



**Conference on
“Protection of Human Rights and Freedoms by means of individual complaint”
Baku, 2 October 2015**

Opening speech

**Mr Gianni Buquicchio
President of the Venice Commission**

Mr Chairman,
Honourable Presidents and Judges
Ladies and Gentlemen,

After some years, I am pleased to be back in Baku again and I notice remarkable progress in your capital city.

But let me first congratulate Azerbaijan to the 20th anniversary of its Constitution. 20 years are a good moment to lean back and take stock of achievements and for avenues for further improvement.

The Venice Commission of the Council of Europe has accompanied your country for many years and in particular the Constitutional Court of Azerbaijan even before its coming into existence; the Venice Commission - and I personally - were closely involved in the drafting of the legislation establishing the Court.

Since 1996, a long list of opinions links the Venice Commission to Azerbaijan. The most important ones for the topic of our conference today are opinions on the law on the Constitutional Court and its revisions in 1996, in 2002 and in 2007.

Since its establishment, your Court regularly contributes to the Bulletin on Constitutional Case-Law and the CODICES database of the Venice Commission and we are pleased that the Constitutional Court of Azerbaijan is a founding member of the World Conference on Constitutional Justice for which the Venice Commission acts as the Secretariat.

Mr Chairman,

You have chosen an important topic for our conference. The protection of human rights and freedoms is a central task for any Constitutional Court. Human rights are the basis of genuine democracy and they are essential in the dynamic triangle of democracy, human rights and the rule of law, which are the founding principles of the Council of Europe.

Human Rights have to be ensured by all Council of Europe member states, all of which are also parties to the European Convention on Human Rights.

The Constitution of Azerbaijan contains an important catalogue of human rights, which provides an excellent basis for their implementation.

It is both the Constitutions and the Convention as interpreted by the Strasbourg Court which are the human rights yardsticks for the member States of the Council of Europe.

All human rights are “fundamental”, simply because they emanate from human dignity which is the common source of inspiration for fundamental rights. Thus all human rights are important but let me point out that freedom of expression, freedom of assembly and freedom of association are at the very core of democracy.

Democracy means that the possibility of a peaceful change of power is part of the essence of the system. This is not a threat to stability but, on the contrary, the very underpinning of stability in a country. If people are dissatisfied, and this arrives, sooner or later, with respect to every government, they can replace the government in peaceful elections.

This means that criticism of the government is not only acceptable but welcome as an essential part of the democratic system. Sometimes criticism will be unfair and sometimes those in power will feel that it encroaches upon their honour and reputation. But the range for permissible criticism of public figures is quite wide and, according to the case law of the European Court of Human Rights, public figures have to accept attacks which would not be acceptable if directed against private persons. Vigorous public debate and pluralistic media are indispensable features of any democracy. Critical voices need to have the possibility to express themselves not only in newspapers but also on radio and television, without the fear of negative consequences either for the media outlet or the person voicing the criticism.

If freedom of expression is thus a cornerstone of democracy, it is not sufficient. There has to be the possibility for opposition forces to organise and to manifest in public. Freedom of association is essential and the task of the government is not to control and restrict the activities of NGOs and opposition parties but to leave them maximum room for their activities. It is not up to NGOs and opposition parties to justify their activities but up to the authorities to justify, against very stringent standards, any restriction of their freedom. To hold a peaceful demonstration is not a threat to public order but the use of a democratic right.

Every politician in power, every policeman or other civil servant and even more every judge and prosecutor has to bear in mind these principles and resist the temptation to abuse legal rules to stifle criticism and take measures against opponents. The role of independent judges is crucial. Their role is not to protect the government against the citizens but to protect the rights of the citizens, including against any encroachment by the government.

Mr Chairman, ladies and gentlemen,

The recent series of judgments of the European Court of Human Rights shows that Azerbaijan needs to reinforce the protection of human rights. In its opinions, the Venice Commission too has found important flaws in the Azeri legislation on freedom of association and assembly. I also share the concerns of the Council of Europe Commissioner for Human Rights.

I think that the Constitutional Court of Azerbaijan can and should play an essential role in this respect. The key to activating this role is the second part of the title of our conference - the individual complaint. In fact, the Constitution of Azerbaijan and the law on the Constitutional Court do provide for individual access.

In Europe, there are various types of individual complaints to the Constitutional Court and the model which was chosen in Azerbaijan is that of the ‘normative’ constitutional complaint. This means that any individual can complain against the application in his or her case of a normative act, typically a law, which allegedly contradicts the Constitution. In such cases, the Constitutional Court can annul the law or parts of it when it establishes that indeed these provisions are unconstitutional.

However, in practice, in all countries, most human rights violations are not due to unconstitutional laws but they are due to unconstitutional individual acts. It is the other type of individual complaint, the 'full constitutional complaint', which is able to remedy such human rights violations. Therefore the Venice Commission recommends the introduction of the full constitutional complaint.

A major advantage of the full constitutional complaint is that it can be an effective filter for cases before they go to the European Court of Human Rights. It is always better to deal with human rights issues in the country than at the European level.

Let me point out that for this reason, Turkey has introduced a full individual complaint. So far, this complaint has been very useful in reducing the number of Turkish cases before the European Court of Human Rights.

Of course, it is always first the ordinary judiciary which is in charge of providing relief to the citizen but we all know that ordinary courts do not always have the Constitution in mind when they apply the laws. Quite naturally, their prime concern is to apply the laws and not to consider whether these laws are in conformity with the Constitution.

Mr Chairman,

The Constitutional Court of Azerbaijan has gone much further than simply applying the normative constitutional complaint. You have espoused the doctrine of the Constitutional Court of Italy, called *diritto vivente* or living law.

The Italian Constitutional Court not only examines the law as it stands on its own; it also looks into the interpretation given to it by the ordinary courts. According to this doctrine, even if the law can be interpreted in conformity with the Constitution, the Constitutional Court can and will annul the law if in practice it is systematically interpreted in an unconstitutional manner by the ordinary courts.

The doctrinal justification to annul even a law that allows for its interpretation in a constitutional manner is that this law is obviously too ambiguous given that the courts do coherently interpret it in an unconstitutional manner. As a consequence, such a law is contrary to the principle of legal certainty because it obviously gives too much leeway to the ordinary courts by allowing for a non-constitutional interpretation.

I strongly encourage the Constitutional Court of Azerbaijan to continue developing this doctrine and to take up cases which are referred to it before they reach the European Court of Human Rights.

I do not say this because the Strasbourg Court overburdened, it even has made enormous progress in reducing its case-load. I say this because human rights are constitutional rights. To the extent possible such constitutional issues should be settled within your country.

Whenever the ordinary Courts do not provide the necessary level of protection, the Constitutional Court should be able to step in and to provide necessary relief. Your Court has the capacity and means both as concerns organisational and most importantly intellectual resources to become an effective filter, to become a cornerstone for the protection of human rights in your country.

The Venice Commission stands by your side in this noble endeavour.

Thank you very much for your attention.