the European Neighbourhood Policy in 2009, Progress Report Armenia, Brussels, 12.05.2010, SEC (2010) 516.

<sup>3</sup> Technical support to the Ministry of Justice or the Group of improvement progress, FWC BENEf LOT N° 11, N° 2010 /234609 Version 1, Initial report, 2010 June. It should be mentioned that the issue of developing judiciary system is in the center of the EU till now and it can be also seen in the documents of 2011.

<sup>4</sup> Implementation of the European Neighbourhood Policy in 2011, Regional Report: Eastern Partnership. Joint Communication to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Brussels, 15.5.2012 SWD(2012) 112 final, p. 4.1-Platform 1 - Democracy, good governance and stability.

sphere mostly relate to the institutional reform of the judicial power and hardly contain any measures for the legislative approximation between the RA and the EU. The only aim is the harmonization of the Code of Ethics for Judges to the EU criteria ensuring complete use of judicial ethics.<sup>5</sup> From this point, within the framework of the judicial power, currently the existence of the mechanisms for the approximation between the RA and the EU legislations, or measures carried out towards it may not be spoken about. So it is obvious that the EU-RA partnership in the sphere of judicial power mainly concerns the rise of the level of judicial power activities, and there are no certain mechanisms for the approximation of the EU legislation in the sphere of the judicial power activities, and no measures are done for that.

The approximation with the help of the judicial power is first of all connected with the “pre-European interpretation” of the Armenian legislation. It is by its nature more limited and only includes the interpretation of the approximated RA legislation relevant to the EU legislation and judicial practice.

In the general theoretical analysis it is emphasized that in the process of approximation the judicial power must play not a passive but a central role. In Croatia, for example, the authors consider the involvement of judicial power in the process of approximation very important, and for organizing these acts some educational projects should be done.<sup>6</sup>

In Ukraine too, it is emphasized that the three branches of government, including judicial power, should be involved in the process of approximation. The effectiveness of approximation depends on the partnership of the parliament and the executive power in the law-making stage, as well as on the judicial power in the stage of using them. Very often the judicial power is missing from this

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<sup>5</sup> Technical support to the Ministry of Justice or the Group of improvement progress, FWC BENEFL LOT N°112010/234609, Version 1, Initial report 2010 June, page 9.

<sup>6</sup> **Ljerka Mintas Hodak**. Activities of the Government of the Republic of Croatia in the Process of European Integration. Centre for European Integration Studies. C 43, 1999, [www.zei.de](http://www.zei.de)

process, whereas it should play a central role in it.<sup>7</sup> Therefore, the involvement of judicial power in the process of approximation is no less important than of the other branches of government. This is due to a very important fact that approximation is not limited by admitting only corresponding legislative acts. After being admitted, the acts should be applied, and that process should correspond to the EU practice. The solution of that complicated issue is possible first of all due to judicial power the active law-making activity of which will lead to administrative practice. For the independence of judicial power to set mechanisms itself is not enough for making a legal state. In the specialized literature only the mechanisms for the independence of the courts are discussed. But there is another factor not less important as well. The independence of judicial power enhances the responsibility for that. The courts in these conditions become not only law-enforcement but also active law-making body. We can say that legal guarantees for the independence of the RA judicial power are sufficient. Their role in the development of the RA legislation should become bigger and bigger. The issue of training courses for judges becomes more important for the EU approximation.<sup>8</sup> The partnership of judicial powers of countries which have different judicial systems is more easy and effective, as in the opinion of many authors the judges in different countries seem to understand each other quicker.<sup>9</sup> Having acquainted constantly with

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<sup>7</sup> **Iryna Kravchuk.** Approximation of Ukrainian Law to EU Law, Comparative Law Center at the Ministry of Justice. Basic Analysis, [www.batory.org.pl/doc/k3](http://www.batory.org.pl/doc/k3)

<sup>8</sup> It should be mentioned that some steps are done for educational programs of judges in Armenia; mainly through the training program 2012 for judge candidates “Judiciary literacy and reasons”, where a separate topic is devoted to international and foreign law. Judicial approximation is also studied as an innovative method. In discussing judiciary approximation issues, special attention is paid to the EU law and European criterion in judiciary power process. We think that it is positive not only for the effectiveness of the judiciary approximation legislation, but also is an important factor and must integrate not only candidates for judges but also in further training programs.

<sup>9</sup> Sjef Van Erp. *Comparative Law in practice: The Process of Law Reform.* Comparative Law. Ed. By Esin Orucu and David Nelken. Oxford and Portland, Oregon. 2007, page 405.

the EU legal values and introduced the two-sided opinions and discussed them, let us know and understand the principle aspects of the solution of some problems in the EU judicial system. As a result, the worldview of the judges is changing and they start to think like the EU specialist while solving similar cases.

These problems, as in other countries, are typical to the Republic of Armenia. The involvement of the judicial power to the approximation of the EU legislation and its effectiveness derive from the RA judicial system and from the introduction of judicial precedent as the sources of law. Particularly, after Constitutional amendments, adoption of the Judicial Code<sup>10</sup>, the role and the importance of the decisions of the Cassation Court in the system of law sources have changed somewhat. Legal interpretations set forth therein, including the interpretation of law, became compulsory for other courts while examining cases with similar factual circumstances.<sup>11</sup> The activity of the RA judicial practice for 2007-2011 shows that the practice of following the decisions of the Cassation Court in other courts is gradually developing. It means that in the RA some elements of the case law, with some peculiarities, are introduced as well. But like in other countries, in the RA the judicial precedent is limited by the interpretation of the legislation and by its frames. So due to the precedential activity of the RA courts, especially the Cassation Court, the use and the “pre-European” interpretation of approximated legislation, to our mind, will be rather effective. As it is known, new branches of legislation are formed as a result of the approximation of the legislation, or the existing branches undergo serious changes. As a result of the approximation, legislative changes and supplements are all innovations, and they cause many problems in practice and need serious interpretation.

The RA judicial practice is rather poor in this matter. For example, the activity of the Cassation Court for 2006-2008 in the sphere of competition law mostly related to the competition

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<sup>10</sup> Judicial Code, Article 15.

<sup>11</sup> RA Constitutional Court decision N 997 of November 15, 2011, which was developed in the RA Appeals Court decision N 2293/02/10 of April 27, 2012.

administration. But some problems arise in the judicial practice connected with the interpretation of the competition legislation.<sup>12</sup> Its more effective solution is the interpretation of the present legislation with the help of approximation and the contribution to the development of law. Nevertheless, in the last few years in the activities of the Constitutional Court and Cassation Court there is a tendency to the interpretation of the legislation existing in the European values, though they don't convey reference to the EU legislation or there are no principals or thesis of the EU law therein.<sup>13</sup>

It should be noted that the RA Constitutional Court, while examining constitutionality of Article 17 of the Law “On the Financial System Mediator”, directly referred to the Recommendation of the EU Commission on 30 March 1998 N 98/257/EC<sup>14</sup> and, examining the constitutionality of Article 4(5) of the RA Labor Code, referred to the EU court precedent.<sup>15</sup> Despite these developments, the RA Cassation Court has not used and explained Partnership and Cooperation Agreement yet. This can be explained as an absence of institutional structures which would systematically inform the courts about the norms of the EU law.

In our opinion, a kind of structural subdivision should be formed in the judicial power, which will try to make easier the process of approximation of the legislation of the RA with the EU legislation through the judicial acts. We find it possible by creating

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<sup>12</sup> RA Appeals Court decision N 3-1462 of October 26, 2006, N3-1784 October 26, 2006, N 3-2030 October 26, 2006, N 3-1714 October 26, 2006, N3-2000 October 26, 2006, N 3-2031 October 26, 2006, N 185 March 2, 2007. Anyway, a lot of analyses are carried out in the sphere of competitive law in the Appeals Court, though we can't consider them sufficient, and there is no reference to the EU legislation: Ref. e.g. RA Appeals Court decision N/2221/02/10 of April 5, 2013, G. Torosyan, RA Practical interpretations of the Civil Code (RA Appeals Court case), editor T. Simonyan, Yerevan 2013, pages 1059-1063, N 0509/02/09 decision which by the Appeals Court decision was resumed.

<sup>13</sup> Constitutional Court decision SDVo-997 of November 15, 2011.

<sup>14</sup> Constitutional Court decision SDVo-1051 of October 9, 2012.

<sup>15</sup> Constitutional Court decision SDVo-991 of October 11, 2011, where the Court referred to the EU Court Case decision C-411/05 Felix Palacios de la Villa v. Cortefiel Servicios SA of October 16, 2007.

such a body in the structure of the RA Judicial Department. The latter, based on the requests from courts, can give corresponding information of general and certain questions that can arise during the case about the solutions existing in the EU judicial system. Besides, we find that this body should perform expertise of the draft decisions of the RA Cassation Court about interpretation of the legislation in the spheres of approximation. As a result, the RA courts will have a subsidiary body during the examination of the case which will provide appropriate information, and the case, before reaching the Cassation Court and the formation of precedent, will have a right solution through the way of approximation. Based on the special nature of the acts of the Cassation Court and with the help of these acts the approximation will be performed more effectively with expertise, as a result of which the Cassation Court case law in the sphere of approximation will be consistent with the EU applicable practice, and the results of effectiveness of approximation will appear earlier.

The discussion of the above mentioned questions is a necessary but not sufficient condition for clarifying the frames of involvement of judicial power in the process of approximation. In this sphere, the experience of other countries makes apparent the further ways of the RA judicial power. In this regard, the examination of the differences of the activities of the judicial bodies of the EU and third countries represents certain interest. The courts of the EU member state are not only national courts. The principle of the EU judicial protection shows that the latter should apply the EU law and ensure its effective functioning in the member state. The courts of the EU member states must interpret national law under the light of the EU law, and in the case of contradiction must apply the last.<sup>16</sup>

During the first period of the judicial practice development of

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<sup>16</sup> European Law. Textbook. L.M. Entin (Ed.), Moscow, 2011, pp. 72-79; I.Engstrom Direct Effect of the EU Law. available at: <http://ecsocman.hse.ru/data/2011/11/02/1270172438/2-2010-10.pdf> . [Европейское право, учебник для вузов, отв. ред. Л. М. Энтин, Москва 2011, стр. 72-79, И. Энгстрем, Прямое действие права Европейского Союза, <http://ecsocman.hse.ru/data/2011/11/02/1270172438/2-2010-10.pdf>]

the EU member states the problem of providing the use and effective functioning of the EU law rises. At the first stage, some countries, taking into account the peculiarities of their own legal systems, didn't use or, because of the absence of legal bases, couldn't use and give priority to the EU legislation. For example, in order to solve this problem, the Great Britain adopted the European Communities Act in 1972.<sup>17</sup> The situation was different in France. France Cassation Court, during the first period of its activities, already found some legal solutions for ensuring the use and immediate action of the EU legislation.<sup>18</sup> While the State Council did not have the same approach during administrative justice, and the latter used very often the EU legislation in the case when national legislation contradicted that of the EU.<sup>19</sup> The Constitutional Court of Germany also raised a serious question about not using the EU legislation in cases contradicting constitutional human rights.<sup>20</sup> Though afterwards as in above mentioned states, in other EU member states (Italy, Spain) too, the problems relating to the EU law were gradually solved, and the courts of the member states started to use the Union legislation actively as well as started to interpret national legislation under the

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<sup>17</sup> European Communities Act 1972, October 17, 1972, <http://www.legislation.gov.uk/ukpga/1972/68/section/1>

<sup>18</sup> Arête Vabre & Weigel France appeals court 1975 decision, taking into notice Article 55 of the France Constitution, found that Company should be superior to national norms, French Constitution 1958, The Supremacy doctrine in France. Cour de Cassation, Audience publique du 24 mai 1975, [http://www.lexinter.net/JPTXT/arret\\_jacques\\_vabre.htm](http://www.lexinter.net/JPTXT/arret_jacques_vabre.htm)

<sup>19</sup> Ref. Syndicat général des fabricants de semoules de France case State council of France decision <http://www.legifrance.gouv.fr/affichJuriAdmin.do?idTexte=CETATEXT000007633957&dateTexte=>

<sup>20</sup> Decision of 29 May 1974, Internationale Handelsgesellschaft, BVerfGE 37, 271 [1974] CMLR 540 case Constitutional court decision of Germany Ref also **Mattias Kumm**, Internationale Handelsgesellschaft, Old and the New Human Rights Paradigm, Forthcoming in: M. Maduro, L. Azoulay (eds.), The Past and Future of EU Law: The Classics of EU Law Revisited on the 50th Anniversary of Rome (Hart 2009) [http://www.law.harvard.edu/faculty/faculty-workshops/kumm\\_paper\\_ii.pdf](http://www.law.harvard.edu/faculty/faculty-workshops/kumm_paper_ii.pdf), **Xavier Groussot**, The Role of the National Courts in the European Union: A Future Perspective, SIEPS 2005 <http://www.lissabonfordraget.se/docs/the-role-of-the-national-courts-in-the-european-union-200510.pdf>

light of the EU legislation. For the states joining the EU later, domestic legal bases for avoiding such complications were established in pre-accession period. For example, in Lithuania a Constitutional act about the membership of Lithuania to the EU was adopted, and appropriate supplements and amendments were made to the procedure code.<sup>21</sup>

The situation is different in case of third countries. The above mentioned criteria intended for the courts of the member states cannot be used for the courts of third countries due to the fact that they are not EU member states. Nevertheless, in some cases third countries carry the EU law influence even in the absence of membership or in the preparation of that process.<sup>22</sup> At the beginning of membership negotiations, when the state starts changing its legislation the courts should be engaged in the works of approximation.<sup>23</sup>

But it is unambiguous the positioning that judicial power bodies in third countries are also involved in legal changes, the processes of their use and commentaries, that take place within the framework of partnership with the EU.

Different authors think that the involvement of judicial power is connected with legal basis and with the political will of that country.<sup>24</sup> That is why it is very interesting to study if the Partnership and Cooperation Agreement and Association Agreement approximation thesis are legal basis for courts to refer to the EU

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<sup>21</sup> **Eglė Rinkevičiūtė**, Ensuring of the Uniform Interpretation of the EU Law in the Judicial Practice of the Member States, 2005.

<sup>22</sup> **Stanislaw Biernat**, "European" Rulings of Polish Courts Prior to Accession to the European Union, The Polish Foreign Affairs Digest, Vol. 5, No 1 (14), 2005, p. 130, A. Lazowski, Approximation of Laws, in: A. Ott, K Inglis (editors), Handbook on European Enlargement-A Commentary on the Enlargement Process, The Hague, 2002, Part III, pages 1-22.

<sup>23</sup> **A. Lazowski**, Approximation of Laws, in: A. Ott, K Inglis (editors), Handbook on European Enlargement - A Commentary on the Enlargement Process, The Hague, 2002, Part III, page 8.

<sup>24</sup> **Stanislaw Biernat**, "European" Rulings of Polish Courts Prior to Accession to the European Union, The Polish Foreign Affairs Digest, Vol. 5, No 1 (14), 2005, page 132.

legislation. In fact, norms on the Partnership and Cooperation Agreement approximation are mostly directed to the legislative power. And these also convey in them the applying of these norms.<sup>25</sup> These norms do not require the courts to use the EU legislation, as obligation set in it is not clear enough. Nevertheless, the practice of other countries shows that these norms with constitution norms serve as a legal base for referring to the EU law or for judicial approximation of legislation. Courts often approximated national legislation to the EU legislation based on these norms.<sup>26</sup> Another important aspect is that courts refer to the EU law during interpretation of the provisions of the Partnership and Cooperation Agreement and Association Agreement, as they are similar in many aspects to the thesis of the founding treaties. Summing up the above mentioned analysis, we can state that the formulation of Article 43 of the Partnership and Cooperation Agreement: “Armenia will try to do so, that its legislation becomes compatible with the Community legislation” is addressed to the RA courts as well, as the set compatibility in the mentioned article can be provided only in the conditions of involvement of judicial power.

The second factor is connected with the will of state bodies, especially of courts to integrate into the EU. In case of this factor, an original judicial policy is adopted to follow the EU legal regulations. It's an inner motivating power, though in some authors' opinion from the legal point of view approximation with the EU membership expectation is the very country's unilateral commitment which the latter has adopted on its own will and through which the state should

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<sup>25</sup> **Stanislaw Biernat**, “European” Rulings of Polish Courts Prior to Accession to the European Union, *The Polish Foreign Affairs Digest*, Vol. 5, No 1 (14), 2005, p. 132

<sup>26</sup> The best example is Poland. Poland Constitutional Tribunal decision K 12/00 of October 20, 2000 or K 35/99 of December 5, 2000. Likewise, practice is also seen in Poland Supreme Court activity e.g. decision I CKN 1217/98 of May 29, 2001 or decision III RN 240/01 of January 8, 2003 and so on. <http://www.sn.pl/SitePages/Strona%20startowa.aspx>, <http://www.trybunal.gov.pl/eng/>

achieve the goals it has set.<sup>27</sup> In fact, the judicial policy is and must be the logical continuation of the first factor; that is the legal basis. Therefore, if in Article 43 of the Partnership and Cooperation Agreement the obligations undertaken by Armenia refer to the courts as well, its first step should be the formation of appropriate judicial policy. It may well be seen as a result of the judicial practice examination of other countries.

For example, courts in Poland have emphasized many times that association agreement as an international treaty has legal and binding effect, though in some cases the latter emphasized that law of the Union is not of a binding nature in Poland yet.<sup>28</sup>

In many authors' opinion, courts use law of the Union in domestic legislation interpretation without accepting the binding nature of the EU law for domestic courts.<sup>29</sup>

The activity of Constitutional and Supreme Courts of Poland is a very vivid example of it. The Constitutional Tribunal in one of its decisions mentioned that during interpretation of laws constitutional principles of encouragement of the process of European integration and international cooperation should be taken into account. So, the Constitutional Tribunal, in the process of interpreting, strongly highlighted its Europeanization which is manifested by the fact that the latter considered the encouragement of European integration as a constitutional principle, thus making the interpretation of the national legislation Europeanized, which was in the base of the European law. In fact, the pre-European interpretation of the national legislation started with this process, though it does not mean fully

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<sup>27</sup> A. Evans, Voluntary Harmonisation on Integration between the European Community and Eastern Europe. *European Law Review*, 1997, page 201.

<sup>28</sup> Poland Constitutional Tribunal decision of October 24, 2000. <http://www.sn.pl/SitePages/Strona%20startowa.aspx>, <http://www.trybunal.gov.pl/eng/>

<sup>29</sup> Stanislaw Biernat, "European" Rulings of Polish Courts Prior to Accession to the European Union, *The Polish Foreign Affairs Digest*, Vol. 5, No 1 (14), 2005, page 136

Poland Supreme Court decision of April 14, 2003 <http://www.sn.pl/SitePages/Strona%20startowa.aspx>, <http://www.trybunal.gov.pl/eng/>

approximation of legislation to the EU legislation.

As the earlier decisions of Poland Constitutional Court show, the measure of interpretation does not lead to the use of the EU law, but it assumes that when a question of constitutionality of some act is discussed, not only the text of Constitution must be taken into account, but also the norms, rules and principles that are known in the EU law<sup>30</sup>. In other words, the Constitutional Tribunal used the concept of “friendly interpretation” towards the European law.<sup>31</sup> Poland Supreme Court adopted the alike position. The latter noted that during such cases where legal problems are regulated by the Community law, courts must interpret the law with the way that comes from the nature and interpretation of the EU law.<sup>32</sup> In other words, the Supreme Court of Poland, continuing the policy adopted by the Constitutional Tribunal, said that one of the most correct ways of interpretation of law is the interpretation of the Poland law that is based on the EU law and on the solutions given therein. The positioning of the Poland Supreme Court towards the jurisdiction of the EU court decision is rather interesting. The court mentioned that before the membership the binding nature of the decisions of the EU court didn't work for Polish courts. Nevertheless, according to Supreme Court during legal interpretation these should be considered as a source in conditions of which the interpretation of the EU law for all the EU member states should be worked out in the same way.<sup>33</sup>

The courts in Poland have worked out mechanisms on how the EU law should be taken into account during the interpretation of the Polish legislation.<sup>34</sup> According to the decision of the Constitutional Tribunal the following was scheduled:

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<sup>30</sup> Poland Constitutional Tribunal decision of January 28, 2003.

<sup>31</sup> Stanislaw Biernat, “European” Rulings of Polish Courts Prior to Accession to the European Union, *The Polish Foreign Affairs Digest*, Vol. 5, No 1 (14), 2005, p. 136

<sup>32</sup> Poland Constitutional Tribunal decision of April 14, 2003, <http://www.sn.pl/SitePages/Strona%20startowa.aspx>, <http://www.trybunal.gov.pl/eng/>

<sup>33</sup> Poland Supreme court decision III RN 240/01 of January 8, 2003.

<sup>34</sup> Poland Constitutional Tribunal decision of January 28, 2003.

- In the process of the membership the friendly interpretation of the EU law must be given only in cases when the Polish law does not have another position in the solution of that problem.

- If there are few possibilities of interpretation, it must be chosen the interpretation which is the closest to the EU law.

All the above mentioned shows that the courts in our country, based on Article 43 of the PCA, should adopt the relevant judicial policy and involve in the process of approximation actively. In this process the first step should be done by the Constitutional Court which like in other countries should derive the constitutional principle of the European integration from the Articles 6 and 9 of the Constitution and Article 43 of the PCA. After such position, the RA Cassation Court should express its position which, based on the Constitutional principle of the European integration developed by the Constitutional Court, would interpret the RA legislation consistent with the EU legal regulations. Like the Cassation Court, the legal position would also be obligatory for other courts, by Article 15 of the RA Judicial Code, as a result of which we would have a common Europeanized judicial practice.

For the approximation through judicial acts, a very interesting question should be discussed — whether courts should apply to other legal systems, especially to the EU legal system in order to develop domestic law? It is known that the approximation of legislation is a very important measure of developing legal system and of receiving the values of other systems. Courts play an original role in creating bridges between current legislation and public values. They, as law-applying and interpreting bodies try to adapt them to public values and conform to the given public peculiarities. In this regard, while performing that function courts create some bridges between that nation and other nations, as well as international values.<sup>35</sup>

The active law-making activity of courts, during law-making process, demands to apply the rules that are given to other law-

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<sup>35</sup> **Esin Orucu.** Comparative Law in practice: The Courts and the Legislator. Comparative Law. Ed. By Esin Orucu and David Nelken. Oxford and Portland, Oregon. 2007, page 429.

making bodies, especially to the legislative body. That is why the authors mention that during the development of judicial system the activity of courts in this aspect is alike the activity of the legislative body, so the courts should refer to other judicial systems while looking for legal solutions.<sup>36</sup> The legal basis of approximation of the RA legislation to the EU law has already been set, so the activity of the courts in this respect is the integral part of the RA-EU approximation.

In the opinion of authors, the courts of many countries during the last 15 years are very much interested in competitive analysis, when referring to other countries' judicial practice. It is well displayed in such cases when looking for a relevant precedent is needed.<sup>37</sup>

For the approximation through judicial acts the practice of British courts can be rather interesting, as it is much more developed.

British courts refer to other countries' judicial practice rather often while solving some legal problems. Moreover, as some judges note in this case, it is not so important the knowledge of foreign law, as its application during the judicial activity. That is, the judge should not have to know the legal regulation of that sphere in other judicial system as fluent as he knows domestic law. The approach of application of practice of legislation is a direct measure for solving the problem, and the judges must refer to that measure while solving problems. For this reason, while studying the EU case law, the judge can follow it or stay on his own position.<sup>38</sup> British courts very often express opinions about the fact that “[i]n the absence of balancing power in British courts ... principles born in other sources should be

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<sup>36</sup> **Esin Orucu.** Comparative Law in practice: The Courts and the Legislator. Comparative Law. Ed. By Esin Orucu and David Nelken. Oxford and Portland, Oregon. 2007, page 413.

<sup>37</sup> **T. Koopmans.** Comparative Law and the Courts. International and Comparative Law Quarterly. 2008, page 544.

<sup>38</sup> **Esin Orucu.** Comparative Law in practice: The Courts and the Legislator. Comparative Law. Ed. By Esin Orucu and David Nelken. Oxford and Portland, Oregon. 2007, page 413.

applied from British law”.<sup>39</sup> There are also cases when the law of the countries of continental judicial system was also used by British courts while solving problems.

The study of the practice of British courts shows that after the Great Britain joined the EU, the quantity of the cases when British courts link to other countries’ judicial systems has grown. During 1972-2002 that number has significantly grown reaching from 26 to 121.<sup>40</sup>

The solution of some judicial problems by referring to other judicial systems is typical to the judicial practice of the RA, too. It is already an established practice in the activities of the RA Constitutional and Cassation Courts to refer to the decisions of European Court of Human Rights and with the help of it to interpret the legislation. Thus, the implementation of other judicial systems by the judicial acts in Armenia is working, so that the process for the EU legislation is also possible. The result that we have today in the case of the European Court of Human Rights also speaks about it. For example, in the context of the right to fair trial, our domestic legislation is interpreted by the Cassation Court under the light of practice of the Convention and of the European Court of Human Rights.<sup>41</sup> As a result, today many thesis of domestic legislation do not prevent formally from the protection of human rights, and Convention rights are transferred to a practical level. Namely, by this mechanism the courts made the rights that were guaranteed by the Convention acting mechanism and provided with concrete cases. These facts speak in favor of the argument of transferring of the EU

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<sup>39</sup> *Martin v Watson*. 1995. 3 ALL ER 559(HL) at 562, 566(Lord Keith).

<sup>40</sup> Represented statistic indexes and British court juridical indexes are taken from **Esin Orucu**. *Comparative Law in practice: The Courts and the Legislator*. Comparative Law. Ed. By Esin Orucu and David Nelken. Oxford and Portland, Oregon. 2007 work.

<sup>41</sup> RA Appeals Court decisions N1790/05/09 of June 15, 2009, N 0053/02/09 or June 17, 2009, 1/0012/02/08, of July 08, 2009, 0338/02/08, of 10 April, 2009, N 0546/02/09 of December 23, 2009, N 4168/05/08 of July 22, 2009, N 0820/02/08 2009 of May 5, N 1/0012/02/08 2009 of July 8, N 0387/02/08 June 24, 2009, N2275/05/09 of August 26, 2009.

legislation to the RA legal system with the help of courts and of approximation of the RA legislation. If the same resources and mechanisms, which we have in the case of the Convention of Human Rights, are introduced to the case of the EU legislation, after a period of time we will have substantial results and we can refer to the cases by which our courts have approximated the RA legislation to the EU legislation.

Foreign law is used only when it is needed.

Its first case is the conflict of law, when the examined case includes foreign elements, or when there is an EU law problem. While discovering such cases the decisions of the EU court are of primary nature.<sup>42</sup> In such cases, the courts follow the principles set by the EU court and the descriptions given thereby, especially when it relates to the EU exclusive jurisdiction. In *R v Secretary of State for the Home Department* it was mentioned: “[a]s it is accepted that the principles set by Convention emphasize also the frames of standards of general law and unite the EU legal system, in such conditions it is unrealistic and unfair to develop British public law without referring to them.”<sup>43</sup> The next case of using the foreign law is the case of understanding the concept of “international or foreign legal institute”. With respect to this situation, it is again typical the position of British courts, according to which: “[i]n the cases connected with international treaties, in different legal systems it is better to express as alike position as possible.”<sup>44</sup> In these cases, the British courts study the meaning of a norm or a term not only in case but also in Continental Law.

The foreign law is used by courts for developing the law in such cases when there are no appropriate laws or sub-law acts. Law of other Common Law countries is studied when the enlargement of legal solutions is needed. British courts sometimes refer to the

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<sup>42</sup> *Wess v Webb*(1992) 1 ALL ER 17(Ch), *Union Transport Group plc v Continental Lines SA* (1992) 1 ALL ER 161(HL).

<sup>43</sup> *R v Secretary of State for the Home Department. Ex parte McQuillan* (1995) 4 ALL ER 400(QBD).

<sup>44</sup> *T v Secretary of State for the Home Department*(1996) 2 ALL ER 865(HL).

Continental Law which, however, is not used the way the Common Law is used. Namely, continental legal regulations and judicial practice are often studied, but are not put in the base of a judicial act. Nevertheless, there are cases when the analysis of a judicial act is done with the help of the judicial practice of countries of that legal system. For example, in the analysis of the case *Diamonds BVBA v Air Europe*, the decision of the Netherlands Supreme Court was taken into account.<sup>45</sup> Such cases are met when it is needed to explain a term which is borrowed from the Continental Law. For example, in one of the cases it was needed to explain one of the terms of Common Customs Tariff, which was borrowed from the German tax law, so here the judicial practice of Germany was studied.<sup>46</sup> From the latest cases of British judicial practice *Fairchild v Glenhaven Funeral Services Ltd* is rather interesting, where not only the legal sources of Australia, Canada, the United States and Scotland were discussed, but also decisions and doctrinal approaches from Germany, France, the Netherlands, Austria, Spain, Norway and even from Roman Law, though they did not play an important role for the final decision.<sup>47</sup>

It is worth mentioning that if, in this case, there exist a legal act, the judicial act should be based on the domestic law. At the same time, the use of the legislation of other countries is also possible when the explanation of statute law is needed. The general rule is that domestic courts use domestic legal norms, but in the absence of which they can refer to the legal norms of other countries. In some countries such as Germany or Denmark, this approach is more consistent than, for example, in France. Referring to other countries' law is an accepted practice in the USA, especially the comparison of the legislations of the States has become an accepted practice.<sup>48</sup> In such countries as the Republic of South Africa, the Constitution

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<sup>45</sup> *Diamonds BVBA v Air Europe* (1995) 3 ALL ER 424 (CA).

<sup>46</sup> *Barclays Bank plc v Glasgow City Council, Kleinwort Benson plc v Glasgow City Council*(1994) 4 ALL ER 865(Ca).

<sup>47</sup> *Fairchild v Glenhaven Funeral Services Ltd* (2002) 3ALL ER(HL).

<sup>48</sup> **Esin Orucu**. *Comparative Law in practice: The Courts and the Legislator*. Comparative Law. Ed. By Esin Orucu and David Nelken. Oxford and Portland, Oregon. 2007, pages 427-428.

authorizes the courts to use the Comparative and International Law during the reasoning of judicial acts about human rights.<sup>49</sup> That practice is accepted by the European Court of Human Rights.<sup>50</sup> The latter applies to the domestic legislation very often, and the basis of many principles set thereby, is the domestic law. The activity of the EU court is also a good example of it. The courts deeply study competitive documents which contain materials from domestic legislations of the member states, from international convention, as well as from the decisions of the European Court of Human Rights.

The approach existing in the countries of general law and in British judicial practice are rather useful in the RA during the process of approximation with the judicial acts. British judicial practice is a classic example of this, as the forming of judicial acts by the study of legal regulations of other legal systems in this country is rather common and developed. The approximation in the RA is rather different from that in Britain, but as an exemplary country the approaches there can be applied by our courts too. It would be more intensively used by the Cassation Court, while performing its constitutional mission to promote to the development of uniform applying of approximated legislation and of the law.

The above mentioned analysis of judicial approximation of legislation is well expressed in other countries' practice. They are expressed in the peculiar behavior of application methods and application spheres of the EU law by the courts of those countries. Especially, the practice shows that the application spheres of the EU law are rather broad. They were about the gender equality, about some problems concerning the labor law, the corporate law, about problems concerning the competition law, customs law, as well as

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<sup>49</sup> South Africa Constitution Articles 39, 233. Especially Article 39 states that while interpreting human rights each court must take into account international law and can take notice of foreign law. Thus, in the constitutional level, courts gain legal possibility to develop domestic legislation on the bases of comparative analysis. [www.concourt.am/armenian/legal\\_resources/world\\_constitutions](http://www.concourt.am/armenian/legal_resources/world_constitutions).

<sup>50</sup> E.g. Jameson against United Kingdom case; European court studied also USA Supreme Court Hawaii Housing Authority v. Midkiff 104 S.Ct.2321 [1984] case decision, James and others v the UK, 21.02.1986, page 40.

about other branches of the EU law, such as tax and banking legislation, consumer protection and so on. Moreover, in this case not only the provisions of the founding treaties were taken into account, but also the secondary legislation and case law of the EU court.

At the same time, it is worth mentioning that though in all the mentioned spheres the EU legislation is being referred to, in the practice there is a difference of the knowledge of judges in those spheres and of frequency of referring to them.

The question of taking the EU law into account can be raised by the participants of trial, as well as by the court.<sup>51</sup>

The studies also show that the courts refer to all the sources of the EU law, such as the founding treaties, regulations, directives and the decisions of the EU court.<sup>52</sup>

But in some spheres such as customs and competition laws, they are much frequent and much accurate.<sup>53</sup> It can be due to few circumstances and first of all due to the concept of “association agreement”. If the association agreement highlights the partnership of some spheres, referral to the EU law in these spheres is more frequent. The next factor is connected with the approximated domestic legislation. In many countries (Poland, Turkey) the customs legislation was almost copied from the EU Customs Code. Therefore, in this sphere the courts use the EU customs legislation more often and more correctly. A similar situation is in the sphere of competition law, as the latter is one of the most important spheres of making the internal market. All this also shows that in this sphere the judges of other countries were rather informed about the EU legislation.

But in the process of judicial approximation the courts also have

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<sup>51</sup> **Stanislaw Biernat**, “European” Rulings of Polish Courts Prior to Accession to the European Union, *The Polish Foreign Affairs Digest*, Vol. 5, No 1 (14), 2005, page 143

<sup>52</sup> **Stanislaw Biernat**, “European” Rulings of Polish Courts Prior to Accession to the European Union, *The Polish Foreign Affairs Digest*, Vol. 5, No 1 (14), 2005, page 143.

<sup>53</sup> Poland Supreme Court decision III RN 126/00 of June 7, 2001.

problems connected with the lack of experience of courts in other spheres as well as with the non-availability of the EU law. In many cases the courts do not take into account the peculiarities of approximation of the EU law different sources. For example, during the approximation of directives, the explanation of domestic legislation is often very categorical, and the courts do not show an analytical approach to the degrees of the approximation of the directive. Namely, it is not taken into account that in some cases the state can deviate from separate provisions of the directive.<sup>54</sup>

Such problems have risen when referring to the EU court. In some cases, the use of the EU court decisions was rather definite and appropriate. In other cases the courts do not take into account that the case law of the EU court has changed. There are cases when non-appropriate decision of the EU court is referred to.<sup>55</sup>

In any case, it is a fact that the courts especially in case of the membership follow European values or standards which are displayed by referring to the appropriate acts of the EU legislation. In very few cases, a member-state is referred to.

Hence, we think that the approximation through judicial acts should be done by keeping the following rules:

- The approximation must be done if it is included in the spheres of approximation, thus taking into account the levels of approximation. The courts also should be aware of the spheres of the RA-EU legal basis of approximation. In such spheres where the RA legislation approximation is not necessary, the courts, when using domestic legislation, have the right not to accept the EU legal regulations.

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<sup>54</sup> Such example according to some authors, Poland Supreme Court decision March 31, 1999, Stanislaw Biernat, "European" Rulings of Polish Courts Prior to Accession to the European Union, The Polish Foreign Affairs Digest, Vol. 5, No 1 (14), 2005, p. 145.

<sup>55</sup> E.g. in causing harm Poland Constitutional Court decision SK 18/00 of December 4, 2001 <http://www.sn.pl/SitePages/Strona%20startowa.aspx>, <http://www.trybunal.gov.pl/eng/>.

E.g. income tax questions reference is made to German system. Poland Supreme Court decision March 13, 2002:

- The approximation should be done if there is a certain legal problem. The courts, using the RA legislation, should apply to the EU legislation not in all cases. The legal problems can be displayed by the following ways:

1. If the legislation is approximated, but at the same time it is not full and clear, it must be completed. In this case, the courts may, on the basis of the EU legislation, within the scope of their activities, complete the parts that are not approximated. As a result, with the help of the institute of precedence in the RA the gap which is a result of incomplete and non-coordinated approximation will be filled.

2. If the legislation is fully approximated, but there is a necessity of explanation, the courts should interpret the RA legislation on the basis of the EU legislation. It is worth mentioning that the pre-European interpretation of domestic legislation is an important measure to complete the process of approximation. It may also be useful for solving the contradictions of domestic legislation. If there is a contradiction between acts having equal legal force, it is more convenient to interpret it under the light of the EU legislation. The interpretation can be general or concrete.

During activities of the courts, it is necessary to study all the sources of the EU law. If general legal analysis and interpretations are necessary, the courts should use all the sources of the EU law, if we speak about the solution of a concrete case in the conditions of concrete factual circumstances, in this case the decision of the EU court can help the courts. In this case, the courts study not only the legal acts which are used for a concrete case, but also factual circumstances of the case examined by the EU court. As a result, both the general interpretation of legislation and the procedure for solving concrete cases by the RA would correspond to the EU legislation and law-applying practice. It will make the process of approximation complete, which is the responsibility of courts.

The above mentioned rules of the judicial approximation of legislation can be used by the administrative bodies as well, while applying administrative acts. In that case, the approximated legislation is used in some administrative cases, and the development

of administrative law-applying practice is also very important for the process of approximation. Especially those bodies and institutes which were established in the RA as a result of approximation should consider this fact very important. However, we think that active judicial approximation in its turn would help the development of administrative law-applying practice.