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PREDICTABILITY OF THE CONSTITUTIONAL COURT JURISPRUDENCE AS AN IMPORTANT PRECONDITION FOR CONSTITUTIONAL STABILITY

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SUMMARY

The article considers the issues of predictability of Constitutional Court jurisprudence in the context of guaranteeing constitutional stability. Author concludes that Constitutional Court legal positions can be developed, as the formation of the constitutional doctrine isn't a one-step, but a continuous process. It presupposes existence of two possible situations: 1. when there is a necessity to fundamentally change the concrete previous legal position of the Constitutional Court, 2. when there is a necessity to broaden the scope of the previous concrete legal position of the Constitutional Court without changing its previous content. In both cases the main key for the effective solution of the discussed issue is to find a balance between continuity and predictability of the Constitutional Court practice and values, underlying the development of the constitutional doctrine, in each concrete situation. Moreover, the approach regarding the mechanical invalidation of the Constitutional Court previous legal positions after constitutional amendments isn't logical, doesn't equivalently express the constitutional essence of the mentioned positions and distorts the ideas of constitutional stability, constitutional developments, predictability of the activities of the Constitutional Court and continuity of its practice.

***Key-words**: constitutional stability; constitutional doctrine; development of legal positions; predictability of the Constitutional Court jurisprudence; binding nature of legal positions, mechanical invalidation of legal positions.*

PREVIZIBILITATEA JURISPRUDENȚEI CURȚII CONSTITUȚIONALE CA O PRECONDIȚIE IMPORTANTĂ PENTRU STABILITATEA CONSTITUȚIONALĂ

SUMAR

Articolul pune în discuție unele aspecte de previzibilitate ale jurisprudenței Curții Constituționale în contextul garantării stabilității constituționale. Autorul concluzionează că pozițiile juridice ale Curții Constituționale pot fi dezvoltate, întrucât formarea doctrinei constituționale nu este un pas, ci un proces continuu. Presupune existența a două situații posibile: 1) când există o necesitate de a modifica fundamental poziția juridică concretă anterioară a Curții Constituționale; 2) când există o necesitate de a lărgi domeniul de aplicare a poziției juridice concrete anterioare a Curții Constituționale, fără a schimba conținutul anterior. În ambele cazuri, principala cheie de soluționare eficientă a problemei discutate este găsirea unui echilibru între continuitatea și predictibilitatea practicilor și valorilor Curții Constituționale, care stau la baza dezvoltării doctrinei constituționale în fiecare situație concretă. Mai mult, abordarea privind invalidarea mecanică a pozițiilor juridice anterioare ale Curții Constituționale după modificările constituționale nu este logică, nu exprimă, în mod echivalent, esența constituțională a pozițiilor menționate și denaturează ideile de stabilitate constituțională, de evoluție constituțională, previzibilitatea activităților Curții Constituționale și continuitatea practicii sale.

***Cuvinte-cheie:** stabilitate constituțională, doctrina constituțională, dezvoltarea pozițiilor juridice, predictibilitatea jurisprudenței Curții Constituționale, caracterul obligatoriu al pozițiilor juridice, invalidarea mecanică a pozițiilor juridice.*

I. Introduction

Effective realization of ways of constitutional development presupposes possibility of the development of the Basic Law not just by making changes in its text, but also by other means, including official interpretation of the Constitution. This circumstance, in turn,

leads to a conclusion that constitutional stability presupposes also stability of including such interpretation legal positions of the Constitutional Court.

Hence, in this context it is necessary to analyze the issues whether including constitutional interpretation CC positions can develop, and if yes, how and how frequently.

II. Predictability and Stability of the Constitutional Court Legal Positions

According to Article 61, Part 5 of the Constitutional Law of the Republic of Armenia „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 [13].

Therefore, the next issue raised in this context is the following: are the Constitutional Court legal positions binding also for the Court itself and can the latter change them over time?

The above-mentioned provision leads most of the authors to a conclusion that the noted binding force of the CC legal positions concerns also the Constitutional Court itself [23, 21, 20, 8]. 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 [9].

With regard to the situation in the Republic of Armenia concerning the discussed issue it should be noted that also in our perception the body, administering constitutional justice, is bound by its legal positions. Other situation can lead to the distortion of such values, underlying the state governed by rule of law, as the predictability of the Constitutional Court activities, the continuity of its practice, abidance by the principle of legal certainty, etc. This is the reason that in the course of its activities the Constitutional Court of the Republic of Armenia adheres to its previously expressed legal positions, regularly recalling them in the decisions[1, 2, 3, 4].

In this context we would like to emphasize the key significance of predictability both from the aspect of guaranteeing stability, and also from the viewpoint of strengthening the Rule-of-Law state. It is obvious that protection and ensurance of lawful expectations of social relaitions' participants are the most important precodintions for strengthening stability, legal certainty and Rule-of-Law state. With this regard the view is worth mentioning that predictability of judicial acts enables possible participants of litigations to foresee the results of consideration as accurate as possible, before submitting their case to the court and making decision on the case. Parallel to increase of predictability of judicial acts the number of litigatons decreases, contributing to formation of a more stable social environment [11]. Moreover, it is emphasized that stability and legal predictability are valued also from the moral point of view, as they guarantee that an equal attitude is expressed towards analogical cases [10].

III. Development of Constitutional Court Legal Positions

At the same time, the above doesn't presuppose absolute unchangeability of the Constitutional Court legal positions. We have been continuously emphasizing in monograph that stability doesn't mean unchangeability, as well as „stability" and „development or changeability" aren't mutually exclusive terms. Moreover, it is obvious that formation of the constitutional doctrine by the Constitutional Court is not a single-step process, but a process, being fulfilled permanently and gradually. 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" [12]. Therefore, formation of the mentioned doctrine isn't a petrified phenomenon and can be changed along with the development of the social relations. 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 [16, 15, 17].

Not by chance is the Constitutional Court endowed with an opportunity to deviate from its decisions and change them in many states, such as, for instance, the Russian Federation, Germany, Lithuania, Hungary, etc. [18, 9, 12]. 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 [12]. An opinion was expressed also in literature that absolute stability and predictability of precedents lead to formation of such a rigid legal paradigm, which isn't able to changes parallel to changes of social norms and practice [10].

The above implies that both predictability of the Constitutional Court activities and necessity of making the constitutional doctrine in comparison with the changing social relations have significant importance from the viewpoint of constitutional stability.

Therefore, we believe that from the viewpoint of guaranteeing constitutional stability the circumstance has primary importance that the Constitutional Court should be endowed with adequate opportunities for the development of constitutional doctrine, and this should

not be based on the unlimited discretion of the Constitutional Court. The Lithuanian Constitutional Court, for instance, expressed a legal position that the Court can deviate from its precedents only if it is necessary for wider protection of the values defined in the Constitution, in particular, human rights, and this should be clearly reasoned in the frames of each case [8].

In our opinion, development of the Constitutional Court legal positions presupposes existence of two possible situations: 1. when it is necessary to fundamentally change previously expressed concrete legal position of the Constitutional Court, 2. when it is necessary to widen the previously expressed concrete legal position of the Constitutional Court without changing its content.

To our mind, in both situations the main key for the effective solution of the discussed issue is finding balance in each concrete situation between the continuity and predictability of the Constitutional Court practice and the values, underlying the development of the constitutional doctrine, accompanied with the observance of the principle of „expedient self-restraint" by the Constitutional Court.

We believe that in the first situation the noted balance pressuposes that Constitutional Court legal positions can be changed just in case when there is concrete constitutional necessity, that is - the change in the corresponding constitutional norm or its perception.

What about the development of Constitutional Court legal positions in the presented second situation, we consider that the latter is also possible in case of the change of a constitutional norm or its perception, but can in no case be limited just by situations concerning the mentioned changes. As already noted above, formation of the constitutional doctrine by the Constitutional Court is not a single-step process, but a process, being fulfilled permanently and gradually. Moreover, the noted doctrine isn't a petrified phenomenon and can be changed along with the development of the social relations. Hence, it is obvious that cases of widening the scope of a legal position, not fundamentally changing its content, can't be conditioned exceptionally by changes of constitutional norm or its perception, and can take place in any situation, if the main key for solution of the mentioned issue is observed (that is - finding balance in each concrete situation between the continuity and predictability of the Constitutional Court practice and the values, underlying the development of the constitutional doctrine, accompanied with the observance of the principle of "expedient self-restraint" by the Constitutional Court).

As an example the Armenian Constitutional Court legal positions on prohibition of discrimination can be mentioned. The Constitutional Court of the Republic of Armenia stated by its decision DCC-731 (dated as of 29 January 2008) that Article 14.1 of the Constitution of the Republic of Armenia stipulates the principle of equality before the law. According to the requirements of this Article, the positive constitutional obligation of the state is to provide such conditions which ***will give equal opportunity*** to the people with identical status to exercise, and in case of infringement, to protect their rights, otherwise not only the constitutional principles of equality, prohibition of discrimination, but also the rule of law and legal definiteness will be violated. Afterwards, developing those legal positions, the Court stated by its decision DCC-881 (dated as of 4 May 2010) that „Constitutional Court in the frames of the principle of prohibition of dicrimination considers admissible any differentiated approach conditioned by objective basis and lawful aim. The principle of prohibition of discrimination doesn't mean that any differentiated approach among the same category of people can be turned into discrimination. The differentiated approach, which lacks objective basis and lawful aim, is a violation of the principle of discrimination. ... Constitutional Court finds that the constitutional principle of equality before the law presupposes ensurance of equal responsibility before the law, inevitability of responsibility and equal conditions of legal protection, and doesn't concern definition for subjects with different status of preconditions, in this case – social independence guarantees or additional obligations for the subjects of the given category conditioned by a lawful aim". The Constitutional Court of the Republic of Armenia stated by its decision DCC-967 (dated as of 7 June 2011) that in case of alleged discrimination a situation should exist, when a differentiated attitude is expressed in the same situation towards concrete subject in comparison with other subjects, the attitude towards whom is more favorable. In the frames of the decision DCC-1224 (dated as of 7 July 2015) the Court also stated that discrimination exists in cases when in the frames of the same legal status differentiated approach is expressed towards a person/persons, in particular, they are deprived of concrete rights or the latter are limited or he/she gets privileges.

It should be noted that the Constitution of the Republic of Armenia after 2015 amendments defines regulations on general equality before the law and prohibition of discrimination analogical (from the aspect of content) to the Constitution in 2005 edition. It is notable from this viewpoint that after constitutional amendments – on 10 July 2018, the Constitutional Court of the Republic of Armenia adopted decision DCC-1424, by which its previous legal positions on the discussed issue were restated.

Returning to the issue of the development of the Constitutional Court legal positions, it should be noted that Part 16 of Article 68 of the Constitutional Law of the Republic of Armenia „On the Constitutional Court" prescribes a possibility for the Constitutional Court to review decisions mentioned in Paragraphs 1 and 2 of that Article on the basis of an application submitted in the procedure prescribed by law, 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 academics consider that in this case one should concern the review of not the Constitutional Court decisions, but the legal positions of the latter, as the review of the Constitutional Court decision leads to a change in the legislative and law enforcement policy, formed on the basis of the previously adopted decision, while the review of the legal position of the Constitutional Court means that the Constitutional Court changes its previously formed position and, conditioned by essential changes in social life, reviews the perception of the constitutional norm in the new case. The change of the legal position of the Constitutional Court can't have a retrospective significance and leads to a change in the legislative and law enforcement policy, formed on the basis of the previously adopted decision [14].

It is obvious that the formulation "review of the decision", prescribed in the RA Constitutional Law "On the Constitutional Court", concerns also legal positions. At the same time, we consider that the aim of the discussed provision is to define regulations concerning the review not of the legal positions of the Constitutional Court, but of the final conclusion regarding the constitutionality or unconstitutionality of the act, and it concerns legal positions so far as their change is necessary for the review of the discussed conclusion. This is testified also by the corresponding judicial practice of the states, where there is an opportunity to review the Constitutional Court decisions, as in the frames of the latter (according to such provisions) the final conclusion of the Court is reconsidered on the basis of the change of the previous legal position [19, 5].

While the international practice of constitutional justice, as already noted, shows that besides the above, there may be situations, when the necessity of the change of the legal position rises not for the review of a previously adopted 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. 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 [22].

Therefore, in such situations the change of the legal position can't be conditioned by such preconditions, as the concrete type of the previous decision, the time frame of its adoption or sumbission of an appeal by the applicant just on the noted issue. While the regulation, prescribed in Article 68, Part 16 of the Constitutional Law of the Republic of Armenia "On the Constitutional Court", concerns only the review of Constitutional Court decisions on finding the challenged act or its challenged provision in conformity with the Constitution or findng the challenged act or its challenged provision in conformity with the Constitution in the interpretation of the Constitutional Court and excludes extension of the mentioned regulation on other types of decisions. Moreover, Constitutional Court may review corresponding decisions on the noted ground just on the basis of the corresponding appeal submitted in the procedure prescribed by law. In addition it should also be noted that before the adoption of the Constitutional Law of the Republic of Armenia „On the Constitutional Court" the RA Law „On the Constitutional Court" of 1 June 2006 prescribed that the discussed regulation on the review of a decision concerns just the cases when 7 years have passed after the ruling of the decision.

Taking the above into account, we consider that the main goal of the noted provision, prescribed in the Constitutional Law of the Republic of Armenia "On the Constitutional Court", is to define regulations concerning the review of the final conclusion regarding the constitutionality or unconstitutionality of the act and it doesn't concern the change of the legal positions of the Constitutional Court in the above-mentioned other situations, which don't have the noted 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.

The above leads to a conclusion that the Constitutional Court should have adequate possibilities for the development of the constitutional doctrine. Moreover, existence of any other criterion or precondition than finding balance in each concrete situation between the continuity and predictability of the practice of the Constitutional Court and the values, underlying the development of the constitutional doctrine, accompanied with the observance of the principle of „expedient self-restraint" by the Constitutional Court, can't be acceptable from this viewpoint.

IV. Mechanical Invalidation of Constitutional Court Legal Positions after Constitutional Amendments: Possible Solution or Deadlock for Constitutional Stability?

In this context we would like to touch upon also issues with regard to application of the Constitutional Court legal positions after constitutional amendments, in particular, the question whether the previously expressed Constitutional Court legal positions continue to act and if yes, in which scope.

To our mind, the approach that the Constitutional Court legal positions should mechanically lose their legal force after constitutional amendments isn't logical and can't adequately express the constitutional essence of the noted positions and the underlying it logic.

The presented analysis on constitutional stability, constitutional developments, peculiarities of the Constitutional Court activities and legal positions leads to a conclusion that 1. stability of the Constitution presupposes unchangeability of the norms, constituting the „core", axis of the Constitution, 2. development of the Constitution presupposes existence of an accumulative link between constitutional norms, 3. among the most important peculiarities of the Constitutional Court activities and legal positions are their predictability and continuity of the Constitutional Court practice.

It is obvious that the idea of the mechanical lose of the force of the Constitutional Court legal positions after constitutional amendments can't be in conformity with the noted logic, as in the result of reforms at least fundamental changes are impossible in constituting the axis of the Constitution norms. Moreover, accumulative link should be kept between the old and new constitutional regulations. This, in turn, presupposes necessity of guaranteeing predictability of Constitutional Court legal positions and continuity of the Constitutional Court practice.

Therefore, though in the result of constitutional amendments Constitutional Court legal positions may be changed and the constitutional doctrine may develop, this can be logical just in one case – when it concerns legal positions on an amended constitutional norm or its changed perception. Analogically, it would be illogical to presuppose that the unamended constitutional norm or its unchanged perception can lead to the change of the Constitutional Court legal positions.

Constitutional Court legal positions on equality before the law and prohibition of discrimination can be mentioned with this regard.

We already noted that after 2015 amendments the Constitution of the Republic of Armenia prescribes analogical to 2005's edition of the Constitution regulations on general equality before the law and prohibition of discrimination from the aspect of the content. Hence, it is obvious that in conditions of such Constitutional Court legal positions the approach of their mechanical invalidation won't be logical and will distort the whole essence of constitutional stability, constitutional development, predictability of the Constitutional Court legal positions and continuity of the Court practice, as well as the logic, underlying them. It is another issue that, as already mentioned, constitutional doctrine can develop in the already discussed situations and accompanied with observance of the noted principles.

The institute of mechanical invalidation of Constitutional Court legal positions is rare also in international practice. In the result of 2013 Fourth amendment in 2011 Fundamental Law of Hungary it was defined in „Closing and Miscellaneous Provisions" that the decisions of the Constitutional Court made prior to the entry into force of the Fundamental Law are repealed. This provision shall be without prejudice to the legal effects produced by those decisions [7]. It is notable that till that – in 2012, the Hungarian Constitutional Court expressed a legal position, according to which the Constitutional Court can apply in the new cases the arguments connected to the questions of constitutional law judged upon in the past and contained in its decisions adopted before the Fundamental Law was put into force, provided that it is possible on the basis of the concrete provisions – having the same or similar content as that of the previous Constitution – and of the rules of interpretation of the Fundamental Law. The Constitutional Court's statements made on the fundamental values, human rights and freedoms and on the constitutional institutions that have not been changed fundamentally by the Fundamental Law remain valid [6].

Noting the above-mentioned analysis and not touching upon the motives, underlying the concrete state's constitutional policy, we consider that definition of such constitutional regulations, particularly, in conditions of already expressed Constitutional Court legal positions, is problematic and can distort underlying the discussed institutes' whole constitutional axiology, deforming the idea of constitutional stability.

V. Conclusion

Summarizing the analysis on Constitutional Court legal positions' development, our general conclusion in the mentioned context is the following:

- Predictability of Constitutional Court activities and its legal positions is one of the most important preconditions of constitutional stability.
- The approach of the mechanical invalidation of the previously expressed Constitutional Court legal positions after constitutional amendments isn't logical, doesn't adequately express the constitutional essence of the mentioned positions and underlying it logic and distorts the ideas of constitutional stability, constitutional developments, predictability of Constitutional Court activities and continuity of the Court practice.
- Formation of the constitutional doctrine by the Constitutional Court is not a single-step process, but a process, being fulfilled permanently and gradually. Moreover, the latter isn't a petrified phenomenon and can be changed along with the development of the social relations.
- Development of Constitutional Court legal positions can presuppose existence of two possible situations: 1. when it is necessary to fundamentally change previously expressed concrete legal position of the Constitutional Court, 2. when it is necessary to widen the previously expressed concrete legal position of the Constitutional Court without changing its content.
- In both situations the main key for the effective solution of the discussed issue is finding balance in each concrete situation between the continuity and predictability of the practice of the Constitutional Court and the values, underlying the development of the constitutional

doctrine, accompanied with the observance of the principle of „expedient self-restraint" by the Constitutional Court. In the first situation Constitutional Court legal positions can be changed just in case when there is concrete constitutional necessity, that is - change in the corresponding constitutional norm or its perception. In the second situation development of Constitutional Court legal positions isn't limited just by changes of a constitutional norm or its perception, and can be implemented in any other situation, presupposing development of constitutional doctrine, accompanied with the observance of the principal and already presented criterion concerning the issue.

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