

MANIFESTATION OF DIRECT APPLICATION OF CONSTITUTIONAL NORMS IN THE FIELD OF LAW ENFORCEMENT

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The article discusses the competence of courts to apply constitutional norms and interpret the law enforcement practice of the Constitutional Court. The article reflects the absence of such guarantees, under which the application of constitutional norms is not effectively implemented. In particular, the subject of discussion was the right of a person to seek judicial proceedings to protect his/her constitutional rights, the competence of courts to apply the Constitution, the relationship between the principle of the supremacy of the Constitution and the concept of the implementation of the Constitution as an exception by the Constitutional Court, the obligation of ordinary courts to appeal to the Constitutional Court and at the same time justify the unconstitutionality of a legislative norm. We have come to the conclusion that there are insufficient guarantees for the interpretation and application of the Constitution in practice, as well as to oblige courts to appeal to the Constitutional Court in order to make the unconstitutionality of the norm the subject of constitutional justice, since the existing legal institutions contradict each other and create difficulties in practice. The effective application of constitutional norms, the introduction of flexible and applicable mechanisms of constitutional justice are proposed.

Key words: *constitutional norm, direct application, interpretation of Constitution, supremacy of Constitution, application of Constitution, applying to the Constitutional court, constitutional justice*

During the exercise of rights and duties by legal subjects, it is the task and purpose of law enforcement to provide proper state-legal support and guarantee by a competent or responsible official through exercising its corresponding authority. For example, in the form of issuance of relevant permission or a certificate, implementation of state registration, satisfaction of a claim, etc¹.

The above-mentioned also applies to the implementation of constitutional rights and responsibilities by law enforcement agencies in the framework of the application of constitutional legal norms. It should be noted that the direct application of the constitutional norm is often presented more as an opportunity for judicial protection of individual rights. In particular, the most characteristic feature of the direct application of constitutional norms is that a person can use judicial protection for the rights reserved to him directly, based on the constitutional regulation, and the court cannot reject that demand, justifying that there is no legislative or sub-legislative legal act specifying the given norm². However, it should be noted that such an approach is a rather narrow definition of the

¹ See **Нерсесянц В. С.** Общая теория права и государства. Учебник для юридических вузов и факультетов. – М.: Издательская группа НОРМА—ИНФРА-М, 1999. – 485с., available at <http://kursach.com/biblio/0010019/507.htm> (02.02.2020)

² See **Венгеров А. Б.** Теория государства и права. Учебник, 3-е изд. – М.: Юриспруденция, 2000. – 528 с.: available at <http://www.bibliotekar.ru/teoria-gosudarstva-i-prava-4/22.htm> (24.04.2020)

direct application of the constitutional norm since the application refers to all bodies of public power and not only to the court. At the same time, such wording ensures only the protection of violated rights and does not provide the preservation of constitutional rights and the prevention of their violation. Simultaneously, the text of the Constitution, including Article 3 of the Constitution, itself testifies that the addressee of the observance of the constitutional provision is, first of all, the public authority. However, taking into account the objective and volume limitations of the scientific article, in this work, we will try to address some features of the direct application of constitutional norms by the courts in the light of the Constitution (2015 edition).

When directly applying the constitutional norm, different situations may arise: *a) when the constitutional norm does not require any specification and is sufficient by itself for the regulation of the legal relationship; b) when the constitutional norm regulating the relationship is not specified by any legislative norm, despite the fact that it is necessary; c) when there is a specific legal norm regulating the given relationship.*

In the first case, it should be observed whether a constitutional norm is a directly regulating norm of the relationship, when it does not require specifications. For example, the same person may be elected as President of the Republic of Armenia only once. Since the Constitution (2015 edition) enshrines only the basic rights and freedoms of a person and a citizen as directly applicable rights, it has become controversial whether this deprives a constitutional norm that does not need additional privatization of its ability to be directly applied. However, we believe that for such cases, the constitutional norm should have been capable of not relying on other legislative regulations.

The issues may arise in the second case when additional regulations are required for the implementation of the constitutional norm. However, such regulations are not stipulated in the legislative acts.

Finally, in the third case, a problematic situation might be when we are dealing with such a legal norm, the application of which raises the question of unconstitutionality.

In cases where the constitutional regulation needs legislative specification but there are no corresponding legal regulations, then proper legal mechanisms should come to the rescue to ensure the application of the constitutional norm. Such a legal mechanism should be, for example, a legal analogy. We believe that this approach should be demonstrated when applying the Constitution (2015 edition). Chapter 3 of the Constitution has a certain peculiarity, considering that the latter were stipulated as the goals of the state's policy and are characterized by gradual implementation. Despite the mentioned, we are certain that Chapter 3, together with other legal norms, should be able to regulate and pre-determine the meaning and essence of these legal norms.

Let's now discuss the direct application of constitutional norms by the courts as a law enforcement body. When directly applying the constitutional norm, it seems, at first glance, that the court should have the authority in case of conflict of norms, based on the principle of the hierarchy of norms (the highest legal force of the Constitution), to apply the constitutional norm itself. Particularly, according to Article 40(1)(1) of the Law "On Normative Legal Acts" adopted on March 21,

2018, in case of conflicts between the norms of normative legal acts, the norm of the normative legal act with higher legal force is applied.

After the constitutional amendments of 2015, the Constitutional Court, in its CCD-1683 decision of April 11, 2023, states: The constitutional provisions concerning the basic rights and freedoms of man and citizen achieve their regulatory goals through legislation and its application, but in the given process of legal regulation it is necessary to prevent threats to basic rights in the face of exceptions to constitutional provisions, deviations from them, legislative conflicts with them and violations of the constitutional provisions. ***One of the important guarantees to prevent those dangers is the supreme legal force of the Constitution; due to this also, the fundamental legal significance of the provisions of the Constitution, as well as norms stipulated in Article 3 (3) of the Constitution, as a basis of the constitutional order defining that "Public power is limited to the basic rights and freedoms of a person and a citizen as a directly applicable right"***. Simultaneously, there is another legal institution: the implementation of constitutional justice exclusively by a special constitutional body. Therefore, when discussing the issue of the application of constitutional norms by the courts, the question of the relationship between the direct application of constitutional norms, as norms with the highest legal force, and the requirements to implement constitutional justice exclusively by a special constitutional body inevitably arises. In particular, the correlation between these two different institutions leads to the fact that addressing the hierarchy of constitutional and legislative norms to resolve the issue of the inconsistency of the legislative norm is outside the scope of the courts' powers as exclusively the jurisdiction of the Constitutional Court. But, at the same time, the court is obliged not to apply the legislative norm with lower legal force but is obliged to apply the higher legal rule, in this particular case, the constitutional norm. By virtue of the Constitution (Article 169 (4)), courts refer to the Constitutional Court regarding the constitutionality of a normative legal act to be applied in a specific case before them, if they have reasonable doubts about its constitutionality and find that the solution of the given case is possible only through the application of that normative legal act. This is not exempt from being problematic: in practice, it is not possible, even through the application of another normative legal act, not to apply the normative legal act regulating the relationship without justifying why it should not be applied. In other words, the law-enforcement body does not have the opportunity, according to Article 40(1)(1) of the Law "On Normative Legal Acts", to apply the norm of a normative legal act with a higher legal force, because it cannot justify it without the Constitutional Court, and at the same time, the requirement to refer to Constitutional Court for the court, in turn, causes confusion with its wording. In order not to apply a normative legal norm, the law-enforcement body must first address the question of whether the given legal norm is really not subject to application, and whether it has the authority not to apply it. At the same time, when applying the constitutional norm, the court (including any law-enforcing body) must justify why it does not apply the legal norm, what legal problem has arisen, that it solves the case, based only on the regulation of the Constitution or any other legal norm. The analysis and discussion of these issues in the reasoning part of the court's decision will also

lead to the conclusion of the issue that this legal norm does not correspond to the constitutional norm. And as it was already mentioned, the answer to that question can be given only in the scope of jurisdiction of the Constitutional Court, discussing the possible unconstitutionality of the legislative norm. Moreover, the wording "reasonable doubt" means that not every doubt should be the subject of the Constitutional Court's examination, but those that will be considered such by the Constitutional Court. For example, the Constitutional Court stated in the procedural decision No. CCPD-10 of January 14, 2022, by rejecting the examination of the case: It directly follows from the content of the provision of the Constitution that the jurisdiction of the courts to apply to the Constitutional Court exists only if the following two conditions are present at the same time when the courts: 1. have reasonable doubts about the constitutionality of the normative legal act to be applied in the specific case before them; and 2. find that the solution of the given case is possible only through the application of that normative legal act. ***Under the conditions of such regulations, there is a situation where the courts have to justify the existence of their duty.*** Which is not an effective legal framework for the principle of the rule of law, the requirement that the law-enforcement body should be limited by human rights, and the realization of a person's right to a fair trial.

Constitutional Court, in its SDAO-212 decision of October 26, 2021, stated: "According to Article 169 (4) of the Constitution, the "reasonable suspicion" can be substantiated by the court if, among other conditions submitted to the application, the court has submitted sufficient justifications that the uncertainty of the norms submitted to the Constitutional Court for verification is impossible to overcome by the court exercising its powers and by providing an exhaustive judicial interpretation ensuring sufficient clarity of the legal norm. In other words, the court applying to the Constitutional Court is obliged to justify how it tried to interpret the disputed legal norms in order to dispel doubts about the clarity of the contested legal norms, and what their final legal content is, using the entire methodological toolkit for the contested norms' interpretation, justifying the inconsistency of that content with the Constitution". In such practice, although the Constitution (2015 edition) defines the duty of the court to apply to the Constitutional Court, the former legal structure of applying to the Constitutional Court was preserved, as far as the new regulation does not create prerequisites for the effective fulfillment of the mentioned duty. The issue also has links with the principle of legal certainty and the requirement to define clearly powers for law enforcement agencies.

It seems that in the conditions of our current legal regulation (Article 169 (4) of the Constitution), the court has no choice but to appeal to the Constitutional Court³. In the meantime, it remains unclear the wording for the court to

³ In a similar way, the decision of the Plenum of the Supreme Court of the Russian Federation "On some issues of the application of the Constitution of the Russian Federation in the administration of justice by the courts" states: "According to the Article 15 (1) of the Constitution of the Russian Federation, the Constitution has the highest legal force, direct effect and is applied throughout the territory of the Russian Federation. (...) In cases where a provision of the Constitution contains a reference, the courts must apply the law governing that relationship when considering the case. In case of uncertainty regarding the compliance of the law to be applied in a specific case with the Constitution, the court applies to the Constitutional Court with an applica-

justify that the solution of the given case is possible only through the application of that certain normative legal act. In fact, acting on the presumption of compliance of legal norms with the Constitution for law-enforcement bodies, there is no actual legal duty imposed on the latter, based on the supremacy of the Constitution, and from the need to protect human rights, to effectively initiate the resolution of the issue of the constitutionality of the norm, even though the Constitutional Court. Moreover, in the case of such legal regulation, it becomes easier for the court to be guided by the regulation of the legislative norm, without delving into the disclosure of the essence of the constitutional norm. Although in the light of the Constitution (as amended in 2015), it is not the discretionary authority of the court, but the duty to apply to the Constitutional Court for the clarification of the constitutionality of the act, which, we believe, is completely justified and is a guarantee of ensuring the application of constitutional norms. *However, when the direct application of the constitutional norm is realized by the court through the Constitutional Court, in our opinion, there is a lack of effective mechanisms. Thus, there is no practical legal mechanism to oblige the court, during the discussion of legal relations subject to the regulation of constitutional norms, to address, first, the question of constitutionality and the need to apply to the Constitutional court.*

Moreover, the Constitutional Court clearly stated in its decision⁴ CCD-1459 of May 7, 2019: “General jurisdiction and specialized (non-constitutional) courts are constrained not only by the Constitution but also by law, otherwise they can act either as legislators or as bodies of constitutional justice. (...) In addition, unlike the Constitutional Court, which is constrained only to the Constitution when administering justice (Article 167 (2) of the Constitution), all other courts are bound by both the Constitution and laws (Article 164 (1) of the Constitution). Therefore, the law cannot be abolished, invalidated, revised by those courts, but can only be applied. (...) Changing the statutory powers of any court in legal practice in order to expand them, regardless of the reason, is inadmissible, and to reduce them means their non-implementation or improper implementation, which, depending on the circumstances, can be tantamount to denying justice”.

With the same decision, the Constitutional Court, referring to its other CCPD-7 decision⁵, on rejecting the examination of the case on determining the question of compliance with the Constitution, on January 25, 2019, stated: “As a means of ensuring the supremacy of the Constitution, **the final and binding interpretation and application of the Constitution is the exclusive competence of the Constitutional Court**, and all bodies of public power can interpret and apply the Constitution **within the framework of their powers established by the Constitution and laws**, especially if, in accordance with Article 3 of the Constitution, it is about directly applying law, that is, the basic rights and free-

tion regarding the question of the compliance of the law with the Constitution”. - see Пленум Верховного суда Российской Федерации: Постановление от 31 октября 1995 г. N 8 “О некоторых вопросах применения судами Конституции Российской Федерации при осуществлении правосудия”

⁴ See Constitutional Court CCD-1459 decision of May 7, 2019.

⁵ However, in our opinion, this decision again does not clearly reveal the essence of the possibility of applying the constitutional norm by the courts.

doms of human and citizen, to which all public power is limited”.

At the same time, *the Constitutional Court stated that verification of constitutionality is the responsibility of all courts*. The Constitutional Court especially emphasized that: “(...) all courts, and not only the Court of Cassation, must incidentally verify the constitutionality of the normative legal act to be applied and are obliged to apply to the Constitutional Court in the presence of the mentioned prerequisites. (...) In the case of the interpreting the requirements of the law, documenting their uncertainty is nothing more than recording the problem of constitutionality. Making the existence of that problem a basis for "liberation" from the fulfilling the requirement established by law and expanding or limiting one's powers means a unique solution to the problem of constitutionality by a non-Constitutional Court, which is impermissible”.

In conclusion, whether the court can interpret the law in line with the meaning and essence of the constitutional provision in case of an ambiguous regulation of the law. If not, how or in what cases does the court generally interpret and apply the Constitution? If we take into account the above interpretation of the Constitutional Court in its decision, in case of an ambiguous regulation of the law, it is not the Constitution that is interpreted and applied by the court, but the court is obliged to document the existence of a constitutional problem and apply to the Constitutional Court⁶.

Thus, we can state the following problems.

a. At first, it reaffirmed the duty to apply to the Constitutional Court. However, the constitutional regulation (Article 169(4) of the Constitution) has remained such that applying to the Constitutional Court is possible only through the court justifying its suspicion and excluding the application of another legal act for issuing its judicial act. In other words, applying to the Constitutional Court becomes the last necessary measure. However, if the court is deprived of the actual (but not theoretical) opportunity to personally interpret and apply the Constitution, then applying to the Constitutional Court should be considered very necessary and not considered a "last resort".

b. Although the legal practice has established both the necessity and the competence (with certain limitations) of interpreting the Constitution by courts, but if there are no effective mechanisms for its implementation, then the theoretical position is not actually realized. *What should it mean, on the one hand, to interpret and apply the Constitution by courts, and on the other hand, to be bound by the laws, and in the case of proving their uncertainty during the interpretation of the requirements of the law, to apply to the Constitutional Court in a mandatory manner, and on the other hand, to apply to the Constitutional Court only in case of reasonable doubt and if it is not possible to apply another law (legal norm), excluding the application of one law (legal*

⁶ Ukraine has adopted a different approach in this matter, ensuring the right of a person to have his case examined within a reasonable time. In particular, if the court finds that the current law does not comply with the Constitution, it applies the constitutional norm as a directly applicable norm, and after making its decision, it refers to the Supreme Court to resolve the question of the constitutionality of the contested legal norm in the Constitutional Court-see **Judge Tetiana Brezina** The principle of direct effect of the norms of the constitution and the specifics of its application by the court, National law journal: Theory and practice- 2008, p. 28: available at http://www.jurnaluljuridic.in.ua/archive/2018/1/part_2/8.pdf

norm). These requirements exclude one another, even more so if we also take into account the fact that the court must justify and give reasons for its actions in each case.

Thus, the regulations and their practical interpretation of the right to apply to the Constitutional court, as well as the duty of applying constitutional norms in general, need to be reviewed, clarified, and coordinated, which should be aimed at ensuring the maximum provision of the direct application of constitutional rights. We believe that the existence of the Constitutional Court as a body implementing constitutional justice should not undermine the demand for constitutional norms to have the highest legal force and be directly applied, but there should be effective legal mechanisms to not make the existence of such a demand meaningless. *One of such guarantees is that the courts do not just act based on the presumption of compliance of the law with the Constitution but take measures as much as possible to reveal the meaning of the constitutional norm. In particular, the obligation to interpret the legal norm in accordance with the essence of the constitutional provision as much as possible should be an expressly defined requirement. Secondly, such a guarantee can be the duty to apply the legal norm in accordance with the general constitutional principles and the fundamentals of the constitutional order, and also not to consider applying to the Constitutional Court as a last resort, that is, the court has the opportunity to apply to and take the position of the Constitutional Court regarding the constitutional norm in any case. Finally, the reassessment of the role and jurisdiction of the Constitutional Court can also be such a guarantee. The primary task of the Constitutional Court should be not so much the compliance of the wording and application of the law with the Constitution, but rather the interpretation and development of the Constitution and the reveal and interpretation of the essence of the constitutional norm.*

ՍՈՍԵ ԲԱՐՍԵՂՅԱՆ – Սահմանադրական նորմերի անմիջական կիրառման դրսևորումը իրավակիրառ ոլորտում – Հոդվածն անդրադառնում է դատարանների կողմից սահմանադրական նորմերի կիրառման և Սահմանադրական դատարանի իրավակիրառ պրակտիկայում տրված մեկնաբանություններին: Աշխատանքը դիտարկում է սահմանադրական նորմերի կիրառման արդյունավետ իրականացման անհրաժեշտ երաշխիքների բացակայությունը: Մասնավորապես քննարկման առարկա են դարձել անձի՝ իր սահմանադրական իրավունքների համար դատական պաշտպանությունից օգտվելու իրավունքը, դատարանների կողմից Սահմանադրության կիրառման իրավասությունը, Սահմանադրության՝ որպես բարձրագույն ուժ ունեցող իրավական ակտ լինելու և սահմանադրական արդարադատության ինստիտուտների հարաբերակցությունը, Սահմանադրական դատարան դիմելու և օրենսդրական նորմի հակասահմանադրականությունը հիմնավորելու պարտականությունը: Եզրահանգել է, որ բացակայում են բավարար երաշխիքները Սահմանադրությունը մեկնաբանելու և կիրառելու, ինչպես նաև դատարանների կողմից նորմի հակասահմանադրականությունը սահմանադրական արդարադատության առարկա դարձնելու համար պայմանավորված այն իրողությամբ, որ միաժամանակ գոյություն ունեն մի քանի ինստիտուտներ, որոնք թեև միգուցե

ոչ տեսականորեն, սակայն գործնականում հակասում են միմյանց, և դժվարություններ են առաջանում այդ իրավանորմերի փաստացի իրացման համար: Հոդվածում առաջադրված եզրահանգումներն ուղղված են սահմանադրական նորմերն արդյունավետ և անմիջականորեն կիրառելու, օրենսդրական նորմերի հակասահմանադրականության քննարկմանն ուղղված սահմանադրական արդարադատության ճկուն և կիրառելի մեխանիզմների ներդրման քննարկումներին:

Բանալի բառեր – *սահմանադրական նորմեր, անմիջական կիրառում, Սահմանադրության մեկնաբանում, Սահմանադրության գերակայություն, սահմանադրական արդարադատություն*

СОСЭ БАРСЕГЯН – Проявление непосредственного применения конституционных норм в сфере правоохранительной деятельности. – В статье обсуждается компетенция судов по применению конституционных норм и толкования правоприменительной практики Конституционного суда. В статье отражено отсутствие таких гарантий, в условиях которых применение конституционных норм эффективно не реализуется. В частности, предметом обсуждения стали право лица добиваться судебного разбирательства для защиты его/ее конституционных прав, компетенция судов применять Конституцию, взаимосвязь между принципом верховенства Конституции и концепцией осуществления Конституции в порядке исключения Конституционным судом, обязанность обычных судов обращаться в Конституционный суд и одновременно обосновывать неконституционность той или иной законодательной нормы. Мы пришли к выводу, что отсутствуют достаточные гарантии для толкования и применения Конституции на практике, а также для того, чтобы обязать суды обращаться в Конституционный суд, с тем чтобы сделать неконституционность нормы предметом конституционного правосудия, поскольку существующие правовые институты противоречат друг другу и создают трудности на практике. Предложено эффективное применение конституционных норм, внедрение гибких и применимых механизмов конституционного правосудия.

Ключевые слова: *конституционная норма, прямое применение, толкование Конституции, верховенство Конституции, конституционное правосудие*